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New York New York, LLC d/b/a New York New York Hotel & Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 28–CA–14519 and 28–CA–15148

March 25, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

These cases, on remand from the United States Court of Appeals for the District of Columbia Circuit, require us to revisit issues arising when the off-duty employees of an onsite contractor seek access to the premises of the property owner to distribute handbills in support of their organizing efforts.

Today, we adopt an access standard that reflects the specific status of such workers as statutorily protected employees exercising their own rights under the National Labor Relations Act, but not employees of the property owner. We reject both the view that these workers enjoy precisely the same access rights as the employees of the property owner (under the Supreme Court's *Republic Aviation* decision[1]) and the view that the property owner may deny access to these workers except in the limited circumstances when even "nonemployee" union organizers must be permitted on the property (under the Supreme Court's *Lechmere* and *Babcock & Wilcox* decisions[2]). Instead, we strike an accommodation between the contractor employees' rights under Federal labor law and the property owner's state-law property rights and legitimate managerial interests. The Supreme Court instructed us to seek such an accommodation in *Hudgens*[3] and we conclude that such an accommodation is possible, consistent with the terms of the Act, Supreme Court precedent, and the District of Columbia Circuit's remand instructions.

I. PROCEDURAL BACKGROUND

On July 25, 2001, the National Labor Relations Board issued its decisions and orders in these now-consolidated proceedings. *New York New York Hotel & Casino*, 334 NLRB 762 (2001) (Case 28–CA–14519); *New York New York Hotel & Casino*, 334 NLRB 772 (2001) (Case 28–CA–15148). The Board found that the Respondent, New York New York Hotel and Casino (NYNY), violated Section 8(a)(1) of the National Labor Relations Act by prohibiting employees of its subcontractor, Ark Las Vegas Restaurant Corporation (Ark), from handbilling on Respondent's property.[4]

Subsequently, the Respondent petitioned for review of the Board's Orders with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement of its Orders. On December 24, 2002, the court granted the Respondent's petitions for review, denied the Board's cross-petitions for enforcement, and remanded the cases to the Board for further proceedings consistent with the court's opinion.[5] *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002).

By letter dated April 2, 2003, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the Respondent, the General Counsel, and the Charging Party each filed a position statement.

On September 4, 2007, the Board issued a notice of oral argument and invitation to the parties and interested amici curiae to file briefs. The notice requested that the parties address specific questions raised by the court of appeals concerning the employment status and Section 7 rights of a contractor's employees. The questions, set forth in detail in part III, below, included whether, for Section 7 purposes, the contractor's employees are employees, nonemployees, or something else vis-à-vis the owner of the property on which they work, the permissible time and location restrictions on their Section 7 activities, and their right to direct their handbills to guests and customers of the property owner and of their employer.

The General Counsel, the Charging Party, the Respondent, and various amici filed briefs.[6] On

[1] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[2] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[3] *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (holding that the "accommodation between employees' rights and employers' property rights . . . must be obtained with as little destruction of one as is consistent with the maintenance of the other").

[4] Administrative Law Judge Timothy D. Nelson issued the underlying decision in Case 28–CA–14519 on June 29, 1998, and Administrative Law Judge Albert A. Metz issued the underlying decision in Case 28–CA–15148 on April 9, 1999.

[5] The court of appeals consolidated the two cases into a single proceeding to address the petitions for review and cross-petitions for enforcement. Because the analysis we adopt today applies to both cases, this decision addresses them in consolidated form.

[6] The General Counsel filed a preargument brief. The Charging Party and Respondent each filed a preargument brief and a reply brief.

November 9, 2007, the Board heard oral argument.[7] The Board has considered the decisions and the record in light of the Court's remand, the parties' postremand statements of position, the preargument briefs, and oral argument and has decided to modify the standard used to assess the access rights of contractors' off-duty employees, to affirm the Board's prior findings that the Respondent violated Section 8(a)(1) in both cases as alleged, to modify the remedy, and to adopt the recommended Orders as modified.[8]

II. FACTS

The facts of these cases are set out in full in our prior decisions. In brief, Ark has contracted to provide food service to NYNY's guests and customers in three sit-down restaurants and a food court consisting of 10 fast food outlets as well as through banquet catering and room service. Ark also provides food service to employees of NYNY and of its contractors (including Ark's own employees) in NYNY's Employee Dining Room. Ark's is a large operation, employing approximately 900 people and operating 7 days per week, 24 hours per day within the hotel.

In 1997, Ark employees working on NYNY's premises initiated a campaign to obtain representation by the Union, which already represented NYNY's employees. Among other actions in pursuit of representation, on three occasions in July 1997 and April 1998, off-duty Ark employees entered onto NYNY's property (i.e., their regular worksite) to distribute handbills to Ark's and NYNY's customers. The handbills described Ark's lack of a union contract as "unfair" and compared the wages and benefits of the nonunion Ark employees to the wages and benefits of unionized employees doing comparable work at other hotels and casinos on the Las Vegas Strip. The handbills requested that customers tell Ark's managers that Ark should "recognize and negotiate a fair contract with its workers." The handbills distributed by Ark employees in July 1997 (but not those distributed in April 1998) expressly disclaimed any dispute with NYNY.

The handbills were distributed at three access points—at NYNY's porte-cochere (the covered sidewalk and driveway just outside NYNY's main entrance) and directly in front of two Ark-operated restaurants within the hotel, America and Gonzales y Gonzales.[9] On all three occasions, the Ark employees refused NYNY's requests that they leave the property. NYNY summoned the Las Vegas police, who issued trespassing citations to the employees and escorted them off the property.[10] These incidents resulted in the unfair labor practice charges at issue here, which allege that NYNY violated Section 8(a)(1) by prohibiting the Ark employees from distributing handbills on its premises.

In both cases, in agreement with the administrative law judges, the Board found that NYNY had violated the Act as alleged. Relying primarily on *Gayfers Department Store* and *Southern Services*,[11] the Board found that because the handbillers were employees of a contractor who worked regularly and exclusively on NYNY's property, they enjoyed the right to distribute literature to NYNY customers in nonwork areas during nonworking time, subject only to NYNY's need to maintain production and discipline.[12] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).[13]

Amicus briefs were filed by the AFL–CIO and its Building & Construction Trades Department, Pennsylvania State University Law Professor Ellen Dannin, Teamsters Local Union 439, the United States Chamber of Commerce, and the Venetian Casino Resort. The Board did not request postargument briefs.

[7] Chairman Liebman was serving on the Board at the time of the oral argument. Members Becker, Pearce, and Hayes had not yet been appointed but have had access to a transcript of the oral argument.

[8] We shall substitute a new notice to conform to the Board's standard remedial language. We modify the Board's prior Orders to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the Board's prior remedy by requiring that monetary awards shall be paid with interest compounded on a daily basis.

The Charging Party has requested that we grant the *New York New York* cases at issue "related-case status" with *Ark Las Vegas Restaurant Corp.*, Case 28–CA–14228, which, at the time of the Charging Party's request, was also before the Board on remand from the Court of Appeals for the District of Columbia Circuit. 334 F.3d 99 (D.C. Cir. 2003). For the reasons stated in our decision in *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1281 fn. 3 (2004), we have denied the Charging Party's request.

[9] On July 9, 1997, several Ark employees distributed handbills at the porte-cochere. On April 7, 1998, several Ark employees handbilled at the restaurants' entrances. As represented by the Union's counsel at oral argument, the Respondent's assertion that the porte-cochere was not an appropriate location for the Ark employees' handbilling, because it was too far from their worksites, led to the April 7, 1998 handbilling at the restaurants' entrances. Upon being prohibited from handbilling at the restaurants' entrances as well, the handbillers returned to the porte-cochere on April 9, 1998.

[10] One handbiller, who was escorted from NYNY's property by its security officers, did not receive a trespass citation from the police. The citations against the April 1998 handbillers were later withdrawn.

[11] *Gayfers Department Store*, 324 NLRB 1246 (1997); *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992).

[12] The Board found that the handbilling at issue did not interfere with production or discipline. 334 NLRB at 763; 334 NLRB at 773, 774.

[13] The Board found that it was not relevant that the Ark employees were off duty when they returned to NYNY to distribute handbills, citing *Nashville Plastic Products*, 313 NLRB 462, 463 (1993).

III. THE COURT OF APPEALS' DECISION

In its review of the *New York New York* decisions, the Court of Appeals for the District of Columbia Circuit concluded that the Board had failed to consider the implications of the Supreme Court's opinion in *Lechmere* (reaffirming the holding of *Babcock & Wilcox* that nonemployee union organizers are entitled to distribute literature on an employer's private property only when they have no reasonable, nontrespassory means to communicate their message). The court of appeals explained that the Supreme Court held in *Lechmere* that "the scope of § 7 rights depends on one's status as an employee or nonemployee." *New York New York Hotel & Casino v. NLRB*, 313 F.3d at 588. The court instructed the Board to address the implications of *Lechmere* on remand.[14] Likewise, the precedents on which the Board relied, which held that a contractor's employees working regularly and exclusively on particular property have the same rights as employees of the property's owner under *Republic Aviation*, did not fully address *Lechmere*'s distinction between employees and nonemployees.[15] Thus, the court concluded that these precedents lacked a fully articulated rationale and that the Board had erred in simply relying on them. As the court explained:

> [T]he critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner. Our analysis of the Supreme Court's opinions, unlike the Board's in *Southern* and *Gayfers*, yields no definitive answer.
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> No Supreme Court case decides whether the term "employee" extends to the relationship between an employer and the employees of a contractor working on its property. No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees—that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner—because their work site, although on the premises of another employer, is their sole place of employment.
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> This leaves a number of questions in this case unanswered. Without more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights throughout all of the non-work areas of the hotel and casino? Or are the Ark employees invitees of some sort but with rights inferior to those of NYNY's employees? Or should they be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold? Does it matter that the Ark employees here had returned to NYNY after their shifts had ended and thus might be considered guests, as NYNY argues? Is it of any consequence that the Ark employees were communicating, not to other Ark employees, but to guests and customers of NYNY (and possibly customers of Ark)? Compare *United Food & Commercial Workers* [*v. NLRB*], 74 F.3d [292, 298 (D.C. Cir. 1996)]. (Derivative access rights, the Supreme Court has held, stem "entirely from onsite employees' § 7 organizational right to receive union-related information." *ITT Industries*, [*Inc. v. NLRB*,] 251 F.3d [995, 997 (D.C. Cir. 2001)].)
>
> 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. The Board did not perform that function in these cases.

