Fortuna Enterprises, L.P. a Delaware Partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers *and* UNITE HERE, Local 11. Cases 31–CA–027837, 31–CA–027954, and 31–CA–028011

May 30, 2014

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On April 30, 2009, the National Labor Relations Board, acting with two members, issued a Decision and Order in this proceeding, finding, among other things, that the Respondent violated Section 8(a)(1) of the Act by suspending 77 employees for participating in an on-site work stoppage.[1] A three-member panel of the Board ultimately affirmed and adopted this action.[2] Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. On December 9, 2011, the court issued its decision granting the Respondent's petition for review in part, enforcing the Board's Order in part, and remanding the suspension issue to the Board. The court, in disagreement with the Board, found that the Respondent had an established procedure (its "open door" policy) for addressing group grievances like the one that gave rise to the work stoppage. The court remanded the case to the Board for it to rebalance the relevant employee and employer interests in light of the court's factual determination that the employees had access to an established procedure for presenting their grievance.[3] On May 24, 2012, the Board notified the parties that it had accepted the remand and invited them to file statements of position. The General Counsel, the Respondent, and the Union filed position statements.

The Board has delegated its authority in this proceeding to a three-member panel. We have considered the decision and the record in light of the court's remand and the parties' statements of position and, as explained below, we reaffirm the Board's prior findings that the work stoppage was protected at all relevant times and that consequently the suspensions were unlawful.[4]

I. FACTS

The Respondent operates the Los Angeles Airport Hilton Hotel and Towers. In January 2006,[5] UNITE HERE! Local 11 began a public campaign to organize the Respondent's employees. On May 10, the Respondent suspended employee Sergio Reyes after he was accused of theft by an undercover auditor. Believing that Reyes may have been targeted because of his union activity, and fearing that the same thing might happen to them, the employees decided to request a meeting with the Respondent's managers to discuss the reasons for Reyes' suspension.

At 8 a.m. on May 11, 70 to 100 employees gathered in the employee only cafeteria. Many of the employees were on formal clocked out breaks of 15 or 30 minutes. Upon arriving at the cafeteria, the employees asked a security guard to inform General Manager Grant Coonley, and Food and Beverage Director Tom Cook, who managed the department where Reyes worked at the time of his suspension, that the employees wanted to meet with them.[6]

Housekeeping Director Anna Samayoa arrived at the cafeteria at approximately 8:13 a.m. Security guard Luis Gallardo informed Samayoa that the employees had requested a meeting with Cook or Coonley. Gallardo also stated that Cook was on his way, but Coonley was not at the hotel. Samayoa then attempted to reach Cook by telephone, but received no answer. Assuming that Cook was en route, Samayoa continued to wait outside the cafeteria.

At approximately 8:26 a.m., pursuant to instructions from Human Resources Manager Sue Trobaugh, Samayoa entered the cafeteria and ordered the employees to return to work if they were not on break. Employee Michael Vargas responded that the employees were not

[1] 354 NLRB 202 (2009).

[2] 355 NLRB 602 (2010).

[3] *Fortuna Enterprises, L.P. v. NLRB*, 665 F.3d 1295 (D.C. Cir. 2011). The court also remanded the Board's finding that the Respondent, through Rogelio de la Rosa, violated Sec. 8(a)(1) by threatening to suspend Fidel Andrade for participating in the work stoppage, which was predicated on the Board's finding that the work stoppage was protected. Id. at 1303 fn. 6.

[4] We also affirm the Board's prior finding that the threat by de la Rosa to suspend Andrade for participating in the work stoppage violated Sec. 8(a)(1).

We shall modify the prior Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to require the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. We have substituted a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB 694 (2014).

[5] All dates are in 2006.

[6] At approximately 6:45 a.m. on May 11, Cook received a telephone call from the Respondent's assistant director of housekeeping, Jose Cano, informing him that the employees were planning to walk out at 8 a.m. Cook then notified Coonley and the Hotel's executive committee of the employees' plans, by email. He also arranged for employees from other departments to fill in for striking employees in the restaurant. Shortly before 8 a.m., and again at approximately 8:20 a.m., Cook was informed that the employees wanted to speak with him in the cafeteria. Cook did not go to the cafeteria, because he was attending to guests in the restaurant.

leaving until they spoke to Coonley or Cook. Samayoa informed Vargas that Coonley was not available, and Vargas responded, "Then we need to speak to [Cook]."[7]

At 8:32 a.m., Samayoa again ordered the employees to return to work if they were not on break, adding that if they did not return to work they should clock out and go home. The employees made no move to leave and began chanting "Śi se puede. Śi se puede" ("Yes, it can [be done]").

At 8:57 a.m.—about one hour after the work stoppage began—Samayoa ordered the employees to return to work or clock out and go home, this time adding that they would be suspended if they remained in the cafeteria. Employee Vargas then asked Samayoa to try to contact Coonley on his cell phone. She responded that she would try.[8]

A few minutes later, pursuant to instructions from Trobaugh, Samayoa began suspending the employees one by one. Vargas intervened and asked Samayoa to "stop intimidating the coworkers and . . . focus on contacting Mr. Coonley." Samayoa said, "Yes, I will try," and left the cafeteria. About this time, the Respondent's chief of security, Grant Taylor, announced that he was going to call the police if the employees did not leave the Hotel. Notwithstanding the threat, however, Taylor also promised Vargas that he would try to contact Coonley.[9]

Shortly after 9 a.m., employee Patricia Simmons called the human resources department and asked to speak to Trobaugh. Her assistant, identified only as Ayesia, answered the telephone and said that Trobaugh was not available. Simmons explained that the employees needed to talk to managers about a coworker who was suspended, and Ayesia said that someone would call Simmons back. After that, the employees just "waited [for] an answer." When Simmons' call was not returned after 20 minutes, she called the human resources department again and let the phone ring "many times," but no one answered.

