UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

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
HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Scott B. Feldman, Esq., NLRB Region 28,
Las Vegas, NV, for the Board's General Counsel.
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for the Respondent.
Kevin Kline, Representative, Las Vegas, NV,
For the Charging Party

DECISION

Statement of the Case

Timothy D. Nelson, Administrative Law Judge: On July 9, 1997, [1] agents of the Respondent[2] prohibited three off-duty employees of Ark Las Vegas Restaurant Corporation (Ark), which operates restaurants within the Respondent's hotel/casino complex, from distributing union handbills to the Respondent's customers on the private sidewalk in front of its main entrance, the "Porte-Cochere," located on the Respondent's private property. This triggered an unfair labor practice prosecution brought in the name of the General Counsel of the National Labor Relations Board alleging that when the Respondent prohibited the handbilling, it violated Section 8(a)(1) of the National Labor Relations Act. I heard the case in trial in Las Vegas, Nevada, on February 11, 1998, following which counsel for the General Counsel and counsel for the Respondent submitted helpful post-trial briefs, which I have studied.[3]

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[1] All dates below are in 1997 unless I say otherwise.

[2] The Respondent is the limited liability company, New York New York Hotel, LLC, that owns and operates the New York New York Hotel & Casino in Las Vegas, Nevada.

[3] I grant the Respondent's unopposed motion to correct the trial transcript, filed separately from its brief, which I hereby receive into evidence as ALJ Exhibit 1. I deny the Respondent's separate motion (hereby received as ALJ Exhibit 2) to strike a portion of the General Counsel's

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The procedural background helps to isolate what is and is not in issue in the case: On July 11, the Union[4] filed an initial charge against the Respondent and Ark as "joint employers," alleging that they, through a common agent, committed a variety of Section 8(a)(1) violations in response to the July 9 handbilling, including by "prohibiting" the handbilling. The Union first amended this charge on August 29, notably by deleting the claim that the Respondent and Ark are joint employers and by now naming only the Respondent as the charged party. On September 8, the Union further trimmed the outstanding charge by alleging simply that the Respondent had unlawfully prohibited the July 9 handbilling. On September 10, embracing the charge as ultimately amended, the Regional Director for Region 28 issued an amended complaint alleging that the Respondent violated Section 8(a)(1) when its agents "denied employees access to its property to distribute union literature." Moreover, implicitly acknowledging that the "employees" in question were not employed by the Respondent, but by Ark, a separate paragraph in the complaint seems to suggest that, due to a supposed "symbiotic relationship" between the Respondent and Ark, the three handbillers were *tantamount* to employees of the Respondent, i.e., they were "invest[ed] with essentially the same rights and privileges as employees of the Respondent in the particular circumstances of the instant case."[5]

By its answer and otherwise, the Respondent has admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,[6] that the Union is

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brief making a factual claim said by the Respondent to be grounded in a misinterpretation of the record. (However, I find that the record does not preponderantly support the General Counsel's claim of fact, and, in any case, the claimed fact, even if true, would not materially affect my analysis.) Finally, the Respondent requests on brief (pp. 38-39), that I order a reopening of the record to permit the Respondent to introduce evidence that I barred during the trial. This was evidence proffered in support of a defense, raised for the first time during the trial, that the handbillers' activities were unprotected because they were allegedly part and parcel of a surrounding campaign by the Union which, although nominally aimed at organizing Ark's employees, independently violated either Section 8(b)(4) or Section 8(b)(3), or both sections. I deny the Respondent's request to reopen for substantially the same reasons I stated after hearing the Respondent's offer-of-proof during the trial. And see Rule 403, *Federal Rules of Evidence.*

[4] As depicted in the undisputed pleadings, the Union is a joint entity, Local Joint Executive Board of Las Vegas, apparently participated in by two local unions, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, each affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO.

[5] The paragraph in question (paragraph 2(e)) reads in full as follows:

> At all material times, Respondent and ARK Las Vegas Restaurant Corporation have shared common premises and facilities, have provided services for each other, have held themselves out to the public as a single-integrated business enterprise, and otherwise enjoyed a symbiotic relationship with one another, thereby investing the employees of Ark Las Vegas Restaurant Corporation with essentially the same rights and privileges as employees of the Respondent in the particular circumstances of the instant case.