New York New York v. NLRB, 313 F.3d at 590–591. The court thus granted NYNY's petitions for review, denied the Board's cross-petitions for enforcement, and remanded the cases to the Board for reconsideration of the Ark-employed handbillers' status and access rights. Id. at 591.

IV. POSITIONS OF THE PARTIES AND AMICI

The parties and the amici diverge on the basic questions presented by this case.

A. The General Counsel

Starting from the premise that the Ark employees are not employees of NYNY, and thus that *Republic Aviation* does not apply,[16] the General Counsel urges us

[14] The Board referred to *Lechmere* in its decision in Case 28–CA–14519 but apparently assumed that Ark's employees fall on the "employee" side of *Lechmere*'s divide, even with regard to their rights in relation to NYNY.

[15] *Southern Services* was decided before the Supreme Court issued *Lechmere*. The Court of Appeals for the Eleventh Circuit enforced *Southern Services* shortly after *Lechmere* issued but did not address the Supreme Court's reaffirmation of the employee/nonemployee distinction. *Gayfers* issued after *Lechmere*, and although the Board discussed the Supreme Court's distinction between employees and nonemployees, it nonetheless vested the contractor's employees with the same rights as employees of the property owner, relying on the finding that the former worked regularly and exclusively on its property.

[16] This view, which the General Counsel has advocated in the wake of the Court's remand, represents a change of position from the General

to engage in a balancing test that accommodates the Section 7 rights of the Ark employees and the property rights of NYNY. On the employees' side of the balance, argues the General Counsel, the Board must consider the specific right for which access is sought, whether that right is exercised derivatively or not, and the access-seekers' relationship to the property and the property owner. On the property owner's side of the balance, the Board must consider the owner's relationship to the underlying labor dispute. The General Counsel proposes a standard requiring the Board to examine whether the employees had reasonable alternative means to inform consumers about their labor dispute, under the standard not of *Lechmere* but rather the Board's decision in *Jean Country*, 291 NLRB 11, 13 (1988).[17]

Here, the General Counsel asks the Board to remand for evidence on the issue of reasonable alternative means or to conclude that the current record establishes that the Ark employees were entitled to handbill at the porte-cochere and the entrances to the Ark restaurants. The General Counsel contends that denying the Ark handbillers access to NYNY's property would impair their Section 7 rights because it would stymie effective communication of their message to Ark customers, it would more likely enmesh neutrals in the dispute, and it would likely create a safety hazard. Moreover, according to the General Counsel, no special circumstances warrant consideration of whether a media campaign would be an effective alternative. Thus, the General Counsel contends that the existing record supports a finding that no reasonable alternative means exist.[18]

B. The Charging Party

The Charging Party Union argues that because the Ark employees are asserting their own statutory rights and are seeking access to property on which they are regularly and exclusively employed, *Republic Aviation* governs, regardless of the lack of an employment relationship between the Ark employees and NYNY. Citing NYNY's control over Ark, the Union contends that unless the Ark employees are treated as the equivalent of NYNY's own employees with respect to the areas in and around which they work, their access to the property for organizing purposes effectively will be foreclosed.

C. The Respondent

NYNY argues that Supreme Court precedent regarding access rights recognizes only two groups: employees with *Republic Aviation* rights and nonemployees, whose access is subject to *Lechmere*. According to NYNY, because the Ark employees have no employment relationship with NYNY, *Lechmere* governs. NYNY also contends that the Ark employees' access claims are particularly weak because they sought to engage in area-standards handbilling, not organizational activity. Applying *Lechmere*'s access standard, NYNY maintains that the Ark employees had reasonable alternative means of reaching consumers, such as a media campaign or handbilling in public locations. Thus, according to NYNY, it could lawfully eject the Ark employees from its property.

D. Amici Supporting the Charging Party

Amicus AFL–CIO essentially endorses the Union's position, as do Professor Ellen Dannin and Teamsters Local 439, who emphasize the Act's protection of workers outside the employment relationship.

E. Amici Supporting the Respondent

The United States Chamber of Commerce joins with the Respondent in arguing that *Lechmere* controls here, given the lack of an employment relationship between the Ark employees and NYNY. The Venetian Casino Resort takes the same position.

V. ANALYSIS

The narrow issue in this case is whether NYNY violated Section 8(a)(1) of the Act when it prohibited off-duty Ark employees from distributing handbills to customers of Ark and NYNY at three locations on NYNY's property. Under the District of Columbia Circuit's remand, we must address the broader legal and policy questions raised by the factual pattern here, which encompasses two circumstances that pull in opposite directions: the Ark employees were *not* employees of NYNY, but they *were* regularly employed on NYNY's property by its contractor.

Counsel's reliance on *Republic Aviation* when the cases were first litigated.

[17] In *Lechmere,* the Supreme Court expressly rejected the *Jean Country* standard, at least as applied to nonemployee union organizers. 502 U.S. at 538.

[18] The General Counsel answers the questions set forth in the Board's Notice of Oral Argument as follows: (1) The Ark employees have *Republic Aviation* rights only in areas of New York New York's premises where they work and in common areas (parking lots, hallways, and the lobby); (2) "invitee" status, based in property law only, is not relevant, but the Ark employees' relationship to New York New York's property is relevant to assessing the strength of their statutory right; (3) Ark employees' status differs materially from that of the *Lechmere*/*Babcock* nonemployees; (4) Ark employees returned to the property as off-duty employees, not as guests; and (5) the Act protects employees' rights to communicate with their employer's customers; Ark employees made a primary appeal, stood near their worksites, and appealed to New York New York guests and customers so as to reach potential Ark customers.

A.

In remanding, the District of Columbia Circuit observed that the "critical question in a case of this sort is whether individuals working for a contractor on another's premises *should be considered* employees or nonemployees of the property owner." 313 F.3d at 590 (emphasis added). The Court added that its "analysis of the Supreme Court's opinions . . . yields no definitive answer." Id. We necessarily start with that question.

1.

As a preliminary point, it is clear that the undisputed lack of an employment relationship between the Ark employees and NYNY is not dispositive here.[19] The Act clearly regulates the relationship between an employer (such as NYNY) and employees of other employers (such as the employees of Ark). The Act contains not only a broad definition of the term "employee," but one whose breadth is aimed directly at the question at issue. The Act provides that

> [t]he term 'employee' shall include any employee, and *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise. . . .

Section 2(3), 29 U.S.C. § 152(3) (emphasis added). The precise terms of the Act's prohibitions also make clear that an employer's action toward the employees of other employers can constitute an unfair labor practice. The prohibition at issue in this case, contained in Section 8(a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The prohibition is not limited to interference with the rights of *his* employees. In contrast, the prohibition in Section 8(a)(5) is so limited, providing that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of *his* employees." (Emphasis added.)[20] Finally, further evidence of Congress' clear intent regarding this issue is found in the Act's definition of the statutory term "labor dispute" to include "any controversy concerning . . . the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."[21]

In each of these ways, Congress made clear in the text of the Act that the term "employee" does not refer to a relationship between individual workers and a single employer and, specifically, that the prohibition contained in Section 8(a)(1) of the Act extends to actions by employers affecting employees of other employers. As the Supreme Court explained in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192 (1941) (internal citations omitted):

> This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. . . . The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee."

Based on these clear textual indications of Congress' intent, the Board as well as the courts have held in a wide variety of contexts that "an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship." *International Shipping Assn.*, 297 NLRB 1059, 1059 (1990). See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 510 fn. 3 (1976) (quoting the language of Sec. 8(a)(1) and observing that "[t]he Board has held that a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own"); *Fabric Services*, 190 NLRB 540 (1971) (employer/owner unlawfully required employee of contractor working onsite to remove union insignia). Cf. *Five Star Transportation, Inc. v. NLRB*, 522 F.3d 46, 50–51 (1st Cir. 2008) (citing Sec. 2(3) in holding employer liable for retaliatory refusal to hire workers who were not its employees when they engaged in statutorily protected activity).

The Ark employees, then, are statutorily protected employees, and NYNY is a covered employer that can, under certain circumstances, be held to violate the Ark employees' statutory rights, even though the Ark employees are not employees of NYNY.

[19] No party argues that the contractual or economic relationship between New York New York and Ark sufficed to make New York New York a joint employer of Ark's employees, notwithstanding the control that New York New York exercised over certain aspects of Ark's operations. See generally *Airborne Express*, 338 NLRB 597 (2002).

[20] "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 (2002) (*quoting Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

[21] 29 U.S.C. § 152(9).

2.

The primary question posed by the court of appeals could be read as posing an either/or choice for the Board, requiring us to treat the Ark employees either as equivalent to NYNY employees (and thus granting them full *Republic Aviation* access rights) or as equivalent to nonemployee union organizers (and so applying the much more restrictive access test of *Lechmere*). Both the Union and NYNY frame the issue this way—and, predictably, propose different answers, the Union insisting that *Republic Aviation* governs and NYNY pointing to *Lechmere*.

