

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FORTUNA ENTERPRISES, L.P., A  
DELAWARE LIMITED PARTNERSHIP  
*dba* THE LOS ANGELES AIRPORT  
HILTON AND TOWERS,

Case Nos. 31-CA-27837  
31-CA-27954  
31-CA-28011

AND

**STATEMENT OF POSITION OF FORTUNA  
ENTERPRISES, L.P. ON REMAND**

UNITE HERE, LOCAL 11

On May 24, 2012, the Board requested statements of position of the parties in the above-captioned case following the Court of Appeals for the District of Columbia's ("D.C. Circuit" or "Court") partial grant of Fortuna Enterprises, L.P.'s ("Hilton") petition for review and remand of the Board's decision in *The Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB No. 95 (2009). (*Fortuna Enterprises, L.P. v. NLRB*, 665 F.3d 1295 (D.C. Cir. 2011).)

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## I. INTRODUCTION

This case stems from the D.C. Circuit's remand of the Board's decision finding that Hilton violated the National Labor Relations Act ("NLRA" or "Act") by suspending 77 employees who engaged in an almost 3-hour work stoppage. (*Fortuna Enterprises, supra*, 665 F.3d at 1301-1303; A.982.)<sup>1</sup> The D.C. Circuit's conclusion that Hilton had an established, effective group grievance procedure and that the work stoppage disrupted Hilton's operations requires the Board to reanalyze the *Quietflex* factors to determine whether the work stoppage was unprotected. (*Fortuna Enterprises, supra*, 665 F.3d at 1301-1303; *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005).) In weighing the factors, and according "apparently decisive consideration" to the group grievance procedure as the ALJ and Board originally did, the Board should determine that the work stoppage was unprotected. Accordingly, the Board should conclude that Fortuna Enterprises, L.P.'s ("Hilton") suspension of the 77 employees and Rogelio de la Rosa's alleged threat to suspend Fidel Andrade did not violate National Labor Relations Act ("NLRA") Section 8(a)(1). (*Fortuna Enterprises, supra*, 665 F.3d at 1301-1303; *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005).)

Both the ALJ and the Board considered the absence of any grievance procedure to hear group employee complaints paramount in finding Hilton violated the NLRA. Because the employees had access to an effective group grievance procedure, the 2-hour 40-minute work stoppage interfered with Hilton's operations, and the employees were given warning that they must leave the premises or face suspension, the balance weighs in favor of finding that Hilton did not violate the NLRA by suspending the employees.

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<sup>1</sup> References to Deferred Appendix are designated as "A" followed by the page number.

## II. PROCEDURAL HISTORY

Upon charges brought by UNITE HERE, Local 11 (“Union”) and issuance of consolidated complaints by the Board’s General Counsel, Administrative Law Judge John J. McCarrick (“ALJ”) issued a decision on October 21, 2008, finding, that Hilton violated Section 8(a)(1) of the NLRA by, among other things, suspending 77 employees for engaging in a protected concerted work stoppage for almost 3 hours in the employee cafeteria. (A.795.) The ALJ analyzed the employee work stoppage under the ten *Quietflex* factors. (A.792; *Quietflex, supra*, 344 NLRB at 1056.)

The ALJ concluded that the balance fell on the side of employees’ rights under Section 7. (A.795.) The key issue tipping the balance in the employees’ favor was the employee’s access, or lack thereof, to an effective group grievance procedure. Referencing this subject three separate times in his analysis, the ALJ stated, “The employees took this action (an action in protest of “discipline given to a fellow employee”<sup>2</sup>) in the context of having no collective-bargaining representative to assist them *and in the absence of an effective employer grievance procedure that addressed group grievances.*” Reiterating the importance of this factor, he again stated, “Respondent was nonresponsive to the employees’ grievance, choosing to ignore the employees’ attempts to speak with management.” He further stated, “Finally, given the fact that employees were engaged in protected activity at the time they were suspended and that the employees’ continued presence on the Respondent’s property at the time of their suspension still served an immediate protected interest, as management had yet to