About 9:30 a.m., Vargas asked Samayoa if she had succeeded in contacting Coonley, and she responded, "No, we're still waiting just like you are."[10] Vargas and Simmons then asked Hotel Chief Steward Rogelio de la Rosa for help contacting Coonley, Cook, or Trobaugh. De la Rosa responded "Okay, let me go and see what I can do." Vargas also asked de la Rosa to relay a message to Cook that the employees were ready to return to work, since management appeared unwilling to meet with them. De la Rosa said that he would "pass the message on."[11]

The employees waited until approximately 10:15 a.m. for a response to their message. Receiving none, they sent a delegation of 8 to 10 employees to the kitchen to tell Cook that they wanted to return to work. When the employees arrived at the kitchen, supervisor David Aragon, after speaking with Cook, informed them that they were suspended and could not go back to work. Shortly thereafter, Samayoa, accompanied by a police officer, entered the kitchen area, and confirmed that the employees could not return to work because they were suspended. The employees, with the permission of Samayoa and the police officer, then went back to the cafeteria to tell the other employees that they were suspended and must leave the Hotel immediately. The employees left the cafeteria at approximately 10:30 a.m., about 2-½ hours after the work stoppage began.

By notices dated May 18, the Respondent informed 77 employees that they were suspended for 5 days for "[i]nsubordination" and "[f]ailure to follow instructions" for refusing to return to work or clock out and go home.

II. PRIOR BOARD PROCEEDINGS

The administrative law judge found that the suspensions violated Section 8(a)(1) of the Act. 354 NLRB at 210–212. The judge reached this conclusion by applying the following 10 factors, set forth in *Quietflex Mfg. Co*., 344 NLRB 1055 (2005), for determining the proper balance between employees' Section 7 rights and the private property rights of employers in on-site work stoppage cases:

(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] About this time, employee Patricia Simmons telephoned the office of the Respondent's owner and spoke to his assistant, identified only as Charlene. Simmons explained that the employees wanted to speak with the owner about the suspension of a coworker. Charlene told her to call the human resources department, which opened at 9 a.m.

[8] Vargas testified that after Samayoa threatened to suspend the employees, "I told her that she needs to go back and try and locate Mr. Coonley because . . . I believe he has a cell phone like everybody else," and Samayoa responded, "I will try." Samayoa did not deny that this conversation occurred.

[9] Vargas testified that he asked Taylor "if he could contact Mr. Grant Coonley . . . via cell phone or, you know, through his secretary" and Taylor said "he'll try." Taylor did not testify and Vargas' testimony regarding the conversation was unchallenged.

[10] Samayoa did not deny that this conversation took place.

[11] De la Rosa did not testify and Vargas' and Simmons' testimony regarding the conversation was unchallenged.

(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.

Applying these factors, the judge first noted that the employees withheld their labor in protest of discipline given to a fellow employee and thus were engaged in protected, concerted activity. 354 NLRB at 211. The judge next found that there was no dispute as to the peacefulness of the work stoppage. Id. With regard to the 3rd factor, the judge found that there was no evidence that the employees denied the Respondent access to its property or interfered with production. In so finding, the judge observed that it is not considered an interference with production where employees do no more than withhold their own services, citing *Quietflex*, 344 NLRB at 1057 fn. 6. Id. Weighing the 4th factor, the judge found that the employees were given no opportunity to present their grievance. Id. As to the 5th factor, the judge found that Samayoa warned employees less than an hour into the work stoppage that they had to return to work, go home, or be suspended. Id. at 211–212. The judge next found that the work stoppage was of a reasonable duration, lasting less than 1 hour before the Respondent began suspending employees, less than 2 hours before the employees attempted to return to work, and less than 3 hours before the employees vacated the Respondent's premises. Id. at 212. Applying the 7th factor, the judge found that the employees were unrepresented and had no established mechanism for presenting group grievances. Although the Respondent had a written "open door" policy in its employee handbook, the judge found that the policy "addressed only individual complaints and not group grievances" like the one presented in this case.[12] Id. With regard to the 8th factor, the judge found there was no evidence the employees remained on the Respondent's premises beyond their shift. Id. With regard to the 9th factor, he found that the employees did not seize or destroy the Respondent's property. Id. Finally, as to the 10th factor, the judge found that the employees were suspended for "insubordination" and "refusal to abide by a reasonable request from a manager" when they did not return to work or clock out. Id. However, he noted that the suspensions were announced only an hour after the protected work stoppage began and while employees were waiting for management to hear their grievance. Id. Balancing the above factors, the judge concluded that the employees' activity remained protected and that the Respondent therefore violated Section 8(a)(1) of the Act by suspending the employees. Id.

The Board affirmed the judge's conclusion that the work stoppage was protected and that the suspensions were unlawful.

III. THE D.C. CIRCUIT'S OPINION

On review, the court assumed the validity of the "multi-factor balancing 'test' suggested in *Quietflex*" and agreed with the Board's application of the majority of the *Quietflex* factors. 665 F.3d at 1300–1301.[13] However, the court questioned the premise of Factor 3 ("whether the work stoppage interfered with production"), given that many protected activities, such as a strike, are specifically intended to exert economic pressure on employers by interfering with production. Id. at 1301–1302. Furthermore, with regard to factor 7, the court concluded that the Board erred in finding that the employees did not have access to an established procedure for addressing group grievances. Id. at 1302. The court explained that the Respondent has an "open door" policy to deal with grievances, which is set out in its Team Member Handbook.[14] The court found that the Board's determination that the policy addressed only individual complaints and not group grievances like the one presented in this case was at odds with the text of the policy, which is not limited to individual complaints, and the Respondent's actual implementation of the policy to address group grievances relating to hotel equipment, employee uniforms, working conditions, and other matters on numerous occasions. Id. at 1302–1303. The court found that this determination also impacted the Board's assessment of factor 4 ("whether the employees had adequate oppor-

[12] The judge analogized the Respondent's open door policy to a similar policy that was found to apply only to individual grievances in *HMY Roomstore, Inc.*, 344 NLRB 963 (2005).

[13] The court noted that the Board "did not quantify the particular weight of any factor" and that "several of them appear to overlap." Id. at 1300. For example, the court pointed out that factor 2 ("whether the work stoppage was peaceful") may involve the same considerations as factor 9 ("whether the employees attempted to seize the employer's property") and seizure of the employer's property may amount to the same thing as factor 3 (depriving the employer of access to its property). Id.

[14] 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.

tunity to present grievances to management"). Although agreeing with the Board's finding that the Respondent's officials suspended the employees without making it clear that a meeting with senior management officials was not immediately possible or offering them an alternative opportunity to meet, the court reasoned that those omissions "are much less significant," given the fact that the employees had access to an established procedure for presenting their grievance. Id. at 1302. The court therefore remanded the case to the Board for it to rebalance the relevant employee and employer interests consistent with its opinion.

