LaGuardia Associates, LLP d/b/a Crowne Plaza La-Guardia *and* New York Hotel & Motel Trades Council, AFL–CIO. Case 29–CA–29347

September 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On December 28, 2009, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

I. INTRODUCTION

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by disciplining 13 employees who concertedly presented its manager with a petition concerning an impending reduction in available working hours. Although the judge found that the employees were initially engaged in protected activity, he found that they lost that protection in the circumstances here, which included several employees deliberately touching and physically restraining the manager. As explained below, we affirm the judge's finding as to three employees who made deliberate physical contact with their Employer's representative, but we reverse as to the remaining employees.

II. FACTS

The Respondent operates a hotel in Queens, New York. In 2004, the Board certified the Union as the exclusive collective-bargaining representative of a unit of the hotel's employees, including its housekeepers. The parties commenced bargaining for a first contract, but by late 2008 they still had not reached agreement.

Away from the bargaining table, the Union employed several strategies to engage employees in the campaign and protest the lack of progress in negotiations. One of those strategies was to send "delegations" of employees to present grievances to managers concerning their working conditions. These delegations usually occurred prior to the employees' shift, during their lunchbreak, or after work.

This case focuses on an employee delegation that was sent to the Respondent on December 10, 2008. Several weeks earlier, the Respondent had indicated that it needed to reduce hotel staffing expenses because of a decline in business. The Respondent had proposed to achieve that reduction by an across-the-board cut in employees' hours. In response, the Union had asked the Respondent to implement layoffs by seniority, and the Respondent had indicated that it would abide by the Union's preference.

By December 10, however, the Union suspected, perhaps mistakenly, that the Respondent in fact was reducing employees' hours.[4] On the morning of December 10, following a union sponsored rally outside the hotel, the Union asked housekeeping employee Franklin Riley to lead an employee delegation to present Gary Isenberg, the Respondent's chief operating officer, with a petition reiterating the Union's demand that any layoffs proceed according to seniority.

As requested, Riley led a group of 13 to 15 housekeepers to Isenberg's office to deliver the petition. The employees had punched in and were dressed in their work uniforms, but it was still several minutes before the start of their 8 a.m. shift. The employees walked to Isenberg's office, which was located in a corridor off the hotel lobby, but he was not there. A security guard, Yassar Hassanein, saw the employees and told them that Isenberg might be in the lobby area of the hotel.

The employees, with Hassanein following them, found Isenberg talking on his cell phone in a 10-foot wide corridor connecting the lobby to the hotel's parking garage.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the judge's conclusions of law consistent with our findings herein, and set them out in full. We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions, and set both out in full. We shall substitute a new notice to conform to the Order as modified.

In the absence of substantive exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by conducting an interview with an employee and failing to advise her of the purpose of the interview pursuant to *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). We find merit in the General Counsel's limited exception to correct the judge's inadvertent error in his conclusion of law concerning this violation.

[3] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[4] The Respondent implemented layoffs by seniority in January 2009.

At this point it was about 8 a.m., and the employees, Isenberg, and Hassanein were standing in view of a stationary security camera, which recorded the events described below. The video footage establishes that these events transpired in approximately 38 seconds.[5]

Once Isenberg finished his phone call, Riley and the group approached him and stood in front of him. Hassanein stood by Isenberg's side. Riley announced that he had a petition to read and asked Isenberg to take it. Isenberg replied that he would speak only to one person and not to the group. Riley responded that he was the only one speaking and began reading the petition. Isenberg told Riley that he would meet with one employee in his office, and several times asked the employees to return to work. Riley continued to read the petition and asked Isenberg to take it. The employees made loud comments to Isenberg and chanted briefly.[6]

At that point, Isenberg began walking away, working his way through the housekeepers. Riley then grabbed Isenberg's shoulder to prevent him from leaving and reached around Isenberg's waist with the petition, touching him at least three times. Employee Julieta Varela pushed her chest against Isenberg and physically blocked him from leaving the scene, stepping side to side in front of him. Employee Maerene Robinson grabbed Isenberg's left elbow, and put her arm around him to keep him from exiting the area. Another employee, Esmeralda Lopez, momentarily made contact with Hassanein's left wrist as he, waving his arms, attempted to clear a path through the employees. Isenberg and Hassanein then made their way through the employees and left the area, ending the incident.

As the employees left the area, they passed by New York City Police Officer Javier Centeno, who was in the lobby responding to a complaint of noise from the rally *outside* the hotel. Centeno had observed the employees' confrontation with Isenberg from approximately 100 to 150 feet away, but had made no effort to intervene. Given the distance, he did not hear what the employees said to Isenberg, although he did hear loud voices. Centeno orally cautioned the employees as a group against harassment, but he did not make any arrests or issue any citations to the employees.

Later the same morning, Human Resources Director Lorraine Mercurio, who had witnessed the incident, reviewed the security video and spoke with Isenberg and Hassanein. Mercurio then suspended 13 of the housekeeping employees[7] without pay, pending an investigation. Two days later, Mercurio issued disciplinary letters discharging four employees, suspending five employees for 3 days without pay, and giving written warnings to four others. The letters stated:

The Discharge Letters[8]

> [Y]ou instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty; and you grabbed and physically attempted to prevent VP/Operations, Gary Isenberg, from leaving the area as he attempted to try to do so. Your behavior was threatening, intimidating, and completely inappropriate in the workplace.

The Suspension Letters[9]

> [Y]ou instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty, and attempted to prevent VP/Operations, Gary Isenberg, from leaving the area as he attempted to do so.

The Written Warning Letters[10]

> [Y]ou participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; and you were away from your work station while on duty.

Mercurio testified that she and Isenberg assessed each employee's actions, together with the Respondent's past treatment of similar conduct, to determine the appropriate discipline of each employee.

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[5] The video's time-stamping feature shows that Riley and most of the employees assembled in front of Isenberg at 8:00:42 a.m. (with a few employees arriving seconds later) and that Isenberg left the area at 8:01:20. The camera, however, recorded only frame-by-frame shots, rather than continuous motion, and did not record sound. Thus, our description of the ensuing events is based on our review of both the video and the credited testimony.

[6] These comments included "no, you're going to listen to us," "no, listen, no, listen," "you're not going anywhere," and "we are all together you would have to speak to all of us." Isenberg was able to identify some of the speakers.

