

No. 20-1010

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**LOCAL 23, AMERICAN FEDERATION OF MUSICIANS
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent**

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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LOCAL 23, AMERICAN FEDERATION OF)	
MUSICIANS)	
)	No. 20-1010
	Petitioner)	
)	
	v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
	Respondent)	16-CA-193636
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

The Petitioner in this case, Local 23, American Federation of Musicians (“the Union”) was the Charging Party before the Board in the proceeding below (Board Case No. 16-CA-193636). Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts (“the Center”) was the Respondent in that proceeding, and the Board’s General Counsel was a party.

B. Rulings Under Review

The matter under review is an August 23, 2019 Decision and Order of the Board, reported at 368 NLRB No. 46, in which the Board dismissed an unfair-labor-practice complaint against the Center. The complaint had alleged, based on a charge filed by the Union, that the Center unlawfully denied property-access to employees of a licensee at the Center.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit

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Dated at Washington, D.C.
this 14th day of July 2020

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GLOSSARY

Act	National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	National Labor Relations Board
Br.	Opening brief of Petitioner Local 23, American Federation of Musicians
Center	Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts
JA	Joint Appendix
Union	Local 23, American Federation of Musicians

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Local 23, American Federation of Musicians (“the Union”) to review a Decision and Order of the National Labor Relations Board issued on August 23, 2019, and reported at 368 NLRB No. 46, in which the Board dismissed the complaint issued against Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing

Arts (“the Center”). (JA7-34.)¹ In doing so, the Board found that the Center did not violate Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by prohibiting off-duty employees of the San Antonio Symphony, a licensee of the Center, from distributing leaflets to the general public on the Center’s property. (JA7,19.) The Union was the charging party before the Board and seeks review of the complaint’s dismissal.

The Board had subject matter jurisdiction under Section 10(a) of the Act, 29 U.S.C. § 160(a), and its Order is final with respect to all parties. This Court has jurisdiction to review Board orders under Section 10(f) of the Act, 29 U.S.C. § 160(f), and venue is proper under the same provision because it allows a party aggrieved by a Board order to obtain judicial review in this Circuit. The Union’s petition for review, filed on January 16, 2020, was timely because the Act establishes no deadline for such filings.

STATEMENT OF THE ISSUE

Whether the Board’s revised standard for determining the statutory access rights of contractor and licensee employees to property not owned by their employer is rational and consistent with the Act; and accordingly, whether the

¹ Record references in this final brief are to the Joint Appendix filed by the Union on July 1, 2020. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Union’s opening brief.

Board rationally dismissed the unfair-labor-practice complaint alleging that the Center violated the Act by preventing off-duty Symphony employees from leafleting on its property.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Foundation Operates the Center, Which Prohibits Solicitation and Distribution on Its Private Property

The Bexar County Performing Arts Center Foundation is a private, non-profit organization that owns and operates the Tobin Center for the Performing Arts, a complex of performance and exhibition spaces in San Antonio, Texas. (JA7,9;JA132-33,162-63.) Located at the former site of the San Antonio Municipal Auditorium, the Center houses a large performance hall that accommodates 1,750 patrons, a smaller indoor theater that accommodates 300 patrons, and an outdoor theater with space for 1,000 patrons. (JA9,31;JA38,132-33.)

In 2010, the City of San Antonio gave its Municipal Auditorium and the surrounding public land to the Foundation on a provisional basis, for it to develop a world-class performing arts facility at that site. (JA9;JA38-39,158-59,491-618.) The Foundation fulfilled its mission in 2014, when it completed construction of the Center and developed the surrounding land using a combination of private and public funding. (JA9;JA40.) Upon completion of the project, the City conveyed

the deed to the entire developed property to the Foundation. (JA9;JA132,158-59,164-98.) The deed specified that the property must be used “for performing and visual arts activities in San Antonio, Texas, including but not limited to musical, dance, and theatrical performances, rehearsals, art exhibitions, arts education, and similar activities, that are open to the general public.” (JA9&n.17;JA149,164-98.) It further specified that “open to the general public” meant “accessible by the general public on a paid or unpaid basis, from time to time.” (JA9&n.17;JA149,164-98.)

Consistent with these provisions, the Center allows members of the general public to access events on-site by securing tickets, which may be free of charge. (JA133,151-52.) To ensure the safety and integrity of the experience for ticketed patrons and guests, as well as performers and other event-participants, the Center prohibits loitering on the property by those who are not attending events, restricts items brought onto the property, and prohibits solicitation and distribution. (JA9,16;JA48-51,63,70-71,107-09,134,142-45,153-56.) The Center’s dedicated event staff enforces these prohibitions, with the help of local police officers. (JA-9-10;JA46-52,59-63,108,115-16,141-45,155.)

B. The Center Licenses Use of Its Spaces, Granting the Symphony Access for Performances and Rehearsals at Designated Times During 22 Weeks

In addition to hosting touring performers from around the world, the Center has “resident companies”—groups based in San Antonio that perform at the Center on a repeated basis. (JA9;JA40-42,143,162.) Among the resident companies are the San Antonio Symphony, Ballet San Antonio, Opera San Antonio, San Antonio Chamber Choir, Youth Orchestra of San Antonio, and the Children’s Chorus of San Antonio. (JA9;JA40-41.) The Center works with the various resident companies to develop a unified schedule that enables each group to use the Center, but it prioritizes scheduling requests by the Symphony, the Ballet, and the Opera. (JA9;JA56-57,162.)

While the Symphony maintains permanent offices elsewhere in San Antonio, its Use Agreement with the Center gives it license to use designated performance and rehearsal spaces, as well as associated backstage areas, for 22 weeks of the year. (JA9;JA42-45,58-59,72-73,91-93,105,124,140-41,145-48,156,199,206.) An addendum to the Use Agreement provides the specific dates when those privileges apply. (JA101,145-47,157,160-61,205.) If members of the Symphony need to access areas of the Center outside the specified dates—for example, to retrieve a stored instrument—they must make an appointment with the Center’s management to gain access. (JA92,99-100,140,157-58.)

The Symphony's musicians are represented by the Union, which has a collective-bargaining agreement with the Symphony setting forth their terms and conditions of employment. (JA9-10;JA74-76,221-95.) The Center is not a party to the agreement. (JA221-95.) Nor does it employ any of the musicians or participate in their selection. (JA16;JA104-05.)

Under the terms of the collective-bargaining agreement, Symphony musicians do not work all year round. (JA9;JA90,123.) Their performance season spans a 39-week period beginning each September, during which they work a total of about 30 weeks (22 of them for the Symphony at the Center).

(JA9;JA41,90,123,131,199,225,230.) Moreover, during some of the 22 weeks, the Symphony splits its time between the Center and at least one other local venue.

(JA9;JA102-03,297-481.) Over the course of a season, the Symphony typically performs not only at the Center but also at a collection of other venues including the Majestic Theater, the Laurie Auditorium at Trinity University, the Barshop Jewish Community Center, and various churches and high schools throughout the San Antonio area. (JA9;JA102-03,297-481.)

C. The Symphony's Musicians Attempt To Distribute Leaflets at the Center When the Symphony Has No Scheduled Performances or Rehearsals There; the Center Prevents the Distribution, Consistent with Its Rules; the Musicians Move to Public Property Across the Street and Successfully Leaflet from that Location

During the 2016-2017 performance season, the Union and the Symphony musicians grew increasingly concerned that the musicians' work opportunities were diminishing because the Ballet, another licensee of the Center, had opted for recorded music at some performances. (JA9;JA78-81,96-97,120,125,482-85.) The Union decided to raise public awareness on the matter, and to exert indirect pressure on the Ballet, by distributing leaflets at the Center before the Ballet's February 2017 performances of *Sleeping Beauty*. (JA9;JA78-81,120-21.) The leaflets, entitled "A Live Orchestra for Live Dancers," stated:

You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky's score over loudspeakers.

You've paid full price for half the product
San Antonio deserves better!

DEMAND LIVE MUSIC!

Go to: Musicians' Society of San Antonio on Facebook:

[A QR code appeared here for scanning.]

(JA9-10;JA296.)