We reject this framework. Rather, we seek to establish an access standard that reflects the specific status of the Ark employees as protected employees who are not employees of the property owner, but who are regularly employed on the property. Neither *Lechmere* nor *Republic Aviation* involved this category of persons. Neither case, in the court's words, "yields [a] definitive answer" here. 313 F.3d at 590.

In *Lechmere*, the Supreme Court dealt with the claims of "nonemployee"[22] union organizers seeking access to an employer's property for the purpose of informing the employer's employees of their Section 7 right to self-organization and encouraging them to exercise that right. Reaffirming its earlier decision in *Babcock & Wilcox*, the Court viewed the organizers as exercising not their own Section 7 rights, but rather rights deriving from the Section 7 rights of the employees they sought to contact. 502 U.S. at 532. *Lechmere* holds that where access to an employer's private property is sought by nonemployee union organizers seeking to exercise Section 7 rights "derivatively," the threshold question is whether the employees are otherwise inaccessible. Id. at 537–538. Only if such a showing is made does a balancing of employee Section 7 rights and employer property rights come into play. Id. at 538.[23]

As the District of Columbia Circuit has explained, simply because the Ark employees were not employees of NYNY does not mean that the holding of *Lechmere* controls. Rather, we see important distinctions, as a matter of both law and policy, between the Ark employees and the nonemployee union organizers involved in *Lechmere*.

[22] The Supreme Court in *Lechmere* classified the union organizers as "nonemployees." We employ that terminology here even though, as employees of a labor organization, the union organizers were employees protected by the Act.

[23] *Lechmere* also recognizes that restricting nonemployee access will violate Sec. 8(a)(1) if done in a manner that discriminates against union activity. Id. at 535.

First, Ark's employees were not seeking access to NYNY's property for the purpose of urging others to exercise their Section 7 rights. They were statutorily protected employees directly exercising their own Section 7 right to self-organization.

Second, the policy implications of applying the *Lechmere* test—which the District of Columbia Circuit has invited us to consider, 313 F.3d at 590—are troubling. In all but exceptional cases, the employees of a contractor who work regularly on another employer's property would be accorded diminished rights based merely on the location of their workplace, without any showing that the resulting limitations on the employees' rights are necessary to protect any legitimate interests of their employer or the property owner. According such employees only the rights of union organizers based solely on the lack of an employment relationship with the property owner would often create serious obstacles to the effective exercise of their Section 7 rights—even though the property owner derives an economic benefit from their work. Indeed, linking full Section 7 rights to the existence of a particular employment relationship might create an incentive for businesses to structure their relationships with each other and thus with workers so as to restrict workers' statutory rights, in contravention of the declared congressional policy of "protecting the exercise by workers of full freedom of association [and] self-organization." 29 U.S.C. § 151.[24]

This approach would be most problematic in the many situations where the employer of the employees who work regularly on the property has no leasehold interest or fixed place of work within the owner's property. For example, janitors employed by a cleaning company who work regularly in an office building not owned by their employer should not be denied Section 7 rights on the sole grounds that they work on the property of an employer other than their own. As explained, the National Labor Relations Act expressly does not require that employees be employed by a particular employer in order to confer rights on the employees or impose obligations on the employer to respect the employees' rights. We see no persuasive reason to adopt a rule that, in essence, establishes such a requirement administratively and thereby relegates some workers to second-class status under the Act based solely on the location of their work.

[24] See *Scott Hudgens*, 230 NLRB 414, 418 (1977) ("A contrary holding would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls, and would thereby render Section 7 meaningless as to their employees.").

Finally, the Ark employees are not "strangers"[25] to or "outsiders"[26] on the property like the union organizers in *Lechmere* and *Babcock & Wilcox*. Whatever the limits of the invitation extended to Ark employees under state property law, the Ark employees worked on the property every day for a party that had both a contractual and a close working relationship with NYNY. For this reason as well, we view the Ark employees very differently than nonemployee union organizers.

For each of these reasons, discussed in more detail below, we conclude that *Lechmere* and *Babcock & Wilcox* do not control here. Nevertheless, we are mindful of the Supreme Court's admonition that the "distinction between rules of law applicable to employees and those applicable to nonemployees" is "one of substance." *Babcock & Wilcox*, 351 U.S. at 113. See *Lechmere*, 502 U.S. at 537. Given that distinction, this case cannot be decided—as the Board has decided similar cases in the past—by mechanically applying the established rules of law articulated in *Republic Aviation*, supra, which govern the ability of employees to engage in solicitation and distribution on the property of their own employer.[27] Just as we see differences between the Ark employees and the union organizers in *Lechmere*, so also do we recognize the distinction between persons employed by a contractor and the employees of the property owner itself.

3.

Our answer to the court of appeals' central question in remanding this case, then, is reached by analyzing the statutory rights of such workers and the property rights and managerial interests of the property owner, seeking an accommodation between the two. In employing this form of analysis, we are guided by the Supreme Court's observation that

> [u]nder the [National Labor Relations] Act, the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two." What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted.
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> . . . Accommodation between employees' § 7 rights and employers' property rights . . . "must be obtained with as little destruction of one as is consistent with the maintenance of the other."
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> . . . .
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> . . . The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and the strength of the respective § 7 rights and private property rights asserted in any given context.

Hudgens v. NLRB, 424 U.S. at 521–522 (citations omitted).

After *Lechmere*, the Board—with the approval of both the Sixth Circuit and the District of Columbia Circuit, the latter in a decision that came after the remand decision here—has employed such an analysis in cases analogous to this one involving the access rights of off-duty employees of the employer/property owner who are employed at locations separate from where they seek access. See *Hillhaven Highland House*, 336 NLRB 646 (2001) (establishing test governing access rights of offsite employees), enfd. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003); *ITT Industries*, *Inc. v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005) (affirming Board test adopted in *Hillhaven Highland House*).

In seeking the proper accommodation here, we thus do not write on a blank slate. Under *Republic Aviation*, it is well established that an employer that operates on property it owns ordinarily violates the Act if it bars its employees from distributing union literature during their nonwork time in nonwork areas of its property. Moreover, such an employer's off-duty employees have a presumptive right to return to their work site and gain access to exterior, nonwork areas for purposes of otherwise protected solicitation under *Tri-County Medical Center*, 222 NLRB 1089 (1976), and *Nashville Plastic Products*, 313 NLRB 462 (1993).[28] Finally, the employer's off-duty employees who are employed at another location presumptively have the same rights as

[25] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978).

[26] *Hudgens v. NLRB*, 424 U.S. at 522.

[27] To the extent that our decisions in *Southern Services*, 300 NLRB 1154 (1990), and *Gayfers Department Store*, 324 NLRB 1246 (1997), did not recognize that distinction, we depart from and overrule their rationales, but not their holdings; for purposes of today's decision, we need not address the correctness of their holdings on their respective facts.

Our dissenting colleague argues that language in our decision today is inconsistent with the Board's decision in *Postal Service*, 339 NLRB 1175 (2003), which involved the access rights of contractor employees who worked regularly, but not exclusively, on the property of someone other than their employer. Because *Postal Service* is clearly distinguishable on its facts, however, we need not and do not address its continuing validity in this case.

[28] See also *ITT Industries v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001) ("It is likewise well-established that the Board has the authority, under Section 8(a)(1) of the NLRA, to prevent employers from posting parking lots against off-duty employees unless the employer present[s] valid business justifications for the restriction."); *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 939–940 (4th Cir. 1990); *NLRB v. Ohio Masonic Home*, 892 F.2d 449, 453 (6th Cir. 1989); *NLRB v. Pizza Crust Co. of Pa.*, 862 F.2d 49, 52–55 (3d Cir. 1988) (all upholding the Board's rule).

off-duty employees who work at the location at issue. *Hillhaven Highland House*, supra.[29] Under these precedents, as the court of appeals recognized, if NYNY had barred its own employees from engaging in the expressive activity engaged in by the Ark employees in the same locations, it would have violated the Act. In conducting the analysis here, then, we ask whether the relevant rights and interests are different in this case because the employees are not employees of the property owner (even though they are regularly employed on the property) and, if so, how that affects the proper accommodation.

The court of appeals found that our original decision "provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same § 7 rights as NYNY's employees." 313 F.3d at 588. We have thus taken as our central task on remand to explore whether and, if so, why "in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same § 7 rights as NYNY's employees."

B.

We turn now to a closer, more practical examination of the Section 7 rights involved in this case and the property rights and managerial interests with which they must be accommodated. The court of appeals has asked us to probe beyond the abstract distinctions between employees and nonemployees as well as between invitees and trespassers. Specifically, the court asked us to consider "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." 313 F.3d at 590. As we will explain, the balance here tips in favor of finding that NYNY unlawfully excluded the off-duty Ark employees from its property.

1.

We begin by considering the Ark employees' rights and interests in relation to the specific activity they engaged in on NYNY's property. As part of a campaign to win union representation for themselves, the Ark employees distributed handbills to Ark's and NYNY's customers, seeking their support in getting Ark to "recognize and negotiate a fair contract with its workers."

