

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD REGION 28**

**LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 872**

**and**

**Case 28-CC-148007**

**NAV-LVH, LLC d/b/a WESTGATE  
LAS VEGAS RESORT & CASINO**

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**WESTGATE'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION OF AUGUST 21, 2015**

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## **I. STATEMENT OF THE CASE**

### **A. Overview of Exceptions**

In accordance to § 102.42 of the Board's Rules and Regulations, Charging Party, NAV-LVH, LLC D/B/A Westgate Las Vegas Resort & Casino ("Westgate") submits this Brief in Support of Westgate's exceptions to the Administrative Law Judge's Decision of August 21, 2015<sup>1</sup> ("ALJD" or "Decision")<sup>2</sup> in which he wrongly concluded that the Laborers' International Union of North America, Local 872 ("Union" or "Local 872") *did not* violate Section 8(b)(4)(ii)<sup>3</sup> of the National Labor Relations Act ("NLRA" or "Act") by its unwarranted and repeated trespass onto Westgate's private property, a neutral secondary employer. Specifically, this Board must reject the Decision because it is unreasonable and untethered from the substantial evidence on the record considered as a whole. This Decision, as it currently stands, is: (A) a wholesale repudiation of applicable National Labor Relations Board ("NLRB") and Supreme Court precedent; (B) an unwarranted disregard and departure from over two hundred years of American Jurisprudence involving private property ownership rights; and (C) unsupported by the clear preponderance of the record evidence.

### **B. Relevant Facts**

The controlling facts are without dispute.<sup>4</sup> Westgate's hotel and casino sits on 36 acres of land north of the end of the Vegas strip. Westgate employs approximately 1800 to 2200 employees who are represented by various unrelated unions, none of which is Local 872.

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<sup>1</sup> Jeffrey D. Wedekind.

<sup>2</sup> Citations to the decision will be referenced as "ALJD" followed by the corresponding page and line numbers. Reference to the hearing transcript will be noted as Tr. followed by the page and line numbers.

<sup>3</sup> Westgate does not challenge the ALJ's findings and conclusions that the Union's use of banners in public property was protected activity under the NLRA. Likewise, Westgate does not dispute the ALJ's conclusions that the Complaint failed to prove a violation of Section 8(b)(4)(i)(B) prohibiting the union from inducing or encouraging a neutral employees to stop working. Westgate's challenge revolves around the Union's illegal and lengthy trespass of its property to erect around seven (7) giant inflatables on Westgate's property during March 6, 9, 10 and 11. Contrary to the Decision, the Union's conduct was prohibited by Section 8(b)(4)(ii).

<sup>4</sup> Unless cited otherwise, the facts recited herein are included in the Decision on pages 1 through 4.

Starting on March 6, 2015, Local 872 erected seven (7) giant inflatables depicting various critters (pigs, cat, roaches and rats) around Westgate's private property in furtherance of its labor dispute with Nigro Construction.<sup>5</sup> The inflatables were mounted on "utility cut-outs" *inside* Westgate's private property, and, while the "utility cut-outs" were subject to an easement, the easement was not granted for the benefit of the public or the Union. The limited easement was granted to various utilities companies for the sole and exclusive purpose of servicing and maintaining utility equipment inside Westgate's property.<sup>6</sup>

The inflatables were erected between 6:30 a.m. and 7:00 a.m. and unlawfully stayed on Westgate's private property until the afternoon, when the Union would end their "protest." The placement of the giant critters inside and through-out Westgate's private boundaries continued on March 9, 10, and ended on March 11, 2015. The actual number of inflatables ranged from four (4) to seven (7) during the dates. The Union did not seek nor did Westgate grant permission to place the inflatables on Westgate's property during those four days.

Based on the pleadings and the evidence presented at the hearing, the ALJ was required to decide: (a) whether Local 872 had the right to erect the numerous inflatables, as it did, on Westgate's private property and if not, (b) whether the Union's trespass was protected activity under Section 8(b)(4)(ii) of the NLRA. As to the response to these discrete queries, the evidence is undisputed. The answer to both questions is No and the only outcome that could be reasonably derived from the evidence, and in keeping with Congressional intent, was a finding that the Union's conduct violated Section 8(b)(4)(ii). However, the ALJ, as explained below, circumvented contravening facts and overlooked dispositive precedent to reach his erroneous Decision.

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<sup>5</sup> ALJD, p. 3, lines 1-6; 5, line 25; 6, lines 5-16.

<sup>6</sup> GC Exhibit 9.

The Union conceded, *albeit* reluctantly, that the inflatables were placed inside of Westgate's property boundaries. Westgate adduced unchallenged expert testimony proving that the inflatables were erected in Westgate's private property.<sup>7</sup> The parties equally agreed- as noted by the Decision- that the location where the inflatables were placed, the "utility cut-outs," were subject to easements.<sup>8</sup> And, while the ALJ "acknowledged" in his Decision that the "utility cut-outs" were subject to easements, he bypassed this inconvenient dispositive fact in his analysis of the Union's conduct or the rights of the parties. In fact, the Decision lacks any discussion or meaningful legal analysis whatsoever on the meaning, scope or impact of the easements on the resolution of the trespass allegations against the Union, or the resulting coercive impact that such trespass imposed on Westgate for purposes of Section 8(b)(4)(ii). This brazen omission is not unexpected as any substantive discussion about the easement's legal ramifications for the Union would be incompatible with the ALJ's outcome.

Instead, the ALJ blindly opined that the Union did not engage in unlawful secondary boycott because their conduct could not be "***reasonably characterized as unlawful harassment or repeated trespass***"<sup>9</sup> while purposely minimizing or overlooking the following detracting and irreconcilable findings of fact: (1) the Union erected between four (4) to seven (7) giant inflatables *inside* Westgate's private property, land to which they had no actual ownership or possessory rights; (2) the Union ***trespassed*** Westgate's property starting on March 6 and ending on March 11, 2015 and this invasion cannot be characterized, as the ALJ suggests, as infrequent

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<sup>7</sup> The Union stipulated to the following: (a) that Mr. Glen Davis was an expert in surveying; and (2) to the accuracy of GC Exhibits 8 and 9, ALTA/CMS Land Title Survey of 5/22/2014 of Westgate's property and Final Map of Westgate's property filed with the Clark County, showing that the inflatables were placed inside Westgate's private property. Tr. 144, lines 22-25; 146, lines 1-7; 149, lines 5-6. These uncontroverted Exhibits (8-10) are not part of the ALJ's Decision even though they play a crucial role in this matter.

<sup>8</sup> While the ALJ gives this dispositive fact a rather cursory treatment (ALJD, p. 6, lines 6-10), the record expressly contains admissible documentary evidence identifying the proper beneficiaries of the easements and the scope of the respective easements. *See*, GC Exhibits 8 and 9; GC Exhibit 10, Recorded Easement documents.

<sup>9</sup> ALJD, p. 7, lines 36-37.

or isolated trespassing; and lastly (3) the Union's illegal daily invasion was prolonged, and lasted, at the very least, between *six to seven hours a day*. The Union representative conceded that the inflatables were not expressive speech but were to "piss off" Westgate..<sup>10</sup> Simply stated, Westgate did not grant the Union authority to be there as the record unequivocally reflects. Neither the trespass nor the illegal taking of Westgate's land was authorized by a third party with a legally recognizable ownership or possessory rights to the "utility cut-outs." The ALJ opined that the utility companies granted the Union access to the "utility cut-outs" but this conclusion is lacking factually and legally, as the record reflects. The easement holders enjoy a narrowly tailored non-possessory interest to use Westgate's property solely in the precise manner prescribed by the easement, a document that is part of the record and stands unchallenged by the Union. However, the utility companies had no ownership or possessing rights. Consequently, they could not, as a matter of law, convey to the Union the right or authority to access and use Westgate's property, even if the conveniently timed hearsay conversation between the Union representative and the "elusive" water company employee took place. Simply stated, the utility companies have *no ownership or possessory rights* to Westgate's private property and could not transfer to the Union "rights" that they never possessed.

