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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

FORTUNA ENTERPRISES, LP., a Delaware limited partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers

Respondent,

and

UNITE HERE LOCAL 11

Charging Party

UNITE HERE LOCAL 11'S POSITION STATEMENT WITH RESPECT TO ISSUES REMANDED IN *FORTUNA ENTERPRISES, LP. v. NATIONAL LABOR RELATIONS BOARD*, 665 F.3D 1295 (D.C. CIR. 2011)

Eric B. Myers
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: 415-597-7200
Facsimile: 415-597-7201

Attorneys for Charging Party
UNITE HERE Local 11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATUTES

In accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Board, UNITE HERE Local 11 hereby addresses the issues remanded by the United States Court of Appeals for the District of Columbia set forth in *Fortuna Enterprises, LP. v. National Labor Relations Board*, 665 F.3d 1295 (D.C. Cir. 2011).[1]

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 9, 2011, the Court denied in part and granted in part Respondent's petition for review of the Board's decision in *Fortuna Enterprises d/b/a The Los Angeles Hilton Hotel and Towers*, reported at 355 NLRB No. 122, 354 NLRB No. 95, and 354 NLRB No. 17, and remanded the case for further proceedings before the Board. The issue on remand pertains to whether Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, afforded protection against discipline to workers who engaged in a peaceful work stoppage in the Respondent's cafeteria on May 11, 2006 to protest the suspension of their co-worker Sergio Reyes. Reviewing the Board's application of the factors set forth in *Quietflex Manufacturing Co., LP*, 344 NLRB 1055 (2005), the Court affirmed the Board's findings and conclusions with respect to seven out of ten of the so-called *Quietflex* factors that favor finding Section 7 protection for the work stoppage, *see* 665 F.3d at 1301. These are: 1) the striking employees were "engaged in protected, concerted activity to protest the suspension of a fellow employee," *see* 354 NLRB No. 17, p. 10; 2) there was "no dispute as to the peacefulness" of the work stoppage, *id.*; 5) that while Respondent warned employees that they had to leave or face suspension, Respondent "began suspending employees [ ] an hour after the employees first gathered to present their grievance,"

[1] The D.C. Circuit will be referred to herein as "the Court." The National Labor Relations Board will be referred to as "the NLRB" or "the Board." The Los Angeles Hilton Hotel and Towers will be referred to as "the Respondent."

id., 6) that the work stoppage was of short duration because it was "barely an hour old before Samayoa began suspending employees," "just over 2 hour old when employees indicated they would return to work but were refused because they had been suspended," and "under 3 hours old when all employees vacated Respondent's premises," *id.*; 8) that there was "no evidence that employees remained on respondent's premises beyond their shift," 9) that there was "no evidence that the employees attempted to seize Respondent's property," *id.*, and 10) that while the suspension notices stated that employees refused three times to return to work or leave the cafeteria, in fact the "suspensions immediately took place" after the first warning came just an hour into the work stoppage, *id.*

The Court remanded proceedings for further consideration of factor (3) – "whether the work stoppage interfered with production," and factors (4) and (7) – "whether employees had adequate opportunity to present grievances to management" or access to "an established grievance procedure." 665 F.3d at 1301. With respect to the latter two factors, the Court specifically disagreed with the Board's finding that the Respondent's open-door policy was not adequate to address certain "group grievances." *Id.* at 1302. The Court found that "the text of the policy is not limited to individual complaints" and the "record demonstrates that Hilton managers addressed group grievances relating to hotel equipment, employee uniforms, working conditions, and other matters." *Id.* The Court noted that the Board "never quantified the weight to be given to any one of the *Quietflex* factors," *id.*, and so asked the Board to explain what weight, if any, should be afforded the existence of Respondent's open-door policy in determining the extent of the Section 7 protection to be afforded the work stoppage.[2]

[2] In all other respects, the Court affirmed the Board's decision. Thus, the Court affirmed the Board's ruling that when 18 employees tried to address shortages in kitchen equipment through group action in April 2006, Respondent's supervisor Pablo Burciaga threatened Antonio Campos

The Board should reaffirm its ruling that the May 11, 2006 work stoppage was protected at all times. With respect to the third *Quietflex* factor, Board law clearly establishes that interference with production caused by employees' withholding their *own* labor is irrelevant to the Section 7 protection afforded a work stoppage; moreover, the Court affirmed the Board's finding that the employees did not *otherwise* interfere with Respondent's operations when they peacefully gathered in the cafeteria. With respect to the fourth and seventh factors, the existence of an open-door policy in Respondent's employee handbook—which Respondent has admitted it would *not* have applied to workers' concerns over Reyes' discharge (as opposed to concerns over uniforms, equipment, or inventory)—does *nothing* to change the Board's initial ruling concerning the extent of Section 7 protection for the work stoppage. The Board has previously made clear that "the existence of an established mechanism for presenting group grievances is only one factor to be considered" under the *Quietflex* analysis. *HMY Roomstore, Inc.*, 344 NLRB at 963, n. 2 (2005). Here, the Board properly applied longstanding precedent when it found the work stoppage to be protected based on its peaceful nature, its protected purpose, its reasonable duration, and other factors establishing that employees were acting in pursuit of an immediately protected Section 7 at all times until they voluntarily left the Respondent's premises. The Respondent's exceptions should again be denied.

