UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC
d/b/a NEW YORK NEW YORK HOTEL
AND CASINO

Employer

and

Cases 28-CA-14519
28-CA-15148

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226, AND BARTENDERS
UNION, LOCAL 165, AFFILIATED WITH
HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO

Charging Party

GENERAL COUNSEL'S POSITION STATEMENT ON RECONSIDERATION BY THE BOARD

To: Lester A. Heltzer, Acting Executive Secretary
Office of the Executive Secretary

Respectfully submitted,

Nathan W. Albright
Counsel for the General Counsel
National Labor Relations Board
Region 28 Las Vegas Resident Office
600 Las Vegas Boulevard S, Suite 400
Las Vegas, Nevada 89101-6637
Telephone: (702) 388-6211

INDEX

Page

INDEX

Headings--cont'd: Page(s)

AUTHORITIES CITED

Cases Page(s)

INDEX

Cases--cont'd: Page(s)

Statutes: **Page(s)**

Miscellaneous

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC
d/b/a NEW YORK NEW YORK HOTEL
AND CASINO

Employer

and

Cases 28-CA-14519
28-CA-15148

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226, AND BARTENDERS
UNION, LOCAL 165, AFFILIATED WITH
HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO

Charging Party

GENERAL COUNSEL'S POSITION STATEMENT ON RECONSIDERATION BY THE BOARD

The National Labor Relations Board has invited the parties to file briefs concerning the issues the Board will consider in this case on remand. In response, the General Counsel submits the following position statement:

STATEMENT OF THE ISSUE

Whether New York New York violated Section 8(a)(1) of the Act when it denied its subcontractor Ark's off-duty employees access to New York New York property to distribute union literature to the public.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

New York New York, LLC ("NYNY") owns and operates a hotel and casino complex on the Strip in Las Vegas, Nevada. 334 NLRB No. 87, slip op. 6. NYNY contracted with Ark Las Vegas Restaurant Corp. ("Ark") to operate restaurants and fast food outlets inside the NYNY complex. Slip op. 7. NYNY permitted Ark's employees, when off duty, to visit and patronize the casino and restaurants. The Union[1] represented some of NYNY's employees and had a collective bargaining agreement with NYNY. Id. In February 1997, the Union began a campaign to organize the Ark employees working on NYNY's premises. Id.

On July 9, 1997, three off-duty Ark employees came onto NYNY's property and stood on a sidewalk in an area located just outside the main entrance to the casino, also referred to as the "porte-cochere" area. Id. The Ark employees distributed handbills to customers as they entered and exited the casino. Id. The handbill protested, as "Unfair," that "Ark Restaurants at the New York-New York have no contracts with the [Union]," and contained a chart purporting to "illustrate the difference between the wages and benefits of Ark workers versus those of Unionized workers up and down the Las Vegas Strip." Id. The handbill urged the

---

[1] Local Joint Executive Board of Las Vegas, a/w Hotel Employees and Restaurant Employees Int'l Union, AFL-CIO.

recipient to "tell Ark's managers" that "Ark should recognize and negotiate a fair contract with its workers," and disclaimed any labor dispute with NYNY. Id. An NYNY official told the Ark employees that they were trespassing on private property. Slip op. 8. After the Ark employees refused to leave, they were escorted off the NYNY property by the police. Id.

On April 7, 1998, four off-duty Ark employees entered inside the NYNY complex and stood just outside the entrances to two restaurants operated by Ark, "America" and "Gonzalez y Gonzalez." 334 NLRB No. 89, slip op. 5. The Ark employees distributed handbills to customers of the two Ark restaurants as they entered and exited the restaurants, and to customers of NYNY as they passed by the entrances to the Ark restaurants. Id. Although essentially the same in content as the earlier handbill, this handbill did not expressly disclaim a labor dispute with NYNY. Slip op. at 6. NYNY's security personnel told the Ark employees that they were trespassing on private property, and they were ultimately escorted out of the complex. Id.

II. THE BOARD'S FINDINGS

A. *New York New York I*

In *New York New York I*, the ALJ concluded that NYNY violated Section 8(a)(1) of the Act when it "prohibited the employees of Ark from distributing union

handbills to customers in the Porte-Cochere area," i.e., the sidewalk area just outside the main entrance to the casino. 334 NLRB No. 87, slip op. 9-10. Relying on *Southern Services, Inc.,* 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992), and *Gayfers Dept. Store*, 324 NLRB 1246 (1997), the ALJ found that "the *Babcock & Wilcox/Lechmere* rule applicable to 'nonemployee union representatives' does not govern the analysis herein"; rather, "the employees of Ark enjoyed *Republic Aviation* rights of access to [NYNY's] nonwork areas to conduct the handbilling in question." Slip op. 9. The ALJ found that "it does not matter to an analysis of their statutory access rights that the employee-handbillers were 'off-duty' when they conducted their handbilling." *Id.* at n.12.

The Board (Members Liebman and Truesdale; Chairman Hurtgen, concurring) affirmed the ALJ's finding that NYNY violated Section 8(a)(1) by prohibiting the Ark employees' handbilling of casino customers in the porte-cochere area. Slip op. 1-2. Relying on *Southern Services* and *Gayfers*, the Board explained that "employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty." Id. at 1. Citing *Gayfers*, the Board found it "irrelevant" that the Ark employees distributed handbills to customers of NYNY, rather than to other employees. Id. at 2 fn. 5. The Board distinguished Ark's employees from "individuals who do not work regularly and exclusively on the employer's property,

such as nonemployee union organizers, [who] may be treated as trespassers, and are entitled to access the premises only if they have no reasonable non-trespassory means to communicate their message." Id. at 1. As a remedy, the Board ordered NYNY to cease and desist from "[p]rohibiting employees who work within [NYNY's] hotel/casino complex, including those employed by [Ark], from distributing union handbills to customers on the sidewalk in front of the Porte-Cochere entry doors." Id. at 4, 10.

B. *New York New York II*

In *New York New York II*, the ALJ concluded that NYNY violated Section 8(a)(1) when it prohibited Ark's employees from distributing handbills "in front of Ark restaurants," i.e., the America and Gonzalez y Gonzalez restaurants located inside the NYNY complex. 334 NLRB No. 89, slip op. 8. Citing *Gayfers*, the ALJ found that "the instant case falls under the *Republic Aviation* standard rather than the *Babcock & Wilcox* standard." Id. at 7.

The Board (Members Liebman and Truesdale; Chairman Hurtgen dissenting in part) affirmed the ALJ's finding that NYNY violated Section 8(a)(1) with respect to the Ark employees' handbilling activity "in the areas in front of America and Gonzalez y Gonzalez." Slip op. 4. The Board explained that:

> For the reasons discussed in *New York New York I*, we agree with the judge in this case that the off-duty Ark employees who took part in the handbilling * * * inside the casino * * * were not trespassing when they did so,

> but were lawfully on [NYNY's] premises pursuant to their employment relationship with Ark.