[7] Franklin Riley, Orfa-Nelly Fernandez, Marie Lajeunesse, Esmeralda Lopez, Santiago Mejia, Antonia Napoletano, Amarilis Martinez Perez, Maerene Robinson, Yaneth Rocha, Gladys Rossi, Lourdes Sanchez, Chan Juan Sun, and Julieta Varela.

[8] The Respondent discharged employees Riley, Varela, and Robinson for touching Isenberg, and employee Lopez for touching Hassanein. The Lopez discharge letter used language similar to that quoted below.

[9] The Respondent suspended employees Fernandez, Lajeunesse, Mejia, Rossi, and Sun.

[10] The Respondent issued written warnings to employees Napoletano, Perez, Rocha, and Sanchez.

The Respondent maintained an employee handbook, relevantly setting forth the following principles of employee conduct:

> Privacy – It is also requested that you maintain a high level of professionalism in your work stations by refraining from loud conversations and any distractive behavior that disturb the Hotel guests.
>
> Principle of Service – Project a professional image though appearance and conduct.

The handbook provided that the following acts, among others, constituted just cause for immediate dismissal:

> 4. Refusing to obey direct instructions from a supervisor. (Insubordination).
>
> 5. Coercion, intimidation or threats against customers, superiors, or fellow associates.
>
> 6. Disrespect or discourteous conduct to customers or superiors.
>
> 11. Harassment of fellow associates, superiors or guests. This includes, but it is not limited to racial or sexual harassment.

The handbook also listed the following acts, among others, as just cause for "remedial action":

> 20. Unauthorized absence from assigned work area or being in an unauthorized area. Loitering or sleeping on the job.
>
> 25. Discussing confidential company information in public areas where customers could overhear conversation.

III. THE JUDGE'S DECISION

As stated, the judge found that all of the employees involved in the December 10 incident were initially engaged in protected concerted activity when they presented the petition to Isenberg. Applying the analysis articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), however, he found that they lost that protection. Under *Atlantic Steel*, the Board examines four factors to determine whether employees' alleged improper conduct during otherwise protected activity warrants a forfeiture of the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the conduct was provoked by an employer's unfair labor practice. Id. at 816.

Briefly, the judge found that only the second factor, the subject matter of the discussion, weighed in favor of protection because the issue the employees raised—how to reduce staff hours—directly concerned the employees' terms and conditions of employment.

The judge found that the first factor, the place of the discussion, and the third factor, the nature of the outburst, weighed heavily against the employees. Regarding the place of the discussion, the judge emphasized that the employees confronted Isenberg in a public area of the hotel, in view of the hotel's guests. As to the nature of the employees' conduct, the judge emphasized that they loudly demanded that Isenberg hear them out, that they engaged in some loud chanting, that they were on duty and did not immediately heed Isenberg's directives to return to work, that Isenberg offered to meet with one employee in his office, that aspects of the employees' conduct violated the Respondent's handbook rules, and that three employees physically touched and restrained Isenberg and a fourth touched Hassanein. The judge discounted the brevity of the confrontation because Isenberg, not the employees, ended it by breaking free of the group and taking the petition.

Finally, with respect to the fourth *Atlantic Steel* factor, provocation, the judge found no evidence that the employees' conduct was triggered by an unfair labor practice. He therefore found that this factor also weighed against protection.

As stated above, the judge observed that only the subject of the employees' petition favored continued protection. He concluded that this factor was outweighed by the remaining factors, particularly the place and nature of the employees' conduct. As a result, he found that the employees lost the protection of the Act, and that the Respondent's discipline of them was not unlawful.

IV. DISCUSSION

We agree with the judge's finding that all of the employees who participated in the December 10 delegation were engaged, at least initially, in protected activity. See *Superior Travel Service.,* 342 NLRB 570, 574 (2004). The petition addressed an impending reduction in the employees' hours, and thus directly concerned their terms and conditions of employment. See *Kysor Industrial Corp.*, 309 NLRB 237, 237 fn. 3 (1992) (employees' concerted effort to clarify their work assignments bore an "immediate relationship" to terms and conditions of employment). We also agree with the judge that the employees' activity was protected even if they were mistaken in suspecting the Respondent of reneging on its agreement to implement layoffs by seniority, as there is no evidence that the employees acted in bad faith. See *Wagner-Smith Co.*, 262 NLRB 999, 999 fn. 2 (1982).

Further, although we agree with the judge that the multifactor *Atlantic Steel* framework applies in determining whether the employees lost the protection of the Act, we

disagree with his application of the *Atlantic Steel* factors in two respects. First, we find that he erred by not accounting for material differences in the nature of the individual employees' conduct. Second, in recognition of those differences, we find, contrary to the judge, that only those employees who deliberately touched or otherwise physically restrained Isenberg forfeited the Act's protection.

A.

Given the severe consequences of a finding that an employee has lost the protection of the Act, we find it appropriate in cases involving multiple employees, like this one, to analyze each employee's specific conduct. By way of close analogy, serious picket-line misconduct does not disqualify all picketers from reinstatement. Rather, the Board requires particularized proof that specific individuals engaged in the misconduct at issue. See *Beaird Industries*, 311 NLRB 768, 769 (1993) ("An honest belief of misconduct requires some specificity in the record linking particular employees to particular acts of misconduct"); *Conoco, Inc*., 265 NLRB 819, 825 (1985), enfd. 740 F.2d 811 (10th Cir. 1984) (individual striker must be identified as a participant in the misconduct rather than have the acts of others imputed to him). The obvious fairness of this approach is reflected in the fact that the Respondent, of its own accord, conducted just such a particularized assessment in meting out discipline here, confirming that the employees engaged in various degrees of misconduct in the eyes of their own employer. So too, the judge should have considered whether there were differences among the 13 employees' actions in applying the *Atlantic Steel* factors.[11]

B.

Taking that approach, we find that the judge's analysis of the third *Atlantic Steel* factor, the nature of the employees' conduct, is fatally flawed, because there are in fact material distinctions among the employees.[12] To isolate those distinctions, we shall first briefly address the common features of their behavior.

As described, the employees loudly demanded that Isenberg hear them out, they engaged in some loud chanting, they did not immediately heed Isenberg's instructions to return to work, they ignored Isenberg's offer to meet with one employee, and aspects of their conduct appeared to violate the Respondent's handbook rules. For the reasons that follow, we are not persuaded that this conduct warrants a finding that the nature of the employees' actions favors a loss of protection of the Act.