Notwithstanding this legal reality, the ALJ arbitrarily concluded that the Union had authority to go onto Westgate's property and to erect the giant critters on the "utility cut-outs" because "there were no obstructions or signs indicating that the cutouts were private property and off limits to anyone other than the utility companies [,] [n]or did any of the utility companies ask the Union to remove the inflatables from the cutouts."<sup>11</sup> This legal conclusion- disguised as findings of fact- is an unjustified abandonment of Westgate's constitutionally protected property

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<sup>10</sup> Tr. 296-297; *See also* ALJD, p. 8 fn 13, where the ALJ wrongly dismisses this testimony or a valid factor in measuring the Union's conduct.

<sup>11</sup> ALJD, p. 6, lines 16-19.

interests. The ALJ's Decision is baseless because the express language of the easement precluded utility companies from authorizing the Union's conduct. More importantly, the factual predicate for concluding that the Union was authorized to use Westgate's property was based on "impermissible hearsay" testimony from Mike DaSilva, the Union's Organizing Director,<sup>12</sup> which was repudiated by Mr. DaSilva's cross-examination testimony, as well as, other admissible and uncontroverted record evidence.

A review of the record evidence, as fully discussed herein, shows that the ALJ cherry-picked the record to rationalize his unreasonable Decision. To validate his arbitrary conclusions, the ALJ: (a) deliberately ignored undisputed evidence or binding legal precedent detracting from his findings, (b) conveniently selected impermissible and uncorroborated hearsay testimony to buttress his findings of fact and conclusions of law, and lastly, (c) manufactured an arbitrary "equitable balancing test" unsanctioned by NLRB precedent or applicable law. The ALJ has wrongly conveyed to the Union ownership rights to Westgate's property that Local 872 did not possess while, at the same time, depriving Westgate from ownership rights it actually possessed under the law. And, by ruling this way the ALJ has legally blessed the Union's illegal coercive trespassing tactics. This Decision is the result of faulty factual and legal analysis that is contravened by applicable precedent, and ultimately repugnant to Congressional intent.

Because this Decision is unreasonable and departs from the substantial evidence on the record considered as a whole, it must be rejected by the Board. The Board must conclude- as the evidence shows- that the Union engaged in unlawful harassment and repeated trespass and violated Section 8(b)(4)(ii) of the NLRA.

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<sup>12</sup> ALJD, p. 6 fn. 11.

## II. Issues and Exceptions Presented

Westgate's specific exceptions have been contemporaneously filed with this Brief and that filing recites the verbatim findings of fact, analysis and conclusions challenged by Westgate.

A summary of the exceptions is as follows:

1. The ALJ's conclusion that the record evidence failed to support the allegations that Local 782 violated Section 8(b)(4)(ii) by repeatedly trespassing into Westgate's property to illegally erect inflatables during a four (4) day period.<sup>13</sup>

2. The ALJ's findings of fact concerning Westgate's rights, to control the use of the "utility cut-out", the supposed authority granted by the utility companies to the Union to access the "utility cut-outs" and place the inflatables on Westgate's private property for four (4) days.<sup>14</sup>

3. The ALJ's credibility assessment of Mike DaSilva's testimony as being "uncontroverted."<sup>15</sup>

4. The ALJ's legal analysis of applicable precedent and his conclusion that Local 872's conduct could not be "reasonably characterized as unlawful harassment or repeated trespass."<sup>16</sup>

## III. Standard of Review<sup>17</sup>

The National Labor Relations Board ("Board") is required to conduct a *de novo* review of an Administrative Law Judge's ("ALJ") findings of law, legal conclusions and any derivative inferences arising from such legal conclusions.<sup>18</sup> A court will uphold a Board's decision if it *is*

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<sup>13</sup> ALJD, p.2, lines 10-12; 8, line 24.

<sup>14</sup> ALJD, p. 6, lines 6-12.

<sup>15</sup> ALJD, p.6, line 11.

<sup>16</sup> ALJD, p. 7, line 26-38, p. 8, line 1-2.

<sup>17</sup> As discussed in this section, both the ALJ's findings of fact and conclusions of law are subject to a *de novo* review by the Board at this stage. Westgate's discussion of the standard of review by a court of a Board's findings of fact and legal determination is appropriate this standard must guide the Board in crafting a sound decision.

<sup>18</sup> *Standard Dry Wall Products*, 91 NLRB 544, 545 [26 LRRm 1531] 1950, *enfd.* 188 F.2d 362 [27 LRRM 2631] (3rd Cir. 1951).

*reasonable and supported by substantial evidence on the record considered as a whole.*<sup>19</sup> A scintilla of evidence is insufficient to meet this standard. Substantial evidence is “such relevant evidence that a reasonable mind would accept to support a conclusion.”<sup>20</sup> The Board “cannot ignore the relevant evidence that detracts” from an ALJ’s findings or its ultimate decision.<sup>21</sup> It is simply “not good enough” for the Board to blindly regurgitate or accept the ALJ’s finding because the “record” contains some evidence that could have conceivably supported them while overlooking contradictory “record” evidence.<sup>22</sup> When an ALJ misconstrues or fails to consider crucial incongruous evidence it is an indication that the decision is not based on substantive evidence.<sup>23</sup>

The Supreme Court admonished against any attempts to cherry-pick the record to justify an ALJ’s decision in *Universal Camera Corp. v. NLRB*<sup>24</sup> by holding that the Board may not make its determination “...merely on the basis of the evidence which in and of itself justify[es] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.”<sup>25</sup> Congress signaled to the Board that its review of findings and conclusions of law was more than a “mere formality” when it incorporated the “substantiality of the evidence on the *whole record*” standard to evaluate an ALJ’s factual findings<sup>26</sup> or conclusions of law. Rubber-stamping a decision is incompatible with this exacting review

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<sup>19</sup> See *Mobil Exploration and Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999); *NLRB v. Thermon Heat Tracing Serv., Inc.*, 143 F.3d 181, 185 (5th Cir.1998).

<sup>20</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

<sup>21</sup> *Lakeland Health Care Associates, Inc. v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012)(internal citations omitted); *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002).

<sup>22</sup> *Sears, Roe Buck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003)(holding that “the ALJ must minimally articulate his reasons for crediting or rejecting” evidence.); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in partial remand).

<sup>23</sup> *Lakeland Health Care*, 696 F.3d at 1335(citations omitted).

<sup>24</sup> *Universal Camera Corp.*, 340 U.S. 474 (1951).

<sup>25</sup> *Universal Camera Corp.*, 340 U.S. at 487.

<sup>26</sup> When credibility issues arise, a court is “bound by the credibility choices of the ALJ, unless (1) the credibility assessment is unreasonable, (2) the choice contradicts other findings, (3) the choice is based upon inadequate reasons or no reason, or (4) the ALJ failed to justify his or her choice.” *NLRB v. Motorola, Inc.*, 991 F.2d 278, 282 (5th Cir.1993).

process.<sup>27</sup>

Ultimately, a Board’s Order (whether it adopts, modifies or rejects an ALJ’s decision) must be: (1) reasonably based on established law correctly applied to the facts of the particular matter at issue; and (2) cannot be inconsistent with the statutory mandate of the National Labor Relations Act or frustrate the congressional policy underlying a statute.<sup>28</sup> Furthermore, the Board “cannot ignore its own relevant precedent” but must explain why is not controlling.<sup>29</sup> Where an agency departs from its prior precedent without a reasonable explanation, its decision will be considered arbitrary and will be rejected.<sup>30</sup> Lastly, the Board’s interpretation or its legal analysis of a state law or issue will be afforded no deference by the courts because it is beyond its expertise.<sup>31</sup>

#### **IV. Congressional Purpose of Section 8(b)(4) and Standard of Law**

Under Section 8(b)(4) it is unlawful for a union to “induce or encourage” anyone engaged in commerce to refuse to “transport, or otherwise handle any goods, articles, materials, or commodities,” or to “threaten, coerce, or restrain” anyone engaged commerce when “an object” of this conduct is to “force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products” of another, “or to cease doing business with any other person.”<sup>32</sup> More simply put, a union may picket primary employers with whom it has labor disputes, “but it runs afoul of Section 8(b)(4) if it pickets a neutral employer with the proscribed

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<sup>27</sup> *Universal Camera Corp.*, 340 U.S at 487–90.