Id. at 2.[2] As a remedy, the Board ordered NYNY to cease and desist from "[p]rohibiting subcontractor employees from engaging in handbilling in front of Ark restaurants inside of [NYNY's] casino." *Id.* at 4, 8.

III. THE COURT'S OPINION

The U.S. Court of Appeals for the District of Columbia consolidated *New York New York I* and *New York New York II* for briefing and argument, and decided both cases in a single opinion. *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). Concluding that "[o]ur decision in *ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001), controls the outcome," the court (Judge Randolph, joined by Judges Edwards and Tatel) remanded the case to the Board for further proceedings. 313 F.3d at 591.

Quoting from *ITT*, the court reiterated that, although both *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), suggested that "the controlling distinction for § 7 purposes was between invitees and trespassers," the Supreme Court's "most recent pronouncement in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), reaffirmed the principle announced in *Babcock*

---

[2] Chairman Hurtgen would have found no violation as to the handbilling near the entrance to the America restaurant. In his view, that location was a work area for employees in NYNY's slot operations department and, accordingly, NYNY could ban distribution in that area. 334 NLRB No. 89, slip op. 4-5.

& Wilcox that the National Labor Relations Act confers rights upon employees, not nonemployees, and that employers may restrict nonemployees' organizing activities on employer property." Id. at 588.

The court acknowledged that "[t]he Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another employer's control" (id.), and allowed 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. It emphasized that:

> No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees -- that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner -- because their work site, although on the premises of another employer, is their sole place of employment.

Id.

However, the court concluded that "the Board's *New York New York* decisions shed little light on the important issues this factual pattern raises." Id. at 588. The court found that the Board "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 § 7 rights as NYNY's employees." Id. Although the court acknowledged that the Board relied on its earlier decisions in *Southern Services* and *Gayfers* in finding

that Ark's employees possessed *Republic Aviation* rights on NYNY's property, it found that "[h]ere, neither *Southern Services* nor *Gayfers* fills the gap, a point on which we are in agreement with the Fifth Circuit in *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 850-55 (5th Cir. 2002), handed down after oral argument in this case." Id.

In particular, the court explained, neither *Southern Services* nor *Gayfers* "takes account of the principle reaffirmed in *Lechmere* that the scope of [Section] 7 rights depends on one's status as an employee or nonemployee." Id. "The critical question in a case of this sort," the court concluded, "is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner." Id. at 590. The court stated that "[o]ur analysis of the Supreme Court's opinions, unlike the Board's in *Southern* and *Gayfers*, yields no definitive answer." Id.[3]

The court concluded that "[t]his leaves a number of questions in this case unanswered:

---

[3] The court stated that "[t]he Board's decisions in *Southern* and *Gayfers*, and thus its decisions in these consolidated cases, purport to rest on the Board's interpretation of Supreme Court opinions." 313 F.3d at 590. However, the court explained that, "[a]s such, the Board's judgment is not entitled to judicial deference," because a reviewing court is "not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." Id. For that proposition, the court (id.) quoted its earlier decision in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002), which, in turn, had quoted from *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), vacated on other grounds, 524 U.S. 11 (1998).

> Without more, does the fact that the Ark employees' work on NYNY's premises give them *Republic Aviation* rights throughout all of the non-work areas of the hotel and casino? Or are the Ark employees' invitees of some sort but with right inferior to those of NYNY's employees? Or should they be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold? 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? 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)?

Id. at 590. The court acknowledged that "[i]t is up to the Board to answer these questions and others, not only by applying whatever principles it can derive from the Supreme Court's decisions, but also by considering the 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.* However, because the Board "did not perform that function in these cases," the court remanded to the Board for further proceedings. Id.

ARGUMENT

The challenge for the Board on reconsideration of this and other recently remanded access cases[4] is to accommodate the competing organizational rights of employees and the private property rights of property owners "with as little destruction of one as is consistent with the maintenance of the other." *Lechmere v.*

---

[4] *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843 (5th Cir. 2002); *ITT Indus., Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001).

NLRB, 502 U.S. 527, 534 (1992), citing *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956). Specifically, in this case, the Board must determine the scope of the Ark employees' Section 7 rights vis-à-vis NYNY, who is not their employer.

Counsel for the General Counsel submits that the Board should answer the questions posed by the Court of Appeals as follows.

First, the Board should reaffirm the result reached in *Southern Services*, 300 NLRB 1154 (1990), enfd., 954 F.2d 700 (11th Cir. 1992), and find that the Ark employees have full Section 7 rights vis-à-vis their own employer, notwithstanding that they work on NYNY property and are not NYNY's employees.

Second, the Board should overrule its decision in *Gayfers Dept. Store*, 324 NLRB 1246 (1997), and in accord with its original view in *Peddie Buildings*, 203 NLRB 265 (1973), enf. denied, sub nom. *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974), followed in *Scott Hudgens*, 230 NLRB 414 (1977), and *Jean Country*, 291 NLRB 11 (1988), should find that whether NYNY had any obligation to allow Ark's employees to use NYNY property to appeal to customers requires consideration of whether other channels of communication were reasonably available to Ark's employees. Because the proposed legal standard was not the standard that applied at trial, the case should be remanded for further proceedings. These points are amplified below.

I. Ark Employees Have *Republic Aviation* Rights As To Ark, Notwithstanding That They Are Working On NYNY Property

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)("*Republic Aviation*"), the Supreme Court upheld the Board's decision, holding that an employer may not prohibit its own employees from distributing union literature on its property on nonworking time in nonwork areas unless it demonstrates that special circumstances exist justifying the ban. In its opinion, the Court, approved the Board's presumption that, absent special circumstances, "[t]ime outside working hours, whether before or after work . . . is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." 324 U.S. at 803 n.10, citing *Peyton Packing Co.*, 49 NLRB 828, 843 (1943).

There is no question that if Ark's workplace were on Ark-owned property, Ark employees would be entitled to distribute union literature on the property during nonworking time in nonwork areas. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Here, however, by virtue of Ark's leasehold, the Ark employees' workplace is entirely within NYNY's property. One of the questions posed by the Court is whether that fact—the nonemployee status of the Ark employees' vis-à-vis NYNY—is a limitation on the Ark employees' right to exercise *Republic Aviation* rights on NYNY property. Counsel for the General Counsel submits that

Southern Services, 300 NLRB 1154 (1990), enfd., 954 F.2d 700 (11th Cir. 1992), correctly answered that question and that the result in *Southern Services* should be reaffirmed here, albeit on a basis that takes into account the issues that the Court directed the Board to consider on remand.

