

Saigon Gourmet Restaurant, Inc. and Saigon Spice, Inc., a Single Employer d/b/a Saigon Grill Restaurant and 318 Restaurant Workers Union.
Case 2–CA–38252

March 9, 2009

DECISION, ORDER, AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 14, 2008, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions with attached exhibits. The General Counsel filed an answering brief in opposition to the Respondent's exceptions. The General Counsel also filed exceptions and a supporting brief.

The National Labor Relations Board¹ has considered the judge's decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions only to the extent consistent with this Decision, Order, and Order Remanding, to adopt the recommended Order as modified and set forth in full below,⁴ and to remand this proceeding for further consideration as discussed herein.

The General Counsel's complaint alleged, inter alia, that the Respondent violated Section 8(a)(1) by interrogating employees about their union and/or protected concerted activities, by promising to raise employees' wages if they abandoned their union and/or protected concerted

activities, and by threatening to discharge employees in retaliation for their union and/or protected concerted activities. Each of these allegations clearly posits conduct targeting either union or protected concerted activity, or both.

The judge decided otherwise. Despite the plain wording of these allegations, the judge deemed the complaint to allege interrogations, promises, and threats directed solely at employees' union activities. Upon finding that the Respondent was unaware of any union activities, the judge dismissed these allegations. There is no dispute, however, that the Respondent knew that employees were preparing to file a wage and hour lawsuit, clearly protected concerted activity, so the judge's disposition of these allegations cannot stand. If we could, we would decide these allegations ourselves. But with one exception, discussed below, we are unable to do so: the relevant testimony is in conflict, and the judge failed to make credibility determinations necessary to resolve the complaint's actual allegations. Thus, as more fully explained below, we must, in part, remand this case to the judge.

I. BACKGROUND

Saigon Gourmet Restaurant, Inc. operates the Saigon Grill Restaurant at 620 Amsterdam Avenue in New York. Saigon Spice, Inc. operates a second Saigon Grill Restaurant at 93 University Place, also in New York. Simon Nget owns and manages both restaurants. Nget's wife is Michelle Nget.

Each restaurant employed delivery workers who used their own bicycles to deliver food to customers. Around the end of February or the beginning of March 2007,⁵ a number of the delivery workers signed authorizations to participate in a wage and hour lawsuit against the Respondent. On March 2, two employees approached Nget and asked or demanded that delivery workers' pay be increased, or else the workers would sue. That night, Nget convened a meeting of delivery employees working out of the Amsterdam Avenue location. He offered them an additional \$5 per shift if they abandoned their wage and hour claims. The employees declined to do so. In his testimony, Nget characterized the delivery workers' concerted action as "theft" and "extortion." By March 5, the Respondent had discontinued delivery service at both locations and discharged all of its delivery workers. Soon thereafter, the discharged employees began picketing outside the restaurants. The Respondent repeatedly videotaped the pickets.

¹ 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.

² The General Counsel asks that we strike the Respondent's exceptions because they fail to conform to Sec. 102.46 of the Board's Rules and Regulations. We decline the request, finding that the Respondent's exceptions sufficiently comply with the requirements of that section. The General Counsel also asks that we strike Exhs. A and B to the Respondent's exceptions because those exhibits are not part of the record. We have disregarded those exhibits.

³ For the reasons stated by the judge, we adopt his finding that Saigon Gourmet Restaurant, Inc. and Saigon Spice, Inc. constitute a single employer. For the reasons stated by the judge as supplemented herein, we affirm his findings that the Respondent violated Sec. 8(a)(1) of the Act by discharging its delivery employees and by videotaping their subsequent protected picketing.

⁴ We will modify the judge's recommended Order to conform to the Board's standard remedial language for respondent employers and in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996). We will also modify the date in the contingent notice-mailing provision in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), in light of our finding that the Respondent, on March 2, 2007, unlawfully promised employees a wage increase conditioned on their cessation of protected concerted activities.

⁵ All dates hereinafter are 2007, unless otherwise stated.

II. ALLEGED PROMISES, THREATS, AND INTERROGATIONS

A. Coercive Promises

The complaint alleges that on March 2, at the Amsterdam Avenue location, the Respondent violated Section 8(a)(1) by promising to raise employees' wages if they agreed to cease engaging in union and/or protected concerted activity. In support, the General Counsel relies in part on the testimony of deliverymen Ke Yu Guan and Li Bing Xing. They testified that at the March 2 meeting, Nget said that he knew the delivery workers were planning to sue him. Then Nget held up two pieces of paper—one in English and one in Chinese—and said that if the workers signed those papers, everything that happened before would be over with and Nget would raise their salary effective the next day.⁶ For his part, Nget denied that he held up two pieces of paper and asked the workers to sign them, and he denied that he ever promised employees more money in exchange for those signatures. The judge made no credibility findings to resolve this testimonial conflict.