---

with violence, physically shoved Campos, Herman Chan, and Juan Banales, and jabbed his finger into Mike Kaib's chest. 355 NLRB No. 122; pp. 2-3; 354 NLRB No. 17, pp. 5-6. The Board also affirmed the Board's ruling that in August 2006 when Natalie Contreras attempted to caucus with her co-workers to discuss sexually harassing slurs that guests made against her and her co-workers in order to prepare a complaint to management, Respondent disciplined her for violating its sexual harassment policy. 354 NLRB at pp. 12-13. The Court also affirmed the Board's finding that the Respondent acted with anti-union animus in disciplining Isabel Brentner, Patricia Simmons, Lilia Magallon, Juana Salinas, and Joanna Gomez in violation of Section 8(a)(3) of the Act in June 2006. 665 F.3d at 1303-1304; 354 NLRB at pp. 13-17.

LEGAL ANALYSIS

I. Whether The Work Stoppage Interfered With Production

The Court first questioned the Board's treatment of the third *Quietflex* factor—that is, "whether the work stoppage interfered with production." 665 F.3d, at 1301-1302; *Quietflex*, 344 NLRB at 1057. As a factual matter, the Court found that the work stoppage *did* interfere with production inasmuch as

> [t]he suspensions left Hilton shorthanded for the remainder of the day. Management called in temporary workers; even so, some of Hilton's operations were adversely affected. For instance, Cook had to recruit staff from Hilton's accounting and sales office to bus tables in the guest café, which converted to buffet-style service due to the staff shortage. In addition, the housekeeping division was unable to clean all of the hotel's guest rooms, which were 99.9% occupied at the time.

665 F.3d at 1298. Given that reality, the Court expressed puzzlement over the Board's footnote in *Quietflex* stating that "[i]t is not considered an interference of production where the employee do no more than withhold their own services," *id*; *see Quietflex*, 344 NLRB 1055 at n. 6. The Court found that statement at "odds with reality." 665 F.3d at 1298.

It appears that the Court took the *Quietflex* footnote as a literal assertion of erroneous fact, while the Board intended the footnote to define the phrase "interference with production" as a legal term of art that excluded interference with production caused by employees' withholding their own labor. Since the Court did not read the footnote the way the Board apparently intended, it was logical for the Court to question whether the Board meant that if a work stoppage exerted economic pressure on the employer, that fact would render the work stoppage less protected. 665 F.3d at 1302. At the same time, the Court expressed doubt that that could be the case. Noting that "[a]n on-site work stoppage is a form of strike," the Court called a strike a "prime example" of "protected activities that exert economic pressure on the employer by

interfering with production." *Id.* Still, the Court suggested that if the Board believed otherwise, it should have weighed the third *Quietflex* factor differently in light of the obvious impact of the strike on the Respondent's operations.

The right of workers to exert economic pressure upon their employer in pursuit of legitimate objectives is the cornerstone of collective bargaining. *See N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963); *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employers of America v. State of Missouri*, 374 U.S. 74, 82 (1963). The Board found—and the Court affirmed—that the purpose of the work stoppage was to show solidarity in response to Reyes' pending discipline. Regardless whether Respondent truly discriminated against Reyes, employees were entitled so to believe, and they had a protected right to strike in protest of his suspension. *See Pepsi Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477, 477 (1970) *John S. Swift & Co.*, 124 NLRB 394, 397-398 (1959), enf. in rel. part, 277 F.2d 641 (7th Cir. 1960). Perhaps they might have succeeded in dissuading Respondent from taking action against Reyes, or perhaps they might at least have made clear that they would stand up for each other against retaliation as they organized. Section 7 of the Act protected them from discipline as they pursued these legitimate objectives.

The fact that employees interfered with Respondent's production when they withheld their own labor did nothing to undermine the Section 7 protection for the strike because it is the *very logic* of a strike to interfere with an employer's production. The Board recently affirmed this self-evident principle in *Atlantic Scaffolding Company*, 356 NLRB No. 113, 113 L.R.R.M. (BNA) 1161, 2011 WL 970487 (N.L.R.B. March 18, 2011). There, the employer argued that an on-site work stoppage was "timed to maximize its effect" and "was therefore unprotected because it was 'extremely disruptive' of the ability of other subcontractors' employees to begin

work scheduled for that day." *Id.* at *3. The Board rejected that argument, responding:

> Stripped to its bare essentials, the Respondent's argument is that the work stoppage lost its protection because of the economic harm inflicted on the Respondent. This argument is antithetical to the basic principles underlying the statutory scheme, *i.e.*, the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the "free play of economic forces" that should control collective bargaining. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The protected nature of the work stoppage in this case was not vitiated by the effectiveness of its timing.

Id. In such definitive terms, the Board firmly rejected the notion that only ineffectual on-site work stoppages enjoy the protection of the Act. Consequently, Respondent's abundant evidence and arguments concerning the business impact of the work stoppage is completely irrelevant. The Court suggested as much. The Board should now affirm it.[3]

It should be emphasized that the Court did *not* address—and thus clearly *rejected*—Respondent's recurring argument that the striking employees "interfered" with its operations