<sup>28</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980); *Lakeland Health Care*, 696 F.3d at 1335(citations omitted); *NLRB v. Teamsters “General” Local Union No. 200*, 723 F.3d 778, 783 (7th Cir. 2013); *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006)( must overturn Board decisions if the Board has incorrectly applied the law).

<sup>29</sup> *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal citations omitted); *Trump Plaza Associates v. NLRB*, 679 F.3d 822, 827 (D.C. Cir. 2012).

<sup>30</sup> *Id.*

<sup>31</sup> *United Food & Commercial Workers Int’l Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000) (reviewing *de novo* a Board’s determination of whether employer had sufficient property interest to exclude union organizers because Board has no special expertise in interpreting Virginia law).

<sup>32</sup> 29 U.S.C. §§ 158(b)(4)(i) and (ii)(B).

object of enmeshing the neutral employer in a controversy not its own.”<sup>33</sup>

Congress enacted Section 8(b)(4)(ii)(B) because it wanted to protect third parties from being dragged into labor disputes not of their own.<sup>34</sup> Congress specifically focused its concern “on the secondary boycott, which was conceived of as pressure brought to bear, not upon the employer who alone is a party [to a dispute], but upon some third party who has no concern in it with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands.”<sup>35</sup> Unions violate the NLRA when they intend “to enmesh neutral secondary employers in primary labor disputes between the union and another employer.”<sup>36</sup> In determining whether a union has engaged in a secondary boycott prohibited by Section 8(b)(4)(ii)(B), courts must consider the conduct and the intent of the union. While the First Amendment protects picketing in other contexts,<sup>37</sup> the First Amendment offers no refuge to unfair labor practices, which include secondary boycotts marked by coercive picketing with unlawful intent.<sup>38</sup> Although peaceful handbilling, without other action, is not typically considered picketing, the “existence of placards on sticks is not a prerequisite to a finding that a union engaged in picketing.”<sup>39</sup> The intent of a union is unlawful when its “conduct is calculated to force the secondary employer to cease doing business with the primary employer.”<sup>40</sup> “If any object of the picketing is to subject the secondary employer to forbidden pressure then the picketing is illegal. It need not be the sole or even main purpose.”<sup>41</sup>

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<sup>33</sup> *Oil Workers Local 1-591 (Burlington Northern Railroad)*, 325 NLRB 324, 326 (1998).

<sup>34</sup> *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 302, (1971).

<sup>35</sup> *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 302, (1971).

<sup>36</sup> *NLRB v. Constr. & Gen. Laborers' Union Local 1140*, 577 F.2d 16, 18 (8th Cir.1978).

<sup>37</sup> See e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011)

<sup>38</sup> See, e.g., *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 611–616 (1980).

<sup>39</sup> *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1265 (11th Cir.2005).

<sup>40</sup> *Kentov*, 418 F.3d at 1263.

<sup>41</sup> *Superior Derrick Corporate v. NLRB*, 273 F.2d 891, 896 (citations omitted).

## V. Argument

**I. The ALJ erred in concluding that the Union did not engage in illegal secondary boycott in violation of Section 8(b)(4) (ii) of the NLRA by their repeated trespass of Westgate’s property and illegal placement of numerous inflatables during a four day period.**

**A. The Decision cannot stand as it is a wholesale repudiation of binding NLRB and Supreme Court precedent making it unreasonable.**

**1. The NLRA does not bestow onto unions ownership or possessory rights- which they never possessed in the first place- to a secondary employer’s private property and the ALJ erred by departing from controlling precedent.**

The Supreme Court and the Board have routinely sustained private property rights emanating from state common law by holding that the NLRA does not supersede an employer’s right to exclude third parties- even Union organizers- from their private property.<sup>42</sup> Hence, the controlling rule is that the property rights of the employers must trump those of non-employee third parties. Only the most exceptional circumstances involving accessibility to “organizational rights,” may trigger a slight modification of this rule. While our case does not involve any organizational rights under Section 7 of the NLRA, a discussion of controlling Supreme Court decisions is necessary to illustrate the grave foundational shortcomings in the ALJ’s legal analysis and ultimate conclusion, that the Union’s repeated trespass and unlawful taking of Westgate’s private property are sanctioned by Section 8(b)(4)(ii).

Section 7 of the NLRA gives employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

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<sup>42</sup> *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Bristol Farms*, 311 NLRB 437, 438 (1993)( Although recognizing that *Lechmere* requires “appropriate respect” for an employer's property rights, the Board will not accord an employer with “any greater property interest than it actually possesses” when dealing with Section 7 disputes.)

mutual aid or protection.”<sup>43</sup> The express terms of the NLRA unequivocally confer rights exclusively on employees ***and not*** on unions or their nonemployee organizers.<sup>44</sup> Consequently, while an employer’s private property rights may be curtailed to allow ***employees*** to engage in organizational activities outside of ***their*** working hours at their employer’s premises, “no such obligation is owed to nonemployee organizers.”<sup>45</sup>

**(a) The Supreme Court in *Babcock* and *Lechmere* severely limited the instances in which a nonemployee union organizer *may* access an employer’s private property for Section 7 organizational purposes only.**

*Babcock* restates the universally recognized principle that employers- as private property owners- have the right to exclude nonemployees from their property but carved out two extremely narrow exclusions to this general rule- commonly referred to as the (1) inaccessibility and (2) discrimination exceptions.<sup>46</sup> *Babcock* rejected any notion that courts are required to weigh the interests of the organizers or the unions as valid grounds for awarding these limited access exceptions to private property. As the Supreme Court enunciated in *Babcock*, the limited access rights exception to private property under Section 7 derives solely from the ***organizational entitlement afforded to employees located at the inaccessible employer’s property***, not any separate access right afforded to third parties, irrespective of whether or not they are unions. Simply stated, the NLRA does not give unions greater special rights under the NLRA to enter or utilize private property.

In 1996, the Supreme Court again addressed, and refused to enforce, a decision by the Board in which the Board found that a shopping mall owner had committed an unfair labor practice by threatening to have nonemployee union agents arrested for picketing on the shopping

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<sup>43</sup> 29 U.S.C. § 157

<sup>44</sup> *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

<sup>45</sup> 351 U.S. at 105.

<sup>46</sup> *Babcock*, 351 U.S. at 112.

mall's private property. In *Hudgens v. NLRB*,<sup>47</sup> warehouse employees who were on strike engaged in picketing at their employer's retail store inside a large shopping mall. The Board argued that the mall owner's threat to arrest the picketers violated Section 8(a)(1) because the picketers had a First Amendment right to engage in picketing in the mall based on the Court's prior precedent. The Supreme Court disagreed. Instead, the Court Supreme determined that the right of a mall owner to eject the picketers was dependent on the interpretation and application of the NLRA. The Supreme Court in *Hudgens* recognized the potential tension between property rights and Section 7 rights but restated, as it had done in *Babcock*, that the basic objective of the NLRA was to accommodate Section 7 and private property rights "with as little destruction of one as it is consistent with the maintenance of the other."<sup>48</sup>

The Board's decisions after *Hudgens* purported to implement a "balance" between the two interests but routinely found the balance tipping for Section 7 rights, unless the circumstances at issue were directly controlled by *Babcock*. Noticeably, the Board mostly disregarded the Supreme Court's language imposing a required assessment of alternative means of communication that did not detract from an employer's property rights. Instead, the Board unilaterally applied the alternative means of communication factor only if the balancing analysis between the property rights of the primary employer and Section 7 rights was "relative in equal strengths," as discussed in *The Fairmont Hotel*.<sup>49</sup>

In *Jean Country*,<sup>50</sup> the Board "reevaluated" and "clarified" its *Fairmont Hotel*'s statements regarding the limited circumstances under which an alternative means of communication would be triggered in the Board's "accommodation" analysis. *Jean Country*

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<sup>47</sup> 424 U.S. 507 (1976)

<sup>48</sup> *Hudgens*, 424 U.S. at 522.

<sup>49</sup> *Fairmont Hotel*, 282 NLRB 139, 142 (1986).

