UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WOODBURY PARTNERS, LLC, d/b/a
THE INN AT FOX HOLLOW

and **Case No. 29-CA-28122**

ANA HERNANDEZ

WOODBURY PARTNERS, LLC, d/b/a
THE INN AT FOX HOLLOW

and **Case Nos. 29-CA-28164**
29-CA-28235

BERTA LUZ GARCIA

***Kevin Kitchen, Esq.,* for the General Counsel**
Jeffrey Meyer, Esq., (Kaufman, Dolowich & Voluck, LLP),
for the Respondent

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried on September 25, and 26, 2007 in Brooklyn, New York, based upon charges filed by Ana Hernandez, in Case No. 28122 on January 16, 2007, and in Case No. 29-CA-28164 and Case No. 29-CA-28235 by Berta Luz Garcia on February 7, 2007 and March 29, 2007 respectively. Thereafter a Consolidated Complaint issued on June 29, 2007 against Woodbury Partners, LLC, d\b\a The Inn At Fox Hollow, herein called Respondent.

On the entire record including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

It is admitted that at all times material herein, Respondent is a domestic corporation, with its principal office and place of business located at 7755 Jericho Turnpike, Woodbury, NY 11797, herein called the Fox Hollow facility, and has been engaged in the operation of a hotel providing hospitality services to the general public.

During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above derived gross annual revenues in excess of $500,000 from the operation of the Fox Hollow facility; and purchased and received at the Fox Hollow facility, products, goods, and materials valued in excess of $5,000, directly from firms located outside the State of New York.

Respondent admits it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent also admits that at all material times herein, Local 1102 Retail, Wholesale and Department Store Union, United Food and Commercial Workers, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent further admits that at all times material herein, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents thereof, acting on its behalf:

Anthony Scotto	Co-Owner
Franklin Manchester	Manager
Alicia Arvelo	Housekeeping Supervisor (until November, 2006)
Maria Garcia	Housekeeping Supervisor (since November, 2006)
Delmi Nolasco	Housekeeping Inspectress

Sometime during the spring and summer of 2006, the housekeeping employees, led by Luz Garcia, complained among themselves about their supervisor, Alicia Arvelo. General Counsel's witnesses Luz Garcia, Ana Hernandez, Maria Ayala and Ana Torres credibly testified that Arvelo frequently complained about the employee work ethic and told them "to take a stick and shove it up her ass". Other times "she told them to use condoms so that they could work harder and not have children." She made these statements individually and in groups. In addition the employees complained about having to clean 14 rooms rather then the 13 rooms they usually cleaned.

Somewhere around June the employees led by Garcia sought help by contacting The Workplace Project, an organization to help employees. The Workplace Project is admittedly not a union, as defined in Section 2(5) of the Act. Sometime in early July a group of employees met with Jaime Vargas, a representative of the Workplace and discussed their complaints. On or about July 20, Vargas sent a letter to Respondent describing the working conditions and the specific complaints concerning Arvelo as set forth in the paragraph above.

Thereafter led by Garcia, the employees contacted Local1102, Retail, Wholesale, Department Store Union, herein the Union. On October 3, 2006 the Union filed a petition to represent the housekeeping staff. Thereafter the employees lost interest and the Union withdrew its petition on November 7, 2006.

On August 17, 2006, Respondent, not having taken any action concerning Arvelo's conduct, picketed Respondent after their work shift with signs concerning these complaints. Garcia was instrumental in leading the preceding. The picketing took place on the sidewalk on the opposite side of Respondent's facility. At this time Arvelo was leaving work in her automobile, and saw the pickets who were shouting her name in anger. There is no evidence that the pickets tried to block her way or damage her vehicle. Based on the credible testimony of Garcia, Hernandez, Ayala, and Torres I conclude that she could have continued on her way home safely. However Arvelo then returned to Respondent's facility and told Franklin Manchester, manager of Respondent, that she was frightened and afraid to go home. Manchester testified that the potential for misconduct was probable, and justified taking pictures of the pickets. When he took his pictures, the pickets were still on the sidewalk on the opposite Respondent's facility. Arvelo did not testify during this trial. Under these circumstances, I conclude that there was no reasonable belief by Manchester that Arvelo was in any danger.

