

Nos. 10-1272, 10-1298

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

FORTUNA ENTERPRISES, L.P.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE, LOCAL 11

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A GRIFFIN
Supervisory Attorney

KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

FORTUNA ENTERPRISES, L.P.	*
	*
Petitioner/Cross-Respondent	* Nos. 10-1272
	* 10-1298
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 31-CA-27837
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
UNITE HERE, LOCAL 11	*
	*
Intervenor	*

**THE BOARD’S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Fortuna Enterprises, L.P. (“the Company”) was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Unite HERE, Local 11 (“the Union”) was the Charging Party before the Board and is an Intervenor before the Court.

B. Rulings under Review

The Company is seeking review of a Decision and Order issued by the Board in case number 31-CA-27837 on August 24, 2010, and reported at 355 NLRB No. 122. That Order incorporated by reference two earlier Board Orders, reported at 354 NLRB No. 17 (2009) and 354 NLRB No. 95 (2009).

C. Related Cases

None.

/s/Linda Dreeben_____

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 15th day of July, 2011

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Fortuna Enterprises, L.P. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order against the

Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)). The Decision and Order, issued on August 24, 2010, and reported at 355 NLRB No. 122 (A. 1016),¹ is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Company petitioned for review of the Board's Order on September 1, 2010, and the Board cross-applied for enforcement of the Order on September 24. On October 1, Unite HERE, Local 11 ("the Union") filed a motion to intervene on the side of the Board, which this Court granted on October 28. The Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act. Both were timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of several unfair labor practices because the Company's opening brief fails substantively to challenge them.

2. Whether the Board reasonably declined to pass on various allegations.

¹ "A." references are to the two-volume Deferred Appendix. "SA." references are to the Supplemental Appendix filed with the Board's final brief. Where applicable, references preceding a semicolon are to the Board's findings; those following to the supporting evidence.

3. Whether the Company may challenge the admissibility of evidence when it failed to object at hearing to the receipt of that evidence into the record.

4. Whether substantial evidence supports the Board's reasonable determination that the Company unlawfully suspended employees for engaging in a concerted work stoppage to discuss a coworker's suspension with management.

5. Whether substantial evidence supports the Board's reasonable finding that the Company violated the Act by disparately enforcing hotel policies against five employees due to their union activities.

RELEVANT STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

Employees shall have 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

Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3):

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 157 of this title.
- (2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on consolidated complaints issued by the Board's General Counsel, pursuant to charges filed by the Union. (A.982,984; A.540-66,582-600,610-13.) Following a hearing, an administrative law judge issued a decision on October 21, 2008, finding that the Company had committed multiple violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by suspending employees, interrogating them, physically pushing and touching them, issuing a written warning, and engaging in other actions adversely affecting employees because of those employees' protected concerted activities. (A.998) The judge further found that the Company had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by issuing written warnings to five employees for engaging in union activity, and dismissed all remaining allegations in the consolidated complaint. (A.998)

The Company and the Union excepted to the judge's decision before the Board and their exceptions were considered by Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group, delegated all of the Board's powers under Section 3(b) of the Act (29 U.S.C. § 153(b)).²

² Effective December 28, 2007, Board Members Liebman, Schaumber, Kirsanow, and Walsh delegated all of the Board's powers to Members Liebman, Schaumber, and Kirsanow, in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. (A. 982 n.1).

(A.982 n.1.) On April 30, 2009, having considered the Company's and the Union's exceptions to the judge's decision, the Board issued a Decision and Order Remanding ("the April 2009 Order"). (A.982) In that Order, the Board affirmed the judge's findings that the five warnings for union activity violated Section 8(a)(3) and (1), and that the Company had committed numerous Section 8(a)(1) violations – including the suspensions of 77 employees for participating in a concerted work stoppage – though the Board declined to pass on certain cumulative violations, and modified the judge's rationale in certain respects.

(A.998 & nn.5-8.) The Board declined, however, to affirm the judge's finding that a company banquet chef, Pablo Burciaga, had violated Section 8(a)(1) by physically pushing employees away from a protected concerted employee gathering, and instead severed and remanded that issue to the judge to reconsider the evidence, make credibility determinations, and explain his findings.

(A.982-83.)

On July 22, 2009, the judge issued a supplemental decision, reaffirming and explaining his determination that Burciaga's conduct violated Section 8(a)(1).

(A.1014.) After considering the Company's exceptions to the supplemental decision, the Board (Chairman Liebman and Member Schaumber) issued a Supplemental Decision and Order on October 29, 2009 ("the October 2009 Order"). The Board agreed with the judge that Burciaga's conduct in pushing

employee Antonio Campos away from protected concerted activity violated the Act but declined to pass on whether Burciaga also had unlawful physical encounters with other employees. (A.1012.)

On June 17, 2010, the Supreme Court determined, in *New Process Steel, L.P. v. NLRB*, that Section 3(b) of the Act (29 U.S.C. § 153(b)) had authorized the Board to delegate its powers to a three-member group, effective on December 28, 2007, but required that the three-member “delegee group maintain a membership of three in order to exercise the delegated authority of the Board.”³ Consequently, the Supreme Court held that Chairman Liebman and Member Schaumber did not have the authority to issue decisions after December 31, 2007, when the Board’s membership fell to two members and the term of the third member of the group expired.⁴

At the time of the *New Process* decision, the April and October 2009 Orders were before this Court on petitions for review and cross-applications for enforcement, but the Board retained concurrent jurisdiction under Section 10(d) of the Act (29 U.S.C. § 160(d)). On August 17, 2010, the Board set aside its 2009 Orders, and moved this Court to dismiss the pending appeals, which the Court did

³ 130 S. Ct. 2635, 2644 (2010).

⁴ *Id.* at 2640.

on August 19. On August 24, 2010, a properly constituted panel of the Board (Chairman Liebman, Members Schaumber and Hayes), issued a Decision and Order (“the 2010 Order”) affirming the judge’s rulings, findings, and conclusions, adopting his recommended orders to the extent and for the reasons stated in the April and October 2009 Orders, and incorporating the 2009 Orders by reference. (A.1016.)

STATEMENT OF THE FACTS

I. The Board’s Findings of Fact

A. Background

The Company owns and operates the Los Angeles Airport Hilton Hotel and Towers (“the Hotel”). (A.985; A.2,583 ¶ 2(a),602 ¶ 2(a).) At all relevant times, Grant Coonley was the Hotel’s general manager, and Sue Trobaugh served as the director of human resources (“HR”). In the food and beverage department, Tom Cook served as director, Manny Collera as assistant director, Rogelio de la Rosa as chief steward, Pablo Burciaga as banquet chef, Clifton Hibbert as sous chef, and Charles Perera as banquet supervisor. In housekeeping, Anna Samayoa was the director and, at the front desk, Erik Burkhart served as director of operations and Ava Hirschsohn as guest-assistance manager. Daisy Argueta was a security guard. The Company has admitted that all of those individuals were statutory supervisors or agents during the period at issue here. (A.985; A.584 ¶ 5,602 ¶ 5.)

The Hotel has an open-door policy, described in its employee handbook. (A.992; A.525,707) The policy encourages each employee to work out any concerns with his immediate supervisor and, if the problem remains unresolved, to “seek assistance from his/her department manager, the Director of Human Resources and the General Manager.” (A.992; A.707.)

In 2006, the Union was conducting an organizing campaign at the Hotel. Employees joined the organizing committee, attended union meetings away from the Company’s facilities, and picketed outside the Hotel. (A.60; A.157,197,238-39,242,266,267-68.) Also during this same time period, organized groups (or “delegations”) of employees attempted on several occasions (some detailed below) to raise grievances to hotel management or to request that the Company voluntarily recognize the Union as their bargaining representative. (A.7,98-99,100-01.)

B. Supervisor Hibbert Interrogates Employee Molina about a Union Meeting

On March 2, 2006, cooks Alberto Barajas and Ricardo Molina went to a union meeting. The following morning, Sous Chef Hibbert, one of Barajas’ supervisors asked Molina, in front of Barajas, whether Molina had gone to the meeting and how it was. Molina did not answer. (A.986; A.60-62.)

C. Supervisor Burciaga Physically Interferes with Employee Campos' Participation in a Delegation, and Threatens Campos to Deter Future Collective Activity

In April 2006, several kitchen employees, frustrated by inadequate cooking equipment, decided to raise their concerns to management (“the kitchen delegation”). (A.1013; A.8-10,54.) They chose, as the forum to raise their issues, a regular pre-shift meeting between Assistant Food and Beverage Director Manny Collera, Restaurant Manager Efren Vasquez, and the Hotel’s servers, held in the kitchen. (A.1013; A.11,18-19.) Approximately 18 employees from various departments attended the delegation, including kitchen employees Herman Chan, Antonio Campos, and Juan Banales, none of whom was on break. (A.1013-14; A.8,24-26,53.) They sought permission to place piggy banks in the kitchen and dining areas to collect employee contributions towards the purchase of additional kitchen equipment, but Collera stated that he did not have the authority to grant that request. (A.1013; A.9,12,56,58,59.)