[6] Relatedly, the pleadings establish, and I find, that New York New York Hotel & Casino

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a labor organization within the meaning of Section 2(5) of the Act, and that it prohibited the July 9 handbilling on its premises. However, the Respondent denied any "symbiotic relationship" with Ark, and further denied that Ark's employee's are "invested with essentially the same rights and privileges" its own employees may enjoy. The Respondent also averred two affirmative defenses in its answer: (1) The July 9 handbillers "did not and do not have any type of employment relationship with Respondent, and. . . had no right of access to Respondent's private property to distribute literature[.]" (2)The handbillers "had reasonable alternative means of. . . communicating with. . . customers and guests of Respondent[.]"

As is implicit in these pleadings, the parties disagree centrally about whether the off-duty Ark employees enjoyed a presumptive statutory right of access to the Respondent's property for purposes of distributing the handbills in question, which related to the Union's campaign to organize Ark's employees. The General Counsel contends that the Ark employees enjoyed the same presumptive rights of access to nonwork areas of their worksite during nonwork times that the Supreme Court declared in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945) were available to employees of the owner of the worksite. The Respondent, invoking *NLRB v. Babcock & Wilcox Co.* 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), argues that the handbillers, being "nonemployees" of the Respondent, enjoyed no presumptive "rights" of access whatsoever for purposes of distributing the union handbills. However, a further question divides the parties even if it were found that the *Republic Aviation* rule properly applies to the handbillers' activities: Is the Porte-Cochere a "nonwork" area? The Respondent says it is; the General Counsel says it isn't.

Based on the further findings and the reasoning set forth below, I judge that *Republic Aviation* declares the rule applicable to the handbillers' activities, and that the Porte-Cochere is, for these purposes at least, a nonwork area—more precisely a "nonselling area open to guests and the public." Accordingly, I find ultimately that the Respondent's prohibition of the handbilling violated Section 8(a)(1). In arriving at that result, however, I will find it unnecessary to visit the question whether the Respondent and Ark "enjoyed a symbiotic relationship with one another"; much less will I decide whether such a business symbiosis, if it existed, would require a finding that the employees of Ark have been "invest[ed]. . . with essentially the same rights and privileges as employees of the Respondent."

I. Findings[7]

A. *The General Setting*

The New York New York Hotel and Casino (NY-NY) is a recent addition to the Las Vegas Strip, having opened in January 1997. NY-NY is a "theme" complex built on the desert floor to resemble, from some perspectives, the lower Manhattan skyline—from the Chrysler Building to the Statue of Liberty, but with a roller coaster imported from Coney Island weaving through this architectural array. Inside the complex, according to the Respondent's

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received gross revenues exceeding $500,000 in the first six months of its operations (starting on or about January 3, 1997), that this was a representative period, and that in the same period it purchased and received more than $50,000-worth of goods and materials directly from points outside Nevada.

[7] Unless I note otherwise, all findings are based on credible and undisputed testimony or documents of record, which include videotapes of the Porte-Cochere area described below.

advertisements, "this themed hotel and full-service casino re-creates the ambiance and excitement of the Big Apple. . . bring[ing] to life the charm of Greenwich Village and the excitement of a bustling Times Square[,]" and "puts gamers right in the middle of all the action." Indeed, even ". . . the carpet paths in the casino carries [*sic*] the design of an authentic New York street, complete with curbs and crosswalks that guide the visitor to the . . . gaming areas."

NY-NY sits at one corner of the intersection of two main public thoroughfares, Las Vegas Boulevard (the Strip) and Tropicana Avenue. Its main or "front" entrance, which the Respondent prefers to call the "Porte-Cochere," features a wide bank of automatic swinging glass doors (9 sets of doors in all) each framed in polished brass, through which customers enter immediately into the casino. The entry doors face out to the Strip, but are set back at least 100 feet from it, separated first by a public sidewalk adjoining the Strip, next by hedgerows marking the perimeter of the private property, next by six private traffic lanes, and next by an 18-foot wide private sidewalk immediately in front of the entry doors. Customers in cars, taxis and shuttle vans must follow a privately-maintained roadway from a public street exit to arrive at the Porte-Cochere, where passengers and their luggage are discharged and collected, and where valet parking services are available. Pedestrian customers may likewise arrive at the Porte-Cochere by following private sidewalks from the public sidewalks adjoining the main thoroughfares.