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<sup>2</sup> The “discipline” at issue, further misharacterized by the ALJ as the “Reyes discharge”, in fact was no more than Reyes’ *investigatory suspension* for stealing from a guest. Given the fact that the investigation was ongoing at the time, and further noting Hilton’s policy regarding the confidentiality of personnel actions (A. 689-766), the ALJ clearly misconstrued relevant fact to justify his result-driven conclusions with respect to the work stoppage, conclusions unfortunately and improperly adopted by the Board.

hear and consider the employees' grievance, the Respondent was not yet entitled to assert its private property right. Accordingly, Respondent had no valid reason to suspend its employees other than for the assertion of their rights guaranteed under Section 7 of the Act.” (*Id.*)

Also important was evidence that “the work stoppage was itself peaceful and did not interfere with the operation of the hotel or Respondent’s property.” (*Id.*) The ALJ found, contrary to the D.C. Circuit, that there was no evidence that the employee work stoppage interfered with production, citing *Quietflex* for the proposition that there is no interference with production where employees do no more than withhold their own labor, as was the case here, a “conclusion at odds with reality”, as noted by the Court..

(A.793.)<sup>3</sup>

Hilton and the Union filed exceptions to the judge’s decisions. The exceptions were considered by Chairman Liebman and Member Schaumber. The Board issued a Decision and Order Remanding (“April 2009 Order”), finding, among other things, that Hilton violated Section 8(a) (1) by suspending the employees.<sup>4</sup> (A.982.) In affirming the ALJ’s rulings, findings and conclusions, the Board referenced that the length of the work stoppage in the cafeteria and the potential for interference with the provision of [hotel] services made the Section 8(a)(1) question a “close” one. But “the unrepresented employees did not lose protection of the Act, particularly when [Hilton’s] officials failed

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<sup>3</sup> The ALJ also found that ‘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 Respondent’s facility or face suspension.’

<sup>4</sup> The Board also affirmed the ALJ’s findings that Hilton violated the NLRA by issuing five warnings to employees for engaging in union activity, interrogating employees, issuing a written warning, and engaging in other actions adversely affecting employees because their protected concerted activities. The Board severed and remanded the issue of whether a company banquet chef violated the NLRA by physically pushing employees away from a protected concerted employee gathering. The ALJ issued a supplemental decision on July 22, 2009 reaffirming and explaining his determination that the chef had violated section 8(a)(1), which the Board upheld in its Supplemental Decision and Order on October 29, 2009 (“October 2009 Order”).

to make it clear that the employees would not be able to meet with senior management at that time and would have alternative opportunities to present their concerns.” The Board made clear that it rejected the ALJ’s finding that general manager Grant Coonley and director of food and beverage Tom Cook chose not to listen to the employees’ concerns because the record demonstrated that Coonley was not at the facility that morning and Cook was occupied serving the abandoned guests in the restaurant. (*Id.*)

Hilton initially filed petitions for review of the Board’s decisions with the D.C. Circuit on May 13, 2009 and November 13, 2009. However, the Board moved the D.C. Circuit to dismiss the case reviewing those decisions on August 19, 2010 in light of *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635. On August 19, 2010, the D.C. Circuit ordered that the NLRB’s motion to dismiss be granted.

On August 24, 2010, a properly constituted panel of the Board issued a Decision and Order (“2010 Order”) affirming the judge’s rulings, findings, and conclusions and 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. (A1016.)

On September 1, 2010, Hilton filed a petition for review the D.C. Circuit. The D.C. Circuit denied enforcement of the Board’s decision that the Hilton unlawfully suspended 77 employees for engaging in a work stoppage in the hotel cafeteria. (*Fortuna Enterprises, supra*, 665 F.3d at 1303.) According to the Court, in analyzing the *Quietflex* factors, the ALJ and Board incorrectly concluded that Hilton lacked an established procedure for hearing group grievances. (*Id.* at 1302-1304.)

The D.C. Circuit held, contrary to the Board, that Hilton had an “open door” policy for employee complaints, which was in no way limited to individual grievances.