During the delegation, Banquet Chef Pablo Burciaga entered the kitchen and approached employees Chan, Campos, and Banales, who worked directly for him. (A.1013; A.6,12,19-21,53,55.) He informed them that if they were not on break, they should return to work, escorting Chan and Banales back to their work stations. (A.1013-14; A.13,55-57.) Burciaga then returned to the delegation and pushed Campos back to his work station. (A.1013-14; A.13-14,658 ¶ 5,SA. 6-8.)

About 30 minutes later, Burciaga approached Campos at the cook's work station. (A.986; A.15.) Burciaga stated that Campos could not be with his fellow employees when not on break. (A.986; A.16,22.) Campos asked what Burciaga would do if his coworkers came to his work station, and Burciaga promised to "fire them to shits along with you." (A.986-87; A.16.) When Campos said he would like to see that, Burciaga reiterated "I'll fire them to shits along with you," and threatened to ". . . kick their asses out of here, including you." (A.986-87; A.16-17,22,23.)

As a general rule, employees in the kitchen regularly moved around the work area and spoke to each other about non-work related subjects during their shifts. (A.1013-14; A.13,21,55.)

D. The Company Bars Employees from Accessing, and Warns Them Not to Enter, the Hotel while Wearing Union Insignia

Around April 21, employee Ana Maria Mendez approached the loading-dock entrance to the Hotel with employee Beatriz Reyes and some other coworkers, intending to pick up her paycheck in Banquet Manager Charles Perera's office, as she usually did. (A.987-88; A.238-40,246,257.) Mendez and Reyes and most of the others were wearing union T-shirts with "UNITE HERE" written in large red letters across the front. (A.988; A.241,246.) In the past, Mendez and Reyes had entered the Hotel without any problem while off duty and out of uniform, but without displaying union insignia. (A.988; A.244-45,262-63.)

When the group reached the door, hotel security guard Argueta stopped them and informed them that they could not access the facility wearing union T-shirts. She then advised them that, to avoid trouble, they should remove the T-shirts and stay out of the Hotel when wearing them. (A.988; A.242-43,249,258, 259.) Argueta physically blocked the entrance the employees had intended to use. A few minutes later, they accessed the Hotel, still wearing the union T-shirts, through another door several yards away. (A.988; A.244,247-51,252,264.)

E. The Company Suspends 77 Employees for Participating in a Delegation Attempting to Raise Concerns with Management

On May 10, waitress Patricia Simmons learned that fellow server Sergio Reyes (“Sergio”) had been accused of stealing money and suspended pending investigation. (A.989; A.112,113,161.) Later that day, she went to the union office and spoke with an organizer and coworker about the suspension, which she and other employees worried might really be a result of Sergio’s union activities. (A.989; A.70-71,73,75-77,114-115.) A number of employees (at the office or contacted that evening) agreed to meet in a delegation in the Hotel’s employee cafeteria the following morning to discuss their concerns with hotel management. (A.989; A.63,76-77,116-18,162.)

Beginning around 8 a.m. on May 11, between 70 and 100 of the Company’s employees gathered in the cafeteria (“the cafeteria delegation”). (A.989,992; A.63, 64,79,120.) Security Supervisor Gallardo, Housekeeping Director Samayoa, and

Assistant Housekeeping Director Cano all arrived shortly before 8:15. (A.989; A.122,328,329,369-370.) During the next 15 minutes, the employees informed the managers that they had assembled to speak to General Manager Coonley or Food and Beverage Director Cook about Sergio's suspension. (A.989 & n.11,990-991; A.72,79-80,121,123,163,327,375-76,377,418.)

The managers conferred, and Gallardo called Human Resources Director Trobaugh, who gave him ongoing instructions, through a series of phone calls, detailing what they should tell the gathered employees as events unfolded in the cafeteria. (A.990; A.331,334-35,338-40,378,380,385,431-33,435-37, SA5.)

Following Trobaugh's instructions, as relayed by Gallardo, Samayoa addressed the cafeteria delegation several times, starting around 8:30. After each announcement, Samayoa left the cafeteria, returning to deliver the next one.

(A.990; A.81-83,84-85,380,388,394.)

When Samayoa first entered the cafeteria, it was loud, with the employees talking to each other in a number of separate conversations. But as she began her announcement, the employees quieted down to listen to what she had to say, and she instructed them to return to work if they were not on break. (A.989-90,992; A.380-81,SA. 2.) The employees responded that they would remain until they had spoken to Coonley or Cook, and Samayoa informed them that Coonley was not at the Hotel. (A.990; A.330-33, SA.3-4)

As the delegation continued and employees' break times expired, some clocked back in, but they returned to the delegation rather than to work. (A.989; A.87,104-05,124,386,SA.1.) Meanwhile, not every table in the cafeteria was occupied by employees participating in the delegation. The protesting employees did not block access to or from the cafeteria, and employees not participating in the delegation came and went from the cafeteria unobstructed. (A.990 & n.16; A.97, 111,129,150-54,400,419).

At one point, Chief Steward de la Rosa, who supervises the cafeteria staff, approached cafeteria cook Fidel Andrade, who was with the other employees. De la Rosa stated that Andrade had exceeded his break time and directed Andrade to return to work. (A.988; A.180,647-48.) Andrade replied that if the employees were sent home, he would go with them. When de la Rosa returned to the cafeteria later and saw that Andrade was still with the delegation, he warned that he would have to suspend Andrade if he saw the cook in the cafeteria again. (A.988; A.647-48.)

When Samayoa addressed the employees for the second time, she told them that they must either return to work or clock out and go home. Again, the employees responded – according to Samayoa “loud, as a group” – that they were not going anywhere. (A.989-90,992; A.81,336,388-90.) When she repeated her

instruction, the employees began chanting and repeated that they would stay, so she repeated it a few more times. (A.390-91.)

Around 9 a.m., Samayoa directed the employees in the cafeteria, for the third or fourth time, to return to work or go home, and added that those employees who did not comply would be suspended pending investigation. (A.989 & n.12, 990,992; A.341,358,392-94,SA.5.) At that point, Samayoa began approaching employees one by one and suspending them. Gallardo accompanied her, recording the names of the suspended employees. (A.990; A.65,342,343-44,395.) Some employees did leave the cafeteria before Samayoa reached them and were not suspended. (A.342,395-96.)

Security Chief Taylor arrived during the suspension process and, when it was complete, told the assembled employees that they were suspended and could not remain in the cafeteria or they would be trespassing and would be removed by the police. (A.990; A.345-47,397-98.) The employees still refused to leave, and Taylor called the police. (A.990; A.347-48,398-400.)

Meanwhile, having failed in their attempt to discuss Sergio's suspension with either Coonley or Cook, the employees asked Chief Steward de la Rosa to notify either manager that the employees wanted to return to work. (A.989; A.88, 106.) At approximately 10:15, having received no response to their message, the employees in the cafeteria delegation sent a small group of employees to inform

the Company that they were all ready to work. (A.989 & n.13,992; A.66-67,88-89, 125-26,402-03.)

The group went to the café kitchen in search of Cook, who was unavailable. (A.990; A.66-67,68,90-91.) After conveying their message to Cook, another manager informed the group that they had been suspended and, consequently, could not return to work. (A.990,992; A.91,323.) Other managers – including Samayoa and Taylor, accompanied by a police officer – reiterated the same point. (A.990,992; A.69,92-94,404-05.)

The managers allowed the group to return to the cafeteria, accompanied by managers and the police officer, to inform the waiting employees that they were all suspended pending investigation and must leave the Hotel immediately, a fact which Samayoa then confirmed. (A.990,992; A.69,94-96,127-28,345,406-09.) At that point, the cafeteria delegation dispersed – all participating employees left by 10:45 a.m. (A.990,992; A.69-70,97,221-22,350,410-11.)

In all, the Company suspended 77 employees, for 5 days each, for “[i]nsubordination” and “[f]ailure to follow instructions,” as a result of their participation in the cafeteria delegation. (A.982,993, 998; A.254-56,444-45, 611¶ 6(b),615¶ 6(b),652-53.) The delegation and ensuing suspensions affected hotel operations but did not shut them down. When all servers and bus-service employees on duty that morning joined the delegation, the food and beverage

managers, along with other hotel managers and staff called in to assist, ran the café, which remained open. (A.989-990; A.102-03,119,285-86,290,325-26.)

Because many housekeeping employees – half of those suspended – also joined the delegation, Samayoa cleaned rooms herself, the Hotel called agencies to find temporary staff to replace them, and some unspecified number of rooms were not cleaned that day. (A.990&n.17; A.415-16,442,526-27.)

F. The Company Disciplines Employees for Entering the International Ballroom during a Union’s Convention

Until May 4, 2006, the Company’s handbook governed employee use of hotel facilities, restricting access to 30 minutes before and after work shifts, with a few specific exceptions. (A.995; A.516,751.) During working hours, the policy barred employees from using the Hotel’s public areas, including the lobby and guest restrooms, or even being in them unless specifically assigned. (A.995; A.517,752.) On May 4, the Company issued a revised usage policy applicable to off-duty employees – which explicitly included employees “on a bona fide rest period” – that “replace[d] and supersede[d]” the handbook provision on that subject. (A.995; A.424,517-18,524,621-24.) The new policy allowed off-duty employees to use the Hotel’s public facilities as guests, and to attend “non-Hilton sponsored” events, but requested that they give the Company advance notice before doing either, and obtain management approval before coming to the Hotel as a guest. (A.995; A.424,521-24,623.)