As to the employees' loud comments and chanting, the Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection. See *Goya Foods*, *Inc.*, 356 NLRB No. 73, slip op. at 3 (2011); *Postal Service*, 251 NLRB 252, 258 (1980), enfd. 652 F.2d 409 (5th Cir. 1981); *Firch Baking Co.*, 232 NLRB 772, 772 (1977). Although two hotel guests were in the vicinity of the confrontation, and others possibly overheard it, we find that these circumstances are diminished by the extremely brief nature of the incident and by the absence of evidence that the noise interfered with the Respondent's service to any guest. See, e.g., *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (less than a minute of loud shouting inside a supermarket did not warrant a loss of protection where there was no apparent disruption to customers). In fact, the video shows one

[11] We recognize that the Board has commented that "employers may lawfully discipline employees who engage in misconduct in concert with others." *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 fn. 11 (2009), adopted in 355 NLRB No. 135 (2010). We do not read that statement to preclude an individualized analysis, however, or to mean that every participant in concerted activity is liable for his fellow employees' actions. In *Starbucks*, the employee in question was part of a group that followed a manager away from a store, at night, while shouting threatening and intimidating remarks, but the Board's analysis clearly focused on the fact that the employee "actively participated" in that misconduct. See id., slip op. at 3.

Nor does our approach conflict with *Auburn Foundry*, *Inc.*, 274 NLRB 1317 (1985), enfd. 791 F.2d 619 (7th Cir. 1986), which the *Starbucks* Board characterized as holding that an "employer lawfully terminated [a] striking employee who, although merely a passenger in [a] vehicle, was 'in association' with others who engaged in [a] high speed chase to intimidate nonstriking employees." The judge in *Auburn Foundry* found that the employee at issue was not part of the chase, because the car in which he rode significantly lagged behind another chase car and crashed before the chase concluded. The Board disagreed, finding in all the circumstances that the discharged employee was "engaged in the same high speed chase." Id. at 1318. The Board did not analyze the differences between the driver's and passenger's conduct in any respect and thus the holding sheds little light on the question at issue here. Moreover, in *Auburn*, the employee at issue was a participant in group conduct that was itself unprotected: a high speed chase. In the present case, the group conduct—the delegation—was clearly protected, and any loss of protection was based on separate, unplanned, individual actions—deliberately touching and physically restraining Isenberg—in which only a few members of the delegation engaged. Thus, the Board's finding of a loss of protection was based on the employee's own active participation in the underlying misconduct.

The same is true of a second case cited by the *Starbucks* Board, *"Restaurant Horikawa,"* 260 NLRB 197 (1982). There, the employee in question was part of a group that engaged in an "invasion" of a restaurant, thereby disrupting business, but the decision plainly indicates that the employee herself committed all the acts that led to the loss-of-protection finding. Id. at 197–199.

[12] The first, second, and fourth *Atlantic Steel* factors were common to all of the disciplined employees. Further, we largely agree with the judge's analysis of those factors, except that we attach greater weight than the judge did to the subject of the employees' protest.

guest walking past the employees without difficulty or evident concern of any sort.

Nor are we persuaded that the employees' momentary refusal to return to work supports a loss of protection. The Board has held that on-the-job work stoppages of significantly longer duration remained protected. See, e.g., *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB No. 17, slip op. at 1, fn. 8, and 11 (2009), adopted by 355 NLRB No. 122 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with the hotel's operations); cf. *Goya Foods*, supra, 356 NLRB No. 73, slip op. at 3 (employee abided by supervisor's instruction to punch out and go home only a few moments later). On a related point, neither Riley nor any other employee was required to abandon his coworkers and meet one on one with Isenberg in his office. See *Leon Ferenbach*, *Inc.*, 212 NLRB 896, 900 (1974) (employer could not require protesting employees to meet individually with supervisors).

Finally, it is irrelevant that the employees' protest may have violated the Respondent's handbook rules. The Board has long held that employees engaged in protected activity "generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies." See *Louisiana Council No. 17*, 250 NLRB 880, 882 (1980).

Having addressed the common aspects of the employees' conduct, we turn now to the differences. We begin with our agreement with the judge's finding that employees Riley, Varela, and Robinson—all of whom deliberately touched Isenberg in an effort to restrain him—lost the protection of the Act. As described, Riley grabbed Isenberg's shoulder to prevent him from leaving and reached around his waist with the petition, touching him at least three times. Varela pushed her chest against Isenberg and moved from side to side in front of him to block his exit. And, last, Robinson deliberately grabbed Isenberg's arm to restrain him from leaving the scene. In agreement with the judge, we find that this deliberate physical contact reasonably threatened Isenberg himself and the Respondent's ability to maintain workplace order and discipline. See *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 (2009), adopted in 355 NLRB No. 135 (2010) (deliberate, intimidating nature of employee's behavior favored a loss of protection). We therefore agree with the judge that the nature of these employees' actions weighs in favor of a loss of protection. Compare *National Semiconductor Corp.*, 272 NLRB 973, 974 (1984) (loss of protection where employee who was attempting to retrieve a petition made "moderate physical contact" with a supervisor and blocked the supervisor's egress) with *Kiewit Power Constructors Co.*, 355 NLRB No. 150, slip op. at 3 (2010), enfd. __ F.3d __, 2011 WL 3332229 (D.C. Cir., Aug. 3, 2011) (absent accompanying physical gestures, no loss of protection where employee angrily told supervisor things could "get ugly" and he "better bring [his] boxing gloves").[13]

As a result, the only factor weighing in Riley's, Varela's, and Robinson's favor is the subject of their discussion with Isenberg. Although this factor strongly favors continued protection, we find that it is overcome by the place and nature of the employees' actions, particularly in the complete absence of any immediate provocation by the Respondent. We therefore affirm the judge's finding that these employees lost the protection of the Act, and that their discharges were not unlawful.

By contrast, we disagree with the judge's finding that employee Lopez forfeited the Act's protection. The evidence establishes that she briefly touched security guard Hassanein's wrist as he, waving his arms, attempted to clear a path through the employees. The judge did not find that Lopez deliberately touched Hassanein or attempted to restrain him, and nothing in the security video footage compels either finding. Indeed, the video suggests that this contact may have resulted from an instinctive reaction by Lopez to Hassanein's arm-waving. The nature of her conduct was thus materially different from that of Riley, Varela, and Robinson, leading us to conclude that her actions did not reasonably threaten to undermine Hassanein's authority or otherwise affect workplace discipline.

