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**Fortuna Enterprises, L.P. A Delaware Limited Partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers and Unite Here, Local 11.**  
Cases 31–CA–27837, 31–CA–27954, and 31–CA–28011

October 29, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On October 21, 2008, Administrative Law Judge John J. McCarrick issued his initial decision in this proceeding. On April 30, 2009, the Board issued a decision severing and remanding to the judge for further findings, analysis, and conclusions the issue of whether the Respondent’s banquet chef, Pablo Burciaga, violated Section 8(a)(1) by physically pushing three employees away from other employees who were engaged in protected concerted activity, and by pushing his finger into the chest of another employee who protested Burciaga’s action.<sup>1</sup> On July 22, 2009, Judge McCarrick issued the attached supplemental decision, again finding that Burciaga’s conduct violated Section 8(a) (1). The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board<sup>2</sup> has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the

<sup>1</sup> 354 NLRB No. 17. The Board affirmed the judge’s finding that the Respondent committed multiple other violations of Sec. 8(a)(1) and (3), including a threat of physical violence for engaging in protected activity made by Burciaga to employee Antonio Campos shortly after the alleged pushing incident.

<sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, \_\_\_ U.S.L.W. \_\_\_ (U.S. September 29, 2009)(No. 09-377).

judge’s rulings, findings, and conclusions as modified,<sup>3</sup> and to adopt the recommended Order as modified.<sup>4</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a/ The Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

“1. Cease and desist from

(a) Physically pushing employees for engaging in protected concerted activities.

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

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 29, 2009

\_\_\_\_\_  
Wilma B. Liebman, Member

\_\_\_\_\_  
Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

<sup>3</sup> We affirm the judge’s finding that Burciaga violated Sec. 8(a)(1) when he pushed employee Antonio Campos away from an employee delegation engaged in protected activity in the kitchen area where Campos worked. We find no need to pass on whether Burciaga also engaged in unlawful physical encounters with other employees. The finding that Burciaga’s conduct was coercive is bolstered by our previous finding that Burciaga threatened Campos with physical violence for engaging in protected activity only a short time after the pushing incident. See fn. 1 supra. We express no opinion on whether an 8(a)(1) violation would have been found if Burciaga had only verbally directed the kitchen employees, who were not on break, to return to work and they had failed to do so.

<sup>4</sup> We have modified the judge’s recommended Order and substituted a new notice conforming to our standard remedial language for the violation found.

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT physically push you for engaging in protected concerted activities.

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

FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS

*Rudy L. Fong-Sandoval, Esq. and Nathan Laks, Esq.* for the General Counsel.

*Stephen R. Lueke and Steven M. Kroll, Esqs. (Ford and Harrison, LLP)* of Los Angeles, California, for the Respondent.

*Eric B. Myers, Esq. (Davis, Cowell and Bowe, LLP)* of San Francisco, California for the Charging Party.

#### SUPPLEMENTAL DECISION

##### STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California on April 14–18 and 21–25, May 12–15 and June 2–4, 2008, upon the amended Order consolidating cases, consolidated complaint, as amended,<sup>1</sup> compliance specification and notice of hearing issued on March 21, 2007, by the Regional Director for Region 31. On October 21, 2008, I issued my decision in this case and found that Respondent violated Section 8(a)(1) and (3) of the Act by: issuing employees written warnings, interrogating and threatening employees, denying hotel access to employees and suspending 77 employees for engaging in protected-concerted activity. On April 30, 2009, the Board issued its Decision and Order Remanding the case and severing for the purpose of making further credibility findings concerning the testimony given by employees Antonio Campos and Juan Banales together with further findings of fact, conclusions of law and a recommended order.

<sup>1</sup> At the hearing, Counsel for the General Counsel withdrew Complaint allegations 18(a) and (b).

#### FINDINGS OF FACT

##### The Coercive Pushing of Employees by Banquet Chef Pablo Burciaga

Complaint paragraph 9 alleges that in March or April 2006 Banquet Chef Pablo Burciaga coerced employees by physically pushing them back toward their workstations during an employee meeting to meet with managers Manny Collera and Efrén Vasquez.

