UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO,
RESPONDENT,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,
CHARGING PARTY.

Case No. 28-CA-14519

RESPONDENT NEW YORK NEW YORK LLC d/b/a NEW YORK NEW YORK HOTEL AND CASINO'S SUPPLEMENTAL STATEMENT OF POSITION ON REMAND

ORAL ARGUMENT SCHEDULED FOR
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Gary C. Moss
Joanna S. Kishner
Paul T. Trimmer
DLA PIPER US LLP
3960 Howard Hughes Parkway, Suite 400
Las Vegas, Nevada 89169
(702) 677-3900
(702) 737-1612 (facsimile)

Attorneys for Respondent

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC d/b/a NEW YORK NEW YORK HOTEL & CASINO, Respondent, and LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165, a/w HERE, AFL-CIO, Charging Party.	)	**Case No. 28-CA-14519**[1]

RESPONDENT NEW YORK NEW YORK LLC
d/b/a NEW YORK NEW YORK HOTEL AND CASINO'S
SUPPLEMENTAL STATEMENT OF POSITION ON REMAND

I. INTRODUCTION

The issue in these cases is whether New York New York, LLC d/b/a New York New York Hotel & Casino (the "Respondent," the "Company," "New York New York" or "NYNY") lawfully precluded off-duty employees of a lessee, Ark Restaurants, ("Ark") from engaging in consumer handbilling activities on NYNY's private property, including its main entrance *porte cochere* and certain locations inside the hotel/casino.[2] The answer is clearly yes. First, it is

[1] In the National Labor Relations Board's ("NLRB" or "Board") letters of August 22, 2007 and September 4, 2007, the Board referenced only this case number which relates to the first of the two cases decided by the Board. Presumably, since the D.C. Court of Appeals had combined the above-captioned matter with Case No. 28-CA-15148, for convenience the Board is referring to the two cases jointly. The argument herein relates to both cases and in many instances they are described as "these cases."

[2] The second issue which was previously considered by the Board, whether the conduct occurred in work or non-work areas of NYNY, is not currently before the Board on remand. Therefore, that issue will not be discussed. However, NYNY maintains its position that even if the off-duty Ark employees did have the right to distribute handbills on NYNY property under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), they did not have the right to distribute in the particular areas of the hotel/casino involved in these cases because substantial evidence

undisputed that the individuals who engaged in the handbilling were not employed by NYNY. Instead, they were off-duty employees of a lessee who operated restaurants and other food service outlets at the hotel. Second, the individuals were engaging in area standards consumer handbilling, a weak Section 7 right. Third, they were off-duty which means that they were guests of NYNY at the time they engaged in the handbilling. The Board should consider each of these factors when reexamining what, if any, Section 7 rights the Ark employees had to engage in this particular conduct on NYNY's private property. It is NYNY's position that even if the Ark employees did have some Section 7 right in these circumstances, that right was minimal as compared to NYNY's property rights. Thus, NYNY's conduct was proper and consistent with applicable law and precedent.

Although the issues in the present cases are narrowly circumscribed by the specific facts involved here, in previous pleadings as well as discussions in the relevant rulings, it has been posited whether these cases should be utilized to determine global policy issues regarding the extent and scope of the rights of employees of contractors who perform work on the premises of another. These far reaching issues are certainly important and should be addressed at some point, but pursuing a broad policy statement with respect to all of the issues relevant to the use of contractors and the rights of their employees based on the facts presented by these cases is not prudent. Instead, NYNY submits that the Board should limit its inquiry here to whether NYNY properly excluded Ark employees who returned to NYNY's private property while they were off duty to engage in consumer handbilling. It is NYNY's position that given the circumstances present in each of the cases, it acted properly and no violation of 8(a)(1) can be found. Whether

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establishes that those areas are work areas for NYNY employees, and the prohibition at issue here was necessary to maintain production and plant discipline. In submitting this position statement and limiting it to the issues set forth by the Board, Respondent is in no way abandoning these other contentions or conceding the correctness of the Board's determinations with respect to them.

a different result in other factual scenarios would obtain is not presently before the Board and should not impact the Board's consideration of these cases on remand.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

NYNY operates a large hotel/casino on the "Strip" in Las Vegas, Nevada. [Tr. 145-6.] The hotel/casino includes a number of restaurants and food service outlets. NYNY does not operate the restaurants and food service facilities; rather, it has entered into agreements with other companies to perform this function. [Tr. 33-4, 44.] One of these companies is Ark Las Vegas Restaurant Corporation ("Ark"). [*Id*.] Ark operates, *inter alia*, the America and Gonzales y Gonzales ("Gonzales") restaurants as well as the Village Streets, a food court. The three restaurants are all inside the main hotel building at various locations adjacent to the casino. [*Id.*] All persons working in these food service operations are employed solely by Ark. [*Id*.]

Prior to its opening on January 3, 1997, NYNY voluntarily recognized the Union as the collective bargaining representative of certain of its employees. [Tr. 185-7; RX 4.] Ark does not have a collective bargaining relationship with the Union, although the Union had been attempting to organize Ark workers for sometime prior to the incidents which are the subject of these cases. [Tr. 220.]

A. The Handbilling on July 9, 1997.

Ark employees Edward Ramis, John Ensign and Ron Isomura were not assigned to work on July 9, 1997. [Tr. 44-5, 93-4.] Shortly before noon, the three appeared at the *porte cochere* at the main entrance of NYNY and began distributing handbills which had been prepared by the Union. [Tr. 44-6, 57, 76, 93-4.] The *porte cochere* is on property privately owned by NYNY. [Tr. 104; RX 2.] All three Ark employees positioned themselves about six feet from the large

doors leading into the hotel/casino. [Tr. 46, 93-4.] None of the employees were wearing their Ark uniforms or displaying Ark identification cards. [Tr. 58-9, 61-2 93-4.]

The three distributed handbills to individuals entering and leaving NYNY through the *porte cochere* entrance. [Tr. 37.] The handbillers also spoke to a number of these individuals, sometimes in conversations lasting as long as two minutes. [Tr. 48.] At some point, a NYNY security supervisor advised each of the three that they were trespassing on the Company's private property and asked them to leave. [Tr. 37.] When the handbillers refused to depart, officers from the Las Vegas Metropolitan Police Department ("Metro") were summoned to the facility and they issued trespass citations. [Tr. 37-9, 52, 93-4; GCX 3-5.] This action was taken pursuant to a NYNY policy which prohibits non-employees of NYNY from distributing literature on the Company's private property. [Tr. 38.]

During the handbilling, a large number of other individuals paraded on an adjacent public sidewalk approximately 200 feet away from the *porte cochere*, carrying signs that read, in part: "Unfair. Ark Restaurants at the New York New York have no contract with the Culinary and Bartenders Union." [Tr. 65-6, 78-82, 93-4.]

B. The Handbilling On April 7 And 9, 1998.

On April 7, 1998, off-duty Ark employees Donald Goodman, John Ensign, Donald Estes and Daniel Malero entered the hotel/casino for the purpose of engaging in handbilling activities. [Tr. 56-7; GCX 2.] Goodman and Ensign stationed themselves immediately outside the entrance to America restaurant and distributed pamphlets to customers entering and exiting the restaurant, as well as to other persons passing by. [*Id.*] Estes and Malero stood outside the entrance to Gonzales restaurant and engaged in similar activities. [*Id.*]

NYNY security officers advised the Ark employees that they were not permitted to distribute handbills on NYNY property and that they were trespassing. [*Id.*] When the Ark employees refused to leave the premises, Metro officers were again contacted and the officers issued trespassing citations to the individuals. [Tr. 56-7; GCX 2.]

On April 9, 1998, off-duty Ark employees Goodman and Antonio Ramirez appeared at the *porte cochere* entrance of NYNY and distributed handbills in the same manner as had occurred on July 9, 1997. [*Id.*] Metro officers were summoned and the two Ark employees were again cited for trespass when they refused to leave.[3] [*Id.*]

C. *New York New York I.*

On July 11, 1997, the Union filed an unfair labor practice charge with Region 28 of the NLRB alleging that the Company violated § 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") when it precluded off-duty employees of a lessee from engaging in handbilling at the NYNY *porte cochere*. *See New York New York Hotel & Casino (New York New York I)*, 334 NLRB 762, 762-3 (2001) *rev. granted, enf. denied* 313 F.3d 585 (D.C. Cir. 2002). A complaint issued and was subsequently amended on September 10, 1997. *Id.* at 762. The Company's timely answer denied any unlawful conduct and raised certain affirmative defenses. On February 11, 1998, a hearing was held before Administrative Law Judge Timothy D. Nelson. *Id.* Judge Nelson issued his decision on June 29, 1998, in which he found that the Company had violated the Act as charged in the amended complaint. *Id.* Exceptions were filed with the Board on July 27, 1998. *Id.*

[3] A full discussion of the each of the handbilling incidents was included in NYNY's various briefs to the ALJs and Board, the subsequent pleadings before the Court of Appeals and the statement of position on remand. Accordingly, the facts are not repeated here in detail but are incorporated herein by reference.