This grievance procedure could be used, and was in fact often utilized before, for hearing both individual and group grievances. The policy allowed an employee to raise problems with a supervisor, the human resources director and the general manager. The Board's conclusion was also contrary to Hilton's longstanding implementation of its "open door" policy. Hotel managers had previously addressed group complaints on numerous occasions including grievances relating to hotel equipment, employee uniforms, working conditions and other matters. Accordingly, the Board lacked substantial evidence for concluding that the Hilton had no procedure for hearing group grievances. (*Id.* at 1302-1303) The D.C. Circuit stressed that this was "the apparently decisive consideration" in the Board's ruling against Hilton. (*Id.* at 1302.)

In addition, in discussing whether the work stoppage interfered with production, the D.C. Circuit questioned the Board's statement in *Quietflex* that "it is not considered an interference with production where the employees do no more than withhold their own services." (*Quietflex*, 344 N.L.R.B. 1055, 1057.) Specifically, the D.C. Circuit proposed the hypothetical that whether all 50 employees on an assembly line walked off the job, or whether only 25 of them walked off, either scenario was enough to require shutting down the line. The D.C. Circuit stated that, under the Board's interpretation, in neither instance would there have been an interference with production. As noted above, the Court declared that such a conclusion was simply "at odds with reality". The Court further concluded that the record showed that the work stoppage did in fact disrupt Hilton's operations. (*Id.* at 1301-1302.)

Finally, according to the Court,, the Board did not quantify the weight to be given to the various *Quietflex* factors. However, since the Board gave "apparently decisive

consideration” to the absence of a group grievance procedure in its decision and erred in its grievance procedure findings, the D.C. Circuit granted Hilton’s petition for review with respect to the Board’s assessment of the May 11 protest. The D.C. Circuit further remanded the issue for reconsideration by the Board. (*Id.* at 1303.)

### **III. STATEMENT OF FACTS**

#### **A. Occupation of Employee Cafeteria and Suspensions**

On May 10, 2006, Sergio Reyes was “suspended pending investigation,” when caught by a “spotter” stealing money from guests. (A.161; A.504; A.531.) Reyes informed his co-workers Patricia Simmons and Miguel Vargas that he was suspended “because of a spotter report” and that it involved a guest check. (A.113; A.75; A.109.) Simmons understood that Reyes was being accused of stealing. (A.158.) Vargas understood that it involved a mystery shopper. (A.109.) The employees decided to organize a delegation the next day at 8:00 a.m. in the employee cafeteria (or “Hangar”) to discuss Reyes’ suspension. (A.77; A.114-118; A.162.)

As planned, on May 11, 2006 at around 8:00 a.m., approximately 100 employees left their work areas and gathered in the cafeteria. (A.120; A.370-374, A.673-687.) The employees informed Director of housekeeping Ana Samayoa, assistant director of housekeeping Jose Cano and night manager and security supervisor Luis Gallardo that they wanted to speak to Coonley or to Cook but did not say why. (A.376; A.377.)

Over twenty minutes later, Samayoa told the employees that if they were not on break they needed to go back to work. (A.379; A.380-381.) It was loud in the cafeteria, but it quieted down when Samayoa addressed the employees. (A.380-381.)

Vargas and other employees told Samayoa that they were not moving and that they wanted to speak to Coonley or Cook. (A.330; A.382; A.383.) Samayoa, however,

told them that Coonley was not in the hotel as he was attending a meeting off property. (A.383.) Numerous employees then *punched in* at the time clock and returned to the cafeteria *while on the clock* rather than return to work. (A.386; A.673-687.)

Fifteen minutes later, Samayoa again told the employees, “If you are not on break you need to go back to work.” (A.331-333; A.388-390, A.673-687.) The employees then shouted, “We’re not going anywhere!” (A.389.) Samayoa responded, “If not, you need to clock out and you need to go home.” (A.333; A.389-390.)

The employees then started chanting, “Si se puede, si se puede” (“Yes we can”) and insisted “we’re not going anywhere.” (A.333; A.390.) It got very loud in the cafeteria. (A.390.) Richard Acosta said “they are trying to intimidate us and they cannot move us.” (A.334.) Samayoa repeated three to four times that “if you are not on break, go back to work.” (A.391.)