IV. ANALYSIS

A work stoppage is a form of economic pressure protected under Sections 7 and 13 of the Act. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 15 (1962). The Board has long held, with court approval, that this protection includes the right to remain on an employer's property for a reasonable period of time "in a sincere effort to meet with management" over workplace grievances. *Roseville Dodge, Inc. v. NLRB,* 882 F.2d 1355, 1359 (8th Cir. 1989) (quoting *Crenlo, Div. of GF Business Equipment, Inc. v. NLRB,* 529 F.2d 201, 204 (8th Cir. 1975)). At the same time, employers unquestionably may protect their private property and legitimate business interests from undue interference by employees. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (work stoppage was unprotected where, among other things, employees seized employer's two key buildings for 9 days, preventing their lawful use by the employer and effectively shutting down operations).

When faced with a conflict between the Section 7 rights of employees and the private property rights of employers, the Board's duty is to accommodate both rights "with as little destruction of one as is consistent with the maintenance of the other." *Hudgens v. NLRB,* 424 U.S. 507, 521 (1976), quoting *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956). To find the proper accommodation in on-site work stoppage cases, the Board, guided by the 10 factors listed in *Quietflex*, engages in a careful balancing of interests, "focusing on the degree of impairment of the employees' Section 7 rights if access is denied, compared to the degree of impairment of the employer's private property rights if access is granted." 344 NLRB at 1058 (citing *Hudgens v. NLRB,* supra). No one factor is given controlling weight and, as the Board noted in *Quietflex*, "the precise contours within which [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 (citation omitted). 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." Id. (quoting *Hudgens v. NLRB,* 424 U.S. at 522).

We accept, as the law of the case, the court's finding that the employees had access to an established procedure for resolving group grievances. We have carefully rebalanced the relevant employer and employee interests in light of the court's opinion, and we find that while the availability of an established grievance procedure weighs against protection, this single factor is substantially outweighed by the other factors that favor finding the work stoppage protected.

1.

Quietflex factors 1, 2, 5, 6, 8, 9, and 10. As indicated above, the court affirmed the Board's findings and conclusions with respect to *Quietflex* factors 1, 2, 5, 6, 8, 9, and 10. We therefore review them only briefly. The employees withheld their labor in protest of the discipline of a coworker and thus were engaged in protected, concerted activity (factor 1).[15] The work stoppage was peaceful and of short duration, lasting less than an hour before the employees were suspended (factors 2 and 6).[16] Although the Respondent warned employees that they would be suspended if they did not return to work or go home, it began suspending them only minutes later (factor 5). Further, in the interval between the warning and the suspensions, Samayoa promised to try to contact Coonley on the employees' behalf. No employees re-

[15] "Section 7 gives employees the right 'to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.' This 'mutual aid' and 'concerted activities' include . . . the right to join other workers in quitting work in protest over the treatment of a coemployee, or supporting him in any other grievance connected with his work or his employer's conduct." *NLRB v. Solo Cup Co.,* 237 F.2d 521, 526 (8th Cir. 1956) (quoting *Carter Carburetor Corp. v. NLRB*, 140 F.2d 714, 718 (8th Cir. 1944).

[16] See *Atlantic Scaffolding Co.*, 356 NLRB 835 (2011) (51/2-hour work stoppage, protected); *City Dodge Center, Inc.*, 289 NLRB 194 (1988), enfd. sub nom. *Roseville Dodge, Inc. v. NLRB,* supra, (2- to 3-hour work stoppage, protected); *Masonic Home*, 206 NLRB 789, 791, 795–796 (1973) (1-1/3-hour work stoppage, protected), enfd. sub nom. *NLRB v. Masonic and Eastern Star Home of District of Columbia*, 514 F.2d 894 (mem.) (D.C. Cir. 1975); *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477, 478 (1970) (sit down strike lasting a few hours, protected), enfd. 449 F.2d 824, 825, 829–830 (5th Cir. 1971), cert. denied 407 U.S. 910 (1972); *Golay & Co., Inc., Lee Cylinder Div.*, 156 NLRB 1252, 1263 (1966) (1-1/2- to 2-hour work stoppage, protected), enfd. 371 F.2d 259 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967). Compare *Quietflex*, supra (12-hour work stoppage, unprotected); *Cambro Mfg. Co.*, 312 NLRB 634 (1993) (4-hour work stoppage, unprotected); *Waco, Inc.*, 273 NLRB 746 (1984) (3-1/2-hour work stoppage, unprotected); *NLRB v. Fansteel Metallurgical Corp.*, supra (9-day work stoppage, unprotected).

mained on the Respondent's property beyond their shift, or attempted to seize the Respondent's property (factors 8 and 9). With respect to factor 10, the employees were suspended for insubordination by failing to abide by the Respondent's repeated request that they either go back to work or clock out and go home.

Based on the above, we find that factors 1, 2, 6, 8, and 9 strongly support a conclusion that the employees were engaged in protected activity at the time they were suspended. We further find that find that factor 5 (Respondent's warning to employees) is entitled to little weight. The Respondent did warn the employees that they would be suspended if they did not return to work or go home, but that warning came less than an hour into the work stoppage, and the Respondent began suspending employees minutes after issuing the warning—while employees were waiting in the employee cafeteria for a manager to arrive and hear their grievance. Similarly, we find that factor 10 (the reason for the discipline, here insubordination) does not weigh against protection. As we have held, employees are entitled to persist in a peaceful work stoppage for a reasonable period of time, in the absence of evidence that they are interfering with the work of nonstrikers. See *Cambro*, 312 NLRB at 636 (finding that "employees were entitled to persist in their in-plant protest for a reasonable period," where "work stoppage . . . caused little disruption of production by those who continued to work").

2.

Quietflex factor 3. As noted, with respect to factor 3, the judge, affirmed by the Board, found no evidence that the work stoppage deprived the Respondent of access to its property or interfered with production. The judge cited *Quietflex*, 344 NLRB at 1057 fn. 6, where the Board stated "[it] is not considered an interference of production where the employees do no more than withhold their own services." 354 NLRB at 211. In remanding, the court characterized the Board's statement in *Quietflex* to be "at odds with reality," given the obvious interference with production that normally results when employees stop working in the middle of their shifts. 665 F.3d at 1301. The court added that "the point of this *Quietflex* factor is unclear," given that "some protected activities exert economic pressure on the employer *by interfering with production*," and it offered a strike as a prime example. Id. (Emphasis in original.) The court went on to state, "We do not know whether the Board in *Quietflex* meant to suggest that if the stoppage exerted economic pressure—that is, if it interfered with production or the provisions of services—this would render the activity less protected." Id. at 1301–1302.