On June 3, the California Teachers Association (“CTA”) held a meeting in the Hotel’s International Ballroom, and asked both lobby attendant Izabel Brentner and café waitress Simmons to address its membership. (A.995-96; A.130-32,199, 207-08.) Each one did so during her lunch break. (A.995-96; A.142,208-09.) That same day, lobby attendants Lilia Magallon, Juana Salinas, and Joanna Gomez each spent time cleaning or emptying trash cans just outside the ballroom doors in the course of their regular job duties. (A 995-96; A.164-65,166,168,182-85,187, 224-25,226,227-29,231,235-36.)

When Simmons returned to work after her speech, Cook and his assistant, Collera, confronted her and asked where she had spent her break. (A.995; A.144-45,318.) She stated that she had been at the CTA convention, and Cook responded that Simmons was not allowed to be there. (A.995; A.145,318-19.) Simmons replied that she had visited guest events in the Hotel’s ballrooms over the past 20 years, as had other employees. (A.995; A.145-47,319-20.)

The following week, the Company disciplined Brentner, Simmons, Magallon, Salinas, and Gomez for entering the International Ballroom during the CTA event. Housekeeping Director Samayoa issued written warnings to Brentner, Magallon, Salinas, and Gomez on June 7, sanctioning each of them for being in an inappropriate area of the hotel during working hours, and while not on break.

(A.995-96; A.171-72,216,218,232,234,509,645-46,649,650,655.) When issuing Salinas' warning, Samayoa stated that it was for entering the ballroom while the CTA was using it. (A.996; A.233.) Cook issued Simmons' written warning on June 10. It stated that she had been "seen in an inappropriate area of the hotel (International Ballroom) while on [her] break," contrary to the handbook policy barring access to "unauthorized or non-designated work or guest areas" without the Company's specific authorization. (A.995; A.148,149,321-22,643-44.)

According to Trobaugh, the warnings sanctioned the five employees' violation of the Hotel's policy governing employee use of public areas during working time, on p.61 of the Handbook. She further explained that the Company considered the violations serious because the employees did not have authorization to enter the ballroom. (A.532-33,537-38,752.) The Company stipulated that it knew of all five disciplined employees' union activities. (A.994 n.25,995-97; A.501-03.)

G. Company Manager Perera Warns Employee Reyes Not to Discuss the Union at the Hotel

In June, Banquet Manager Perera had a conversation with employee Beatriz Reyes in his office. He told Reyes, "as friends," that he had no problems with her because she was a good worker, but that she had better not discuss the Union inside the Hotel if she did not want to have problems, and reiterated his admonition when she asked for clarification. (A.989; A.260-61.)

H. The Company Disciplines Employee Contreras for Her Posters Protesting Verbal Abuse of Employees

Nathalie Contreras was subjected to insults (i.e., “bitch” and “crack head”) from hotel guests during her tenure as a guest-services agent at the Hotel’s front desk and complained about them to Director Burkhart, who failed to resolve the situation. (A.993; A.28-29,35-38.) Other guest-services agents were similarly disrespected. (A.993; A.33-34,36,291.)

Contreras and two fellow employees discussed belittling comments they had received from both guests and managers and, to address the situation, prepared four large posters. (A.993; A.38-39,40,46,47,775-78.) The posters featured drawings of hotel guest-services agents, explained that they were insulted by guests and management without recourse, provided examples of the slurs, and invited employees to add more. (A.993; A.39,40,46,49,775-78.)

On August 24, 2006, Contreras went to the employee cafeteria during her lunch break and hung the posters on the wall where the Company regularly places informational or celebratory displays. (A.993; A.41-42,48,426,430,513.)

Contreras then gave a presentation, explaining that hotel guests and management had repeatedly subjected guest-services agents to the type of language displayed on the posters, and asking if others had experienced similar disrespect. Some employees present replied in the affirmative. (A.993; A.43-44.)

HR Director Trobaugh believed that some of the words on the poster were inappropriate in the workplace and violated the Company's Harassment Free Workplace Policy (A.708-09) by arguably creating a hostile work environment. (A.994; A.425-28,429,507-08,514-15.) On August 28, she issued Contreras a written warning for posting materials in violation of the harassment policy. (A.993; A.44-45,429-30,449,619-20.) The narrative portion of Contreras' warning stated that the posters violated the policy because they contained "several offensive words, including 'bitch,' 'sexy' and 'moron,'" explaining that "[d]isplays of such visual conduct may be considered offensive by others and create an intimidating, or hostile work environment." (A.993; A.619-20.)

II. The Board's Conclusions and Order

Based on the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company had committed multiple violations of Section 8(a)(1) by: suspending 77 employees for participating in the cafeteria delegation; interrogating employee Molina about a union meeting; physically pushing employee Campos for engaging in protected concerted activities; threatening Campos with violence, and employee Andrade with suspension, if they engaged in protected concerted activity; denying access to the Hotel to employees wearing union insignia, and threatening them with trouble if they entered; issuing a written warning to employee Contreras for her posters calling attention to verbal

abuse of front-desk employees; and threatening employee Beatriz Reyes with unspecified reprisals if she engaged in union activity. (A.1016,982,998,1012&n.3.)

The Board further found, also in agreement with the judge, that the Company had violated Section 8(a)(3) and (1) of the Act by issuing five written warnings to employees who entered the International Ballroom during the CTA convention, disciplining them for union activity. (A.1016,982&n.5,996-98.) The Board declined to pass on certain other, cumulative violations found, and noted the lack of exceptions to the judge's dismissal of a number of further allegations. (A.1016,982nn.3,5,6,1012n.3.)

To remedy the Company's unfair labor practices, the Board's Order requires the Company to cease and desist from: suspending employees for engaging in protected concerted activities; interrogating employees about union and other protected concerted activities; physically pushing employees for engaging in such activities; threatening employees with violence if they engaged in protected concerted activity; denying employees access to the Hotel, and threatening them with trouble if they entered, because they wore union insignia; threatening employees with suspension if they participated in protected concerted activity; issuing written warnings to employees for engaging in union and other protected concerted activities; threatening an employee with unspecified reprisals if the

employee engaged in union activity; and, 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. (A.1016,983,998,1012,1014.)

The Order also affirmatively mandates that the Company make whole enumerated employees for their unlawful suspensions by paying them stipulated amounts of backpay and post remedial notices set forth in the 2009 Orders.

(A. 1016,983,998-00,1012-14.)⁵

⁵ The Company rescinded the suspension as to one employee, Melvin Sampole, and has made him whole. (A.998; A.50-52,256.)

SUMMARY OF ARGUMENT

The Board found that, during a union organizing campaign among the Hotel's employees, the Company committed repeated violations of the Act – threats, interrogations, physical intimidation, denial of access, and targeted discipline – designed to discourage the employees' concerted, protected, and union activities. The Company does not even contest the majority of those unfair labor practices, and its arguments with respect to the two violations it does substantively challenge are unavailing. As to each one, the Board's determination finds ample support in the record evidence and is consistent with both the Act and relevant precedent.

First, the Board reasonably concluded that the Company unlawfully suspended 77 employees for participating in the cafeteria delegation. That large gathering of employees – collectively withholding their services from the Company to secure an audience with management – constituted a quintessential concerted protected activity, well within the scope of the Act's protection. The employees did nothing to forfeit that protection. Nonetheless, the Company acted quickly to sanction their protected activity without even hearing their grievance. Under those circumstances, the Company's interest in removing the employees from the Hotel did not trump their right to mutual aid and protection.

Second, the Board reasonably determined that the Company disparately applied its facility-usage policies to issue written warnings to five employees, ostensibly for entering the International Ballroom during the CTA event, in order to discourage their union activities. Ample evidence supports the Board's underlying findings that none of the employees actually violated the applicable hotel policies, that the Company has not consistently applied those policies in the past, and that, therefore, its application of the policies to issue the five contested warnings was mere pretext, intended to conceal its actual, and unlawful, anti-union motivation.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law."⁶ The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.⁷ Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a

⁶ *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

⁷ 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Citizens Inv. Svcs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005).

conclusion.”⁸ Thus, the Board’s reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.⁹

Of particular relevance here, this Court affords “considerable deference” to the Board’s conclusion that an employee’s activity qualifies as concerted and protected under Section 7 of the Act, because such a determination “implicates [the Board’s] expertise in labor relations.”¹⁰ And it gives “even greater” deference to the Board’s resolution of questions of motive.¹¹

⁸ *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) (“Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board’s conclusion.”).

⁹ *See Universal Camera*, 340 U.S. at 488. *Accord Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004) (“[T]he court will uphold the Board’s decision upon substantial evidence even if we would reach a different result upon *de novo* review.”).

¹⁰ *Citizens Inv. Svcs.*, 430 F.3d at 1198 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)).

¹¹ *Citizens Inv. Svcs.*, 430 F.3d at 1198 (internal quotations omitted).