On the evening of February 17, 2017, about an hour before the first *Sleeping Beauty* performance, a group of Symphony musicians convened near the Center with individuals sympathetic to their cause. (JA9-10;JA75-76,82-83,118.) At the time, the musicians were off-duty and had no Symphony business at the Center. (JA9-10,17;JA448.) Indeed, the Symphony was scheduled to perform that evening at an entirely different venue (the Majestic Theater). (JA9-10,16;JA98,448.)

With a few hours to spare before the Majestic Theater performance, the musicians and sympathizers gathered across the street from the Center's Valera Plaza, an open area at the front of the Center's property that patrons traverse to reach the box office and largest performance hall. (JA9-10;JA82-83,135-36,139,486-87,489.) Once assembled, they walked towards the Plaza with leaflets in hand. (JA10;JA84-85.) Their plan was to disperse and leaflet on the sidewalks bordering the Plaza, to reach patrons arriving for *Sleeping Beauty*. (JA83-84,121-22.)

When they attempted to position themselves in accordance with this plan, the Center's event staff informed them—consistent with the Center's policy against solicitation and distribution—that they could not leaflet anywhere on the property, which included the sidewalks bordering the Plaza. (JA10;JA54-55,64-67,71,84-85,486.) The staff and an assisting police officer suggested, as an alternative, that they leaflet on the sidewalk directly across the street from the

Center, which was on city property. (JA10;JA66-69,84-85,111-12.) The group moved there and distributed leaflets without impediment. (JA10;JA54-55,67,86-87,106.)

Essentially the same sequence of events unfolded before each subsequent performance of *Sleeping Beauty* during the weekend of February 17-19, 2017. (JA9-10;JA66-67,88.) The Symphony—and therefore its musicians—had no right to use the Center or its grounds that weekend for any performance or rehearsal. (JA17;JA199,205-06,448.) Instead, the Symphony was scheduled to appear only at the Majestic Theater that weekend. (JA448.) Nevertheless, the musicians attempted to use the Center’s property each day, to distribute leaflets with a group of sympathizers. (JA9-10,17;JA88.) When the Center’s staff and on-site police officers barred them from leafleting on the property, they relocated to the public sidewalk across the street. (JA10;JA88-89.) Notwithstanding this minor adjustment of location, they reached many people with their message, handing out hundreds of leaflets over the course of the weekend. (JA10,17;JA82,106,112.)

II. THE BOARD’S CONCLUSIONS AND ORDER

The Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran dissenting) dismissed the unfair-labor-practice complaint based on its determination that the Center could lawfully “inform[] the off-duty Symphony employees whom it did not employ that they could not engage in informational

leafleting on its private property.” (JA17.) The Board held that although such concerted activity enjoyed some protection under Section 7 of the Act, 29 U.S.C. § 157, a property owner has a fundamental right to exclude others from its property, and under Supreme Court precedent that property right is especially strong where those seeking Section 7 access are “nonemployees in relation to the property owner.” (JA7-8&n.14,17n.81.)

Consistent with that statutory assessment, the Board concluded that employees of an on-site contractor or licensee cannot be “granted . . . the same Section 7 access rights as the property owner’s own employees.” (JA8.) Accordingly, it overruled *New York New York Hotel & Casino*, 356 NLRB 907 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011), because those cases had effectively blurred the distinction of substance between the access rights of a property owner’s own employees and others. (JA8.)

To restore the distinction, moreover, the Board considered anew the degree of Section 7 access a property owner owes to off-duty employees of an on-site contractor or licensee. (JA10-16.) The Board held that such third-party employees are only entitled to access for Section 7 purposes when they “work both regularly and exclusively on the property,” and “the property owner fails to show that they

have one or more reasonable nontrespassory alternative means to communicate their message.” (JA8-9,14-16.)

Applying that revised standard, the Board found that the Center lawfully denied the musicians access to its property because they did not work there regularly and exclusively, and even assuming that they did, they clearly had a “reasonable alternative nontrespassory channel of communicating their concerns to the theater-going public” without infringing on the Center’s property rights. (JA9.) The Board accordingly dismissed the unfair-labor-practice complaint against the Center. (JA19.) The Union filed a motion for reconsideration, which the Board denied.

STANDARD OF REVIEW

As the Supreme Court has recognized, “it is to the Board that Congress entrusted the task of applying the Act’s general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978) (internal quotation marks and citation omitted). Accordingly, the Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

When interpreting ambiguous provisions in the Act, the Board’s conclusions are subject to the general principles of *Chevron U.S.A., Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837, 843 (1984). Thus, if the Act is “silent or ambiguous with respect to the specific issue,” the Board is entitled to deference “as long as its interpretation is rational and consistent with the statute.” *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987).

As particularly relevant here, the Act does not expressly address whether or to what extent individuals are entitled to access private property for statutorily protected purposes. *See* 29 U.S.C. §§ 157, 158(a)(1); *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 999-1000 (D.C. Cir. 2001). In these circumstances, the Board, in the first instance, “must be allowed to define the limits of the [Act] in assessing the legality of no-access, no-solicitation rules not yet considered by the Supreme Court.” *ITT Indus.*, 251 F.3d at 1003-04; *see also New York New York, LLC v. NLRB*, 313 F.3d 585, 588 (D.C. Cir. 2002) (noting that the Supreme Court has “never addressed” whether the Act entitles a contractor’s off-duty employees to access private property not owned by the contractor).

As the Supreme Court has further recognized, it is the agency’s affirmative obligation to “consider varying interpretations and the wisdom of its policy on a continuing basis.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citation omitted); *accord NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975) (approving the Board’s “evolutional approach” to interpreting Section 7 of the Act). Accordingly,

rules formulated by the Board in order “to fill the interstices of [the Act’s] broad statutory provisions” are entitled to “considerable deference,” even if a given rule represents a departure from the Board’s prior policy. *Curtin Matheson Scientific, Inc.*, 494 U.S. at 786-87. In such circumstances, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); accord *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 8–9 (D.C. Cir. 2012). Ultimately, courts are to defer to rules formulated or modified by the Board as long as they are “rational and consistent with [the Act],” and as long as the Board’s “explication is not inadequate, irrational or arbitrary.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998).

The same degree of deference is warranted when reviewing the Board’s conclusion in a particular case to dismiss an unfair-labor-practice allegation. See *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990). The Court will reverse the Board’s dismissal only where “the evidence required the Board” to find a violation of the Act because there was no rational basis on the record for dismissal. *Amalgamated Clothing Workers v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964); see also *Am. Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004) (a Board dismissal “must be upheld unless it has no rational basis

in the record”); *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-87 (D.C. Cir. 1991) (same).

ARGUMENT SUMMARY

In considering the musicians’ right to leaflet at the Center, the Board reasonably re-examined its caselaw addressing the access rights of contractor and licensee employees who have no employment relationship with the property owner. As this Court has recognized, no Supreme Court case has addressed this precise scenario. Accordingly, the matter is left to the Board’s discretion.

In the present case, the Board exercised that discretion to address that precise scenario and reached a conclusion that is rational and consistent with the Act. In doing so, it determined that its previous decisions in *New York New York Hotel & Casino*, 356 NLRB 907 (2011) (“*New York New York II*”), to which this Court deferred, 676 F.3d 193 (D.C. Cir. 2012), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011), had not reached an appropriate accommodation between the Section 7 rights of on-site contractor employees and the rights of property owners who possess a fundamental right to exclude others. As the Board explained, although those cases purported to observe a distinction of substance between a property owner’s own employees and nonemployees, they effectively gave contractor employees—who are nonemployees in relation to the property owner—the same broad access rights accorded to the owner’s employees. Specifically,

those cases held that contractor employees who regularly work on a property are entitled to access under Section 7, unless the owner can demonstrate that their use of the property for Section 7 purposes would interfere with its own use of the property. Thus, as the Board found here, *New York New York II* and *Simon DeBartolo* permitted excessive infringement of the owner's property rights and failed to comply with the Supreme Court's teaching that any accommodation between competing Section 7 rights and property rights must be achieved with as little destruction of one as is consistent with maintenance of the other.