Thus, the only factors that continue to weigh against Lopez are the place of the discussion and the absence of provocation. On balance, we find that those factors are outweighed by the subject of the discussion, in particular, and the nature of her conduct. We therefore find that Lopez did not lose the protection of the Act, and that her discharge was unlawful.

Finally, we reverse the judge's finding that the remaining employees—Fernandez, Lajeunesse, Mejia, Rossi, Sun, Napoletano, Perez, Rocha, and Sanchez—lost the protection of the Act. There is no finding or reliable evidence that any of these employees touched either Isenberg or Hassanein, intentionally or otherwise. At worst, they engaged in the "common" conduct discussed above, i.e., they spoke loudly in the hotel hallway for less than 40 seconds and then dispersed. To that extent, they are

[13] We emphasize that our assessment of the nature of the employees' conduct is made in the particular circumstances of this case and does not rest on the fact of physical contact alone. In particular, we are persuaded by the absence of any immediate provocation, either legal or illegal. To the contrary, the general contours of the delegation were planned in advance and Isenberg was polite and respectful to the employees, and certainly nonconfrontational.

similarly situated to employee Lopez, meaning that only the place of their confrontation with Isenberg and the absence of provocation continue to weigh against them. As such, and considering that none of these employees touched either Isenberg or Hassanein, we find that the balance of factors weighs even more heavily in their favor, as compared to Lopez. We therefore find that they did not lose the protection of the Act, and that the Respondent's discipline of them was unlawful as well.

Although we have distinguished between those employees who deliberately touched Isenberg and those who did not, we generally agree with our dissenting colleague that no rigid line between protected and unprotected conduct should be drawn at the point of intentional physical contact.[14] Still, we remain convinced that there is a qualitative difference between the conduct of Riley, Varela, and Robinson, and that of the remaining employees, even accepting our colleague's observation that all the employees momentarily surrounded Isenberg and spoke loudly. The loud statements simply demanded that Isenberg stay and listen to the employees; there were no threats of any kind. Similarly, the employees congregated around Isenberg because they happened to meet him in a relatively narrow corridor, but the employees did not plan to confront Isenberg at that location and there is no evidence that any of them other than Riley, Varela, and Robinson did anything to obstruct his passage once he ended the discussion to return to this office.

V. CONCLUSION

For all of the foregoing reasons, we affirm the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by discharging employees Riley, Varela, and Robinson, but that its discipline of the remaining participants in the December 10 delegation did violate that Section.

AMENDED CONCLUSIONS OF LAW

1. By conducting an interview with an employee and failing to advise her of the purpose of the interview pursuant to *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), the Respondent has violated Section 8(a)(1) of the Act.

2. The Respondent has violated Section 8(a)(1) of the Act by disciplining employees Esmeralda Lopez, Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, Chan Juan Sun, Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez.

3. The Respondent has not violated the Act by disciplining employees Franklin Riley, Julieta Varela, and Maerene Robinson.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, including conducting an interview with an employee without advising her of its purpose and imposing unlawful discipline (consisting of a discharge, suspensions, and written warnings) of 10 employees, we shall order it to cease and desist and to take certain actions designed to effectuate the policies of the Act. We shall order the Respondent to offer the unlawfully discharged employee immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed. We shall order the Respondent to make the 10 disciplined employees whole for any loss of earnings and other benefits, including the 2 days of suspension imposed on all of them pending the Respondent's investigation of the December 10 incident. Backpay shall be computed in accordance with *F. W. Woolworth,* 90 NLRB 289 (1950)*,* with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to remove from its files any and all references to the unlawful discipline imposed on these employees, and to notify them in writing that this has been done and that the discipline will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia, East Elmhurst, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or issuing written warnings to employees because they engaged in protected concerted or union activity protected by the National Labor Relations Act.

(b) Conducting interviews with employees concerning the issues in this case, without providing the safeguard warnings set forth in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

(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.

[14] Thus, we recognize that a loss of protection may be found absent such contact. Cf. *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 (2009), adopted in 355 NLRB No. 135 (2010). And, as noted, our finding that Riley, Varela, and Robinson lost the protection of the Act is not based on the fact of intentional physical contact alone.

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

(a) Within 14 days from the date of this Order, offer Esmeralda Lopez immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Esmeralda Lopez, Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, Chan Juan Sun, Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline imposed upon them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to: the unlawful discharge of Esmeralda Lopez; the unlawful suspensions of Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, and Chan Juan Sun; and the unlawful written warnings issued to Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez, and, within 3 days thereafter, notify each employee in writing that this has been done and that her unlawful discharge, suspension, or written warning will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its East Elmhurst, New York facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, 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, defaced, or covered by any other material. If 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 December 10, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

Dated, Washington, D.C. September 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Unlike my colleagues, I agree with the judge that, under the four factor test of *Atlantic Steel Co.*,[1] the entire 13-employee delegation involved in the incident with Manager Isenberg lost the Act's protection.[2] They all participated in a loud and disruptive effort during work time to surround and detain Isenberg in a public hotel space until he heard and accepted their grievance petition. The laws of physics being what they are, not all of these employees could be so close to Isenberg as to deliberately touch him, but all contributed by voice and presence to his detention and/or a state of general disorder incompatible with a hotel lobby environment. As a result, I would find that the Respondent lawfully disciplined them in varying degrees for this misconduct. Accordingly, I dissent.

At the outset, I note that my colleagues and I agree that *Atlantic Steel* factors one (place of discussion) and four (provocation) weigh against finding the employees' actions during the incident with Isenberg to be protected. We also agree that factor two (subject matter of the discussion) weighs in favor of their activities being protected. But we part company as to the third factor—the

[15] 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."

[1] 245 NLRB 814 (1979).

[2] As indicated herein, I agree with my colleagues' conclusion that the Respondent lawfully discharged employees Riley, Varela, and Robinson, but I do not agree with their limited rationale supporting this conclusion.

nature of the employee's outbursts. In this regard, my colleagues conclude that the judge's analysis as to the third *Atlantic Steel* factor is "flawed" because he did not analyze each employee's specific conduct in determining whether he or she lost the Act's protect. They then conclude that only the act of intentionally touching Isenberg was sufficiently egregious to justify finding that three of the employees lost their statutory protection. I disagree.