D. *New York New York II.*

On April 20, 1998, the Union filed an unfair labor practice charge with Region 28 contending that the Company violated Section 8(a)(1) of the National Labor Relations Act when it precluded off-duty Ark employees from engaging in handbilling at the *porte cochere* and at certain locations in the interior of the hotel/casino. *See New York New York Hotel & Casino (New York New York II)*, 334 NLRB 772, 772-3 (2001) *rev. granted, enf. denied* 313 F.3d 585 (D.C. Cir. 2002). A complaint issued on July 29, 1998. *Id.* at 772. The Company's timely answer again denied any unlawful conduct and raised certain affirmative defenses. On December 17, 1998, a hearing was held before Administrative Law Judge Albert A. Metz. *Id.* A decision issued on April 9, 1999, in which Judge Metz found that the Company had violated the Act. *Id.* Exceptions were filed with the Board on May 7, 1999.

E. The Initial Board Decisions.

On July 25, 2001, the Board issued decisions in both *New York New York I*, *supra*, and *New York New York II*, *supra*. Board members Hurtgen, Liebman and Truesdale issued the Decision and Order in both cases. In *New York New York I*, the Board affirmed the ALJ's findings and conclusions that the Ark employees were entitled to engage in handbilling activities in the *porte cochere*; that the *porte cochere* was a non-work area; and that the Company had failed to establish that its handbilling prohibition was necessary to maintain production and discipline in that area. In *New York New York II*, the Board affirmed the ALJ's findings and conclusions that the lessee's employees were entitled to engage in handbilling activities in the *porte cochere* and at certain areas in the interior of the hotel/casino; that the *porte cochere* and the interior areas at issue were not work areas; and that the Company had failed to show its handbilling prohibition was necessary to maintain production and discipline.

Petitions for Review were filed on August 15, 2001. The United States Court of Appeals for the District of Colombia (the "D.C. Circuit," the "Court of Appeals" or the "Court") consolidated the cases by way of an order filed on October 26, 2001. On December 24, 2002, the Court of Appeals issued a decision granting Respondent New York New York's petitions for review, denying the NLRB's applications for enforcement, and remanding the cases to the Board for further proceedings. *See New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). On April 2, 2003, the Board notified the parties that it had accepted remand of the cases and invited them to submit position statements. All parties did so.

On August 22, 2007, the Board advised the parties that it will hear oral arguments with respect to the remanded cases on Friday, November 9, 2007. On September 4, 2007, the Board issued its formal notice of oral argument and invited additional briefs to be filed by October 2, 2007.

III. QUESTIONS ON REMAND

In denying enforcement to the NLRB's orders, the D.C. Circuit determined that the underlying decisions upon which the orders were based "leave[ ] a number of questions … unanswered." *New York New York*, 313 F.3d at 590. The Court went on to direct the Board to answer those questions in reevaluating its earlier decisions. *See id.* In its Notice of Oral Argument, the Board reiterated the issues the D.C. Court had indicated should be considered, and suggested that the parties' briefs address those issues, which are as follows:

1. Without more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights (324 U.S. 793 [1945]) throughout all of the non-work areas of the hotel and casino?;

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

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

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

5. Is it of any consequence that the Ark employees were communicating, not to other Ark employees, but to guests and customers of NYNY (and possibly customers of Ark)? *Compare United Food & Commercial Workers*, 74 F.3d at 298. (Derivative access rights, the Supreme Court has held, stem "entirely from on-site employees' § 7 organization right to receive union-related information." *ITT Industries*, 251 F.3d at 997.)[4]

IV. ARK EMPLOYEES WHO HAVE NO EMPLOYMENT RELATIONSHIP WITH NEW YORK NEW YORK DO NOT HAVE RIGHTS UNDER SECTION 7 OF THE ACT TO ENGAGE IN AREA STANDARDS CONSUMER HANDBILLING ON NEW YORK NEW YORK'S PRIVATE PROPERTY DURING THEIR OFF-DUTY HOURS.

Supreme Court precedent compels the conclusion that there are only two classes of individuals for purposes of evaluating the extent of those individuals' Section 7 rights on the private property of another. If, as in the present case, the individuals at issue are not employees of the private property owner, the standards set forth in *NLRB v. Babcock & Wilcox Co.*, 351 US 105, 110 (1956), and *Lechmere, Inc v. NLRB*, 502 U.S. 527, 534 (1992), apply. If the individuals enjoy an employment relationship with the property owner, then those individuals' Section 7 rights are governed pursuant to the guidelines set forth in *Republic Aviation*. The analysis, however, does not stop there. The Board must also look at whether the individuals were on duty

[4] It should be noted that in 2005, after the present cases were remanded, the D. C. Circuit enforced the Board's reconsidered ruling in *ITT*. For the convenience of the Board, Respondent will refer to the first appellate decision, *ITT Indus. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001), as *ITT I* and will refer to the second appellate case, *ITT Indus. v. NLRB*, 413 F. 3d 64 (D.C. Cir. 2005), as *ITT II*. The remanded case before the Board, *ITT Indus., Inc.*, 341 NLRB 937 (2004), will be referred to as the *ITT Remand Decision*.

or off duty when the conduct occurred.[5] Finally, the Board must also consider the nature of the conduct those seeking access wish to engage in, as well as the intended target of that conduct. In the present case, since the individuals were not employees of NYNY, were engaged in area standards handbilling and were off duty, their rights if any, to engage in the conduct at issue is severely limited. The D.C. Circuit, in remanding these cases, took note of all of these factors and offered guidance on how the Board should resolve the issues before it. Specifically, the D.C. Circuit said: "It 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 § 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." *New York New York*, 313 F.3d at 590. It is NYNY's position that when considering all the factors present in these cases, in light of controlling precedent and the D.C. Court's guidance, the Board must now conclude that NYNY did not violate the Act when it excluded the Ark employee handbillers.

The argument which follows discusses each of the three major legal issues that are referenced above and which should control the outcome of these cases. It also separately discusses the Board's original decisions which are being reconsidered on remand, and more particularly, specific reasons why those decisions were erroneous and why the Board should not now adopt the reasoning of those decisions or the underlying ALJ decisions.

Respondent initially submitted a Statement of Position on Remand on May 16, 2005. The questions that were posed by the D.C. Circuit, and reiterated by the Board in its notice of

[5] As noted previously, the location of the activity and whether it was conducted in work areas or non-work areas are also factors that may need to be evaluated. As discussed in footnote 2, this issue is not currently before the Board.

September 4, 2007, were addressed therein. Therefore, those questions are not discussed seriatim in this brief, but rather in the context of the broader arguments that are presented here.[6]

A. The Employment Status Of An Individual Who Attempts To Engage In Area Standards Consumer Handbilling On The Private Property Of Another Determines Whether The Property Owner Has The Right To Exclude That Individual.

In its remand order, the D.C. Circuit questioned whether the fact that the Ark employees worked on NYNY's premises, without more, gave them *Republic Aviation* rights throughout all of the non-work areas of the hotel and casino. NYNY submits that the answer is no.

Presumably, the Court raised this issue because when the Board initially heard these cases, it found NYNY violated Section 8(a)(1) because it did not provide the Ark employees access to its property in accordance with *Republic Aviation* despite the fact the individuals were not employees of NYNY. In doing so, the Board ruled contrary to the Supreme Court's decisions in *Republic Aviation, Babcock & Wilcox,* and *Lechmere,* which clearly establish that the extent, if any, of an individual's right of access to private property for the purpose of engaging in purported Section 7 activity depends upon whether there is an employment relationship between the private property owner and the individual seeking access. Since the Ark employees did not have such an employment relationship with NYNY, their rights were limited to those articulated in *Babcock/Lechmere.*

1. The Supreme Court has established a clear standard for determining whether an individual has the right to exercise particular Section 7 rights on the private property of another.

The Supreme Court long ago articulated two standards for determining whether an individual has the right to exercise particular Section 7 rights on the private property of another.

[6] For purposes of reference, the questions are directly or indirectly addressed in the discussions at the following pages in this brief: #1, pp. 10-25, 37-45; #2, pp. 32-37, 43-45; #3, pp. 10-25, 37-45; #4, pp. 32-37, 40-45; and #5, pp. 25-37, 40-45.

The first test applies to individuals who are employees of the property owner and was set out in the Court's 1945 decision in *Republic Aviation*. In *Republic Aviation*, the Court held that "an employer may not prohibit distribution of organizational literature by employees in non-working areas without a showing that the ban is necessary to maintain plant discipline or production." *ITT II*, 413 F.3d at 68 (discussing *Republic Aviation Corp.*, 324 U.S. at 803 n.10). Approximately 11 years later, in *Babcock & Wilcox*, the Court found that the Board could not order a property owner to grant non-employee union organizers access to company property absent a showing that the targeted employees are otherwise inaccessible through reasonable efforts. *Id.* at 69 (discussing *Babcock*, 351 U.S. at 112). Thirty-six years later, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court revisited *Babcock's* holding and made it clear that for the purpose of evaluating access rights, there are only two categories of individuals – employees and non-employees. As is discussed below, the Ark employees "should be considered the same as non-employees" when they [were distributing] literature on NYNY's premises outside of Ark's leasehold.[7]

2. Controlling authority in access cases mandates that an individual must be deemed to be either an employee or a non-employee of the property owner – there can be no hybrid category.

a. Prior decisions by the Board and D.C. Circuit establish that for purposes of evaluating access rights there are only two categories of actors – employees and non-employees.

