

# NLRB Grants Contractor's Off-Duty Employees Access to Business Owner's Property

**March 28, 2011**

In a 3-1 decision, the National Labor Relations Board (“NLRB”) found that a Las Vegas casino violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) by prohibiting off-duty employees of a lessee restaurant from distributing handbills to restaurant patrons on the lessor casino’s premises. The case, [New York New York, LLC](#), 356 NLRB No. 119, was remanded to the Board from the United States Court of Appeals for the District of Columbia Circuit to consider whether the contractor’s employees should be treated as having the same rights as employees of the casino, or no greater rights than nonemployee union organizers.

## **Background**

In 1997, the handbillers, employees of Ark Las Vegas Restaurant Corporation (“Ark”), distributed handbills outside Ark’s restaurant on New York New York Hotel & Casino (“the Casino”) property. The purpose of the handbilling was to garner public support for their organizing efforts as Ark employees. They were located at three access points: the casino’s porte-cochere (“the covered sidewalk and driveway just outside the Casino’s main entrance”) and outside of two Ark-operated restaurants inside the Casino.

On each of the occasions, the Casino requested that the Ark employees leave the property. After they refused to comply, the Casino called the Las Vegas police, who issued trespassing citations and escorted the Ark employees off of the premises. An unfair labor practice charge was subsequently filed, alleging that the Casino violated Section 8(a)(1) of the Act by prohibiting the Ark employees from distributing handbills on its property.

In its original ruling on this case, the NLRB found that the Casino violated the Act by relying on *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) in its analysis. The Board reasoned that “because the handbillers were employees of a contractor who worked regularly and exclusively on [the Casino’s] property, they enjoyed the right to distribute literature to [the Casino’s] customers in nonworking areas during nonworking time, subject only to [the Casino’s] need to maintain production and discipline.”

On review, the Court of Appeals for the District of Columbia Circuit remanded the case because it wanted the Board to consider the implications of the Supreme Court’s opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Court held in *Lechmere* that “the scope of § 7 rights depends on one’s status as an employee or nonemployee.” The *Republic Aviation* analysis did not fully take into consideration the distinction between employees and nonemployees, as discussed in *Lechmere*. Thus, the Board was directed to determine whether Ark’s employees should be treated as if they were employees of the Casino – which would have allowed them full access rights under *Republican Aviation* – or as if they were nonemployee union organizers – requiring the Board to apply the Supreme Court’s more restrictive access test in *Lechmere*, which requires access only when the employees whom the nonemployee organizers sought to contact are “otherwise inaccessible.”

### **The Board’s Decision**

In its decision, the Board said it was addressing only the “narrow” situation where “a property 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.”

The Board first considered the broader legal and policy questions encompassed in the particular fact pattern, specifically: “The Ark employees were *not* employees of [the Casino], but they *were* regularly employed on [the Casino’s] property by its contractor.” Ultimately, the Board decided that the Ark employees did not fit into either of the categories addressed in *Lechmere* or *Republic Aviation*.

Under *Lechmere*, the Court held that when nonemployee union organizers seek access to an employer's private property to exercise Section 7 rights, then the standard is whether the employees are otherwise inaccessible. Here, the Ark employees were not seeking access to urge *others* to exercise their Section 7 rights, and they were not outsiders on the property, as would be union organizers. Even though it found the analysis should not be based on the *Lechmere* standard, the Board recognized that *Lechmere* created an important distinction between "rules of law applicable to employees and those applicable to nonemployees." And therefore, the distinction between those employed by a lessee or contractor versus those employed by the property owner itself made the *Republic Aviation* standard inapplicable as well.

Instead, the Board looked to the standard it articulated in [Hillhaven Highland House](#), 336 NLRB 646 (2001), a case which involved an employer with employees at multiple locations, and the rights of employees from one location to have access at the other locations. There, the Board decided that "an employer's off-duty employees who are employed at another location presumptively have the same rights as off-duty employees who work at the location at issue." In the absence of overriding business reasons to the contrary, off site employees were permitted the same rights to the outside nonwork areas as on site employees.

Relying on the mode of analysis in *Hillhaven*, the Board held that a property owner may prohibit off-duty employees of a lessee or contractor from engaging in handbilling to the lessee's or contractor's customers *only* where (i) it can demonstrate that activity of the subcontractor's employees "significantly interferes" with the owner's use of the property; or (ii) there is another legitimate business reason to justify the exclusion. "The need to maintain production and discipline" (as defined by the Board's case law) are "legitimate business reasons." The Board explained of its ruling:

"[A]ny 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. . . . 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."

## Member Hayes' Dissent

Board Member Brian Hayes dissented from the majority's decision and found only that the Casino violated the law by excluding the handbillers from the porte-cochere area *outside* the main entrance of the Casino. He found the majority's decision afforded "as much, if not more, protection to the efforts of Ark employees to engage in union organizational activity on the [Casino's] premises as the [Casino's] own employees would have." Of particular note, Hayes stated that to have access *inside* the casino, the employees should be required to show that they had no other reasonable way to communicate with their fellow employees or the customers of the restaurant. The majority did not require that showing.

## Implications for Employers

The Board's long-awaited decision is significant in the generous access rights it has given to nonemployees of property owners. Though the Board claims its decision is narrow in scope, such lessor-lessee and owner-contractor relationships are common in many industries in our economy, and the decision has profound implications for business property owners where such relationships exist.

### Related Professionals

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