A. The Result In *Southern Services* Should Be Reaffirmed On A Basis Consistent With The Court's Remand

1. The Board's Decision in *Southern Services*

Southern Services considered the Section 7 rights of janitors working for a subcontractor, SSI, that regularly provided cleaning services at Coca Cola's headquarters office complex. Some of the SSI employees sought to hand out leaflets to their fellow janitors at their sign-in station at the Coke dock just before work. As the Board noted, the janitorial employees "have not attempted to distribute literature to Coke employees." 300 NLRB at 1155 fn. 12. The precise issue before the Board therefore was whether "it is reasonable to require Coke, as well as SSI, to treat SSI employees engaged in organizing activities *among themselves* under the *Republic Aviation* standards." Id. at 1155 (italics added).

In answering that question in the affirmative, the Board reversed the administrative law judge, who had concluded that, because the employees of SSI were not Coke's employees, their right to engage in Section 7 activity on Coke's property was governed by *Jean Country*, 291 NLRB 11 (1988), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)("*Babcock*"). Id. at 1159-1160.

Because under both *Jean Country* and *Babcock* the issue of reasonable alternative means of communication must always be considered and because the General Counsel introduced no evidence to counter Coke's claim that alternative effective means for distributing literature existed, the judge recommended that the complaint be dismissed. Id.

In declining to adopt the judge's recommendation, the Board recognized that *Babcock* "made a distinction between rules of law applicable to employees and those applicable to nonemployees." Id. at 1155. But in the Board's view, that distinction, as elucidated by the Supreme Court's subsequent decisions, turned on the fact that employees with *Republic Aviation* rights are rightfully on the employer's property pursuant to an invitation based on an employment relationship, while the nonemployees with only *Babcock* rights are "strangers to the employer's property" who sought to trespass on that property. Id., citing *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976) and *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978).[5]

---

[5] In *Hudgens*, the Supreme Court explained that *Republic Aviation* struck "[a] wholly different balance" from that in *Babcock* "when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved." 424 U.S. at 521 fn. 10. In *Eastex*, the Supreme Court similarly observed that "the nonemployees in *Babcock* sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not." 437 U.S. at 571. Accord *Southern Services v. NLRB*, 954 F.2d 700, 703-704 (11th Cir. 1992) ("it is the [union] organizer's status as a trespasser or stranger to the employer's property, rather than the nonemployee status, that invokes the employer's property right to restrict premises distribution by the organizer").

In categorizing the situation presented in *Southern Services*, the Board considered it decisive that the SSI employees on Coke's property had "been invited to work at the Coke site on a continuing basis" and that the employee seeking to solicit her fellow SSI employees "was reporting to work pursuant to her employment relationship." Id. In that circumstance, the Board concluded that *Republic Aviation* governed the SSI employee's distribution rights. The Board found that, unlike the situation in *Babcock,* the SSI employee "did not seek to trespass on Coke's property" and "was a 'stranger' neither to the property nor to the SSI employees working on the property whom she was soliciting." Id. Instead, at the time that Coke and SSI prohibited her distributing literature to her fellow employees, the SSI employee was "'already rightfully on [Coke's] property.'" Id. quoting *Hudgens*, 424 U.S. at 521 fn. 10.

2. The D.C. Circuit's Critique of *Southern Services*

As discussed above, in remanding this case for further consideration, the District of Columbia Circuit stated that, like the Fifth Circuit in *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843 (2002), it regarded the Board's *Southern Services* analysis as inadequate because it preceded the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)("*Lechmere*") and did not take account of that decision's singular focus on the employee-nonemployee distinction. 313 F.3d at 588-89. See also *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1002-03 (D.C. Cir.

2001), where the Court made a similar point. In the Court's judgment, the Supreme Court's *Lechmere* decision, unlike *Hudgens* and *Eastex,* did not rely on an invitee-trespasser distinction in explaining the rights established in *Republic Aviation* and *Babcock*. 313 F.3d at 588. Instead, *Lechmere* stated that "the critical distinction [was] between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) and nonemployees (to whom § 7 applies only derivatively)." 502 U.S. at 533. Quoting from its decision in *Babcock*, 351 U.S. at 113, the *Lechmere* Court explained:

> Thus, while "[n]o restriction may be place on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," 351 U.S., at 113 (emphasis added) . . . . "no such obligation is owed nonemployee organizers"

Lechmere, 502 U.S. at 533. On that basis, *Lechmere* stated that, as a general rule, "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." Id.

Although recognizing that "[t]he Supreme Court has never addressed the § 7 rights of a contractor working on the property under another employer's control," 313 F.3d at 588, the D.C. Circuit concluded that the invitee-trespasser distinction underlying *Southern Services* was legally insufficient after *Lechmere*. Specifically, the Court suggested that *Lechmere* required the Board to accept that *Republic Aviation* itself did not decide what property rights Coke could invoke against SSI's

employees but only limited Coke's property rights vis-à-vis its own employees. Id. at 589. Without more, the SSI's employees were just as much trespassers as the nonemployee organizers in *Lechmere,* since in both instances the property owner's no solicitation rule was disregarded. That is trespass, the Court explained, because "[a]s the Restatement puts it, a 'conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.'" Id. at 589 (quoting Restatement 2d of Torts §168 (1965)).[6]

In raising these objections to the Board's *Southern Services* decision, the D.C. Circuit did not hold that the result reached by the Board was necessarily incorrect. To the contrary, it expressly acknowledged that

> No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees—that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner—because their work site, although on the premises of another employer, is their sole place of employment.

313 F.3d at 590. Rather, the Court's charge to the Board is to address the questions the Court has raised "not only by applying whatever principles it can

---

[6] See also *Santa Fe Hotel & Casino*, 331 NLRB 723, 727 fn. 15 (2000) (summarizing the testimony of an official from the Las Vegas city attorney's office that, under the Nevada law of criminal trespass, the right of invited guests or employees to remain on the property is at the will of the owner, who need have no cause in ordering someone off their property).

derive from the Supreme Court's decisions, but also by considering the policy implications of any accommodation between the § 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. at 590-591.[7]

B. Consistent With *Fabric Services*, The Board Should Find That *Babcock* Limits Ark Employees' Right To Solicit NYNY Employees, Not Their Right To *Republic Aviation* Rights Against Their Own Employer On NYNY Property