That it is the employment relationship which determines whether an individual has heightened access rights with respect to another's property has been articulated consistently through both Board and Court decisions. For example, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), striking employees were denied access to a mall which housed several retail

[7] *See* Question 3, *supra* at 7.

establishments, including one operated by their employer. Following the Supreme Court's remand of the matter, the Board, although finding that under the circumstances of that case the denial of access did violate the Act, analyzed the access issue under the *Babcock & Wilcox* standard. *See Scott Hudgens*, 230 NLRB 414, 416-18 (1977). More specifically, in its reconsideration of the case, the Board did not evaluate whether the mall owner properly banned distribution activities for purposes of plant discipline and production, as would be required if *Republic Aviation* applied to the case. Rather, since there was no employment relationship with the mall owner, the Board applied the *Babcock & Wilcox* standard and considered whether the picketers had reasonable alternative means of communicating their message. *Id.* at 416.

The D.C. Circuit itself, throughout its opinion in this case, emphasized that individuals must be classified as either employees or non-employees and the determination of their rights *vis-a-vis* a property owner must be evaluated in that context. In discussing the application of *Hudgens* to the issue involved here, the D.C. Circuit observed:

> Highlighting the difference between the rights of employees and nonemployees, the Court explained in a later case that a "wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved. *Id*.

New York New York, 313 F.3d at 587-88, quoting *Hudgens*, 424 U.S. at 521-22 n. 10.

Implicit in the quotation from *Hudgens*, especially in its use of the phrase "management interests," as well as the D.C. Circuit's interpretation of the decision, is that the right of an individual to come onto another's private property to engage in Section 7 activity is premised upon the fact that the individual is employed by the property owner. *Supra* at 521-22.

Even more to the point, the D.C. Circuit then observed:

> [T]he Court's most recent pronouncement in [*Lechmere*] reaffirmed the principle announced in *Babcock & Wilcox* that the National Labor Relations Act confers **rights upon employees, not nonemployees, and that employers may restrict nonemployees' organizing activities on employer property.** [emphasis added]

New York New York, 313 F.3d at 588 (citations omitted).

Further, in criticizing the Eleventh Circuit Court of Appeals' decision in enforcing the Board's order in *Southern Services*, 300 NLRB 1154 (1990), *enfd*. 954 F.2d 700 (11th Cir. 1992), in which the Eleventh Circuit had concluded that an employee of a contractor of the Coca-Cola Company was not trespassing when she distributed literature to co-workers on Coca-Cola's property, the Court stated:

> But that is the very point of *Lechmere*, as we explained in *ITT Industries*: the § 7 rights of employees entitle them to engage in organization activities on company premises. Nonemployees do not have comparable rights. The Seventh Circuit case *Southern* cited – *Montgomery Ward* – is no longer good law. On its facts it was nearly identical to *Lechmere*, yet it held that nonemployees could enter a store and distribute union literature to employees in violation of the employer's rule against it – just the opposite of what the Supreme Court later held in *Lechmere*.

New York New York, 313 F.3d at 589 (citations omitted).[8]

b. Board precedent decided after its initial decisions in these cases also supports the proposition that the employee/non-employee distinction is crucial to the analysis of access rights.

In two cases decided after the initial decisions here, *First Healthcare Corp. (Hillhaven)*, 336 NLRB 646 (2001), and the *ITT Remand Decision*, 341 NLRB 937 (2004), enfg. *ITT II*, 413 F.3d 64 (2005), the Board, and subsequently the Appellate Court, also utilized the employment

[8] Although *Lechmere* involved an attempt to contact employees rather than customers of a third party property owner, as in the present cases, the point of this excerpt is that the Supreme Court has shown that for purposes of determining access rights, there can be only two classifications of individuals – employee and non-employee. It is only if a person is determined to be an employee of the property owner that the analysis takes place as to what rights that person has as to the property at issue.

relationship analysis in determining the extent, if any, of access rights to private property for Section 7 purposes.

Hillhaven involved access rights of off-site employees. *Supra* at 646-7. There, the Board decided that off-site employees did, indeed, have non-derivative Section 7 access rights to other facilities of their employer. However, the rationale underlying the Board's reasoning in the case is instructive. In that regard, the Board stated:

> [O]ffsite employees are not only "employees" within the broad scope of Section 2(3) of the Act, they are "employees" in the narrow sense: "employees of a particular employer" (in the Act's words), that is, employees of the employer who would exclude them from its property. ***Clearly, then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer***. [emphasis added]

Hillhaven, 336 NLRB at 648.

The Board's *ITT Remand Decision*, *supra*, also involved the access rights of off-site employees. In that case, the D.C. Circuit had refused to enforce the Board's initial order and remanded the matter for proper consideration of *Babcock/Lechmere* and its distinction of substance between employees and non-employees. *See ITT I*, 251 F.3d at 1001-2. In doing so, it commanded the Board to take the employer's property interests into account. *Id.* On remand, the Board applied the analysis used in *Hillhaven*, *supra*, and found that the ITT off-site employees could access outside, non-working areas at the ITT plant, except where such access interfered with the company's business operations. *ITT Remand Decision*, 341 NLRB 940-41.

In enforcing the Board's order after remand, in *ITT II*, the D.C. Circuit re-emphasized what it had expressed prior to remanding the instant cases – that the Board must consider the employment relationship between those engaged in the conduct and the property owner. 413 F. 3d at 68-69, *enfg.* 341 NLRB 937 (2004). The Court compared the circumstances under which

the *Babcock/Lechmere* test would apply with those where *Republic Aviation* and its progeny would apply. It stated:

> *Babcock* … held that the Act required a distinction "of substance" between the union activities of employees and non-employees. In cases involving *employee* activities, we noted with approval, the Board "balanced the conflicting interest of employees to receive information on self-organization on the company's property from fellow employees during nonworking time. With the employer's right to control the use of his property." In cases involving *nonemployee* activities (like those at issue in *Babcock* itself), however, the Board was not permitted to engage in the same balancing (and we reversed the Board for having done so). [emphasis in original]

Id. at 69, quoting *Lechmere*, 502 U.S. at 537. The Court went on to point out that "*Lechmere* …reaffirmed *Babcock's* central thesis that Section 7 extends only derivative access rights to nonemployee union organizers." *Id.* (quotations and citations omitted). In upholding the decision of the Board granting access to the off-site employees to the parking lot of their employer, the D.C. Circuit explained that it found reasonable "the Board's conclusion that permitting access by off-site employees trenches less seriously on the employer's property interest than would permitting access by non-employees." *ITT II*, 413 F.3d at 72. As the Court explained: "Surely it is easier for an employer to regulate the conduct of an employee – as a legal and practical matter – than it is for an employer to control a complete stranger's interfering on its property interest. The employer, after all, controls the employee's livelihood." *Id.*, quoting *ITT Remand Decision*, 341 NLRB at 940.

It is clear from each of the cases discussed above, that the "issue of substance" in access cases is whether the conduct is being carried out by employees or non-employees. Even in *Hillhaven* and *ITT*, which involved off-site employees, the critical issue for the Board (and subsequently the Courts that enforced the decisions) was that the individuals' conduct should be evaluated in the context of their employment status with the property owner. Specifically, the

ITT Court stated that "the situation of off-site employees implicates some distinct considerations" from that of either non-employees or on-site employees. *ITT II*, 413 F.3d at 64; *see also Hillhaven*, 336 NLRB at 649 ("[o]f critical importance on the other hand is the facts that an employment relationship exists between them and the employer…") (internal citations omitted). In fact, as both *Hillhaven* and *ITT II* demonstrate, there was clearly an understanding that the analysis and balancing of rights in both of these cases would be different if the individuals were non-employees. Also apparent is that in the absence of an employment relationship, the outcome of the balance of rights would favor the property owner.

The *ITT II* court also articulated a practical rationale why the instant Ark employees cannot be treated as employees of NYNY. It stated:

> The Board recognized that the "employee status of off-site employees . . . may be more difficult to determine, at least initially," and that there may be other, unique problems involved, as well," citing our statement in *ITT Industries* that the "employer's right to control the disputed premises likely implicates security, traffic control, personnel, and like issues that do not arise when only on-site employee access is involved." The NLRB thus reasonably concluded that, while access by off-site employees raised fewer concerns than access by nonemployees, "an employer may well have heightened private property-right concerns when off-site (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights.

413 F.3d at 73 (discussing *ITT Remand Decision* and *Hillhaven*) (informal quotations and citations omitted).

If the *ITT Remand Decision* Board recognized that the fact that the employees at issue were from a different location could present heightened concerns – even though they were employed by the same employer – surely the fact that the Ark employees are not NYNY employees raises even greater concerns. In fact, the rationale for allowing the off-site employees access to the parking lots of a different site of their employer was that the employer still had

rights emanating from the employment relationship, such as discipline and discharge, to regulate the individual's conduct. Here, unlike *ITT*, NYNY does not control the Ark employees' employment relationship with Ark and thus has no means other than exercising its private property rights to control the conduct of non-employees such as the handbillers.

c. Despite the clear case law to the contrary, in its original decisions the Board inexplicably created a third category of quasi-employee.

Despite all of the authority which mandates that individuals seeking access to another's property must be deemed to be either an employee or non-employee with respect to the property owner upon whose private property interests they are seeking to impinge, the Board, in its initial decisions, ignored the fact the Ark employees had no employment relationship with NYNY and inexplicably created a third category of quasi-employee. *See New York New York, New York New York*, 313 F.3d at 588-90. Not only is that result contrary to the holdings of *Hudgens, Hillhaven* and *ITT*, but it also causes the incongruous result that the Ark employees were given stronger Section 7 rights than the off-site employees of *Hillhaven* and *ITT* were given.