Of course, physical misconduct, standing alone, weighs heavily in favor of finding that employees' activity unprotected. See *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 (2009), adopted in 355 NLRB No. 135 (2010); and *National Semiconductor Corp*., 272 NLRB 973, 974 (1984). However, the line of statutory protection is not, and should not, be drawn at the point of intentional physical contact. Thus, in this particular case, there is no need to decide whether the physical misconduct of the three employees should be attributed to their coworkers in order to find that the entire employee group crossed the line. At a minimum, it is undisputed that *all* of the employees loudly confronted their manager in a public area of the hotel where common sense, as well as the Respondent's valid workplace rules, require more decorum to maintain production and discipline. In addition, all but three of the employees undisputedly encircled Isenberg to obstruct his movement until such time as he accepted their petition, and they ignored his instructions to return to work until he finally complied with their demand.[3]

Indeed, the disruptive nature of the incident is reflected in the credited testimony of New York City Police Office Javier Centeno that he was in the lobby and observed a "commotion." He stated that he saw a group of employees around Isenberg and "multiple people" were speaking loudly. Centeno could not hear the specific words that were spoken, but said the employees "did not sound happy." Centeno testified that he followed the group of employees after the incident and, on his own initiative, cautioned them that they risked harassment allegations for confronting people in a manner that made them fear for their safety.

While the Board recognizes that an employee's right to engage in protected activity permits some leeway for impulsive behavior, this leeway must be balanced against an employer's right to maintain order and respect. See, e.g., *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). On this point, the Board has held that "employers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum." *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004). Disorder in this regard can have a "detrimental impact on morale, productivity, and discipline" and thus must be weighed in determining whether an employee's conduct lost the Act's protection. Id. In the circumstances of this case, the employees, by acting together to loudly confront Isenberg in a public area of the hotel and then to prevent him from leaving the area until he listened to their demands, all while ignoring his authority and proper workplace decorum, significantly impaired order and discipline in the hotel. The actions of every individual in this group went well beyond what should be expected or tolerated in the workplace, and accordingly, what the Act should protect.

Based on the foregoing, upon a full application of the *Atlantic Steel* factors, I would find that factors supporting removal of statutory protection substantially outweigh the sole factor supporting its retention. I would therefore adopt the judge's well reasoned conclusion that the Respondent did not violate the Act by disciplining all 13 employees for their misconduct, and I dissent from my colleagues' strained decision to the contrary.

Dated, Washington, DC September 30, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

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.

[3] In reversing the judge, my colleagues assert that the brevity of the incident weighs in favor of finding that the employees did not lose the Act's protection. However, the judge found that if it were not for Isenberg moving to depart the scene, then "he would have been engaged by the workers much longer." In any event, the brevity of misconduct in this case does not so diminish its egregious nature as to justify retention of statutory protection.

WE WILL NOT discharge, suspend, issue a written warning to any of our employees for engaging in protected, concerted activities, or supporting New York Hotel & Motel Trades Council, AFL–CIO or any other labor organization.

WE WILL NOT conduct interviews with our employees concerning the issues in this case, without providing the safeguard warnings set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

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

WE WILL, within 14 days from the date of the Board's Order, offer Esmeralda Lopez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Esmeralda Lopez, Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, Chan Juan Sun, Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Esmeralda Lopez; the suspensions of Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, and Chan Juan Sun; and the warnings issued to Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge, suspension, or warnings, respectively, will not be used against them in any way.

LAGUARDIA ASSOCIATES, LLP D/B/A CROWNE PLAZA LAGUARDIA

Michael Berger, Esq, for the General Counsel.
Andrew S. Hoffmann, Esq. (Wiseman & Hoffman, Esqs.), of New York, New York, for the Respondent.
Jane Lauer Barker, Esq. (Pitta & Giblin, LLP), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on December 19, 2008, by New York Hotel & Motel Trades Council, AFL–CIO (Union), a complaint was issued on May 15, 2009, against LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia (Respondent, Employer, or Hotel).

The complaint, which was amended at the hearing, alleges essentially that the Respondent issued written warnings to employees, suspended others, and discharged four employees in violation of Section 8(a)(1) of the Act because they engaged in protected, concerted activities by meeting with its manager to present him with a signed petition concerning the employees' wages, hours, and working conditions. The complaint further alleges that the Respondent, in the presence of its attorney, unlawfully conducted an interview with an employee concerning the issues in this case, also in violation of Section 8(a)(1) of the Act.

The Respondent's answer denied the material allegations of the complaint, and on July 20, 21, and 24, 2009, a hearing was held before me in Brooklyn, New York.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability New York company having its principal office and place of business at 104–04 Ditmars Boulevard, East Elmhurst, New York, operates a 358 room hotel under the trade name Crowne Plaza LaGuardia. During the past 12 months, the Respondent derived gross revenues in excess of $500,000 and purchased and received at its facility goods and materials valued in excess of $5000 directly from points located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

On September 29, 2004, following an election, the Union was certified by the Board as the exclusive collective-bargaining representative in a unit consisting essentially of all engineering, housekeeping, banquet, front desk, kitchen, restaurant, health club, lounge, and PBX employees employed at the Hotel.[1]

Following the Union's certification, negotiations were held toward a first contract but no contract had been reached by the time of the hearing. The Union conducted rallies outside the Hotel's premises for the past 4 years, and also assembled a group of "strong union supporters" who are the "core" of the Union's campaign, acting as a committee to encourage and educate their coworkers as to their rights and the status of the negotiations. The organizing committee consisted of Maria Lajeunesse, Santiago Mejia, Franklin Riley, Mary Robinson, Janeth Rocha, Gladys Rossi, and Julieta Varela.

According to Nicki Dunham Hoshida, the Union's lead organizer, since there is no official shop steward representing the employees' interests with management, the Union uses the

[1] JD(NY)–32–06; 2006 WL 1895045.

committee members as "employee delegations" to present grievances concerning working conditions. The purpose of the delegation is to build support among the workers, to show management that a large number of employees are engaging in activities in behalf of the Union, and to enable the Union to exert "pressure" at negotiations. Franklin Riley, the leader of the December 10 delegation at issue here, stated that the purpose of a delegation is to present an issue to management and attempt to have it resolved.

Hoshida stated that she conducted about 10 training sessions with the organizing committee concerning how to conduct a delegation, and they practiced doing so. One person speaks to the Employer's agent in a calm voice accompanied by a group of coworkers who act as witnesses and as support for the speaker. The delegation meets with an Employer representative before they begin work, during lunch, or after they complete their work day. Hoshida instructed the delegation to approach the manager in his office or in the cafeteria. If he is not in those areas, they may ask another manager for the location of the official they wish to speak to. Hoshida denied instructing the delegation to prevent the manager from leaving an area by blocking his egress or touching him.