In April 2006 a meeting of about 18 employees took place in the kitchen area at Respondent's facility with Assistant Director of Food and Beverage Manny Collera (Collera) and Restaurant Manager Efrén Vasquez (Vasquez). This was a regularly scheduled pre-shift meeting of servers called by Collera and Vasquez.<sup>2</sup> At this meeting the employees sought permission to place a piggy bank in the kitchen and dining areas so employees could contribute to the purchase of kitchen equipment. According to Cooks Antonio Campos (Campos) and Juan Banales (Banales), employees had previously complained to supervisors about the lack of needed cooking items but not enough had been provided. According to Campos, employee Mike Kaib asked both Collera and Vasquez if they could have permission to place a piggy bank in the kitchen to purchase kitchen equipment. Collera said he had no authority to give permission for the piggy bank. Kitchen employees Herman Chan, Campos, and Banales listened in on the meeting. According to Campos, Banquet Chef Pablo Burciaga (Burciaga) then approached employees Herman Chan, Campos, and Banales and told them if they were not on break they should return to work. Burciaga then grabbed Chan and Banales, who were not on break, by the shoulders and shoved them back toward their workstations in the kitchen. Burciaga then came back for Campos and pushed Campos back to his station. Banales testified, consistent with Campos, that Burciaga said if he and Chan were not on break they could not be in the area of the meeting and forced them back to their workstations. Both Campos and Banales said that Kaib then came up to Burciaga and asked Burciaga what he was doing. After some discussion, Burciaga pushed Kaib in the chest and told him to go to his business. The record establishes that employees regularly spoke among themselves in the kitchen about nonwork related subjects during working time.

I have again reviewed the testimony of employees Campos and Banales and that of Burciaga. Campos and Banales impressed me with their forthright attitudes together with their long history of employment with Respondent while Burciaga was often nonresponsive to questions. Campos and Banales displayed no hostility in their demeanor and gave detailed, complete and consistent testimony without contradiction. Thus, both testified that in April 2006 Burciaga pushed employees back to their workstations and later put his finger in Kaib's chest. The fact that Banales did not mention that Burciaga pushed Campos is not inconsistent since Banales was already back at his workstation when Burciaga returned for Campos. While Burciaga denied being within two feet of Banales, Campos, and Chan, or pushing Kaib, an internal investigation by

<sup>2</sup> Neither Collera nor Vasquez testified.

Respondent revealed that in fact Burciaga grabbed Campos and raised his arm toward Kaib. This internal investigation corroborates the substance of Campos and Banales' testimony while refuting Burciaga's denials. I credit the testimony of both Campos and Banales and do not credit Burciaga.

#### Analysis

It is clear that the employees gathered in the kitchen area of the hotel were engaged in protected-concerted activity for the purpose of seeking funds to purchase needed kitchen equipment. While the employees were not in their work areas and not on break, the record establishes that employees regularly moved around in the kitchen and spoke about nonwork related subjects. Further, Burciaga's conduct went beyond any legitimate efforts to persuade employees to return to work. The Board has found that acts of physical touching of employees while engaged in protected-concerted activity, including pushing, grabbing an employee's arm and shaking a fist at an employee may violate Section 8(a)(1) of the Act. *Impressive Textiles, Inc.*, 317 NLRB 8, 13 (1995); *Kenrich Petrochemicals*, 294 NLRB 519, 535 (1989); *Rike's a Division of Federated Department Stores*, 241 NLRB 240, 252 (1979). Here, in order to prevent Campos, Chan, and Banales from engaging in a protected-concerted meeting, Burciaga grabbed and pushed each individual away from the meeting and poked his finger into Kaib's chest when Kaib attempted to intervene for the three employees. Such action was a coercive attempt to interfere with the employees' rights to engage in protected-concerted activity and violated Section 8(a)(1) of the Act.

#### Conclusions

Respondent violated section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities.

#### REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>3</sup>

#### ORDER

Respondent Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a/ the Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors and assigns shall

1. Cease and desist from physically pushing and touching employees for engaging in protected concerted activities.

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

(a) Within 14 days after service by the Region, post at its 5711 West Century Boulevard, Los Angeles, California facility

<sup>3</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

copies of the attached notice marked "Appendix"<sup>4</sup> in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon 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. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 3, 2006.

(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, July 21, 2009.

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

<sup>4</sup> 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."

WE WILL NOT physically push or touch you for engaging in protected-concerted activities.

FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS