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

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
UNITE HERE

PRE-ARGUMENT BRIEF OF THE GENERAL COUNSEL

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On September 4, 2007, the Board solicited the parties to file pre-argument briefs addressing the questions posed by the District of Columbia Circuit Court of Appeals in its remand of these matters to the Board, 313 F.3d 585, 590 (D.C. Cir. 2002). The parties had previously filed position statements on remand with the Board at its invitation. The following pre-argument brief supplements the General Counsel's Statement of Position on Remand filed on May 16, 2003. We provide in the attached Appendix responses to the Court's specific inquiries.

ISSUE PRESENTED

Restaurant employees of Ark Las Vegas Restaurants (Ark) work for their employer on the premises of New York New York Hotel and Casino (NYNY), a major hotel and casino in Las Vegas, pursuant to a contract between Ark and

NYNY to provide restaurant and food services at NYNY's facility. Did the employees' nonderivative, directly held § 7 right to organize and to enlist the support of Ark customers in their organizing campaign outweigh the property concerns of NYNY so as to permit the employees to handbill Ark's customers on NYNY's premises during nonwork time and in nonwork areas?

OVERVIEW

As the General Counsel argued in his Statement of Position on Remand (Statement), in resolving this issue, the Board must acknowledge that the relationship of the Ark employees to NYNY is different than that of the employees in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), to their property owner/employer. Accordingly, resolution of these cases must turn on the application of the balancing principles of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which direct the Board to accommodate § 7 rights and property rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock*, 351 U.S. at 112. See Statement at pp. 20-26. As the D.C. Circuit noted in remanding, however, the precise circumstances here are not addressed in *Babcock* and *Lechmere*. 313 F.3d at 590. Specifically, unlike the nonemployee organizers exercising derivative rights in those cases: (1) the Ark employees are engaged in § 7 activity related to their own union organizational efforts at their worksite; (2) although they are not employees of NYNY, they work onsite on NYNY's premises; and (3) NYNY has a close business relationship with Ark, the employer

with whom the employees have a dispute. The Board's task on remand is to consider whether NYNY's rights as a third-party property owner allow it to disregard the § 7 rights of Ark employees to communicate the facts of their labor dispute with Ark to customers about to enter their place of employment.

The General Counsel adheres to his position in the Statement, pp. 31-41, that Ark employees' right of access should be determined under the *Babcock*-dictated framework applied by the Board in similar circumstances in *Scott Hudgens*, 230 NLRB 414 (1977), on remand from *Hudgens v. NLRB,* 424 U.S. 507 (1976), and *Peddie Buildings*, 203 NLRB 265 (1973), enf. denied sub nom. *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974). That standard requires consideration of whether there are reasonable alternative means by which Ark employees could exercise their § 7 right to inform consumers about their labor dispute. See *Seattle-First National Bank*, 243 NLRB 898, 899 (1979), enfd. in relevant part, remanded on other grounds, 651 F.2d 1272, 1275-76 (9th Cir. 1980) (employees of restaurant entitled to appeal to customers of restaurant on third party owner's property). Because that was not the standard at the time of the trial, the General Counsel previously urged the Board to remand for the purpose of taking additional evidence on the alternative means issue. If the Board does not wish to remand for the taking of additional evidence but wishes to decide the case on the existing record (including the evidence of alternative means in the record), the General Counsel in this supplemental brief sets forth the reasons why, applying the correct legal standard to the facts now in evidence, the Board should

find that the Ark employees were entitled to handbill at the entrances to the Ark restaurants and the NYNY porte cochere.

ARGUMENT

I. The Analytic Framework for Conducting *Babcock/Lechmere* Accommodation

In remanding these cases, the D.C. Circuit rejected the Board's reliance on an analysis positing that the employees were entitled to access as business invitees of the property owner. The Court found that the Board's analysis overlooked that the property owner is entitled to condition the terms of access to its property. 313 F.3d at 589. In his Statement at pp. 27-28, the General Counsel agreed that the handbillers' status under property law does not resolve the issue and urged the Board to accommodate the § 7 right and the third-party property owner's right "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.

The Board has accepted the analytic approach urged by the General Counsel in recent cases that explicitly recognize the necessity to balance property rights and § 7 rights. See *Hillhaven Highland House*, 336 NLRB 646, 649-650 (2001), enfd. sub nom. *First Healthcare Corp. v. NLRB,* 344 F.3d 523 (6th Cir. 2003) (acknowledging "trespasser" status of offsite employees engaged in organizational activity in determining whether § 7 afforded them access rights); *ITT Industries, Inc.*, 341 NLRB 937, 939 (2004), enfd. 413 F.3d 64 (D.C. Cir. 2005) (*ITT Industries II*) (same).