[3] Strikes have been found to be unprotected based on their economic impact to the employer only in the most egregious circumstances where the strike was timed to incur "'aggravated' injury to persons or premises." *See Leprino Cheese Co. dba Leprino Cheese Mfg. Co.*, 170 NLRB 601, 607 (1968). An example of such an extreme circumstance was addressed in *N.L.R.B. v. Marshall Car Wheel and Foundry Co.*, 218 F.2d 409 (5th Cir. 1955), where the court found a strike unprotected because it was timed to occur during the process of pouring molten lead in order to cause physical damage to the employer's plant. This is the exception, not the rule. *See Central Oklahoma Milk Producers Association*, 125 NLRB 419, 435 (expressly noting that a hazard of milk spoliation is not within the reach of the *Marshall* holding because "loss is not uncommon when a strike occurs") and *N.L.R.B. v. Morris Fishman and Sons, Inc.*, 278 F.2d 792, 796 (3rd Cir. 1960) (strike did not pose "threat of aggravated physical injury to the plant.") Even accepting Respondent's unsupported rhetoric concerning the extent of the strike's interference with its operations, Respondent does not come close to showing that the strike was unprotected based on the extent of economic interference. In fact, Respondent caused its own work shortage by suspending employees who offered to return to work. Respondent's Food and Beverage Manager Tom Cook—who admitted that he had advance notice that workers intended to stage an action that morning—explained in assessing the strike's impact: "we did ok and the guests were not upset." (G.C. Exh. 12, Tr. 1581; 1575; 1577.)

because some unidentified persons not participating in the strike were supposedly unable to use the employee cafeteria, because Respondent chose to set up an alternative employee dining area (most likely to prevent other employees from joining the strike), or because employees working in the cafeteria were somehow hampered in performing their jobs. Respondent explained that theory to the Court and urged it to overturn the Board's factual findings. (A true and correct copy of pages 26-28 of Petitioner's Brief on Petition for Review is attached hereto as Exhibit A.) The Court ignored the argument altogether. Instead, the Court grappled *only* with the weight to be given the "interference" with production caused by workers who withhold their *own* labor. Thus, Respondent's argument that the interference caused by this strike extended beyond the interference inherent to *any* strike has now been rejected by every tribunal that has considered it. The argument is dead, and the Board should ignore it should Respondent seek to resurrect it yet again.[4]

In conclusion, the third *Quietflex* factor squarely favors finding the work stoppage protected. Employees did not "interfere" with production beyond the interference logically caused by their own protected concerted refusal to work. They conducted themselves peacefully and without obstruction of the Respondent's property and business operations at all times. Section 7 protected them from retaliation as they did so.

II. Whether Employees Had An Alternative Channel For Bringing Their Grievance

The Court granted the petition for review with respect to the fourth and seventh *Quietflex*

[4] Respondent's "evidence" that the work stoppage interfered with employees use of the cafeteria was based on hearsay that the ALJ properly rejected. (354 NLRB No. 17 at n. 16.) Respondent continued to shop this argument to the Court, but the Court properly rejected it. Moreover, Respondent argued to the Court that the work stoppage interfered with the work of Rogelio De la Rosa and Fidel Andrade. The evidence did not support Respondent's claim with respect to De La Rosa (Tr. 1287-1290), and the claim regarding Andrade was pure fabrication: Andrade actually joined the work stoppage and was suspended. (354 NLRB No. 17 at 18-19.)

factors—"whether employees had adequate opportunity to present grievances to management" or access to "an established grievance procedure." 665 F.3d at 1301.

Reviewing the Board's reasoning, the Court noted that Member Schaumber (later joined by Member Hayes) emphasized the fact that Hilton officials "failed to make it clear that employees would not be able to meet with senior management at that time and would have alternative opportunities to express their concerns." *Id.* at 1299; *see* 354 NLRB No. 17 n. 8; 355 NLRB No. 122, n. 3. But the Court reasoned that management had "no obligation" to inform employees regarding alternative means to bring their grievance because Respondent's "open door" policy offered employees an avenue for resolving group grievances that was "widely known and often used." 655 F.3d at 1302.

Citing *Cone Mills Corp v. NLRB*, 413 F.2d 445, 451-52 (4th Cir. 1969) and *Cambro Mfg Co.*, 312 NLRB 634, 636 (1993), the Court observed that "the availability of a grievance procedure cuts against the justification for protecting on-the-job work stoppages." *Id.* at 1303. The Court acknowledged that the Board had considered Respondent's open-door policy, but ruled that the Board's analysis was skewed by its erroneous factual finding that the policy did not provide an avenue to address so-called "group grievances." *Id.* According to the Court, Respondent had used its policy to address "group grievances relating to hotel equipment, employee uniforms, working conditions, and other matters on numerous occasions." *Id.* at 1302. The Court concluded that "to the extent" that the Board's analysis rested on a comparison between the Respondent's open-door policy and the policy at issue in *HMY Roomstore, Inc.*, 344 NLRB 963 (2005), the analysis was flawed because the analogy failed.

Having ruled that the Board erred in characterizing the scope of Respondent's open-door policy, the Court made clear that it was the Board's prerogative to determine what *weight* to give

the policy under the *Quietflex* analysis. It remanded the case to the Board to determine whether the fact that Respondent maintained an open-door policy capable of addressing certain group grievances rendered the peaceful work stoppage over Reyes' impending discharge unprotected.

A. The Weight That The Board Gave the Respondent's Open-Door Policy In Its Original Decision

Before addressing what weight the Board *should* give to Respondent's open-door policy under the *Quietflex* analysis, it is useful to review what weight the Board *did* give to the policy in its original decision. The answer is that the Board gave it no apparent weight at all. While the Board affirmed the ALJ's findings and rulings (except in areas not germane to this discussion), the Board did not address the ALJ's treatment of *HMY Roomstore, Inc.* at all, and it did not discuss the scope of the Respondent's grievance procedure. For his part, the ALJ gave only cursory attention to the matter of the open-door policy. *Id.* at p. 11. After reproducing the policy's text, he wrote:

> Respondent also presented anecdotal examples of individual employees bringing their individual concerns concerning equipment to their supervisors' attention for resolution. However, the Board found a similar 'open door policy' in *HMY Roomstore, Inc.*, 344 NLRB 963 (2005) addressed only individual complaints and not group grievances like the one presented in the instant case.