B. Events Leading Up to the Employee Delegation

Hoshida testified that at a negotiation session in November 2008, the Employer announced that its business had slowed considerably and that there was a need for a reduction in staffing. She stated first that the Employer proposed that the workweek of all employees be reduced and the Union objected, asking that a reduction in staff be implemented by lay ing off employees according to their seniority with the Hotel. The Union sought to have the employees' working conditions mirror its collective-bargaining agreements in other hotels where layoffs by seniority was a standard term.

She then testified that the Employer asked the Union which method it preferred and the Union decided on layoffs by seniority. Hoshida stated that although the Employer agreed to implement a layoff by seniority policy, the Union claimed that, at the time of the December 10 delegation, at least one employee's workweek had been reduced, and that the Employer had not laid off employees by seniority as it had agreed. Employee Valera stated that, as of December 10, the Employer had not acted contrary to its agreement to lay off by seniority since no layoffs had yet occurred, but it was her belief that the Respondent "calls" employees with less seniority ahead of those with greater seniority. Further, Hoshida noted that "officially" the method of reduction of employees had been decided but the "purpose of the petition is to show management that over 100 people inside the hotel supported what the union had said. So, it didn't really matter if management even read the petition or got the petition, but the fact that we had a group of workers from inside go support what we had said at negotiations."[2]

According to Gary Isenberg, the Respondent's chief operating officer and acting general manager, he proposed at negotiations that reductions in staffing could be effected by laying off the least senior workers or by reducing all employees' hours, but that the Hotel would agree with the Union's choice. The Union opted for layoffs by seniority and he agreed. He stated that layoffs were effected in January 2009, so that as of the time of the December 2008 delegation, there had not been any layoffs.

On the morning of the December 10 delegation a rally was held outside the Hotel with 30 to 40 employees participating.

Hoshida prepared a petition, in English and Spanish, which stated:

> We, the undersigned, demand that if Martin Field [the Hotel's owner] and his management team start layoffs, they be implemented by seniority, as practiced by the majority of hotels in New York City. We do not want reduced schedules, we want a fair system. It is unjust for Martin Field to build a new hotel while the workers who made the Crowne Plaza La-Guardia profit for years are laid off.

The petition, which consisted of 8pages, bore the signatures of about 100 employees. On the morning of the December 10 delegation, Hoshida called employee Riley and asked him to lead the delegation with the committee. They had conducted about six or seven delegations prior to that time.

C. The Delegation

The employees' work day begins at 8 a.m.[3] Delegate leader Riley and the other delegates punched in at work between 7:53 and 7:55 a.m. Riley donned his uniform and went to the cafeteria where he waited for other committee members, all of whom were housekeepers. The delegates, all in their work uniforms and some carrying clipboards indicating that they had received the day's assignments from their supervisors, assembled in the cafeteria. When Riley saw that enough workers had arrived, about 12 to15, he told them that they would do a delegation that morning.

Riley stated that he told the delegates that he would read the petition to manager Isenberg and ask him to take the petition and make layoffs by seniority. They went in a group to Isenberg's office.

Isenberg was not in his office. Riley stated that he could not have simply left the petition in the office because he would not enter the office when Isenberg was not present. He saw security guard Yassar Hassanein who asked him if he was looking for Isenberg. Hassanein suggested that he may be in the lobby area.[4] The group walked toward the rear of the Hotel and saw Isenberg speaking on his cell phone in a hallway off the lobby near the entrance to the garage. They waited until Isenberg's phone conversation ended and then approached him.

A security camera recorded the meeting. A silent video re-

[2] Employee Riley was confused as to the Employer's proposal. He believed that the Employer wanted to lay off the most senior employees first.

[3] According to Riley, employees may punch in up to seven minutes after 8 a.m. and still be considered on time. This was contradicted by the Employer's witnesses, and I find that the work day began at 8 a.m.

[4] I need not resolve the conflicting testimony of whether, according to Riley, Hassanein accompanied them to Isenberg or whether he followed them. The video shows that Hassanein followed the first group of six employees who approached Isenberg.

cording of the incident in stop-start intervals and individual photographs taken from the video recording were received in evidence. About 15 employees congregated closely around Isenberg in an area 10 feet wide by 32 feet long.

Riley stood next to Isenberg while a group of employees surrounded them in a tight semicircle. Riley testified that he greeted Isenberg and told him, in a "very low tone of voice" that "I have a petition here to read. I'm just asking that you take it." Riley stated that he began to read the petition when Isenberg interrupted, saying "wait. Wait. I'm not going to speak to all you guys. I will only speak to one person." Riley responded that he was the only one speaking. Isenberg testified that when Riley began reading, Isenberg told him "I really appreciate what you have to say, Franklin, but I'm not going to meet with a group of employees especially not in the lobby, and you're more than welcome to come to my office and meet with me, my door is always open for you, but I'm not going to meet with you here in the lobby, so please go back to work.

Riley stated that he continued to read the petition and asked Isenberg several times to take it. Riley finished reading the petition and as Isenberg left the area he took the petition from Riley. Riley stated that when Isenberg was about to accept the petition, Hassanein pushed his arms out and said "hey guys, you guys." The workers then returned to their work stations.

The Respondent claims that the employees at the delegation engaged in improper conduct in violation of its policy, specifically, touching Isenberg and preventing him from leaving the scene, and touching Hassanein, and also that employees engaged in loud chanting. The employees denied engaging in any such conduct.

The video records the incident second by second. It establishes that the first employee appeared in the lobby some distance from Isenberg, who was then on the phone, at 8:00:33 a.m. Isenberg ceased his phone conversation at 8:00:38 and faced the approaching employees. He is face-to-face with Riley at 8:00:42 who begins reading the petition at 8:00:43. They are surrounded by other delegates. Isenberg begins to move away from the scene at 8:01:06 and cannot easily exit the area, when at 8:01:14 he turns to Hassanein and, according to his testimony, asks for help. At 8:01:17, Isenberg finds an opening in the group and begins to leave.

At 8:01:19 he is handed the petition, and at 8:01:20 he is no longer in the video. At 8:01:30 no employees are visible in the video.