ARGUMENT

I. The Company Waived Any Objection to Violations Not Substantively Challenged in Its Opening Brief; the Board Is Entitled to Summary Enforcement of Those Unfair-Labor-Practice Findings

In its opening brief, the Company mentions six of the Board’s unfair-labor-practice findings only in passing. Specifically, in a footnote to its final issue statement regarding the June 3 Section 8(a)(3) violations (Br. 4 n.2), the Company asserts that “the Board erred in finding and concluding” that the six underlying incidents – (1) the Molina interrogation, (2) the Campos threat, (3) threatening and barring access to employees in union T-shirts, (4) the Beatriz Reyes threat, (5) the Contreras discipline, and (6) physically pushing Campos from the kitchen delegation – violated Section 8(a)(1) of the Act. Nowhere else in its brief does the Company either recite the facts underlying those six violations or make any legal argument challenging them. The Company then concludes its brief (Br. 54) by asking for relief from the entire Board Order.

The law of this Court is clear that the Company has waived any opportunity to challenge those six uncontested 8(a)(1) violations by failing to make any substantive argument relating to them in its opening brief.¹² Accordingly, the

¹² See *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that arguments raised in opening brief merely by reference are waived and cannot be argued in reply brief); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (holding issue waived before Court when not raised in opening brief). See also *Sherley v. Sebelius*, 610 F.3d 69, 71 (D.C. Cir. 2010)

Board is entitled to summary enforcement of the portions of its Order finding and remedying those violations.¹³

II. The Board Legitimately Declined To Pass on Certain Alleged Violations

On a related note, the Company asserts in the same cursory footnote (Br. 4 n.2 ¶2), and at various other points in its brief (Br. 3, 42-43, 45-46), that the Board “erred in declining to rule” on certain alleged unfair labor practices. The Board declined to rule on those alleged violations because it determined that doing so “would be cumulative and would not materially affect the remedy.” (A.982nn.5 &6). The Company does not cite any authority for its implicit assertion that the Board has an obligation to rule on charges under such circumstances. Nor, in any event, has the Company made any effort to show that it is aggrieved by the Board’s decision not to pass on those allegations, or to clarify what remedy it seeks

(citing *Sitka* and interpreting failure to challenge district-court finding on appeal as concession); *Parsippany Hotel Mgmt Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996) (“[E]ven had Parsippany raised the . . . issue before the Board, it would nonetheless be barred from consideration by this court, as it did not raise the issue in its opening brief.”). *See also S.E.C. v. Banner Fund Int’l*, 211 F.3d 602, 613-14 (D.C. Cir. 2000) (citing Federal Rule of Appellate Procedure 28(a)(9)(A) and several cases for proposition that Court will not entertain cursory argument that does not identify and explain alleged errors in challenged decision or provide appropriate factual and legal citations).

¹³ *Flying Food Grp., Inc. v. NLRB*, 471 F.3d 179, 181 (D.C. Cir. 2006) (summarily enforcing uncontested portions of the Board’s order).

regarding those charges, as to which the Board made no findings or rulings, and issued no Order.

III. The Company Cannot Contest the Board's Factual Basis for Finding That Chief Steward de la Rosa Threatened Employee Andrade during the Cafeteria Delegation

According to his own signed statement (A.647-48), admitted hotel supervisor de la Rosa approached cafeteria cook Andrade during the cafeteria delegation and threatened to suspend Andrade if the cook remained in the cafeteria with the other protesting employees. Unsurprisingly, the Company does not challenge the Board's conclusion that, if the underlying facts occurred as described in that document, de la Rosa's threat violated Section 8(a)(1) of the Act. Instead, the Company's entire challenge to this violation (Br. 43-45) rests on its assertion that the exhibit underlying those factual findings was inadmissible hearsay. At the hearing in this case, however, the Company did not object to the admission of de la Rosa's statement, so it cannot now challenge the document's admissibility before this Court.¹⁴

¹⁴ See *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1130 n.14 (D.C. Cir. 2001) (holding objection to district court's consideration of document "not properly preserved for appeal" when party did not object to submission); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554 n.15 (D.C. Cir. 1984) ("It is axiomatic that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission.") (internal quotation omitted).

Moreover, the Company's suggestion (Br. 44-45) that the Board ought to have drawn an inference against the General Counsel and the Union for failure to call Andrade as a witness overlooks the fact that the General Counsel presented evidence of the de la Rosa threat in the form of the supervisor's written admission. If the Company believed that Andrade or any other witness would have contradicted de la Rosa's admission, then the Company should have called that witness in its defense. General Counsel's and the Union's decision not to clutter the record when they had already established the facts of the Company's unfair labor practice is unremarkable.

IV. The Board Reasonably Found that the Company Violated the Act by Suspending Employees for Concertedly Stopping Work to Seek Information from Management Regarding a Coworker's Discipline

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Section 7 (29 U.S.C. § 157), in turn, confers on employees the right "to engage in . . . concerted activities for . . . mutual aid or protection" Such mutual aid or protection encompasses employee protests concerning a coworker's discipline, whether that discipline was lawful or not.¹⁵ That protection

¹⁵ See *Kenworth Trucks of Philadelphia*, 229 NLRB 815, 821 (1977), *enforced mem.*, 99 L.R.R.M. 2157 (3d Cir. 1978); *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477, 478 (1970), *enforced*, 449 F.2d 824 (5th Cir. 1971).

should be interpreted broadly, particularly with respect to unrepresented workers who must “speak for themselves as best they [can].”¹⁶

In *NLRB v. Washington Aluminum Company*, the Supreme Court held that a concerted work stoppage by unrepresented employees, stemming from a “labor dispute” within the meaning of Section 2(9) of the Act (29 U.S.C. § 152(9)) – i.e., “any controversy concerning terms, tenure or conditions of employment” – is protected even if the protesting employees fail to articulate a specific remedial demand to their employer.¹⁷ When an employee work stoppage occurs on an employer’s premises, however, the Board has recognized that the employees’ Section 7 rights must be balanced against the employer’s private property rights.¹⁸ The point at which a protected stoppage crosses the line into unprotected conduct is not fixed, but the Board considers a variety of factors – recently delineated in

¹⁶ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). *Accord Citizens Inv. Svcs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting *Washington Aluminum*).

¹⁷ 370 U.S. at 15. *Accord Ne. Beverage Corp. v. NLRB*, 554 F.3d 133, 138-39 (D.C. Cir. 2009) (describing *Washington Aluminum* holding and finding nothing in that case “suggests the Act protects an employee walkout that is not part of an ongoing ‘labor dispute’ over ‘terms, tenure or conditions of employment’”). *See also Kysor/Cadillac*, 309 NLRB 237, 238 (1992) (holding employees’ failure to explain source of confusion underlying concerted inquiry did not preclude protection).

¹⁸ *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005) (citing *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993)).

Quietflex Manufacturing Company – when weighing the circumstances of a particular stoppage to determine whether it qualifies for protection under the Act.¹⁹

The *Quietflex* factors are: (1) the reason the employees stopped working; (2) whether the stoppage was peaceful; (3) whether it interfered with production, or deprived the employer of access to the property; (4) whether the employees had an adequate opportunity to present their grievances to management; (5) whether they received any warning that they must leave the premises or face discipline; (6) the duration of the stoppage; (7) whether the employees were represented or had access to an established grievance procedure; (8) whether they remained on the premises beyond their shift; (9) whether they attempted to seize the employer's property; and (10) the reason for which the employer ultimately sanctioned them. In this case, the Board reasonably held (A.982,992) – as demonstrated below – that each of those factors favors finding the cafeteria delegation to be protected concerted activity, and that the Company's consequent suspension of the employees involved violated Section 8(a)(1) of the Act.

1. The work stoppage had a protected purpose

As an initial matter, the first *Quietflex* factor favors a finding of protection because the subject matter of the cafeteria delegation – which was indisputably concerted – falls comfortably within the scope of Section 7 of the Act. Ample

¹⁹ 344 NLRB 1055, 1056-57 (2005).

evidence supports the Board's determination (A.989) that the employees gathered in the cafeteria in an effort to raise and address with Coonley or Cook certain concerns about Sergio's suspension. Specifically, they organized the delegation because they suspected Sergio had been disciplined in retaliation for his union activities, and that other employees who expressed support for the Union were at risk of a similar sanction.

As the Board pointed out (A.991-92), the subject of the cafeteria delegation thus falls within the classic protected category of protesting a coworker's discipline.²⁰ Contrary to the Company's assertions (Br. 21-22, quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978)), there is nothing "attenuated" about the relationship between such a protest and the protesters' "interest as employees." That is particularly true where, as here, one source of the protesting employees' concern is that they might suffer the same fate as their disciplined colleague.

Moreover, as in *Washington Aluminum*, the protest in this case grew out of an ongoing labor dispute between the protesting employees and their employer.

²⁰ See *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006) (holding protesting coworker's discharge to be protected); *Embossing Printers, Inc.*, 268 NLRB 710, 724 (1984) (holding protesting lawful lock-out of coworkers to be protected), *enforced*, 742 F.2d 1456 (6th Cir. 1984); *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477, 478 (1970) (holding protesting even non-discriminatory discharge to be protected), *enforced*, 449 F.2d 824, 830 n.5 (5th Cir. 1971) (describing "well-settled" law that "a concerted work stoppage to protect even a lawful discharge of a fellow employee is protected by Section 7 of the Act").

The cafeteria delegation's focus on whether union animus motivated Sergio's discipline arose in the context of the employees' months-long attempt to secure the Company's recognition of the Union as their bargaining representative.