Approximately one hour after the cafeteria occupation began, Samayoa again told employees that if they were not on break, they need to go back to work. She further told employees that if not, they needed to clock out, otherwise they would be suspended pending investigation. (A.335-336; A.394-395; A.673-687.) Vargas insubordinately responded that management “cannot suspend us or remove us from the cafeteria.” (A.337.) He also told the employees not to give their names and to just stay put. (A.337.) Likewise, Wilfredo Matamoros told the employees not to move or go anywhere. (A.338.) The employees again started clapping and chanting, “Si se puede, si se puede.” (A.337.)

Samayoa, Cano, and Gallardo then went one-by-one suspending employees. (A.341-342; A.343-344; A.395; A.663-672.) Given this chance to return to work, several

employees left the cafeteria, returned to work and were not suspended. (A.342; A.395-396; A.673-687.) Seventy-seven employees refused to return to work and leave the cafeteria and were thus suspended, pending investigation.

After employees were informed of their suspensions, director of security Graham Taylor told the employees that they could not remain in the cafeteria. (A.347; A.398.) Some of the employees started chanting, "Si se puede, si se puede." (A.398.) Taylor told them that they were trespassing and that he would call police. Numerous employees responded by telling Taylor to "go ahead, call the police" and "we're not leaving." (A.85; A.347.) In a clear act of defiance and insubordination, the suspended employees remained in the Hangar. (A.347; A.401.) Taylor was forced to call the police. (A.348; A.399-400.)

After the suspensions, and well over two hours after the cafeteria occupation began, a committee of employees went to the Café to tell Cook that they wanted to return to work. (A.89; A.90-91; A.126; A.402; A.673-687.) They spoke with a manager, who, after speaking with Cook, informed them that they were suspended and could not return to work. (A.91.)

Shortly thereafter, Taylor, Samayoa, two police officers, Vargas and Matamoros returned to the cafeteria, which was still full of employees. (A.128; A.407-A.408; A.673-687.) A police officer instructed the employees to leave the area. (A.409.) The employees complied and began to leave the cafeteria. (A.412-A.413; A.673-687.)

The next day, the human resources department interviewed the suspended employees. (A.443-444.) The final decision to suspend the employees five working days without pay was eventually made by human resources and the department heads. (A.138;

A.417; A.444-445.) They were suspended for occupying the cafeteria (*e.g.*, insubordination and failure to follow instructions). (A.420; A.445; A.652-653.)

Contrary to the ALJ's findings and as noted by the Court, there were in fact numerous adverse operational effects on the hotel resulting from the illegal occupation of the employee cafeteria. Employees legitimately on break could not effectively use the cafeteria for the three hours it was occupied by employees. Management received complaints from employees not being able to enjoy the Hangar during the occupation. (A.305; A.309; A.438-440.) Hilton set up an employee lunch room in the private dining room during the occupation, which was full with employees during lunch with more employees waiting in line to eat. (A.303-305; A.309-A.312; A.440-A.441; A.660) A guest group had reserved the private dining room for lunch at 11:00 a.m., but it was transferred to another location as a result. (A.305-A.307; A.440-441.)

The dining outlets of Hilton were impacted by the occupation since all of the servers in the Café and in room service walked off the job during breakfast, the busiest meal. (A.103; A.118-119; A.293-296; A.299-300.) There were at least 30 and potentially more than 50 guests still in the restaurant when it happened. (A.108; A.156.)

The menus of guests in the Café had to be collected, and guests were told that Hilton would only be able to serve a buffet breakfast. (A.302-303; A.324.) Cook was compelled to recruit employees from various departments and areas of Hilton to help in the Café. (A.300-301; A.324.) As many as 15 to 20 employees left their duties to assist in serving the guests. (A.325.) Cook had to set and bus tables, and serve guests. (A.292; A.313-314.) For approximately two hours, a Front Desk manager served food, bussed plates, poured water, and attended to guests. (A.285-286.)

The housekeeping services of Hilton were also adversely impacted by the occupation. (A.419.) Hilton's occupancy was 99.9% on May 11th. (A.288; A.415; A.661.) All of Hilton's 1,234 rooms had to be cleaned, yet 43 of the 77 employees involved in the occupation were housekeeping employees. (A.288; A.415; A.661.) Approximately 500 rooms that had to be cleaned were not covered. (A.442.) Hilton drafted a letter and distributed it to the guest rooms, informing guests of the short staff situation. (A.380.) Director of Human Resources Sue Trobaugh called temp agencies and individuals with whom she had worked in the past to obtain additional housekeepers. (A.442.) Samayoa cleaned guest rooms until 10:00 p.m. (A.415.) Still, not all of the rooms were cleaned that day. (A.416.)