The Board accordingly overruled *New York New York II* and *Simon DeBartolo* and announced a revised access standard to better account for the rights of property owners vis-à-vis the access rights of contractor employees. The Board reasonably held, consistent with its pre-*New York New York II* precedent, that only contractor employees who work regularly and exclusively on private property not owned by their employer should be able to access the property for Section 7 purposes. The Board also reasonably clarified that a contractor's employees cannot be deemed to work regularly on a property if the contractor for whom they work does not regularly conduct business or perform services there. Finally, to further ensure as little infringement of property rights as necessary to maintain Section 7 rights, the Board provided that a property owner will not be compelled to grant access if it can show that the contractor employees, notwithstanding their

regular and exclusive work on the property, have a reasonable alternative nontrespassory means to convey their Section 7 message.

Contrary to the Union's claims, the Board gave reasonable meanings to the terms "regularly" and "exclusively," and nothing in the factual context of this case or prior Board precedent suggests otherwise. Nor is the Board's interpretation of those terms inconsistent with their generally accepted meaning.

Moreover, the Union is mistaken in claiming that the Board gave improper weight to the non-employer property owner's right to exclude, and insufficient weight to employees' Section 7 rights. As the Board explained, a property owner's right to exclude is particularly implicated where nonemployees or others with whom it has no employment relationship seek to use its property for their own purposes. And as the Board further explained, the Section 7 rights of contractor employees are appropriately protected, without unnecessary destruction of private property rights, where the property owner meets its burden of demonstrating that the contractor employees have an alternative avenue of conveying their protected message.

Applying its revised access standard, the Board justifiably found that the Symphony's off-duty musicians were not entitled to leaflet on the Center's property. The musicians do not work regularly at the Center because the Symphony itself only performs there for 22 weeks of the year, nor do they perform

at the Center exclusively. Moreover, even if they had worked regularly and exclusively at the Center, the record plainly establishes that they had an alternative nontrespassory means of reaching their intended audience (the general public) by handing out leaflets on public property directly across the street from the Center. Accordingly, the record fully supports the Board's dismissal of the complaint, which is rationally predicated on its finding that Center could lawfully deny the Symphony's off-duty musicians access to leaflet on the Center's property.

ARGUMENT

THE BOARD'S REVISED STANDARD FOR DETERMINING THE STATUTORY ACCESS RIGHTS OF CONTRACTOR AND LICENSEE EMPLOYEES TO PROPERTY NOT OWNED BY THEIR EMPLOYER IS RATIONAL AND CONSISTENT WITH THE ACT, AND ON THAT BASIS, THE BOARD RATIONALLY DISMISSED THE COMPLAINT

A. The Board Bears Responsibility for Interpreting the Act To Ensure as Little Destruction of Property Rights as Is Consistent With Maintenance of Section 7 Rights

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection.” 29 U.S.C. § 157.² As this Court has recognized, Section 7 encompasses the right of employees “to enlist the assistance of others,” including “customers and the general public,” “in addressing employment matters.” *Capital Med. Ctr. v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018) (internal quotation marks and citations omitted). But no Section 7 right is “unlimited in the sense that [it] can be exercised without regard to” the legal rights and duties of others. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

When Section 7 rights conflict with private property rights, the problem is one of finding “a proper accommodation between the two.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972); accord *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176-77 (D.C. Cir. 1993). To be sure, “[i]nconvenience or even some dislocation of property rights[] may be necessary in order to safeguard the right[s]” guaranteed by Section 7. *Republic Aviation*, 324 U.S. at 802 n.8 (internal quotation marks and citation omitted). But “[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

² Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. 29 U.S.C. § 158(a)(1).

“The determination of the proper [accommodation] rests with the Board” in the first instance. *Id.*; *see also Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (the Board bears “primary responsibility for making this accommodation”). Indeed, “[w]hat is a ‘proper accommodation’ in any situation may largely depend” on factual variables uniquely within the Board’s expertise to analyze, such as “the content and the context of the [Section] 7 rights being asserted.” *Hudgens*, 424 U.S. at 521; *see also Republic Aviation*, 324 U.S. at 800 (the Board’s role is to evaluate “evidential facts” based on its “appreciation of the complexities of the subject which is entrusted to [its] administration”). Accordingly, the Board enjoys considerable latitude to define the “locus of . . . accommodation” in “each generic situation,” and it “may fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context.” *Id.* at 522; *see also New York-New York, LLC v. NLRB*, 676 F.3d 193, 194, 196 (D.C. Cir. 2012) (the Board has “discretion” to determine the appropriate accommodation between a property owner’s rights and the Section 7 rights of those who work on the property but are not the owner’s own employees).

B. There Is a Distinction of Substance Between the Section 7 Property-Access Rights of Employees and Non-Employees

The Board has long held, with Supreme Court approval, that when an employer invites employees onto its property for work, it cannot place

unreasonable restraints on their association ““on company property”” and ““outside working hours, whether before or after work, or during luncheon or rest periods.”” *Republic Aviation*, 324 U.S. at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)). As the Board has explained, the employer’s property is a “place uniquely appropriate” for its workers to organize on matters of common concern. *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943), *enforced*, 142 F.2d 193 (2d Cir. 1944), *affirmed*, 324 U.S. 793 (1945). It “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 matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks and citation omitted). And although the employer may legitimately seek to control employee activity insofar as it affects production and discipline, its core property rights—most importantly, the right to exclude outsiders from the property—are not implicated. *See Hudgens*, 424 U.S. at 521–22 n. 10 (where employees who are “already rightfully on the employer’s property” engage in organizing activity, “the employer’s management interests rather than his property interests [a]re . . . involved”); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) (“one of the essential sticks in the bundle of property rights is the right to exclude others”).

Accordingly, the Board's accommodation of the employer's interests in relation to its own employees reflects that "employee rights are at their zenith" when employees are rightfully on their employer's property for work, while the employer's countervailing interests are comparatively weak. *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 373-74 (D.C. Cir. 2016). Under the Board's rules as approved by the Supreme Court in *Republic Aviation*, employees may engage in protected solicitation on their own time, and protected literature-distribution on their own time in non-work areas of their employer's property, unless the employer demonstrates that "'special circumstances make [a] rule [prohibiting such activity] necessary in order to maintain production or discipline.'" 324 U.S. at 797-98, 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943)); *see also* *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003) (the parameters set forth in *Republic Aviation* apply when employees seek sympathy or support from nonemployees lawfully on the property).³

³ The balance likewise favors employee rights of association, even when some of the employees involved are off-duty or work for the employer at a different facility. *See ITT Industries, Inc.*, 341 NLRB 937, 939 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005) (applying the test for off-site-employee access in *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003)); *Tri-County Medical Center, Inc.*, 222 NLRB 1089, 1089 (1976) (off-duty-employee access).

A decidedly different accommodation applies when nonemployees seek access to private property for Section 7 purposes. As the Supreme Court explained over 60 years ago in *NLRB v. Babcock & Wilcox Company*, 351 U.S. 105 (1956), and reaffirmed more recently in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), there is a distinction “of substance” between “rules of law applicable to employees and those applicable to nonemployees.” 351 U.S. at 113; 502 U.S. at 533. “By its plain terms, . . . the [Act] confers rights only on *employees*, not on unions or their nonemployee organizers.” *Lechmere*, 502 U.S. at 532 (emphasis in original). Accordingly, an employer must permit a property owner’s *employees* to exercise their Section 7 rights on company property “unless the employer can demonstrate that a restriction is necessary to maintain production or discipline,” but “no such obligation is owed nonemployee organizers.” *Lechmere*, 502 U.S. at 533 (contrasting the rule of *Republic Aviation* with that of *Babcock & Wilcox*) (internal quotation marks omitted).

And although employees’ “right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,” it does not necessarily follow that a property owner must open its property to nonemployee organizers in order to give effect to employees’ organizational rights. *Babcock & Wilcox*, 351 U.S. at 113. On the contrary, a property owner need only yield its fundamental right to exclude others, and permit

trespassory access by nonemployee organizers, “when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” *Babcock & Wilcox*, 351 U.S. at 112.

Thus, Supreme Court precedent firmly establishes the “general rule” that an employer “may validly post [its] property against nonemployee” union organizers. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978) (citing *Babcock & Wilcox*, 351 U.S. at 112). To gain access, the union has the burden “of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer’s access rules discriminate against union solicitation.” *Id.* at 205 (citing *Babcock & Wilcox*, 351 U.S. at 112). Moreover, although nonemployees may occasionally seek access for purposes unrelated to organizing, the argument for trespassory access weakens as their purpose strays from effectuating the “core” employee rights protected by Section 7 of the Act, such as the right to self-organize. *Id.* at 206 n.42 (1978) (area standards picketing by nonemployees is entitled to less protection than organizing); accord *United Food & Commercial Workers Union, Local No. 880 v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996) (nonemployee right of access is weaker where its intended audience is not employees but customers or other nonemployees).