Nor is the cafeteria delegation's quest for information analogous to the one this Court found to be unprotected in *Northeast Beverage Corporation v. NLRB* (Br. 22-24), where several drivers sought more details on their employer's plans for implementing its imminent consolidation with another company.²¹ Unlike the Hotel's employees, those drivers were not only represented but also had a collective-bargaining agreement with their employer.²² And, critically, at the very time the drivers left work in search of information, their union representatives were engaging in effects bargaining with the drivers' employer. Their steward advised the drivers not to leave work (and other union officials directed them to return to work), specifically promising to "try and get some answers for everybody to see what was going on."²³ In holding that the drivers had no "labor dispute" with their employer in *Northeast Beverage*, this Court emphasized the facts that their collective-bargaining agreement covered the subjects of their concern and that their

²¹ 554 F.3d 133, 134 (D.C. Cir. 2009).

²² *Id.* at 134-35.

²³ *Id.* at 135-36.

union was in the process of negotiating the contract's application to the impending merger.²⁴

In contrast, the unrepresented employees who participated in the cafeteria delegation had no similar assurance that their need for information would be met at all, much less so promptly, or that anyone was protecting their interests in the matter concerning them. And they sought an explanation for an action that the Company had already taken, not clarification of future plans. For those reasons, the cafeteria delegation's decision to confront the Company about Sergio's suspension and about the employees' suspicion that his discipline was related to his union activities is more analogous to other concerted employee quests for information that the Board has found to be protected.²⁵

²⁴ *Id.* at 138.

²⁵ *See, e.g., Waco, Inc.*, 273 NLRB 746, 746 (1976) (stoppage initially protected when employees gathered to talk to employer about coworker's discharge, even though they "never stated a specific grievance or formulated any demands other than to have [their supervisor] meet with them in the lunchroom"); *Kenworth Trucks of Philadelphia*, 229 NLRB 815, 821 (1977) (holding work stoppage to confer on how to react to coworker's discharge and to seek information from employer regarding discharge, protected), *enforced mem.*, 99 L.R.R.M. 2157 (3d Cir. 1978); *Globe Wireless, Ltd.*, 88 NLRB 1262, 1265 n.14 (1950) ("[I]t is immaterial whether the employees were withholding their services in order to force [a fired coworker's] reinstatement or to secure a discussion of what they regarded as a grievance. Under either view[,] the strike was a protected concerted activity."), *enforced*, 193 F.2d 748 (9th Cir. 1951).

In *Grimmway Farms*, for example, a production employee felt sick, asked to see a doctor and was instead scolded by the plant superintendent, only to die shortly after the end of the shift.²⁶ The employee's coworkers conferred and "decided they needed to know more about the circumstances [surrounding the superintendent's handling of the sick employee's request for assistance] so they could determine whether they needed to take steps to prevent a similar happenstance."²⁷ Like the employees here, their need for information concerned an action the employer had already taken, and no representative was seeking that information for them.

2. The work stoppage was "peaceful"

Indisputably, the cafeteria delegation was, as the Board found (A.991-92), peaceful. In the labor-relations context – where the Board and the courts have long found that passions run high and have tolerated a certain level of intemperate or even abusive or insulting conduct,²⁸ but have also consistently proscribed

²⁶ 315 NLRB 1276, 1277 (1995). *See also Kysor/Cadillac*, 309 NLRB 237, 238 (1992) (holding employees engaged in protected activity when, confused by two arguably conflicting employer memoranda, they approached supervisor as group for clarification of their work assignments).

²⁷ *Id.* at 1279-80.

²⁸ *See Beverly Health & Rehab. Svcs., Inc.*, 346 NLRB 1319, 1323 (2006) ("[I]t is well established that the Act allows employees some leeway in the use of intemperate language where such language is part of the 'res gestae' of their concerted activity.") (citing *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964),

violence²⁹ – “peaceful” is best understood as “nonviolent.” The Company cites no relevant authority for its apparent understanding (Br. 24-26 & n.6) that this *Quietflex* factor refers to a level of silence or tranquility that would be appropriate in a library, much less that it imposes a standard of etiquette that would preclude interruptions or overt employee disagreements with management.

Nor does the evidence support the Company’s equation (Br. 24-26 & n.6) of the cafeteria delegation to a rugby tailgate party or “pandemonium,” “conflict, agitation and commotion,” much less its characterization of the gathering as “disruptive.” The record shows that there was a certain amount of noise in the cafeteria – the effect of multiple conversations carried on among nearly 100 people in a single room, augmented by occasional chanting – but that the employees quieted down to listen to Samayoa’s announcements. (A.107,188-89,380-81, 390.) The noise level was perhaps unusual at that time of morning, but did not exceed that created by similar or larger groups of employees who regularly gather

enforced, 351 F.2d 584 (7th Cir. 1965)); *Burle Indus.*, 300 NLRB 498, 501, 504 (1990) (“[T]he Board recognizes that concerted activity may involve very emotional situations and gives some leeway for misconduct that occurs during the course of that concerted activity.”), *enforced*, 932 F.3d 958 (3d Cir. 1991). *Cf. Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 61 (1966) (“[T]he Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees. . .”).

²⁹ See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (listing the “normal categories of unprotected concerted activities,” including violent conduct).

in the cafeteria to eat lunch, or for various hotel-sponsored events. (A.107,189-94.) And there is no suggestion anywhere in the record that the delegation was audible in any area of the Hotel accessible to guests, or even in any other work area of the Hotel, much less that the noise disturbed any guest or interfered with any employee's performance of his or her work.

3. The work stoppage did not interfere with the Hotel's operations or impede the Company's access to its premises

When evaluating the impact of an in-plant work stoppage, the Board and the courts do not consider the protesting employees' withholding of their own labor – as opposed to preventing other, non-striking employees from performing work – to constitute interference with the employer's business.³⁰ The Company cites no authority for its assertion (Br. 27 n.8) that hotel employees should be held to a higher standard than other employees, or implication that its business operations,

³⁰ *Quietflex*, 344 NLRB at 1057 n.6 (“It is not considered an interference of production where the employees do no more than withhold their own services.”) (citing *Lee Cylinder Div. of Golay & Co.*, 156 NLRB 1252, 1262 (1966) (“*Golay*”), *enforced*, 371 F.2d 259, 262 (7th Cir. 1966), and *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1358 (8th Cir. 1989)); *Benesight, Inc.*, 337 NLRB 282, 282 (2001) (listing among factors favoring protection of an on-site work stoppage that the protest “causes little disruption of production *by those employees who continue to work*”) (emphasis added).

and customers' goodwill, are somehow more important or sensitive than those of other employers.³¹

In the end, the Company's arguments (Br. 27-29) regarding interference boil down to complaints that striking servers did not staff the restaurant and that protesting housekeepers did not clean rooms, proving only that the employees who participated in the cafeteria delegation engaged in a work stoppage. As the Board found (A.990&n.17,991-992), however, the undoubted inconvenience flowing to the Company from their withheld labor does not meet the *Quietflex* definition of "interference with production."

Moreover, the record simply does not support the Company's oft-repeated claim (Br. 27 n.8, 41-42) that it experienced a "massive disruption" or that the cafeteria delegation "wreaked havoc" on its operations. Hotel managers and non-striking employees staffed the restaurant to customers' (and Cook's) satisfaction. (A.300-01,324-26,290.) Indeed, some who showed up to assist were sent away because Cook had more help than he could use. (A.325.) Testimony regarding the disruption to housekeeping establishes only that the Company called in temporary

³¹ Cf. *Waco, Inc.*, 273 NLRB 746, 750 (1984) (Manufacturing employer was subject to contractual penalty for late delivery.); *Leisure Lodge Nursing Home*, 250 NLRB 912, 912 (1980) ("[T]he Board has not held work stoppages against health care institutions to be outside the protection of Section 7. Rather, it has determined that it will apply the same standards of conduct to health care institutions as to other enterprises.") (quoting *Walker Methodist Residence & Health Care Ctr., Inc.*, 227 NLRB 1630, 1632 (1977)).

workers, that Samayoa had to clean rooms assigned to striking employees, and that some indeterminate number of rooms were not cleaned that day. (A.415-16,442.)

Incidentally, most of the repercussions of the cafeteria delegation in the housekeeping department stemmed not from the employees' voluntary work stoppage but from their subsequent suspension from the bulk of their work day, which they explicitly offered to complete just over two hours into their protest.

Finally, substantial evidence supports the Board's finding (A.990-92) that the delegation did not interfere with other employees using or working in the cafeteria, or impede the Company's access to that room or any other part of the Hotel. The principal work space (kitchen) was separate from the seating area where the delegation occurred, and Samayoa testified to seeing de la Rosa performing his job during the delegation. (A.282, 284,421-22.) Moreover, the judge rejected as hearsay (A.990n.16) the testimony the Company cites to establish that employees felt uncomfortable using the cafeteria, some of which he then struck from the record. (A.307-09,438-40.) The Company did not seriously challenge that ruling at the hearing, arguing only that the evidence should be admitted for company managers' state of mind rather than the truth of the matter (A.309,439), and does not challenge it before this Court.