<sup>50</sup> 291 NLRB 11, 14 (1988).

involved nonemployee union agents engaged in area standards picketing in front of a small retail store inside a large shopping mall. The Board found that the Section 7 interests at issue trumped the property owner's "exceedingly weak" interest in "protect[ing] the mall property from the Union's intrusion" because the message was directed at the store's customers; therefore, it could not be effectively communicated to the intended employer from the closest public areas. Although the Board conceded that the availability of reasonable alternative means was a factor needed to be considered in every access case, it nonetheless disregarded this requirement by compelling the property owner to allow nonemployee union agents to trespass on the owner's private property, so the union could effectively communicate its message.

This Board's "revamped" test was expressly repudiated by the Supreme Court in *Lechmere, Inc. v. NLRB*.<sup>51</sup> *Lechmere* reaffirmed and further sharpened the distinction between employee/non-employee Section 7 rights already delineated in *Babcock*. *Lechmere* once again reiterated that the NLRA confers rights only on *employees*, not on unions or nonemployee organizers....<sup>52</sup> Accordingly, the default rule, contrary to the Board's prior rulings, will always be that "an employer cannot be compelled to allow nonemployee organizers onto his property."<sup>53</sup> The Court expressly repudiated the Board's automatic default imposition of a balancing test by holding that it "is only when reasonable access to employees is infeasible that it becomes appropriate to balance § 7 rights and private property rights."<sup>54</sup> Simply stated, there *cannot be* a balancing test of the employer's ownership rights *unless* the union first shows a lack of access to communicate Section 7 rights to employees.

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<sup>51</sup> 502 U.S. 527, 532 (1992).

<sup>52</sup> *Lechmere*, 502 U.S. at 532 (emphasis is original).

<sup>53</sup> *Id.* at 527.

<sup>54</sup> *Lechmere*, 502 U.S. at 528, 537-538.

Thus, unions seeking the abridgment of an employer’s property rights bear a “high burden” of showing first (a) the existence a Section 7 right; and (2) the existence of one of the *Babcock* exceptions before the Board *may* engage in a balancing test between the two. Even then, the available “accommodation” is not the automatic access to the employer’s private property. As the Supreme Court noted, in those extraordinary cases in which a union could actually trigger the exceedingly heightened burden of the balancing test under *Babcock* and an accommodation may be warranted, such “accommodation has rarely been in favor of trespassory organizational activity.”<sup>55</sup> The default rule continues to be that organizational trespassing encompassing Section 7 inherent rights is generally prohibited “except where ‘unique obstacles’ prevented nontrespassory methods of communication with employees.”<sup>56</sup>

In disavowing the notion that Section 7 rights afforded unions a “reasonable trespass” right, as justified by the Board in prior decisions, Justice Thomas wrote:

Our reference to ‘reasonable’ attempts [in *Babcock*] was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees-*not an endorsement of the view (which we expressly rejected) that the Act protects “reasonable” trespasses.* Where reasonable alternative means of access exists, § 7 guarantees do not authorize trespasses by nonemployee organizers, *even* (as we noted in *Babcock, ibid.*) ‘under ... reasonable regulations’ established by the Board... So long nonemployee union organizers have reasonable access to employees outside of the employer’s property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to the second level, balancing the employees’ and the employers’ rights as described in the *Hudgens* dictum.<sup>57</sup>

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<sup>55</sup> *Lechmere*, 502 U.S. at 535.

<sup>56</sup> *Id.*

<sup>57</sup> *Lechmere*, 502 U.S. at 535 (emphasis is original, internal citations omitted.)

**(b) The ALJ erred in arbitrarily creating an “equitable balancing test” of Westgate’s ownership rights and by imposing an unlawful “accommodation” which are “factors” incompatible with the principles enunciated in *Lechmere*.**

*Lechmere* expressly rejected the idea that Section 7, the soul of the NLRA, disavows long standing ownership principles or confers to a union ownership rights or possessory interests that it does not possess. Hence, it is incongruous to hold, as the ALJ did here, that the employer’s absolute property rights explicitly recognized in *Lechmere* are suddenly abandoned or forfeited in a Section 8(b)(4) analysis. Or, that Section 8(b)(4) would endorse the “minor” trespass defense - a term concocted by the Union and blindly adopted by the ALJ- after the Supreme Court rejected the availability of “reasonable trespass” option in discussing Section 7 rights. The ALJ’s interpretation is not reconcilable with the express language of the NLRA, Supreme Court or this Board precedent.

The NLRA, as *Lechmere* held, protects *employees*, not unions or nonemployee organizers for purposes of Section 7 and the limited intrusion on an employer’s ownership rights was justified because it directly benefited the employees wishing representation based on the extraordinary lack of access otherwise. No such constraints exist on a secondary boycott scenario under Section 8(b)(4), which by its very nature pits an unrelated union against a neutral secondary employer. Consequently, there is less, not more, justification to allow trespass onto a secondary employer or to depart from *Lechmere*’s default rule that employers- as private property owners- have the right to exclude nonemployees from their property. There are no factual or legal basis for the ALJ’s departure from *Lechmere*.

First, this action did not involve Section 7 rights. Equally missing from our record was the inaccessibility element. The Union erected several banners on public sidewalks airing their

labor dispute with Nigro Construction from March 6 until the end of the protest.<sup>58</sup> In the absence of these two factual predicates, the *Lechmere* “balancing test” was unnecessary. Hence, the ALJ’s unsanctioned balancing test was an unreasonable departure from this Board and Supreme Court precedent. Lastly, and just as importantly, automatic trespass was not the sole or most reasonable accommodation suitable to the Union’s desire to transmit its message to the public. Simply stated, there is a dearth of record evidence justifying this outcome.<sup>59</sup>

Why then, in the absence of the necessary legal and factual predicate, the ALJ engaged in an arbitrary “equitable balancing test” of the parties’ rights and declared that Local 872’s trespass was protected under Section 8(b)(4)? The Decision fails to justify this drastic deviation from precedent which must, in turn, render the Decision both unreasonable and contrary to the substantial record evidence as a whole. The ALJ’s transgression goes further than an isolated, yet, unlawful digression from precedent by improperly resuscitating the “reasonable trespass” expressly repudiated by the Supreme Court in *Lechmere*. The ALJ additionally fashioned an “accommodation” for this Union that’s discordant with *Lechmere*’s admonitions regarding the unprotected nature of trespass. As a result, this Decision legalizes the compelled and unconstitutional deprivation of Westgate’s inherent ownership rights to use, dictate and control its private property by ruling that the Union’s erection of the inflatables during those 4 days was protected under Section 8(b)(4). Notably, this wholesale repudiation of legally recognizable constitutional rights and well-settled body of property law is done without reference to a single legal authority substantially, let alone, vindicating the ALJ’s use of an arbitrary “equitable balancing test” for Section 8(b)(4) or the resulting destruction of Westgate’s property rights over

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<sup>58</sup> ALJD, p. 3-5.

<sup>59</sup> The Union could certainly find alternative ways to mount the inflatables on non-Westgate property as the union did in *Brandon, infra*, an NLRB decision cited by the ALJ. Instead, they wrongly gambled, at their own peril, that the “utility cut-outs” were “public property” or treated as “public property.”

its “utility cut-outs.” This glaring omission of supporting legal authority is not unexpected. There is no legal basis for the rejection of applicable law and settled precedent.

This Decision can only make sense if the ALJ’s goal is to provide the Union with ownership or possessory rights of an employer’s private property, even though the Union has no such rights and cannot legally obtain them otherwise. This, the Board cannot do without running afoul of its own precedent, Supreme Court decisions and constitutionally protected property rights. Local 872’s counsel’s ultimate concession that the Union’s actions were an “invasion[s] of [Westgate’s] property rights,” although characterized as “minor,” is an indication that the Union’s trespass was in fact an unlawful activity under the NLRA.<sup>60</sup> The ALJ’s failure to reconcile, as he must, his Decision with the Supreme Court’s mandate in *Lechmere* renders his conclusion unreasonable and this Board must reject it accordingly.