C. The Board Appropriately Exercised Its Discretion in Overruling Prior Cases that Granted On-Site Contractor Employees Expansive Property-Access Rights, and in Adopting a Revised Standard that Better Accommodates Section 7 Rights and Private Property Rights

As this Court has recognized, the Supreme Court's decisions in *Republic Aviation*, *Babcock & Wilcox*, and *Lechmere* do not address the access rights of individuals who are neither employees of the property owner nor nonemployee union representatives. See *New York New York, LLC v. NLRB*, 313 F.3d 585, 587-88, 590 (D.C. Cir. 2002). The Board accordingly retains discretion to determine the appropriate "locus of accommodation" where such individuals seek access for Section 7 purposes. *Hudgens*, 424 U.S. at 522; accord *New York New York*, 313 F.3d at 590. Contrary to the Union's claims (Br.18-19), the Board here appropriately exercised that discretion in determining that its prior decisions in *New York New York Hotel & Casino*, 356 NLRB 907 (2011) ("*New York New York II*"), enforced, 676 F.3d 193 (D.C. Cir. 2012), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011), improperly granted contractor employees full *Republic Aviation* rights to a third party's property, which excessively infringed on private property rights. As shown below, the Board reasonably overruled those decisions and substituted a revised standard that accommodates both sides' rights, as required by Supreme Court precedent.

1. *New York New York II and Simon DeBartolo Inappropriately Gave Contractor Employees, Who Are Not Employed by the Property Owner, Essentially the Same Broad Section 7 Access Rights as the Owner's Employees*

In its initial *New York New York* decisions, the Board held that an on-site contractor's off-duty employees were entitled to distribute leaflets on a property not owned by their employer, so long as they worked there regularly and exclusively, and the property owner failed to demonstrate any interference with its use of the property. *See* 334 NLRB 762, 762 (2001); 334 NLRB 772, 772 n.3, 773 (2001). In so holding, the Board relied on prior cases finding that under *Republic Aviation* contractor employees "who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty," and therefore enjoy the same access rights as the owner's employees. 334 NLRB at 762 (citing *MBI Acquisition Corp. d/b/a Gayfers Dept. Store*, 324 NLRB 1246, 1249-50 (1997), and *Southern Servs.*, 300 NLRB 1154, 1155 (1990), *enforced*, 954 F.2d 700 (11th Cir. 1992), which relied on *Republic Aviation*, 324 U.S. 793 (1945)); *accord New York New York*, 334 NLRB at 772 & n.3, 773 (citing *Gayfers* and *Republic Aviation*).

On appeal, this Court held that the Board's reasoning was inadequate to support its grant of such expansive access rights, "equivalent to those of the [owner's] own employees," to employees of an on-site contractor. *New York New*

York, 313 F.3d at 587, 590. As the Court explained, the Board relied on its own prior holdings, which had interpreted Supreme Court precedent as granting *Republic Aviation* rights to on-site contractor employees because they were “properly on company property pursuant to [an] employment relationship.” *Id.* at 588-90. But as the Court clarified, “[n]o Supreme Court case decides whether the term ‘employee’ as used in *Republic Aviation* ‘extends to the relationship between an employer and the employees of a contractor working on its property.’” *Id.* at 590. Likewise, the Court found that “[n]o Supreme Court case decides whether a contractor’s employees have . . . *Republic Aviation* rights . . . because their work site, although on the premises of another employer, is their sole place of employment.” *Id.* The Court therefore found that it was “up to the Board” to substantively determine the degree of property-access appropriate for contractor employees, after considering the Supreme Court’s relevant decisions and “the policy implications of any accommodation” between Section 7 rights and property rights where contractor employees are concerned. *Id.* The Court remanded the cases for the Board to exercise its discretion consistent with these instructions. *Id.* at 590-91.

On remand in *New York New York II*, the Board accepted that its previous decisions had erred in “mechanically applying” the *Republic Aviation* framework to determine the access rights of contractor employees. 356 NLRB at 913. As the

Board noted, *Republic Aviation* “govern[s] the ability of employees to engage in solicitation and distribution on the property of *their own employer.*” *Id.* (emphasis added). And the Board recognized that there was “distinction between persons employed by a contractor and the employees of the property owner itself.” *Id.* The Board accordingly concluded, consistent with *Babcock & Wilcox*, that there must also be a distinction ““of substance”” between rules of law applicable to the two groups. *Id.* (quoting *Babcock & Wilcox*, 351 U.S. at 113).

Despite these pronouncements, a majority of the Board articulated an access standard for contractor employees that made little distinction between the rules governing on-site contractor employees and those applicable to a property owner’s own employees. Specifically, the majority’s standard provided that if an on-site contractor’s employees worked “regularly” on a property, they would be entitled to engage in protected activity there, on their own time and in nonwork areas “open to the public,” unless the property owner could “demonstrate that their activity significantly interferes with his use of the property,” or that “exclusion is justified by another legitimate business reason” such as “the need to maintain production and discipline.” *Id.* at 918-19. The majority emphasized, moreover, that any restrictions “greater than those lawfully imposed on [the owner’s] own employees” would require special justification. 356 NLRB at 919-20.

To be sure, the *New York New York II* majority acknowledged that a property owner has a right to exclude trespassers, such as contractor employees who exceed their invitation to enter and to use the property for approved purposes. *Id.* at 916. Nevertheless, the majority inappropriately minimized that right and instead privileged the property owner's other "interests," such as its interest in "preventing interference" with its use of the property. *Id.* at 916-18. The majority found that the owner could "fully protect" those interests through its contracts with the on-site contractor, without invoking state trespass laws as it would to protect its interests against nonemployee "strangers" to the property. *Id.*

In dissent, Member Hayes aptly observed that the majority's access test "reduce[d] to legal insignificance the critical distinction between employees and nonemployees of a particular employer" and "greatly understate[d] the strength of the [property owner's] property rights" in relation to those who are not its employees. *Id.* at 922-23. As he explained, because contractor employees "are not employees of the property owner," their Section 7 rights are "entitled to less weight than the rights of the property owner's own onsite and offsite employees." *Id.* at 922 (emphasis omitted). He therefore considered it inappropriate for the majority to grant contractor employees the "full *Republic Aviation*" access rights previously reserved for the owner's own employees. *Id.* at 923.

Member Hayes also criticized the majority's choice not to consider "what reasonable alternative means exist for [the contractor employees] to communicat[e] the[ir] Section 7 message." *Id.* at 922. As he explained, "[a] case-by-case consideration of communication alternatives is a necessary predicate to deciding," consistent with *Babcock & Wilcox*, "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." *Id.* at 924.

On review, this Court emphasized that the Act "and Supreme Court precedent grant the Board discretion over how to treat employees of onsite contractors for [access] purposes." *New York New York, LLC v. NLRB*, 676 F.3d 193, 196 (2012). The Court held that the Board majority had not exceeded the bounds of that discretion, and accordingly deferred to the majority's decision without commenting on the merits of its access standard. *Id.* at 196 & n.2 (quoting *New York New York*, 313 F.3d at 590).

Meanwhile, in *Simon DeBartolo Group*, 357 NLRB 1887 (2011), the Board majority expanded the access rights of contractor employees to reach well beyond the class of contractors addressed in *New York New York II*. Whereas *New York New York II* had granted Section 7 access rights to those who "worked on the property every day" and nowhere else for a single contractor, 356 NLRB at 912, the *Simon DeBartolo* majority granted the same broad access rights to contractor

employees who merely work regularly on another's property. 357 NLRB at 1888 & n.8. Thus, the majority did away with any requirement that on-site contractor employees work exclusively on a property before they can claim access rights comparable to those of the owner's employees under *Republic Aviation*. *Id.* at 1888 n.8.