The Porte-Cochere "area" referred to below is defined primarily by the impressive canopy that covers the main entry. The canopy, a large rectangular form with a smaller rectangular tab protruding from it, extends about 100 feet from the building at its outermost edge, and spans a roughly equal width, covering a total area of about 10,000 square feet. It shelters not only the private sidewalk in front of the main entry doors, but also the six private traffic lanes adjacent to the sidewalk. The three lanes farthest from the entry doors are reserved for temporary parking by customers who use the valet parking service; the three lanes closest to the entry are for vehicles that stop briefly to discharge or pick up passengers; two are for taxis and shuttle vans and one is for private cars.

NY-NY employs car valets, baggage-handlers, and uniformed doormen/cab-hailers (two doormen per shift), all of whom who spend substantially all of their work time in the Porte-Cochere area. Some other NY-NY employees, such as maintenance workers and security personnel, work or appear at regular intervals in the Porte-Cochere area as part of their roving duties. Still other NY-NY employees, too varied in classification to capture briefly, may find *ad hoc* business reasons to visit or perform tasks in the Porte-Cochere area.

In keeping with its overall promise of big-city fun and excitement, NY-NY advertises that it "serves up tempting cuisine. . . with an array of restaurants. . . [e]ach. . . [p]roviding [a] variety of different fares[.]" In fact, the Respondent does not own or operate these restaurants; rather, it leases space to independent restaurant management businesses such as Ark, which itself operates at least two main restaurants in the complex ("America" and "Gallaghers"), plus 6 or 7 small, fast-food outlets arranged together in an area called "Village Streets," a food-court setting apparently designed to evoke the experience of dining in Greenwich Village. Ark also is responsible for preparing and furnishing room-service meals to the Respondent's hotel guests.

All employees working within Ark's restaurants are employed exclusively by Ark, but according to the terms of Ark's employee handbook they are also subject to NY-NY's own "policies" respecting such things as "[e]mployee entrances, parking, drug testing, name tags

[and] conduct at the hotel while off and on duty." NY-NY permits, even encourages, off-duty, employees of Ark to visit and patronize the casino and the restaurants in the complex and to use routes open to the public, including through the Porte-Cochere, to enter or exit from the complex. Indeed, it appears that NY-NY (and Ark, in turn) imposes only two restrictions on the visitation rights of off-duty Ark workers—that they not wear their work uniforms, and that they not patronize the bars. [8]

Shortly before opening NY-NY in January 1997, the Respondent recognized the Union as the exclusive collective-bargaining representative of any of its employees working in certain "culinary classifications," and it later entered into a labor agreement with the Union purporting to cover those classifications—an agreement which, by its terms, was due to run for only two months (from April 1 through May 31, 1997), but which the parties were apparently still treating as "in effect" when this case was tried in February 1998.[9] However, inspection of the union contract suggests that the recognition—indeed, the contract itself—may have been essentially prospective and conditional in nature. This is because, so far as this record shows, NY-NY did not employ any culinary employees when the union contract was signed, nor at the time of the July 9 handbilling. Rather, as the union contract itself acknowledges, only "lessees" of NY-NY (such as Ark) and their own employees were currently involved in any food service operations, and "[c]onsequently, the contract relating to food service functions is not applicable[,]" but would be subject to "activat[ion]" in the "future" event that NY-NY might itself engage in "food service operations."[10]

It is clear in any case that the union contract was not intended to cover Ark's employees, who have been unrepresented at all material times. Indeed, the record shows that at the time of the July 9 handbilling, described next, the Union was trying to organize Ark's employees and to obtain recognition from Ark as their exclusive representative.