Accordingly, the delegation, beginning when the group first appeared in the video until the video no longer recorded their presence in the area lasted about 57 seconds, and the confrontation with Isenberg from the time he stood next to Riley took approximately 38 seconds.

D. The Respondent's Evidence

Isenberg testified that Riley began reading "something" to him. Isenberg heard him speak but did not understand what he was saying. He interrupted Riley and told him that he appreciated what he was saying but would not speak to the group of employees in the lobby, but would speak to one person in his office. He asked them to return to work, and began to step away from the group. At that time about 10 to 15 employees were present.

Isenberg stated that he attempted to leave the area and was blocked by the employees from doing so. He heard the workers loudly say "no, you're going to listen to us." Isenberg specifically testified that he heard employee Sun say "no, listen, no, listen" and heard Fernandez yell "no, you're not going anywhere," and heard a man, he assumes that it was Mejia, say "no, you are going to listen to us." Riley denied that any of the assembled employees, except him, spoke during the incident.

Isenberg stated that when the employees "surrounded" him, he repeated his instruction for them to return to work, directing them in that manner at least three times during the incident. Riley denied that Isenberg told the workers to return to work, but employee Sun recalled hearing someone, possibly Riley, telling them to go back to work. Isenberg then attempted to leave the area but found that when he moved in one direction, employee Varela followed his movement "like a defensive linebacker" preventing his departure, "pushing her chest up against" him. Isenberg asserted that she touched him in this way several times while loudly telling him "you're going to listen to us, you're not going anywhere."

Isenberg kept trying to move away from the group but found that they blocked his way. He stated that employee Robinson prevented his movement by stepping next to Varela and putting her arm around his waist, stopping him from getting past her. He then found that he could not move in any direction. Isenberg recounted that the workers, specifically Robinson, were telling him very loudly, in a repetitive fashion, "you're not going anywhere, you're going to listen to us." He then turned to guard Hassanein and asked for assistance . . . "they're not letting me out, I need help." At that moment, Isenberg noticed a gap in the crowd and spun around in a "360 football move" and found "somewhat of a clear path to move," but as he did so Riley moved with him, attempting to grab his shoulder to slow him down. Isenberg "shrugged him off but he kept chasing me," grabbing his shoulder, reaching around his waist with the petition, and touching him at least three times. Isenberg also stated that Varela then "kind of cut in front of" him and grabbed his left arm, stopping his progress.

Riley stated that as Isenberg was moving he was still asking him to take the petition, and he did so. Isenberg stated that at that point he realized for the first time that the employees wanted him to take the petition. He heard Riley ask him to take it, and he did. Prior to that time he did not know that the papers in Riley's hand was a petition or that Riley wanted him to accept it. He just heard the employees say that they wanted him to listen to them. In this respect, employee Varela stated that Isenberg did not want to take the petition because he did not reach out and accept it.

At that point, with Isenberg moving away and taking the petition, the delegation ended, and the group walked through the lobby to their workstations, passing Human Resources Director Mercurio and New York City Police Officer Javier Centeno.

Guard Hassanein testified as to his recollection of the incident. He stated that he saw the group of employees walk to Isenberg's office and he asked if they needed help. They said that they were looking for Isenberg. Hassanein did not know his whereabouts, and they walked through the lobby, and "every-

one started to talk to [Isenberg]" in a loud voice, chanting "we want to talk to you." Hassanein followed and saw Riley handing Isenberg a paper telling him that he wanted to speak to him. He heard Isenberg tell the workers that he could not speak to them at that time, and that they should return to work and that he was available in his office to speak to them.

Hassanein saw Isenberg attempt to get through the crowd to leave the area when employee Varela prevented him from doing so by stepping in front of him "with her chest." As Isenberg left the area Hassanein was "going after him to try to give him space" opening his arms to clear an opening for him, saying "hey guys, hey guys, move, move, move." At that time an employee grabbed his [Hassanein's] arm. At the same time, Hassanein concedes that when he extended his arms he may have touched employees since they were close to him. He admitted that the video shows his elbow on the neck of employee Robinson who testified that she asked Hassanein why he was pushing her. According to Robinson, Hassanein replied that "my boss pay me for that. If you don't move I'm going to call the police." Employee Lopez stated that she saw Hassanein get between the group and Isenberg, moving his arms and telling the workers to get away from him.

During the incident, two guests could be seen in the video walking around the assembled employees and exiting the Hotel into the garage area. They did not stop and were not prevented from leaving the area.

Isenberg stated that he left the area and went to his office feeling shook up, panicky, nervous, anxious, and a little fearful, but not in fear of his physical safety. He believed the situation was becoming "hostile," while nevertheless admitting that some of the housekeeper delegates were over 60 years old, had been employed by the Hotel for nearly 20 years, and he had known them for many years. Further, they bore no weapons that he saw, and security guard Hassanein was at his side during the incident. When he tried to step away he was afraid that the incident would "escalate to the next level" when employees tried to touch him and hold him back. He noted that he could have broken through the crowd and pushed his way through but was careful not to do anything to "instigate" the situation further.[5]

Human Resources Director Mercurio stated that she had seen the crowd surrounding Isenberg and chanting loudly for about 37 seconds. As she approached them, Isenberg maneuvered his way out. She observed that he looked frightened, and his face was very red. Mercurio and he entered Isenberg's office where he read the petition and was surprised to learn that the message was meaningless because the Employer had already agreed to lay off workers by seniority. Mercurio asked Isenberg if he was all right and if the employees touched him. He said they did and Mercurio suggested calling the police.

Police Officer Centeno was in the Hotel in response to a complaint of noise from the union rally outside the building. He testified that he observed the scene, which he described as a "commotion" from about 100 to 150 feet away. He stated that he saw a group of employees surrounding Isenberg. He could hear "multiple people" speaking and they did not sound happy, but he could not hear the specific words spoken. He described their tone as "loud"—louder than a normal conversation, but not chanting or screaming.

Officer Centeno stated that after the group left the area and walked by him, he decided, on his own, to follow them as they walked through the lobby and speak with them "because they surrounded a man." He told them that they had to be careful in approaching someone, cautioning that if they had a problem with someone their method of handling the situation was wrong, adding that if they put a person in fear of their safety it could be considered harassment. Centeno made no arrests, and heard no claims that anyone was injured.