**2. The ALJ erred by wantonly disregarding over two hundred years of American Jurisprudence controlling private property ownership.**

The Decision’s legal analysis of Westgate’s property rights is equally dishonest, and has to be, in order to reach the result reached by the ALJ. While the Decision purports to provide the expected recitation of “facts” supposedly guiding the ALJ’s legal inquiry, in actuality, the Decision fails to embark, as it must, in a substantive legal analysis of these facts. Neither does the ALJ attempt to correctly apply these facts to controlling law. The discussion- or more appropriately here the absence of discussion- concerning the easement best exemplifies this fatal defect. The ALJ was very aware, as shown in the transcript and the post-brief submissions by the parties, that ownership rights, as dictated by state law, would play an integral role in deciphering Westgate’s ownership rights and what, if any, possessory rights did the Union have on the “utility cut-outs.” Identifying the proprietary rights, if any, of each party consequently

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<sup>60</sup> Tr. 45, lines 9-16.

was a necessary component in evaluating whether the Union's conduct was coercive or persuasive, as required by Section 8(b)(4). However, the Decision failed to seriously undertake this needed analysis.

The ALJ begrudgingly acknowledges Westgate's ownership rights in finding that the seven (7) inflatables were mounted on Westgate's private property and that the property was subject to an easement for the benefit of the utility companies. Yet, he similarly concluded- erroneously labeled as a finding of fact- that the Union had a possessory right over the "utility cut-outs" and sanctioned its unabashed use of Westgate's private property for those 4 days because "there were no obstructions or signs indicating that the cutouts were private property and off limits to anyone other than the utility companies [] [n]or did any of the utility companies ask the Union to remove the inflatables from the cutouts."<sup>61</sup> This "conclusion" and the conflation of these irreconcilable facts suggests either a basic disregard for universally recognized canons of property law and binding precedent. The ALJ's conclusion cannot stand and the very fact that the ALJ purposely omitted to discuss, let alone evaluate, the legal effect of the easement on the parties is an indication that the Decision was not based on substantive evidence and must be reversed.

**(a) The easement holders cannot "grant" access to Westgate's property to third parties nor modify the nature and use of the easement.**

Let's start, as we must, with the very legal principle that the ALJ negligently omitted from his analysis: the easement and its impact on the parties' rights. An easement is a nonpossessory interest in the land of another.<sup>62</sup> *An easement is not an ownership interest in a servient tract, but a mere privilege to use the land of another in a particular manner.*

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<sup>61</sup> ALJD, p.6, lines 16-19.

<sup>62</sup> *Boyd v. McDonald*, 81 Nev. 642, 647 (1965); *see also* Restatement (Third) of Property (Servitudes) § 1.2 (2000).

Easements may be created by express agreement, implication, necessity, or prescription.<sup>63</sup> An express easement is created if the intent of the parties has been specifically evidenced by language in declarations or documents.<sup>64</sup> Courts are required to construe an easement strictly in accordance with its terms and to give effect to the intentions of the parties.<sup>65</sup> More importantly, easements are construed strictly in favor of the property owner.<sup>66</sup> A party is privileged to use another's land only to the extent expressly allowed by the easement.<sup>67</sup>

In *S.O.C. Inc. v. Mirage Casino-Hotel*, the Mirage Casino-Hotel granted Clark County a “perpetual easement and pedestrian easement over, under and across” the sidewalk property at issue.<sup>68</sup> The easement also included the following descriptive language: “a perpetual easement for a pedestrian and maintenance easement for streetlights, traffic control devices and for detectors over, under, and across the parcel of land.”<sup>69</sup> This is similar to the language used in GC Exhibit 9, with the exception that the easement granted by Westgate does not contain the term “pedestrian” or allowed the use of the easement by pedestrians. The Mirage brought suit to enjoin the distribution of commercial handbills on the privately owned sidewalks of its properties by third parties alleging that the acts constituted trespass.<sup>70</sup>

The defense raised two arguments: first that the sidewalks were encumbered by a perpetual easement allowing for public access, and second that the activities of the hand-billers fell within the permissible scope of the easement.<sup>71</sup> Both arguments were rejected by the

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<sup>63</sup> *Id.* The creation of an easement by necessity, implication or prescription is not at issue here. Similarly, there is no record evidence supporting the Union’s entitlement to an express easement. The Union is unable to rely on the easement to justify its trespass.

<sup>64</sup> *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408 (Nev. 2001).

<sup>65</sup> *S.O.C., Inc.*, 117 Nev. at 408; *Peake Development, Inc.*, 2014 WL 859215, at \*2.

<sup>66</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>67</sup> *Id.*; *City of Las Vegas v. Cliffs Shadows Prof'l Plaza*, 293 P.3d 860, 867 (Nev. 2013).

<sup>68</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 407.

<sup>71</sup> *S.O.C., Inc.*, 117 Nev. at 408.

Supreme Court.<sup>72</sup> The Nevada Supreme Court held that the existence of an easement alone, without more, failed to transform private property into a public forum.<sup>73</sup> because the “right to exclude others” has been held to constitute a “fundamental element of private property ownership.”<sup>74</sup> Likewise, it rejected the argument that the hand biller’s actions were within the scope of the easement at issue.<sup>75</sup> A court cannot interpret easements broadly but must narrowly apply them in a manner tailored to achieve the intended result of the easement and “[a]ny misuse of the land or deviation from the intended use of the land is a trespass for which the owner may seek relief.”<sup>76</sup>

Hence, the resolution of the easement query for our case was rather simple had the ALJ actually followed the applicable common law on easements. Local 872 was not an easement holder or a beneficiary of the easements, as these were not public easements. The Union’s activities (*i.e.* erecting inflatables on the “utility cut-outs”) were completely outside of the nature and scope of the easements. By allowing Local 872’s activity, the ALJ improperly negated the intent of the parties when creating the easements. Lastly, the utility companies were legally incapable of granting the Union either access to the property or permission to erect the colossal inflatables for four days as they did- even if one believes the hearsay conversation between Mr. DaSilva took place on March 6, 2015.<sup>77</sup> Simply stated, the Union had no right to trespass onto Westgate’s property based on the express language of the easements and the ALJ erred in concluding otherwise.

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<sup>72</sup> *Id.* at 416.

<sup>73</sup> *Id.* at 408, 411 (“Privately owned property does not lose its private nature merely because the public traverses upon it.”).

<sup>74</sup> *Id.* at 412.

<sup>75</sup> *Id.* at 408.

<sup>76</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>77</sup> See *Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871 (9th Cir. 2001) (holding that the Cable Communications Policy Act of 1984 did not allow a cable franchisee access to a private apartment complex through easements granted to other cable providers). As discussed in Section 4, there is no reason to adopt the ALJ’s credibility assessments of Mr. DaSilva’s testimony as they are contrary to the clear preponderance of the evidence.

**(b) The ALJ erred by inferring that the absence of a “private property sign” on the “utility cut-outs” transformed private property into a public forum permitting the Union unfettered access to utilize Westgate’s private property.**

Equally unfounded is the ALJ’s conclusion that Westgate somehow “waived” its rights to control the access and use of its private property because it did not post “a sign” alerting the public that they could not access or use the “utility cut-outs.” The absence of a sign is not a silver-bullet, as the ALJ seems to infer, automatically transforming private property into public property or mitigating the Union’s repeated and unauthorized use of Westgate’s land. In fact, the Decision lacks the required legal predicate vindicating its unilateral creation of possessory rights for the benefit of the Union, when the evidence shows, and the Union concedes, that no such right could exist under applicable property law. Indeed, this arbitrary “concession” of “property rights” in the absence of entitlement to actual ownership rights under the law has been routinely rejected in the NLRA arena.<sup>78</sup> The fact that the intended beneficiary here is the Union does not, and cannot, change the outcome.