However, in response to a subpoena, the Respondent admitted that on March 2 it offered the employees a raise if they abandoned their wage and hour claims. The only defense the Respondent raises to the complaint allegation is that its offer did not mention the word “union” and therefore was not an effort to cause the employees to abandon their union activities. However, as stated above, the complaint alleges that the Respondent offered the employees a raise in order to cause them to abandon union and/or protected concerted activity. Concertedly asserting a claim for unpaid overtime constitutes protected activity.⁷ As the Respondent has failed to raise any argument as to why its promise of benefits conditioned on cessation of protected concerted activity was lawful,⁸ we find the 8(a)(1) coercive promise violation as alleged.⁹

⁶ There is no record evidence definitively establishing what those two papers said. However, in a memorandum decision in the delivery workers' action against the Respondents and the Ngets for violations of the Fair Labor Standards Act and state wage and hour laws, Magistrate Judge Dolinger reasonably inferred that the papers were “a waiver of any claims against the defendants.” *Ke v. Saigon Grill*, ___ F.Supp.2d ___, No. 07 Civ. 2329(MHD), 2008 WL 5337230, slip op. at 7 (S.D.N.Y. Oct. 21, 2008).

⁷ *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162, 1170 (2005) (filing a lawsuit for failure to pay overtime protected concerted activity).

⁸ The Respondent does not claim that its statement was made in the course of settlement discussions or was privileged as settlement discussion. *Id.* at 1162 fn. 2. Nor does the evidence suggest that interpretation.

⁹ We find it unnecessary to pass on whether the Respondent also unlawfully promised a wage increase in exchange for cessation of protected activity on March 3 at its University Place restaurant, as the additional violation would not affect the remedy.

B. Coercive Threat

The complaint alleges that on March 2, at the Amsterdam Avenue location, the Respondent threatened to close the delivery department and discharge all of the delivery workers in retaliation for their union and/or protected concerted activities. In support, the General Counsel again relies on the testimony of Ke Yu Guan and Li Bing Xing. Ke testified that at the March 2 meeting discussed above, Nget's wife Michelle, in Nget's presence, told the delivery workers: “If all you guys refuse to sign, then there is no more need to be say [sic]. Then tomorrow do not show up for work. Just take your bike and all your personal belongings in Saigon and go.” Li testified that Michelle Nget said: “If you guys not going to sign this piece of paper, then starting tomorrow we're not going to do any deliveries anymore. Take all your bicycles and belongings and go.” Contradicting this testimony, however, Nget denied that his wife said anything at the March 2 meeting.

Because the judge made no credibility findings resolving the testimonial conflict, we will remand this allegation to the judge.

C. Coercive Interrogations

The complaint alleges that on March 2, at the Amsterdam Avenue location, the Respondent interrogated its employees about their union and protected concerted activities.¹⁰ In support, the General Counsel relies on the testimony of Ke Yu Guan. Ke testified that around 5 p.m. on March 2, approximately 10 delivery workers were congregated in front of the Amsterdam Avenue restaurant signing a document authorizing an attorney to file a wage and hour lawsuit on their behalf. Ke testified that while they were doing so, Simon and Michelle Nget drove up, parked, and entered the restaurant; and Ke was “pretty sure” that Simon saw them. Ke also testified that, later that evening but before the meeting, he overheard Nget talking to Michelle and a few others, and that Nget said that “he saw the group of us signing a piece of paper [and he] believed we are about to sue him.” Ke testified that at the March 2 meeting, Nget asked the assembled delivery workers: “In front of the store today did you sign a piece of something? Can you take it out?”

Nget did not specifically deny telling his wife that he saw the delivery workers signing a piece of paper, and he did not specifically deny asking the workers if they signed something “in front of the store today.” However, he denied seeing anybody in front of the restaurant when

¹⁰ The General Counsel neglected to allege this violation disjunctively as well as conjunctively: par. 5(a) of the complaint says “and,” not “and/or.” In light of the complaint's otherwise uniform “and/or” wording, we deem this an inadvertent oversight.

he and his wife arrived that day. This testimony effectively contradicts Ke's testimony, which is predicated on Nget having seen the workers in front of the restaurant. Once again, the judge made no credibility findings. We will remand this allegation for him to do so.