In distributing handbills to support their own organizing efforts, Ark employees—who indisputably are covered by the Act, as protected employees under Section 2(3)—were exercising their own Section 7 rights. In *Lechmere*, the Supreme Court pointed out that the Act "confers rights only on *employees*, not on unions or their nonemployee organizers," whose rights are derived from the right of employees to learn about the advantages of self-organization from others. 502 U.S. at 532 (emphasis in original). Thus, as the Court explained, there is a "critical distinction between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) and nonemployees (to whom § 7 applies only derivatively)." Id. at 533. This case involves the organizing activities of employees whose right to self-organization is statutorily guaranteed, not persons "to whom Section 7 applies only derivatively." That the Ark employees lack an employment relationship with NYNY does not make their Section 7 rights in any way "derivative" of the rights of other employees.[30]

Indeed, the Ark employees were not "outsiders," in contrast to the union organizers in *Babcock & Wilcox* and *Lechmere*. This distinction is relevant in considering both the weight of the employees' rights and the extent to which their exercise interferes with the owner's rights and interests (as discussed below). The Ark employees were regularly employed on NYNY's property by the company's contractor. The hotel and casino complex was their workplace. They worked not only inside Ark's restaurants but throughout the premises, providing room service, carrying supplies, and servicing and patronizing NYNY's employee cafeteria. As the Supreme Court has observed, the workplace is the "one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other

[29] See also *ITT Industries*, 341 NLRB 937, 939–941 (2004), enfd. 413 F.3d 64 (D.C. Cir. 2005); *Eagle-Picher Industries*, 331 NLRB 169, 169 fn. 2 (2000), *Southern California Gas Co.*, 321 NLRB 551, 551 fn. 1 & 557–558 (1996); and *Postal Service*, 318 NLRB 466, 466 (1995).

[30] In access cases, the District of Columbia Circuit has approved the Board's taking into account whether an access claim was derivative or not. See *ITT Industries v. NLRB*, 413 F.3d at 70–71 (affirming Board's conclusion, following remand, that offsite employees of property owner exercised "personal rather than derivative" rights).

We do not read *Food & Commercial Workers Local 880 v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996), cert. denied 519 U.S. 809 (1996), as foreclosing the Board, here and in similar cases, from giving weight to whether individuals are seeking to exercise their own Sec. 7 rights as employees or merely urging others to do so. The issue in *Food & Commercial Workers* was whether *Lechmere* applied (as the Board had found it did) when union organizers and union members not employed on the property sought access not for the purpose of organizing activity (as in *Lechmere*), but rather to pursue area standards and consumer boycott activity. The court rejected the union's argument that because the right to engage in such activity did *not* derive from the rights of the property owner's employees, the access claim at issue was actually *stronger* than the claim asserted, unsuccessfully, in *Lechmere*. 74 F.3d at 298–299. The crux of the court's holding was that *Lechmere* applies to all claims of access by individuals not employed by an employer working on the premises.

matters related to their status as employees." *Eastex*, 437 U.S. at 574 (internal quotation marks omitted). It seems unlikely, as a practical matter, that Ark employees would view the limits of Ark's leasehold as setting the boundaries for engaging in Section 7 activity at work. Yet NYNY's argument—which would have the Board treat Ark employees no differently from union organizers—suggests the hotel could bar an Ark employee from handing a union card to a fellow employee in the hotel's parking lot, as they walked together through the hotel to the restaurant, or as they sat together at lunch in NYNY's employee cafeteria.

Even if the Ark employees were exercising their own rights proximate to their own workplace, we must address the District of Columbia Circuit's question:

> 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 organizational right to receive union-related information." *ITT Industries*, 251 F.3d at 997.)

313 F.3d at 590. As reflected in a decision cited by the court, there is some support in the circuit's case law for finding certain Section 7 rights weightier than others. *Food & Commercial Workers*, 74 F.3d at 298 (distinguishing between organizational activity and other union activities directed at consumers in upholding Board's application of *Lechmere* test to area standards and consumer boycott activity by union organizers and nonemployee members).[31] But what matters here is less the intended audience of the Ark employees than that the Ark employees were exercising their own rights under Section 7 in organizing on their own behalf.[32] Indeed, the Ark employees' very act of appealing for public support immediately outside their workplace communicated their determination to form a union to their fellow employees.[33] Moreover, the purpose of the communication to consumers (and, indirectly, to employees)—to gain support in organizing—rests at the core of what Congress intended to protect through Section 7. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978) ("[T]he right to organize is at the very core of the purpose for which the [National Labor Relations Act] was enacted."). This is true regardless of the primary audience of the organizational communication. As the court of appeals explained in a decision issued after the remand of this case, which involved employee solicitation of nonemployees on their employer's property:

> [N]either [the circuit] nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees.

Stanford Hospital & Clinics v. NLRB, 325 F.3d 334, 343 (D.C. Cir. 2003).[34] See also *Santa Fe Hotel & Casino*, 331 NLRB 723, 728–729 (2000) (holding that employer unlawfully prohibited off-duty employees from handbilling customers at entrances to hotel and casino, seeking support in persuading employer to bargain for first contract). *Food & Commercial Workers*, supra, is not to the contrary.[35]

Indeed, in the context of this case, the intended audience of the Ark employees is a factor that strengthens, rather than weakens, their statutory claim to access, certainly with respect to the areas in front of the Ark-operated restaurants. At those locations, Ark employees were uniquely able to identify and communicate with the relevant subset of NYNY customers—those considering whether to patronize an Ark restaurant—with minimal difficulty and expense. See *Scott Hudgens*, 230 NLRB at 416 (explaining that intended audience of picketers, potential customers of store, "became established as such only when individual shoppers decided to enter the store"). For this reason, the location of the expressive activity here—the very threshold of the employees' own workplace—has been a central site of protected Section 7 activity since the

[31] See also *Hudgens*, 424 U.S. at 521–522 (the "locus of accommodation" of Sec. 7 rights and property rights "may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context").

[32] The dissent would create an entirely new hierarchy of rights resting not only on the object of their exercise (i.e., self-organization v. other objects), but also on the manner of their exercise (self-organization via communication with other employees v. seeking support from consumers or the general public).

[33] Moreover, even if the flyers' primary audience was consumers, other Ark employees might have received a flyer on their way in or out of work and the flyers' message—that Ark employees were underpaid and should have union representation—would have had significance for employees.

[34] The primary issue in *Stanford Hospital* was whether an employer could prohibit employees from soliciting nonemployees and distributing union materials to them anywhere on its property. Affirming the Board, the court held that the employer's rule was overbroad. "What matters under *Lechmere*," the *Stanford Hospital* court observed, "is not the identity of a solicitor's intended audience . . . but whether the solicitor is employed by the property owner or otherwise lawfully on the employer's property." 325 F.3d at 343.

[35] In *Food & Commercial Workers*, not only were none of the individuals at issue employed on the property, but in neither of the two consolidated cases was their message directly related to organizing. In one case, it related to a layoff, and, in the other, it asked consumers to boycott a nonunion store. 74 F.3d at 295–297.

passage of the Act. Wholly excluding the Ark handbillers from these uniquely effective locations would place a serious burden on the exercise of their Section 7 rights to communicate with the relevant members of the public.

In sum, we find that the statutorily-recognized interests of the Ark employees, as implicated here, are much more closely aligned to those of NYNY's own employees (who, under our law, would have been entitled to the access sought) than they are to the interests of the union organizers at issue in *Lechmere* and *Babcock & Wilcox*. As we have explained, despite their lack of an employment relationship with NYNY, the Ark employees are statutorily protected employees, who were exercising their own Section 7 rights of self-organization, not rights derived from those of other employees. They were not strangers or outsiders to NYNY's property; rather, they worked there regularly, for an employer with a close economic relationship to NYNY. Finally, they sought access to locations that were uniquely suited to the effective exercise of their statutory rights.

2.

We turn now to a consideration of NYNY's interests in denying off-duty Ark employees access to portions of its property outside Ark's leasehold for purposes of distributing literature.[36] Most fundamentally, there is no question that—countervailing considerations of Federal labor law aside—NYNY, as the property owner, had a right to exclude the Ark employees. "[O]ne of the essential sticks in the bundle of property rights is the right to exclude others." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). Any rule derived from Federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude. We must, and do, give weight to that fact. As a corollary, it also seems clear that, purely from the perspective of state property law, the Ark employees were trespassers at the moment they began to distribute handbills. Whatever their status as NYNY's invitees at other times and for other purposes, there is no suggestion that the off-duty Ark employees had an invitation from NYNY that privileged them to distribute handbills to the public in the locations involved here. This fact, too, must be taken into account, although it cannot be dispositive consistent with the well-established principle that state law property rights sometimes must yield to the imperatives of Federal labor law.[37]

Apart from its state law property right to exclude, NYNY also has a legitimate interest in preventing interference with the use of its property. Whether that interest is deemed a property right or a "management interest," perhaps ultimately derived from property ownership,[38] it is entitled to appropriate weight. Indeed, even under *Republic Aviation*, an employer can impose restrictions on its own employees' solicitation and distribution if the restrictions are shown to be necessary to maintain production and discipline. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492–493 (1978); *Republic Aviation*, 324 U.S. at 803 fn. 10. On the records here, however, the judges found, and we agree, that the Ark employees' handbilling did *not* interfere with operations or discipline at NYNY's complex. The handbilling did not adversely affect the ability of customers to enter, leave, or fully use the facility or the ability of Ark or NYNY employees to perform their work, and it was not a violation of any rule that NYNY attempts to defend as necessary to ensure operations or discipline.

[36] The dissent states that we pay only "lip service to the owner's property interest." In fact, and in contrast to the dissent, we proceed to carefully analyze that interest and the legal and practical means available to the owner to protect it in this precise situation.

[37] As we have observed in an analogous situation, with the approval of the District of Columbia Circuit, because "any employee engaged in activity to which the employer objects on its property, might be deemed a trespasser, not an invitee," "[t]here is an inherent tension . . . between an employer's property rights and the Section 7 rights of its employees." *Hillhaven Highland House*, 336 NLRB at 649 (addressing access rights of offsite, off-duty employees).