**B. Rogelio de la Rosa's Alleged Threat to Suspend Fidel Andrade**

On May 11, 2006, de la Rosa told Andrade that he was not supposed to be in the cafeteria and that he was over his break time.<sup>5</sup> He further asked Andrade to go back to work. Andrade replied that if the employees were sent home, he would leave with them. Later, de la Rosa returned to the cafeteria and found Andrade still there with other employees. De la Rosa told Andrade that if he saw him in the cafeteria again he would have to suspend him.

**IV. ARGUMENT**

Whether group activity like the employees' occupation of the cafeteria is protected by the Act "cannot be defined by hard-and-fast rules." (*Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005).) Instead, the Board weighs the rights of employees against the

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<sup>5</sup> The record evidence consists of a mere stipulation that de la Rosa was a "supervisor" of Andrade (A.180-181), and an alleged writing by de la Rosa (A.647-648) discussing the incident in question. The writing should have been excluded because it contains multiple layers of hearsay.

private property rights of the employer. In so doing, the Board considers the following 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 the 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 the employees were represented or had an established grievance procedure; (8) whether the 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. *Id.* at 1056-1057.

**B. The D.C. Circuit's Findings Conclusively "Tip the Balance" in Favor of Hilton to Establish That No Violation of the NLRA Occurred**

**1. The Employees Had Adequate Opportunity to Present Grievances to Management Through the Established, Effective Group Grievance Procedure**

Since the D.C. Circuit concluded that Hilton had a group grievance procedure, the *Quietflex* balance tips in Hilton's favor and the Board should find that the work stoppage was not protected. Although the Board has not quantified the weight to be given to any one of the *Quietflex* factors, the essential consideration in any *Quietflex* analysis is clearly the opportunity to present group grievances to management since it is reflected in two different *Quietflex* factors.<sup>6</sup> Moreover, here, in both the ALJ's and Board's *Quietflex* analysis in finding an NLRA violation, "the apparently decisive consideration related to the Hilton's handling of employee grievances." (*Id.* at 1302, *citing* 2009 NLRB LEXIS 136, at \*4 n.8; *Id.* at 1303.)

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<sup>6</sup> As set forth above, *Quietflex* weighs both (4) whether the employees had adequate opportunity to present grievances to management and (7) whether employees were represented *or* had an established grievance procedure. (*Quietflex, supra*, 344 NLRB at 1056.)

As set forth above, the ALJ's primarily reason for finding an NLRA violation was the absence of an effective employer grievance procedure that addressed group grievances. (A.795.) The Board similarly found the opportunity to present grievances to management key. (A.982.) Although the "length of the work stoppage in the cafeteria and the potential for interference with the provision of services there make this a close case," the Board found precedent supported a violation, "particularly when the Respondent's officials failed to make it clear that the employees would not be able to meet with senior management at that time and would have alternative opportunities to present their concerns." (*Id.*)

However, given the D.C. Circuit's conclusion that Hilton had an established group grievance procedure, the fact that Hilton managers did not specifically state that the 77 employees would not be able to meet with senior management at that time and would have alternative opportunities to present their concerns becomes inconsequential. The employees knew, as informed by managers, that Coonley and Cook were unavailable that day to meet with them. (A.982.) The employees also knew they could bring this grievance to Hilton management at a later date as they had done numerous times in the past, established by substantial and replete record evidence of at least 10 instances where Hilton resolved both individual and group grievances.

The ALJ and Board based primary reliance on the absence of any group grievance procedure in analyzing the *Quietflex* factors and finding an NLRA violation. Since the D.C. Circuit concluded that Hilton, in fact, had an established and effective group grievance procedure, the *Quietflex* balance tips in Hilton's favor and the Board should find that Hilton did not violate the NLRA by suspending the employees.