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[8] For findings in this paragraph I rely in part on the testimony of Dennis Shipley, the Respondent's Vice President for Human Resources, and in part on Ark's Employee Handbook. The Handbook states pertinently that it is the "explicit policy of New York-New York" that "[a]ll Ark Las Vegas employees are welcome to use the gambling facilities, when off duty[,]" but that "[t]he only restriction is that you must not be in a Company uniform of any kind[,]" and that, "[a]ll bars, unfortunately, are off limits to all employees at all times."

[9] Testimony of the Union's Staff Director, Donald Taylor.

[10] To elaborate, the Recognition clause of the union contract purports to grant recognition to the Union as the exclusive representative of the employees of the Respondent "working in those job classifications listed in Exhibit 1[.]" The "Exhibit 1" incorporated into the contract (appearing at pp. 37a-b) lists over 40 separate job classifications—described in the heading to the exhibit as "culinary classifications." However, according to " Side Letter # 5" (p. 43) of the contract,

> The Union understands and agrees that the Employer has leased its entire food operations to third parties ("Lessees"). Consequently the food classifications in Appendix A [*sic*] and the contract relating to food service functions is [*sic*] not applicable. If, in the future, the Employer engages in food service operations other than those described in the paragraph below, food-related classifications and language will be activated.

B. *The July 9 Handbilling; the Respondent's Reaction*

Sometime in the late morning of July 9, three off-duty employees of Ark—Edward Ramis, John Ensign, and Ron Isomura—appeared in the Porte-Cochere area and positioned themselves about ten feet apart on the 18-foot wide sidewalk separating the private traffic lanes from the doorways into the casino. There, they passed out identical handbills to customers as they walked across the sidewalk to the entry doors. The handbills, authored by the Union, protested as "Unfair" that "Ark Restaurants at the New York-New York have no contracts with the Culinary & Bartenders Unions." The handbills contained a lengthy 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." The handbills also contained a request—that the customer-recipients "[t]ell Ark's managers at America, Village Streets (food court), Gonzales y Gonzales, and Gallaghers that Ark should recognize and negotiate a fair contract with its workers." They further advised as follows:

> We are not asking the employees of any employer to stop their work. We have no dispute with the New York-New York Hotel & Casino, only Ark Restaurants Corporation, which runs some of the food and beverage operations inside the New York-New York.

Each of the three employee-handbillers was dressed in street clothes, not Ark work uniforms, and each wore a union button on his shirt identifying him as a "Committee Leader, Union Local 226." In some cases, customers taking the handbills would pause to ask questions, and the handbillers would reply; however, the frequency of such exchanges is uncertain on this record, and, crediting Ramis, no such exchange lasted more than two minutes. The record otherwise shows—and the Respondent's agents concede— that the handbilling activities did not impede customer entry or egress, and caused no disruption to the work being performed by the car valets, baggage-handlers, and doormen who were then working in and around the Porte-Cochere area.

Shortly before noon, apparently not long after the handbilling began, Karen Lightell, a security supervisor for the Respondent, approached the handbillers and was soon joined by Dennis Shipley, the Respondent's Vice-President of Human Resources. In the ensuing conversations, Lightell told the handbillers that they were trespassing on the Respondent's private property and weren't allowed to solicit or distribute literature there.[11] At some point, the handbillers produced and displayed their Ark employee identification cards to Lightell and/or Shipley. Eventually, when the handbillers refused to leave voluntarily, Lightell read to them from a copy of the Nevada Trespass Statute (apparently a formality required before the police could be called to evict and cite the claimed trespassers under the trespass statute), and when they still refused to leave, Shipley authorized another security agent to call-in the "Metro" police. At about noon, the Metro police arrived, escorted the three handbillers from the premises, and issued each of them written citations for trespass, noting on the citations that they had "remain[ed] on the property after warning not to trespass by a representative of the owner, to wit, Karen Lightell[.]"

[11] On demeanoral grounds, and in the light of surrounding circumstances unnecessary to detail, I discredit Ramis insofar as he claims that either Lightell or Shipley told him that he could be fired for his handbilling activity.