In our view, proper application of the principle that statutory rights and property rights must be accommodated "with as little destruction of one as is consistent with the maintenance of the other" (*Babcock*, 351 U.S. at 112) requires a slight but significant refinement of the issues posed by the Court on remand. In remanding these cases, the D.C. Circuit framed the "critical question" as "whether individuals working for a contractor on a [third party's] premises should be considered employees or nonemployees of the property owner." 313 F.3d at 590. See also id. at 588 (criticizing the Board for failing to "take[ ] account of the principle reaffirmed in [*Lechmere*] that the scope of § 7 rights depends on one's status as an employee or nonemployee" of the third party). This simple dichotomy fails, however, to incorporate the further distinction noted in *Lechmere*, between persons seeking access only in furtherance of statutory employees' § 7 right to receive information about self-organization (persons with "derivative" § 7 rights) and employees who seek access to exercise their own § 7 rights ("nonderivative" or "direct" § 7 rights). See *Babcock*, 351 U.S. at 113; *Lechmere*, 502 U.S. at 532.

In other words, *Republic Aviation* and *Babcock,* as applied in *Lechmere*, are not "either/or" decisions turning solely on employee status but rather reflect opposite ends of an analytic spectrum. As the Supreme Court explained in *Hudgens v. NLRB,* 424 U.S. at 521-522:

> Under the Act the task of the Board . . . is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two."
>
> ****

> The focus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.

quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

A review of cases addressing this issue suggests that to evaluate the "nature and strength" of the § 7 right at stake requires scrutiny of the specific right for which access is sought, whether it is being exercised derivatively or nonderivatively, and the access seekers' relationship to the property and the property owner. To evaluate the "nature and strength" of the private property right requires consideration of the property owner's relationship to the dispute. When the activity at issue is other than employee-to-employee contact for self organization, the Board must consider the availability of alternative means of access.

A. The Nature and Strength of the § 7 Right

1. The Identity of the Right

Ark employees' activity was part of a campaign to organize and obtain recognition from their employer. Employees engaged in self-organization are exercising core § 7 rights. As the Supreme Court has recognized, "[t]he central purpose of the Act [i]s to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *American Hospital Ass'n v. NLRB,* 499 U.S. 606, 609 (1991). Employees are presumptively entitled to engage in solicitation of and distribution to coworkers regarding

organization on their employer's property. *Babcock*, 351 U.S. at 685, citing *Republic Aviation,* 324 U.S. at 803 (absent special circumstances related to maintenance of production and discipline employer may not ban solicitation and distribution on nonwork time in nonwork areas).

Employees' right to engage in self-organization includes not only solicitation of coworkers but also the solicitation of support from the general public, customers, supervisors, or members of other labor organizations. *Stanford Hospital v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003), cert. denied 540 U.S. 1104 (2004) (§ 7 and § 8(a)(1) protect employee rights to seek support from nonemployees; total ban on solicitation of nonemployees anywhere on employer property unlawfully overbroad). See also *Scott Hudgens*, 230 NLRB at 416 (noting § 7 right of striking employees "to communicate their message both to persons who would do business with the struck employer and to those employees of the struck employer who have not joined the strike").

2. Whether the Access Seeker Holds the § 7 Right Derivatively or Directly

The § 7 right of self-organization includes not only the right to discuss organization with one's coworkers but also the right to receive information from elsewhere about organization. When nonemployees distribute such information in furtherance of that right, the protection afforded their activity is "derivative" of employees' entitlement to receive the information. Nonemployees acting pursuant to derivative rights enjoy less protection as against property rights; the property

owner's rights justify exclusion absent a showing of "no other reasonable means of communicating [their] ... message." *Lechmere,* 502 U.S. at 535, quoting *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 205 (1978). Where, however, employees are exercising a directly held, nonderivative core § 7 right, they are entitled to access notwithstanding their employer's right to exclude trespassers. *Hillhaven*, 336 NLRB at 648 (offsite employees seeking to distribute organizational material to coemployees at another worksite are exercising nonderivative organizational right and entitled to access), enfd. 344 F.3d at 538; *ITT Industries II,* 413 F.3d at 70-71.

A third-party property owner does not avoid the obligation to grant access simply because those seeking access are not its employees. As noted in the Statement, p. 24, an employer may violate § 8(a)(1) with respect to employees other than its own. Under this principle, a general contractor may not deny nonemployee union representatives access to a construction site to carry out their representational duties to employees of a subcontractor, pursuant to a contractual access agreement with the subcontractor. The nonemployees are not exercising derivative rights but implementing "the employees' own undisputed § 7 right to negotiate and benefit from a collective bargaining agreement which allows union access for purposes of investigating the premises and interviewing employees on-site." *Wolgast Corp. v. NLRB,* 349 F.3d 250, 256 (6th Cir. 2003), enforcing 334 NLRB 203 (2001), cert. denied 541 U.S. 936 (2004) (*Lechmere's* distinction between the rights conferred on employees, but not on unions or nonemployee

union organizers not controlling; *Lechmere* is not a "trump card" that authorizes exclusion of every nonemployee union representative from third party property, regardless of the purpose or relationship with employees located at the jobsite).