**(c) The First Amendment of the Constitution does not absolve or authorize Local 872’s trespass of Westgate’s private property.**

Once again, what is purposely missing from the Decision ultimately dooms its validity. It is well settled that the public has a right to engage in expressive activity in public forums. Are Westgate’s “utility cut-outs” public forum as defined by law? The Decision does not directly address this question or evaluates applicable First Amendment precedent. The proper standard of law is not as the ALJ suggests: (1) whether there was a sign at the “utility cut-outs” designating it private property; or (2) whether the utility companies, who had no ownership or

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<sup>78</sup> See *Glendale Assoc. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003)(explaining that employers need not be accorded greater property rights than they actually possess); *In re A & E Food Co. 1, Inc.*, 339 NLRB 860, 862 (2003).

possessory right of that property, had tacitly approved the Union's use of Westgate's property. The proper inquiry was whether the "utility cut-outs," while owned by Westgate, served as the equivalent of a public forum, which would protect the Union's activity, in the same manner that the ALJ concluded that the display of the banner on public property was protected under the First Amendment. The Decision, once again, omits any discussion or required analysis because it detracts from the ALJ's findings that the Union had the authority to access and utilize the "utility cut-outs," as it did.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."<sup>79</sup> Embedded in this principle is the idea "that freedom of speech prohibits the government from telling people what they must say."<sup>80</sup> Nor can the government force private actors to promote messages with which they disagree.<sup>81</sup>

The Supreme Court has identified three types of forums, "the traditional public forum, the public forum created by government designation, and the nonpublic forum."<sup>82</sup> "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or government fiat,' the property has been 'devoted to assembly and debate.'<sup>83</sup> Designated public fora are created by "purposeful government action,... by intentionally opening a nontraditional public forum for public discourse."<sup>84</sup> Other property is either a nonpublic forum or not a speech forum at all.<sup>85</sup>

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<sup>79</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>80</sup> *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quotation omitted).

<sup>81</sup> *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 7 (1986).

<sup>82</sup> *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998) (quotations and citations omitted).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

For the Board to adopt the ALJ's Decision granting the Union unfettered access Westgate's private property, it must first find that the utility easements functioned as the equivalent of the "quintessential public forum" typified by public sidewalks. No such finding is compatible with this record evidence. The Ninth Circuit Court of Appeals decision in *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*<sup>86</sup> underscores this impossibility. At issue there was whether the Casino's sidewalk built on private property lost its "First Amendment protection," commonly given to other public sidewalks.

The Ninth Circuit held that while built on private property, the disputed sidewalk was intended to be used -and was actually used- as the equivalent of a public sidewalk making it a protected public forum.<sup>87</sup> "Whether a property has historically been used for public expression plays an important role in determining if the property will be considered a public forum."<sup>88</sup> In that case, the new sidewalk was built to replace the former public sidewalk in order to accommodate the construction of the Venetian and to ensure a continuous pathway between strip hotels. The Casino also agreed to subjugate its ownership rights to the sidewalk and to provide "for [the] unobstructed public use of the [private] sidewalk" through an agreement with the County.<sup>89</sup>

No such public forum indicia is present here, a dispositive fact, omitted by the ALJ's failure to apply the proper standard of law. The functionality of these areas is completely different from a sidewalk type of structure. The utility easements provide no designated connection or pathway to the property, as shown by the pictures in GC Ex. 3. In fact, a pedestrian using the utility cutouts as a pathway would face a number of serious and dangerous

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<sup>86</sup> *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas et al.*, 257 F.3d 937 (9th Cir. 2000)

<sup>87</sup> *Id.* at 943-46.

<sup>88</sup> *Id.* at 944 (internal citations omitted).

<sup>89</sup> *Id.* at 943.

obstacles- from changing surfaces, substantial inclines, to dangerous equipment such as transformers and switches- as those areas were never intended to be or used as paths of travel to or from the Hotel. GC Ex. 3 (c), (e), (f) and (g)<sup>90</sup> underscore the absurdity of characterizing the utility easements as “public sidewalks.” The fact that the utilities easements abutted the public sidewalk, as noted by the ALJ, only highlights the non-public nature of the easements. They were not sidewalks or pathways to the Hotel

Likewise, an inference from the record that the “utility cut-out” at issue were ever used or had been historically used as “public forums” is equally unavailing. First, the Union did not adduce any evidence corroborating the easements’ usage by that particular Union or the public at large. Indeed, such inference can’t survive when measured against the evidence. Mr. Froehlich, Vice President of Westgate’s Western Region, testified that he contacted the police when homeless persons tried to rest on the utility easements.<sup>91</sup> Certainly, there is no testimony showing that Westgate routinely allowed the “public” to stand for prolonged periods on the utility easements or to erect any kind of structure there for four (4) whole days, as Local 872 did here. Or more importantly, there is a dearth of record evidence showing that Westgate allowed the public to engage in “expressive activity” on those utility easements. The fact that a tourist may – on occasion- stop momentarily at one of easements does not make it public property, let alone a public forum, as that term is defined by law.

Local 872’s “expressive activity” was incompatible with the easement’s nature, purpose and use of the property in question.<sup>92</sup> The “utility cut-outs” were never intended to be public

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<sup>90</sup> Photos of the roach erected by the power boxes on Karen Ave./Joe W. Brown Blvd.; the rat on the concrete utility easement by Karen Ave./ Paradise Rd. surrounded by gravel, rocks and a substantial incline; fat cat by Paradise Rd./North lot surrounded by gravel and requiring to walk underneath the monorail; and the pig on Paradise Rd. surrounded by power boxes.

<sup>91</sup> Tr. 58, lines 6-9.

<sup>92</sup> *Int'l Soc'y for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672, 688, 698-99 (1992); GC Ex. 9(a).

easements or for the benefit of the public. Indeed, the operative facts in this case are akin to the facts in *Hawkins*<sup>93</sup> where the Tenth Circuit found that walkways within the Galleria, a partially open area leading to the Denver Performing Arts Complex (DPAC), were not a public forum. The Tenth Circuit reasoned that the disputed property could not be a traditional public forum because it was not analogous to a public “*right of way or thoroughfare*.”<sup>94</sup> Like Westgate’s utility easements, the Galleria did not form part of the transportation grid and pedestrians did not generally use it as a throughway for other destinations. Westgate’s utility easement cannot be considered public fora. And, the ALJ’s conclusions that they effectively served a public forum are unreasonable and contrary to the substantive weight of the evidence.

**3. *Eliason* and its progeny are factually and legally distinguishable as they do not involve nor sanction union trespass as protected conduct under Section 8(b)(4)(ii) and the ALJ departed from Board precedent when concluding otherwise.**

The underpinning of the ALJ’s legal conclusion that Union’s “expressive” conduct was outside of the proscription of Section 8(b)(4)(ii) is the result of the misapplication of the Board’s decisions in *Eliason & Knuth of Arizona, Inc.* (“*Eliason*”) <sup>95</sup> and its progeny, *Marriot Warner Center* (“*Marriott*”) and *Brandon Regional Medical Center* (“*Brandon*”). *Eliason* and its “off-springs” stand for the proposition that *in certain circumstances* the use of stationary banners and inflatables against a secondary/ neutral employer does not violate Section 8(b)(4)(ii) of the Act. However, the *operative* facts in those cases are legally distinguishable from our case and cannot ratify the ALJ’s finding that Union’s conduct was protected under Section 8(b)(4)(ii), as fully discussed *infra*.

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<sup>93</sup> *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287-88 (10th Cir.1999).

<sup>94</sup> *Id.* at 1287.

<sup>95</sup> See ALJD, p. 6, lines 25-30; p. 7, lines 1-6 discussing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010); *Carpenters Local 1506 (Marriot Warner Center)*, 355 NLRB 1330 (2010); *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB No. 162 (2011).

At issue in *Eliason* was whether Section 8(b)(4) foreclosed public forum expressive activity that was otherwise constitutionally protected by the First Amendment, simply because it was aimed at a secondary employer. To determine this, the Board closely examined Congressional intent in enacting Section 8(b)(4) and found that Congress did not intend to “bar all forms of union protest activity directed at a secondary employer...”<sup>96</sup> Instead, Congress sought to bar coercive or intimidating conduct by unions. To determine whether the Union’s conduct was intended to persuade or coerce, a goal proscribed by Section 8(b)(4), the Board instructed the finder of fact to consider the union’s conduct in its entirety, including but not limited to, the “location, size or features” of the banners or inflatables and other forms of protest, if any, used by the union against the secondary employer.