Dissenting, Member Hayes criticized the Board majority for repudiating the understanding reflected in the Board's pre-*New York New York II* caselaw that contractor employees only have access rights if they work both regularly and exclusively on the property. *Id.* at 1892. He explained that “the ‘regularly work’ factor alone is far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights” for contractor employees. *Id.* Indeed, if regularity of work alone was decisive, those with “only a fleeting working relationship” with the property, for example once a month, could enjoy “the same access rights as employees of the owner”—a result that would inappropriately elevate contractor employees' rights and derogate property owners' rights. *Id.* at 1891-92.

2. The Board Reasonably Overruled *New York New York II* and *Simon DeBartolo*

In addressing the access rights of the licensee employees at issue here, the Board re-examined its precedent regarding contractor employees, who are “indistinguishable” from licensee employees for statutory access purposes. (JA7.)

In particular, the Board carefully considered the majority and dissenting opinions in *New York New York II* and *Simon DeBartolo*, and reasonably “disagree[d] with the [majority’s] choices” regarding the accommodation of contractor employees’ Section 7 rights and the owner’s property rights. (JA10-13.) Contrary to the Union’s claims (Br.18-19), in overruling those cases and articulating a new access standard for contractor employees, the Board did not exceed its discretion or “fail[] to heed this Court’s guidance” in *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002), and *New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012). Instead, as discussed below, the Board followed that guidance more closely by returning to the Supreme Court’s teachings in property-access cases and considering the policy implications of any accommodation between property rights and contractor employees’ Section 7 rights. (JA12.) *See New York New York*, 313 F.3d at 590 (instructing the Board to develop an access rule for contractor employees that considers Supreme Court precedent and the policy implications of any accommodation between competing rights).

As the Board explained here, *New York New York II* appropriately acknowledged that under the Supreme Court’s decisions in *Lechmere* and *Babcock & Wilcox* there is a distinction “of substance” between “rules of law applicable to employees and those applicable to nonemployees.” (JA8,13 (citing 356 NLRB at 913 (internal quotation marks and citations omitted).) Building on that premise,

New York New York II also acknowledged that the rules of law articulated in *Republic Aviation*, which apply to a property owner's own employees, cannot apply equally to a contractor's employees because the two groups simply are not "equivalent." (JA8&n.11 (citing 356 NLRB at 913)).

But as the Board found here, these acknowledgements "ring hollow" in light of the ultimate holding in *New York New York II*, "which drew only the faintest of distinctions between the access rights of a property owner's own employees and those of contractor employees who work on the property." (JA13.) Simply put, *New York New York II* granted contractor employees—who obviously are not employees of the property owner—the "same Section 7 access rights as the property owner's own employees, subject to an exception that has never been found to apply and predictably never would be found to apply." (JA8.) Thus, although *New York New York II* suggested that a property owner might impose restrictions on contractor employees "greater than those lawfully imposed on its own employees," it made those restrictions contingent on the highly improbable showing that they are demonstrably necessary and narrowly tailored to serve a "legitimate" owner interest. (JA8n.14 (quoting 356 NLRB at 919)). As the Board recognized, no property owner could reasonably expect to qualify for this "abstract, theoretical exception." (JA8n.14.)

In setting the bar high for a property owner to treat contractor employees differently from its own employees, *New York New York II* not only disregarded the substantive distinctions it purported to acknowledge between the two groups, it also “disregard[ed]” the owner’s “private property rights,” including its “fundamental right to exclude” those it reasonably views as nonemployees.

(JA13.) Consequently, as the Board noted here, *New York New York II* created an access standard for contractor employees that “failed to properly accommodate the property owner’s property rights” as required under *Babcock & Wilcox*. (JA8.)

The Board majority’s subsequent decision in *Simon DeBartolo* only exacerbated the problem by “greatly expand[ing] the class of contractor employees entitled to Section 7 access rights.” (JA8.) While *New York New York II* had, in effect, granted access rights to contractor employees who worked both regularly and exclusively on another’s property, *Simon DeBartolo* made clear that contractor employees who work “regularly” but not exclusively on such property have the same broad access rights. (JA8.)

After giving thorough consideration to these holdings and their policy implications, consistent with this Court’s guidance, the Board reasonably concluded that *New York New York II* and *Simon DeBartolo* should be overruled. (JA12.) As the Board explained, those decisions fundamentally failed to respect the “critical distinction of substance” between a property owner’s own employees

and a contractor's employees. (JA8,13-14 (internal quotation marks omitted).) *See Lechmere*, 502 U.S. at 533 (describing *Babcock & Wilcox's* "critical distinction" between employees and nonemployees). After all, unlike a property owner's own employees, contractor employees "lack an employment relationship with the property owner." (JA13.) This absence of a relationship, in turn, has certain practical and foreseeable consequences that *New York New York II* and *Simon DeBartolo* did not squarely recognize, and that the Union here entirely ignores.

As the Board explained, the property owner, who "has neither hired nor vetted the contractor employees," may not "have the same confidence in [their] integrity and self-discipline . . . that it has in its own employees." (JA14.) "Indeed, the property owner may have little, if any, idea who the contractor employees are." (JA14.) And the owner "may reasonably be concerned about the security of its property and the safety of persons rightfully thereon when contractor employees are off duty and not being supervised by the onsite contractor." (JA14.)

Given the tenuous status of contractor employees in relation to the property owner, the Board reasonably found that although they may not be "complete strangers" to the property, "their diminished contact with the owner and its property should reasonably correspond to lesser rights of access . . . than the property owner's own employees enjoy." (JA14.) In so finding, the Board did not,

as the Union suggests, ignore the interests of contractor employees. (Br.23-25,34-35,50-51.) Instead, the Board appropriately recognized that a property owner need not cede its right to exclude simply because a contractor's employees claim some familiarity with its property and interest in using it for Section 7 purposes. (JA13-14.)

In sum, far from granting contractor employees "lesser" access rights, *New York New York II* and *Simon DeBartolo* "granted these nonemployees of the property owner the same Section 7 access rights as the property owner's own employees." (JA8.) In so doing, as the Board found here, those decisions excessively "infringe[d] upon [] private property rights," and failed to achieve an appropriate accommodation between Section 7 rights and property rights—that is, one "that causes as little destruction to private property rights as is consistent with maintaining employees' Section 7 rights." (JA12-13.) *See Babcock & Wilcox*, 351 U.S. at 112. The Board accordingly revisited the question of an appropriate accommodation and announced a revised access standard for contractor employees that "ensures a proper weighing of both rights the Board is responsible for accommodating." (JA13.)

D. The Board’s Revised Access Standard Adheres to Supreme Court Teachings by Recognizing a Distinction Between Employees of the Property Owner and Others, and by Striking an Appropriate Balance Between Section 7 Rights and Private Property Rights

In developing a revised access standard, the Board appropriately followed the guiding principles articulated by the Supreme Court in resolving apparent conflicts between Section 7 rights and private property rights. In particular, the Board focused on the “critical distinction ‘of substance’” between “the property owner’s own employees” and others. (JA8 (quoting *Lechmere*, 502 U.S. at 537, and *Babcock & Wilcox*, 351 U.S. at 113).) As the Board explained, that distinction “necessitates that, although employees of an onsite contractor enjoy some Section 7 access rights, they are weaker than those of the property owner’s own employees.” (JA11.) Accordingly, “the extent to which the contractor employees must be permitted to infringe upon private property rights is inherently more restricted.” (JA12.)

Honoring this distinction, the Board articulated a revised access standard that undertakes a two-part analysis. First, the Board examines whether the contractor employees have established “a sufficient connection to the property” by “regularly and exclusively work[ing]” there. (JA13.) Second, to protect against “unwarranted infringement” of a property owner’s right to exclude others, the Board permits the owner to show that the contractor employees nevertheless “have

alternative nontrespassory means to communicate their message.” (JA13.) Thus, under this standard, if the contractor employees work regularly and exclusively on an owner’s property, and the owner cannot show they have alternative nontrespassory means of communication, then they may access the property for Section 7 purposes. As shown below, this analysis strikes an appropriate balance between the competing rights.

1. The Board reasonably found that contractor employees have a connection to the property sufficient to qualify initially for Section 7 access if they work there regularly and exclusively

As the Board appropriately recognized, a contractor employee’s Section 7 access rights have always been determined, at least in part, by the employee’s relationship to the property. (JA14.) *See, e.g., Southern Servs.*, 300 NLRB at 1155 (granting access rights to a contractor employee who worked “on a regular and exclusive basis” at the property). Thus, even in *New York New York II* and *Simon DeBartolo*, the Board accepted as a baseline for access that contractor employees must work “regularly” on the property to which they seek access. *See New York New York II*, 356 NLRB at 918; *Simon DeBartolo*, 357 NLRB at 1888 & n.8.