This tension, the District of Columbia Circuit has held, "cannot be resolved merely by reference to the law of trespass." *ITT Industries v. NLRB*, 413 F.3d at 72. As the *ITT* court explained, "[p]urely from the perspective of trespass law, on-site employees may exceed the scope of their invitation to access, and so not be 'rightfully' on, the employer's property when they handbill at a place or time forbidden by their employer." Id. at fn. 2, citing *Restatement (Second) of Torts* § 168 (1965).

In its remand decision here, the District of Columbia Circuit raised the possibility that the Ark employees might be considered "invitees of some sort but with rights inferior to those of NYNY's own employees" or, alternatively, as "guests," for whom NYNY was entitled to set the terms of access. 313 F.3d at 590. We see no clear basis in property law for regarding the Ark handbillers as invitees, but, as explained, we also conclude that viewing them as trespassers for some purposes and guests for others cannot be dispositive of the access issue presented. In short, the categories of property law can take the analysis here only so far.

[38] See *Hudgens v. NLRB*, 424 U.S. at 522 fn. 10 (distinguishing *Republic Aviation* from *Babcock & Wilcox* by observing that "when the organizational activity was carried on by employees already rightfully on the employer's property," the "employer's management interests, rather than his property interests" were involved); *Eastex*, 437 U.S. at 574 (in evaluating employees' in-plant distribution of literature, Board was "entitled to view the intrusion by employees on the property rights of their employer as quite limited in this context as long as the employer's management interests are adequately protected").

We must nevertheless consider the fact that the Ark employees had no employment relationship with NYNY and ask whether that fact might justify a prophylactic rule limiting their access, despite the lack of any disruption or misconduct in this case. In considering the access rights of offsite, off-duty employees, we have pointed out that the existence of an employment relationship gives the employer some measure of control over the employees, independent of its property rights, which is not available in relation to "strangers" such as union organizers. See *Hillhaven Highland House*, 336 NLRB at 649. It is appropriate, then, to consider the *absence* of an employment relationship in cases like this one in evaluating NYNY's interests. Here, however, that deficit is mitigated by a different means through which NYNY could exercise control over the Ark employees: its relationship with the employees' employer, Ark. This mechanism is not available to a property owner with respect to persons who are truly strangers to the property, like the union organizers in *Lechmere* and *Babcock & Wilcox*.

Given the voluntary and mutually beneficial arrangement between NYNY and Ark, NYNY reasonably could have anticipated that Ark employees would seek access to its property for Section 7 activity (access that, under existing law, NYNY would have been compelled to grant to its own employees), and NYNY was free to negotiate contractual terms with Ark sufficient to protect its interests in relation to Ark's employees.[39] In fact, NYNY's contract with Ark did exactly that, requiring Ark to make all reasonable efforts to ensure that Ark employees

> abide by any reasonable rules and regulations as [New York New York] may, from time to time, reasonably adopt for the safety, care and cleanliness of [Ark's premises], or the Hotel or for the preservation of good order thereon or to assure the operation of a first-class resort hotel facility.

NYNY's contract with Ark also imposed specific requirements on the contractor in relation to its employees, including that they be subject to drug testing.[40] Furthermore, NYNY's control over Ark's employees, through its relationship with Ark, extended specifically to their off-duty, on-premises conduct, for example, to barring them from wearing their uniforms and entering the bars inside the hotel. 334 NLRB at 767–768 fn. 8. Even absent the express contractual commitment on the part of Ark to use its employment authority to enforce NYNY's rules and so protect against disruption of the hotel's operations, NYNY and Ark share an economic interest in ensuring that Ark employees do nothing that might interfere with the operations of the hotel. NYNY is simply wrong, then, when it argues that "there existed no means for NYNY to regulate or control the infringement on its private property other than through reliance on state trespass laws." Statement of Position at 9.

NYNY's ability to protect its operational and property interests in relation to its contractors' employees is the rule, not the exception. The Board's case law reflects long and extensive experience with contractual relationships between employer/contractors and property owners. Our experience suggests that such a relationship ordinarily permits the property owner to quickly and effectively intervene, both through the employer and directly, to prevent any inappropriate conduct by the employer's employees on the owner's property. As the judge found in one case affirmed by the Board, "[a]n employer receiving contracted labor services will of necessity exercise sufficient control over the operations of . . . the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations. . . ." *Southern California Gas Co.*, 302 NLRB 456, 461 (1991). Property owners often give directions to employees of contractors through the contractors' onsite managers and supervisors.[41]

[39] In *Scott Hudgens*, 230 NLRB at 418, the Board reasoned that "[i]n leasing the shops to the merchants, Hudgens necessarily submitted his own property rights to whatever activity, lawful and protected by the Act, might be conducted against the merchants had they owned, instead of leased, the premises."

After *Lechmere*, the Board has continued to require construction contractors to grant union agents access to their property, in order to carry out representational duties on behalf of a subcontractor's employees pursuant to the provisions of a collective-bargaining agreement between the subcontractor and the union, reasoning that the contractor, "by soliciting other employers to perform work at the jobsite, 'invited' subcontractors . . . onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors." *CDK Contracting Co.*, 308 NLRB 1117 (1992). See also *Wolgast Corp. v. NLRB*, 349 F.3d 250 (6th Cir. 2003), enfg. 334 NLRB 203 (2001).

[40] Ark's employee handbook informed Ark employees:

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

[41] See, e.g., *J.P. Mascaro & Sons*, 313 NLRB 385, 387 (1993) (owner's maintenance manager set schedule for needed work and gave it to contractor's lead, onsite mechanic who assigned work to contractor's employees), enfd. sub nom. *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93 (2d Cir. 1994); *Southern California Gas*, 302 NLRB at 459 ("The general practice was that assignments, orders, requests, and complaints were given [by owner to contractor's supervisors], and that

Contractor employees, then, are ordinarily deterred from engaging in misconduct not only by the presence of their own employer on site (whose managers and supervisors are just as likely as those of the owner to immediately respond to any disruptive behavior), but also by the property owner's ability to direct the employer's managers and supervisors to take action.[42] In specific instances, such as when they observe misconduct, property owners themselves often direct contractors' employees without the mediation of the contractor/employer's agents.[43] Finally, property owners can exercise their authority to direct contractors to remove employees from the premises and not permit them to return.[44] Such exclusion by the owner may result in the contractor terminating the employee.[45] The owner need not even make a request of the contractor, in many instances, as the contractor has every incentive not to permit its employees to interfere with the owner's operations and thereby jeopardize its contract.[46]

These cases support our conclusion that property owners ordinarily are able to protect their property and operational interests, in relation to employees of contractors working on their premises, without resort to state trespass law.[47] Like these property owners, NYNY is very differently situated with respect to Ark employees seeking access to its property than were the property owners in *Lechmere* and *Babcock & Wilcox* faced with union organizers who sought access to their property.

C.

The Board's task is thus to find an accommodation between the Ark employees' Section 7 interests and NYNY's property rights and managerial interests as we have analyzed them. Careful consideration of the questions asked by the court of appeals, and of our own case law and experience, leads us to conclude that the property owner generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor (as this case illustrates), but the contractors' employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without our intervention.

Nevertheless, our decision is a relatively narrow one. We address only the situation where, as here, a property

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these supervisors took the necessary steps to accomplish the task."); *International Shipping Assn.*, 297 NLRB at 1066 (warehouse manager patrolled the premises and, when he observed a problem, informed contractor's supervisor).

[42] See, e.g., *TLI, Inc.*, 271 NLRB 798, 799 (1984) (When a contractor-employed driver "engages in conduct adverse to [manufacturer/owner's] operations, [manufacturer/owner] supplies [contractor] . . . with an 'incident report' whereupon a [contractor] representative investigates. Disciplinary notices, or necessary actions, are issued by [contractor]."), affd. mem. sub nom. *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985).

[43] See, e.g., *Service Employees Local 254 (Women & Infants Hospital*), 324 NLRB 743, 747 (1997) (college directed janitorial contractor's employees "to clean spills, stock bathrooms, or perform similar 'emergency' tasks"); *International Shipping Assn.*, 297 NLRB at 1066 (warehouse manager patrolled the premises and when he observed a problem either informed the contractor's supervisor or instructed contractor's employees).

[44] See, e.g., *Akal Security, Inc.*, 355 NLRB No. 106 (2010) (U.S. Marshals Service revoked credentials of two employees of security contractor working in courthouses, leading to their termination the following day); *Service Employees Local 254*, 324 NLRB at 746 (college directed janitorial contractor to replace employees, including one "as part of an effort to curb petty thefts"); *Southern California Gas*, 302 NLRB at 458–459 (after owner's employee found contractor's employee sleeping on the job, owner informed contractor that employee would no longer be permitted on the premises); *Osco Drug, Inc.*, 294 NLRB 779, 781 (1989) (if customer asked contractor/carrier to remove particular driver from its account, contractor would do so); *Cabot Corp.*, 223 NLRB 1388, 1389 (1976), affd. 561 F.2d 253 (D.C. Cir. 1977) (contract provided that owner could insist that contractor "remove employees from the job").

[45] See, e.g., *Bowling Transp.*, 336 NLRB 393, 393–394 (2001), enfd. 352 F.3d 274 (6th Cir. 2003) (employer violated Sec. 8(a)(3) by discharging employees after property owner barred them from the premises due to suspected union activity).

[46] See, e.g., *Osco Drug*, 294 NLRB at 781 (after contractor-employed driver "had repeatedly and insistently rung the bell at the entrance of [owner's property]," contractor disciplined him and warned "that he would not be allowed to work for [owner] if there were a repetition of this type of incident").