Id. Nowhere did the Board suggest that its decision depended on the lack of an available procedure for Respondent to hear "group grievances." While Member Schaumber placed weight on the fact that "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," 354 NLRB at n. 8, he was clearly addressing the overall failure of Respondent's officials to engage with the strikers constructively—a factor bearing upon the duration of the protection afforded the work stoppage in *Cambro Manufacturing, Co.*, 312

NLRB 643 (1993) and other cases, *see infra*. Member Schuamber was not addressing management's failure to notify employees about the existence of the open-door policy in particular; in fact, he did not even mention the open-door policy. Thus, while the Board should explain the weight to be given the existence of Respondent's open-door policy in light of the particular facts of this case, it need not and should not rethink the result. It properly gave minimal weight to the Respondent's open-door policy (whether capable of addressing group grievances or not) because the employees continued to pursue an immediately protected interest in pressing their demands at all times, and because they vacated the premises at a reasonable moment in time when it became clear that their efforts were not going to bear fruit. Meanwhile, management engaged in no interceding act of constructive engagement that rendered its employees' refusal to leave unreasonable, and thus, shorten the duration of the Section 7 protection afforded the strike. The fact that Respondent maintains an open-door policy—one which it admitted it would not have applied to employees concerns over Reyes' discharge in any case—should do nothing to change the Board's analysis.

B. The Existence Of An Open-Door Policy Does Not Merit Determinative Weight, Or Even Significant Weight

The Board has consistently emphasized that there is not a single factor that determines at what point a lawful on-site work stoppage loses its protection. *Quietflex*, 344 NLRB at 1056. Avoiding "hard-and-fast rules," the Board has admonished that "many relevant factors must be weighed." *Id.* More specifically, the Board has stressed that "the existence of an established mechanism for presenting group grievances is only one factor to be considered in determining whether employees lost the protection of the Act by continuing an in-plant work stoppage too long." *HMY Roomstore, Inc.*, 344 NLRB at n. 2; *see also*, *Advance Industries Division-Overhead Door Corp.*, 540 F.2d 878, 885 (7th Cir. 1976) ("We do not mean to indicate that an

employer can prevent employees from expressing their grievances in any proper manner they see fit by unilaterally establishing a grievance procedure").

One cannot give talismanic significance to the existence of a unilaterally promulgated grievance procedure as somehow promoting the goals of collective bargaining. Only a bilaterally agreed-upon grievance procedure that culminates in arbitration deserves such recognition because "*arbitration* is the substitute for industrial strife." *See Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377 (1974) (emphasis added); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 369 U.S. 95, 105 (1962)(stating that it is the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare"); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (a "no-strike obligation is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.") A unilaterally promulgated "open door" policy where management sets the rules and controls the outcome plays *no role* in the nation's system of *collective* bargaining. In fact, it is the opposite of collective bargaining. To the extent that such a grievance procedure bears upon the *Quietflex* analysis, it does so only because it suggests that workers at *some point* have an alternative means for communicating with an employer that has demonstrated a willingness to allow them to express their concerns. As hereafter discussed, the Respondent was not that employer.

If there were a hierarchy among the *Quietflex* factors, a unilaterally promulgated grievance procedure should fall at or near the bottom. That is because the existence of a grievance procedure does not strengthen the employer's interest in its property, but merely serves as an alternative channel for workers to convey a message that they have a protected right to convey in the first place by striking. To be sure, as with all the *Quietflex* factors, the existence or

not of a grievance procedure may shift the locus of the accommodation between the employees' Section 7 rights and the employer's property rights. But a grievance procedure does so less forcefully than other factors that bear more directly upon the employer's property interest. For example, a work stoppage in which employees do not merely stay on the employer's property but commit willful acts of damage to it would in all likelihood lose its protection at the very moment that such acts were committed. Interference with the employer's rightful use of its property through direct interference with the work of non-striking employees or the employer's access to its equipment or facilities also puts the issue of the employer's property interest front and center. In the context of hotel operations, this factor might have weighed against the strikers if they had elected to congregate for two hours and forty minutes in front of the reservations desk demanding a meeting over Reyes' suspension, thus interfering in a very tangible and public way with Respondent's use of its property to conduct its business. As it was, employees waited in the non-public cafeteria during their working hours and without interfering with the work of anyone else. The existence of a unilaterally promulgated open-door policy did not strengthen the employer's property interest, and employees did not engage in any acts that weakened their Section 7 interest. As discussed *infra*, the Board's finding concerning the protected nature of the May 11, 2006 work stoppage is consistent with its prior precedent and should be affirmed.

C. No Weight Should Be Afforded The Open-Door Policy Because Respondent Admits That Reyes' Discharge Was Not A Suitable Subject Matter Under It

In assessing the weight to be given the Respondent's open-door policy as an alternative means for striking employees to express their grievance over Reyes' suspension, it is appropriate to examine whether they might reasonably have resolved their concern using that procedure. Respondent has argued—and the Court agreed—that Respondent had used its open-door policy to address "group grievances relating to hotel equipment, employee uniforms, working

conditions, and other matters on numerous occasions." *Id.* at 1302. But one need not second-guess the Court's finding to recognize that employees were not complaining about *those* matters. They were complaining about the impending discharge of one of their leaders. The Court did *not* find that Respondent has used its group grievance procedure to address concerns of the nature that animated employees to strike, and in fact Respondent has repeatedly admitted that it would *not* have discussed Reyes' situation with employees under the open-door policy. In its Brief to the Court, Respondent wrote: "As set forth in the Employee Handbook (R. Ex. 28) and in the record, managers *may not* discuss confidential personnel matters [using the open door policy], such as Reyes' termination, with other employees (R. Ex. 28, p. 58.), a fact of which the employees, as recipients of the Handbook, were doubtless aware." (A true and correct copy of the pages 31-32 of Respondent's Brief is set forth as Exhibit B.)[5] This admission alone answers the question what weight the Board should give the open-door policy under *Quietflex.* It should give none, because while the policy was adequate for to address "group grievances" over uniforms, equipment or inventory practices, Respondent admits that employees could not use it to address Reyes' discharge and were "doubtlessly" aware of that fact.