Specifically, in the present cases, the Board not only created a new quasi-employee status but it gave the Ark handbillers the right to enter into the interior premises of NYNY and its *porte cochere*. At the same time, it took away NYNY's property rights but did not provide it with a way to control the conduct of the encroachers. Indeed, without the right to control access to its private property through the trespass laws, the Company would lack *any* means to ensure compliance with its rules. That result is not only untenable, it is also contrary to prior cases such as *Hudgens, Hillhaven* and *ITT* where an employee's infringement on the property owner's private property is allowed because the property owner is also the employer and thus has the legal ability to regulate the conduct of its employees without resort to property law.

3. The individuals who are the subject of these cases were employees of Ark, had no employment relationship with NYNY and did not otherwise have any characteristics of a NYNY employee.

a. The individuals had no direct employment relationship with NYNY.

In order for an employment relationship to exist under the Act, the putative employer must control the essential terms and conditions of the employment of the purported employee. The "employer" must be able to designate the wages, control the scope of the individual's job duties and be able to discipline or discharge the individual. *See, e.g., NLRB v. Arizona Republic*, 349 NLRB No. 95, slip op. at 4-5 (2007) (In determining whether individuals are employees or independent contractors, the Board looks to the common law agency test and considers whether those factors create an employment relationship.) There is no contention in these cases that any of these factors existed in the relationship between the Ark employees and NYNY. Thus, it is uncontroverted that the handbillers were not directly employed by NYNY, nor was there any intent by NYNY to employ the Ark employees.

b. There was no joint employment relationship between NYNY and Ark.

Under the Act, in certain circumstances, an employer who has control and dominion over an employee but is not that individual's direct employer can be considered a joint employer and accordingly, the individual can be considered to have an employment relationship with each of the joint employers. In order to be considered a joint employer, however, the secondary company has to meet the specific parameters of the Board's joint employer test. In making that determination, "the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment. The essential element in this

analysis is whether a putative joint employer's control over employment matters is direct and immediate." *In re Airborne Freight Co.* (*Airborne Express*), 338 NLRB 597 fn. 1 (2002).

The basic principle of joint employer status was set forth in *Laerco Transportation*, 269 NLRB 324, 325 (1984), where the Board stated:

> To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Further, in *Clinton's Ditch Co-Op Co. v. NLRB*, 778 F.2d 132, 138-139 (2d Cir. 1985), the Second Circuit Court of Appeals weighed the following five factors in considering whether a joint employer relationship existed: hiring and firing; discipline; pay, insurance and records; supervision; participation in the collective-bargaining process.

Here, in *New York New York I*, the Union and the General Counsel initially contended that a joint employer relationship existed between Ark and NYNY and the Ark employees. However, that position was later abandoned in an amended complaint. The contention was never pursued thereafter. Therefore, when both cases came to the Board, it was acknowledged that the Ark employees involved in the handbilling were neither direct nor joint employees of NYNY.

c. The individuals would not have been employees of NYNY under the common law.

A simple *Webster's* definition of an employee demonstrates that the individuals were not employees of NYNY. *Webster's* defines an employee as:

> One employed by another usually for wages or salary and in a position below the executive level.

Merriam-Webster's *Dictionary of Law* (1996), *available at* http://dictionary.reference.com; *see also H. S. Care LLC d/b/a Oakwood Care Center (Oakwood)*, 343 NLRB 659, 662 (2004).

In the present case, there is no testimony – nor could there be – that NYNY employed the handbillers. They did not receive wages from NYNY nor perform services at NYNY's direction. In short, it is undisputed that the individuals who were handbilling were employed by Ark and received wages from Ark for work they performed on behalf of Ark. They were not employed by NYNY. Thus, even if the Board was to look outside the Act to attempt to bolster its concept that an individual who lacks an employment relationship with a property owner can still be considered an employee of that third party, there would be no support for that proposition.

d. In *NYNY I* and *NYNY II*, the Board improperly attempted to circumvent the holdings of *Republic Aviation* and *Babcock/Lechmere* by ignoring the employee/non-employee issue and instead created a quasi-employee classification.

Notwithstanding the absence of any direct or joint employment relationship with NYNY, or even sharing of common characteristics of NYNY employees, the Board's earlier decisions equated the Ark employees with the NYNY employees and accorded them the same or even superior Section 7 rights. In order to reach this result, the Board unjustifiably created a new category of quasi-employee. However, there was no legal basis for doing so.

The clear precedent from both the courts and the Board is that individuals' access rights are based on their employment status. In the absence of an employment relationship, the individuals must be treated like all other non-employees who have impinged on the property rights of another. Obviously cognizant of the need to come up with a theory to avoid the dictates of *Babcock/Lechmere,* the General Counsel initially asserted that NYNY and Ark had a "symbiotic relationship." He contended

> [a]t 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.

New York New York and Local Joint Executive Board of Las Vegas, et al., Case No. 28-CA-14519, slip op. at 2 fn. 5 (June 29, 1998).

According to the complaint, as a result of this relationship between NYNY and Ark, the handbillers were "invest[ed] with essentially the same rights and privileges as employees of the Respondent in the particular circumstances of the instant case." *Id.* at 3. Although neither the ALJ nor the Board based their decisions on this concept, they both *de facto* came to the same result but instead claimed that the handbillers' presence on NYNY property leased by Ark somehow provided them with the same rights as employees of NYNY. One of the many problems with this tortured reasoning is that the Board is attempting to create an employment relationship between NYNY and the Ark employees through asserting that there is a business relationship between Ark and NYNY from the lease. A contractual relationship between two corporations, however, does not create an employment relationship between the employees of one company and the other company. Instead, as the Board has long held, an employment relationship can only be created when a company exercises control and dominion over the employee who receives compensation for the services he/she performs for that employer.

4. The test that the Supreme Court has articulated in *Babcock/Lechmere* should be applied here.

a. *Babcock/Lechmere applies*.

As the above analysis demonstrates, the Board had no basis in law for granting employee access rights to non-employees such as the Ark employee handbillers. Not only is the Board's reasoning unsupportable in light of the facts and applicable law, it creates a category of quasi-employee which is contrary to property and contract law and defies reasoning. Moreover, it

completely disregards *Lechmere*. That these decisions were without support and did not take into account the Supreme Court's holding was specifically pointed out by the D.C. Circuit, when it stated that:

> Neither Board decision takes account of the principle reaffirmed in *Lechmere* that the scope of § 7 rights depends on one's status as an employee or nonemployee.

New York New York, 313 F.3d at 588.

In so ruling, the D.C. Court, by implication, is asserting that the *Babcock/Lechmere* test is the correct one to apply in these circumstances. NYNY concurs. Since the original Board decisions failed to take *Lechmere* into account, their rulings were erroneous.

b. Even the General Counsel's position statement on remand concurs that *Babcock* is the correct standard to apply.

Presumably recognizing the absurd result that could occur, the General Counsel's Initial Position Statement on Reconsideration By the Board concurs in part with NYNY's position that *Babcock*/*Lechmere* should be applied to the instant circumstances. He states:

> 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.[9]

As is clear from the position espoused by the General Counsel, the Board's conclusion that *Republic Aviation* governed the present case is not appropriate. *Babcock/Lechmere*, as explained by the D.C. Court, governs the rights of non-employees such as the Ark employees to engage in distribution on NYNY's private property premises. Contrary to the Board's prior holding, NYNY does have the right to post its property against non-employee solicitation. This position allows NYNY to maintain control of its own property but does not infringe on any rights the Ark employees may have *vis-a-vis* their own employer.[10]

5. The *Babcock/Lechmere* standard compels the conclusion that the Ark employees had reasonable alternative means of engaging in area standards consumer handbilling against Ark, and thus did not have the right of access to NYNY's property to engage in that conduct.

The Supreme Court has specifically stated that there is only a limited exception to an employer's right to exclude non-employees from trespassing on its property. *See Lechmere,* 502 U.S. at 536-41. Section 7 "simply does not protect nonemployee union organizers *except* in the

[9] As the General Counsel has acknowledged, in access cases the Board and the courts have given deference to the property rights of third parties. The ability of a property owner to control who has access to its premises is a foundational property right. This is particularly true in the hospitality industry where, in order to be successful, a hotel/casino such as NYNY must be able to control the conduct of invitees. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (*quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property."). When individuals, such as the Ark handbillers, attempt to embroil guests of NYNY in a dispute with some other employer, NYNY clearly has a right to protect its business interests. *See, e.g., NLRB v. Visceglia*, 498 F.2d 43, 49-50 (1974) (denying enforcement of Board Order requiring third party to grant access to non-employees for area standards activity). Any limitation on that right must be based not only in law but sound public policy since the right to own and use property is based on the Constitution.