3. The Access Seeker's Relationship to the Property and the Property Owner

Employees' relationship to the property at which they seek to engage in protected activity affects their access rights. Thus, absent business justification, offduty employees are entitled to return to parking lots and other exterior nonwork areas of employer-owned premises to engage coworkers. *Tri-County Medical Center,* 222 NLRB 1089, 1089 (1976). As noted above, offsite employees also share this right, although their more attenuated relationship to the property may give rise to heightened private property interests, such as security concerns that would warrant additional limitations on access. *ITT Industries II*, 341 NLRB at 939; *Hillhaven*, 336 NLRB at 648.

In contrast, when employees seek access to property at which their employer is not present, to engage in protected secondary appeals, their § 7 right does not outweigh the property owner's right to exclude trespassers. *Oakland Mall*, 316 NLRB 1160, 1163, n.12, n.13 (1995), rev. denied sub nom. *United Food & Commercial Workers Local No. 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom. *Teamsters Local 243 v. NLRB,* 519 U.S. 809 (1996) (employees who were laid off when their employer's contract to provide home delivery services for a retail store was lawfully severed, had no access right to

distribute handbills calling for a secondary boycott of the retail store, where alternative means of reaching their audience were not infeasible). Accord, *Leslie Homes, Inc.*, 316 NLRB 123, 126-127 (1995), rev. denied sub nom. *Metropolitan District Council of Philadelphia Carpenters v. NLRB,* 68 F.3d 71 (3d Cir. 1995) (nonemployee union representatives appealing to customers in aid of an "area standards" dispute have no right of access to the picketed employer's property).

Member Higgins' dissent in *Gayfers Dept. Store*, 324 NLRB 1246, 1252 (1997), represents a similar analytic approach. There, employees of a subcontractor working on renovations to a retail store in a mall sought access to solicit a boycott by store customers in aid of an area standards dispute with their own employer. In an approach criticized by the D.C. Circuit in remanding the instant cases (313 F.3d at 589-590), the majority in *Gayfers* relied on the handbillers' status as employees of the subcontractor and "invitees" to the property to conclude that under *Republic Aviation* the conduct was presumptively protected absent legitimate concerns regarding production or discipline. 324 NLRB at 1250. In dissent, Member Higgins agreed that the handbillers were statutory employees and rightfully on the property but disagreed that these circumstances warranted a *Republic Aviation* presumption. Id. at 1252. Although the employees were employed at the site of the handbilling activity, the handbills they distributed were addressed not to employee self-organization but to an area standards dispute with their own employer and sought a customer boycott of the retail store, with which the employees did not have a dispute.

The circumstances in the instant cases represent yet another relationship of employees to property: their worksite is on the premises of a third party and they are appealing for support directed at their own employer. As explained in the Statement, pp. 21-25, unlike the nonemployees in *Babcock* and *Lechmere* they are "employees" within the broad scope of Section 2(3) of the Act; even though their jobsite is located at another's premises, that jobsite, like that of the employees in *Republic Aviation,* remains the one place where they can most effectively engage in union organizational activities. And, as discussed above, such activities include not only contact with their fellow employees but also with others, including customers of their employer, whom they would seek out for support. That was the same § 7 activity the Board found outweighed a third party's property right in *Scott Hudgens*, 230 NLRB at 416 (§ 7 rights at issue when striking employees sought to picket their employer's retail store located in a shopping mall "are those of employees, i.e. the pickets' right to communicate their message both to persons who would do business with the struck employer and to those employees of the struck employer who have not joined the strike").

B. The Property Owner's Relationship to the Dispute

To the extent the property owner is linked to the employer of the access-seeking employees by mutual economic interest, the burden on the third-party owner becomes more nearly like that which § 7 activity normally places on private property and supports granting access to third-party premises. *Scott Hudgens*, 230 NLRB at 416-18 (mall owner whose lease arrangements with shops provide that

mall receives a percentage of gross sales and that mall provides security, maintenance and other services to shops, has a financial interest in the success of the businesses in the mall and a direct interest in seeing struck employer's profits maximized; third-party property interests must yield to store employees' § 7 right to appeal to coworkers and the public to support their strike). See also *Peddie Buildings*, 203 NLRB at 265; *Seattle-First National Bank*, 243 NLRB at 899.

C. Availability of Alternative Means of Access

In determining in *Scott Hudgens, Peddie Buildings,* and *Seattle-First* that the third-party's property interests must give way to the employees' exercise of § 7 rights, the Board also considered the effectiveness of alternative means of access. That inquiry is also required when offduty employees seek access to communicate a boycott message to customers. See *Providence Hospital,* 285 NLRB 320, 322 (1987) (offduty employees not entitled to access to picket, when picketing on public property adjacent to the employer hospital's main driveway enabled union and employees to convey protests to 99 percent of the public using the hospital). Accord: *Gayfers*, 324 NLRB at 1246 (Member Higgins dissenting) (requiring showing that customers could not be reached elsewhere, where handbill sought boycott of secondary). Accordingly, the access right of employees to their workplace on third-party property for the purpose of soliciting customers of their employer must be judged with consideration of alternative means.