Thus, with respect to the concerns that animated employees to strike *in this instance*, the open-door policy did not serve as an effective alternative channel for employees to convey their protected message. *Compare Cambro Manufacturing*, 312 NLRB at 636. That is not to say that Section 7 requires employers to resolve employees' complaints, as opposed to respecting employees' right to complain. But if a grievance procedure does not serve as an alternative avenue for deliberation over the grievance that has caused the strike, then its suitability for other matters is of no consequence in determining whether employees should have tried to resolve

[5] Respondent made the same admission before the Board. *See* Employer's Brief In Support of its Exceptions to the Decisions of the Administrative Law Judge, p. 32.

their grievance using its procedures. Respondent's open-door policy deserves no more weight in the *Quietflex* analysis with respect to *this* strike than does its policy regarding funeral leave or use of the fitness center.

It bears mentioning in this regard that employees chose to gather in the cafeteria precisely to limit any possible interference with the Respondent's operations. (Tr. 285; 414; 471-473; 810). In the days prior to the work stoppage, Respondent had issued a memorandum advising employees that they could not try to meet with management in working or public areas of the hotels. (Res. Exh. 2).[6] In the prior month of April, employees had tried to communicate a group concern over kitchen equipment during a pre-shift meeting, only to be met by physical aggression and threats by a supervisor. 354 NLRB No. 122, pp. 2-3. In the month of February, Nathalie Contreras tried to meet with her supervisor to discuss workplace concerns, but he told her she had no right to do so; Contreras was later illegally disciplined for violating the Respondent's sexual harassment policy under absurd circumstances. (Tr. 140) In light of all this, the argument that workers should reasonably have understood that it would be better for them to have returned a different day to try to speak with Grant Coonley in his office under the "open-door policy" to express their opposition to Reyes' treatment is highly tenuous. Coonley would almost certainly have locked his door, and quite possibly have called the police. At any rate, Respondent's admission that the open-door policy does not apply to concerns over Respondent's imposition of discipline means that the policy deserves no weight in determining the extent of Section 7 protection for the work stoppage.

---

[6] The same memorandum instructed employees that they could use their breaks to discuss "individual work place concerns," which suggests that Respondent had suspended its open-door policy with respect to group grievances by May 11, 2006. (Res. Exh. 2.) At any rate, Respondent admits that the policy did not provide an avenue for discussing Reyes' suspension.

D. Prior NLRB Precedent Demonstrates That Respondent' Open-Door Policy Deserves No Determinative Weight Given the Facts of This Case

Even if Respondent's open-door policy were applicable to the dispute at hand, the Board has made clear that the weight to be given a grievance policy in any particular case depends upon the facts of that case. In *Cambro Manufacturing Co.*, 312 NLRB 643 (1993)—a case that the Court cited approvingly, *see* 665 F.3d at 1302—the Board made clear that it affords greater weight to such a policy in assessing the scope of Section 7's protection when an employer acts in accordance with the policy's letter and spirit by showing itself as willing to hear about the striking workers' concerns at a reasonable time and place.

The workers at Cambro engaged in an in-plant work stoppage to protest unfair treatment by a supervisor and as well as management's disregard for seniority principles in offering training opportunities. The workers ceased working despite that the employer maintained an open-door policy that was broad enough to address the workers' grievance; in fact, the same workers had already won a hearing for their grievance a few days prior to the strike and they were waiting for management to formulate a response. *Id.* at 634. But dissatisfied at the speed of the employer's response, the workers engaged in a several hour long work stoppage to demand more immediate action.

After the workers started their strike at about 2.30 a.m., a supervisor directed them to return to work or to clock out. At that time, the supervisor indicated that the plant manager would arrive early in the morning to meet with them, just as he had done to address their grievance originally pursuant to the open door policy. The workers refused to accede to the supervisor's demand, but insisted that the plant manager come immediately. *Id.* at 634-635. They waited in the cafeteria or in the hallway outside the supervisor's office for the next

approximately two hours. During this time, the Board determined that the work stoppage was protected. It found that the "the employees were entitled to persist in their in-plant protest for a reasonable period of time" because their "work stoppage here was peaceful, focused on several specific job-related complaints, and caused little disruption of production by those who continued to work." 312 NLRB at 637. This was so despite the existence of the open-door policy, and despite the initial effort of the supervisor to channel workers' protests into that procedure.

But subsequent events caused the work stoppage to lose its protection. At around 4.30 a.m., the supervisor telephoned the plant manager to report on the situation. The plant manager instructed the supervisor to tell the strikers that he would meet with them at 7.30 a.m., but that they needed to return to work or clock out and leave until that time. The supervisor communicated this message to the strikers, but they refused to leave. *Id.* at 637. It was at juncture that the Board found the work stoppage to have lost its protection. That was so because the strikers "were assured the opportunity, in full accord with the Respondent's open door policy, to meet in just a few hours with Thompson for further discussion of their complaints. They had met with him in the very same manner and at the very same time [just a few days before.]" *Id.* at. 636.