[47] In fact, the property owner's ability to protect its legitimate interests in controlling access may be greater in relation to employees of contractors who work regularly on the owner's property than in relation to the owner's own, offsite employees who have a presumptive right to enter exterior, nonwork areas to engage in expressive activity. See *Hillhaven*; *ITT*. Whatever identification and access control policies are in place at the property presumably already apply to contractors' employees, but may not, in many instances, apply to the property owner's own, offsite employees. In addition, as a practical matter, the property owner's onsite managers, supervisors, and security personnel are more likely to be familiar with contractors' employees who work on the owners' property every day than with the owner's own employees who work at a separate site. Finally, if there is misconduct, property owners can go immediately to contractors' onsite supervisors or managers and demand redress. In the case of a large, multisite operation (e.g., a nursing home chain such as Hillhaven), that process may be more complex.

In this case, NYNY's security department issued badges and identification cards to all Ark employees (reading "New York New York, Ark Las Vegas") just as it did to NYNY employees. *Ark*, 343 NLRB at 1283; *New York New York*, 334 NLRB at 767. The Ark employees had to use the identification cards when they arrived at work in the hotel. In fact, the handbilling employees presented their identification cards when they were confronted by hotel security. Tr. 61 (Case 28–CA–14519). Compare *First Healthcare*, 344 F.3d at 541 ("[I]f [an employer/owner] is faced with a security concern by not being able to identify offsite employees in an orderly or reasonable fashion, the Board has taken account of such a situation and may well consider the employer's denial of access in such a situation to be justified.").

owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.[48]

We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law). Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer's property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner's interests in the efficient and productive use of the property. The standard we adopt today is thus analogous to that adopted in *Hillhaven Highland House*, which was enforced by the District of Columbia Circuit.[49]

We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees. We express no view today, however, on precisely which unique restrictions on contractor employees' access might be lawful, although they will be evaluated consistent with the accommodation of interests we have engaged in here. Such determinations are best made on a case-by-case basis.[50]

In adopting this test, we decline to condition access to the property on a showing by the off-duty employees (or by the General Counsel on their behalf) that they lack a reasonable alternative means, however defined, of communicating with their intended audience.[51] In this situation, where the employees are seeking to exercise their own statutory rights in and around their own workplace, imposing such a prerequisite burdens employees' Section 7 rights more than is necessary to adequately protect the property owner's rights and interests. As the Supreme Court confirmed in *Eastex*, supra at 574, the workplace "is a particularly appropriate place for the distribution of § 7 material." Neither the Board nor any court has ever required employees to prove that they lacked alternative means of communicating with their intended audience as a precondition for recognition of their right, subject to reasonable restrictions, to communicate concerning their own terms and conditions of employment in and around their own workplace. By permitting the property owner to impose reasonable, narrowly tailored restrictions on access when demonstrably necessary, in contrast, we ensure a more refined and a more easily administered accommodation of rights and interests. With respect to the issue of alternative means of communication, then, we view employees like the Ark handbillers as substantially different from the access seekers involved in cases applying some type of a reasonable-alternative-means standard—the union organizers in *Lechmere* and

[48] We conclude that this case does not require us to decide whether the Ark employees would be entitled to access to all other or, indeed, any other nonwork areas of the hotel and casino.

[49] In that case, as here, we accommodated the property rights of the owner and the Sec. 7 rights of employees whose activities arguably caused the owner heightened concern (though the bases for the claimed concerns differ). In *Hillhaven*, we recognized that "an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property," and thus we held that offsite employees have a right of "access to the outside, nonworking areas of the employer's property" as do off-duty, onsite employees, "except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees." 336 NLRB at 648.

[50] Our dissenting colleague mistakenly asserts that today's decision extends greater rights to the Ark employees than would be enjoyed by off-duty NYNY employees under *Tri-County Medical Center*, 222 NLRB 1089 (1976). Pursuant to that precedent, an employer/owner could lawfully adopt a rule barring off-duty employees from returning to interior areas of its premises. Here, there is no evidence in the record that NYNY maintained a rule barring its own employees from returning to interior areas of the hotel. Similarly, there is no evidence in the record that NYNY maintained a rule barring off-duty Ark employees from returning to interior areas of the hotel (other than to the bars). In fact, the record clearly demonstrates the contrary.

Unlike our colleague, NYNY did not argue that the off-duty Ark employees had no right to return to interior areas of the hotel to engage in otherwise protected activity. Rather, NYNY argued that Ark employees had no rights anywhere on the property outside Ark's leasehold without distinguishing interior from exterior areas. Thus, unlike our colleague, NYNY never offered the porte-cochere as an alternative location to the restaurant entrances. Indeed, the Union's counsel stated at argument that the Union resorted to handbilling at the entrances to the restaurants only because NYNY argued, in response to the charge filed after handbillers at the porte-cochere were ticketed and escorted off the property, that the handbilling at the porte-cochere was not protected because it was too far from the Ark employees' worksites. When the Ark employees were then barred from handbilling at the restaurant entrances, they went back to the porte-cochere and again were ejected. If an owner/employer imposes a reasonable, non-discriminatory, narrowly-tailored restriction on the access of its contractors' employees to interior areas of its property and that restriction is challenged under the Act and defended under *Tri-County*, we will consider the matter. But no such facts or arguments are at issue in this case.

[51] Or to permit the Respondent to prove the converse as suggested in the dissent.

the offsite employees of a shopping center tenant in *Hudgens*—who had no connection to the property. In this regard, the Ark employees share more in common with the property owner's own employees, to whom no alternative-means standard applies. See *Eastex*, 437 U.S. at 572–573.

As a general matter, the test we adopt today seeks to place the Ark employees and similarly situated, protected employees at a point on the spectrum of accommodation between Section 7 rights and property rights that reflects the similarities and differences between them and other access seekers considered in the Supreme Court's and our prior jurisprudence, as well as the similarities and differences between NYNY and other property owners who wish to exclude the protected employees from their property. As in *Hillhaven Highland House*, we have sought a nuanced resolution of the legal issue presented to us, rather than simply fitting the Ark employees into some preexisting category.

D.

As we do, our dissenting colleague concludes that this case cannot properly be resolved by making a categorical distinction between employees of the property owner and nonemployees. He correctly observes that "Ark's employees, who regularly and exclusively work on NYNY's property, are neither 'stranger' fish nor 'employee' fowl." As a result, the Board must, in his view, apply an

> accommodation-of-interests test that would sometimes result in requiring the property owner's interests to yield to a greater extent than for strangers who have no employment connection with the property or the property owner.

But our colleague would place the "locus of accommodation" at a different point on the spectrum, assigning less weight to the Section 7 interests of statutory employees and assigning even greater weight than we do to the interests of the property owner, while dismissing our finding that here the property owner was fully able to protect its interests in relation to Ark's employees while they were on its premises. That is a policy choice—defensible, perhaps, but certainly not compelled by the Act, by the Supreme Court's decisions, or by the Board's own precedent.

The dissent's central claim is that the "balancing test to be applied must be a variant of *Babcock*, as the Board held upon remand of *Hudgens*" and that "any test based on *Babcock* must consider not only the relative strengths of competing Section 7 and property interests, but also what reasonable alternative means exist for communicating the Section 7 message." But both the Board and Court distinguished *Babcock* in *Hudgens* on the ground that it involved nonemployees and nothing in *Hudgens* addressed the access rights of statutory employees employed on the property to which they sought access.[52] Nor, of course, did *Babcock*. We have explained why, in the factual context of this case, permitting the property owner to impose reasonable, non-discriminatory, and narrowly-tailored restrictions on the access of contractors' off-duty employees when demonstrably necessary is superior to inquiring whether employees have reasonable alternative means to communicate their statutorily protected message in and around their own, regular workplace.

Our colleague insists that our approach "represents no real accommodation of competing interests" and that under it, "[t]here will be no case-by-case balancing." The claim, at bottom, is that the Board's decision today does not do what it plainly does and does not mean what it plainly says. We can only disagree.

E.

Applying the test adopted here, we conclude that NYNY violated Section 8(a)(1) by excluding the handbilling Ark employees from its property.[53] NYNY has not demonstrated that the handbilling significantly interfered with its use of the property or that exclusion was justified by some other legitimate business reason, such as the need to maintain operations or discipline. Because NYNY had no preexisting restrictions on access applicable to the Ark employees, we need not consider what, if any, restrictions short of a blanket prohibition on distribution NYNY lawfully might have imposed.

ORDER

The National Labor Relations Board orders that the Respondent, New York New York, LLC d/b/a New York New York Hotel & Casino, operating in Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the actions set forth in the underlying National Labor Relations Board decisions issued in Cases 28–CA–14519 and 28–CA–15148 on July 25, 2001.

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[52] Our colleague describes *Hudgens* as the "case most factually analogous to the one we consider today." But the similarity of *Hudgens* to this case depends on how much importance is placed on the fact that the employees in *Hudgens* were not employed on the property involved there.

[53] The standard we adopt today is more lenient to NYNY than the Board's prior standard, in effect at the time NYNY excluded the Ark employee handbillers. This case, then, implicates no concern about the retroactive application of a new legal rule to find previously permissible conduct unlawful. See generally *SNE Enterprises*, 344 NLRB 673 (2005) (discussing Board's traditional practice of applying new rule retroactively, absent "manifest injustice").

Dated, Washington, D.C. March 25, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

In cases where the Board weighs nonemployees' Section 7 rights against a property owner's right to limit access to its property, the Board must adhere to the Supreme Court's mandate that "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."[1] My colleagues have failed to do so here. In determining that the Respondent violated the Act by excluding employees of food concessionaire Ark Las Vegas Restaurants from soliciting customer support for their organizational campaign in the interior of Respondent's hotel and casino complex, they apply a test that artificially equates the Section 7 rights of a contractor's employees with those of the property owner's employees, pays only lip service to the owner's property interests, and gives no consideration to the critical factor of alternative means of communication.