Nevertheless, as the Board aptly noted here, a general requirement of “regularity,” standing alone, is “far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights.” (JA14 (internal quotation marks and citation omitted).) Regularly may mean daily, but it could

also mean weekly, monthly or even less frequently, so long as the practice is uniform. *See Simon DeBartolo*, 357 NLRB at 1892 (Member Hayes, dissenting). Accordingly, “a myriad of contractor employees” could meet a simple regularity standard even if they spent “only a small fraction of their work-week on the property owner’s property” and were effectively strangers to the property owner. (JA14.)

To guard against this possibility, which would unnecessarily infringe on the property owner’s right to exclude those who are essentially strangers or outsiders, the Board held that to begin with, only contractor employees who work regularly and exclusively on a third party’s property may invoke a Section 7 right of access to that property. (JA14.) The Board also clarified that because a contractor employee’s right to access the property at all is “derivative of their employer’s right of access to conduct business there,” a contractor employee cannot be said to work regularly on a property unless “the contractor regularly conducts business or performs services there.” (JA8-9.) In other words, “it is simply impossible to find that the contractor’s employees work regularly on the property owner’s property” if the contractor for whom they work “performs services [there] only occasionally, sporadically, or on an ad hoc basis.” (JA14.) The Board likewise explained that “to work ‘exclusively’ on the owner’s property,” the contractor employee must “perform all of their work for that contractor on the property.” (JA9.)

In focusing the inquiry, at the outset, on whether those seeking access work regularly and exclusively on the property, the Board borrowed from its pre-*New York New York* caselaw, which correctly recognized that contractor employees lack a sufficient connection to a property to warrant Section 7 access, unless they work there regularly and exclusively. (JA14.) *See United States Postal Service*, 339 NLRB 1175, 1177 (2003); *MBI Acquisition Corp. d/b/a Gayfers Dept. Store*, 324 NLRB 1246, 1250 (1997); *Southern Servs., Inc.*, 300 NLRB 1154, 1155 & n.8 (1990), *enforced*, 954 F.2d 700 (11th Cir. 1992). As *Postal Service* explained, only “[w]hen employees work regularly and exclusively on the premises of another employer” do they understandably acquire a legitimate claim to engage in protected activity on the premises, because “there is no other place at which they can exercise their Section 7 rights.” (JA14.) 339 NLRB at 1178. In that instance, their regular and exclusive workplace is “the only practical site” for their exercise of Section 7 rights. *Postal Service*, 339 NLRB at 1178 (quoting *Southern Servs, Inc. v. NLRB*, 954 F.2d 700, 704 (11th Cir. 1992)). *See also Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (the workplace is the logical location for organizational activity if it is “the one place” where employees commonly meet and interact) (internal quotation marks omitted).⁴

⁴ Nevertheless, as explained below pp. 49-54, contractor employees may still have

In its brief, the Union does not take issue with the Board’s decision to “draw the line on access rights” at the familiar place suggested by prior cases—that is, at those who work both regularly and exclusively on the property. (JA14 (internal quotation marks omitted).) *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) (issues not raised in argument section of opening brief are forfeited on appeal). Instead, the Union argues that the Board was overly “strict” in its interpretation and application of the terms “regularly” and “exclusively,” particularly given the specific facts of this case. (Br.36-51.) The Union fails to establish, however, that the Board’s interpretation and application of the relevant terms was irrational.

a. The Board gave the requirement of working “regularly” on the property a reasonable meaning

Contrary to the Union’s claim (Br.37), there is nothing “arbitrary” in the Board’s finding that contractor or licensee employees do not work “regularly” at a property where, as here, the contractual arrangement that allows them and their employer to use the property limits their use to 22 weeks of the year. (JA9,16-17.) The Union attempts to obscure the basic reality that the Symphony’s musicians

alternative avenues to convey their Section 7 message, and the availability of those other avenues may properly be raised by the property owner before any incursion on its property rights will be deemed appropriate.

only work at the Center for 22 weeks primarily by playing up tangential facts. (Br.38-43.) The Union's arguments, however, do not provide a viable basis to disturb the Board's reasonable definition of "regularly" and application of the regularity requirement to the facts of this case.⁵

For example, the Union notes that the Symphony is a "principal" resident company at the Center for its entire 39-week season and calls the Center its "home." (Br.38.) But "principal" status means only that the Center prioritizes the Symphony's scheduling needs over those of non-principal resident companies. (JA57,146-47,160-62.) And the Center is the Symphony's "home" only in the sense that the Symphony performs there more than at any other venue. The Symphony's headquarters are in fact elsewhere, off the Center's property. Accordingly, the Board appropriately did not consider the "principal" and "home" monikers dispositive on the issue of regularity.

Likewise, the Board reasonably did not consider the musicians' bi-weekly pay schedule dispositive on that issue. (Br.42.) At most, the pay schedule suggests that the musicians perform work *somewhere* in each bi-weekly pay period

⁵ Judicial review of the Board's factual findings is limited, given that those findings are "conclusive" so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. Ingredion, Inc.*, 930 F.3d 509, 514 (D.C. Cir. 2019).

of their 39-week performance season. However, as the Union admits and the record establishes, there are several inactive weeks during the season, when the Symphony's musicians are not working anywhere, much less at the Center.

(Br.4,8-9.)

Moreover, although the Symphony's Use Agreement with the Center covers a 10-month period each year, the Union is mistaken that the agreement effectively gives the Symphony the equivalent of a ten-month "lease." (Br.40-41.) Instead, as the Board found, the Use Agreement only gives the Symphony license to use the Center on specific dates within a ten-month period encompassing the Symphony's traditional season. (JA9;JA145.) Indeed, the Symphony cannot use the Center for more than 22 weeks during the ten-month period because the Center must accommodate other principal resident companies, namely the Opera and the Ballet.⁶

⁶ The Union suggests that individual musicians may work at the Center beyond the maximum 22 weeks allocated to the Symphony, if and when they serve the performance needs of other resident companies. (Br.6,9n.2,38,49-50.) Nevertheless, the Union does not argue that this case turns on a person-by-person analysis of which individual musicians worked "regularly" at the Center. Nor could it. The General Counsel did not litigate the requirement of regularity based on a person-by-person analysis. *See New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 193 (2d Cir. 2006) ("It is settled that a charging party cannot enlarge upon or change the General Counsel's theory"; internal quotation marks and citation omitted). The Union thus admits (Br.7-8) that the musicians are most often at the Center as employees of the Symphony, and it does not assert that

The Union similarly errs in suggesting that regularity should be based on the continuous presence of a Symphony-controlled library at the Center during the Symphony's 39-week performance season.⁷ (Br.8,42.) The library is governed by a separate agreement between the Symphony and the Center that only covers the single librarian who staffs the library, not the musicians at issue here. (JA93-94,219-20.) The presence of the symphony library and its librarian at the Center therefore does not raise any implication about the regularity of the Symphony's presence at the Center for musical performances and rehearsals.

Nor was the Board required to find that the musicians work regularly at the Center because the Board previously found in *Gayfers*, on a substantially different evidentiary record, that the contractor employees there worked regularly on the property of a party other than their employer. (Br.39-40 (citing *Gayfers*, 324 NLRB at 1250 & n.2).) In *Gayfers*, there was no evidence that the contractor's

they could be found to work "regularly" at the Center if the Symphony itself did not "regularly conduct business or perform services there." (JA9.)

⁷ In suggesting that the library is an aspect of the musicians' continuous "presence" at the Center, the Union relies on a portion of the administrative law judge's underlying decision describing the facts he considered relevant. (Br.42 (quoting JA31).) But the Board took a different view of the relevant facts, reciting them in a decision that affirmed the judge's findings "only to the extent consistent" with the Board's findings. (JA7n.1,9-10.) In these circumstances, the judge's observations about the library's significance cannot be attributed to the Board as the Union implies.

electricians worked anything but regularly at a department store's property on an ongoing construction project. 324 NLRB at 1250 & n.2 (noting that at all material times the contractor employees worked regularly and exclusively at the department store, although not as part of the store's staff). Here, by contrast, the record includes evidence of weeks during the Symphony season, and months over the summer, when the Symphony's musicians are not working at the Center. *Gayfers* in no sense requires the Board to ignore that evidence. Accordingly, the Union errs in suggesting (Br.39-40) that to align this case with *Gayfers* the Board was obliged to find that the musicians work regularly on the Center's property.