Cambro Manufacturing makes clear that it is not the mere *existence* of a grievance procedure that matters. The Board afforded determinative weight to the employer's open-door policy only because management acted proactively in accordance with its letter and spirit to allow employees to express their concerns at a specific point a few hours later. Even so, the Board found that the workers had a protected interest in maintaining their peaceful strike for the two hours prior to that promise, despite that workers certainly knew the open-door policy was

available to them and despite that they could reasonably have demanded a second meeting under it in the near future.

The present case stands in stark contrast. The employees here were clearly in the initial phase of the work stoppage—the phase in which "employees were entitled to persist in their in-plant protest for a reasonable period of time"—when Samayoa abruptly started suspending them just an hour after they gathered in the cafeteria. 354 NLRB No. 17, p. 11. Subsequently, employees attempted to follow Respondent's command to return to work, but because they had already been suspended an hour into the work stoppage, it was too late for them. They left peacefully when Respondent rejected their attempt to return to work. All in all, the operative events of the work stoppage were of comparable duration to the protected phase of the strike in *Cambro Manufacturing*. But *unlike* in *Cambro Manufacturing*, Respondent's managers did *not* seek constructively to engage with workers in an effort to channel their concerns into a different forum, thus providing a cut-off point at which the employees' persistence was rendered unreasonable. To be clear, this does not mean that employers have an "obligation" to deal constructively with employees engaged in an on-premise work stoppage. They may choose to ignore them. But the actions of employers—like the action of employees—are relevant to determining the duration of the Section 7-protection that attaches to such work stoppages.

None of the Board's other precedent is contrary to this analysis, and in fact Board law is uniformly consistent with it. In *Quietflex*, *supra*, the employer did not have an established grievance procedure, but nonetheless "provided the employees with multiple opportunities to present their complaints to management" throughout their 12-hour work stoppage. 344 NLRB at 1059. In *Waco, Inc.*, 273 NLRB 746, 746 (1984), employees refused an offer to meet with their supervisor made within about 45 minutes of the start of their work stoppage, but instead

continued to strike for four hours. In both cases, management engaged proactively with employees in an effort to hear their concerns, even though in neither case was there a formal grievance procedure. Like *Cambro Manufacturing*, these cases illustrate that the existence (or not) of a grievance procedure does not carry determinative weight; it is management's effort to engage employees over their concerns that matters in determining the immediacy of employees' interests in persisting in their work stoppage.

Court decisions do not support a different result. In *Cone Mills Corp.*, 413 F.2d 445 (4th Cir. 1969), employees who were represented by a union stopped working to protest the discharge of a fellow employee. The court found the work stoppage unprotected because the employees staged their work stoppage at their machines—some of which were still running, *id.* at 451—and because after management refused the union steward's demand to reinstate the employee, employees threatened to stay put until their demands were met. *Id.* In light of the employees' stated intent to occupy the plant's working area indefinitely, and owing to the existence of a functioning grievance procedure under the expired union contract into which they might have channeled their demand, the court understandably ruled that the work stoppage was not protected. *Id.* Finally, in *Advance Industries Division-Overhead Door Corp.*, 540 F.2d 878 (7th Cir. 1976), the court found the refusal of three employees to leave the plant in protest of the employer's decision to shorten the shift to be unprotected. The employees demanded to work until midnight even as the employer was trying to shut the plant down at ten; ultimately, the police had to arrest and physically remove the strikers from the plant. *Id.* at 881-882. In light of such intransigence, the court reasonably considered the existence of the employer's grievance procedure to weigh in favor of finding the occupation unprotected. None of these cases militates in favor of a result that *this* work stoppage—peacefully conducted and reasonable in duration—

should be found unprotected.

The Board has consistently made clear that "the existence of an established mechanism for presenting group grievances is only one factor to be considered in determining whether employees lost the protection of the Act by continuing an in-plant work stoppage too long." *HMY Roomstore, Inc.*, 344 NLRB at n. 2. This is in accordance with the Board's longstanding view that it must avoid "hard-and-fast rules" and weigh "many relevant factors" in determining the extent to which work stoppages are protected. *Quietflex*, 344 NLRB at 1056. If the Board were to rule that the May 11, 2006 was unprotected owing to the existence of Respondent's open-door policy (and despite Respondent's admission that the open-door policy did not apply to Reyes' discharge), then the Board would be constrained to abandon the *Quietflex* balancing approach in favor of a hard-and-fast rule that unrepresented employees may never engage in a protected work stoppage when their employer maintains an "open door" policy. That is so because the existence of this irrelevant policy is the *only* *Quietflex* factor that ostensibly favors a finding that the work stoppage was not protected. The careful consideration that the Board paid to the reasonableness of the employer's actions in *Cambro Manufacturing Co.* and other cases would be irrelevant because it would be the fact of the grievance procedure without more that matters. Such a ruling would represent a significant departure from Board precedent, and an important compromise of employee rights recognized since *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

In contrast, upholding the current case lends important predictability to the *Quietflex* analysis for both employers and employees. This case teaches that if an employer ignores its striking employees—albeit that it has no "obligation" to do otherwise—, then the protection that Section 7 affords to the otherwise peaceful, non-interfering work stoppage lasts longer than it

might otherwise last. If, on the other hand, the employer elects to respond proactively by offering to hear strikers' concerns in a reasonable manner given the circumstances, *see Cambro Manufacturing*, *Quietflex*, *Waco*, the employer may succeed in re-asserting its property rights more quickly over the now less immediate Section 7 rights of its employees. There is an intuitive quality about this principle that employers and employees engaged in a heated work stoppage can innately understand (despite that they may not realize that their rights are governed by a ten-factor test.) At the point in time when an employer offers a constructive alternative to the strike, workers have an opportunity to decide whether to persist in their action—risking discipline—or to take the employer up on its offer. Here, that moment never arrived. As a result, the Board should find that the Section 7 protected for the action did not end.