II. Analyses, Supplemental Findings, Conclusions

A. *General Principles*

Under established interpretations of Section 7's "mutual aid or protection" clause, employees have a presumptive statutory right (i.e., a right that exists absent "special circumstances") to use their workplace as a forum for circulating petitions or distributing literature, so long as they do it in nonwork areas and during nonwork times (*Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945)), and so long as the subject of their activity can fairly be said to "bear a relationship to their interests as employees." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 567 (1978). By contrast, "nonemployee union representatives" seeking to advance the interests of employees enjoy no right grounded in the Act to enter or use an employer's property for such purposes, except in relatively rare cases where it can be demonstrated that there exist no adequate, alternative ways for the union to communicate with its target audience. *NLRB v. Babcock & Wilcox Co.* 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

We are instructed by *Hudgens v. NLRB,* 424 U.S. 507, at 521-22 (1976), that there is a "reason. . . of substance" for treating employees differently from nonemployee union representatives for these purposes, namely, that "employees [are] already rightfully on the employer's property," and therefore, only the "employer's management interests rather than his property interests [are] involved," whereas nonemployees have no such pre-existing status as "invitees," and, therefore, the employer's property interests are most directly implicated when a nonemployee union representative seeks access to the property. *Id.,* at 521-522. Accordingly, an employer who maintains and enforces in a nondiscriminatory way a nondiscriminatory policy banning "outsiders" from access will not normally commit a Section 8(a)(1) violation when it enforces that policy as to nonemployee union agents, no matter what their particular purpose may be for seeking access. *Ibid.*

B. *Which Standard Applies?*

The *purpose* of the handbilling activity conducted by the three Ark employees—to protest Ark's failure to recognize and negotiate with the Union as their representative, and to enlist customer support to help secure recognition and a union contract from Ark—clearly bore a direct and intimate "relationship to their interests as employees," and thus clearly qualified as protected activity under the liberal standard expressed in *Eastex, supra.* However, as previously noted, the parties' dispute is grounded in large part on a disagreement about the handbillers' rights to use NY-NY property as a site for conducting their otherwise protected activity. The Respondent, relying exclusively on the fact that Ark employees have no "employment relationship with NYNY," argues that this case is governed by *Babcock & Wilcox* principles. To the contrary, the General Counsel argues, in substance, that the fact that the employee-handbillers were not employed by the Respondent does not defeat the applicability of the *Republic Aviation* rule to their activity, because here the handbillers were not "strangers" to the property, but were employed "regularly and exclusively" on the property, and were thus "invitees" to the property.

The General Counsel's argument is well-supported by at least one recent Board decision affirming that employees of a subcontractor of a property owner who work regularly or

exclusively on the owner's premises enjoy rights under *Republic Aviation* to use the nonwork areas of the premises to distribute union literature to customers entering or leaving the premises. See *MBI Acquisition Corp d/b/a Gayfers Dept. Store*, 324 NLRB No. 188 (November 8, 1997). The General Counsel's argument draws further nourishment from the case on which *Gayfers* principally relies, *Southern Services, Inc.*, 300 NLRB 1154 (1990), enfd. 954 F2d 700 (11th Cir. 1992) (Coca Cola Company violated Section 8(a)(1) by prohibiting employee of janitorial subcontractor from distributing union organizing literature to fellow janitors employed on Coca Cola's premises.)

The Respondent argues that the cited cases are distinguishable on their facts from this one. I find that the factual differences cited by the Respondent are too marginal and inconsequential to justify a different legal analysis herein. The Respondent further argues in any case that "the Board's legal analysis in *Gayfers*, like *Southern Services*, is fatally flawed," because it relied on "extremely attenuated reasoning" to justify application of the *Republic Aviation* rule to cases involving the access rights of employees to premises where they work but which are owned by someone other than their own employer. Such arguments are better directed elsewhere. I must follow the Board's precedents unless they are reversed by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749, fn. 14 (1984); see also, *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

Accordingly, relying on *Gayfers* and *Southern Services*, I find that the *Babcock & Wilcox/Lechmere* rule applicable to "nonemployee union representatives" does not govern the analysis herein; rather, I find, the employees of Ark enjoyed *Republic Aviation* rights of access to the Respondent's nonwork areas to conduct the handbilling in question.[12] Thus, it remains only to determine whether the *area* they selected to conduct their handbilling, the Porte-Cochere, is properly regarded as a "nonwork" area.