Counsel for the General Counsel submits that the decision of Judge Arthur Leff, adopted by the Board in *Fabric Services, Inc.*, 190 NLRB 540, 541-43 & fn. 11 (1971), suggests how the *Lechmere* issues raised by the Court of Appeals' remand should be approached. In *Fabric Services*, the property owner required a Southern Bell telephone repairman working on the property owner's premises to remove a union pocket protector as a condition of working there. There was no claim of special circumstances. Instead, the claim was that, because the property owner was not the employer of the repairman, it could not, as a matter of law,

---

[7] Other recent decisions questioning *Southern Services* in light of *Lechmere* have similarly suggested that it is open to the Board to reaffirm *Southern Services* so long as it confronts the issues raised by *Lechmere's* emphasis on the employee-nonemployee distinction. See *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 855 (5th Cir. 2002) ("*Republic Aviation* may well be the correct standard to employ as against the contracting employer. . . ."); *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1003 (D.C. Cir. 2001) (court has "no doubt" that Board could justify awarding similar access rights to subcontractor employees as those enjoyed by employees of property owner).

violate the repairman's *Republic Aviation* right to wear union insignia on the job. 190 NLRB at 541. The Board found that the repairman did have *Republic Aviation* rights vis-à-vis the property owner. Id. at 541-543. But in dicta Judge Leff suggested that the result would have been different if the repairman had been attempting to organize the property owner's own employees, because in that situation *Babcock* would control. Id. at 543 fn. 11.

The balance of conflicting interests thus suggested in *Fabric Services* reasonably takes account of both NYNY's property rights and the Ark employees' § 7 rights. On the one hand, *Fabric Services* supports the conclusion that Ark employees are subject to *Babcock* limitations to the extent that they should ever seek to organize NYNY employees (some of whom are already unionized). On the other hand, *Fabric Services* supports the conclusion that Ark employees have *Republic Aviation* rights to engage in organizing activities *among themselves* while they are on NYNY property.

The conclusion that Ark employees, as nonemployees of NYNY, have only *Babcock* rights if they should seek to organize NYNY employees, reasonably takes account of the legal principles reaffirmed in *Lechmere*. As explained in *Lechmere*, 502 U.S. at 533, *Babcock's* general rule is that "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." In context, that rule reflects "Babcock's holding that an employer need

not accommodate nonemployee organizers unless the [employer's] employees are otherwise inaccessible." Id. at 534. That is so, because the nonemployees' § 7 rights (here Ark's employees) vis-à-vis the property owner's employees (here NYNY's employees) "appl[y] only derivatively," id. at 533, that is, they are dependent on a showing by the nonemployee organizers that the property owner's employees cannot be reached through other reasonably available channels of communication, id. at 533-534, or that the property owner's denial of access for the purpose of organizing is discriminatory, *Babcock*, 351 U.S. at 112.

1. The Board Should Reconsider Its Prior Holding That *Babcock* Is Not A Limit On The Ark Employees' § 7 Rights

The approach to *Babcock* and *Lechmere* urged here is not the approach that the Board took in its initial decisions in these cases. In its initial decisions, the Board held that *Babcock* had no bearing on the Ark employees' § 7 rights on NYNY property. *New York New York I*, 334 NLRB No. 87, slip op. 2 fn. 5. But, as the D.C. Circuit pointed out on review, the Board's reasoning—that the Ark employees were rightfully on NYNY property pursuant to their employment relationship—did not take account of what, under *Lechmere*, was a legally significant fact, namely, that the Ark employees' employment relationship was with Ark, not NYNY. 313 F.3d at 588-89. The Court's remand requires that the Board now take account of the legal principle that a property owner may prescribe

the conditions under which individuals may enter its property (see Restatement (2d) of Torts §168 (1965)), 313 F.3d at 589-90. More particularly, the law of the case calls for the Board to undertake an analysis that accepts that, while *Republic Aviation* limits a property owner's right to condition entry in order to accommodate the organizational rights of its own employees, *Babcock* and *Lechmere* hold that a property owner is generally under no obligation to yield that prerogative to nonemployee organizers. Id.

Counsel for the General Counsel submits that, in light of the considerations raised by the Court, the Board should now find that, at least with respect to Ark-employees' right to solicit NYNY employees on NYNY property, NYNY should be accorded the benefit of *Babcock*'s teaching that an employer "may validly post his property against nonemployee distribution of union literature" absent discriminatory application of the prohibition or employee inaccessibility. 351 U.S. at 113. That view appeared sound to Judge Leff in *Fabric Services*, 190 NLRB at 543 fn. 11, and the soundness of that view is confirmed when the competing interests are analyzed in light of *Lechmere and Babcock.*

So acknowledging *Lechmere*'s and *Babcock*'s application to Ark's employees would not be inconsistent with the Board's reaffirming, on remand, that NYNY should be required to treat Ark employees engaged in organizing activities *among themselves* under the *Republic Aviation* standards. As the Court of Appeals

recognized in remanding, that different issue was addressed neither in *Babcock* nor any other Supreme Court decision. 313 F.3d at 588, 590. *Babcock's* relevance to the question whether a property owner has a right to deny *Republic Aviation* rights to employees working for another employer on its property rather lies in *Babcock's* teaching that the Board must resolve the conflict between property rights and § 7 rights "with as little destruction of one as is consistent with the maintenance of the other." *Lechmere*, 502 U.S. at 534, *citing Babcock*, 351 U.S. at 112.

2. The Board Should Reaffirm *Southern Services* On The Basis Of A Balancing Of Property And § 7 Rights

Counsel for the General Counsel submits that a finding that the Ark employees have the limited organizational rights afforded by *Republic Aviation* vis-à-vis their own employer, notwithstanding that they work on NYNY property and are not NYNY's employees, reasonably takes account of the conflicting legitimate interests at stake. As applied to the Ark employees' own self-organizational rights, NYNY's exercise of its common law right to bar organizing activity from its premises, even in nonwork areas, is not meaningfully different from the exercise of that same common law right by the employers in *Republic Aviation*. See *Eastex*, 437 U.S. at 581-82 fn. 1 (Rehnquist, J., dissenting) (arguing that *Republic Aviation* involved a trespass "in that union members sought to override the employer's right to prescribe the conditions of entry to its property . . . . The fact that this right may be subordinated by various governmental

enactments makes it no less a property right."); *Republic Aviation*, 324 U.S. at 802 fn. 8 (noting that in *LeTourneau Company*, 54 NLRB 1253, 1259-60 (1944), the Board had reasoned that the right to collective bargaining justified some interference with property rights).

In both *Republic Aviation* and this case, any rule that allowed the property owner to post its property against all self-organizing activity by the employees working on the premises—even when the employees are on their own time and in nonworking areas—would have the effect of denying to the affected employees the right to exercise their core organizational rights at their regular jobsite. As has long been recognized, the jobsite is "'the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life'" *Eastex*, 437 U.S. at 574 (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)).

