UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

New York New York Hotel, LLC, d/b/a
New York New York Hotel and Casino

and **Case 28-CA-14519**

Local Joint Executive Board of Las Vegas,
Culinary Workers Union, Local 226, and
Bartenders Union, Local 165, affiliated
With UNITE HERE[1]

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Of Counsel
Chamber of Commerce of
the United States of America

Harold P. Coxson, Jr.
Bernard P. Jeweler
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W.
Fifth Floor
Washington, DC 20037
(202) 887-0855

Counsel to the *Amicus Curiae*
Chamber of Commerce of
the United States of America

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[1] We have amended the caption to reflect the disaffiliation of the Culinary Workers Union and Bartenders Union from the AFL-CIO and their affiliation with UNITE HERE.

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INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interest of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to the National Labor Relations Act. Over the past thirty years, the Chamber has filed *amicus* briefs in many landmark labor law cases before the National Labor Relations Board ("Board") and federal courts.

The Chamber and many of its members have a vital interest in the issues presented in the instant case. As the U.S. Court of Appeals for the District of Columbia Circuit noted on its remand of this case to the NLRB, there are a number of unanswered legal questions concerning

the relationship between the rights and obligations of an employer and a contractor's employees working on its property which have not been decided by the Supreme Court, but are left to interpretation by the NLRB and lower federal courts. It is up to the NLRB, in the first instance, to consider the policy implications of these issues. Proper resolution of those policy issues will affect a broad cross section of the Chamber's business members of all sizes across the country not only in the retail and hospitality industries, but in other industries as well.

STATEMENT OF THE CASE

I. Procedural History

This consolidated case is before the Board on remand from the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") on December 24, 2002. *See New York New York, LLC v. National Labor Relations Board*, 313 F.3d 585 (D.C. Cir. 2002). The court issued a decision granting petitions for review by Respondent (herein "NYNY") and denying the NLRB's applications for enforcement of the Board's decisions in two related cases, *New York New York I*, 334 NLRB No. 87 (2001) and *New York New York II*, 334 NLRB No. 89 (2001).

In the former case, *New York New York I*, the Board affirmed the ALJ's finding that lessee Ark's ("Ark") employees were entitled to engage in area standards handbilling activities directed at Ark in the non-work areas of NYNY's hotel and casino, including its porte cochere at the entrance to NYNY's hotel and casino, and that NYNY had failed to show that its handbilling prohibition was necessary to maintain production and discipline.

In the latter case, *New York New York II*, the Board affirmed the ALJ's findings that the lessee Ark's employees were entitled to engage in area standards handbilling directed at Ark in

the interior of NYNY's private property at the hotel and casino, and again that NYNY had failed to show that its prohibition on handbilling was necessary to maintain production and discipline.

The D.C. Circuit consolidated the two cases in a single decision and denied enforcement of the Board's Orders in the cases, finding that the Board had "provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same Section 7 rights as NYNY's employees." 313 F.3d at 558. The Court acknowledged that "[t]he Supreme Court has never addressed the Section 7 rights of employees of a contractor working on property under another employer's control" *Id.*, and that "[n]o Supreme Court case decides whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property." *Id.* at 590. The court observed that "[t]he critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner." *Id.*

Thus, the court remanded the consolidated cases to the Board to consider "policy implications of any accommodation between the Section 7 rights of Ark's employees and the rights of NYNY to control the use of its premises, and to manage its business and property." *Id.*

II. Statement Of The Facts

Respondent operates the New York New York Hotel and Casino in Las Vegas, Nevada. NYNY has leased space in its hotel and casino complex to independent restaurant management companies to run food service facilities. One of the companies, Ark Las Vegas Restaurant Corporation ("Ark"), operates two restaurants and several fast food outlets in a food court on NYNY's premises.

NYNY permits Ark employees, when they are off-duty, to visit and patronize the casino and restaurants, and to enter the complex through NYNY's public entrances, but they may not wear their uniforms, and the bars are off limits at all times. As the Court of Appeals stated, "NYNY presented evidence that it had a policy against solicitation of any sort on its premises." 313 F.3d at 586.