In *National Steel & Shipbuilding Co.,* 324 NLRB 499, (1997), the Judge correctly observed that the fundamental principles governing employer surveillance of protected employee activity are set forth in *F.W. Woolworth Co.,* 310 NLRB 1197 (1993). The Board in *Woolworth* affirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitutes more than mere observation because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woodworth* reaffirmed the principle that photographing in the mere belief that **something might happen** does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. *Id., Flambeau Plastics Corp.,* 167 NLRB 735, 743 (1967), *enfd.* 401 F.2d 128 (7th Cir. 1968), *cert. denied* 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing". *NLRB v. Colonial Haven Nursing Home,* 542 F.2d 691, 701 (7th Cir. 1976). The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. *Sunbelt Mfg. Inc.,* 308 NLRB 780, fn.3 (1992), *affd. in part* 996 F.2d 305 (5th Cir. 1993). In the instant case, I find photographing the pickets had a reasonable tendency to interfere with the employees picketing.

Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint further alleges three 8(a)(1) violations as set forth below.

On October 13, 2006, at a meeting with employees at the Fox Hollow facility, Respondent, by its agent Scotto:

(a) threatened employees with discharge if they continued to give support and assistance to the Union

(b) threatened employees with plant closure if they continued to give support or assistance to the Union

(c) and informed employees that it would be futile to choose to be represented by the Union. Sometime after November 7, Respondent met with the employees. Garcia credibility testified:

Q. What was said by Mr. Scotto at this meeting?

A. Well, I have done (meaning Scotto) something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a Union here.

Q. What, if anything, did Mr. Scotto say?

A. Mr. Scotto said, "I promise. I promise all of you that from this day going forward the offices of Mr. Manchester, and Maria Garcia who is the new director, are going to be open for any problem that may occur. Everyone can solve their problems in that manner. So I stood up and said, "How can you guarantee this? What can you give us to guarantee this, sir? You do not give us a document. You're not giving us anything".

And he signaled me and said to me, "I give you my word", he said. And I said,

"As before we don't have money", I said, "and our word is our honor. Our word is our bond on many occasions. My word is honor. I swear on my mother and God that the mistreatment and abuse that you have endured will no longer continue. And if you cannot resolve something with Ms. Garcia or Mr. Manchester, you're directed to come and speak to me, because I do not want to have anymore problems at the hotel. And I do not want any Union, okay", and he left.[1]

Clearly, Garcia's testimony does not relate to paragraph 11(a) and (b) of the Complaint. It appears that General Counsel is relying on Garcia's testimony to establish the violation set forth in paragraph 11(c). I find there is no evidence that it would be futile to choose to be represented by the Union. General Counsel cites *Gold Kist Inc.,* 341 NLRB 1040, 1041 (2004).

Gold Kist states as follows:

> It is a violation of Section 8(a)(1) of the Act for an employer to warn employees that there will be strikes and violence if they choose to be represented by a union. *Gary Mfg. Co.,* 242 NLRB 539, 542 (1979), *enfd.* 630 F.2d 934 (3rd Cir. 1980). There, in a flyer entitled "It Could Happen Here", the Employer unlawfully warned the employees about strikes and strike violence if the union won election. Specifically, the flyer listed several instances of violence and constant turmoil in our plant, vote for District 65". In *Grove Valve & Regulator Co.,* 262 NLRB 285 (1982), the employer violated Section 8(a)(1) by warning its employees that strikes were inevitable. Specifically, the employer told the employees that it thought that the risk of a strike and job loss, or plant relocation, was especially real because the employer's wages and benefits were already so good.

In these cases the Employer clearly created a reasonable impression in the minds of its employees that if they elected to be represented by the Union a strike was inevitable, and that it was likely to be a violent one. Indeed, Crawford expressly told the employees that a strike was the Union's only weapon to win the Respondent's agreement to the Union's proposals, and that such a strike was likely to be violent.

I find that Garcia's testimony does not establish the futility as described in paragraph 11(c). Accordingly, I find no violation as alleged in paragraph 11(c) of the Complaint.

Paragraph 11(a) of the Complaint alleges Respondent's threats to discharge employees. Paragraph 11(b) alleges a threat to close the shop if the employees engaged union activities.

