

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

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

Cases: 31-CA-27837
31-CA-27954
31-CA-28011

and

UNITE HERE! LOCAL 11

**ACTING GENERAL COUNSEL'S STATEMENT OF POSITION
WITH RESPECT TO THE ISSUES RAISED BY THE REMAND**

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Pursuant to the Board's request for statements of position dated May 24, 2012 and in conformance with Section 102.46(j) of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this Statement of Position with respect to the issues raised by the remand in *Fortuna Enterprises, L.P. v. NLRB*, 665 F.3d 1295 (D.C. Cir., decided December 9, 2011), granting review in part, granting enforcement in part, and remanding *The Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB No. 95 (2009) Board Case 31-CA-027837, et al.

I. PROCEDURAL HISTORY

This case was tried before the Honorable John J. McCarrick on April 14 through 18, April 21 through 25, May 12 through 15, and June 2 through 4, 2008, in Region 31, Los Angeles, based on an Amended Order Consolidating Cases, Consolidated Complaint, Compliance Specification, and Notice of Hearing, issued on March 21, 2007, by the Regional Director for Region 31 ("Complaint"). The Complaint is based on unfair labor practice charges filed by Unite HERE Local 11 (the "Union"). The Complaint alleges, *inter alia*, that Fortuna Enterprises, L.P., a Delaware Limited Partnership, d/b/a The Los Angeles Airport Hilton Hotel and Towers (the "Respondent," the "Hotel," or the "Employer"), violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by suspending 77 employees for engaging in a work stoppage; by interfering with an employee's right to engage in union activity by ordering the employee to take a break earlier than scheduled; by interrogating employees regarding their union or protected concerted activity; by coercing employees; by physically touching and pushing employees for engaging in union or protected concerted activity; by threatening employees with violence if employees engaged in union or protected concerted activity; by threatening employees with trouble for wearing union paraphernalia; by threatening employees with suspension if they engaged in union or protected concerted activity; and by denying employees

access to the Respondent's facility to engage in union or protected concerted activity. The Complaint further alleged that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employees Nathalie Contreras, Isabel Brentner, Lillia Magalon, Isabel Salinas, Patricia Simmons, and Joanna Gomez for engaging in union and other protected-concerted activities. The compliance specification alleges that the 77 employees suspended on or about May 11, 2006, are owed backpay in the total sum of \$36,067.93.

On October 21, 2008, Administrative Law Judge ("ALJ" or "the Judge") McCarrick issued his Decision and Recommended Order ("ALJD") finding that Respondent committed numerous violations of the National Labor Relations Act ("the Act") in response to the initial public organizing efforts of its employees during the spring and summer of 2006. ALJ McCarrick found that Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

- Suspending 77 employees for engaging in protected-concerted activities;
- Interrogating employees about union and other protected-concerted activities;
- Physically pushing and touching employees for engaging in protected, concerted activities;
- Threatening employees with violence if they engaged in protected, concerted activity;
- Denying access to Respondent's facility and threatening employees with trouble if they entered the hotel because employees wore union insignia;
- Threatening employees with suspension if they participated in protected, concerted activity;
- Issuing a written warning to employee Nathalie Contreras for engaging in protected, concerted activity; and
- Threatening an employee with unspecified reprisals if the employee engaged in union activity.

ALJ McCarrick found that Respondent violated Section 8(a)(1) and (3) of the Act by issuing written warnings to Isabel Brentner, Lilia Magallon, Isabel Salinas, Joanna Gomez, and Patricia Simmons for engaging in union activity.

On April 30, 2009, the Board issued a Decision and Order Remanding (“the April 2009 Order”), which affirmed ALJ McCarrick’s findings that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to five employees for alleged violations of Hotel policy. The Board also affirmed the ALJ’s findings that the Respondent committed multiple violations of Section 8(a)(1) of the Act, including interrogating and threatening employees, denying hotel access to employees wearing union insignia, issuing a written warning to employee Nathalie Contreras for engaging in protected concerted activity, and suspending 77 employees for engaging in a protected concerted work stoppage for 2 hours in the employee cafeteria in an effort to discuss a coworker’s suspension with senior management. In addition, the Board ordered, *inter alia*, that the Complaint allegation that Respondent violated Section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities be severed from the case and remanded to the ALJ so that he may reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings.