III. The Board Should Affirm Its Original Ruling That The Strike Was Protected At All Times

The Board should confirm its original ruling that Respondent violated Section 8(a)(1) of the Act when its suspended employees for engaging in a work stoppage on May 11, 2006. All the *Quietflex* factors favor finding Section 7 protection for the strike. Workers stopped working for a protected purpose of showing solidarity with Reyes and with one another against perceived acts of anti-union retaliation. They were peaceful at all times, and they did not interfere with production beyond the interference caused by their own refusal to work. Respondent's managers started suspending them after only an hour, and thereafter refused to engage with them even minimally. After being suspended, employees tried to return to work, first by communicating with managers in the cafeteria that they would do so, and then by sending a delegation to try to talk with Cook. Cook rejected their offer to return to work and affirmed that they had been suspended. At that point, the strikers realized that there was no more to be gained, and they left

the cafeteria peacefully.[7]

For the reasons stated above, the fact that Respondent maintained an open door policy which it admits was inapplicable to strikers' concerns over Reyes suspension does nothing to outweigh the strong arguments in favor of finding the strike protected at all times. The Board should find that the Respondent acted illegally when it suspended employees on May 11, 2006 and deny its exceptions.

CONCLUSION

For all the foregoing reasons, the Board should again deny Respondent's exceptions and order Respondent to remedy its violations of the Act.

Dated: July 9, 2012

Respectfully submitted,

/s/ Eric B. Myers

Eric B. Myers
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

Attorneys for Charging Party
UNITE HERE Local 11

[7] Respondent contends that the police forced the employees to leave the cafeteria. The Board did not so find (354 NLRB No. 17, p. 11). The ALJ concluded that "employees were told it was alright if they returned to the cafeteria to tell employees they had all been suspended," and that after that, the employees all left peacefully. *Id.* The Court noted that a police officer had arrived—which is true—but the Court did *not* find that the police forced the employees to leave. They left voluntarily. Had they persisted in their work stoppage beyond that point, they may have acted unreasonably. As it was, they left at the most logical and reasonable moment in time.

EXHIBIT A

When Samayoa started suspending employees one by one *pending investigation,* Vargas told the employees that she could not suspend them or make them leave. (Tr. 1639.) He also directed the strikers to refuse to give their names and to just stay put. (Tr. 1639.) Likewise, Matamoros told the employees not to move or go anywhere, (Tr. 1640.) and led employees in clapping and chanting, "Si se puede, si se puede." (Tr. 1639.) As detailed above (and quite in contrast to the ALJ's characterization of May 11), the morning's events – including insubordinate outbursts together with chanting, screaming and shouting - more closely resembled a rugby tailgate party than a "peaceful protest" regarding employees' *own* working conditions. Incredibly, between chants, the strikers never even found the time to vocalize to management the reason for their protest.

Moreover, only when Taylor obtained police assistance did employees finally start leaving the cafeteria at 10:45. (Tr. 314, 1656, 1933-1934, 2098, R. Ex. 24-25.) Based on such overwhelming evidence, the Board erred in affirming the ALJ's conclusion that the work stoppage was somehow "peaceful".

3. The Work Stoppage Interfered with Use of the Cafeteria and Hilton's Operations

The third *Quietflex* factor is "whether the work stoppage interfered with production, or deprived the employer access to its property." *Quietflex,*

supra, at 1056. Again, the Board erred in affirming the ALJ's conclusion that the work stoppage "did not interfere with the operation of the hotel or Respondent's property." (D. 17, L. 17-19.)[8]

However, the record is replete with evidence that the work stoppage interfered with use of the cafeteria and Hilton's operations. First, employees could not effectively work in or use the cafeteria for in excess of 2 ½ hours. The cafeteria is *both* a work and break area for employees. (Tr. 1287-1290.) The work stoppage interfered with the performance of de la Rosa's and Andrade's job duties in the cafeteria, and displaced them from the cafeteria during the occupation. (Tr. 1287-1290.) Management received complaints from employees not being able to use the cafeteria during the occupation. (Tr. 1544, 1548, 2095-2097.) As a result, Hilton was compelled to set up a temporary employee lunch room in a private dinning room during the

---

[8] *Quietflex* cites to *Roseville Dodge* and *Golay & Co.*, 156 NLRB 1252 (1966), *enfd.* 371 F. 2d 259 (7th Cir. 1966), *cert. denied,* 387 U.S. 944 (1967) regarding interference with operations. In *Golay,* the employer operated *manufacturing plants*, producing propane gas cylinders, material handling and other equipment. Employees in that case were engaged in a ULP strike lasting only about 1 ½ hours. The court found that by withholding their own services, they interfered with *production* no more than a simple cessation of work by these employees would have. The *Golay* employee concerns were considerably less attenuated that an unprotected protest over the suspension of a thief, as here. Moreover, the cessation of propane gas cylinder production can hardly be equated with the massive disruption in providing service to Hotel guests as was evident in the instant matter.

occupation (Tr. 1542-1544, 2097-2098, R. Ex. 7). This displaced a private group that had previously reserved the room for lunch at 11:00 a.m. (Tr. 1544-1546, 2097-2098.) This temporary facility was, however, inadequate to accommodate employees as it only seated only about 35 people, considerably less than the Hanger. Many employees were thus upset because they couldn't get in to eat. (Tr. 1548-1551.)