[10] In prior briefing, the argument has been asserted that if the Ark employees did not have the right to handbill on NYNY property, they would not have any Section 7 rights. Although not before the Board, NYNY is not asserting that Ark employees have no Section 7 rights at all. Whatever Section 7 rights the Ark employees have with respect to their own employer is independent of what, if any, rights they have with a third party property owner such as NYNY.

rare case where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* at 537. "[A]ssuming, arguendo, that nonemployees have rights to assert in the nonorganizational context, … the *Babcock* rule reaffirmed in *Lechmere* would apply with no less force in the context of area standards or consumer boycott activities." *United Food and Commercial Workers Union*, 74 F.3d 292, 298 (D.C. Cir. 1996). The Union's burden of establishing such isolation is "a heavy one," *Sears*, 436 U.S. at 205, and "one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of non-trespassory means of communication." *Lechmere*, 502 U.S. at 540. The Supreme Court has "expressly rejected" the view that Section 7 "protects reasonable trespasses." *Id.*

Here the evidence, *already in the record*, establishes that the Union cannot meet its burden to show that the Ark customers are beyond the reach of reasonable attempts to communicate with them. *See, e.g., Babcock*¸ 351 U.S. at 113. The Union's message could have easily been disseminated in a number of ways such as radio, television, computer and newspaper advertisements, as well as handbilling on public sidewalks and public locations, such as the airport. *See, e.g., Victory Markets, Inc.*, 322 NLRB 17, 20-21 (1996) (employer did not violate the Act by ejecting non-employees because handbilling interfered with access to its property). Indeed, in the present cases, the Union's own actions demonstrate that there were adequate alternative means to communicate the area standards message. During the same time period as the handbilling at issue in *New York New York I* was taking place, the Union was conveying its message to both employees and the public by numerous individuals picketing on the public sidewalk approximately two hundred feet from the *porte cochere*. *See Leslie Homes*, 316 NLRB

123, 129-130 (1995) (union had adequate alternative means); *see also Sparks Nugget, Inc. v. NLRB,* 968 F.2d 991, 998 (9th Cir. 1992).

In addition to this picketing, the off-duty Ark employees also could have given out their handbills to individuals as they left NYNY property, or handbilled at other public locations along Las Vegas Boulevard, taking advantage of the fact that customers generally visit a variety of hotel/casinos while in Las Vegas and in recognition that Ark operates restaurants at a number of different locations in the Strip corridor. *See, e.g., Sparks Nevada, Inc.*, 968 F.2d at 998. Taken together, there can be no question that there were adequate alternative means to communicate at the Union's and Ark employees' disposal. However, they chose, for their own convenience and in clear violation of NYNY's property rights, to set up shop in front of NYNY's front entrance and inside the hotel near entrances to Ark's restaurants. Because the Union and Ark employees cannot satisfy their burden under *Babcock/Lechmere*, NYNY was entitled to eject the off-duty Ark employees from its premises as a matter of right.

B. Since The Individuals Involved Here Were Non-Employees Of New York New York Engaging In Area Standards Consumer Handbilling, They Had Little Or No Right Under Section 7 To Infringe On The Private Property Rights Of NYNY.

The Supreme Court has repeatedly held that in situations where an individual seeks access to an employer's premises for the exercise of primary or derivative Section 7 rights, such access must be balanced against the employer's private property rights. In recognizing that the proper accommodation depends in part on the nature of the conduct engaged in, both the D.C. Circuit and the Board have asked whether "[i]t is of any consequence that the Ark employees were communicating, not to other Ark employees but to guests and customers of NYNY?" [11] As

[11] NYNY recognizes that this is one of the issues on which the Board requested briefing. As noted above in Section IV.A, it is clear that the importance of this issue was settled by *Lechmere* which established a strict dichotomy of employees and non-employees from which every discussion of access rights must flow. *See also Lechmere*, 502

is set forth below, when the Board considers that the Ark employees were engaged in area standards handbilling rather than organizational activity, it must conclude there was no violation of the Act.

1. The Ark employees were engaging in area standards activity targeted at customers of NYNY and Ark and thus they were attempting to exercise one of the weakest of Section 7 rights.

It is an undisputed fact that the off-duty Ark employees were not engaged in organizational activities when they were on NYNY property.[12] This is demonstrated both by what the off-duty Ark employees chose not to do, as well as by what they actually did. Importantly, they did not seek out their co-workers to discuss organizing under the Union. They also did not engage in organizational handbilling in areas where it would have been easiest for them to contact their fellow Ark employees, such as Ark employee break rooms, locker rooms, the designated eating area, near employee entrances or in employee parking lots. Instead, the off-duty Ark employees stationed themselves in areas where they would be able to contact the public – the NYNY *porte cochere* and inside the hotel/casino in aisleways in front of America and Gonzales.

U.S. at 536-37 (Board has no discretion to interpret the Act in a manner that would be contrary to Supreme Court precedent); *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 249 F.3d 1115, 1119 (9th Cir. 2001) (same). Therefore, the simple answer to the question is no, because once it is accepted that the individuals are not NYNY employees, it is permissible for NYNY to exclude them from its property because they have reasonable alternative means to communicate their message. However, to the extent the Board wishes to consider the nature of the individual's activity, as set forth herein, it is clear that because the off-duty Ark employees were engaged in area standards activity, they possessed virtually no Section 7 access rights because there is no evidence that requiring the off-duty Ark employees to engage in their activity by alternative means renders it so ineffective that access is required.

[12] In distinguishing between area standards and organizational activity, NYNY does not deny that the off-duty Ark employees' activities could be considered organizational in the very general sense that they were performed in hope of furthering the organizational goals of the Union. It is undisputed, however, and the Board has previously found that the handbilling was directed at consumers and was therefore considered area standards activity. *See New York New York I*, 334 NLRB at 782-3.

The content and the manner in which the off-duty Ark employees disseminated the handbills belies the true nature of the Section 7 right that they sought to exercise: they were engaged in simple area-standards handbilling. The "handbills bore an area standards message, stating that Ark paid its employees less than unionized workers" and indicated that Ark had not entered into a collective bargaining agreement with the Union. *See New York New York I*, 334 NLRB at 782-3; *see also Leslie Homes*, 316 NLRB 123, 124 (1995) (describing area standards handbilling). The off-duty Ark employees indiscriminately handbilled in both in the NYNY *porte cochere* and in NYNY's public area. There is no evidence in the record that the individuals limited the distribution of the flyers to patrons entering the NYNY who intended to dine at Ark-operated food service facilities, and there is no indication that the off-duty Ark employees in front of America and Gonzales attempted to handbill only individuals seeking access to the restaurants. In short, there can be no doubt that the goal of the off-duty Ark employees was to communicate a message to the public – that Ark was "unfair" and paid lower wages to its employees than comparative unionized employers – not to organize the Ark employees. As such, they were engaging in area standards activity under Section 7 of the Act.

2. Area standards consumer handbilling is one of the weakest of Section 7 rights.

That the off-duty Ark employees were engaging in area standards activity, rather than conduct calculated to organize their co-workers is a critical distinction that essentially requires that the Board find in favor of NYNY. As set forth in more detail below, this is because under the hierarchy of activity protected by Section 7 of the Act, non-employee area standards activity warrants only minimal protection, and those rights are swamped when they come into conflict with an employer's legitimate prerogative to enforce its private property rights. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 206 n. 42

(1978); *United Food and Comm. Workers v. National Labor Relations Board*, 74 F.3d 292, 298 (D.C. Cir. 1996) (Oakland Mall II); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992).

It is well-established that the right of non-employees to participate in area standards activity is peripheral conduct that is "[far] removed from the core concerns of § 7." *Great Scot, Inc.*, 39 F.3d at 682. It is a weaker right than that of non-employees to engage in organizational activity, and under such circumstances, "the *Babcock* rule reaffirmed in *Lechmere* would apply with no less force in the context of area standards or consumer boycott activity." *United Food and Comm. Workers*, 74 F.3d at 298. There, the D.C. Circuit explained

> Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of nonemployees in organizing an employer's employees being somewhat weaker, and the interest of the uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still. Thus, "under the § 7 hierarchy of protected activity imposed by the Supreme Court," non-employee activity in which "the targeted audience was not [an employer's] employees but its customers' 'warrants even *less* protection than non-employee organizational activity.'" [emphasis in original]

Id., quoting *Great Scot, Inc.*, 39 F.3d at 682 (6th Cir. 1994); *see also Sears, Roebuck & Co.*, 436 U.S. at 206 n. 42; *Sparks Nugget, Inc.*, 968 F.2d at 997-98. In a case similar to those at bar, the Sixth Circuit has previously held that area standards handbilling targeted at a contractor that regularly did business in a shopping mall, rather than the actual employer of the handbilling employees, was an even more remote right under the Act, and therefore deserved only minimal protection. *See Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 685-89 (6th Cir. 2001).

3. The Ark employees did not have a right to engage in area standards consumer handbilling on NYNY's premises.

As demonstrated above, the Ark employees were, at best, attempting to engage in area standards handbilling, the weakest right in the Section 7 hierarchy. *See Sandusky Mall Co.*, 242 F.3d at 691. In contrast, those individuals were severely infringing on the right of NYNY to control access to its private property, control the conduct of invitees to that property, manage its business, and conduct operations – rights which are "fundamental element[s] of private property ownership" and "one of the most treasured strands in an owner's bundle of property rights." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 412, 23 P.3d 243, 249 (2001) (citations and quotations omitted). Because the quality of NYNY's right to exclude so far outweighs the relative interests of non-employees merely engaging in area standards activity, there can be no question that the NYNY's request that they leave the premises was proper.