In sum, the majority's purported balancing test affords as much, if not more, protection to the efforts of Ark employees to engage in union organizational activity on the Respondent's premises as the Respondent's own employees would have. Applying what I believe to be the correct test, and in the absence of a sufficient record regarding the existence of less intrusive reasonable alternative means of communication, I would find that the Respondent acted unlawfully only when it excluded Ark handbillers from the nonwork porte-cochere area outside the main entrance to the hotel and casino complex.

I.

In July 1997, off-duty Ark employees stood in the porte-cochere area and distributed their handbills to customers of the hotel, the casino, and the restaurants as they entered the facility. Sometime later, in April 1998, off-duty Ark employees handbilled again in the porte-cochere area as well as at the entrances to two restaurants operated by Ark inside the Respondent's hotel and casino complex. In each instance, the Respondent summoned police, who issued trespass citations to the Ark handbillers and escorted them off the Respondent's property.

The Board addressed the Respondent's exclusionary actions in separate decisions. In one decision, it found that the porte-cochere was not a work area and that the handbillers' activity did not adversely affect either the customers' ability to enter or leave the hotel or the hotel employees' ability to perform their jobs.[2] Thus, the Board found that Ark employees should be granted access to this area of the owner's property outside the hotel to engage in Section 7 activities. In another decision, the Board found that the areas in front of the restaurants—inside the hotel complex—were nonwork areas and that the handbillers did not interfere with production or discipline.[3] The Board found that Ark employees should also be allowed access to those areas in front of Ark's restaurants to engage in Section 7 activities. In each decision, the Board relied primarily on *Southern Services*[4] and *Gayfers Department Store*.[5]

The cases involving Ark employees' handbilling activities at NYNY were consolidated for review by the United States Court of Appeals for the D.C. Circuit.[6] The court found that the rationale of *Southern Services* and *Gayfers*, and therefore the rationale of the consolidated cases relying on them, lacked sufficient explanation on "the critical question in a case of this sort whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner."[7] Further, the court perceived no definitive answer to this question in Supreme Court precedent. It therefore remanded the consolidated cases with instructions to consider the distinction between rules of law applicable to employees and those applicable to nonemployees, and to answer certain specific questions relevant to application of those distinctions to the facts presented here.

II.

On remand, the majority has reaffirmed the Board's prior findings that the Respondent unlawfully denied Ark

[1] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[2] *New York New York Hotel & Casino*, 334 NLRB 762 (2001).

[3] *New York New York Hotel & Casino*, 334 NLRB 772 (2001).

[4] 300 NLRB 1154 (1990) (subcontractor's employees who work regularly and exclusively at owner's facility were "invitees," not "trespassers," and because they were rightfully on the property, they had the same access rights as owner's employees), enfd. 954 F.2d 700 (11th Cir. 1992).

[5] 324 NLRB 1246 (1997) (same).

[6] *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002).

[7] Id. at 590.

employee access to the porte-cochere area and to the two interior restaurant entrances. The majority reasons that (1) the Ark employees are "employees" within the meaning of the Act, albeit not employees of the Respondent; (2) as such, they have Section 7 rights, which they sought directly to exercise when handbilling on the Respondent's property, where they regularly work; (3) the particular right they sought to exercise, i.e., the right to organize, is a core Section 7 right; (4) the intended audience of their handbilling, i.e., potential customers of Ark's restaurants, strengthens their right to engage in activity on the Respondent's premises at the Ark restaurant entrances; (5) although the Ark employees were trespassing under state law, Federal labor law policy predominates in determining their rights of access; (6) as a general matter, the Respondent can limit Ark employees' access to the same degree as for its own employees by imposing those limits in its contract with Ark; and (7) absent more specific evidence of interference with the Respondent's operations, it can impose no greater limits than for its own employees.

III.

For purposes of determining rights of access to private property under the Act, there are arguably only two categories of individuals: (1) "strangers" who are not employees of the private property owner, and who may, barring exceptional circumstances, be denied access to any location on the property;[8] and (2) employees of the private property owner, whose rights of access to that property are far more extensive.[9] Under this two-category definition, because Ark's employees are not employees of the specific owner whose property they seek to access, the legal balance of interests involved has been struck by the Supreme Court in *Babcock*, and they can be entirely excluded from that property. However, Ark's employees, who regularly and exclusively work on NYNY's property, are neither "stranger" fish nor "employee" fowl, and the Supreme Court's opinions in *Hudgens*[10] and *Sears*[11] support an accommodation-of-interests test that would sometimes result in requiring the property owner's interests to yield to a greater extent than for strangers who have no employment connection with the property or the property owner.

Still, the balancing test to be applied must be a variant of *Babcock*, as the Board held upon remand of *Hudgens*,[12] and the balance struck must involve as little destruction of one right as is necessary for maintenance of the other. To reach that end, any test based on *Babcock* must consider not only the relative strengths of competing Section 7 and property interests, but also what reasonable alternative means exist for communicating the Section 7 message.

Addressing first the Section 7 interests of the Ark handbillers, I agree with my colleagues that those interests are stronger than those of nonemployee union organizers because Ark employees are directly asserting their core organizational rights. However, my agreement with the majority goes only this far.

First, I cannot subscribe to a holistic definition of statutory employee status which reduces to legal insignificance the critical distinction between employees and nonemployees of a particular employer. This, the Supreme Court has repeatedly stated, is a distinction "of substance."[13] Employment and employee status are creatures of contractual relation, not of the physical location of work activity. Accordingly, as they are not employees of the property owner, the Section 7 rights of a contractor's employees who regularly and exclusively work on that owner's property are entitled to less weight than the rights of the property owner's own onsite *and* offsite employees. I therefore find that precedent involving the organizational rights of a property owner's employees cannot control here. In particular, I reject the majority's heavy reliance on *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003), which involves the access rights of offsite employees to another of their employer's properties to organize employees working there.

Further, I do not agree with the proposition that the organizational rights of the lessor's employees are stronger if their primary audience consists of members of the public patronizing the property owner's establishment.[14] The Ark employees' appeal to the public is ancillary to the primary object of their organizational campaign, which is to persuade their co-

[8] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[9] See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[10] *Hudgens v. NLRB,* 424 U.S. 507 (1976).

[11] *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).

[12] See *Sears*, supra at 211 (Blackman, J., concurring, describing the Board's test in *Scott Hudgens*, 230 NLRB 414 (1977)).

[13] *Babcock & Wilcox*, 351 U.S. at 113; *Lechmere*, 502 U.S. at 537. In this respect, I do not join my colleagues in questioning the *Lechmere* Court's reference to union organizers as nonemployees. The Court clearly did not regard the organizers' Sec. 7 rights vis-à-vis their own employer as relevant to the analysis of whether they should have access as employees to the property of another employer.

[14] I need not decide in this case whether the majority's proposition would be valid in cases where, as in *Hudgens*, a lessee's offsite employees seek access to the lessor's property to engage in Sec. 7 activity aimed at publicizing a primary economic dispute with their employer.

workers to support collective-bargaining representation by the Union. In my view, the right to engage in appeals to the public, which can only indirectly effect employees' organizational goals, is weaker than the right to engage in appeals to fellow employees, which goes directly to organization.

Turning next to the Respondent's property interests, I note initially that there is no dispute about the Respondent's right under state law to exclude the Ark handbillers from its property. My colleagues acknowledge that, as a matter of state law, those employees were trespassers at the moment they began to distribute handbills on the Respondent's property. They nevertheless posit that Federal statutory labor law is the ultimate determinant of whether that state-assured exclusionary right, "one of the essential sticks in the bundle of property rights,"[15] must nevertheless yield to nonemployees seeking access to the property of another employer where they regularly work.[16] That reasoning is correct, as far as it goes, but where it should then go is right back to the Supreme Court's interpretation of labor law. Time and again, from *Babcock*, to *Central Hardware*,[17] to *Lechmere*, the Court has repudiated the Board's attempts to broaden nonemployee access to private property in furtherance of Section 7 rights. Reading through the Court's decisions, one is struck by the brevity of discussion with respect to the property rights involved. It is apparent that the Court is reflexively willing to give far greater weight than either the Board or my colleagues to an employer's private property rights, which are, after all, protected to a degree by the Fifth and Fourteenth Amendments and are derived from a common law long predating the Act.

The majority acknowledges that Ark employees have no employment relationship with NYNY, and they recognize that a direct employment relationship is significant because it gives the property owner some means for protecting its property interest by exercising control over its employees in the event of misconduct. But the majority finds that the absence of an employer-employee relationship is mitigated by the control that NYNY can exercise over Ark employees through its relationship with Ark, and because of provisions in the Ark employees' handbook that require Ark employees to adhere to certain NYNY rules. I see no reason why the Respondent must contract expressly for controls over a contractor employees' access, or why it is relevant that Ark's handbook contains access rules for its employees parallel to those in effect for the Respondent's employees. The salient point is that even with contract provisions and handbook rules in effect, the Respondent can do no more to limit the trespassory conduct of Ark employees under the majority's test than it can to limit the access of its own employees who seek to engage in organizational activity.