In February 1997, the Hotel Employees and Restaurant Employees Union ("Union") began a campaign to organize the Ark employees working on NYNY's property. In July 1997, three off-duty Ark employees stood on NYNY property outside the main entrance, distributing union handbills to customers entering and exiting the casino and hotel. The handbills stated that Ark paid its employees less than comparable unionized workers and urged the customers to tell Ark to sign a union contract. Shortly after the handbilling began, NYNY management told the Ark employees that they were trespassing and that they were not allowed to distribute literature on NYNY's property. The Ark employees protested that they had a right to be on the property and refused to leave. NYNY summoned local law enforcement officers, who issued trespass citations to the handbillers. The Union then filed an unfair labor practice charge with the National Labor Relations Board ("Board"), alleging that NYNY had violated Section 8(a)(1) of the National Labor Relations Act ("Act") by restraining and coercing employees in the exercise of their rights to self-organization under Section 7 of the Act.

In April 1998, off-duty employees of Ark entered NYNY and distributed handbills to customers inside the complex. The Ark employees stood outside Ark-operated restaurants as they handbilled. After they refused a NYNY request to stop distributing handbills, NYNY summoned the authorities, who issued trespass citations to some of the Ark employees. Another

incident occurred two days later when two off-duty Ark employees stood outside NYNY's main entrance again, distributing handbills to passing customers. These Ark employees also received trespass citations from the police, which NYNY had summoned to the premises.

The Board's General Counsel alleged in a complaint before the Board that Ark employees had a right to handbill at NYNY in non-work areas of the hotel and casino during off-duty hours and that NYNY violated the Act when it prevented them from such activity, which was protected activity under Section 7. NYNY countered that because the employees worked for Ark, not NYNY, they had no Section 7 right to distribute handbills on NYNY's property and that NYNY validly applied its restriction on solicitation activities on its premises.

The Board rejected NYNY's contentions, finding, in the words of the D.C. Circuit, that "when employees of a contractor work regularly and exclusively on the owner's property, their Section 7 rights are equivalent to those of the employer's own employees" and "that the Section 7 rights of the Ark employees were equivalent to those of NYNY's employees … in non-work areas of NYNY's property." 313 F.3d at 587. The Board concluded that NYNY, by interfering with this activity, violated Section 8(a)(1) of the Act as alleged. On review, the Court of Appeals refused to enforce the Board's order against NYNY and remanded the case to the Board for further proceedings, suggesting a number of questions the Board should answer on remand.

III. Issues Presented

In its Notice of Oral Argument and Invitation to File Briefs on September 4, 2007, the NLRB specifically requested *amicus* briefs on five questions raised on remand of this case to the Board by the D.C. Circuit. Those questions are:

1. Without more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights (324 U.S. 793 (1945)) throughout all of the non-work areas of the hotel and casino?
2. Or are the Ark employees invitees of some sort but with rights inferior to those of NYNY's employees?
3. Or should they be considered the same as nonemployees when they distribute literature on NYNY's premises outside Ark's leasehold?
4. Does it matter that the Ark employees here had returned to NYNY after their shifts had ended and thus might be considered guests, as NYNY argues?
5. Is it of any consequence that the Ark employees were communicating not to other Ark employees, but to guests and customers of NYNY (and possibly customers of Ark)? Compare *United Food & Commercial Workers*, 74 F.3d at 298. (Derivative access rights, the Supreme Court has held, stem 'entirely from on-site employees' Section 7 organizational right to receive union-related information.' *ITT Industries*, 251 F.3d 997.)

SUMMARY OF ARGUMENT

With regard to the initial four questions posed by the D.C. Circuit and submitted by the Board for public comment through *amici* briefs, the Chamber submits that the direct answer to all four should be that, consistent with the long-standing Supreme Court precedent in *NLRB v. Babcock & Wilcox,* 351 U.S. 105 (1956) *and Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), the controlling factor in determining the exercise of Section 7 rights on private property should be the employment relationship of the employees seeking to exercise those rights with the property

owner. Here, nonemployees of the property owner, although rightfully on the property pursuant to an employment relationship with a contractor or lessee of the property owner, seek to exercise a Section 7 right to engage in consumer handbilling on the property owner's property. The balance between the Section 7 rights of the contractor or lessee's employees, and the property rights of the owner with whom those employees have no employment relationship, should be struck in favor of the property owner's right to prohibit such activity on the premises. The only exception should be if employees of the contractor or lessee are so isolated from the ordinary flow of information as to eliminate any alternative means of exercising their rights except on the property. Fine distinctions as to whether the employees are "invitees," "licensees," "guests", or making other common law tort and property distinctions in the context of balancing Section 7 rights would, it seems to us, invite confusion and endless litigation as to the proper classification of individuals working on another employer's private property. Such distinctions are unnecessary.