We further submit, however, that the standard for determining whether alternatives exist should be that enunciated in *Jean Country*, 291 NLRB 11, 13

(1988), rather than the more stringent standard articulated in *Lechmere,* 502 U.S. at 538 (property right permits exclusion absent a showing that alternative means of access are "infeasible"). In *Lechmere,* the nonemployees seeking access had no relationship to the employer/property owner and were exercising only derivative § 7 rights. The *Lechmere* "infeasibility" test is also applicable where statutory employees seek access but the employees have no employment relationship with any entity at the property. *Oakland Mall*, 316 NLRB at 1163-1164. In contrast, alternative means are not a consideration at all in determining the access rights of offsite employees more closely related to the property to which access is sought. *ITT Industries II,* 341 NLRB at 941; *First Healthcare v. NLRB*, 344 F.3d at 541 (alternative means inquiry is made only when nonemployees seek access).

As the General Counsel noted in the Statement, pp. 36-38, *Lechmere/Babcock* did not purport to overrule *Jean Country* in cases involving employees exercising nonderivative rights. In such cases, the effectiveness of alternative access should be determined under the test defined in *Jean Country*, 291 NLRB at 13: the access seeker is not necessarily required to have attempted the proposed alternatives but must clearly show, based on objective considerations, rather than subjective impressions, that reasonably effective alternatives were unavailable.

Under this test, the first consideration is how effectively alternatives will permit employees to convey their message. In finding that striking warehouse employees in *Scott Hudgens* were entitled to handbill at their employer's retail

store in a mall owned by a third party, the Board noted that alternatives to trespassory access would preclude or severely diminish reaching potential customers who might not think of doing business with the employer until they saw its window display inside the mall; they become identifiable as potential customers "only when [the] individual shoppers decide to enter the store." 230 NLRB at 416-417 (1977). Accord *Seattle-First National Bank,* 243 NLRB at 899; *Sentry Markets, Inc.*, 296 NLRB 40, 41 (1989), enfd. 914 F.2d 113 (7th Cir. 1990) (retail store unlawfully denied striking supplier's employees access at store's main customer entrances to distribute handbill asking customers to boycott products made by their struck employer; removing handbillers to entrance of shopping center drastically reduced the number of handbills strikers were able to distribute and they were unable to ascertain which cars were driven by customers of store; alternative means of communication through mass media were ineffective). Second, to the extent alternative means of access are more likely to enmesh neutrals in employees' activity, access to third-party property closer to the primary is warranted. *Scott Hudgens*, 230 NLRB at 417, and 419 (Chairman Fanning, concurring). Accord *Peddie Buildings*, 203 NLRB at 267. Third, a risk of harm to motorists and those engaged in the § 7 activity diminishes the effectiveness of alternative means. *Sentry Markets,* 296 NLRB at 41. Finally, when considering whether advertising or other media campaign would be a reasonable alternative means of access to customers, the Board considers the cost and effectiveness of

such activity and finds them feasible only in "exceptional" cases. *Sentry Markets,* 296 NLRB at 43, quoting *Jean Country*, 291 NLRB at 13.[1]

II. Applying the *Babcock* Accommodation Analysis

As detailed above, the *Babcock* analysis balances the competing interests associated with § 7 activity, with property interests, and with an assessment of reasonable alternatives available to avoid trespassory conflict. Applying this accommodation analysis to the record evidence, we show below that the Ark employees were engaged in direct and nonderivative § 7 organizing activities at their place of employment; that the employees' appeal sought no economic harm against Ark or NYNY; that Ark's operations were closely related to NYNY's operations; and that NYNY exerted strong influence over Ark's employees. In all these circumstances, the employees' § 7 right significantly outweighs NYNY's property right to determine the conditions of entry. Finally, based on objective considerations, there were no reasonable alternatives to the handbilling undertaken by Ark employees at NYNY's premises.

A. Ark Employees Were Exercising Core, Nonderivative § 7 Rights to Solicit Customers of Their Own Employer in Support of Their Organizing Campaign; Their Activity at NYNY's Premises Occurred at Their Place of Employment.

NYNY hotel and casino is located on one corner of the intersection of two main public thoroughfares, Las Vegas Boulevard, commonly known as the

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[1] Where nonemployees unrelated to the property seek access and the *Lechmere* "infeasibility" test is applicable, the Board requires, as with other alternatives, the party seeking access to demonstrate that resort to media campaigns is an infeasible alternative. *Oakland Mall*, 316 NLRB at 1163-1164.

"Strip," and Tropicana Avenue. *New York New York, LLC*, 334 NLRB 762, 767 (2001) *(NYNY I)*. In 1997 and 1998, employees of Ark's restaurant and food service operations at NYNY were attempting to obtain recognition from their employer. While off duty and in furtherance of their organizing goal, they sought to handbill Ark customers or potential customers on three different days in 1997 and 1998. The handbills set out Ark employees' wages as compared to other unionized employees and requested the handbill recipients to urge Ark's managers at four Ark restaurants on NYNY premises to recognize and negotiate a fair contract with its workers.[2] The employees distributed the handbills in two areas: (1) the porte cochere at the front entrance doors into NYNY's establishment, [3]

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[2] Respondent has attempted to diminish the significance of the employees' § 7 right by characterizing the handbilling as merely area standards handbilling, an action normally associated with a union's effort to protect negotiated wages elsewhere. Where, as here, the handbills explicitly appealed to customers to assist the employees in obtaining recognition from their employer, the Board was correct in finding no evidence that the handbills' "message was anything other than organizational." *NYNY I*, 334 NLRB at 764.