Second, the dining outlets were adversely impacted by the occupation. All of the servers in the Café and in room service walked off the job to gather in the cafeteria. (Tr. 366, 412, 1507-1510.) Many guests were left in the restaurant as breakfast is typically the busiest meal in the Café. (Tr. 1538-1539.) The menus of guests in the Café had to be collected, breakfast service was curtailed and guests were told that only a buffet breakfast could be served. (Tr. 1541-1542, 1579.) As many as 15 to 20 employees from the accounting, event services, and sales departments, as well as and the front desk had to set aside their normal duties to assist in serving the guests. (Tr. 1539-1540, 1579-1580.) Food and Beverage Director Tom Cook even had to set and bus tables, and serve guests himself. (Tr. 1505, 1553-1554.) The Café, which holds about 140 – 160 people, was approximately 60% to 75% occupied throughout the morning. (Tr. 1342-1343; 1512.) (Tr. 1342-1343;

EXHIBIT B

4. The Employees Had Adequate Opportunity to Present Grievances to Management through its Open Door Policy

The fourth *Quietflex* factor is "whether the employees had adequate opportunity to present grievances to management."[9] (*Quietflex*, *supra*, at 1057.) The Board appeared to find that management failed to make it clear to employees that they could not meet with management at that time but would have alternative opportunities to present their concerns.

However, Hilton has an established grievance procedure in its handbook, and employees have made frequent use of this open door policy to address workplace concerns and complaints. The substantial evidence in the record established the employees had, and frequently utilized, adequate opportunities to communicate grievances to management and to have them resolved. First, in the handbook, its Open Door 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

---

[9] In support of this factor, *Quietflex* cites to *Golay, supra.* and *Pepsi-Cola Bottling Co.,* 186 NLRB 477 (1970), *enfd.* 449 F.2d 824 (5th Cir. 1979). *Quietflex* notes that in *Pepsi-Cola,* employees had been *denied* the chance to communicate their grievances to management. *See also*, *Waco, Inc.*, *supra.*

> issue or problems remains unresolved, the team member can seek assistance from his/her department manager, the Director of Human Resources and the General Manager.
> (R. Ex. 28, p. 16.)

Prior to and after the May 11 work stoppage, employees have made frequent use of this open door policy to address workplace concerns and complaints. As set forth in the Employee Handbook (R. Ex. 28) and in the record, managers *may not* discuss confidential personnel matters, such as Reyes' termination, with other employees (R. Ex. 28, p. 58.), a fact of which the employees, as recipients of the Handbook, were doubtless aware. But to the extent that the employees' concerns were non-confidential, Hilton consistently provided employees with the opportunity to present and resolve those concerns with management.

Moreover, at the hearing, Hilton provided several illustrative examples of the effectiveness of this policy. Samayoa testified that Hilton resolved housekeeping employees' concerns regarding cleaning equipment (Tr. 1830-1832), uniforms (Tr. 1832), inventory practices (Tr. 1832-1833), lobby attendant carts (Tr. 1834), and work scheduling issues (Tr. 1835-1836). Trobaugh testified that Hilton resolved general employment concerns regarding working conditions (and promotional opportunities) for service bartenders (Tr. 2110-2112, 2113-2114), for linen room attendants

(Tr. 2106-2108, 2113), and regarding PTO notification procedures (Tr. 2115-2116). Jung testified that Hilton resolved kitchen employees' concerns regarding the purchase of new kitchen equipment and supplies such as egg and sauté pans, cooking utensils and various other kitchen equipment. (Tr. 1271-1274, 1282.)

In addition, at the delegation in early February, Coonley told the employees that he was available to meet with any employee, but reasonably requested that they set up an appointment to speak with him. (Tr. 1824.)

Based on such overwhelming evidence, the Board erred in analyzing the fourth *Quietflex* factor.

5. The Work Stoppage Lasted Approximately 2 hours and 40 minutes in the Cafeteria

The sixth *Quietflex* factor is "the duration of the work stoppage." (*Quietflex*, *supra*, at 1057.) The ALJ ultimately found the work stoppage was under three hours old when all employees vacated Hilton's premises, and in fact found that the work stoppage was "barely an hour old" before Samayoa began suspending employees. What the Board and ALJ ignore, however, is that Samayoa began suspending employees *pending investigation,* in an effort to regain custody of the cafeteria. (D. 16, L. 1-2; 5-6.)

PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: 595 Market Street, Suite 1400, San Francisco, California 94105.

On July 9, 2012, I served a copy of the following document(s) described as **UNITE HERE Local 11's Position Statement With Respect To Issues Remanded in *Fortuna Enterprises, LP v. National Labor Relations* Board, 665 F.3D 1295 (D.C. Cir. 2011)** on the interested party(ies) in this action as follows:

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

Lafe Solomon, Acting General Counsel
Office of the General Counsel
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Miguel A. Manriquez
Counsel for the Acting General Counsel
National Labor Relations Board, Region 31
11150 West Olympic Blvd., Suite 700
Los Angeles, CA 90064-1825

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is place for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in San Francisco, California, in a sealed envelope with postage fully prepaid.

[X] **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 9th day of July, 2012 at San Francisco, California.

Joyce A. Archain