As to the fifth question posed by the D.C. Circuit and submitted by the Board for public comment through *amicus* briefs, we believe it is relevant and supportive of NYNY's position, though not dispositive in light of our position above, that the off-duty Ark employees through their handbilling were communicating, not with other Ark employees, but with NYNY (and possibly Ark) customers. Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees.

ARGUMENT

In support of NYNY, the Chamber urges the Board to recognize and hold that under controlling Supreme Court precedent, only individuals who have an employment relationship with a property owner have so-called "*Republic Aviation* rights" (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)) to engage in Section 7 activities on the owner's property. "*Republic Aviation* rights" in the context of the instant cases, which concern distribution of literature, means the right of employees to engage in union organizational or other Section 7 activity on their employer's property during off-duty time and in non-work areas, absent a showing that a ban on such activity is necessary to maintain production or discipline. In the absence of an employment relationship with the property owner, the Board should recognize and hold that the rights of non-employees to enter the property to engage in Section 7 activities must be evaluated under the criteria established in *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In both of those cases the Court held that non-employees stand on a different and less privileged footing than employees in evaluating rights to access to another employer's property. "Non-employees" in this context include not only outside union organizers not employed by the property owner but also employees of another employer, such as a tenant of the property owner, whose work location may be on the property owner's premises but who seek to use those premises to publicize a work dispute with their own employer in a manner which amounts to a trespass on the property.

It is uncontroverted that Ark's employees are not the employees of NYNY. We submit, therefore, in agreement with Respondent NYNY, that Ark's employees are not entitled to the Section 7 rights of employees of NYNY through some derivative employment relationship which

would entitle them to derivative Section 7 rights to, as in this case for example, engage in area standards handbilling throughout all of the non-work areas of the hotel and casino's private property.

NYNY has a constitutionally-guaranteed right to exercise its property rights as the property owner of its hotel and casino by, as in this case, the right to exclude others from its property. The Supreme Court has long recognized a property owner's rights to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164 (1991)).

Where the exercise of a property owner's property rights conflict with employees' rights to self organization, the Board and the courts have engaged in a balancing test. The balancing of an employer's property rights which conflict with employees' Section 7 rights, as instructed by the Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976), "must be obtained with as little destruction of one as is consistent with the maintenance of the other." Where, as here, Section 7 rights are asserted by **nonemployees**, the balance should tilt more heavily in favor of upholding the affected owner's property rights at least in the absence of proving a *Babcock & Wilcox* and *Lechmere* standard that alternative means of communication are lacking.

It is clear from the D.C. Circuit's discussion of this issue in its opinion remanding these cases that it believes -- and we submit that the Board should likewise be persuaded -- that this is indeed the import of the decisions in *Republic Aviation*, *Babcock & Wilcox*, and *Lechmere*, although no Supreme Court case flatly decides the issue. As the D.C. Circuit observed in the instant case (313 F.3d at 587-588), further support can be found in *Hudgens v. NLRB*, 424 U.S.

507 (1976), where the Supreme Court, highlighting the difference between the rights of employees and non-employees, explained that "a wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved." 424 U.S. at 521-522 n.10 (emphasis added). As NYNY observes in its Statement of Position on Remand, "management interests" can only have meaning in this context where the property owner has control over the person exercising Section 7 rights as that person's employer. Otherwise, no "management interest" (as opposed to "property interest") exists. *See* Respondent's Statement of Position on Remand at pp. 7-9.