[3] As described by the ALJ in *NYNY I*, the "porte-cochere" area is an exterior 10,000 square foot area covered by a canopy that extends from the entry doors (9 sets of automatic swinging glass doors) out about 100 feet.

> 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. 334 NLRB at 767.

which is situated about 100 feet from Ark's America restaurant and the NYNY hotel room service kitchen operated by Ark (Tr. 47 – I);[4] and (2) at the entrances to two Ark restaurants, America and Gonzalez y Gonzalez (Gonzalez), within the NYNY complex. As discussed above, pp 6-9, the Ark employees' organizing campaign and the solicitation of support of Ark's customers constituted core nonderivative § 7 organizing activity. Moreover, unlike the appeals in *Gayfers* and *Oakland Mall,* the Ark employees did not seek a boycott of any business on NYNY's premises; they only enlisted recipients of the handbill to join with them in urging Ark to recognize the Union.

Further, the activity entailed no disruptions or misconduct that would deprive it of statutory protection. As found by the ALJs and the Board in both cases, the handbilling took place in nonwork areas of NYNY's premises. *NYNY I,* 334 NLRB at 763, 769-70; *New York New York, LLC,* 334 NLRB 772, 773-75, 778 (2001). None of the handbilling impeded any customer or guest entry or egress, and caused no disruption to work being performed by any employees working in the areas. *NYNY I,* 334 NLRB at 763; *NYNY II,* 334 NLRB at 772, 774, 777-778. When approached by NYNY's security officials, each handbiller showed their Ark employee identification. (Tr. 20, 48 - I; GCX 2 – I; GCX 2 – Exh A - II).

[4] References to the respective transcripts and exhibits will be designated with either "I" signifying the record in Case 28-CA-14519 (*New York New York I*) or "II" indicating the record in Case 28-CA-15148 (*New York New York II*).

Further, Ark employees and the organizing campaign are closely tied to NYNY's premises and operations. They are employees of a subcontractor carrying on permanent restaurant and food service businesses on NYNY's premises. Thus, the NYNY premises are Ark employees' permanent, regular and exclusive work site. Ark's lease with NYNY grants Ark and the Ark employees the right, "in common with [NYNY] and all others to whom [NYNY] has or may hereafter grant rights, to use such common areas of the [hotel and casino] (including, but not limited to, the parking lot, walkways, sidewalks, hallways, lobby and public restrooms as may be designated from time to time by [NYNY])." (GCX 5, §11 - II). Ark employees perform their work in various areas of NYNY's premises: in the Ark restaurants, including the America and Gonzalez restaurants, the Greenwich Village area (a food court involving several fast food stores on the first level of the facility), in loading areas and walkways between the restaurants, in the NYNY employee dining room (EDR), and, when performing NYNY's room service, traveling from the kitchen to any of the 2035 rooms located in four major hotel guest towers. In carrying out their duties, Ark employees inevitably have contact with NYNY's hotel, bar, maintenance, and casino employees. Aside from performing their room service work in the hotel guest towers, where they would interact with NYNY hotel staff, Ark employees both work and take their breaks in the EDR where NYNY employees take their meal breaks. (Tr. 74; RX 4 – I; Tr. 99; JX 11 - II). Thus, unlike the union organizers in *Babcock* and *Lechmere*, Ark employees are not strangers to NYNY's premises. Those premises are the one

place where they can most effectively engage in union organizational activities with the fellow employees and with others, including customers and union members[5] whom they would solicit for support.

B. NYNY has a Close Relationship to Ark and Exercises Significant Control Over the Ark Employees; NYNY Cannot be Said to be an Uninterested Party to the Dispute Between Ark and the Employees.

NYNY's intimate relationship with the Ark operations and Ark employees minimizes the difference between its property interest and that of the employees' own employer. Ark provides extensive services to NYNY's operations in the form of four restaurants, the EDR, and room service for the NYNY hotel. Other NYNY subcontractors operate restaurants on NYNY's premises and NYNY operates various bars throughout the premises, but NYNY does not perform any restaurant functions. (Tr. 189 – I; 70 – II; GCX 12 – I; JX 11 - II) NYNY's extensive advertising includes, among its publicized amenities, the restaurants at the property. NYNY makes no attempt to inform the public through these ads or other sign displays that the restaurants in its facility are separately owned and operated. (Tr. 35, 20, 35, 224; GCX 6 and 12 – I; 36, 63-64 – II) Ark's restaurant customers, as well as NYNY's hotel guests who order room service, are permitted to charge their food to their NYNY room account. (Tr. 35 – I; *NYNY I*, 334 NLRB 767; *NYNY II*, 334 NLRB at 776.) Ark's lease provides that NYNY may place its Kino operations in Ark's restaurants. (GCX 5 – II, § 8.1.) NYNY has provided

[5] Most of the NYNY employees are already represented by the same Union which Ark employees were seeking to have represent them. (RX 4 – I; JX 11 - II).