The majority finds that the most significant factor in assessing the strength of the Respondent's property interest is that Ark employees regularly work on that property. In fact, the Ark employees work regularly *and* exclusively on the Respondent's premises. In past Board iterations of an access standard for contract employees, the exclusivity factor has been significant in determining whether the contract employees should have access. See *Postal Service,* 339 NLRB 1175, 1177–1178 (2003) (finding that a contract employee who worked regularly—but not exclusively—at the owner's facility did not have the same access rights as the owner's employees.) The majority's omission of "exclusively" from its test is therefore contrary to the emphasis previously given this factor. More importantly, its omission has the potential to dramatically expand the class of contractor employees entitled to access an owner's property to engage in Section 7 activity. I would continue consideration of the exclusivity factor as somewhat lessening the weight to be assigned to a property owner's security interests. However, I cannot agree with my colleagues' assignment of determinative weight to the mere fact that a contractor's employees regularly visit the owner's property. In effect, the majority's emphasis on the Ark employees' relationship to the jobsite, instead of the absence of an employment relationship with the Respondent, reverts their analysis to the locus-based rationale of *Southern Services* and *Gayfers,* which the D.C. Circuit questioned in light of *Lechmere*.[18]

In short, despite my colleagues' elaborate analysis, they end up in the same place and for the same reasons as the Board's preremand decisions—granting Ark employees full *Republic Aviation*[19] rights of access to nonwork areas during nonwork time because they work regularly (and exclusively) on the owner's property. Indeed, by allowing Ark employees access to handbill customers inside the hotel, the majority has arguably granted these nonemployees *greater* access to the

[15] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980).

[16] As discussed below, the majority does not require that such employees work "exclusively," as opposed to just regularly, on the owner's property to warrant access rights greater than other nonemployees.

[17] *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

[18] *New York New York,* 313 F.3d at 588 ("Neither Board decision takes account of the principle reaffirmed in *Lechmere* that the scope of Section 7 depends on one's status as an employee or nonemployee.").

[19] *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

property than would be allowed to the Respondent's own employees.[20] This result does not give sufficient substance to the employee/nonemployee distinction and greatly understates the strength of the Respondent's property rights.

IV.

Although I find fault with the relative weight assigned by my colleagues to the Ark employees' Section 7 rights and the Respondent's property rights, they at least nominally apply the *Babcock* framework to that extent in deciding where to strike the proper accommodation. However, the greater fault of the majority's test stems from their refusal to consider reasonable alternative means of communication. The majority thereby omits an essential element of the *Babcock* balancing test, a marked departure from the test applied by the Board on remand in *Hudgens*, the case most factually analogous to the one we consider today. Although the majority claims that their refusal "ensure[s] a more refined . . . accommodation of rights and interests," I believe they achieve just the opposite, assuring that the balance will always be struck in favor of requiring a property owner to permit organizing activity on its property by a contractor's employees to the same extent that it must permit such activity by its own employees.[21] A case-by-case consideration of communication alternatives is a necessary predicate to deciding what degree of access to private property must be permitted to assure maintenance of Section 7 rights with as little destruction of property rights as possible.

If this case involved complete strangers to the Respondent's property, as in *Babcock* and *Lechmere*, the General Counsel would bear the heavy burden of proving that reasonable nontrespassory alternatives for communicating the nonemployees' organizational message to the public did not exist. However, as I have previously indicated, while Ark employees are nonemployees vis-à-vis the Respondent, the fact that they regularly and exclusively work on the Respondent's premises slightly lessens the Respondent's property interest in the balance against Ark employees' interests in exercising their organizational rights. In my view, a proper accommodation of competing interests *in this situation* can be accomplished by imposing the burden on the property owner to prove that there are reasonable alternative means for the contractor's employees to communicate their organizational message. In a particular case, the reasonable alternative may be nontrespassory, or, as in the present case, it may involve access to a less intrusive location on the owner's property. The resulting legal balancing test gives greater weight to the asserted statutory rights of a contractor's employees working on the property of another than in a "stranger" nonemployee access case, but does not give the rights as much weight as in the situation of off-duty employees of the property owner, where alternative means of communication is not a factor.[22]

In this case, the Respondent contends that the Ark employees did have reasonable nontrespassory alternative means of communicating their organizational message to the public, either through the use of mass media or by handbilling at locations outside the Respondent's property. As a general matter, I would find that requiring employees to resort to mass media communications is not a reasonable alternative. On the other hand, requiring that the handbilling take place off premises could often be a reasonable alternative. However, the record is limited with respect to the locations cited by the Respondent in this case. Were my position to be the Board's test, due process considerations could dictate remanding for a hearing in which the Respondent could present evidence to meet a newly-imposed burden. However, as I am dissenting, I will proceed to determine whether the Respondent has met its burden on the record as it stands.

On that record, I find that the Respondent has failed to prove the availability of reasonable nontrespassory means of communication. As to handbilling on the Respondent's property, the record clearly shows that permitting this activity in the porte-cochere nonwork area outside the hotel and casino would be less intrusive of the Respondent's property rights than if permitted at the restaurant entrances in the interior of the hotel/casino complex. In this area, the handbillers could reach their target audiences—customers of the hotel, casino, and restaurants—while infringing to a fairly small degree on the Respondent's property.

On the other hand, requiring the Respondent to permit organizational handbilling inside its establishment at the entrance to the Ark restaurants obviously represents a far

[20] It is not clear to me that, if the Respondent maintained a valid work rule restricting its employees' off-duty access to its property, Respondent's off-duty employees would be allowed, under current Board law, to solicit customers in areas inside the hotel and casino, but the majority grants that right to off-duty Ark employees.

[21] It remains to be seen in future cases whether the assertion by contractor employees of a different Sec. 7 right will make any difference in the majority's test.

[22] In other factual situations where the Sec. 7 right asserted by a contractor's employees is weaker, or the property owner's interests are stronger, the failure of the property owner to prove the availability of reasonable alternative means of communication might not be determinative of whether it was unlawful to exclude those employees from the property.

greater intrusion on the Respondent's property rights. The Board has only allowed such destruction of the owner's rights in extreme circumstances where, even after considering alternative means of access, the employees were left with no reasonable means of reaching their target audiences except in areas inside the owner's property. For example, in *Scott Hudgens,* 230 NLRB 414 (1977), the Board found that off-duty employees of Butler Shoes, one of over 60 stores with retail space inside the owner's shopping mall, could picket and handbill inside the mall in front of their employer's shoe store in order to reach their intended audience, Butler's customers. The only alternative areas, on the sidewalks, parking lots, and public areas outside the mall, were not reasonable solutions because activities there would significantly dilute the employees' message, enmesh the customers of the many other neutral employers within the mall, and cause safety concerns.[23]

No such concerns exist here. Although the majority claims that "excluding the Ark handbillers from these uniquely effective locations [in front of their restaurants] would place a serious burden on the exercise of their Section 7 rights to communicate with the relevant members of the public," the facts flatly contradict this claim. As discussed above, the handbillers' audience is customers of the hotel, the casino, and the restaurants. Everyone who entered through the porte-cochere is a member of this audience. Limiting Ark employees' access to the porte-cochere places little or no burden on their ability to reach their intended audience. Even assuming that the restaurant entrances may have been the point of optimal effect for their handbilling activity, the Act does not require assuring access to those sites if the burden on the Respondent's property interest would be required to yield to a much greater extent than at the porte-cochere.

Thus, not only do I believe that a consideration of alternative means of access is a required element of any variant of the *Babcock* test, but, contrary to the majority, I find that it is the consideration of this very factor that ensures a more refined accommodation of competing Section 7 and property interests.

Conclusion

We consider in this case a factual scenario that none of the Supreme Court cases expressly addresses. On this much, the court of appeals, my colleagues, and I agree. From that point, however, I part company with the majority. Their analysis of the factors relevant to whether the employees of a contractor should have access to the property of another employer where they work gives far too much weight to the locus of their work, far too little weight both to their lack of an employment relationship with the property owner and to the property interests of that owner, and no weight at all to whether reasonable alternative means exist for communicating the organizational message to the employees' intended audience.

The inevitable result of the majority's analysis represents no real accommodation of competing interests. There will be no case-by-case balancing. The contractor employees' rights to engage in organizational activity will trump the property owner's rights every time, subject only to the suggested possibility that in some future case a property owner may be able to justify the imposition of "reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' employees, greater than those lawfully imposed on its own employees."

In my view, the appropriate balancing test must be drawn from the *Babcock* framework, inasmuch as it involves nonemployees of the property owner. The fact that they work regularly and exclusively for their employer on the property of another should be considered in that test, but it cannot elevate those nonemployees to equal standing with the property owner's own employees vis-à-vis the assertion of Section 7 rights, nor can it abnegate the owner's exclusionary property rights. In this particular case, I would find based on the existing record that the Respondent has failed to prove the availability of reasonable nontrespassory means for Ark handbillers to communicate their message. I therefore conclude that the Respondent unlawfully excluded Ark employees from engaging in minimally intrusive handbilling activity on the Respondent's property in the porte-cochere area. In a future case with different facts, particularly as to reasonable nontrespassory alternative means of communication, I would not require that a property owner's rights should yield at all.

Dated, Washington, D.C. March 25, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[23] As previously stated, *Hudgens* is also distinguished from the present case with respect to the Sec. 7 activity involved, i.e., economic strike activity as opposed to organizational activity.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL remove from our files and records, including security incident reports, any reference to the fact that employees of Ark Las Vegas Restaurants, Inc., conducted handbilling on July 9, 1997, or on April 7 or 9, 1998, at the porte-cochere entrance or at the entrances to Ark-managed restaurants within the hotel/casino complex, and/or that we invoked Nevada trespass law against these employees, and WE WILL notify each employee, in writing, that this has been done and that we will not use these facts against them in the future.

WE WILL inform the Las Vegas city attorney in writing that we want to withdraw the trespass citations we caused to be issued against these employees for their conduct on July 9, 1997, or April 7 or 9, 1998.

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

NEW YORK NEW YORK HOTEL, LLC D/B/A NEW YORK NEW YORK HOTEL AND CASINO