Indeed, the Board itself has emphasized this very distinction in *Hillhaven Highland House*, 336 NLRB 646, 649(2001), enforced, 344 F.3d 523 (6th Cir. 2003), a case involving access rights to private property of an employer by off-site employees from another of the employer's locations. As the Board there stated:

> Offsite employees are not only "employees" within the broad scope of Section 2(3) of the Act, they are "employees" in the narrow sense: "employees of a particular employer" (in the Act's words"), that is, employees of the employer who would exclude them from its property. Clearly then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer. 336 NLRB at 648 (emphasis added).
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> Of critical importance ... is the fact that an employment relationship exists between them and the employer, which distinguishes offsite employees from the ordinary trespasser, who truly is a stranger. The existence of an employment relationship, in turn, means that the employer has a lawful means of exercising control over the offsite employee (even regarded as trespasser), independent of its property rights. Surely it is easier for an employer to regulate the conduct of an employee -- as a legal and practical matter -- than it is for an employer to control a complete stranger's

> infringement on its property interests. The employer, after all, controls the employee's livelihood. 336 NLRB at 649.

We agree with NYNY's argument that the *Hudgens* and *Hillhaven* analyses should have been applied in this case. (Respondent's Statement of Position at p.9). If the Board had done so, we submit, the Board could not have failed to recognize, as NYNY states, that "there existed no means for NYNY to regulate or control the infringement on its private property other than through reliance on state trespass laws." *Id.* Clearly, then, it is inconsistent with the law and sound labor policy that merely because Ark employees are rightfully on the premises of NYNY per their employer's leasehold from NYNY, such employees may then abuse their presence to exercise *Republic Aviation* rights throughout the non-work areas of NYNY's premises contrary to NYNY's restricted invitation to non-employees of NYNY.

Without question, the effect of the Board's original decisions in this case is to erroneously elevate the rights of Ark employees to engage in Section 7 activity on NYNY's premises to a status equal to the Section 7 rights of NYNY's own employees. Such a result cannot be squared with applicable Supreme Court precedent, for it fails to balance, as the law requires, the Section 7 rights of Ark employees against the property rights of NYNY "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox v. NLRB,* 351 U.S. at 112. The Board simply subjugates NYNY's property interest as if NYNY is somehow Ark employees' employer rather than their employer's landlord. On the facts of this case, the Board took no account, for example, of the fact that Ark employees would have avenues at locations off of NYNY's private property to exercise their Section 7 rights to engage handbilling of customers. It took no account that the Ark employees had returned to NYNY after their shifts when they conducted their handbilling, and it took no account of the fact that

Ark employees -- non-employee "strangers" to NYNY-- who were handbilling were engaged in conveying an "area standards" message to NYNY's customers and not appealing directly to other Ark employees. *See United Food and Commercial Workers v. NLRB,* 74 F.3d 292, 298 (1996) ("Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees."). See also *MBI Acquisition Corp. d/b/a Gayfers Dep't Store,* 324 NLRB 1246, 1252 (1997) (Member Higgins, dissenting) ("... I am not prepared to say that an employer must open up its property to allow persons to inflict economic injury on its enterprise (through a consumer boycott) particularly where … the employer is a neutral to the underlying area-standards dispute"; " … the Section 7 right involved … is not on a par with the Section 7 right to organize fellow employees … [and] the General Counsel has not met his burden of showing that the customers could not be reached elsewhere."

The Board's decisions in these cases create an expanded legal fiction of derivative rights and powers of nonemployees under Section 7 contrary to property rights of owners without any employment relationship. The Board has sought to accomplish this legal fiction, which would have far-reaching practical and public policy consequences throughout industry, based on its previous decisions in *Southern Services*, 300 NLRB 1154 (1990) and *MBI Acquisition Corp. d/b/a Gayfers Dep't Store*, 324 NLRB 1246 (1997). However, as the D.C. Circuit confirmed in remanding this case, in neither decision had the Board adequately addressed the relationship between the individuals asserting Section 7 rights and the private property owners who were not their employers in accommodating the competing Section 7 and property rights. *New York New York,* 313 F.3d 585 (2002). The D.C. Circuit was unwilling, and this Board should be equally

unwilling, to take the leap of faith in crafting a "*Southern Services / Gayfers Dep't Store*" doctrine that equates the access rights of nonemployees (the contractor's employees) to those of employees (the property owner's employees). To do so, we submit, would impermissibly ignore the Supreme Court's controlling authority in *Babcock & Wilcox* and *Lechmere*.