Ark with a form letter to respond to any customer complaints that might be lodged (Tr. 83; GCX 10 - 11). Thus, as with the relationship between the targeted employers and the property owners in *Scott Hudgens, Peddie Buildings,* and *Seattle First,* Ark's operations are integral to NYNY's overall operation. Indeed, NYNY directly benefits by patronage at Ark's restaurants because part of the rent NYNY receives under its lease with Ark is a percentage of Ark's revenues. (Tr. 49-50 – II.)

Further, NYNY plays a significant role in setting Ark's employment policies. Under the lease provisions (GCX 5 – II), Ark commits to abide, and have its employees abide, by all NYNY's rules and regulations that may be adopted for safety, care, cleanliness, and preservation of good order (§ 8.9), subject to the rules NYNY might put in place.[6] Ark's employee handbook must be approved by NYNY. (Tr. 50 – II). NYNY mandates that applicants for employment with Ark submit to a drug test before they are hired. The lease provides that, if questioned, Ark is to tell its employees that NYNY requires the drug test. (GCX 5, § 6.1 – II). The Ark employee handbook's introduction reflects the depth of control NYNY has over Ark working conditions:

> Please keep in mind that many of the policies stated in our handbook are in part the result of our tenancy at the New York New York Hotel Casino. Employee entrances, parking, drug testing, name tags, conduct at the hotel while off and on duty are just some of the rules we have included as it relates to Hotel policies, not necessarily our policies.

[6] NYNY also regulates Ark employees' off-duty access to the property; they are invited to return as NYNY patrons but may not wear their work uniforms or patronize NYNY bars. (Employee policy manual - GCX 7 – I; Lease agreement - GCX 5 - II).

(Tr. 20, GCX 7, "Welcome to Ark Las Vegas" – I; Tr. 50 – II).

In sum, although the Ark employees are not employed by NYNY, both Ark and Ark's employees are closely related to NYNY's operations. Like the property owner in *Scott Hudgens,* NYNY has a direct interest in the Ark employees' organizational and recognitional campaign against their employer. In these circumstances, the burden that the handbilling imposes is more nearly akin to that which § 7 normally imposes on private property and in comparison diminishes any independent property right to deny access. *Scott Hudgens,* 230 NLRB at 416-418.

NYNY's security concerns do not warrant its denial of access to the Ark employees for § 7 activity. Obviously, NYNY has a security interest in providing for the safety and security of its guests, customers, tenants, and employees in its operations which are open to the public each day and night of the year. However, the record evidence of the extensive security control mechanisms it already has in place demonstrate that NYNY could adequately deal with any security issues arising out of the handbilling activities. Several of NYNY's security officers and other NYNY officials were on scene virtually as soon as the handbilling occurred. (Tr. 48-50 - I; GCX 4 – II) The handbilling was captured on NYNY's elaborate security surveillance cameras in both the porte cochere and restaurant areas, allowing the viewer of the videotapes to observe the handbilling activities from several different angles. (GCX 4-II) Any legitimate interest in identifying the handbillers was satisfied immediately when the Ark employees who were handbilling presented their identification cards to the security detail. (Tr. 63-I)

Thus, the weight which might be given to NYNY's security concerns is diminished by the significant security measures already in place to monitor, maintain control, and record such activities.[7]

Nor can NYNY's asserted concern that handbilling may occasion potential disruption to hotel-casino operations serve to elevate its property interest and justify denial of access. First, as earlier found by the Board, the handbilling caused no such disruptions here. *NYNY I,* 334 NLRB at 763; *NYNY II,* 334 NLRB at 772, 774, 777, 778. Second, the Board has expressly held that, in the hotel-casino setting, the locations at which the Ark employees handbilled are not work areas. *Santa Fe Hotel, Inc.,* 331 NLRB 723 (2000); *Flamingo Hilton-Laughlin,* 330 NLRB 287, 294 (1999) (the primary function of a hotel-casino is to provide games of chance and to lodge guests; while a hotel-casino operator may lawfully prohibit the distribution of union literature in gambling and lodging areas, it may not prohibit distribution of union literature in other areas, including entrances, where the only work that is performed is incidental to the operator's primary business purpose).

Accordingly, although NYNY has legitimate property concerns and business operational needs, they do not justify the denial of access to offduty Ark employees to carry out core nonderivative § 7 rights in the 1997 and 1998 handbilling.

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[7] Cf. *ITT Industries II,* 341 NLRB at 940 (undercutting its claimed interest in security was the employer's failure to install security cameras, to post security guards, or request police to patrol the premises).