We also remand a second interrogation allegation. The complaint alleges that on March 3, at the University Place location, the Respondent interrogated employees about their protected concerted and/or union activities. In support, the General Counsel relies on employee Qi Hua Lian's testimony that Nget asked him, "If others boycott in front of the restaurant are you going to join?" But Nget testified that no such conversation took place, and the judge did not resolve the testimonial conflict.

III. THE 8(a)(1) MASS DISCHARGE

The judge found that the Respondent violated Section 8(a)(1) by discharging its delivery workers because they engaged in conduct protected by Section 7 of the Act. For the following reasons, we agree.

In its exceptions, the Respondent admits that the delivery workers were discharged, but disputes that the General Counsel proved that the discharges were motivated by the workers' protected activity. An 8(a)(1) allegation where motive is at issue is analyzed under the Board's *Wright Line*¹¹ test. Under *Wright Line*, supra, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity.¹²

It is undisputed that the Respondent's employees engaged in protected concerted activity and that the Respondent was aware of that activity. Again, the Respondent admitted in its response to the General Counsel's subpoena that "[t]he employer made an offer of addi-

tional compensation if the employees withdrew their demands of over \$2 million, claiming overtime." Thus, the Respondent admits employee activity that was concerted ("employees") and protected ("demands of over \$2 million, claiming overtime"); and Nget's admitted offer of a wage increase in exchange for withdrawal of the overtime claim shows that Nget knew of the employees' concerted demand. In addition, the Respondent does not except to the judge's finding that it "admitted that on [March] 2, 2007, two employees approached Nget and requested/demanded that the pay of the delivery employees be increased and that unless this was done he would be sued." The Respondent's animus against the employees' protected activity is shown by Nget's unlawful promise of a wage increase to coerce cessation of that activity and his characterization of the employees' protected activity as "theft" and "extortion." The dramatic timing of the mass discharge hard on the heels of Nget's learning of the delivery workers' overtime demand also strongly supports an inference of animus and discriminatory motivation.¹³ We thus find that the General Counsel met his initial burden under *Wright Line*.

The facts discussed in the previous paragraph concern the Section 7 activities of the delivery workers at the Amsterdam Avenue location. The Respondent asserts a failure of proof on the General Counsel's part with respect to its discharge of the University Place delivery workers because there is no evidence that those employees authorized a wage and hour lawsuit or engaged in other Section 7 activity. As the Respondent discharged its delivery employees at both locations en masse, however, the General Counsel was not required to show a correlation between *each* employee's protected activity and his or her discharge. Rather, his burden was to establish that the mass discharge was ordered in retaliation for the protected activity of some. *ACTIV Industries*, 277 NLRB 356, 356 fn. 3 (1985). As explained above, the General Counsel met that burden. Thus, the Respondent's assertion is without merit.

As for the Respondent's *Wright Line* rebuttal, there was none. The Respondent does assert that the delivery service was unprofitable, but at most claims that reinstating its delivery service would pose an undue financial burden. That claim goes to the remedy, not to the merits of the *Wright Line* analysis.¹⁴ Accordingly, we affirm

¹¹ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹² *United Rentals*, 350 NLRB 951 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). Member Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Member Schaumber agrees with this addition to the formulation. In this case, he finds a causal connection between the Respondent's Sec. 7 animus and the discharges.

¹³ See, e.g., *Case Farms of North Carolina*, 353 NLRB No. 26, slip op. at 4 (2008).

¹⁴ As the judge stated in his decision and the General Counsel acknowledges in his answering brief, the Respondent is entitled to an opportunity to establish at compliance that restoring its delivery service would be unduly burdensome. *We Can, Inc.*, 315 NLRB 170, 174-177 (1994).

the judge's finding that the Respondent's discharge of its delivery employees violated Section 8(a)(1).¹⁵

IV. THE 8(a)(1) VIDEOTAPING OF
PROTECTED ACTIVITY

Absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1).¹⁶ The Respondent does not dispute that it videotaped its discharged delivery workers as they picketed in front of the restaurants. In its exceptions, the Respondent claims that its videotaping was justified because the pickets "threatened customers, called them names, [and] threatened Simon Nget's family." But the Respondent introduced no evidence to support these claims. The Respondent asserts that it was hamstrung in presenting a justification defense because the videotapes that would have proved its defense were under the General Counsel's control. But the General Counsel counters that the Respondent never asked for the tapes to be returned, on or off the record, before or during the hearing; and the Respondent makes no reply. Thus, we affirm the judge's finding that by its videotaping the Respondent violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondents, Saigon Gourmet Restaurant, Inc. and Saigon Spice, Inc., a single employer, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activity of pursuing a wage and hour lawsuit against their employer.