Given the court's concern, we take the opportunity to clarify this factor. It is firmly established that employees do not forfeit the protection of the Act by withholding their own services. Refusing to work merely constitutes "the means by which an employee may strike." *Golay,* 156 NLRB at 1263. As the Board explained in *Atlantic Scaffolding*, supra, to hold otherwise would be "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." 356 NLRB 835, at 837 (quoting *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971)). The Board's statement in *Quietflex* that "[i]t is not considered an interference of production where the employees do no more than withhold their own services," 344 NLRB at 1057 fn. 6, was thus not meant to suggest that there is no interference with production when employees withhold their own services, but rather that the resultant interference and economic pressure does not render the activity less protected.

The focus of the Board and the courts when applying this factor is on whether striking employees interfere with production or the provision of services by preventing *other* employees who are working from performing their duties.[17] The interference with production factor thus seeks to accommodate the right of employees to concertedly withhold their services, with the right of the employer to continue operating its business using nonstrikers and replacement workers. Strikers overstep the bounds of protected conduct to the extent they interfere with the employer's legitimate efforts to continue operating, by preventing nonstriking employees from working.[18]

[17] See, e.g., *Cambro*, 312 NLRB at 636 ("employees were entitled to persist in their in-plant protest for a reasonable period," where "work stoppage . . . caused little disruption of production by those who continued to work"); *Roseville Dodge, Inc. v. NLRB,* 882 F.2d at 1359 (placing reliance on the absence of evidence that strikers "interfered with other employees," in finding work stoppage to be protected); *NLRB v. Pepsi-Cola Bottling*, 449 F.2d at 829 (finding in-plant work stoppage to be protected because, among other things, "[t]he strikers were not shown to have interfered with the work performance of nonstrikers"); *Golay & Co. v. NLRB*, 371 F.2d at 262 (observing that work stoppage "interfered with production no more than a simple cessation of work by these employees would have").

[18] See, e.g., *Yale University*, 330 NLRB 246, 248 (1999) (striking teaching fellows forfeited protection by withholding papers and test materials necessary for the employer to reassign the struck work to nonstriking employees, effectively preventing the employer from maintaining its business); *Beacon Upholstery Co.*, 226 NLRB 1360, 1366–1367 (1976) (striking employees exceeded the bounds of protected conduct where they retained the employer's sample books, order forms

Here, there is no suggestion that the striking employees attempted to prevent other employees from working. Because the record is devoid of any evidence that the striking employees interfered with the work performance of nonstrikers, and the Respondent suffered no appreciable loss of production or disruption of services beyond the work the strikers themselves did not perform,[19] we find that the interference with production factor weighs strongly in favor of protection.

3.

Quietflex factor 4. With respect to factor 4 (whether employees had an adequate opportunity to present grievances to management), the court found that the record supports the Board's finding that the Respondent suspended employees without notifying them that senior managers were not immediately available to meet with employees or offering a future opportunity to meet. But the court found that these failures by the Respondent were "much less significant" than the Board regarded them, given the employees' access to an established grievance procedure.

We accept the court's finding. We nevertheless conclude that this factor weighs slightly in favor of protection. We assess the factor in the context of the repeated assurances given the employees by Samayoa and other managers that they were trying to contact Coonley and Cook on the employees' behalf. The employees thus reasonably believed that Coonley or Cook might yet meet with them and listen to their grievance. This belief demonstrably contributed to the employees' decision to persist in the work stoppage for as long as they did. Notably, when the employees finally realized that senior management officials were *not* going to meet with them, they promptly offered to return to work.[20]

4.

Quietflex factor 7: We accept the court's determination that the employees had access to an established procedure through the Respondent's "open door" policy for addressing group grievances. We give that factor due weight, but not decisive weight.

In general, employees may strike in support of a workplace complaint without first exhausting a grievance procedure unilaterally adopted by their employer.[21] The Act, which affirmatively guarantees the right to strike, did not create such an exhaustion requirement, and imposing one administratively would have little, if any, support in the policies of the Act.[22] Section 7 of the Act grants employees the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," while Section 13 provides that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right." [23]

To be sure, on-site work stoppages implicate some distinct considerations. An on-site work stoppage may unduly interfere with an employer's private property rights and its right to continue operating during a strike. In this context, the court here—citing *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 451–452 (4th Cir. 1969), and *Cambro*, 312 NLRB at 636—stated that the availability of a grievance procedure as an alternative means for peacefully resolving disputes "cuts against the justification for protecting on-the-job work stoppages." 665 F.3d at 1302. *Quietflex,* by giving weight to the grievance-procedure factor (among others), acknowledges as much.

and price lists, preventing the employer from continuing its business with replacement employees).

[19] While the record reflects disruption of some operations, the Respondent succeeded in providing services to Hotel guests, even given the events of the morning. During the walkout, the restaurants were serviced by 15–20 employees from other departments. Food and Beverage Director Cook testified that he had more help than he needed in the restaurants and that "We did ok and the guests were not upset." Further, although the Respondent contends that there were some rooms that were not cleaned, it does not assert that it was unable to provide a clean room to any guest.

The Board's finding in the underlying decisions that the work stoppage had "the potential for interference with the provision of services," 354 NLRB at 202 fn. 8; 355 NLRB at 602 fn. 3, was referring to the potential for interference with food and beverage services available to nonstriking employees in the employee cafeteria. The Board was not referring to a disruption in services to hotel guests caused by work the strikers themselves did not perform while engaged in the work stoppage. Despite the Respondent's contentions that management received complaints from employees about "not being able to enjoy the [cafeteria] during its occupation," and that it was therefore compelled to set up an alternative lunch room in a private dining area, the Respondent did not present the testimony of a single employee that the work stoppage interfered with their ability to use the cafeteria.

[20] Assuming, arguendo, that factor 4 was neutral, or even that it weighed somewhat against protection, it would not alter our ultimate conclusion that the suspensions were unlawful. In our considered judgment, the balance of factors would still favor protection.