Finally, contrary to the Union's claim, the Board's interpretation of what it means to work "regularly" on a property does not "def[y] the ordinary meaning of the word." (Br.38,40.) As the Union acknowledges, for work to be "regular," it must occur in a "'steady or uniform'" way (Br.40 (quoting *Webster's Third New International Dictionary* (1981)), forming "a constant or definite pattern, especially with the same space between individual instances." *Regular*–Definition, Lexico Online Dictionary, <https://www.lexico.com/en/definition/regular> (last visited June 2, 2020). Here, it was entirely reasonable for the Board to consider the pattern of Symphony work at the Center over the course of an entire year (September to September) encompassing a given Symphony season. (JA16-17.) From that reasonable vantage point, it is undeniable that the Symphony and its

musicians do not work at the Center at “constant” or “definite” intervals. *See id.* On the contrary, the Symphony uses the Center for no more than 22 weeks annually, with off weeks interspersed throughout the Symphony season, and two off *months* during the summer between seasons. In these factual circumstances, the Board’s finding that the musicians do not work “regularly” at the Center is fully consistent with the accepted definition of that term. (JA9,16-17.)

b. The Board gave the requirement of working “exclusively” on a property a reasonable meaning

Paradoxically, in challenging the Board’s interpretation of what it means to work “exclusively” on a property, the Union argues for a definition that would deviate from the accepted meaning of that term. (Br.43-51.) “Exclusively” generally means “[t]o the exclusion of others; only; [or] solely.” *Exclusively*–Definition, Lexico Online Dictionary, <https://www.lexico.com/en/definition/exclusively> (last visited June 2, 2020). The Board hewed to this standard definition in finding that a contractor’s employees “work ‘exclusively’ on the owner’s property if they perform all of their work for

that contractor on the property,” regardless of any additional employment they may have for a different employer.⁸ (JA9.)

Ignoring this accepted definition of the term, the Union would have the Board interpret “exclusively” to instead mean “principally,” so that contractor employees who work for the same contractor in multiple locations could potentially have Section 7 access rights to the location where they principally work. (Br.48.) But contrary to the Union’s claim, the Board was not required by precedent or established policy to adopt this obviously non-standard interpretation of the term “exclusively.” (Br.44.)

In *Postal Service*, on which the Union relies (Br.44-46), the Board held that an employee of a trucking contractor did not have a right to distribute union literature at a Postal Service facility where he regularly worked, because he did not work solely or “exclusively” at that facility. 339 NLRB 1175, 1175, 1177 (2003).

⁸ Consistent with precedent applying the exclusivity requirement, the Board reasonably chose not to probe into a contractor employee’s possible “second job elsewhere for another employer” because the only salient employment relationship for purposes of the access analysis is the relationship between the employee and the contractor who brought the employee to the third party’s property. (JA8-9.) *See, e.g., Southern Servs.*, 300 NLRB at 1154 (considering where the contractor’s employees collectively work for the contractor). The Union, accordingly, is mistaken that the Board lacked a justification for distinguishing between the employee who works for a single contractor at different locations and the employee who works for entirely different employers at different locations. (Br.48.)

In reaching this conclusion, the Board found it irrelevant that the trucking contractor exclusively provided services to the Postal Service, because the focus of the inquiry was on “the locus of the [employees’] workplace rather than [] the customer for whom the contractor works.” *Id.* at 1177. The Board therefore considered where the contractor employees performed their work and held that because the contractor employees in question started and ended their work days away from Postal Service property, at a trucking terminal owned by their employer, they did not work “exclusively” on Postal Service property. *Id.* Nothing in this holding suggests, as the Union claims, that if contractor employees *lack* a similar “home base” provided by their employer, they must be entitled to treat as their exclusive workplace, and access for Section 7 purposes, any property where they principally work. (Br.46-51.)

Nor does Member Hayes’ persuasive dissenting opinion in *Simon DeBartolo*, 357 NLRB at 1891-93, stand for such a proposition, contrary to the Union’s claim (Br.45-46). Member Hayes aptly criticized the Board majority’s failure to require, as a precondition for Section 7 access, that contractor employees work “exclusively” on the property they seek to access. 357 NLRB at 1892. As he explained, absent such a requirement, contractor employees with only “a fleeting working relationship with the property owner’s site” would be able to use the property for organizational activity, without any consideration of whether, for

example, “there [was] a home base, owned by [the contractor], . . . at which they could engage in organizational activities without impinging upon the property rights of third parties.” *Id.* But Member Hayes did not endorse the view advanced by the Union (Br.47-51), that if contractor employees lack a home base on their own employer’s property, they should be entitled to treat another’s property as their home base for Section 7 purposes.

Contrary to the Union’s further suggestion (Br.51), principles of accommodation (*see* pp. 18-19) do not require the Board to interpret the term “exclusively” in a liberal manner, so that most contractor employees can claim a “home base” for Section 7 activity somewhere. Such an interpretation fails to give appropriate weight to the rights of third-party property owners, including their rights to exclude others and control use of their property. As the Supreme Court held in *Babcock & Wilcox*, 351 U.S. at 112, a proper accommodation of competing statutory and property rights must not only take private property rights into account, it must ensure “as little destruction” of those rights “as is consistent with the maintenance of [Section 7 rights].”

In accordance with these guiding principles, the Board here interpreted “exclusively” to mean working for a contractor solely at one third-party property, so that only contractor employees who have the strongest connection to that property, and the strongest interest in Section 7 access, can infringe on the third-

party owner's property rights. Contrary to the Union's claim (Br.50-51), the Board did not abuse its discretion by interpreting the term "exclusively" in this manner to find an appropriate accommodation between private property rights and Section 7 rights.

2. The Board appropriately recognized that contractor employees are not entitled to Section 7 access if the property owner shows they have a reasonable alternative nontrespassory means of communicating their protected message

As the Board explained, even if contractor employees work regularly and exclusively on a third party's property, they are not entitled to access the property for Section 7 purposes to the same extent as the property owner's own employees because they occupy a fundamentally different status in relation to the owner. (JA8-9,14-16.) They are, after all, "nonemployees in relation to the property owner." (JA8n.14.) Accordingly, their Section 7 access rights are "weaker than those of the property owner's own employees," and "the extent to which [they] must be permitted to infringe upon private property rights is inherently more restricted." (JA8n.14,12.) *See also DHL Express, Inc. v. NLRB*, 813 F.3d 365, 374 (D.C. Cir. 2016) (noting that "distinctions between employees and non-employees and between property rights and managerial rights may dramatically shift the balance" in favor of, or against, access).

Consistent with these principles, the Board reasonably found that contractor employees should not have *Republic Aviation* rights, which are subject to limitation only if the employer-owner can establish that its employees' protected activity would interfere with its management interests. (JA7-8.) Instead, contractor employees' access rights should be subject to greater limitation by the property owner.

In explaining the nature of that limitation, the Board rightly looked to Supreme Court precedent specifically addressing the appropriate accommodation between the Section 7 rights of individuals not employed by the property owner and the owner's property rights. (JA15.) Thus, the Board considered the Supreme Court's holding in *Babcock & Wilcox* that "Section 7 'does not require that the employer permit [nonemployee union officials to] use . . . its facilities for organization when other means are readily available.'" (JA15 (quoting 351 U.S. at 114).) The Board also took into account the Supreme Court's holding in *Lechmere* that "Section 7 does not authorize trespass by nonemployees where 'reasonable alternative means of access exist.'" (JA15 (quoting 502 U.S. at 537).)