In a closely analogous case, the Ninth Circuit Court of Appeals has held that due to the weak nature of the right to engage in area standards handbilling, and the "narrow construction of the exception to the employer's private property rights articulated in *Lechmere*," employers need not accommodate non-employees participating in area standards handbilling under any circumstances. *Sparks Nugget, Inc.*, 968 F.2d at 997-98. It explained that this was so because the *Babcock/Lechmere* "no reasonable alternative means" exception was created only to allow non-employees limited access to assist isolated employees in exercising their right to *organize*, which is the most important right granted to employees under Section 7. *See id.* In a later decision, the D.C. Circuit made a similar distinction, noting that

> The principle announced in *Babcock* is limited to [an] accommodation between organizing rights and property rights. This principle requires a yielding of property rights only in the context of an organization campaign … In short, the principle of accommodation announced in *Babcock* is limited to labor

> organization campaigns, and the yielding of property rights it may require is both temporary and minimal.

United Food and Commercial Workers Union (Oakland Mall II), 74 F.3d at 298, quoting *Cent. Hardware Co. v. NLRB*, 424 U.S. 507, 522 (1972).

Although the Board has stated that the question of whether non-employees engaging in area standards conduct are entitled to invoke the *Babcock/Lechmere* exception remains open, *see Leslie Homes*, 316 NLRB at 129, under the rationale of *Sparks Nevada*, which is controlling in the Ninth Circuit, the interests of the off-duty Ark employees who sought to excuse their interference with NYNY's operations merely by exercising the weakest of all Section 7 rights, must yield to the fundamental property interests of NYNY. Accordingly, the charges should simply be dismissed, because the facts of these cases could not conceivably justify the off-duty Ark employees' unsanctioned presence on NYNY property.

4. The Ark employees should have utilized alternative means to communicate their message.

Even if the Board did not follow the Ninth Circuit precedent, there is no question that the Union must, at the very least, meet *Lechmere*'s heavy burden in order to warrant the off-duty Ark employees' interference with NYNY's property rights. As noted above in Section IV.A.5, it is well-established that the *Babcock/Lechmere* rule applies to area standards or consumer boycott activities, and non-employees seeking refuge under this exception must demonstrate that NYNY's customers were "not reasonably accessible by non-trespassory methods, and that [the off-duty Ark employees] therefore may be entitled to engage in area standards activities on" NYNY's property. *Leslie Homes*, 316 NLRB at 127-131; *see also United Food and Commercial Workers Union*, 74 F.3d at 298; *Victory Markets, Inc.*, 322 NLRB at 20-21 (employer properly

evicted handbillers who were disrupting traffic and business activities, even though handbillers were not on employer's property); *Sandusky Mall Co.*, 242 F.3d at 685-89.

The discussion in Section IV.A.5 above, clearly demonstrates that the Union cannot meet this burden. Neither the Ark employees nor Ark customers are isolated populations beyond the reach of the Union's reasonable attempts to communicate with them, as evidenced by the fact that the Union also concentrated picketing and other activities on the public site adjacent to the *porte cochere*. *Sparks Nevada, Inc.*, 968 F.2d at 998.

5. Even if the Board were to create a new classification of hybrid Ark/NYNY employees, those "employees" would have only severely limited Section 7 rights on NYNY's property.

As discussed in more detail above, from its prior decisions in this matter, NYNY submits that the Union is asking the Board to create a new category of quasi-employee. Even if the creation of such a classification were possible, the Ark employees would still have only *de minimis* Section 7 rights that are trumped by NYNY's right to exclude individuals from its property because they were engaging in consumer handbilling.

Assuming, arguendo, that the off-duty Ark employees in these cases have some form of Section 7 access right that can be compared to that of a NYNY employee, both the scope and the strength of that right must be defined before it can be balanced against the strong private property interests of NYNY to prohibit consumer handbilling inside the casino area. *See Hudgens*, 424 U.S. at 521; *Hillhaven*, 336 NLRB at 649. In doing so, the Board must consider its previous holdings in *Hillhaven* and *ITT* where it limited the access of off-site employees engaging in organizational conduct to the parking lot and other outdoor non-working areas.

Although those cases are clearly distinguishable from those at issue here, as is discussed in detail at pages 13 to 17 *supra*, because they involved the respective company's own

employees, they are also distinguishable because they involved a different kind of Section 7 right. The off-site employees in *Hillhaven* and *ITT* were engaged in organizational activity, a strong Section 7 right. The off-duty Ark employees were engaged in area standards activity, one of the weakest forms of Section 7 rights and were not even scheduled to perform work on the day the incidents took place. Even if the Board were to treat the Ark employees consistent with the analysis and holdings of *Hillhaven* and *ITT*, it must conclude that the Ark employees, who were engaged in a less protected form of activity, are entitled to less access than the off-site employees in *Hillhaven*, 336 NLRB at 650, and *ITT*, 341 NLRB at 940. Therefore, the proper accommodation of the parties' conflicting interests would respect NYNY's right to exclude handbillers from its property and requires them to communicate their message through less burdensome means. *See, e.g.*, *Leslie Homes*, 316 NLRB at 127-131; *see also NLRB v. Visceglia*, 498 F.2d 43, 48-50 (3d Cir. 1974) (denying enforcement of Board's order in *Peddie Buildings*, 203 NLRB 265 (1973), and finding that third party property owner properly excluded picketers).

Accordingly, even if the Board were initially to try and accord the handbillers an elevated quasi-employee status, there is still no basis to impinge on NYNY's private property, particularly its interior and *porte cochere*. In sum, even if the Board determined that the Ark employees have some access rights, under the conditions of these cases, those access rights are clearly trumped by the legitimate private property rights of NYNY, and the proper accommodation is to require the Ark employees to handbill off NYNY premises.

C. The Ark Employees Who Returned To NYNY's Premises During Their Off-duty Hours Were Guests Of NYNY And Thus Did Not Have Any Right To Engage In Consumer Handbilling In NYNY's Public Areas.

As discussed above, the off-duty Ark employees cannot be considered "employees" of NYNY, and they were not engaging in a type of activity under Section 7 of the Act that would

grant them access to NYNY property. Moreover, when the off-duty Ark employees came to NYNY on their days off, they did so solely as guests. Whether their presence on NYNY property was proper is a simple question of state property law, and therefore, like any other guest, their access to the hotel/casino complex was conditioned upon complying with NYNY rules and private property rights. Once they violated NYNY's solicitation rule, NYNY could properly exclude them from the property.[13] The fact that the Ark employees were off-duty at the time of their handbilling activities and that they were present at the hotel/casino as guests requires the Board to find that NYNY did not violate Section 8(a)(1) of the Act in prohibiting their conduct.

1. The off-duty Ark employees were, at best, guests of NYNY.

NYNY had a policy in effect that allowed off-duty employees of its lessees to return to NYNY to engage in gaming, attend entertainment events and dine in the restaurants so long as they were not in uniform and did not patronize bars. *See New York New York*, 313 F.3d at 586. Otherwise, such individuals' presence on NYNY property was subject to the same terms and conditions that applied to any other NYNY customer or guest. As such, the off-duty Ark employees were permitted to return to NYNY property in a manner essentially equivalent to that of other members of the general public.

There is no question that when the Ark employees appeared in the *porte cochere* and inside the casino, they did not do so as employees. They were not scheduled to work that day and they were not present to serve Ark's interests or pursuant to an Ark directive. Nor were they

[13] Question No. 4 requested briefing on the issue of whether the Ark employees should be treated as guests and whether such treatment would impact these cases. Question No. 2 asks whether the Ark employees should be considered invitees with rights inferior to NYNY employees. As set forth in this section, NYNY submits that the answer to Question No. 4 is yes; the off-duty Ark employees must be treated as guests, and therefore whether they were properly cited for trespass is purely a question of state law. In turn, the answer to Question No. 2 is no. The Ark employees are not invitees.

subject to supervision by Ark management; they were freely engaging in an off-duty activity completely unrelated to their employment. The only legal basis for their presence in the hotel/casino was therefore, as guests of NYNY. *See generally MGM MIRAGE v. Cotton*, 121 Nev. 396, 116 P.3d 56, 58-59 (2005) (employee under employer's control only when acting within the scope of employment); *Billingsley v. Stockmen's Hotel*, 111 Nev. 1033, 1038, 901 P.2d 141, 145 (1995) (guests permitted to stay until asked to leave, and once asked to do so, a guest becomes a trespasser).

2. Guests have no right to engage in consumer handbilling in NYNY's public areas.

Guests are not a protected class of individuals under the Act. Therefore, to the extent that the off-duty Ark employees were permitted to remain on NYNY property, they had to comply with the Company's reasonable restrictions on guest activity. *See, e.g., S.O.C., Inc.*, 117 Nev. at 412, 23 P.3d at 249 ("A party is privileged to use another's land only to the extent expressly allowed by the easement . . . Any misuse of the land or deviation from the intended use of the land is a trespass for which the owner may seek relief."); RESTATEMENT OF TORTS (Second) § 168 (1965) (A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction was complied with.); *Id. at* § 169 (1965) ("A consent given by a possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on any other part"); *Id.* at § 170 (1965) ("A consent given by the possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on the land at any other time."). For a variety of reasons, NYNY maintains rules that are consistent with its nature as a casino property. One of those rules prohibits any outsiders, including invitees, from distributing literature or engaging in solicitation on the premises. *See New York New York*, 313 F.3d at 586.