[21] See, e.g., *San Diego County Assn. for the Retarded***,** 259 NLRB 1044, 1048–1049 (1982), enfd. 705 F.2d 467 (9th Cir. 1983) (table), cert. denied 463 U.S. 1209 (1983) (rejecting the argument that employees, before going out on strike, were required to first attempt to resolve their grievance through the employer's unilaterally established procedures). See also *J. P. Hamer Lumber Co.,* 241 NLRB 613, 613 fn. 2, 619 fn. 31 (1979); *Mercy Hosp. Assn.,* 235 NLRB 681, 683 (1978).

[22] In general, an employer cannot restrict employees' substantive Sec. 7 rights through unilaterally established rules or policies. In *NLRB v. Washington Aluminum Co*., 370 U.S. at 16–17, the Supreme Court rejected the employer's argument that it lawfully discharged employees for participating in an on-site work stoppage because they violated a plant rule that prohibited them from leaving work without the permission of their foreman.

[23] 29 U.S.C. §§ 157, 163.

This does not mean, however—nor have the Board or the courts ever held—that the Act affords *no* protection to employees who engage in peaceful, nondisruptive, on-site work stoppages without first attempting to resolve their complaint through approved channels. That result would permit an employer to effectively foreclose the exercise of Section 7 rights on its property by unilaterally establishing a grievance procedure. But the Supreme Court has made clear that the "[a]ccommodation between employees' [Section] 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens v. NLRB*, 424 U.S. at 521, quoting *NLRB v. Babcock & Wilcox*, 351 U.S. at 112.[24] Indeed, examination of *Cone Mills* and *Cambro* reveals that the tribunals relied on a combination of factors in concluding that the work stoppages at issue were unprotected. The facts in those cases make them readily distinguishable from this one.

Cone Mills involved a planned work stoppage to protest the discharge of a coworker. The employees were represented by a union and they had access to a negotiated grievance procedure. 413 F.2d at 451. Shortly after the work stoppage began, the union steward communicated the employees' complaint to a manager and demanded that the discharged employee be put back to work "right away." The manager responded "We have a regular grievance procedure to handle this sort of thing and we will not put [the discharged employee] back to work right now." Id. at 450. Dissatisfied with the response, the employees stated that they would not return to work until the discharged employee was rehired. After they ignored several directives to return to work or leave the plant, the employees were discharged. Of critical importance to the court in finding the discharges lawful was the fact that the union steward had communicated the employees' grievance to the employer and received a response, albeit not one the employees were happy with. On these facts, the court found that the employees had "made their point and . . . registered their complaint," id. at 454, but "they were not interested in being heard. They had planned in advance to stop production for thirty minutes in protest of the discharge." Id. at 452. In sharp contrast, in this case, the employees were unrepresented, the Respondent never considered or responded to their grievance, and it never suggested that the employees use the established grievance procedure. Moreover, the employees—who repeatedly had been assured that efforts were being made to contact senior managers—remained on the premises in a sincere effort to meet with management and not merely to protest Reyes' suspension.[25] *Roseville Dodge v. NLRB*, 882 F.2d at 1359 (employees have a right to remain on their employer's property for a reasonable period of time "in a sincere effort to meet with management" over workplace grievances).

Cambro involved a work stoppage to protest perceived unfair treatment by a supervisor. The employees were unrepresented, and the employer had an "open door" policy for the presentation and discussion of grievances. The employees had already filed a grievance over the issue that led to the work stoppage and had been promised a response within 3 days. 312 NLRB at 634. Because they did not want to wait for the response, the employees demanded that the owner or plant manager come to the plant to meet with them in the middle of the night. A supervisor repeatedly told them that the owner or plant manager would meet with them early in the morning to further discuss their grievance, and directed them to go back to work or clock out and return later for the morning meeting. However, the employees persisted in their demand that the owner or manager come to the plant and they refused to return to work or leave the premises. Id. at 634–635. Notwithstanding that the employer had a published grievance procedure and a grievance on the subject of the work stoppage was pending, the Board expressly found that "the employees were entitled to persist in their in-plant protest for a reasonable period of

[24] 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.").

[25] Although not essential to our conclusion that the work stoppage retained the protection of the Act, we note that the action of the employees in gathering in the cafeteria during their break and requesting a meeting with Coonley or Cook was arguably itself an attempt to process their grievance pursuant to the established procedure. The Respondent's "open door" policy did not place any restrictions on the time, place, or manner employees could present concerns about working conditions to management. However, on May 5, the Respondent posted a memorandum reminding employees not to take their breaks in unauthorized areas and designating the cafeteria as the only approved break area in the Hotel. The memo additionally stated that "Breaks may be used . . . to discuss your individual workplace concerns with your supervisor, your manager or Human Resources," and stated further that "Hotel managers will make themselves reasonably available to meet with you upon request." The record reflects that the employees were attempting to comply with the "open door" policy as clarified or modified by the May 5 memorandum when they sought to arrange a meeting with senior-level managers in the employee only cafeteria during break time. The failure of the Respondent to either consider the employees' concerns or tell them that they would have an opportunity to present their concerns in the future necessarily exhausted that procedure. Accordingly, for this reason, as well as for the reasons discussed above, we reject the argument that the work stoppage was unprotected because the employees failed to present their grievance through approved channels.

time" because their work stoppage was peaceful, focused on job-related complaints, and caused little disruption of production by those who continued to work. Id. at 636. The Board found however that the work stoppage exceeded the Act's protection after employees were "assured the opportunity, in full accord with the Respondent's open door policy, to meet in just a few hours with [the plant manager] for further discussion of their complaints." Id. The Board found that the work stoppage lost protection at that point, because "[f]urther in-plant refusals to work served no immediate protected employee interests and unduly interfered with the employer's right to control the use of its premises." Id. In this case, in contrast, the employees were never offered an opportunity to discuss their grievance with senior managers—although they were repeatedly told that senior managers were being sought. Hence, the factors that tipped the scale in favor of loss of protection in *Cambro*—a definitive response that a meeting was not immediately possible and an offer to meet pursuant to the employer's "open door" policy in a few hours—are not present in this case.

5.