C. *Is the Porte-Cochere a Non-Work Area?*

The Respondent's claim that the Porte-Cochere area is a "work area" stresses that the area is the regular daily work site for car valets, doormen and baggage-handlers employed by NY-NY, and the occasional situs for work done by NY-NY's roving maintenance and cleaning crews and a variety of other NY-NY employees who may have *ad hoc* reasons to go into the area. The General Counsel, relying on authorities discussed below, urges that these facts don't matter to the analysis. Rather, according to the General Counsel, what counts ultimately

[12] Moreover, it does not matter to an analysis of their statutory access rights that the employee-handbillers were "off-duty" when they conducted their handbilling. That an employer may not ban off-duty employees from using nonwork areas to conduct protected solicitations or distributions is explicit in several Board decisions involving hotel/casino operations. See *M&R Investments, Inc d/b/a Dunes Hotel & Country Club*, 284 NLRB 871, 877-78 (1987); *Harvey's Wagon Wheel*, 271 NLRB 306, 316 (1984); *John Ascuaga's Nugget*, 230 NLRB 275 (1977). (For cases applying the same reasoning in nonretail operations, see, e.g., *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), and *Southern California Gas Co.*, 321 NLRB 551, 557 (1996).) Indeed, the fact that the employees herein conducted their handbilling at times when they were not scheduled to work at the premises is an especially trivial consideration in determining their Section 7 rights of access where NY-NY has clearly invited them to visit and patronize the casino and most of its facilities during their off-duty hours.

is that the Porte-Cochere area is a "public" area, and that it is physically and functionally distinct from the "selling floor" of the particular kind of "retail" business that we confront in this case, i.e., the casino floor itself. Again, I find that the General Counsel's arguments are well-supported by the caselaw, and that the Respondent's contentions don't fit at all well within that body of law.

As all parties recognize, the Board has held that "gambling establishments" (no matter that they may include associated amenities such as hotels, restaurants and bars, or entertainments such as lounge acts, stage shows, or even roller coasters) "are analogous to a retail store for the purpose of considering the lawfulness of no-solicitation and no-distribution rules." *Dunes Hotel & Country Club* (*supra,* at fn. 11), 284 NLRB at 876-78, citing *Barney's Club,* 227 NLRB 414 (1976). Thus, in *Dunes Hotel,* the Board found, applying the "selling/nonselling area" distinctions set forth in its "seminal" decision in *Marshall Field & Co.,* 98 NLRB 88, 92 (1952), and its later decision in *McBride's of Naylor Road,* 229 NLRB 795 (1977), that the casino-employer's ban on employee solicitation and distribution "in work areas or areas open to guests" was unlawfully broad insofar as it purported to bar such activity in "nonselling areas open to the guests or the public." 284 NLRB at 878.

It appears that the Board has not yet addressed the precise question whether the area outside the front entrance to a casino, such as the Porte-Cochere area herein, should be regarded as a "nonselling area open to the guests or the public" within the meaning of the *Dunes Hotel* holding, and thus a protected zone for employee solicitations and distributions. However, on the face of things, such an area would clearly seem to fall within the quoted category, despite the fact that the area may also be a work situs for some of the Respondent's employees.[13]Thus, the fact that some employees perform work in the Porte-Cochere area would appear to be legally subordinate to the controlling fact that the area is nevertheless a "nonselling area open to the guests or the public."[14] In addition, I note that the handbilling on

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[13] Although the Board has not itself addressed the precise question, I note that two different administrative law judges have used reasoning in cases now pending before the Board on exceptions that is essentially similar to that I have just applied to reach the same conclusion I have just reached—that the area outside the entrance to a casino is a "nonselling area open to the guests or the public," and that employees' statutory rights were violated when the casino-employers, invoking no-solicitation/distribution rules, took various steps to prevent them from distributing union handbills to customers outside these entrances—and this despite the fact that in each of those cases, as herein, those areas were likewise work sites for car valets, doormen and others employed by the casino employers. See *Reno Hilton,* JD (SF) 09-98 (Administrative Law Judge Jay R. Pollack), and *Santa Fe Hotel & Casino,* JD (SF)-64-96 (Administrative Law Judge Burton Litvack).