In support of this allegation Ana Torres testified, pursuant to leading questions by General Counsel:

BY MR. KITCHEN:

Q. Ms. Torres, during this meeting, do you recall if Scotto said anything about closing the hotel?

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[1] I credit Garcia's testimony. Garcia testified in great detail concerning this meeting. Her direct testimony is consistent with Respondent's cross-examination. Moreover, her entire testimony was detailed and consistent with Respondent's cross-examination. I was impressed with her overall demeanor, and conclude that she is a credible witness with the sole exception of her denial of Respondent's written warnings to her.

Q. What did he say?

A. He said that if, that if a union entered there, and he could close the hotel at any hour he wants. Because he was the owner. And with him, nobody could tell him what to do.

I do not credit Torres' testimony. Her entire testimony was established through leading questions by General Counsel. As set forth below, I found Garcia to be a credible witness, with the exception of her discharge, as described below. Given her credibly, I find that had there been a threat to close the shop, Garcia would have testified to such threat. Moreover, Ana Hernandez and Maria Ayala, also a credible witness did not testify as to a threat to close the hotel. Accordingly I find no evidence to establish a threat to close the shop, and accordingly find no violation of Section 8(a)(1) of the Act.

I also find that there was absolutely no testimony in the record as to threatening employees with discharge because of their Union or concerted activities. Therefore I find there was no violation of Section 8(a)(1) as alleged in the complaint.

The Complaint alleges that Luz Garcia was discharged because of her Union and/or concerted activities.

In order to establish a *prima facie* violation of Section 8(a)(3), it must be established that the employee was engaged in union activity, that the Employer had knowledge of such activity, that the Employer exhibited animus or hostility toward said activity, and that the employee's protected activity was a "motivating factor" in the Employer's decision to take adverse action against the employee. *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), *enfd.* on other grounds, 662 F.2d 899 (1st Cir. 1981), *cert. den.* 455 U.S. 989 (1982), approved in *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

The evidence establishes that Garcia was the most active employee complaining about Arvelo's conduct during the course of four employee/employer meetings. She was a leader in the picketing on August 17 to force Respondent to discharge Arvelo. I have concluded Respondent's supervisor, Manchester violated Section 8(a)(1) of the Act by taking photographs of the picketers. I conclude by such conduct that General Counsel has met his *Wright Line* burden.

Once the General Counsel has established a *prima facie* case, the burden shifts to the Respondent to show that the same action would have taken place even in the absence of protected conduct. *Wright Line, supra.* This burden cannot be satisfied by a mere statement or demonstration of a legitimate reason for the action taken. Rather, Respondent must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316 NLRB 771 (1995).

Respondent placed into evidence four separate warnings between February 6, 2006 and December 6, 2007 alleging insubordination, substandard work, uncooperative attitude, violation of company's policies, rudeness to employees and failure to follow instructions. Garcia testified that she never saw or received copies of these warnings.

In *Nu—Skin International Inc.,* 320 NLRB 385, 400 (l995), the Board affirming the Administrative Law Judge's Decision held that:

> Cook claimed that prior to being discharged on August 23 he had never been given a warning for being late. He denies receiving the written warning on July 30 and

denies that the signature on the warning is his. I find Cook's denial of the July 30 written warning hard to believe.

While I find that Garcia was a credible witness, as described above, I find that Manchester's testimony that the written warnings were part of its business records. While these records may not be as definitive as payroll records, I find it hard to believe that Respondent's records were fabricated for this trial. Based upon Manchester's testimony and the written warnings I find that Respondent has established its' *Wright Line* burden, and therefore I conclude Respondent has not violated a Section 8(a)(1) discharge violation as alleged in the Complaint.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by unlawfully taking photographs of a lawful employee picket line.

Remedy

With respect to the violation described above, I shall recommend an Order requiring Respondent to cease and desist the conduct describe below. On these findings of fact and conclusions of law and on the entire record, I shall issue the following recommended [2]

ORDER

Respondent, Woodbury Partners, LLC d/b/a The Inn at Fox Hollow, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Photographing employee lawful picket lines.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its principal place of business located at 7755 Jericho Turnpike, Woodbury, N.Y. 11797, copies of the attached Notice marked "Appendix."[3] Copies of the Notice, on forms provided by the Regional Director for Region 29,

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 5, 2007.

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Howard Edelman
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT photograph employees on lawful picket lines.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.