## 2. The Work Stoppage Interfered With Operations

Since the work stoppage disrupted Hilton's operations, the *Quietflex* factors further tip balancing in favor of finding no violation. The ALJ incredibly found that there was no evidence that the employee work stoppage interfered with production. (A.793.) The Board acknowledged that the work stoppage had "the potential for interference with the provision of services" even though the participating employees did "no more than withhold their own services." (A.982.) Conversely, the D.C. Circuit emphatically stated that "The record also shows that the work stoppage did disrupt some of Hilton's operations" and that the ALJ's conclusions, adopted by the Board, were "at odds with reality" (*Id.* at 1301-02.)

As stated by the D.C. Circuit, the only reasonable explanation of the "interference with production" factor is that a stoppage that interferes with production or the provision of services renders the activity less protected. Because the employees had access to an effective group grievance procedure, the almost 3-hour work stoppage interfered with Hilton's operations and the employees were given warning that they must leave the premises or face suspension, the balance weighs in favor of finding the work stoppage unprotected. Since the work stoppage was not protected, Hilton's suspension of the employees and Rogelio de la Rosa's alleged threat to suspend Fidel Andrade did not violate the NLRA.

### **B. The ALJ and the Board Erred in Finding that The Employees Were Engaged in Protected Concerted Activity by Gathering to Discuss Reyes' Suspension**

Finding that the employees were not engaged in protected activity by gathering to discuss Reyes' investigatory suspension, although not necessary, would even further tip the balance in favor of concluding Hilton did not violate the NLRA. The first *Quietflex*

factor is “the reason the employees have stopped working.” *Quietflex, supra*, at 1056. Here, the D.C. Circuit upheld the ALJ’s and Board’s conclusion that the employees were engaged in protected concerted activity by gathering to discuss Reyes’ suspension. However, in so finding, the Court noted that the subject of the employees’ concern “falls within the Act’s definition of a ‘labor dispute’ ...or *at least the Board was entitled to so find*” *Id.* At 1301 (Emphasis added) Accordingly, it is respectfully submitted that the ALJ’s analysis, and the Board’s adoption of it, was misplaced because the work stoppage did not grow out of a “labor dispute” and was not sufficiently related to the workers’ “interest as employees” to come within the mutual aid or protection clause of the Act. Thus, Hilton urges the Board to reconsider, in light of undisputed record evidence, whether a “labor dispute” did in fact exist.

The seminal case in determining what constitutes activity protected by the Act is *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case, the Supreme Court held that a spontaneous walkout, undertaken to protest bitterly cold working conditions about which the employees had previously complained, was protected by the Act. There, the walkout grew out of a “labor dispute” because the record in the case showed “a running dispute between the machine shop employees and the company over the heating of the shop on cold days – a dispute related directly to employees’ own concerns which culminated in the decision of those employees to act concertedly in an effort to force the company to improve that condition of their employment.” (*Id.* at 15-16.)

The Supreme Court, however, has held that not all group activity falls within the protection of the Act. In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978), the court noted:

It is true, of course, that some concerted activity bears a less immediate relationship to employees’ interest as

employees than other such activity. We may assume at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause.

The D.C. Circuit has recognized what constitutes a labor dispute in a factual context similar to that presented in this case, finding that impromptu meetings not pertaining to employment conditions are not labor disputes protected by the Act. In *Northeast Beverage Corp. v. NLRB*, 554 F.3d 133, 135 (D.C. Cir. 2008), the Court concluded that a work stoppage and walkout was unprotected because it did not grow out of a labor dispute. There, before Northeast closed one of its subsidiaries and consolidated it with another facility, it bargained with the union over the effects of the planned consolidation. During one bargaining session, six delivery drivers walked off the job and went to the union hall to ask their employer's bargaining representatives about their future employment. Despite being told by their business manager to return to work, the men refused to leave and said they wanted answers to their questions about their jobs. When they refused to return to work, they were suspended then ultimately discharged.