Considering all the relevant factors, we conclude that the work stoppage was protected for its entire duration. We reach this conclusion relying primarily on the following factors: the purpose of the work stoppage was clearly protected; it was peaceful and did not disrupt the work of nonstriking employees; it was of a limited duration; and no employees remained on the Respondent's premises beyond their shift or attempted to seize the Respondent's property. Further, we give limited weight to the Respondent's failure to make it clear to the employees, who were waiting to hear whether senior management would meet with them, that they would not be able to meet with senior management officials on that day or that they would have alternative opportunities to present their concerns. These factors, taken together, substantially outweigh the significance of the availability of a grievance procedure in the circumstances of this case. In sum, the employees were entitled to continue their on-site work stoppage for a reasonable period of time in a legitimate effort to meet with senior-level managers, despite the existence of an established grievance procedure and despite the Respondent's directive that the employees return to work or leave the Hotel, less than an hour after the peaceful work stoppage began and while employees were waiting to hear whether senior management would meet with them.[26]

Accordingly, we reaffirm our prior finding that suspensions violated Section 8(a)(1) of the Act.

SUPPLEMENTAL ORDER

The National Labor Relations Board reaffirms the Board's prior Order reported at 355 NLRB 602, as modified and set forth in relevant part below, and orders that the Respondent, Fortuna Enterprises, L.P. a Delaware Limited Partnership d/b/a/ The Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending employees for engaging in protected, concerted activities.

(b) Threatening employees with suspension if they participate in protected, concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Juan Jimenez	$696.19
Silviano Castillo	745.19
Agustin Vega	479.70
Juan Vizuete	513.44
Marco Zamudio	481.70
Rosario Mendoza	296.21
Alejandra Chamorro	194.40
Alicia Huizar	550.50

[26] Our concurring colleague agrees that the work stoppage here was protected at the time that the Respondent suspended participating employees. In reaching that conclusion, he would weigh the "*Quietflex*" factors somewhat differently than we would, in particular those factors related to the Respondent's grievance procedure, which he gives greater weight. Ultimately, however, he acknowledges that rather than stand "fast on its grievance procedure, "the Respondent's" on-scene personnel repeatedly sent mixed messages" to employees "that they were trying to contact upper-level officials to get a response from those officials, even as on-scene personnel evinced displeasure with the employees."

Contrary to our colleague, we do not read the Board's case law generally as establishing that the "central purpose of the latitude employees have under the Act to engage in an onsite work stoppage is to allow them to present their grievance to their employer." If this were the case, then the Board's test would focus on a single factor, but it does not. Nor do we agree with our colleague that "how and how long [employees] may permissibly carry out the stoppage must necessarily reflect the scope and extent of the employer's grievance procedure." Our disagreement, however, is not decisive here, where the Board—after careful consideration of all of the *Quietflex* factors in response to the court's remand—is unanimous in finding the suspensions unlawful.

Benjamin Lopez	534.50
Francisco Diaz	642.37
Miguel Vargas	740.14
Patricia Simmons	743.51
Raul Gonzalez	544.13
Rigoberto Gomez	796.38
Wilfredo Matamoros	703.05
Alberto Barajas	599.42
Richard Acosta	584.37
Samuel Zambrano	579.21
Cliff Lai	446.93
Adela Barrientos	447.75
Amelia Luna	450.24
Ana Flamenco	450.24
Blanca De la Torre	432.14
Christopher Fawcett	429.75
Claudina Colomer	418.56
Concepcion Molina	450.24
Edith Garcia	432.14
Estela Cabreras	450.24
Eva Pulido	458.40
Fernando Gutierrez	437.80
Gloria Saldana	450.45
Guadalupe Perez	429.75
Immacula Rene	440.29
Isabel Brentner	467.10
Ivan Gomez	393.75
Jaime Chamul	416.25
Joanna Gomez	416.25
Jose Ayala	437.80
Josefina Castillo	474.22
Juana Salinas	474.22
Juliete Cabrera	447.75
Kathy Andrade	447.75
Lazaro Orellana	429.75
Lazaro Soto	474.22
Lenardo Reynoso	418.56
Lidia Zavala	418.56
Lilia Magallon	461.12
Lillian Alcantara	447.75
Manuel Alvarez	447.75
Maria Ceja	438.02
Maria Hernandez	418.56
Maria Martinez	440.44
Maria Nunez	471.60
Maria Osuna	458.40
Marina Rivera	432.14
Raquel Benitez	447.75
Reyna Vasquez	432.14
Rigoberto Matamoros	459.74
Rolando Romero	429.75
Rosa Vaca	422.59
Rosie Delgado	475.11
Ruben Can	440.16
Silvia Alvarez	447.75
St. Wenceslaus Lawrence	422.59
Susana Argumedo	447.75
Victor Salgero	450.24
Zulnia Jurado	422.59
Concepcion Ortiz	446.40
Jose Luis Garcia	499.27
Jose Molina	431.14
Maria Letona	422.45
Mauricio Hernandez	414.03
Fernando Vasquez	389.38
Fidel Andrade	457.48
Nieves Contreras	435.16
Ricardo Chapa	454.05
Total	$36,052.74

(b) Compensate the above-named employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

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

(d) Within 14 days after service by the Region, post at its 5711 West Century Boulevard, Los Angeles, California facility copies of the attached notice marked "Appendix"[27] in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

[27] If this Order is enforced by a judgment of a United States court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 2006.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER JOHNSON, concurring.

Although I concur with my colleagues' finding that the Respondent unlawfully suspended and threatened to suspend employees for their onsite protest of a coworker's discharge on May 11, 2006, I write separately because I do not agree with several aspects of their analysis of the *Quietflex*[1] factors following the remand from the United States Court of Appeals for the District of Columbia Circuit.[2] In particular, I disagree with their failure to give adequate weight to the availability of the Respondent's open door policy as an alternative means to present their grievances.