C. There Were No Reasonable Alternative Means of Access to Ark's Customers

Applying the *Jean Country* factors detailed above at pp. 13-15, denying access would impair the Ark employee's § 7 right because it would stymie effective communication of their message to Ark customers; it would more likely enmesh unrelated neutrals in the dispute; and it would predictably create a safety hazard.

First, the audience for the Ark employees' handbills was potential Ark customers. Often such customers emerge only when a hotel/casino patron considers, on his or her way into or through the complex, which restaurant to choose. Thus, the most effective means to reach the handbill's audience is when the customer is entering the premises with intent to choose a restaurant or is at the restaurant area deciding which restaurant he or she wants to patronize. See *Seattle-First National Bank*, 243 NLRB at 899 (picketing on public sidewalk inadequate to communicate to intended audience of potential patrons of restaurant on 46th floor of office building); *Scott Hudgens*, 230 NLRB at 417-418.

If the § 7 activity could be effectively carried out without trespass by moving only a short distance, the Board will find that the impairment of the property right by upholding access outweighs the minimal impairment of § 7 activity by permitting exclusion. *Providence Hospital*, 285 NLRB at 322 (picketing on public property adjacent to the main entrance permitted union to reach 99 percent of the public using the hospital; hospital did not act unlawfully in

denying access to adjacent private property). Here, however, NYNY operates a complex with over 20 restaurants and eateries, numerous bars, and over 2035 guest rooms. Requiring the Ark employees to confine their activity to public areas outside this vast complex to the publicly-situated entrances at extremely busy intersections on and near the Las Vegas Strip, would minimize the handbillers' interaction with potential customers who are more focused on negotiating traffic than contemplating restaurant choices. (GCX 8; RX 6-I; JX 11-II) Further, it would create predictable issues of safety for the public as well as the handbillers. *Sentry Markets*, 296 NLRB at 41 (picketing and handbilling on or near major streets with high volumes of traffic, creates safety issues such as "sight distance problems," i.e., potential for collisions from temporarily stopped cars that partly block drivers' view of the avenue); *Giant Food Markets, Inc.*, 241 NLRB 727, 729 (1979), enf. denied 633 F.2d 18 (6th Cir. 1980) (motorists entering a parking area from adjoining public roads are more concerned with safely making their entrance than with attempting to receive a handbill at the roadside).

Moreover, locating the handbilling activity close to Ark premises and to potential patrons of Ark's restaurants and the hotel room service operated by Ark, permits the most direct approach to the targeted audience and minimizes involvement of persons with no potential relationship to Ark. (Tr. 47-I; GCX 4-II) *Peddie Buildings*, 203 NLRB at 267; *Scott Hudgens*, 230 NLRB at 417, 419. Handbilling in closer proximity to Ark's premises is even more compelling when NYNY has taken great pains in its advertising and displays to draw no distinction

in the ownership and operation of restaurants within its facility, leaving even the most astute potential patron with no ability to distinguish Ark restaurants from the many others.

Finally, there are no special circumstances here that would warrant consideration of a media campaign as an effective alternative. *Jean Country*, 291 NLRB at 13; *Scott Hudgens*, 230 NLRB at 416 (resort to mass media not an effective means of communication for employees seeking to publicize a dispute with a single store).

In sum, an objective consideration of the facts already in this record leads to the conclusion that to effectively carry out their protected appeals to potential customers, employees had no reasonable alternatives to distributing their handbills on NYNY's property at the port cochere and at Ark restaurant entrances. Accordingly, NYNY's property right must give way to the Ark employees' § 7 activity at the port cochere and the entrances to the Ark and Gonzalez restaurants. *Jean Country,* 291 NLRB at 14 (the impairment of the employees' § 7 right if access is denied outweighs any impairment of NYNY's property right if impairment is granted).

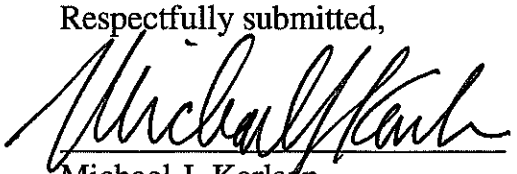
CONCLUSION

In explicitly considering, as the D.C. Circuit directed, how the Ark employees' status as nonemployees of NYNY affects whether they have a right to enter NYNY's property to engage in § 7 activity, the Board should apply the *Babcock* accommodation analysis set out above. Under this test, it is clear that the

Ark employees' handbilling of Ark customers was core nonderivative § 7 activity. Even though carried out on the property of a third party, their conduct was integral to their exercise of the fundamental right to organize. Because NYNY's premises were the regular and permanent workplace of the Ark employees and because NYNY derives substantial benefit from Ark's operations at its premises and exercises significant control over the Ark employees' terms and conditions of employment, NYNY's right to exclude persons from its property is diminished vis-à-vis the employees' § 7 right. Adequate alternatives did not exist to the employees' handbilling at locations close to Ark's operations and potential customers. Accordingly, the Board should confirm its earlier conclusions reached in *New York New York I* and *II* and find that NYNY violated § 8(a)(1) of the Act when it denied Ark employees access to handbill customers at NYNY's sidewalk in front of the porte cochere entry doors and in front of the America and Gonzales restaurants.