To deny employees any opportunity to organize at their jobsite was "deemed an unreasonable impediment to the exercise of the right of self-organization" in *LeTourneau Company*, 54 NLRB at 1260, notwithstanding the property rights of the employer of the employees. *Southern Services*, 300 NLRB at 1155, reached the right result in concluding that it would be equally unreasonable if the employees of an employer working on another employer's property were denied the right to distribute organizational material to their fellow employees. Similarly

here, the Board should find that, on balancing NYNY's property rights and the Ark employees' organizational rights, it would be an unreasonable result if the Ark employees working on NYNY property were denied the same self-organizational rights vis-à-vis their own employer that *Republic Aviation* requires NYNY to accord to its own employees working on that same property.

On these different facts, where the issue is whether NYNY's property rights would justify NYNY's denying Ark employees *Republic Aviation* rights against their own employer, the controlling consideration is not, as in *Babcock* and *Lechmere*, that Ark employees are nonemployees as to NYNY. The relevant consideration is that Ark employees are themselves statutory employees and as such are entitled to be protected against unwarranted interference with their statutory rights, even if the source of that interference is an employer other than their own.

Section 2(3) of the Act broadly defines "employee" to "include any employee" and expressly provides that that term "shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . . " In accordance with that statutory design, the Board has held that an employer may violate Section 8(a)(1) with respect to employees other than its own. See *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976); *Western Clinical Laboratory, Inc.*, 225 NLRB 725, 749 (1976), enfd. in relevant part, 571 F.2d 457, 459 (9th Cir.

1978).[8] That is the statutory principle underlying *Fabric Service*'s holding that the employer there interfered with the *Republic Aviation* right of the Southern Bell repairman to wear a union pocket protector while working on Fabric Service property, 190 NLRB at 541-543. That same principle underlies *Southern Service*'s holding that Coke interfered with the SSI employees' *Republic Aviation* rights to solicit fellow SSI employees working on Coke's property, 300 NLRB at 1155 fn. 13. That same principle should govern NYNY's obligation to respect the Ark employees *Republic Aviation* rights vis-à-vis their own employer while working on NYNY property.

For the foregoing reasons, the Board on remand should reaffirm the result in *Southern Services*, on which it relied in its initial decision, but should do so by balancing property rights and § 7 rights. On that basis, the Board should state, in answer to the Court of Appeals question, that the Ark employees do have *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property

[8] See also *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 857 (5th Cir. 2002); *Dews Construction Corp.*, 231 NLRB 182, 183 fn. 4 (1977), enfd. 578 F.2d 1374 (3d Cir. 1978), both dealing with employers held to violation §§ 8(a)(3) and (1) by securing the discharge or otherwise affecting the working conditions of the employees of another employer because of their union activity.

owner. At a minimum, Ark employees have those rights on the Ark leasehold, which is their primary place of employment. Whether there are additional places in the NYNY complex to which Ark employees are normally permitted access and where, on balance, it would be unreasonable for NYNY to deny Ark employees *Republic Aviation* self-organizational rights should be decided when that issue is presented on concrete facts.

A further issue suggested by the Court's remand—the extent to which off duty Ark employees may have a right of entry upon NYNY property for the purpose of organizing Ark employees—was not an issue litigated in the original proceeding and therefore need not be addressed on remand. The Board does not appear to have comprehensively addressed how the principles of *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976), may apply where, as here, the primary employer is located on a third party's property. The task of balancing the statutory and property rights at stake would certainly be more complex than that considered in *Hillhaven Highland House*, 336 NLRB No. 62 (2001), pet. to review pending (6th Cir. 01-2478), where the issue was the right of off-site and off-duty employee to trespass on their own employer's property for the purpose of organizing fellow employees. Accordingly, it is appropriate for the Board to defer making a *Lechmere*-based analysis of the more complex *Tri-County* issue until it is presented in a concrete case.

Here the off duty Ark employees sought access to NYNY property for the purpose of appealing to customers. In *Providence Hospital*, 285 NLRB 320, 322 fn. 8 (1987), the Board indicated that *Tri-County* is inapposite where access is sought by off-duty employees to communicate with the public. As explained below, Counsel for the General Counsel submits that whether off-duty employees should have a right to trespass on a third party employer's property for the purpose of appealing to the customers of their employer should be decided by reference a *Babcock*-based balancing test that includes consideration of alternative means of communication.

II. As In *Peddie Building, Scott Hudgens*, And *Jean Country*, The Right Of Employees To Mount Consumer Appeals On The Property Of A Third Party Employer Should Be Determined By Application Of A *Babcock*-Based Balancing Test That Considers Alternative Means Of Communication

The question whether *Southern Services* survives *Lechmere* is only a threshold question, which the Court of Appeals required the Board to reconsider because *Southern Services* was a cornerstone of the Board's prior decisions. The second and more far reaching question posed by the Court's remand is whether Section 7 privileges Ark employees to engage in trespassory consumer handbilling on the property of a third party, NYNY, who is not their employer. In its initial decisions, the Board relied on its decision in *Gayfers Dept. Store*, 324 NLRB 1246

(1997), to hold that that question must be answered by reference to *Republic Aviation* principles because the Ark employees are invitees of NYNY and not trespassers. Counsel for the General Counsel submits that Member Higgins was correct in arguing in his *Gayfers* dissent that *Republic Aviation* does not govern appeals to consumers by employees on the property of a third party. 324 NLRB at 1252. The Board should overrule *Gayfers* and return to the Board's original view. As set forth in *Peddie Buildings*, 203 NLRB 265 (1973), enf. denied, sub nom. *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974), and subsequent cases,[9] the Board's longstanding position prior to *Gayfers* was that the rights of employees in that circumstance should be assayed with a *Babcock*-based balancing test that takes into account whether there are reasonable alternative means by which employees can make nontrespassory appeals to consumers.

A. *Gayfers* Should Be Reconsidered

As discussed above, p. 11, *Republic Aviation* decides that employees have a limited right to engage in self-organizational activity on the property of their own employer. *Republic Aviation* does not address the right of employees to engage in self-organizational activity on a third party's property. And *Republic Aviation* says nothing at all about what right employees may have to appeal to consumers either

---

[9] See *Scott Hudgens*, 230 NLRB 414 (1977); *Seattle-First National Bank*, 243 NLRB 898 (1979), enfd. in relevant part, 651 F.2d 1272, 1275-76 (9th Cir. 1980); and *Jean Country*, 291 NLRB 11 (1988).

on their employer's property or on the property of another. For that reason, in *Gayfers* the General Counsel did not rely on *Republic Aviation* but on *Jean Country* in arguing that that employees of nonunion construction firm performing remodeling work at Gayfers Department Store had a right to handbill consumers at the store's entrance to urge them not to patronize Gayfers because its remodeling contractor did not pay area standard wages. 324 NLRB at 1248.