4. The cafeteria-delegation participants had no opportunity to present their grievance to hotel management

Crucially, substantial evidence supports the Board’s finding (A.982n.8, 991-92) that the Company did not, at any time during the cafeteria delegation – much less before it started suspending the protesting employees, *either* (1) give them an opportunity to present their grievance to General Manager Coonley or Director Cook *or* (2) make clear that the managers they sought were unavailable that morning and advise the employees that they would have another opportunity to present their concerns to those managers.

In analyzing whether, and for how long, on-site work stoppages retain protection, the Board gives great weight to employees’ basic right to secure an audience with their employer. Once the employer provides the employees with an opportunity to present their concerns, they no longer have an “immediate protected interest” in remaining on their employer’s property.³² Indeed, the employers’ provision to employees of adequate opportunities to present their concerns in *Quietflex*, *Cambro Manufacturing Company*, *Waco, Inc.*, and *Central Motors Corporation* helps explain why the work stoppages in those cases lost protection –

³² *Quietflex*, 344 NLRB at 1059 (noting, as well, the extraordinarily long duration – 12 hours – of stoppage).

and after only 20 minutes in *Central Motors*.³³ Conversely, the Board found employee stoppages protected in *City Dodge Center* and *Pepsi-Cola Bottling Company of Miami*, where the employers failed to do likewise.³⁴ And, here, the Board highlighted (A.982n.8) that same failure. The fact that the Company provided the employees in the cafeteria delegation neither an opportunity to address Coonley or Cook nor the prospect of doing so in the near future – and that the employees’ protected interest in having their concerns heard consequently

³³ *Id.* (highlighting, in holding stoppage lost protection, that employees had many opportunities to present grievances to management during stoppage, including when management accepted letter outlining demands, made effort to respond to them, and offered to meet with delegation of employee group); *Cambro*, 312 NLRB 634, 636 (1993) (holding on-site stoppage lost protection after supervisor ordered employees to work or leave for second time, *and* assured them that the manager they sought would meet with them either way when he arrived at plant in a few hours); *Waco*, 273 NLRB 746, 746 (1976) (Employees remained on employer property for hours after manager offered to meet with them individually, or with some group spokesmen, if they returned to work.); *Central Motors*, 269 NLRB 209, 209 (1984) (holding stoppage lost protection after only 20 minutes because supervisor had already taken grievances to management, held meeting to explain management’s position, allowed employees to confer, taken employee spokesman to meet with management, and allowed the employees to confer again before ordering them back to work).

³⁴ *City Dodge*, 289 NLRB 194, 194 n.2, 195 (1988) (finding 1-4 hour on-site stoppage protected; employer president refused employees’ request to meet with them, and refused to schedule a meeting), *enforced sub nom. Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989); *NLRB v. Pepsi-Cola Bottling Co. of Miami, Inc.*, 449 F.2d 824, 829 (5th Cir. 1971) (“An employer cannot convert a protected inplant work stoppage into an unprotected trespass by the simple expedient of ordering his employees from the plant where, as here, such an order serves no immediate employer interest and unduly restricts the employees right to present grievances to their employer.”).

persisted (A.991-92) – is key to the Board’s determination that they retained the Act’s protection.

Finally, the Hotel’s open-door policy and confidentiality rules (Br. 30-32, 35-36) do not alter the analysis of this factor. The open-door policy does not, as discussed below, qualify as “an established grievance procedure.” And, in any event, it does not affect the Board’s analysis, under this *Quietflex* factor, of the Company’s response – or lack thereof – to the employees’ effort to communicate at the time of the work stoppage. The confidentiality rules might have restricted what information Coonley and Cook could provide in response to the employees’ questions or concerns, but do not curtail the employees’ right to present their grievances to those managers in the first place.

5. The Company gave employees little warning that they must leave the Hotel or face suspension

As the Board found (A.989-90,992), and as described in more detail above, Samayoa directed the employees participating in the cafeteria delegation more than once either to return to work or clock out and go home. Around 9 a.m., or approximately one hour after they began their work stoppage, Samayoa reiterated that choice to the employees, adding for the first time that the Company would suspend those employees who neither returned to work nor left. Without further delay, she then began suspending the employees one-by-one. Another hour or so later, having realized that hotel management simply would not entertain their

grievance, the employees made the choice to return to work, but the Company rebuffed them, informing them that they could not do so because they were suspended.

In other words, the Company suspended the employees just 1 half hour after Samayoa first offered them a choice of working or going home (as compared to over 3 hours in *Waco*).³⁵ Moreover, it suspended them just 1 hour after they began their work stoppage, and immediately (as opposed to 45 minutes in *Quietflex*) after first raising the specter of such discipline.³⁶ The fact that the Company qualified the sanctions it imposed as “pending investigation,” and did not technically finalize the suspensions until the following day (Br. 32), does not alter the fact that it eliminated the employees’ option of returning to work as of 9 a.m., barely 1 hour into the cafeteria delegation, without affording the employees time to consider their options, particularly with the prospect of a suspension in mind.

³⁵ 273 NLRB at 746-47 & n.3 (finding employees were not fired precipitously but had time to consider choice when supervisor twice offered to meet with them individually and ordered them to work or leave, the first time nearly three hours before he fired them; also distinguishing *Pepsi-Cola* because employees in that case were discharged shortly after beginning stoppage).

³⁶ 344 NLRB at 1055 (Employer – after hours of stoppage and more than one offer to talk to employee representatives – gave employees 45 minute deadline, warning them that any employee who did not return to work or leave property by stated time would be fired.).

6. The cafeteria delegation was not extraordinarily long

As the Board found (A.992), the Company reached its decision to penalize the employees participating in the cafeteria delegation after “barely an hour” of work stoppage. After just over 2 hours in the cafeteria, the employees offered to return to work. And, after less than 3 hours, once the Company definitively rejected their offer, they all vacated the Hotel. A 1-hour stoppage, without any particular aggravating factor, fits easily within the time frames of on-site stoppages the Board has found protected in the past, as evidenced by the various cases discussed in the Board’s decision (A.992) and this brief. Even if the Court were to consider the entire length of the cafeteria delegation, including the time *after* suspension, 2 hours and 45 minutes is perhaps long but not extraordinarily so. The Board has found on-site stoppages of comparable lengths protected in the past, particularly where, as here, other factors also favor protection.³⁷

³⁷ See, e.g., *City Dodge Ctr.*, 289 NLRB at 194 n.2 (1988) (1-3 hours); *Nanticoke Homes, Inc.*, 261 NLRB 736, 740-41, 749 (1982) (roughly 2 hours), *enforced*, 716 F.2d 897 (4th Cir. 1983); *Pepsi-Cola*, 186 NLRB at 478 (“a few hours”); *Golay*, 156 NLRB at 1259 (employees stopped work for an average of 1.5 hours, some up to 3 hours).

7. The Company's employees are unrepresented, and its open-door policy does not qualify as "an established grievance procedure"

The Company does not contest that its employees were unrepresented, but it argues (Br. 30-32, 35-36) that they had access to "an established grievance procedure" in the form of the open-door policy in the Hotel's handbook (A.707). The Board reasonably found (A.992), however, consistent with the relevant caselaw, that the Company's open-door policy did not weigh against protection of the cafeteria delegation in the *Quietflex* analysis because it did not constitute "an effective employer grievance procedure that addressed group grievances."

As the Board noted (A.992), it rejected an employer's argument, in *HMY Roomstore, Inc.*, that a very similar open-door policy to the Company's ought to weigh against finding a work stoppage protected.³⁸ In *HMY*, the Board acknowledged evidence that individual employees had used the open-door policy to obtain individual solutions, but noted that the employer was only willing to speak to employees one-on-one and found that the "policy had been used to resolve individual problems and not group complaints."³⁹ Similarly, in *Firestone Steel Products Company*, the Board found "no meaningful, enforceable grievance procedure" where the employer had a four-step open-door policy with, according

³⁸ 344 NLRB 963, 963 n.2 (2005) (also noting that even an established grievance procedure is not determinative in the analysis of a stoppage's protection).

³⁹ *Id.* at 963 n.2, 964-65.

to the personnel manager, “no limit as to the type of problem that an employee could present under its steps.”⁴⁰

One case where the Board *did* equate an open-door policy to a true grievance procedure for purposes of evaluating an on-site work stoppage is *Cambro*, and the facts of that case further bolster the Board’s treatment of the Company’s policy here.⁴¹ In *Cambro*, a group of second-shift employees met with management pursuant to the open-door policy and obtained resolution of their problem. Subsequently, a group of third-shift employees attempted to do the same but became impatient waiting for a promised response from management.⁴² The Board found that the third shift employees’ ensuing work stoppage lost protection when they refused to comply with a directive to work or go home *after* “[t]hey were assured the opportunity, in full accord with the [employer’s] open door policy, to meet in just a few hours with [management] for further discussion of their complaints.”⁴³ Unlike here, another group of employees had already resolved their complaint through the open-door policy, the protesting employees were in the

⁴⁰ 248 NLRB 549, 550, 553 (1980).

⁴¹ 312 NLRB 634 (1993).

⁴² *Id.*

⁴³ *Id.* at 636.

middle of that same, effective open-door process, *and* their employer had committed to continuing that established process in just a few hours.