(b) Offering employees a wage increase if they cease their protected concerted activity of pursuing wage and hour claims against their employer.

(c) Videotaping employees engaged in peaceful picketing.

(d) 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. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the delivery employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the delivery employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the delivery employees, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility 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 Respondent at any time since March 2, 2007.

(f) 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.

IT IS FURTHER ORDERED that the portion of Case 2-CA-38252 alleging that the Respondent violated Section 8(a)(1) by interrogating employees about their union and/or protected concerted activities, and by threatening to discharge employees in retaliation for their union and/or protected concerted activities, is hereby severed and remanded to Administrative Law Judge Raymond P.

¹⁵ The Respondent suggests in its exceptions that backpay for the discriminatees may be affected by their immigration status. The Respondent may raise that issue at compliance. *Case Farms of North Carolina*, supra, slip op. at 7.

¹⁶ *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001).

¹⁷ 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."

Green for further consideration, including making necessary credibility resolutions as discussed above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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.

WE WILL NOT discharge our employees because of their protected concerted activity of pursuing a wage and hour lawsuit against us.

WE WILL NOT offer our employees a wage increase if they cease their protected concerted activity of pursuing wage and hour claims against us.

WE WILL NOT videotape our employees engaged in peaceful picketing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer our delivery employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make our delivery employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of our delivery employees, and WE WILL,

within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

SAIGON GOURMET RESTAURANT, INC. AND
SAIGON SPICE, INC., A SINGLE EMPLOYER D/B/A
SAIGON GRILL RESTAURANT

Jaime Rucker, Esq., for the General Counsel.
S. Michael Weisberg, Esq., for the Respondent.
Yvonne Brown, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York on December 3, 5, and 6, 2007. The charge and the amended charge were filed on May 14 and July 30, 2007. A complaint was issued on September 28, 2007, and an amended complaint was issued on November 8, 2007. The amended complaint alleged as follows:

1. That Saigon Gourmet Restaurant, Inc., and Saigon Spice Inc., constitute a single employer within the meaning of the Act.

2. That on or about March 2, 2007, the Respondent by Simon Nget, its owner, (a) interrogated employees about their union and protected concerted activities, (b) promised to raise wages if employees agreed to cease engaging in union activities, and (c) threatened to close the delivery department and discharge those employees in retaliation for their union activities.

3. That on or about March 3, 2007, the Respondent by Simon Nget, (a) promised to raise employee wages, (b) told employees that their activities were futile, and (c) interrogated employees about their union and protected concerted activities.

4. That on or about March 3, 2007, the Respondent discharged all of its delivery employees employed at 620 Amsterdam Avenue, because they signed a document authorizing a wage and hour lawsuit. It is further alleged that Respondent ceased operating its delivery service at this location on this date.

5. That on or about March 5, 2007, the Respondent discharged all of its delivery employees employed at 93 University Place, because they either signed a document authorizing a wage and hour lawsuit or because they engaged in other concerted activity or because they engaged in union activity. It is further alleged that Respondent ceased operating its delivery service at this location on this date.

6. That on various dates after March 30, 2007, the Respondent by Simon Nget, Leanna Nget, a manager, and by persons named Timmy and Kenny, engaged in video surveillance of the picketing activity of its employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following¹

¹ I hereby grant the General Counsel's unopposed motion to correct the record.

I. JURISDICTION

It is undisputed that the two restaurants in question meet the Board's retail standards for asserting jurisdiction. I therefore conclude that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The two restaurants in question are solely owned by Simin Nget. He is also the sole officer and shareholder. One of the restaurants is located at 620 Amsterdam Avenue and the other is located at 93 University Place. Both are in Manhattan. Nget is the person who does the hiring and firing and he sets wages and other employment policies at both locations. The evidence also shows that there is some degree of interchange between the two locations, with some employees working at both.

Although each restaurant is a separate corporation, the evidence shows that there is common ownership, common management, and common control of labor relations. As such, I conclude that for purposes of the National Labor Relations Act the two constitute a single employer. *Lihli Fashions v. NLRB*, 151 LRRM 2943 (2d Cir. 1996), and *Flat Dog Productions, Inc.*, 347 NLRB 1180 (2006).