In rejecting the General Counsel's theory of the complaint in *Gayfers*, the Board majority reasoned that *Republic Aviation* was controlling because the employees of the construction firm "were not 'strangers' to the [department store] property, but rightfully on it pursuant to their employment relationship." 334 NLRB at 1250. In so construing *Republic Aviation*, the *Gayfers* majority relied on the invitee/trespasser gloss that *Hudgens* and *Eastex* had given to *Republic Aviation*. Id. at 1249. Particular weight was given to *Eastex*'s statement that if employees were "'already rightfully on the employer's property' the employer's legitimate interest in regulating their activity is solely a managerial one and one that, at the very least, does 'not vary with the content of the material [that the employees disseminate.]'" Id. at 1250 (quoting *Eastex*, 437 U.S. at 572). On that basis, the *Gayfers* majority rejected the dissent's argument that *Gayfers* presented materially different issues than *Republic Aviation* (as well as *Southern Services* and *Eastex*, on which the majority also relied) because in *Gayfers*, unlike those cases,

the employees' appeal was not to fellow employees but to customers. Id. Satisfied that *Republic Aviation* governed appeals to customers on a third party owner's property, the *Gayfers* majority did not find it necessary to address the dissent's objection "that the General Counsel has not met his burden of showing that the customers could not be reached elsewhere." Id. at 1252 (dissent).

For the reasons set forth above, pp. 14-16, in connection with the Court of Appeal's *Lechmere*-based critique of the Board's similar reliance on the invitee-trespasser distinction in deciding *Southern Services*, the law of the case requires the Board to reconsider *Gayfers.* As the Court of Appeals has analyzed the Supreme Court precedent in light of *Lechmere*, the construction of *Republic Aviation* underlying the decision of the *Gayfer's* majority is no longer tenable. In the Court's judgment, *Lechmere* made clear that *Republic Aviation,* standing alone, only obliges a property owner such Gayfers to refrain from conditioning its own employees' entry on their refraining from all self-organizational activity on its property. Further analysis is required if the Board is to justify allowing nonemployees whose employer is located on that property to have a right of trespass on property for the purpose of appealing to customers. The Court of Appeals found that *Gayfers* does not supply that analysis. 313 F.3d at 589-90.

Counsel for the General Counsel submits that, on the basis of Member Higgins's *Gayfers* dissent and the Court of Appeals' criticism of the reasoning of

the *Gayfers* majority, the Board should overrule *Gayfers*. In its place, the Board should substitute a legal standard that acknowledges that third party property owners such as Gayfers have property rights at stake, not just managerial rights, when employees of employers on their property seek to trespass for the purpose of appealing to customers. As discussed below, prior to *Gayfers*, the Board had such a standard—the *Peddie Building*, *Scott Hudgens, JeanCountry* standard—and that standard should be re-adopted by the Board.

B. Consideration Of The Property Rights Of Third Party Owners Warrants The Board's Readoption Of A Legal Standard That Disallows Trespass Where There Are Reasonable Alternative Means Of Communication

As Justice Blackmun pointed out in his concurring opinion in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 211 (1978), "for a number of years, the First Amendment holding of *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), overruled in *Hudgens v. NLRB*, [424 U.S. 507 (1976)] diverted the Board from any need to consider trespassory picketing under the statutory test of *Babcock.*" Not until *Peddie Buildings*, 203 NLRB 265 (1973), enf. denied, sub nom. *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974), did the Board first address the question whether the National Labor Relations Act alone gives employees a right to trespass on the third party property where their employer does business in order to appeal to the public to take their side in a labor dispute with their employer. 203 NLRB at 266-267 ("we find the

principles of *Babcock & Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case").

1. *Peddie Buildings*

In Peddie Buildings, striking warehouse employees of American Hospital Supply sought to picket their employer, not only at the warehouse where they worked, but also at a nearby warehouse located on leased property in another section of the same privately owned industrial park. The Board concluded that the right of employees to picket their employer on property owned by a third party was governed by *Babcock* principles.[10]

In weighing the conflicting interests, the Board found that, in picketing their own employer, the employees were engaged in activity protected by Section 7 and "given emphasis by Section 13." Id. at 267. Giving "due consideration" to the rights of the third party property owner, the Board found that the limited access road upon which the employees sought to picket was one that the employees were

---

[10] *Peddie Buildings* expressly reserved the question whether nonemployee "outside organizers" would have the same right of access as the striking employees themselves. 203 NLRB at 267, fn. 7. The Ninth Circuit has since construed *Lechmere* to mean that the inaccessibility exception of *Babcock* and *Lechmere* does not apply at all where nonemployee union picketing and handbilling activity was aimed at the general public, and not at employees. *Sparks Nugget v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992). See also *United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996) ("Under the established case law, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's employees"). As in *Peddie Buildings*, it is unnecessary for the Board to address that issue in order to decide these cases, since both only involve employees of an employer located on third party property.

privileged to use for work purposes, and the Board found that the employees could not lawfully be refused access "for the sole reason that they choose to engage in protected concerted activity. Id. In addition, because the closest "purely public location" was approximately one-fifth mile away, "a more desirable accommodation is achieved if employees are accorded the right to picket their employer at the most proximate location, directly in front of the employer's premises, and not be required to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects." Id. [11]

2. *Scott Hudgens*

In *Scott Hudgens*, 205 NLRB 628 (1973), the Board again relied on *Peddie Buildings* statutory analysis to find that *Babcock* balancing principles justified striking warehouse employees of Butler Shoes entering a private shopping mall to picket their employer's retail outlet store. In affirming the Board, however, the Court of Appeals for the Fifth Circuit also relied in part on First Amendment principles, 501 F.2d 161, 166, 169 (1974). The Supreme Court reversed and remanded. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

---

[11] In denying enforcement of the Board's order in *Peddie Building*, the Third Circuit assumed without deciding that *Babcock* could be extended to non-organizational picketing, as the Board had done, 498 F.2d at 49, but found that substantial evidence did not support the Board's findings, especially its finding that access was essential in order for employees to communicate their message effectively, id., or to avoid having their picketing unduly enmesh neutrals, id. at 50.