On July 22, 2009, ALJ McCarrick issued his Supplemental Decision (“ALJSD”), reaffirming and explaining his determination that Respondent violated Section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities.

On October 29, 2009, the Board issued a Supplemental Decision and Order (“the October 2009 Order”) affirming ALJ McCarrick’s finding that the Respondent violated Section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities.

On August 24, 2010, the Board issued a Decision and Order (“the 2010 Order”) affirming the ALJ’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.

The Employer filed its Petition for Review on September 1, 2010. The Board filed its Cross-Petition for Enforcement on September 24, 2010. The Union intervened on October 1, 2010.

On December 9, 2011, the United States Court of Appeals, District of Columbia Circuit (the “Circuit”) issued its Decision (“Circuit Decision”) regarding the Employer’s Petition for Review and the Board’s Cross-Petition for Enforcement of the Board’s Order. The Circuit held that: the employees’ occupation of the staff-only cafeteria grew out of bona fide labor dispute and thus was concerted activity that was eligible for protection under NLRA; the Board’s finding that hotel employees who occupied the cafeteria did not have access to an established procedure for handling group grievances was not supported by substantial evidence; and the Employer’s issuance of warnings to hotel employees, who used the Hotel’s public facilities in violation of Employer’s policy, was motivated by anti-union animus. The Circuit granted the Petition for Review with respect to the Board’s assessment of the May 11 protest and remanded the issue for reconsideration by the Board. As a result of the aforementioned remand, the Circuit set aside and remanded the Board’s separate ruling that the Employer, through Supervisor Rogelio de la Rosa, violated Section 8(a)(1) when he threatened to suspend Fidel Andrade for participating in the May 11 work stoppage. According to the Circuit, the Board held that Supervisor de la Rosa’s threat was unlawful because the work stoppage was protected by Section 7 of the Act, and thus if it was not protected, the threat was lawful.

II. INTRODUCTION

As the following discussion will demonstrate, the Board’s finding that Hotel employees

who occupied the cafeteria did not have access to an adequate procedure for handling group grievances is supported by substantial evidence. The evidence reveals that, on at least three prior occasions, Hotel managers rejected or threatened employees who presented collective grievances. The record provides examples of the Employer addressing individual issues and some complaints from various employees about particular problems; however, it does not show that the Employer was receptive to group grievances like the cafeteria delegation on May 11, 2006. In fact, the record reveals that the open-door policy was closed to group grievances.

III. DISCUSSION

According to the Circuit, the Board erred in finding the Employer's "open door" policy to employee complaints inadequate because it did not deal with group grievances, and for this reason, the Circuit granted the Petition for Review with respect to the Board's assessment of the May 11 protest and remanded "this issue for reconsideration by the Board."¹ *Fortuna Enterprises, L.P. v. NLRB*, 665 F.3d 1295, 1302-1303 (D.C. Cir. 2011). More broadly, the Circuit questioned the Board's application of *Quietflex* factors (4) and (7) – "whether employees had adequate opportunity to present grievances to management" or access to "an established grievance procedure." *Quietflex Manufacturing Co.*, 344 NLRB 1055, 1057 (2005). The Circuit's decision that the Board erred in finding the absence of a group grievance procedure is based on the following: the text of the policy "is in no way limited to individual complaints"; the Employer's "longstanding implementation of the 'open door' policy"; and examples of the