Dated at Phoenix, Arizona, this 2nd day of October 2007.

Respectfully submitted,



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Apppendix

Response to the D.C. Circuit's Specific Inquiries

1) 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?

No. As described above p. 18, Ark employees' work takes them to various locations associated with NYNY's food service and hotel operations and they have rights to use common areas of NYNY's facility such as parking lots, walkways, hallways, and lobby. NYNY must refrain from interfering with the *Republic Aviation* rights of Ark employees to discuss self-organization with each other only in such areas. Such rights would not extend to areas associated with other operations of NYNY and with tenants other than Ark, to which Ark employees do not have access as part of the employment relationship.

2) Or are the Ark employees invitees of some sort but with rights inferior to those of NYNY's employees?

Whether Ark employees are invitees of NYNY is not a concept relevant to the issues presented here. That status is based in property law. As the D.C. Circuit made clear in remanding these cases, property law permits any property owner to condition its consent to enter. 313 F.3d at 589. NYNY certainly did not consent to the Ark employees' entry onto its property for the purposes of handbilling Ark customers. Thus, a conclusion that they are invitees for other purposes, does not advance the analysis of whether they are entitled to enter NYNY's premises for these purposes. Rather, whether Ark employees were

entitled to do so is based on their statutory rights and a determination whether NYNY's property interest must give way to the Ark employees' exercise of those rights at the entrances to the Ark restaurants and front entry at the porte cochere.

To be sure, the Ark employees cannot be considered strangers to NYNY. Its premises are their workplace. That fact is relevant to determining the strength of their statutory right, however, not determining their relationship to NYNY under property law. More closely relevant to NYNY's property right is its relationship with Ark and the Ark employees (see discussion at section II B).

3) Or should they be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold?

As detailed above in section II A, the Ark employees' status vis-à-vis NYNY significantly differs from the nonemployees in *Babcock/Lechmere*, because the Ark employees are exercising direct, nonderivative § 7 rights on NYNY's premises. Moreover, as discussed in section II B, although the Ark employees are not employed by NYNY, NYNY is not a stranger to them or to their employer. Ark supports NYNY's operations by providing restaurant and room service to the patrons of NYNY's hotel and casino. NYNY's lease revenues are based on Ark's sales. In addition, NYNY exercises significant control over the Ark employees' work life.

4) Does it matter that the Ark employees here had returned to NYNY after their shifts had ended and thus might be considered guests, as NYNY argues?

Ark employees returned after their shift as offduty employees, carrying the statutory rights accorded such employees. They did not return as "guests" or business patrons of NYNY. Thus, their rights to solicit on NYNY property should be analyzed under the statutory principles articulated here. NYNY's limitations on the rights of its business invitees are of no relevance.

5) Is it of any consequence that the Ark employees were communicating, not to other Ark employees, but to guests and customers of NYNY (and possibly customers of Ark)?

First, we assume that the Court used the phrase "possibly customers of Ark" in the sense that guests and customers of NYNY are also potential customers of Ark. Ark provides room service to the NYNY hotel and operates several of the many restaurants that NYNY provides for its hotel and casino customers. Any implication in the Court's question that the employees were making a secondary appeal should be rejected. The language of the handbill prominently identified Ark as the employer with whom the employees had a dispute and urged readers to talk to Ark's managers. Moreover, where Ark provides room service for the NYNY hotel, it was reasonable for employees to station themselves at the main entrance to the hotel in the porte cochere, which is, incidentally, located 100 feet from the room service kitchen.[8] On the other occasion, employees stood at the entrance to Ark restaurants and distributed handbills to those entering and leaving

[8] Indeed, one of the handbillers was a room service cook (Tr 47-I).

the restaurant and those passing by. While those persons might well also be casino or hotel patrons, these circumstances suggest that the employees appealed to them as potential customers of Ark. As the Board explained in *Scott Hudgens,* an effective strategy for reaching potential customers is to reach them where they are faced with the possibility of making a decision to patronize.

Second, § 7 protects Ark employees' efforts to communicate with Ark customers as it does their efforts to communicate with Ark employees. Nevertheless, as detailed in the brief, where the accommodation of that right falls with respect to NYNY's property interest is a matter to be resolved through an application of the *Babcock* analysis. The audience of the message is a relevant factor in that analysis, particularly with respect to evaluating alternative means.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **PRE-ARGUMENT BRIEF OF THE GENERAL COUNSEL**, in **NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL AND CASINO**, Cases 28-CA-14519 and 28-CA-15148, was served by E-Gov E-Filing and facsimile (with permission) on this 2nd day of October 2007, on the following:

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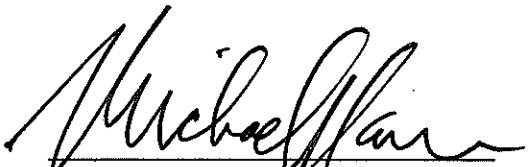

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