Formally overruling its decision in *Logan Valley,* the Supreme Court in *Hudgens* held that First Amendment principles were inapplicable, 424 U.S. at 512-21, and that "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." Id. at 521. The Court declared it the Board's task "to resolve conflicts between § 7 rights and private property rights, 'and to seek a proper accommodation between the two.'" Id. (quoting *Central Hardware Co. v. NLRB,* 407 U.S. 539, 543 (1972)). Noting that the Board decision under review "was ostensibly reached under the statutory criteria set forth in *NLRB v. Babcock & Wilcox,"* the *Hudgens* Court pointed out that the § 7 activity in *Hudgens* differed from the activity in *Babcock* "in several respects which may or may not be relevant in striking the proper balance." 424 U.S. at 511, 521-22:

> First, it involved lawful economic strike activity rather than organizational activity . . . . Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. See *NLRB v. Babcock & Wilcox Co., supra,* [351U.S.] at 111-113. Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.

Id. at 522.

On remand, the Board reaffirmed its previous finding of a statutory violation on the basis of a balancing of interests analysis. *Scott Hudgens*, 230 NLRB 414 (1977). In reaching that result, the Board reaffirmed that the striking Butler

employees were engaged in core § 7 activity. Id. at 416. It concluded that, as employees of Butler, the strikers were entitled "to at least as much protection as would be afforded to nonemployee organizers such as those in *Babcock & Wilcox*." Id. In considering alternatives to trespassory access, the Board took note of the difficulties that the strikers, if denied entry to the mall, would have in reaching the potential customers of the Butler retail store "who might, when seeing Butler's window display inside the Mall, think of doing business with that one employer" and who became identifiable as potential customers "only when [the] individual shoppers decide to enter the store." Id. Concluding that the alternative means of reaching customers were inadequate, the Board found that property interests of the mall owner should yield to the § 7 rights of the striking Butler employees. Id. at 416-418. The Board found that, in the absence of any reasonable alternative means of the strikers' appealing directly to Butler's customers, the burden on the property owner's rights was justified, not only because the owner and the picketed store were linked by mutual economic interest, but also because that burden was indistinguishable from the burden that § 7 strike activity normally places on private property. Id. at 417-18.

3. *Jean Country*

In *Jean Country*, 291 NLRB 11 (1988), the Board reviewed its previous access to property cases and announced its conclusion "that the availability of

reasonable alternative means is a factor that must be considered in *every* access case." Id. at 11 (italics added). Acknowledging that the Supreme Court's remand in *Hudgens* "did not specifically refer to the 'alternative means' test," *Jean Country* reasoned that that test was implicit in *Hudgen's* "reiteration of the necessity of seeking an accommodation that produces 'as little destruction of one [right] as is consistent with the maintenance of the other.'" Id. at 12. The Board explained:

> When individuals seeking to exercise Section 7 rights have reasonable means of exercising them without trespassing, precluding access to the private property in question does not threaten the destruction of Section 7 rights. When such individuals have *no* reasonable alternative means, then at least some yielding of the property right may be required to avoid destruction of the Section 7 right.

Id. For these reasons, the Board held that "in all access cases" the availability of reasonably effective alternative means is an "especially significant" factor in weighing "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." Id. at 14.

4. *Jean Country* After *Lechmere*

In *Lechmere* the Supreme Court rejected *Jean Country*'s three-factor balancing test "as applied to nonemployee organizational trespassing," 502 U.S. at 536. To that extent, the Court held, *Jean Country*'s balancing test conflicted with the Court's

holding in *Babcock*. Id. at 536-538. *Lechmere* explained that the deference to which an administrative agency is normally entitled in interpreting "an ambiguous statutory provision that it administers," id. at 536, has no place where the Supreme Court has already determined "'a statute's clear meaning.'" Id. at 537 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). *Babcock* thus trumps *Jean Country* with respect to the issue decided in *Babcock*—the locus of accommodation "where nonemployee organizing is at issue." *Lechmere*, 502 U.S. at 538. As *Lechmere* explained,

> So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in the *Hudgens* dictum.

Id. at 538 (emphasis in original).

As *Lechmere* thus makes clear, "*Hudgens* did not purport to modify *Babcock*." 502 U.S. at 538. It remains true, however, as *Hudgens* itself took pains to point out, 424 U.S. at 521-22, that *Babcock* did not decide the different issues that were presented in *Hudgens*. As discussed above, *Hudgens* recognized that *Babcock* did not decide how property and statutory rights should be accommodated (1) where the § 7 activity was "lawful economic strike activity rather than organizational activity," (2) where the § 7 activity was being carried out employees

of an employer on the property, and "not by outsiders," and (3) where the property interests where those of a third party and "not those of the employer against whom the § 7 activity was directed . . . ." 424 U.S. at 522. Those are issues that the Supreme Court remanded for the Board to consider in the first instance in *Hudgens*, 424 U.S. at 521, 523. With respect to those kinds of issues, which have never been resolved by the Supreme Court, the Board is entitled to the deference that *Lechmere* recognized is normally its due. 502 U.S. at 536. And with respect to those issues, the Board's three-factor *Jean Country* balancing test remains a valid standard after *Lechmere.*

5. *Jean Country* Balancing is Appropriate here

Counsel for the General Counsel submits here—as the General Counsel also submitted in *Gayfers*, 324 NLRB at 1248—that the *Babcock*-based balancing test in *Jean Country* is the appropriate legal standard for determining whether employees of an employer located on a third party's property may trespass for the purpose of apprising customers of their employer of their labor dispute. That *Jean Country* test, like the Board's earlier tests in *Peddie Buildings* and *Scott Hudgens*, is appropriate precisely because it recognizes that the third party owner has a property interest that must be taken into account.

In one of its previous decisions in these cases, *New York New York I*, 334 NLRB No. 87, slip op. 2 fn. 5, the Board suggested that *Scott Hudgens* was

inapposite because there the employees seeking access to picket their employer's retail store did not actually work on the property (they were warehouse employees), and thus, unlike the Ark employees "were not rightfully on the [third party owner's] property pursuant to their employment relationship." But in both *Hudgens* and these cases, the use to which the employees were putting the property was objected to by the property owner, and to that extent, as the Court of Appeals explained in defining the analytical problems posed by *Southern Services*, all the employees were trespassers. 313 F.3d at 589.[12] Prior to *Gayfers*, the Board had upheld the General Counsel's position that *Scott Hudgens* was the proper standard where employees who work on property owned by another seek to make a direct appeal to the customers that they serve on the premises. See *Seattle-First National Bank*, 243 NLRB 898, 899 (1979) (holding that the Bank's property rights must yield to the right of employees of a restaurant on the Bank's premises to appeal directly to restaurant customers in the 46th floor foyer immediately adjacent to the restaurant), enfd. in relevant part 651 F.2d 1272, 1275-76 (9th Cir. 1980). The standard applied in *Seattle-First*, like the standard applied in *Peddie Buildings* and *Jean Country*, is more appropriate than the standard applied in *Gayfers* because

[12] See also *Hillhaven Highland House*, 336 NLRB No. 62, slip op. 4 (2001), pet. to review pending (6th Cir. 01-2478), where the Board acknowledged the general property law principle that "any employee engaged in activity to which the employer objects on its property might be deemed a trespasser, not an invitee: the employer is arguably free to define the terms of its invitation to employees."

that standard recognizes that that the property rights of the third party owner are at stake and that trespassory employee activity aimed at the public is not authorized by § 7 if there are reasonable alternative means by which the employees can communicate with the public.