The restaurant at Amsterdam Avenue employed about 22 delivery persons in addition to a larger complement of kitchen and server employees. The restaurant at University Place employed about 6 delivery people. From the inception of these operations, the Employer has provided sit-down, take-out, and food delivery services. For the most part, the delivery people utilize their own bicycles and work from about noon to around 9 or 10 p.m. Their income normally is derived from tips, but they are also paid a small sum for each shift. I am not here to decide or discuss whether these employees received the appropriate legal minimum for tipped employees. Nevertheless, there is no question that employees talked about this subject and were not happy with their incomes.

There was some evidence that this Union had undertaken organizational activities among other Chinese or Asian restaurants in Manhattan and that there was some coverage of this in Chinese language papers. But to say, as the General Counsel argues, that Nget was therefore aware of any union organizational efforts at his restaurant is speculative at best.

On February 28, 2007, a number of the employees signed union authorization cards. At the same time they also signed authorizations to participate in a wage and hour lawsuit against Saigon Grill. There is no evidence to show that the Employer, before its decision to discharge the delivery employees, became aware of their union support. But the wage and hour matter was an entirely different story.

It is essentially admitted that on May 2, 2007, two employees approached Nget and requested/demanded that the pay of the delivery employees be increased and that unless this was done he would be sued. It also is clear that Nget understood that he was being threatened with a lawsuit concerning the alleged failure of his restaurants to meet the minimum wage requirements. He thereupon decided to call a meeting with the delivery employees who worked at the Amsterdam location and

tried to dissuade them from filing a lawsuit. In substance, he offered them an extra \$5 per shift. This offer was rejected.

Although the Respondent asserted (without really offering any proof), that the delivery service was not profitable and would have been terminated in any event, the testimony of Nget establishes that had the employees accepted the extra \$5 per shift and dropped the idea of suing him about wages, he would have continued the delivery service. In this regard, I also note that the delivery operation has always been an integral part of Nget's business from the opening of his restaurants.

In any event, after the conclusion of the meeting, Nget decided to terminate the delivery service at both restaurants and by March 4 effectuated that decision and notified all of the delivery people that their services were no longer needed.

Following the cessation of the delivery service, the employees, in conjunction with the Union set up a picket line. It is admitted that during the course of the picketing, Nget, on various occasions, had the picketers videotaped. While asserting that this was done in relation to alleged picket line misconduct, the Respondent failed to adequately offer any proof to support that assertion.

III. ANALYSIS

Although the General Counsel argues that one of the motivations for the discharge of the delivery drivers was because they signed union authorization cards or expressed their support for the Union, there is no objective evidence that convinces me that (a) the Respondent was aware of this activity or (b) that his decision to terminate the delivery service was motivated by union activity. Further, I do not conclude that the Respondent's promise of \$5 extra per shift was related to his fear that the employees were seeking unionization. Nor do I conclude that the Respondent coercively interrogated employees about their union membership or activities or that he threatened employees with plant closure because of their union membership or activities.

Nevertheless, Section 7 of the National Labor Relations Act, not only protects union activity it also protects concerted activity for "mutual aid and protection." And the case law, establishes that the actions of employees to prepare for the filing of a lawsuit under the Fair Labor Standards Act, is concerted activity as that term is defined in Section 7. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-578 fn. 15 (1978); *Igramo Enterprise Inc.*, 351 NLRB No. 99 (2008); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005); and *Kysor Industrial Corp.*, 309 NLRB 237 (1992). The Supreme Court made it clear in *Eastex* that pursuant to Section 7 of the Act, employees are protected from discharge or other retaliation for their concerted actions in seeking to improve their working conditions through "resort to administrative and judicial forums" and through "appeals to legislators to protect their interests as employees."

Accordingly, as it is my conclusion that the Respondent decided to discharge all of its delivery employees because he believed that at least some of them would initiate a lawsuit claiming wages under the Fair Labor Standards Act, I find that these discharges impinged on the protection afforded to em-

ployees under Section 7 of the Act and therefore violated Section 8(a)(1) of the Act.²

I also conclude that the videotaping of employees constituted a violation of Section 8(a)(1) of the Act. Thus, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), in finding a violation of Section 8(a)(1), the Board, with Member Oviatt dissenting, stated:

As the judge recognized, the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc.*, 273 NLRB 746, 747 (1984). . . . Here the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that “something ‘might’ happen does not justify Respondent’s conduct when balanced against the tendency of that conduct to interfere with employees’ right to engage in concerted activity.”