The Court distinguished *Washington Aluminum*, stating that nothing in that case suggested that the Act protects an employee walkout that is not part of an ongoing "labor dispute" over "terms, tenure or conditions of employment." *Id.* at 138 The Court concluded that there was "no such dispute; on the contrary, there was a collective bargaining agreement dealing with those subjects and ongoing bargaining over its application to an impending change of circumstances." *Id.*

Importantly, and like in the present case, the Court in *Northeast* specifically found the drivers did not have a plan to pressure Northeast but wanted only to get information about their own employment:

That the drivers were particularly anxious to get answers, and wanted to ask their questions directly, does not distinguish this case from the others in which employees left their jobs during working time to seek information that just as well could have been obtained from the union during non-working hours. Accordingly, the employees' leaving work was justified neither by connection to an ongoing labor dispute with their employer nor by a compelling necessity to attend the bargaining session that day. The employees simply used working time to engage in union-related activity customarily reserved for non-working time.

*Id.* at 139-140. The Court concluded that the Board erred in treating the employees' mere request for information from the employer as a "labor dispute," stating that "*Section 7 and the relevant cases thereunder do not protect employees who leave work to seek information from their union or their employer.* *Id.* at 140 (emphasis added). Since the drivers' departure from work to obtain information concerning issues directly related to them was not protected by the Act, the employees' walkout was unprotected, and Northeast legitimately discharged and disciplined them.

Here, exactly like *Northeast*, the employees' work stoppage was unprotected because it did not grow out of a labor dispute. The employees were merely seeking information regarding Reyes' investigatory suspension that just as well could have been obtained during non-working hours (although the only information to be obtained was that an investigation was ongoing and that personnel decisions could not be discussed with them, rendering their demands inherently futile). The employees had no plan to pressure Hilton regarding Reyes or any term or condition of employment. And, just like *Northeast*, that these employees were particularly anxious to get answers, and wanted to ask their questions directly, does not distinguish this case from the others in which

employees left their jobs during working time to seek information that just as well could have been obtained during non-working hours.

Moreover, the 77 employees' work stoppage here was equally as, if not further futile than the employees' walkout in *Northeast*. Hilton managers were *prohibited* from discussing confidential personnel matters with other employees, including Reyes' *then-ongoing investigatory* suspension (A.689-766), a fact of which the employees, as recipients of the Handbook, were demonstrably aware. Since the employees were merely seeking information regarding Reyes' confidential *investigatory* suspension, an act with "*so attenuated*" a relationship to their own interests, the suspended employees were not acting for their "mutual aid or protection" and were thus not engaged in any labor dispute protected by the Act. *Eastex, supra, at 556-57*. This simple fact, although not necessary, further tips the *Quietflex* factors balancing in favor of finding no violation of Section 8(a)(1).

## V. CONCLUSION

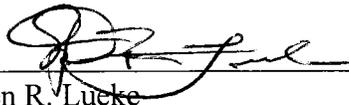
On remand, Hilton respectfully submits that the Board should determine that Hilton did not violate section 8(a)(1) of the Act. Accordingly, it is respectfully submitted that the Board's decision with respect to unfair labor practice charges addressed herein be overruled, and that the subject Complaint allegations be dismissed in their entirety.

Dated: July 6, 2012

Respectfully submitted,

FORD & HARRISON LLP

By: \_\_\_\_\_

  
Stephen R. Lucke

Lara E. Unger

Attorneys for Fortuna Enterprises, L.P.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of Fortuna Enterprises, L.P.'s , Statement of Position on Remand was filed by e-filing with the Board and that the original plus 8 copies were served by hand delivery on the following:

Hon. Farah Z. Qureshi Associate Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

In addition, copies were duly sent by facsimile and overnight mail (via Federal Express) to all parties listed below on July 9, 2012. The partes were notified telephonically of this electronic filing.

Soledad Garcia, Esq. UNITE HERE – Local 11 464 Lucas Avenue, Suite 201 Los Angeles, CA 90017	Regional Director NLRB, Region 31 11150 West Olympic Blvd., Suite 700 Los Angeles, CA 90064
Eric B. Myers, Esq. Davis, Cowell & Bowe LLP 595 Market Street, Suite 1400 San Francisco, CA 94105	Ellen Greenstone, Esq. Rothner, Segall & Greenstone 510 S. Marengo Avenue Pasadena, CA 91101

FORD & HARRISON LLP

By:   
Stephen R. Lueke  
Lara E. Unger  
Attorneys for Fortuna Enterprises, L.P.