In this case the record does, as the Company asserts (Br. 31-32, 36), contain a number of examples of the Company addressing and resolving individual issues, including requests for schedule flexibility and better equipment, as well as evidence that the Company at times received multiple complaints, from various employees, about particular problems (*e.g.*, A.276-79,361-67,446-48,450-56). But it does not show that employees used the open-door policy for group grievances. Instead, as outlined above, employees organized a series of delegations in 2006 to support their organizing campaign and to raise various issues, from a request that the Company recognize the Union, to an effort to collect money for better kitchen equipment, to complaints about various terms and conditions of employment.

Moreover, on at least two separate occasions in addition to the cafeteria delegation, company managers rebuffed employees who tried to approach them with collective grievances. Once, when 15-20 employees approached Trobaugh about a coworker's termination, she said she would not talk to the group about it, and would "be happy to listen to your concerns individually if you have concerns." (A.459.) And when another group approached Burkhart to talk to him about an employee's termination, expressly citing the Company's open-door policy, he refused to meet with them. (A.31-32.)

In sum, the record does not demonstrate that employees ever successfully approached management as a group, or “delegation,” under the open-door policy. Unlike in *Cambro*, there is no evidence that the Company’s open-door policy allowed, encouraged, or was used by employees to raise – or by the Company to address – the sort of group grievance that the cafeteria delegation represented.

8. Each protesting employee vacated the Hotel well before the end of his or her shift

As the Board found (A.992), no employee participating in the cafeteria delegation stayed at the Hotel beyond his or her shift.⁴⁴ The Company does not dispute that finding but points out that the employees stayed past the end of their scheduled breaks, and that some employees even punched back in only to return to the delegation “on the clock.” Those facts are immaterial – they prove nothing more than that the employees engaged in a work stoppage which, by definition, requires that they stop *during working time*.⁴⁵

⁴⁴ See *HMY Roomstore, Inc.*, 344 NLRB 963, 966 (2005) (weighing in favor of protection the fact that entire stoppage occurred during employees’ normal working hours).

⁴⁵ See *Golay*, 156 NLRB at 1258 (holding that employees did not forfeit protection by punching in at the end of their lunch break and then failing to perform work, which the Board expressly held “merely constitute[d] the means by which an employee may strike”). See, e.g., *Benesight, Inc.*, 337 NLRB 282, 286 (2001) (Protected work stoppage began when employees refused to return from break.); *Molon Motor & Coil Corp.*, 302 NLRB 138, 138 (1991) (Protected work stoppage began when employees clocked in for their shift and refused to work.), *enforced*, 965 F.2d 523 (7th Cir. 1992).

The Company's cite to *Peck, Inc.* is inapposite.⁴⁶ The employees in that case, angry that their supervisor had not released them early in bad weather, refused to leave the employer's premises after the end of their shift, thereby preventing the supervisor from going home and the employer from closing and locking up its plant. As the Board there found, the employees – because they were off-duty – were not withholding labor through a stoppage, but rather taking over their employer's property, a key fact not present in this case.⁴⁷

9. The cafeteria delegation was not a “seizure” of hotel property

As the Board also found (A.992), there is no evidence that the employees in the cafeteria delegation did anything that would qualify as a “seizure” of the Company's property under the extant case law. In *NLRB v. Fansteel Metallurgical Corporation*, the classic case of an unlawful sitdown strike and seizure, employees occupied two key buildings at the employer's plant for over a week and in defiance of a court order, halting operations entirely, and violently fought off the police before their ultimate, forcible eviction.⁴⁸ Here, as the Board explained (A.992),

⁴⁶ 226 NLRB 1174 (1976).

⁴⁷ *Id.* at 1174 n.1, 1180 (emphasizing employer's “immediate interest” in ordering employees to leave and fact that employees were not engaging in a stoppage but were trying to “punish[] their supervisor for imposing upon them valid conditions which they disliked and which they wanted modified in the future”).

⁴⁸ 306 U.S. 240, 248-49, 252 (1939).

none of the established elements of a seizure were present – the employees did not prevent the Company’s management, or other non-striking employees, from accessing or using the cafeteria, and they left peacefully after less than 3 hours.⁴⁹

Furthermore, although the Company called the police, it overstates the record to assert that it “*required* police assistance” (Br. 26, 38-40) to convince the employees to leave. As the Board found (A.992), when the small group sent to talk to Cook learned the employees would not be allowed to return to work, they requested and received permission to carry that message back to the larger group waiting in the cafeteria. When the small group returned to the cafeteria and explained the situation to the larger delegation, all protesting employees, convinced at that point that they could not complete their shifts (A.992), left voluntarily. (A.69,94-96,128,349.)

⁴⁹ See *Pepsi-Cola*, 186 NLRB at 478 (emphasizing that employees did not seek to bar or exclude employer and distinguishing that from cases of unlawful seizure where, “though some did not include acts of violence or damage to the plant by the employees sitting in, they all included a potential for violence through the forcible dispossession of management officials”); *Golay*, 156 NLRB at 1261-62 (finding no merit in argument that employees seized employer property by loitering in plant for 1.5 to 2 hours when there was “no evidence of any violence and no resort to, or threat of, physical force by the strikers” and the employer “was not denied access to the property”). See also *Quietflex*, 344 NLRB at 1058 (weighing in favor of protection the facts that the employees never blocked ingress or egress to the employer’s facility or sought to deprive the employer of the use of its property).

Samayoa alone (contradicting Gallardo and several employees) recalls that the police, rather than an employee, delivered the final suspension message, contrary to the Board's implicit determination (A.992). (A.409.) The distinction, however, is ultimately immaterial. Factually, as the Board found, the employees left because the Company had rebuffed their offer to end their work stoppage, regardless of who delivered that message. And, legally, the mere fact that employees engaged in a protected on-site stoppage fail to leave before the police instruct them to do so does not, alone, remove them from the Act's protection.⁵⁰

10. The Company did not legitimately suspend the employees for failing to leave the Hotel

Finally, the Company's argument (Br. 40) that it suspended the employees only for insubordination and occupying its property, and not for their protected refusal to perform their work, is disingenuous, particularly given the repeated, hysterical focus in its brief (Br. 27 n.8, 41-42) on the "havoc" allegedly wrought by the cafeteria delegation. As the Board explained (A.992-93), Samayoa began suspending the employees just an hour after their delegation began, and immediately after first warning them she would do so. While the Company may not have formalized those suspensions until the next day, it immediately removed

⁵⁰ See, e.g., *Pepsi-Cola*, 186 NLRB at 478 (finding protected in-plant stoppage though employees "were asked to leave by company officials, but refused to do so until the request was repeated by the police"). See also *HMY Roomstore, Inc.*, 344

from the employees their option of returning to work. At that time, as the Board found (A.992-93) after duly considering all of the *Quietflex* factors, the Company had no lawful reason to assert its private property right to expel them.

In conclusion, all of the *Quietflex* factors support a determination that the cafeteria delegation was protected. The employees' peaceful not-quite-3-hour presence in the Hotel's employee cafeteria, during their regular work hours, served their immediate protected interest in securing a meeting with Coonley or Cook regarding a coworker's suspension. The Board's determination that the cafeteria delegation retained protection – and, thus, that the Company's consequent suspension of the 77 protesting employees violated Section 8(a)(1) of the Act – is solid. That is particularly true in light of the Company's failure, before sanctioning the employees, to provide them with a present, or reasonably certain future, opportunity to air their grievances. And the Board's conclusion is further bolstered by the other circumstances of their protest, as the foregoing review of the 10 *Quietflex* factors amply demonstrates.

NLRB at 964 (finding protected stoppage despite employees' return to exterior of employer's property and refusal to leave until the police requested that they do so).

V. The Board Reasonably Found that the Company Violated the Act by Applying Workplace Policies Disparately in Issuing Warnings to Known Union Supporters

Section 8(a)(3) of the Act bars “discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization. . . .”⁵¹ An employer thus violates Section 8(a)(3) when it disciplines an employee because of, or to discourage, the employee’s union activities.⁵² In this case, the Board reasonably found (A.982,998), based on substantial evidence in the record, that the Company did just that when it issued written warnings to Simmons, Brentner, Magallon, Salinas, and Gomez for entering – or allegedly entering – the International Ballroom during the CTA meeting on June 3.

Because the Company asserts that it had a lawful reason for issuing those warnings, the Board applied (A.996-98) its mixed-motive analysis, articulated in *Wright Line, a Division of Wright Line, Inc.*⁵³ Under that framework, the Board first determines whether the General Counsel has met his initial burden of demonstrating that animus against union activity was a “motivating factor”

⁵¹ 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

⁵² See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

⁵³ 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

underlying the employer's decision to take the adverse action. Then, if such improper motivation has been shown, the Board considers whether the employer, as an affirmative defense, has proven that it would have taken the same action in the absence of the employee's union activity.⁵⁴ In evaluating an employer's motive for discipline under *Wright Line*, the Board may infer impermissible animus from indirect evidence.⁵⁵ Of particular relevance here, disparate treatment of employees may indicate discrimination,⁵⁶ and a pretextual explanation for an

⁵⁴ *Wright Line*, 251 NLRB at 1089; *Tasty Baking*, 254 F.3d at 125-26. *Accord NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983) (approving *Wright Line* test).