In *Eliason*, the union displayed stationary banners *on a public sidewalk or right-away outside of the secondary employer’s facility*<sup>97</sup> bearing a message directed to the public. In *Marriott*, like in *Eliason*, the union’s “conduct” at issue involved banners placed 15 feet *outside of the secondary employer’s premises on public sidewalks and streets*.<sup>98</sup> Lastly, in *Brandon* the union mounted a gigantic inflatable rat, similar to the ones at issue here, on a “flatbed trailer and placed the trailer on *public property* in front of the hospital approximately 100 to 170 feet” from the entrance to the hospital.

The expressive union activity at issue in these cases was limited to the placement of *stationary banners or inflatables on public property*. The unions did not engage in other types of activities which were analogous to a strike or a picket line. And, while the union’s conduct in *Eliason* (and the others analogous cases) was certainly bothersome to the secondary employer,

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<sup>96</sup> 355 NLRB 797, slip op. 5.

<sup>97</sup> 355 NLRB 797, slip op. 2.

<sup>98</sup> 355 NLRB 1330, slip op. 1-2. See also *SW Regional Council of Carpenters (Richie’s Installations, Inc.)*, 355 NLRB 1445(2010) cited by ALJD, p. 7, lines 22-23. That case also involved the use of stationary banners placed on public sidewalks. 355 NLRB 1445, slip. Op. 6.

the Board concluded that the union's stationary bannerling failed to rise to the "coercive" level proscribed by Section 8(b)(4). The persuasive factor for the Board's reasoning was that the expressive activity at issue – bannerling and the use of inflatables on public property- was protected speech under the First Amendment. Based on the constitutional principles enunciated in *DeBartolo Corp.*<sup>99</sup>, the Board refused to construe Section's 8(b)(4) language – to "threaten or coerce"- in a manner conflicting with First Amendment guarantees or threatening the constitutionality of Section 8(b)(4).<sup>100</sup>

These controlling factual and legal predicates driving the Board's decision in *Eliason* are simply lacking here and the ALJ erred by relying on these line of cases to justify his conclusion that Local 872's conduct did not violate Section 8(b)(4)(ii). There are no "public forum" or protected free speech concerns here, as the ALJ should have concluded if he considered the location of the activity and overall conduct of the Union, as required by *Eliason*. Local 872's conduct consisted of repeated and lengthy illegal incursions into Westgate's private property and the unsanctioned use of private property for four days, as discussed *supra*. Local 872's conduct is not only dissimilar to the union's actions in *Eliason*, it is the very antithesis of the type of "expressive conduct" sanctioned by the Board. And, while it is reasonable to conclude that Section 8(b)(4) allows expressive conduct in "public forums" under the First Amendment; it is unreasonable to extrapolate an identical conclusion with regard to the unauthorized use of private property. The only reasonable inference that the ALJ should have reached based on *Eliason* was that Local 872's conduct violated Section 8(b)(4)(ii). The Decision must be reversed as it is an unreasonable departure from Board precedent.

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<sup>99</sup> *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 577 (1988).

<sup>100</sup> *Eliason*, 355 NLRB 797, slip. Op. 4-6.

**(a) The Seventh Circuit’s decision in *520 Michigan Avenue Associates* supports a finding that Local 872’s actions ran afoul of Section 8(b)(4) and the ALJ erred by concluding otherwise.**

The Decision purports to rely on the Seventh Circuit’s opinion in *520 Michigan Avenue Associates v. Unite Here Local 1*<sup>101</sup> to vindicate its conclusion that the Union engaged in protected activity. Yet, a review of the opinion in *520 Michigan Avenue Associates* discredits the ALJ’s conclusion. The plaintiff, a Hotel, filed a lawsuit in federal court seeking damages for the union’s alleged violations of Section 8(b)(4)(ii) of the Act. *520 Michigan Avenue Associates* involved the appeal of a summary judgement for the union after the trial court concluded that the union did not violate Section 8(b)(4)(ii) of the Act.

The union began a strike outside of the Hotel in 2003. In 2008, the union expanded its strategy to specifically target Hotel customers, including individuals and organizations, associated with those customers. The supposed goal of the strategy was to leverage consumer pressure to force the Hotel to reconsider its positions in the labor dispute by sending delegations, which numbered from two (2) to ten (10) people, to visit Hotel customers and associates of those customers on both public and private property. By January 2009, the Union was deploying as many as ten (10) to fifteen (15) delegations per day in connection with the Hotel strike. The lawsuit arose from certain delegation “visits” involving nine (9) customers or associates of those customers. The Hotel argued, among other grounds, that the union violated Section 8(b)(4) (ii) when the delegations repeatedly trespassed onto private property, forced their way onto private offices to leave literature, called customers every ten minutes for an hour and engaged in other harassing conduct.

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<sup>101</sup> 760 F.3d 708 (7th Cir. 2014).

After discovery was closed, the union moved for summary judgment arguing that its delegations were engaged on expressive activity protected under the First Amendment and their conduct could not be considered a violation of Section 8(b)(4), even if it burdened or annoyed the neutral parties. The union further argued that the trial court would violate the canons of constitutional avoidance discussed in *DeBartolo*, if it ruled otherwise. The trial court sided with the union and held that sending emails, calling and making unwanted visits into private property were protected speech because the conduct did not involve actual threats, and fell short of what could be considered picketing. The Seventh Circuit reversed the summary judgment- in part- because it found that there were genuine material issues of fact negating the trial court's conclusions that the conduct surrounding three customers was not coercive or a violation of Section 8(b)(4)(ii).

The central question to be resolved in Section 8(b)(4) cases, as the Seventh Circuit, noted is “whether the Union's conduct [] is coercive, as in the sense of a boycott or picket, or persuasive, as in the case of handbilling outside an establishment.”<sup>102</sup> The Appellate Court conceded that “reality is not so easily divided into two neat categories” and a trial court “may find that certain aspects of the Union's conduct could be persuasive or coercive in ways that distinguish it from both handbilling and picketing.”<sup>103</sup> After evaluating the conduct alleged by the Hotel, in the light most favorable to the non-moving party, the Court opined that while some of the conduct was akin to handbilling and presumably protected, “many of the Union's other activities [were] disturbingly similar to trespass and harassment,” which would indicate coercion.<sup>104</sup> The Court's discussion on trespass and its supporting legal authority is very persuasive and unequivocally discredits the ALJ's findings and conclusions as follows:

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<sup>102</sup> 760 F.3d at 720.

<sup>103</sup> 760 F.3d at 720.

<sup>104</sup> 760 F.3d at 720.

The question then becomes whether trespassing and harassment could count as coercive behavior under federal labor law. We concede that the Union is permitted some initial entry onto private property so it may convey its views to the decision-makers of a secondary organization. See *Servette*, 377 U.S. at 51, 84 S.Ct. 1098. But, even in the context of primary picketing, at some point the trespass becomes unprotected. See *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (“[T]here are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable.”); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992) (“[T]respasses of nonemployee union organizers are ‘far more likely to be unprotected than protected.’ ”) (quoting *Sears*, 436 U.S. at 205, 98 S.Ct. 1745); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L.Rev. 1527, 1573–74 (2002) (“[S]tates are largely free to enforce general laws against violence, intimidation, and trespass in the context of labor disputes.”). And the Supreme Court has made clear that federal labor law “does not require that [an] employer permit the use of its facilities for organization when other means are readily available.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 114, 76 S.Ct. 679, 100 L.Ed. 975 (1956).