¹ While the Circuit Court raised some concerns about the Board's treatment of *Quietflex* factor (3) – "whether the work stoppage interfered with production" – the Circuit found that it did not appear to play a significant role in the Board's ruling against the Employer. *Fortuna Enterprises, L.P.*, 665 F.3d at 1302. To the extent the Board wishes to reconsider *Quietflex* factor (3), there is no evidence that the work stoppage, which took place in the cafeteria, prevented any guests or employees from getting food service or coffee. (ALJD 14.) During the stoppage, the Hotel restaurants were serviced by 15-20 members of the Hotel staff including restaurant managers and other management staff. *Id.* Although the Employer argues that the stoppage adversely impacted its ability to clean guest rooms, the evidence does not establish what impact the work stoppage had on the cleaning of guest rooms. *Id.* Accordingly, the record does not reveal that the work stoppage significantly interfered with production, or deprived the Employer access to its property.

Employer addressing group grievances relating to hotel equipment, employee uniforms, working conditions, and other matters “on numerous occasions.” *Fortuna Enterprises, L.P.*, 665 F.3d at 1302-1303.

Contrary to the Circuit’s finding, a reasonable employee would interpret the text of the open-door policy to mean that the policy is limited to individual complaints.² The wording of the policy is consistently in singular form. The following are some examples of the wording used in the policy: discrimination against “a team member;” “... presenting an issue, problem or complaint ...;” “A team member should always attempt to work out problems...;” and “... the team member can seek assistance from his/her department manager...” Although the text of the policy does not explicitly state that it is limited to individual complaints, the text is not – as the Circuit found – “in no way limited to individual complaints.” On its face, the text of the policy does not invite or welcome group complaints. In light of the text of the policy and the Employer’s rejection of employees who approached management as a group under the open-door policy as discussed below, a reasonable employee would not interpret the policy to encompass group complaints or concerns.

The record reflects that the Employer did not have an open-door policy which permitted or invited group action. On at least three separate occasions, the Employer turned away or threatened employees who tried to approach management as a group, or “delegation,” under the open-door policy. On or about March 15, 2006, former employee Nathalie Contreras (“Contreras”) formed a delegation of 8 to 10 employees concerning former Hotel “front desk”

² The policy states:

Hilton Los Angeles Airport is proudly committed to maintaining an open door policy. Any discrimination or recrimination against a team member for presenting an issue, problem or complaint is prohibited.

A team member should always attempt to work out problems with his/her immediate supervisor. If the issue or problem remains unresolved, the team member can seek assistance from his/her department manager, the Director of Human Resources and the General Manager. (R. Exh. 28.)

employee Laurie Villalobos (“Villalobos”) who was fired the day after she participated in a union picket line. (Tr. 136, Tr. 137, Tr. 139/Contreras.)³ On or about March 15, 2006, Contreras told the delegation that Employer Assistant Director Eric Burkhart (“Burkhart”) had an open-door policy and recommended that the delegation present its issue directly to Burkhart. (Tr. 139/Contreras.) Earlier that same year, Burkhart told Contreras that he had an open-door policy and encouraged Contreras to use that policy for presenting complaints or problems. (Tr. 138-39/Contreras.) On or about March 15, 2006, the delegation of 8 to 10 employees walked to Burkhart’s office, and upon seeing the delegation, Burkhart said, “Well, what are you guys doing? You guys aren’t supposed to be back here. It’s not a designated work area.” (Tr. 139-40/Contreras.) Contreras replied, “Well, we came to talk to you about your open door policy and we’re on break. We would like to ask you a few questions about Laurie’s firing.” (Tr. 140/Contreras.) Burkhart said, “I have no reason to discuss this.” *Id.* Contreras replied, “But you have an open door policy.” *Id.* Burkhart said, while wearing a suit and tie, “I’m not technically working. I’m not even supposed to be here. As far as I know, I’m not here right now.” (Tr. 140, Tr. 142/Contreras.) Contreras asked, “[W]hen we come and take advantage of your open door policy, you’re no longer working at this point. So what is your open door policy then?” (Tr. 140/Contreras.) Burkhart responded by pointing at members of the delegation and demanding that they “get out of here” and “get back to work.” (Tr. 141/Contreras.) Thereafter, the delegation walked away from Burkhart’s office and returned to work. *Id.*