When the off-duty Ark employees began distributing leaflets to patrons and guests of NYNY in violation of the Company's no solicitation/no distribution rule, they exceeded the scope of their invitation. In doing so, they lost their status as guests or invitees and transformed into trespassers, and were subject to ejection from the property. *See New York New York*, 313 F.3d at 589 ("[w]hile the actions of the subcontractor's employee may not have fit within the ancient tort of trespass *quare clausum fregit*, her violation of the company's no solicitation rule nonetheless made her a trespasser."); *Billingsley*, 111 Nev. at 1038, 901 P.2d at 145 (guest in violation of property rule is a trespasser who may be removed from the property).

3. The Board's reliance on *Tri-County* was misplaced.

In an attempt to avoid the implications of the fact that the Ark employees were engaging in these handbilling activities on days when they were not scheduled to work and had no work related reason to be at NYNY, both the General Counsel and the Board's decisions assume that the employees had a right to be on NYNY's premises in accordance with *Tri-County Medical Center, Inc.*, 222 NLRB 1089, 1089-90 (1976). This assertion misses the mark and stretches the application of that case far beyond its principle holding. The Ark employees may have certain rights under *Tri-County*, but assuming that they have those rights against NYNY and that they may therefore exercise them to frustrate the proper enforcement of NYNY's non-solicitation policy improperly assumes away the fundamental issue in this case.

The reasoning behind *Tri-County* clearly depended on the fact that the individuals seeking access were *employees*, and it was that characteristic that distinguished them from strangers. *Id.* at 1089-90. Such reasoning does not apply to these cases; the handbillers were not NYNY employees. The holding of the case cannot be divorced from that critical fact, and any

attempt to do so is sophistry. *See, e.g.*, *Nashville Plastic Products*, 313 NLRB 462, 463 (1993) (Employees have rights under *Tri-County*, non-employees do not).

Moreover, *Tri-County* does not support the other conclusion reached by the Board that the Ark handbillers could handbill within the public areas inside the hotel and its *porte cochere*. Merely because Ark employees may have rights under *Tri-County* does not mean that the proper place to exercise those rights is in the public areas of NYNY. *Tri-County* allowed the off-duty employees involved in that case access only to non-work areas outside the plant such as the employee parking lot. *Id.* at 1089-90. This analysis would not warrant the entry of NYNY guests into the *porte cochere* or the interior of the casino.

If the interpretation of *Tri-County* requested here were followed, it would stand the framework of Section 7 rights crafted by the Supreme Court in *Republic Aviation* and *Lechmere* on its head, for it would grant off-duty non-employees access to NYNY premises that would be superior to that of NYNY's own employees. *Compare Tri-County*, 222 NLRB at 1089-90, *with Lechmere*, 502 U.S. at 536-37. That NYNY employees have *Tri-County* rights with respect to NYNY does not mean that Ark employees have rights that are coterminous because they may utilize some common facilities. Ark's premises begin and end with its leasehold and it can grant no access to its employees outside of the areas fixed within its contract with NYNY. While it may well be that areas, such as the employee parking lot, can accurately be described as outside, non-work areas within Ark's leasehold, aisleways outside of America and Gonzales and the *porte cochere* are not. Equating those areas with the outdoor, non-work areas discussed in *Tri-County* merely because they are outside of the Ark leasehold is overly simplistic.

Accordingly, the answer to the fourth question posed by the Board is yes. The Ark employees were not entitled to remain on the property as a matter or statutory right. The fact

that the off-duty Ark employees were guests at the time they come to NYNY's premises means that their privilege to patronize NYNY premises was conferred by the Company and was therefore subject to reasonable restrictions that it placed on the scope of that access: the no solicitation/no distribution rule. *See, e.g., Sandusky Mall Co.*, 242 F.3d at 691 (non-solicitation rule properly barred individuals engaging in area standards activity at mall).

D. The Board's Original Decisions In *NYNY I* and *NYNY II* Were Contrary To Law, Clearly Erroneous, And Cannot Be Affirmed After Reconsideration On Remand.

In *NYNY I* and *NYNY II*, the Board virtually ignored or misapplied well established judicial and Board authority and improperly relied upon the general location of Ark employees' workplace, the frequency of their presence at work and two erroneously decided earlier decisions in finding that the Employer violated Section 8(a)(1) in excluding the handbillers from the property. The Board's original decisions were contrary to law and clearly erroneous and cannot be affirmed upon reconsideration on remand.

1. The Board ignored or misapplied well established judicial and Board authority.

As is demonstrated in detail in Sections IV.A.1 and 2 above, in concluding that off-duty Ark employees have the right to engage in handbilling activities at various locations at NYNY which are open to the public, the Board virtually ignored, or at least seriously misapplied controlling legal authorities when it failed to acknowledge the significance of the fact that the handbillers had no employment relationship with NYNY (*see* discussion at pp. 10-25 above), disregarded the fact that the Ark employees were engaging in the weak Section 7 right of area standard consumer handbilling (*see* discussion at pp. 25-32 above), and that they were at NYNY only as guests of the hotel. (*See* discussion at pp. 32-37.) Since no appropriate analysis of these cases on remand can be made without correctly applying the law with respect to these issues as

described herein, the Board is precluded from finding now that NYNY violated the Act when it excluded the off-duty Ark employees from its property.

2. The Board improperly relied upon the conclusion that the off-duty Ark employees were rightfully on NYNY property due to their employment relationship with Ark.

A key element of the ALJ's and Board's analysis in the original decisions was the conclusion that the off-duty Ark employees were "rightfully" on NYNY's property on the days in question, due to their employment relationship with Ark. However, this reliance was improper as a matter of fact and law.

First, the conclusion was factually incorrect. Each of the Ark employees who are the subject of these cases came to NYNY to engage in handbilling on days when they were not assigned to work. They had no reason to be at NYNY, and particularly in the location where they were, in order to perform any job duties associated with their job at Ark. Thus, they were not "rightfully" on NYNY's premises because they were there to work.

As noted earlier, the only way the Board could have concluded that the Ark employees were "rightfully" on the property at that time would be to invoke the principle of *Tri-County* that off-duty employees have the limited right to return to the external non-work areas of their workplace to engage in Section 7 activities. If *Tri-County* applied here, the Ark employees were then at least theoretically "rightfully" on NYNY property because their employment by Ark gave them the "right" to be at least somewhere on NYNY's premises. However, this is circular reasoning and begs the question. As discussed in detail at pp 35-37 above, reliance on *Tri-County* is wholly misplaced.

Moreover, there was no determination in the original decisions as to what was meant by "NYNY's premises." As the facts clearly establish, the handbillers did not perform any job

duties for NYNY or Ark in the *porte cochere*. Their job duties were performed generally within the confines of Ark's leased premises. The areas where the handbilling took place were on NYNY property where they did not perform their Ark job duties and thus they had no right to be on that part of NYNY property unless they were there as any other guest or customer. There is no legal basis for a finding that any rights the Ark employees may have under *Tri-County vis-à-vis* Ark are coterminous with the rights that NYNY employees might enjoy under the Act.

That being the case, there is no way that the Board can now find that NYNY's action toward the individuals when they began their handbilling activity was unlawful.

3. The Board improperly relied upon the conclusion that the Ark employees worked on NYNY's premises "regularly and exclusively."

Another key element of the reasoning of the original Board decisions was the conclusion that the Ark employees work "regularly and exclusively" at the Ark job at NYNY. This reliance was also improper.[14]

First, there is little or no evidence in the record to support the conclusion – the Board simply assumed that these individuals worked regularly and exclusively at the Ark jobs in NYNY. That may or may not be the case, but the Board should not have made this such a fundamental element of its determination without requiring a more extensive production of evidence on that question.

More importantly, even assuming that it is correct that the employees of Ark work at their jobs within the confines of NYNY on a regular and exclusive basis, the Board offered no

[14] NYNY acknowledges that certain recent Board decisions appear to rely on its erroneous use of the terms "regularly and exclusively" in both *New York New York I & II* when discussing the *Babcock/Lechmere* standard. *See, e.g., American Postal Workers Union*, 339 NLRB 1175 (2003); *Wal-Mart Stores, Inc.*, 349 NLRB No. 102 (2007). The D.C. Circuit clearly rejected that standard in *New York New York*, finding it contrary to *Lechmere*. 313 F.3d at 589. It would be inappropriate to attempt to apply it here. *Id.*; *see also Adtranz v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001).

explanation of why those facts would be significant to a determination of whether those individuals should therefore be considered to be employees of NYNY and enjoy the right to distribute handbills in areas of NYNY which were open to the public and in which they did not work. There probably is a good reason why no explanation was offered – no rational justification can be given because there can be no legally supportable basis for finding that NYNY's private property rights have been forfeited because of the manner in which a company with which NYNY has entered into a contractual relationship conducts its business. Indeed, there certainly is no evidence in the record that NYNY required Ark to schedule work assignments of employees in any particular manner and certainly no evidence that it required Ark to give the employees regular work assignments exclusively at Ark's NYNY locations. That may be the practice of Ark, but if NYNY had no role in determining that, it is illogical and contrary to law to conclude that NYNY's private property rights can somehow be diminished as a result of Ark's business practices.