Applying the same logic to the situation of contractor employees, who are also "nonemployees in relation to the property owner," the Board held that "[i]f there is an option that allows off-duty contractor employees" who work regularly and exclusively on the property "to communicate their Section 7 message without

infringing on the property owner's rights," it is "simply not necessary to invade private property rights in order to make room for the exercise of Section 7 rights by off-duty contractor employees." (JA8n.14,13,15.) Indeed, "[r]equiring the property owner to cede its right to exclude" regardless of whether the contractor employees have "alternative nontrespassory means to communicate their message" would "cause greater destruction of property rights than is necessary to the maintenance of Section 7 rights, contrary to the Supreme Court's authoritative teaching." (JA13 (citing *Babcock & Wilcox*, 351 U.S. at 112). The Board accordingly held that "[i]f the property owner can prove that the contractor employees have reasonable alternative means for communicating their message," Section 7 of the Act will not require the owner "to cede its fundamental right to exclude" and "grant access to contractor employees with whom it has no employment or other contractual relationship."⁹ (JA15.)

The Union (Br.54-55) charges the Board with making too much of the property owner's right to exclude others and the potential for destruction of

⁹ Consistent with this holding, the Board overruled *Nova Southeastern University* to the extent that it had granted a contractor employee Section 7 access rights to a third party's property without "consider[ing] alternative nontrespassory channels of communication." (JA8n.16.) See 357 NLRB 760, 761, 774 (2011) (applying *New York New York* to an employee who worked regularly and exclusively on the property), *enforced*, 807 F.3d 308 (D.C. Cir. 2015) (deferring to the Board's *New York New York* test).

property rights, given that contractor employees are employees covered by the Act. But in so arguing, the Union fails to appreciate the critical distinction that the Board aptly perceived, here and in *New York New York II*, 356 NLRB at 913, between the property owner's own employees and contractor employees. (JA8,13-14.) As the Board made clear in the present case, “[w]hen a property owner itself employs employees covered by the Act, the owner-employer relinquishes to a certain degree, its control over its real property,” and must “accommodate its employees’ right, under Section 7 of the Act, to engage in union or other protected concerted activity, subject to the owner-employer’s managerial interests in maintaining production and discipline.” (JA13.) In other words, where a property owner’s own employees are concerned, it is only his “management interests rather than his property interests” that are implicated. *Hudgens v. NLRB*, 424 U.S. 507, 522 n.10 (1976) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). “The same is not true” where contractor employees are concerned, because a contractor’s employees are not equivalent to the property owner’s own employees, for all the reasons explained above pp. 33-34. (JA13-14.) Contractor employees are, at bottom, “nonemployees in relation to the property owner.” (JA8n.14,17n.81.) As to those employees, therefore, the property owner’s property rights, including the right to exclude, are very much implicated, contrary to the Union’s claims.

The Union is also mistaken that the Board gave no weight to the contractor employees' Section 7 rights because it declined to compel a third-party property owner to grant them access when they have "reasonable alternative means" of conveying their protected message without infringing on the owner's property rights. (Br.52.) Just as the Supreme Court has done in *Babcock & Wilcox* and *Lechmere*, the Board gave effect to employees' Section 7 rights by crafting a test that ensures they have some avenue to engage in protected communication. In this case, the Board additionally acknowledged the Section 7 rights of "contractor employees who work regularly and exclusively on a property" as compared to nonemployee union organizers by placing the burden with regard to reasonable alternative means, not on those seeking access (as is the rule where nonemployee union organizers seek access), but on the property owner. (JA13,15n.68.) *Cf. Lechmere*, 502 U.S. at 535 (the union has the burden of proving no-reasonable-alternative-means under *Babcock & Wilcox*).

To be sure, as the Board found, the property owner can meet its burden in some cases by pointing to the electronic avenues that can help contractor employees reach their target audience. (JA16.) But contrary to the Union's suggestion (Br.56-57n.8), the reasonableness of those avenues is not assumed. Therefore, the burden remains on the property owner to prove that any proposed alternative to in-person communication on the property is reasonable in light of the

relevant factual circumstances. (JA18.) Meanwhile, the absence of an initial burden on contractor employees to affirmatively establish their need to communicate on the property places them in a better position than nonemployees who bear that burden. Thus, the Union errs in asserting that the Board treated contractor employees the same as nonemployee strangers. (Br.57.) Contrary to the Union's claims, the Board considered the Section 7 rights of contractor employees vis-à-vis the rights of property owners and reached an appropriate accommodation between the two. (Br.57.)

E. The Record Amply Supports the Board's Finding that, Under the Revised Access Standard, the Center Did Not Violate Section 8(a)(1) of the Act, and Therefore the Board Rationally Dismissed the Complaint

The Union does not—and cannot—argue that under the revised access standard explicated in this case, the Symphony's musicians were entitled to distribute leaflets to members of the public on the Center's property. The musicians undisputedly are not employees of the Center. Instead, they are employees of a licensee (the Symphony). Moreover, as shown below, they do not work regularly or exclusively at the Center. (JA8-9,16-17.) And even if they had satisfied those twin requirements, they clearly had alternative means to convey their message to the general public before the Ballet's February 2017 performances of *Sleeping Beauty*, without trespassing on the Center's property. Accordingly, the record amply supports the Board's finding that the Symphony's off-duty musicians

had no Section 7 right of access to leaflet at the Center before those performances, and therefore the Center did not violate Section 8(a)(1) of the Act by denying them access on those dates, and rationally dismissed the complaint. *See Am. Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004) (a Board dismissal “must be upheld unless it has no rational basis in the record”), and cases cited at pp. 13-14.

As the Board found and the Union admits, the Symphony’s musicians work for only part of the year, typically for about 30 weeks spread over a 39-week period beginning each September. (JA9,16-17,Br.4.) And critically, at all relevant times “the Symphony itself . . . was entitled to use the [Center’s] property for only 22 weeks of the year” under its pertinent Use Agreement with the Center. (JA16-17.) Given these straightforward facts, the Board correctly concluded that there is “no basis to find that the Symphony [musicians] worked regularly on the [Center’s] property,” because “the Symphony itself did not regularly conduct business or perform services there.” (JA16-17.)

The Board likewise correctly found that the musicians “did not work on the [Center’s] property exclusively.” (JA16.) The undisputed evidence shows that the Symphony, and derivatively the musicians here, “also performed at the Majestic Theater and other venues throughout San Antonio.” (JA16.) Moreover, as the Board found and the Union admits, “[d]uring the 2016-2017 performance season,

only 79 percent of the Symphony [musicians'] performances and rehearsals were held on the [Center's] property." (JA16,Br.8-9,49.)

Having found that the musicians "did not work regularly and exclusively on the [Center's] property," the Board "could have end[ed]" its inquiry there. (JA17.) After all, the Board's revised access standard plainly provides that only contractor or licensee employees who work regularly and exclusively on a property are potentially entitled to access for Section 7 purposes.

Nevertheless, the Board went on to explain that "even assuming arguendo" that the musicians had worked regularly and exclusively at the Center in their capacity as employees of the Symphony, their access claim would fail because they "did not have to infringe on the [Center's] private property rights, including its fundamental right to exclude," in order to convey the message contained in their leaflets directed to the general public. (JA17.) Indeed, on the record here "it is clear" that the musicians "were able to leaflet on a public sidewalk across the street from the [Center's] property—and they did, distributing several hundred leaflets." (JA17.)

In addition to that obviously successful channel of communication, the musicians had other potential methods to convey their message, which "sought to communicate with the general public" and ultimately to direct the public to a Facebook page. (JA17;JA296.) Thus, the musicians could easily have used

“newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites.” (JA17.) There was, in short, no need for the musicians to tread on the Center’s property in order to reach their intended audience.

Given all of the relevant circumstances described above, the record fully supports the Board’s finding that the Symphony’s off-duty musicians, who are not employees of the Center, had no Section 7 access right to distribute leaflets on the Center’s property before the Ballet’s February 2017 performances of *Sleeping Beauty*. (JA17.) The Board therefore appropriately found that the Center did not violate Section 8(a)(1) of the Act by enforcing its generally applicable no-solicitation and no-distribution rules and denying the musicians access to distribute their leaflets, and rationally dismissed the complaint. (JA17.)

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review.

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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LOCAL 23, AMERICAN FEDERATION OF)	
MUSICIANS)	
)	No. 20-1010
Petitioner)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	16-CA-193636
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,755 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, D.C.
this 14th day of July 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, D.C.
this 14th day of July 2020

ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-60:**

Sec. 7. [§ 157.] Employees shall have 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 mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively,

wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the

proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.