⁵⁵ *See Waterbury Hotel Mgmt, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003) (Board may rely on direct and circumstantial evidence in determining employer motivation); *Hacienda Hotel, Inc.*, 348 NLRB 854, 864-65 (2006) (holding unlawful "motive may be established by circumstantial evidence as well as by direct evidence and is an issue of fact," and finding such motive where "no direct evidence of motive [was] extant in the record"); *Leading Edge Aviation Svcs.*, 345 NLRB 977, 977 (2005) (inferring animus, absent any direct evidence, from "the record as a whole, and in particular the [employer's] pretextual reasons" for its actions), *enforced*, 212 F. App'x 193 (4th Cir. 2007).

⁵⁶ *See Waterbury*, 314 F.3d at 652-53 (finding employer's departure from past hiring practice of first considering incumbent employees, and disparate treatment of incumbent-employee applicants, supported finding that it tried to avoid hiring union members); *Tasty Baking*, 254 F.3d at 126 (considering fact that no other employee had been disciplined for similar conduct in finding sanction unlawful); *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006) (emphasizing fact that no other employee had been discharged for similar infraction in rejecting employer's *Wright Line* defense); *Fluor Daniel, Inc.*, 304 NLRB 970, 970-71 (1991) (inferring unlawful motive from facts that employer did not interview or hire any union-affiliated applicants, and that all applicants it did hire were non-union), *enforced mem.*, 976 F.2d 744 (11th Cir. 1992).

employer's decision to discipline indicates that the actual motive is unlawful.⁵⁷

Ample evidence supports the Board's finding (A.997-98) that union animus – generally, and not based on any of the employees' particular union activities on June 3 – was a motivating factor in the Company's decision to issue written warnings to employees it believed had entered the CTA event. As an initial matter, the Company knew that the event in the ballroom that day was a union event, stated that Salinas' warning was for entering the ballroom while the CTA was using the room (A.233), and stipulated that it was aware of each of the disciplined employees' union activities (A.501-03). Moreover, both the Board's determination that the Company's motives were unlawful and its conclusion that the Company would not similarly have disciplined the employees in the absence of union activity are supported by findings of: (1) pretext – not one of the employees who received warnings related to the CTA event had actually violated the Company's express, written usage rules, and (2) disparate treatment – the warnings did not comport

⁵⁷ See *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “not only dooms [employer's] defense but it buttresses the . . . affirmative evidence of discrimination” and supports inference of unlawful motive), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007); *Leading Edge*, 345 NLRB at 977-78 (finding pretextual reason supported initial finding of animus and rejection of employer's but-for defense); *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978) (finding unlawful motive because employer's stated reason – that employee should have walked 32 miles through snow to work – was pretextual), *enforcement granted in part, denied in part, mem.*, 622 F.2d 592 (7th Cir. 1980).

with the Company's treatment of other employees it has sanctioned, or not, for misuse of hotel facilities.

First, it is undisputed that both Simmons (Br. 49) and Brentner (Br. 51) received their warnings for entering the International Ballroom while on break, even though Brentner's warning (A.649) erroneously states that she was not. Under the Hotel's then-applicable policy, "Use of Location Facilities by Off-Duty Team Members," employees "who are 'off duty' (i.e., . . . on a bona fide rest period) . . . are *requested* to provide advance notice to [hotel management] of attendance at any non-Hilton sponsored function. . . ." (A.623 (emphasis added).) The same policy later states that it "does not prevent" off-duty employees from enjoying the Hotel's facilities as guests, and again *requests* that they provide hotel management with notice, and obtain approval, in advance. (A.623.) Accordingly, as the Board found (A.995,997) the Hotel's policy did *not* – contrary to the handbook language referenced in their warnings (A.643-44,649) and the Company's contentions in its brief (Br. 49, 51-52) – *require* them to give notice or secure permission to enter the International Ballroom at the invitation of the CTA, as guests at a non-hotel-sponsored event.

In arguing that Simmons and Brentner violated express hotel policy, the Company quotes (Br. 49) the Use of Public Areas policy from its Handbook.

(A.752) But, as the Board found (A.995), and as Director of HR Trobaugh testified (A.424,517-18), the policy that applied to employees on break, like Simmons and Brentner, was the new off-duty policy (A.623) just discussed, which superseded the handbook provisions where they conflict. The Company's application of the inapplicable on-duty policy to Simmons and Brentner, not to mention its continued citation of that rule in its brief to this Court, strongly supports the Board's finding of a violation as to those two employees' warnings.

The record evidence also supports the Board's finding (A.982n.5,997) that Magallon, Salinas, and Gomez did not violate the Hotel's usage policy. The Company asserts it reasonably determined that they had entered the International Ballroom during the CTA event by reviewing security videos. As the Board explained (A.996), however, the videos prove only that those employees were near the ballroom doors, outside of the security cameras' range, on a few occasions for short periods of time. (A.456-57,468-69,470,475-77,486-88,491-93,494,496,498-99.) As the Board further detailed, each of those three employees was, at the time, on-duty and had, as the Hotel's usage policy requires, "been assigned to be in a public area." (A.752.) Indeed, as detailed above, their job duties required that they perform work, such as emptying and cleaning lobby trash cans, in the vicinity of the ballroom doors.

The Company claims (Br. 50) to have had a reasonable basis for inferring that the three employees entered the ballroom in violation of the usage policy, and defends (Br. 52-53) its investigation into the June 3 events. But it was not reasonable for the Company to conclude that employees assigned to clean the area adjacent to the ballroom doors necessarily entered the ballroom, much less that they were not legitimately in or around the room in the course of performing their job duties.⁵⁸ To the contrary, as the Board found (A.997), the record evidence establishes that each one was performing her job duties when near the International Ballroom on June 3. Moreover, the Board explicitly disclaimed (A.982n.5) any reliance on the inadequacy of the Company's investigation in finding discriminatory motivation for the warnings.

Second, with respect to disparate treatment, the Company entered into evidence only four other examples of employees disciplined for unauthorized facilities use. (A.460-64.) Three of those comparator disciplines issued before the new off-duty usage policy went into effect and, as the Board found (A.997), all four involved violations far more egregious than either the lobby attendants' alleged under-one-minute forays into the ballroom, or Simmons' and Brentner's explicitly solicited speeches to the CTA. Specifically, one employee was fired the

⁵⁸ The Company defends (Br. 52-53) its investigation into the June 3 events but the Board explicitly disclaimed (A.982 n.5) any reliance on the inadequacy of that investigation in finding discriminatory motivation for the warnings.

second time he misappropriated a hotel van for personal business, after a suspension and warning for the same conduct, and for various other issues, including excessive absenteeism. (A.767.) Another employee received a written warning for collecting cans during work time and in unauthorized areas of the Hotel *after* he had been counseled against doing so and had agreed that he would not continue. (A.770-73.) The final two were discharged for using the hotel pool, and inviting friends to do so, without authorization – and one of them also had other work-performance issues. (A.768&769.)

Conversely, as the Board also noted (A.997), the Company has declined to sanction facility-usage violations at least as severe as the alleged June 3 violations. When lobby attendants complained in 2006 that other employees were increasing their workload by using guest restrooms near the lobby café rather than dedicated employee restrooms, for example, the Company eventually responded by locking the restroom when it was not needed for guest events in the vicinity. Despite the fact that the lobby restroom use was unauthorized, violated the Hotel's facility-usage policy, did not occur at the invitation of a legitimate hotel guest, and created extra work, the Company made no effort to identify, much less discipline, the employees involved. (A.367,510-12,518-21,534-36.)

Moreover, with respect to Simmons and Brentner, whom the CTA expressly invited to its event, the Company's position conflicts, as the Board described

(A.997), with its practice of allowing employees to attend other events in its ballrooms – including AMMA, the Conscious Life Expo, and the Emerald Ball – on multiple occasions in the past. (A.134-38,211-12,213-16,220.) The Company argues (Br. 52) that employees who attended those events had management’s permission, if not individually, then through agreements between the Hotel and the event holders. But the off-duty usage policy (A.623) nowhere requires any such agreement, and employees’ testimony regarding past ballroom events indicates that they were not always aware that they had management’s authorization to attend, if they did.

In sum, none of the employees who received written warnings for (allegedly) entering the International Ballroom on June 3 actually violated the Hotel’s usage policies, demonstrating that the Company’s ostensible reason for disciplining them was pretext. Moreover, even if they had violated those policies, the Company’s decision to issue written warnings for their conduct was discriminatory as indicated by the fact that it was inconsistent with its past practice – regarding both the level of violation disciplined and the type of conduct condoned. Substantial evidence in the record thus supports the Board’s reasonable conclusion that all five CTA warnings violated Section 8(a)(3) and (1) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2949
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	* 10-1298
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	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 31-CA-27837
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
UNITE HERE, LOCAL 11	*
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,806 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
This 15th day of July, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Stephen R. Lueke, Esquire
Ford & Harrison LLP
350 South Grand Avenue
Suite 2300
Los Angeles, CA 90071

Richard G. McCracken
David, Cowell & Bowe LLP
595 Market Street
Suite 595
San Francisco, CA 94105

/s/Linda Dreeben_____

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-296

Dated at Washington, DC
this 15th day of July, 2011