In or around April 2006, a delegation of 15 to 20 employees, including former employee Jasmine Ortiz (“Ortiz”), presented to management concerns about allegations that employees

³ References to the transcript are abbreviated as “Tr.” followed by the name of the witness whose testimony is being cited. When more than one page of a witness’s testimony is cited, the witness’s name follows the last of the citations to the transcript.

were “sabotaging the kitchen.” (Tr. 801-02/Ortiz.) Three days later, Employer Manager Chriss Draper (“Draper”) called Ortiz into his office where he asked her if she participated in the delegation. (Tr. 805/Ortiz.) Ortiz told Draper that she participated in the delegation and that she was a “leader of the union.” *Id.* Draper replied, “[Y]ou know how much trouble you’re getting into.... It’s my bosses who told me they [*sic*] mad because you were in the kitchen delegation.” (Tr. 806/Ortiz.) During the same conversation, Draper read a Handbook out loud and told Ortiz that she is not supposed to be around the kitchen anymore. (Tr. 807/Ortiz.)

In or around March 2007, a delegation of about 15 to 20 employees was formed concerning former Hotel housekeeping employee Alicia Melgarejo’s (“Melgarejo”) discharge. (Tr. 2122-2123/Trobaugh.) In or around March 2007, the delegation approached Employer Director of Human Resources Sue Trobaugh (“Trobaugh”) near her office, and delegation member and employee Isabel Segunda Bretner (“Segunda”) asked Trobaugh why Melgarejo was terminated. (Tr. 2124/Trobaugh.) Trobaugh replied, “I don’t discuss those types of personnel issues with team members.... I will be happy to listen to your concerns individually if you have concerns.” *Id.* Trobaugh added, “I’m not going to talk about her termination.” *Id.*

Further, the record does not support the Circuit’s finding that the Employer has a “longstanding implementation of the ‘open door’ policy” and that it “addressed group grievances relating to hotel equipment, employee uniforms, working conditions, and other matters on numerous occasions.” *Fortuna Enterprises, L.P.*, 665 F.3d at 1302. The record contains examples of the Employer addressing individual issues, including, but not limited to: an individual complaining to management about his Personal Time Off (Tr. 2115/Trobaugh); an individual requesting a position as a “regular Bartender” (Tr. 2113/Trobaugh); and individuals requesting schedule changes for personal reasons. (Tr. 1837/Samayoa.) While the record

demonstrates that the Employer occasionally received multiple complaints from various employees about particular problems, the record does not establish that complaints were presented to management as a group, or “delegation.” For example, Hotel lobby attendants complained about the poor condition of the lobby attendant carts, and they raised these issues “all the time” at meetings and “talked to [Samayoa] a couple of times.” (Tr. 1834/Samayoa.) Hotel room attendants “wanted to go from dresses to pants” and a year later, employees had new uniforms. (Tr. 1832/Samayoa.) It is unclear if complaints about these issues were presented collectively or individually. As such, the record does not demonstrate that employees used the open-door policy for group grievances.

Assuming, *arguendo*, that the employees successfully used the open-door policy to present their group grievances, the aforementioned evidence of the Employer turning away or threatening employees who tried to approach management as a group shows that the Employer inconsistently applied its open-door policy, thus giving employees cause to believe that the policy did not encompass group action.