The court's basis for remanding this case was fairly limited. It assumed the validity of the *Quietflex* multifactor balancing test for assessing continued protection of employee work stoppages on an employer's private property. *Fortuna Enterprises, L.P.*, above at 1300. It expressly affirmed the Board's finding with respect to factor 1—why the employees stopped working—that they did so for the protected purpose of expressing support for a discharged coworker and ensuring that the Respondent would not target other union supporters for discipline. Id. at 1301. It questioned the Board's treatment of factor 3—whether the work stoppage interfered with production—but determined that this factor apparently had not played a significant role in the Board's decision. Id. at 1301–1302. Finally, the court found that substantial evidence did not support the Board's finding that employees did not have access to presentation of group grievances under the Respondent's open door policy, a matter related both to *Quietflex* factor 4—adequate opportunity to present grievances—and factor 7—access to an established grievance procedure. Id. at 1302. The court noted that the Board had not quantified the weight to be given to any one of the *Quietflex* factors (which was natural enough when finding that all factors favored statutory protection) other than to mistakenly emphasize the absence of a group grievance procedure. Id. at 1303. Accordingly, the court remanded this case to the Board for reconsideration of the protected nature of the employees' onsite protest. Id.

My colleagues respond to the court's remand with a rebalancing of the *Quietflex* factors that gives substantially greater protective weight to many of them than in the Board's prior analysis. I have doubts that they are entitled to do so under the law of the case here, and further fail to see the basis for such reweighting.[3] It may be that there are sound reasons for finding that one or more factors now "strongly" support a conclusion that the employees retained statutory protection at the time they were suspended, but I prefer not to join in this characterization without more explanation.[4]

With respect to the "interference-with-protection" factor 3, I likewise would not find that it weighs "strongly" in favor of continued protection, but I concur in my colleagues' clarification of the meaning of this factor; that is, the relevant inquiry is whether the onsite withholding of services interfered with production and discipline to a greater degree than would have occurred if employees had walked off the job in protest. The Respondent has failed to prove such interference in this case.[5]

[1] *Quietflex Mfg.* Co., 344 NLRB 1055 (2005).

[2] *Fortuna Enterprises, L.P. v. NLRB*, 665 F.3d 1295 (D.C. Cir. 2011).

[3] Under the law of the case doctrine, I will apply *Quietflex* here, and recognize it as Board precedent until such time as a majority would vote to consolidate and refine its ten factor test. Although well-intentioned, the test could be improved. First, it simply has too many factors to be predictable, especially for parties faced with time sensitive situations such as an on-site work stoppage. Second, as this case demonstrates, the test is fraught with difficulty for remand purposes. An obvious problem posed by reweighting factors under any multifactor test, much less a 10 factor one, after a case has been remanded to us is the susceptibility to results-oriented analysis. In other words, colloquially speaking, the Board's reweighting the factors to achieve the same result may seem to the impartial observer more like some analytical version of Whac-A-Mole than reasoned decisionmaking.

[4] For instance, with respect to factor 1, my colleagues say nothing more than that the employees were engaged in protected concerted activity in undertaking their protest. Of course, if that were not the case, their conduct would be unprotected ab initio and there would be no need for undertaking a balancing test in order to find the suspensions lawful. If they mean that the particular protected activity is entitled to significant weight on a sliding scale of Sec. 7 rights, then they should explain why this is. Similarly, with respect to factor 2, that the protest was peaceful does not in and of itself indicate why this should strongly favor continued protection, unless the intended comparison is to raucous or confrontational conduct that would be entitled to less weight. Of course, if the protest was violent, as opposed to peaceful, it would be unprotected and, again, there would be no need for balancing prior to finding the suspensions lawful.

[5] The staffing shortages and service interruptions resulting from the onsite work stoppage appear no different than what would have transpired if the protesters had left the Respondent's facility at 8 a.m. The only allegedly greater interference with the Respondent's operations was the need to provide an alternative space for employees to eat while

Rather than straining to give greater weight to factors that the court did not question as favoring statutory protection to some degree, I believe this case boils down to assessing the weight to be assigned to the employees' failure to seek redress of their grievance through the open door policy. On this point, which the court deemed relevant to an assessment of two *Quietflex* factors, I believe my colleagues fail to give adequate weight to the significance of such a procedure as a limitation on the rights of employees to pursue grievances through onsite work stoppages.

The court specifically held that the Respondent's "Open Door" policy covered "group grievances" and "was widely known and often used" by employees. *Fortuna Enterprises, L.P.*, above, at 1302.[6] Yet my colleagues conclude that factor 4 still weighs in favor of protection, albeit only "slightly," and that factor 7 is ambiguously assessed as entitled to "due weight, but not decisive weight." In my view, both factors weigh substantially against protection and would, with only a slight change in circumstances, strike the balance in favor of a loss of protection.

As stated by the court, the availability of the open door policy was significant because "[g]rievance procedures provide an orderly means for resolving employee concerns and thus promote the Act's goal of achieving "industrial peace and stability."' (Citation omitted.) Id. "For this reason, the availability of a grievance procedure cuts against the justification for protecting on-the-job work stoppages." Id. To be sure, as my colleagues note, the determination of whether a work stoppage was or remained protected does not depend on one factor but requires balancing multiple factors to accommodate employees' Section 7 rights and the employer's property interests. Drawing that line requires balancing "whether the means utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act." *Peck, Inc.*, 226 NLRB 1174, 1175 (1976) (Member Penello, concurring). In balancing those competing interests, however, the Board and courts have repeatedly emphasized the existence, or absence, of an established grievance procedure. Compare *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (work stoppage protected in absence of established grievance procedure), and *NLRB v. Pepsi-Cola Bottling Co.*, 449 F.2d 824, 829–830 (5th Cir. 1971) (same), cert. denied 407 U.S. 910 (1972), with *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969) (in-plant work stoppage unprotected where there was an established grievance procedure), and *Cambro Mfg. Co.*, 312 NLRB 634 (1993) (established open door policy).

My colleagues minimize the importance of an established grievance procedure on grounds that an employer cannot "prevent employees from expressing their grievances in any proper manner they see fit by unilaterally establishing a grievance procedure." *Advance Industries Division-Overhead Door Corp.,* 540 F.2d 878, 885 (7th Cir. 1976). The point they fail to recognize from the cited case is that "the existence of such a procedure shifts the locus of the accommodation between employees' rights and private property rights." Id. Consequently, employees who opt initially to pursue their grievance by engaging in an on-site work stoppage and demanding direct, immediate discussion with management are not prevented from doing so because of an established grievance procedure, but they have far less latitude to do so before their employer is entitled to insist that they return to work or continue their protest off its property.[7] In essence, the central purpose of the latitude employees have under the Act to engage in an onsite work stoppage is to allow them to present their grievance to their employer. See 354 NLRB at 211 ("the presentation of the employees' grievance to management [is] . . . the immediate protected interest"). Thus, how and how long they may permissibly carry out the stoppage must necessarily reflect the scope and extent of the employer's grievance procedure.