For the foregoing reasons, Counsel for the General Counsel submits that the Board should overrule *Gayfers Dept. Store*, 324 NLRB 1246 (1997) and return to the *Babcock*-based balancing standard that guided the Board's decisions in *Peddie Buildings*, 203 NLRB 265 (1973), enf. denied, sub nom. *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974); *Scott Hudgens*, 230 NLRB 414 (1977); *Seattle-First National Bank*, 243 NLRB 898 (1979), enfd. in relevant part, 651 F.2d 1272, 1275-76 (9th Cir. 1980); and *Jean Country*, 291 NLRB 11 (1988).

C. These Cases Should Be Remanded For The Purpose Of Taking Evidence On The Availability Of Reasonable Alternative Means Of Communication

The two cases that the Court of Appeals has remanded for reconsideration in light of *Lechmere* well illustrate why the factor of alternative reasonable means of communication is an essential element in any balancing of employee § 7 rights and third party owner property rights.

On the one hand, because the Ark employees do work on NYNY property and are seeking to appeal to the very customers they normally serve on the premises, they have a strong § 7 interest in making a direct appeal to customers

about to enter their place of employment. As noted, the Board, with court approval, has found that that interest can, in appropriate circumstances, outweigh the third party property owner's interest. See *Seattle-First National Bank*, 243 NLRB 898, 899 (1979) (employees of restaurant entitled to appeal to customers of restaurant on third party owner's property), enfd. in relevant part 651 F.2d 1272, 1275-76 (9th Cir. 1980). See also *Sentry Markets*, 296 NLRB 40 (1989) (Cudahy employees entitled to engage in trespassory struck product handbilling asking customers of grocery store not to purchase Cudahy meat products inside the store), enfd. 914 F.2d 113, 117 (7th Cir.1990).

On the other hand, as previously explained, the law of the case now requires the Board to accept that the property owner has the right to determine the terms of its invitation to nonemployees. 313 F.3d at 589. The Board is thus no longer free to find, as it did in *New York New York II*, 334 NLRB No. 89, slip op. 2, that the Ark employees "were not trespassing" when they used NYNY property to urge Ark customers to urge Ark to sign a union contract. Under Nevada law, an employer's ability to define the scope of its invitation is broad; it does not change merely because the employer's business is also open to the public. *See S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247-248 (Nev. 2001) (property does not "lose its private character merely because the public is generally invited to use it for designated purposes"); *Venetian Casino Resort v. Local Joint Executive Board*

of Las Vegas, 257 F.3d 937, 947-48 (9th Cir. 2001) (distinguishing a privately owned sidewalk over which the public had a right of unobstructed use from pedestrian promenades inside private enclosed shopping centers, where the invitation to the public was solely for the purpose of doing business with the tenants, citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 553, 564-65 (1972)).

In these circumstances, where there is a collision of the § 7 rights of employees working on property and the property rights of the third party owner, the principles that the Board set forth in *Jean Country* should govern the disposition of this case. As discussed above, *Jean Country* distilled the Board's experience in regulating conflicts of the sort presented in the cases now before the Board on remand. *Jean Country* concluded "that the availability of reasonable alternative means is a factor that must be considered in *every* access case." 291 NLRB 11 at 11 (italics added). Not to consider that factor is to fail to accept "the necessity of seeking an accommodation that produces 'as little destruction of one [right] as is consistent with the maintenance of the other.'" Id. at 12.[13] Because that critical factor was not considered under the *Gayfers* standard that previously

[13] Cf. *Providence Hospital*, 285 NLRB 320, 321-22 (1987) (off-duty employees and nonemployee union representative not entitled to picket on hospital property where the General Counsel had failed to establish an absence of reasonable alternative means for communicating with the intended audience).

governed the litigation of these cases, the two cases should be remanded in order that the parties may have the opportunity to adduce evidence on the issue of whether there was a reasonable nontrespassory alternative available to the Ark employees seeking to enlist the support of Ark customers in their labor dispute.

CONCLUSION

For the foregoing reasons, Counsel for the General Counsel urges that these cases should be remanded to an administrative law judge for the purpose of making a record upon which it can be determined whether nontrespassory alternative means were reasonable available to the Ark employees seeking to appeal directly to Ark customers about their dispute with Ark.

Dated at Las Vegas, Nevada, this 15th day of May 2003.

Respectfully submitted,

Nathan W. Albright
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101-6637
Telephone: (702) 388-6211

CERTIFICATE OF SERVICE

I hereby certify that an original and seven copies of *GENERAL COUNSEL'S POSITION STATEMENT ON RECONSIDERATION BY THE BOARD*, was served by overnight express mail, this 15th day of May, 2003, on the following:

Lester A. Heltzer, Acting Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11600
Washington, DC 20570-0001

and a copy was served by certified mail, return receipt requested, on the following parties:

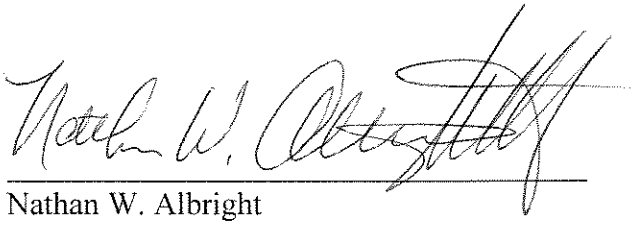
Celeste M. Wasielewski, Esquire
Verner, Liipfert, Bernhard,
McPherson & Hand
901 15th Street NW
Washington, DC 20005-2301
Certified – 7002 1000 0004 8157 3042

Richard G. McCracken, Esquire
Davis, Cowell & Bowe
595 Market Street, Suite 1400
San Francisco, CA 94105
Certified – 7002 1000 0004 8157 3059

and a copy was served by regular mail on the following parties:

New York New York, LLC
d/b/a New York New York
Hotel and Casino
3790 Las Vegas Boulevard South
Las Vegas, NV 89109

Local Joint Executive Board
of Las Vegas
1630 South Commerce Street
Las Vegas, NV 89102



Nathan W. Albright
Counsel for the General Counsel
National Labor Relations Board
Region 28 - Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, Nevada 89101-6637
Telephone: (702) 388-6211