[14] Indeed, in *United States Steel Corp.,* 223 NLRB 1246, 1247 (1976), the Board took a skeptical view of the nonretail employer's ban on employee solicitations or distributions in purported "work areas" that included *any* areas where "work" may be performed. Thus, the Board adopted the administrative law judges observation that,

> [the employer's] contention that all its property is a work area is a contention that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks, whether it be cleaning up, maintenance, or other incidental work, are performed at some time in almost every area of every company.

July 9 had no adverse impact on either the customers' entry or egress or on the ability of the Respondent's employees to perform their customary work there. Finally, contrary to the Respondent's arguments, I find that handbilling of *customers* in the Porte-Cochere area has no inherent tendency to interfere significantly with either the customers' ingress or egress or with the ability of car valets, doormen, baggage-handlers, or any other employees who may perform work in the area. Accordingly, the Respondent has failed to demonstrate that its legitimate "management interests" (as *Hudgens v. NLRB, supra,* used that expression, distinguishing it from "property interests") would be impaired in any significant way by permitting employee-handbilling directed to customers in the Porte-Cochere area.

In sum, consistent with the thrust of the complaint, and rejecting all arguments of the Respondent to the contrary, I conclude as a matter of law that when the Respondent prohibited the employees of Ark from distributing union handbills to customers in the Porte-Cochere area, the Respondent unlawfully interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8(a)(1). And on the foregoing findings and conclusions, I issue the following recommended,[15]

ORDER

The Respondent, New York New York, LLC, d/b/a New York New York Hotel & Casino, operating in Las Vegas, Nevada—including its officers, agents, successors, and assigns, shall

1. Cease and desist from,

(a) prohibiting employees who work within the Respondent's hotel/casino complex, including those employed by Ark Las Vegas Restaurants, Inc., from distributing union handbills to customers on the sidewalk in front of the Porte-Cochere entry doors.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Within 14 days from the date of this Order unless otherwise specified below, take the following affirmative action necessary to effectuate the policies of the Act::

(a) Remove from its own files and records, including security incident reports, any reference to the fact that the employee-handbillers herein, Edward Ramis, John Ensign, and Ron Isomura, conducted handbilling on July 9, 1997 at its Porte-Cochere entrance, and/or that the Respondent invoked Nevada trespass law against these employees, and, within three days thereafter, notify each employee, in writing, that this has been done and that it will not use either fact against them in the future.

(b) Inform the Las Vegas City Attorney in writing that it wants to withdraw the trespass citations it caused to be issued against these employees on July 9, 1997.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Reimburse these employees for any legal or other expenses which any of them may have incurred while defending themselves against the trespass citations prior to the point when the Respondent shall have notified the Las Vegas City Attorney of its desire to withdraw the citations.

(d) Post at its Las Vegas hotel/casino facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees (including employees of lessees occupying its premises) are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent (or by lessees occupying its premises) at any time on or after July 9, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated June 29, 1998

Timothy D. Nelson
Administrative Law Judge

[16] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD(SF)–68–98
Las Vegas, NV

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit employees who work within our hotel/casino complex, including those employed by Ark Las Vegas Restaurants, Inc., from distributing union handbills to customers on the sidewalk in front of the Porte-Cochere entry doors.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL remove from our files and records, including security incident reports, any reference to the fact that three employees of Ark Las Vegas Restaurants, Inc., conducted handbilling on July 9, 1997 at the Porte-Cochere entrance, and/or that we invoked Nevada trespass law against these employees, and WE WILL notify each employee, in writing, that this has been done and that we will not use either fact against them in the future.

WE WILL inform the Las Vegas City Attorney in writing that we want to withdraw the trespass citations we caused to be issued against these employees on July 9, 1997.

WE WILL reimburse these employees for any legal or other expenses which any of them may have incurred while defending themselves against the trespass citations prior to the point when we notify the Las Vegas City Attorney that we want to withdraw the citations.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 234 North Central Avenue, Suite 440, Phoenix, Arizona 85004–2212, Telephone 602–379–3188.