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Putting the matter succinctly, we hold that a union may be liable under § 158(b)(4)(ii)(B) for unlawfully coercing a secondary to cease doing business with the struck employer if the union's conduct amounts to harassment or involves repeated trespass or both. Granted, trespass and harassment of a secondary organization's members differ from picketing in one central way that supports the Union's position. They do not create a symbolic barrier between a business and its customers in the way a picket line does. But such conduct may nevertheless significantly disrupt a business and pose a substantial threat to an organization's finances. Indeed, trespass and harassment may be more coercive than picketing in one important sense. Picketing generally occurs outside a place of business—perhaps on a sidewalk, or on the periphery of the neutral's establishment. The Union here is accused in several instances of barging into offices, bypassing security, following certain targets around stores, and shouting at employees. This is the sort of conduct that can—and did—get the police called in to intervene. The Union's alleged conduct easily could have been as disruptive of a neutral organization's property, privacy, and business operations as any picket line. Instead of creating a barrier between customers and the business, the Union infiltrated their neutral targets and disturbed them from the inside. That behavior, if proven, can be deemed coercive. It is also important to point out that Section 158(b) does not merely bar coercion that is actually exerted; it also does not permit the Union “to threaten” a neutral with unlawful secondary activity.<sup>105</sup>

The Seventh Circuit concluded that “repeated and sustained trespass or unlawful harassment” used as a labor tactic was not persuasive because it sought to compel a certain result

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<sup>105</sup>760 F.3d at 721-722.

transforming the conduct into a secondary boycott in violation of Section 8(b)(4).<sup>106</sup> The Court similarly held that neither trespass nor unlawful harassment were protected expressive conduct under the First Amendment; hence, the invocation of *DeBartolo's* constitutional avoidance canon was unwarranted. Lastly, the Court further admonished the trial court, when remanding the case, that the employer need not show that the union was criminally or civilly liable for trespass or harassment in order to prevail on its claims.<sup>107</sup> The application of the Seventh Circuit's principles to our operative facts requires the opposite legal conclusions reached by the ALJ, and as a result the Decision must be reversed by the Board.

**(b) Local 872's repeated trespass onto Westgate's property is the epitome of coercive activity proscribed in Section 8(b)(4).**

There is no safe harbor for the Union's trespass or taking of Westgate's property. The Union's conduct was meant to compel an outcome, not to persuade, the very goal precluded by Section 8(b)(4). First, Local 872 did not send a representative to Westgate's property to talk or try to persuade Westgate from doing business with Nigro Construction. They instead illegally barged into Westgate's private property and placed between four (4) to seven (7) inflatables during a 4 day period. The Decision attempts to justify the Union's unlawful trespass by noting that the "utility cut-outs" did not have a trespass sign up prior to March 12, 2015. But, as held in *520 Michigan Avenue Associates*, Westgate is not required to prove criminal trespass even though there is enough evidence on the record to establish otherwise.<sup>108</sup>

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<sup>106</sup> 760 F.3d at 722. While this case has been remanded to the trial court, no decision has yet been reached on the remaining allegations.

<sup>107</sup> 760 F.3d at 722.

<sup>108</sup> NRS §207.200 (1)(a)(b) defines criminal trespass as any person who goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act; or willfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not to trespass.

Whether the Union believed that the “utility cut-outs” were public property or not is inconsequential as the undisputed evidence shows that they were part of Westgate’s private property. Any contention that the Union was unaware of that issue since March 6, 2015 is equally negated by the record evidence.<sup>109</sup> The Union’s own representative testified that both parties called the police on the first day and Westgate’s security told the Union that they did not belong there. He also testified that the sole intent of the inflatables was to “piss off” Westgate, a fact that the ALJ opted to disregard because he wrongly believed it was not relevant to the Union’s conduct.

The Union’s repeated, lengthy and violent trespass, as documented by the record, was not the peaceful expressive activity characterized by the Decision. Quite to the contrary, the very act of trespassing is the antithesis of peacefulness and it is never meant to persuade. The Supreme Court in *Lechmere* rejected the notion that the NLRA provided independent rights to Unions and severely limited the union’s access to private property for organizational rights. Allowing a third party – just because it happens to be a Union- to enter into a neutral employer’s property and set up materials regarding an unrelated labor dispute violates the very essence of Section 8(b)(4) and Congress’s intent in protecting innocent bystander employers.

More importantly, the Union’s actions were a direct affront to Westgate’s ownership rights which demanded and caused a confrontation. The erection of numerous gigantic inflatables on Westgate’s private property for four days was intended to, and in fact did, enmesh Westgate directly into Local 872’s labor dispute. The actions of Local 872, reflected by the record, were the equivalent of illegal picketing with the improper purpose of “enmesh[ing] neutral secondary employers in primary labor disputes between the union and another employer”

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<sup>109</sup> Tr. 294, lines 21-25; 295, lines 1-4; 272, lines 20-21; 273, lines 18-21; 277, lines 14-16; 283, lines 1-15.

and sought to coerce Westgate into taking sides, violating Section 8(b)(4)(ii)(B). Local 872 acknowledged it had no right to enter into private property. Mr. DaSilva testified on various occasions of the importance of being on public property.<sup>110</sup> The fact that they ultimately ended up on Westgate's private property- by design or incompetence- is irrelevant. Local 872's trespass constituted a violation of Section 8(b)(4) and the Board must reverse the Decision.

**4. The ALJ's credibility findings concerning Mr. DaSilva were not supported by the preponderance of the evidence.**

While the Board *may* defer to an ALJ's credibility assessments concerning witness testimony, no such deference is required *unless* the ALJ's credibility findings are supported *by the clear preponderance of all relevant record evidence as a whole*.<sup>111</sup> The ALJ's credibility assessment of Mr. DaSilva's testimony was patently wrong and must be rejected.<sup>112</sup> Mr. DaSilva testified of a conveniently timed "discussion" with an unidentified "water district employee who happened to be working near *one of the west-side utility cut-outs* on March 6." This mystery man told Mr. DaSilva that there "was no problem putting an inflatable in the cutout as they were not working there."<sup>113</sup> While the Union could have called this anonymous worker to substantiate this conversation, it did not do so. Indeed, the ALJ erred in giving any credence to Mr. DaSilva's testimony as none was warranted or justified.

First, the ALJ was aware of actual admissible produced during the hearing, including the maps and the easement documents, repudiating Mr. DaSilva's testimony.<sup>114</sup> Secondly, Mr. DaSilva conceded during cross examination that he did not seek nor obtained permission from

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<sup>110</sup> Tr. 272, lines 20-21; 273, lines 18-21, 277, lines 14-16

<sup>111</sup> *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *NLRB v. Katz's Delicatessen of Houston St.*, 80 F.3d 755, 765 (2nd Cir. 1996)(An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole.")

<sup>112</sup> ALJD p. 6, fn 11.

<sup>113</sup> *Id.*

<sup>114</sup> GC Exhibit 8, 9 and 10.

anyone (metro, detectives or utilities) to place the inflatables in Westgate's property *before or after* March 6, 2015.<sup>115</sup> Mr. DaSilva's testimony was not creditable, let alone persuasive. The ALJ consequently erred by ignoring evidence detracting from his findings.

The ALJ's recitation and reliance on hearsay testimony from Mr. DaSilva, involving the Nevada metro police and detectives to substantiate the findings that the Union has a right to erect the inflatables is equally misplaced.<sup>116</sup> These people- who allegedly reviewed the placement of the inflatables and deemed it legal- never testified. There is no record evidence showing that the police or the detectives were authorized or had the expertise to determine Westgate's property boundaries, let alone the legal impact of the easements. Mr. DaSilva conceded this during cross-examination. More importantly, the record evidence unequivocally shows that these second hand assurances that the Union was on "public property," if they took place at all, were misplaced because the expert and the maps conclusively proved otherwise. No such inference could be derived from the record and the ALJ's creditably assessments of Mr. DaSilva's testimony must be discounted.

#### **IV. CONCLUSION**

For the reasons stated here and in Westgate's Exceptions, the Board must reverse the Decision of Administrative Law Judge Jeffrey D. Wedekind of August 21, 2015 because it is unreasonable and untethered from the substantial evidence on the record considered as a whole. The new Order should state that the Laborers' International Union of North America, Local 872 violated Section 8(b)(4)(ii) of the National Labor Relations Act when it repeatedly trespassed onto Westgate's property and hijacked Westgate's use of its property by illegally erecting numerous gigantic inflatables for approximately four (4) days. The Union's actions were

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<sup>115</sup> Tr. 291, lines 4-24, 292, lines 8-16; 294, lines 21-25; 295, lines 1-4.

<sup>116</sup> Tr. 294, lines 21-25, 295, lines 1-4.

coercive with the proscribed object of enmeshing Westgate, the neutral employer, in a controversy not its own and violated Section 8(b)(4)(ii).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed via E-Gov, E-Filing, and electronic mail on this 16th day of October, 2015 on the following:

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