Based on the foregoing, the evidence shows that, under *Quietflex*, the Hotel employees did not have an “adequate opportunity to present grievances to management” or access to “an established grievance procedure.” 344 NLRB at 1057. Therefore, it is respectfully requested that the Board once again hold that the May 11 suspensions violated the Act as set forth in the Board’s April 2009 Decision.⁴ Further, because the work stoppage was protected by Section 7 of the Act, the Board’s ruling that Supervisor Rogelio de la Rosa violated Section 8(a)(1) when he

⁴ The Circuit asserts that the Board “never quantified the weight to be given to any one of the *Quietflex* factors.” *Fortuna Enterprises, L.P.*, 665 F.3d at 1303. However, as the Board stated in *Quietflex*, “the precise contours within which such [a work stoppage] is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed.” 344 NLRB at 1056, quoting *Waco, Inc.*, 273 NLRB 746, 746 (1984). Further, “the locus of [the] accommodation [between employer and employee rights] ... may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context.” *Quietflex*, 344 NLRB at 1056, quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976).

threatened to suspend Fidel Andrade for participating in the May 11 work stoppage should remain as set forth in the Board's April 2009 decision.

In the alternative, even if the Board erred in applying *Quietflex* factors (4) and (7), the overall balance of the factors weighs in favor of finding that the work stoppage was protected. It is not necessary that all factors favor protection in order for a work stoppage to be protected. For example, in *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 5 (2011), although factor (7) weighed against protection, the Board held that the application of the *Quietflex* standard strongly favored protection because factor (7) was "substantially outweighed by the other factors." Likewise, for the reasons set forth in the ALJD's analysis of the May 11 work stoppage, factors (4) and (7) are substantially outweighed by the remaining 8 factors.

The following are the 10 *Quietflex* factors: (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged. *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

The *Quietflex* factors applied to the case at hand establish that the work stoppage was protected. First, the employees were engaged in protected, concerted activity in gathering to protest the suspension of a fellow employee. The Board has long held that employee protests regarding employee discipline are protected even if the discipline was lawful. (ALJD 15, citing

Pepsi Cola Bottling Co. of Miami Inc., 186 NLRB 477 (1970).) Second, there is no dispute as to the peacefulness of the employee work stoppage. (ALJD 15.) Third, the record does not establish that the work stoppage interfered with production, food service for Hotel guests, the cleaning of Hotel rooms, or deprived the Employer access to its property. *Id.* The fourth factor is discussed above at pages 5 to 9. With regard to the fifth factor, the employees were told that they should return to work and later were told that if they did not return to work they had to leave the Hotel facility or face suspension. *Id.* Sixth, the work stoppage was barely an hour old before the Employer began suspending employees for failure to return to work or go home. The work stoppage lasted just over two hours when employees indicated they would return to work but were refused because they had been suspended, and the work stoppage lasted less than three hours when all employees vacated the Employer's premises. (ALJD 16.) The seventh factor is discussed above at pages 5 to 9. With respect to the eighth factor, there is no evidence that employees remained on the Employer's premises beyond their shift. *Id.* Ninth, there is no evidence that the employees attempted to seize the Employer's property. *Id.* Tenth, the Suspension Notices issued to employees note:

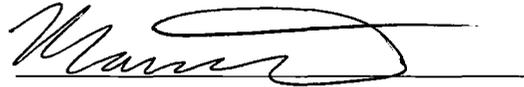
On Thursday, May 11, 2006 you were asked to go back to work or clock out and go home at least three times by a hotel manager. You refused to do either of these. You were then suspended pending investigation for insubordination due to your refusal to abide by a reasonable request from a manager. (GC Exh. 11.)

Accordingly, based on the application of the *Quietflex* factors, Respondent violated Section 8(a)(1) when it suspended 77 of its employees because of the May 11 work stoppage.

IV. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel submits that the Employer violated Section 8(a)(1) of the Act by suspending 77 employees for engaging in a protected work stoppage and by threatening to suspend employee Andrade.

Dated at Los Angeles, California, this 9th day of July, 2012.

A handwritten signature in black ink, appearing to read "Manriquez", written over a horizontal line.

Miguel A. Manriquez, Esq.
Counsel for the Acting General Counsel

Re:

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

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The undersigned hereby certifies that a copy of the foregoing STATEMENT OF POSITION OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD was served on the 9th day of July 2012, upon the following parties:

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