In the prior Board decision in this case, the conclusion that the onsite employee work stoppage was protected rested heavily on the lack of a grievance procedure for handling group grievances and the failure to offer employees an alternative opportunity to present their concerns. Even then, a majority of the Board panel held this to be a "close case." See 355 NLRB 602, at 602 fn. 3 (2010), and 354 NLRB 202, 202 fn. 8. (2009). I believe that the D.C. Circuit's holding that the Respondent did have a "widely known and often used" grievance procedure covering group grievances necessarily "shifts the locus" of the balance and cuts "against the justification for protecting on-the-job work stoppages." *Fortuna En-*

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the protesters occupied the cafeteria. In my view, even if proven, this was not significant enough to warrant finding that this *Quietflex* factor weighed against continued protection.

[6] As noted by the General Counsel and the Union in statements on remand, there is evidence indicating that the Respondent had previously rebuffed efforts to present group grievances over discharge issues through the open door policy. I assume for purpose of this analysis that the court considered this evidence and found it unpersuasive.

[7] I note that my colleagues rely in part on inapposite precedent holding that employees have no general obligation to exhaust unilaterally imposed grievance procedures before exercising their statutory right to strike offsite. The *Quietflex* analysis does not apply in that situation because there is no need to balance employee rights against an employer's property rights.

terprises, L.P., above at 1302. The court's findings thus make what was a close case even closer. Here, if the Respondent had stood fast on its grievance procedure and required the employees to state their grievance to a supervisor on location, for example, I would hold the stoppage lost its protection at that point. But the Respondent did not do that. Instead, as my colleagues note above, Respondent's on-scene personnel repeatedly sent mixed messages, at best from the point of view of Respondent, that they were trying to contact upper-level officials to get a response from those officials, even as the on-scene personnel evinced displeasure with the employees. And, then, the employees were not clearly told that they could not meet with those officials until after the suspensions began to take place.

Having said that, weighing all the relevant factors, I conclude that the employee work stoppage remained protected at the point where the Respondent began suspending the protesters.[8] This took place at about 9 a.m., an hour into the work stoppage. I believe that at that time it was still reasonable for the protesters to have remained onsite while engaged in confusing communications with management about whether they would be able to present their grievance directly to senior officials Coonley or Cook.[9] While the court indicated the failure of management to notify the employees that such a meeting was not possible was "much less significant" in light of the established open door policy,[10] it did not hold this omission to be of no consequence whatsoever. I would find that at 9 a.m. it justified continuing the conversations for a few more minutes at most. Had the Respondent waited that short while longer, even without requiring the employees to state their grievance on the spot or making clear that there would be no meeting with Coonley or Cook, it would have been entitled to reclaim the use of its entire premises and to discipline those protesters who failed to return to work or leave the hotel. It would unquestionably have been entitled to do so after they unreasonably occupied the employee cafeteria for 2-1/2 hours.

[8] I find unavailing my colleagues' attempt to distinguish the cases cited by the court, *Cone Mills Corp.* and *Cambro Mfg. Co*. The cited reasons for distinguishing the cases are more post hoc rationalizations, were dismissed by the court as less insignificant in its decision, and do not affect the central point of those cases, and the reason the court cited them, i.e., that the absence or existence of a grievance procedure is a significant consideration in balancing the interests.

[9] Contrary to my colleagues, I see no basis for suggesting that the gathering of 70–100 employees in the cafeteria here could even arguably be viewed as an attempt to process their grievance pursuant to the established "Open Door" policy

[10] *Fortuna Enterprises, L.P.*, above at 1302.

Accordingly, while I disagree with my colleagues' rebalancing of *Quietflex* factors, particularly their failure to give adequate weight to the existence of an open door policy for the presentation of group grievances, I concur in their reaffirmation of findings that the Respondent violated Section 8(a)(1) of the Act by suspending and threatening to suspend employees for engaging in a protected onsite work stoppage in the particular facts of this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT suspend you because you engage in protected, concerted activities.

WE WILL NOT threaten you with suspension if you participate in protected, concerted activities.

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

WE WILL make whole the below named employees for any loss of wages and benefits, with interest, that they suffered as a result of their suspensions:

Juan Jimenez	Josefina Castillo
Silviano Castillo	Juana Salinas
Agustin Vega	Juliete Cabrera
Juan Vizuete	Kathy Andrade
Marco Zamudio	Lazaro Orellana
Rosario Mendoza	Lazaro Soto
Alejandra Chamorro	Lenardo Reynoso
Alicia Huizar	Lidia Zavala
Benjamin Lopez	Lilia Magallon
Francisco Diaz	Lillian Alcantara

Miguel Vargas	Manuel Alvarez
Patricia Simmons	Maria Ceja
Raul Gonzalez	Maria Hernandez
Rigoberto Gomez	Maria Martinez
Wilfredo Matamoros	Maria Nunez
Alberto Barajas	Maria Osuna
Richard Acosta	Marina Rivera
Samuel Zambrano	Raquel Benitez
Cliff Lai	Reyna Vasquez
Adela Barrientos	Rigoberto Matamoros
Amelia Luna	Rolando Romero
Ana Flamenco	Rosa Vaca
Blanca De la Torre	Rosie Delgado
Christopher Fawcett	Ruben Can
Claudina Colomer	Silvia Alvarez
Concepcion Molina	St. Wenceslaus Lawrence
Edith Garcia	Susana Argumedo
Estela Cabreras	Victor Salgero
Eva Pulido	Zulnia Jurado
Fernando Gutierrez	Concepcion Ortiz
Gloria Saldana	Jose Luis Garcia
Guadalupe Perez	Jose Molina
Immacula Rene	Maria Letona
Isabel Brentner	Mauricio Hernandez
Ivan Gomez	Fernando Vasquez
Jaime Chamul	Fidel Andrade
Joanna Gomez	Nieves Contreras
Jose Ayala	Ricardo Chapa

WE WILL compensate the above named employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL remove from our files any reference to the unlawful suspensions of the above named employees, and WE WILL not make reference to the suspensions in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against you.

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

The Board's decision can be found at www.nlrb.gov/case/31-CA-027837 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.