CONCLUSIONS OF LAW

1. By terminating its delivery service and discharging all of its delivery employees, because the Respondent believed that these employees intended to file a lawsuit under the Fair Labor Standards Act, the Respondent has violated Section 8(a)(1) of the Act.

2. By videotaping employees who engaged in peaceful picketing activity, the Respondent has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease

² In my opinion, the termination of the delivery service and the consequent discharge of the delivery employees is not encompassed by *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), or its progeny. Darlington established the proposition that an Employer can close its entire business without violating the Act even if motivated by unlawful reasons. The court also stated that an employer could be held liable in a situation where it partially closed its operations if that action chilled unionization elsewhere. For one thing, I don’t think that the facts in this case amount to a partial closing as that term has been used in *Darlington* or other cases where an employer permanently closed a plant or terminated a separate business operation. For another, since the delivery employees worked in close proximity to the restaurant’s other employees, their discharge for concerted activities, would necessarily deter those other employees from seeking redress for any other violations of minimum wage or other labor laws. *Cub Branch Mining*, 300 NLRB 57, 59 fn. 20 (1990). See also *George Lithograph Co.*, 204 NLRB 431 (1973), where the Board concluded that the closing of a mailing division for antiunion reasons, would necessarily act as a deterrent to the exercise of Section 7 rights by other employees who worked in the same building and who operated under the same immediate management.

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks inter alia, an Order requiring the Respondent to reinstate all of the delivery employees who were discharged on March 3 and 4, 2007. This would require the Respondent to reinstate its delivery service operations.

In *We Can, Inc.*, 315 NLRB 179 (1994), the Board stated:

When an employer has curtailed operations and discharged employees for discriminatory reasons, the Board’s usual practice is to order a return to the status quo ante—that is, to require the employer to reinstate the employees and restore the operations as they existed before the discrimination—unless the employer can show that such a remedy would be unduly burdensome.³

As there is no capital equipment or other investment that would be required to restore the delivery service, it could hardly be said that a restoration remedy would be unduly burdensome.

It may be that a restored delivery service might not be profitable if the employees are reinstated under terms that are in compliance with various Federal and State employment laws.⁴ But as of now, this is purely speculative and nothing in this recommended Order would compel the Employer to continue to operate this service on a loss basis. If the future operation of a delivery service under these new conditions is ultimately not feasible, then the Employer may discontinue it so long as its decision is not based on illegal considerations.

In *We Can, Inc.*, supra, the Board, although refusing to reopen the record, did amend the administrative law judge’s recommended Order to provide that restoration and reinstatement would be required “unless the Respondent can establish at compliance—on the basis of evidence that was not available at the time of the unfair labor practice hearing—that those remedies are inappropriate.” See also *Ferragon Corp.*, 318 NLRB 359 (1995).

In view of the above, I shall recommend that the Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (2987). I shall further recommend that the delivery service be restored. Although I can see no present basis for failing to restore the delivery service operation, I shall recommend that the Respondent be allowed at the compliance stage of the proceedings, to try to establish, based on new evidence that the restoration of this operation would not be feasible.

As the Respondent’s employees are largely Chinese speaking, it is recommended that the notices be in Chinese and English.

³ See also *Ferragon Corp.*, 318 NLRB 359 (1995).

⁴ Among the laws applicable to employees are those relating to (1) minimum wages and overtime, (2) workers compensation; (3) Federal and State income tax, and (4) social security.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Saigon Grill Restaurant, Inc., and Saigon Spice Inc., d/b/a Saigon Grill Restaurant, its officers, agents, and representatives, shall

1. Cease and desist from
(a) Discharging employees because of their concerted activity of indicating their intention to file a lawsuit under the Fair Labor Standards Act.

(b) Videotaping employees who are engaged in peaceful picketing.

(c) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to 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 from the date of this Order, offer the delivery employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the delivery employees and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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

⁵ 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.

⁶ 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."

notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, 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, 2007.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 11, 2008

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our delivery employees because of their concerted actions in seeking to enforce by way of a lawsuit, the Fair Labor Standards Act.

WE WILL NOT videotape employees who are engaged in peaceful picketing.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL restore the delivery operation and reinstate the delivery employees who have been found to have been illegally discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole the delivery employees, for the loss of earnings they suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in question, in writing, that this has been done and that these actions will not be used against them in any way.

SAIGON GOURMET RESTAURANT, INC. AND SAIGON
SPICE, INC., D/B/A SAIGON GRILL RESTAURANT