4. The Board's original decisions improperly relied upon *Gayfers* and *Southern Services*.

The primary basis of the ALJ's and Board's decisions in *New York New York I* was Board authority articulated in two earlier decisions, *MBI Acquisition Corp. d/b/a Gayfers Dept. Store (Gayfers)*, 324 NLRB 1246 (1997), and *Southern Services*. However, reliance on these cases was erroneous because those cases are legally unsupportable and the cases are also factually distinguishable. As the D.C. Court pointed out, in both *Gayfers* and *Southern Services* the Board equated the access rights of the contractor's employees to those of the employees of the property owner without taking into account the Supreme Court's findings that non-employees do not have the same Section 7 rights as employees. Instead of analyzing the nature of the employment relationship between the property owner and those engaging in the conduct, the Board in *Gayfers*

merely focused on whether the contractor's employees were rightfully on the property of the mall owner. It improperly concluded that since the individuals were not 'strangers' "to the [r]espondent's property, but rightfully on it pursuant to their employment relationship," Gayfers acted improperly when it removed them. *Gayfers*, 324 NLRB at 1250. It then reasoned that since the handbillers were not trespassers, they were entitled to have their conduct evaluated under the *Republic Aviation* standard. Strikingly absent from the analysis is why not being a trespasser on the property, if that were true, automatically elevates the handbillers to the status of "employees" of the property owner. The decision also ignores that *Republic Aviation* involved the self-organizational activity of employees on the property of their employer. It does not deal with handbilling activity on the private property of a third party. 324 U.S. at 797. Thus, the case was wrongly decided and should not have been advanced as a basis for the decision.

Even the General Counsel's Position Statement on Reconsideration by the Board, reasoned that ". . .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." (Brief of General Counsel, p. 30.)

Southern Services has many of the same defects as *Gayfers*. In that case, the Board also leaped to the conclusion that an employee of Southern Services, Inc., ("SSI"), a company providing janitorial services to Coca-Cola, who distributed organizational handbills to co-workers on Coca-Cola's property as she and her fellow employees were reporting for work, was elevated to the level of an "employee" of Coca-Cola, and thus, entitled to have her conduct evaluated in accordance with the standard set forth in *Republic Aviation*. In making the determination, the Board did not consider at all whether she was an employee of Coca-Cola but

merely assumed away any such consideration by concluding that the SSI employees were properly on the Coca-Cola property as a result of the contractual relationship between the companies. Given the Board did not consider the nature of her employment relationship, as required by Supreme Court precedent, *Southern Services*, as with *Gayfers*, does not provide adequate support for the Board's ruling here. *See, e.g., Adtranz v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (erroneous NLRB precedent is an improper basis for decision).

That *Southern Services* is inapposite to the current case is particularly true since the two cases are factually distinguishable. Importantly, the nature of the message was different. In *Southern Services*, the handbiller was distributing organizational materials to her co-workers, whereas here the leaflets had an area standards, rather than organizational, purpose. Moreover, the leaflets were being distributed to the individual's co-workers, not customers of Coca-Cola, the property owner. Here, the intended targets of the leafleting were not Ark employees, but rather customers and visitors to NYNY who passed through the *porte cochere* doors or walked by the entrances to the America and Gonzales restaurants. The area standards message of the handbills makes it clear that the handbilling was done in public areas precisely because customers and guests would be present, rather than Ark employees. Moreover, the handbilling in *Southern Services* took place at the entrance used by the SSI employees to enter the Coca-Cola premises, and the SSI employee distributed the handbills while coming into work. In stark contrast, the Ark employees who engaged in handbilling were not on their way to work, were not on a break or meal period, and had not just completed their shifts. They returned to NYNY on their scheduled days off and went to public work areas inside and outside of the hotel/casino for the express purpose of handbilling the hotel/casino's customers and guests. Thus, the Ark employees were not on the premises "pursuant to their employment relationship" with Ark.

It is clear that *Gayfers* and *Southern Services* should not now be relied upon by the Board. Giving the Ark employees *Republic Aviation* rights merely because they perform some services on Ark leased space does not raise them to the level of "employees" of NYNY under the Act. Compelling precedent dictates that it is the employment relationship – not mere presence on the property – which determines whether the *Babcock/Lechmere* or *Republic Aviation* standard is used. In order for the off-duty Ark employees to have *Republic Aviation* rights throughout the non-work areas of the hotel and casino, they must, according to *Lechmere* and the other Supreme Court authority discussed above, be employed by the private property owner. Since they were not, their rights cannot be found to be as broad as the rights of NYNY employees.

5. The Board's original decisions severely erode NYNY's private property rights.

As has been noted elsewhere in this brief, the Supreme Court has counseled the Board that in situations where an individual seeks access to an employer's premises for the purpose of exercising Section 7 rights, the importance of the access right must be balanced against the corresponding effect that it will have on the owner's private property right. Here, it is clear that the Board's original decisions accorded the Ark employees a right that is very low in the Section 7 hierarchy, but at the same time seriously compromises NYNY's private property rights.

First, it must be acknowledged that, with the possible exception of the Supreme Court's decisions in *Babcock* and *Lechmere*, the courts and Board have been slowly but steadily granting employees greater Section 7 access rights at the expense of employers' property rights. *Republic Aviation* itself began that process when it granted various rights to a company's employees that could be exercised on company property while the employees were on the premises for the purpose of performing their jobs. Further, access rights were extended to off-duty employees by

Tri-County and its progeny, then additional rights to "off-duty, off-site" employees in *ITT* and *Hillhaven.*

The original Board decisions here, which would extend Section 7 access rights to non-employees, further contribute to the elevation of Section 7 rights and erosion of employer property rights. While the events that are the subject of these cases may seem relatively benign, the potential impact on property owner's rights are profound. For example, what could the impact be on a hotel/casino that has leases with ten different restaurateurs to operate food outlets at the property? If a union such as the Charging Party sought to organize the employees who work at each of those restaurants, under these decisions employees of each of those employers could, on any given day, come to the main entrance of the hotel/casino, or station themselves in different locations throughout the hotel, and distribute area standard handbills. Perhaps three well-behaved employees at the main entrance would not be disruptive, but certainly thirty would be, regardless of the nature of their activities.

And, what if employees from two independent retail outlets decided they also wanted to contact possible consumers on that day? Add to this the possibility that the employees of a construction contractor might be performing a job on the premises and also want to exercise their Section 7 rights to handbill. The potential impact on the hotel/casino's property rights could be very substantial, yet the hotel owner would have no remedy since each individual handbilling employee would have a Section 7 right to engage in the conduct, and the owner would have no way to prevent the individual from doing so. If this is the logical potential result of the Board's original decision, which it is, there can be no contention that the proper balancing of right was, or could be, made in these cases. [15]

[15] In the original cases, the Employer argued to the Board that the logical outcome of the General Counsel's position in the cases was that it would open NYNY's premises to a wide variety of vendors, salespersons, or others who

V. CONCLUSION

For the reasons set forth above and in Respondent's prior pleadings to the Court of Appeals and Board, the standard in *Babcock & Wilcox*, as affirmed in *Lechmere*, controls the cases on remand because the workers at issue were not employed by Respondent, were off duty and were engaging in consumer handbilling. Consequently, the Complaints in the instant cases should be dismissed in their entirety.

Dated this 2nd day of October, 2007

Respectfully submitted,

DLA PIPER US LLP

Gary C. Moss
Joanna S. Kishner
Paul T. Trimmer
3960 Howard Hughes Parkway, #400
Las Vegas, Nevada 89169
(702) 677-3900
(702) 737-1612 (facsimile)
Attorneys for Respondent

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performed services at NYNY. For example, cab drivers who regularly bring customers to NYNY's *porte cochere* would ostensibly have the right to engage in handbilling without deference to NYNY's property interest. The same would presumably apply to any vendor that regularly provides, food, beverages, and other deliveries. In its decision in *NYNYI*, the Board dismissed this argument, noting that there were significant differences between these types of individuals and the Ark employees, implying that the other types of employees would not have a Section 7 right to consumer handbill on the property.

However, the orders that the Board actually issued in both cases make no such distinction. 334 NLRB at 763; *see also New York New York*, 313 F.3d 588-9. Those Orders require NYNY to allow any individual who qualifies as a statutory employee that works within the hotel/casino complex to distribute union literature. *See NYNY I*, 334 NLRB No. 87 at 5 ("We will not prohibit employees who work within our 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."); *New York New York II*, 334 NLRB No. 89 at 8 ("Cease and desist from (a) Prohibiting subcontractor employees from engaging in protected activity ... inside of Respondent's casino ... (b) in any like or related manner interfering with ... the exercise of rights guaranteed by Section 7 of the Act."). These Orders do not give or even permit deference to NYNY's property rights. The Orders are not tied to the facts of these cases, and instead require NYNY to suffer the trespass of a vast array of individuals who may choose to engage in consumer handbilling inside of the casino or in front of the main entrance doors.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **Respondent New York New York Hotel & Casino's Supplemental Statement of Position on Remand** was filed electronically on October 2, 2007, and additional copies were sent to the Executive Secretary *via* UPS overnight mail, pursuant to Rule 102.114. In addition, other parties were served as follows:

National Labor Relations Board
600 Las Vegas Boulevard South
Suite 400
Las Vegas, NV 89101-6637
Via UPS

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 – 14th Street, N.W.
Washington, D.C. 20570-0001
File electronically and *via UPS*

Michael J. Karlson, Esq.
Regional Attorney
Region 28
National Labor Relations Board
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Via e-mail: Michael.Karlson@nlrb.gov
and *via UPS*

Michael T. Anderson, Esq.
Davis, Cowell & Bowe, LLP
8 Beacon Street, 4th Floor
Boston, Massachusetts 02108
Via e-mail: Michael.T.Anderson@verizon.net
and *via UPS*

An Employee of DLA Piper US LLP

Dated this 2nd day of October, 2007.