Public policy weighs heavily in favor of a property owner's rights to control the use of its premises and to manage its business and property where, as here, the *Republic Aviation* rights asserted are those of nonemployees.

Again, the Board's decisions in these cases create an expanded legal fiction of derivative rights and powers of non-employees under Section 7 contrary to property rights of owners without any employment relationship. Such a decision could have far-reaching practical and public policy consequences through industry, and as the D.C. Circuit suggests, is contrary to Supreme Court precedent demarcating the boundaries between private property rights and NLRA Section 7 rights. The Board's decisions in *New York New York* I and II will invite abuse of the private property rights of employers, especially retail and hospitality employers, who have no employment relationship with the non-employees and over whom they have no control other than through the exercise of their property rights, as NYNY exercised in these cases. Supreme Court jurisprudence and sound public policy suggests that if the property owner's rights are to be subordinated to Section 7 rights under the NLRA, the employees exercising those rights must be employees of the property owner. If they are, access rights of those employees are governed by *Republic Aviation*. If they are not, the standards of *Babcock & Wilcox* and *Lechmere* apply.

The Chamber submits that the Board on remand should now determine that, as a matter of law and sound public policy, non-employees of a property owner, even if employed by a

lessee on the property and therefore "rightfully on the property" (*New York New York, LLC*, 334 NLRB 762, 762) should have no greater rights outside their employer's leasehold than any other non-employee of the property owner. Of course, consistent with Supreme Court precedent, their access rights may vary if their work location finds them "isolated from the ordinary flow of information that characterizes our society." *Lechmere, Inc. v. NLRB*, 502 U.S. at 540. Presumably, such is not the case here, where Ark employees had many other avenues to assert their Section 7 rights vis-a-vis Ark.

Public policy, and sound labor policy, must continue to recognize the right of a property owner to control the use of its premises, and to manage its business and property. Privileging non-employees to violate the lawful, and consistently maintained no-solicitation policies of property owners absent an employment relationship would invite disruption of the property owner's business, confusion among the property owner's customers, and expansion of labor disputes to neutral employers with no relationship to the affected employees or control over their terms and conditions of employment. An important component of national labor policy is to reduce labor disputes which have the effect of disrupting commerce. The effect of the Board's decisions in the instant cases is contrary to that purpose.

CONCLUSION

For the foregoing reasons, the Chamber urges the Board to adopt a policy based on a *Babcock & Wilcox / Lechmere* analysis, giving primacy to the employer-employee relationship, for determining the *Republic Aviation* rights, if any, of individuals working on the property of another employer. We believe that such analysis will be easily administered, clearly

understood by the stakeholders and the public, and protective of an owner's property rights while fully protecting employees in the exercise of their Section 7 rights vis-a-vis their employer.

Respectfully submitted,

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Of Counsel
Chamber of Commerce of
the United States of America

Harold P. Coxson, Jr.
Bernard P. Jeweler
OGLETREE, DEAKINS,
NASH, SMOAK &
STEWART, P.C.
2400 N Street, NW
Washington, DC 20037
(202) 887-0855

Counsel to the *Amicus Curiae*
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REQUEST FOR ORAL ARGUMENT

The Chamber of Commerce of the United States of America respectfully requests that the Board permit the Chamber to participate in oral argument of this case.

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Of Counsel
Chamber of Commerce of
the United States of America

Harold P. Coxson, Jr.
Bernard P. Jeweler
OGLETREE, DEAKINS,
NASH, SMOAK &
STEWART, P.C.
2400 N Street, NW
Washington, DC 20037
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October a true copy of the Brief of the Chamber of Commerce of the United States of America, as Amicus Curiae in Support of Respondent has been sent by overnight delivery to the following parties:

Gary C. Moss, Esq.
DLA Piper USLLP
3960 Howard Hughes Pkwy., Suite 400
Las Vegas, Nevada 89169

Michael T. Anderson, Esq.
Davis, Cowell & Bowe, LLP
8 Beacon Street, 4th Floor
Boston, Massachusetts 02108

Michael J. Karlson, Regional Attorney
National Labor Relations Board
Region 28
2600 North Central Avenue
Suite 1800
Phoenix, Arizona 85004-3099

Bernard P. Jeweler