At the same time, after the incident ended, two Hotel employees who worked in the front desk area, Carol Lynn Mears, a front desk agent, and Effie Mikedis, the director of guest services, noticed the group walking towards the ballroom area, speaking loudly. Guests were in the lobby. Mikedis stated that they were also chanting and giggling, but could not hear what they were saying and the noise lasted about 1½ minutes while they walked from the garage area past the lobby. She stated that guests asked what was happening but no complaints were made, although she believed that the group's conduct was "disrespectful." In addition, no guests stated that they would not patronize the Hotel again, and no guest meetings scheduled for that day were cancelled because of the incident.

Mears heard the noise for a couple of seconds and saw Isenberg emerge from the crowd, appearing to be trying to "get away" from the employees. Neither Mears nor Mikedis saw anyone touch Isenberg, and neither had observed this kind of activity before in the Hotel.[6]

Isenberg told Officer Centeno that he felt nervous by being surrounded by the employees and wanted to make a police report. Centeno and other officers joined the Employer's officials and watched the video of the incident. A written police report of "harassment" was made that day which states:

> Harassment/victim states he was in the lobby of Crowne Plaza Hotel when a group of employees surrounded the victim and prevented him to pass through the lobby. Victim states he had to push through the employees at which point (3) employees grabbed his arm causing alarm and annoyance. No injury to victim[7]

Mercurio, Mikedis, and Officer Centeno stated that they did

[5] Isenberg and Hassanein are over 6 feet tall while the employees were all 5'4" or shorter, except for Riley who was 5'9." The workers were, for the most part, in their 50's or 60's.

[6] The Union alleges that Mikedis and Mears were biased against it. Mikedis admitted asking a front desk employee to remove his union button when he was at work. That request was apparently the subject of a charge which was settled when the Employer agreed that it would not tell employees not to wear union buttons at work. Mears, a bargaining unit employee, stated that she did not believe that the Union was necessary, and according to the Union, was accused by another employee of being against the Union.

[7] There was some confusion as to when this report was made. A careful examination of the report establishes that it was made on the date of the incident, December 10. A copy of the report was requested on December 29 and a copy was issued on January 5, 2009.

not observe any employee touch Isenberg or Hassanein during the incident.

E. The Discipline

Isenberg testified that the busiest time in the Hotel lobby is in the morning with guests entering, leaving, and checking in and out. He stated that the Employer has an interest in maintaining decorum in the lobby because it is the place where guests enter and leave and is the focal point of the Hotel. He added that it is important that hotel guests feel welcome and have a pleasant, safe, and secure feeling when they enter the Hotel. Isenberg stated that he was not aware of any other incident, in his 25 year hospitality career where employees were loud or acted inappropriately in a hotel lobby.

The video establishes that the incident began with Riley being face to face with Isenberg at 8:00:43 a.m., and it ended at 8:01:21 a.m. when Isenberg left the area holding the petition. After viewing the video and speaking with Isenberg and Hassanein and identifying the workers involved, Mercurio suspended employees Riley, Orfa-Nelly Fernandez, Marie Lajeunesse, Esmeralda Lopez, Santiago Mejia, Antonia Napoletano, Amarilis Martinez Perez, Maerene Robinson, Yaneth Rocha, Gladys Rossi, Lourdes Sanchez, Chan Juan Sun, and Julieta Varela without pay pending an investigation. Thereafter, on December 12, four employees were discharged, five were suspended without pay for 3 days, and four were given written warnings for their conduct during the incident.

Mercurio stated that she and Isenberg determined the severity of the discipline to be issued to the employees based on the nature of the individual employee's actions during the incident, and their examination of discipline of others in the past who were engaged in similar misconduct. For example, employees who physically touched Isenberg or Hassanein and blocked their egress were discharged. Workers who "were involved in the circling of the group" and speaking loudly in the lobby, shouting and being disruptive and "trying to keep us from moving freely but did not touch them, and who did not obey a direct order, were suspended without pay for 3 days, and those who were insubordinate by not returning to work when directed and participated in the incident were given a written warning.

Employees Franklin Riley, Maerene Robinson, and Julieta Varela were discharged by the following letter:

> Based on the events on 12-10-08 at 8:01 a.m.; you instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty; and you grabbed and physically attempted to prevent VP/Operations Gary Isenberg from leaving the area as he attempted to try to do so. Your behavior was threatening, intimidating, and completely inappropriate to the workplace.

Esmeralda Lopez, who was also discharged, received the following letter:

> Based on the events on 12-10-08 at 8:01 a.m. you instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty; and physically grabbed the arm of Security Supervisor Yassar Hassanein, and tried to prevent him from assisting VP/Operations Gary Isenberg from exiting the area as he attempted to try to do so.

Employees Riley, Robinson, and Varela testified that they did not physically prevent Isenberg from leaving the area or touch him, nor did they see any other workers do so. Riley stated that he was the only one speaking. However, employee Robinson conceded that when Isenberg told Riley he would speak to him "one on one" she remarked we are "all together you would have to speak to all of us," and Valera admitted asking him "are you afraid of us?" They denied that employees were chanting or yelling. Discharged worker Lopez also testified that the workers did not want Isenberg to leave until he took the petition "because that's why we went there; for him to please take the petition" and the employees were "all worried that he is going to escape without getting the petition . . . because we wanted him to take the petition. That's why we went there." Lopez denied preventing Isenberg from leaving the area or touching Hassanein.

Accordingly, it is likely, and I find that the employees disciplined for touching Isenberg did so. The video and photographs do not distinctly show touching in all instances. The camera was positioned on a wall near the ceiling, while the workers, their backs to the camera, faced the two company officials. However, it is clear that the employees were extremely close to Isenberg, surrounding him in a tight circle as he was being addressed by Riley, and as he was attempting to leave the area. Nevertheless, the video and photographs do show Robinson touching Isenberg's left elbow and back in frames 8:01:13 and 14. Varela may be seen moving from side to side standing in front of Isenberg blocking his egress at 8:0107 through 8:01:10. This is consistent with Isenberg's testimony that she pushed her chest against him several times. Further, Lopez' left hand may be seen on Hassanein's left wrist as he attempts to clear a space among the workers for Isenberg to leave the area. I credit Isenberg's testimony that Riley grabbed his shoulder to prevent him from leaving and reached around his waist with the petition, touching him at least three times. It is likely that Riley engaged in such conduct since it was his duty to give Isenberg the petition and Isenberg did not accept it until he was leaving the area.

Employees Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, and Chan Juan Sun were suspended without pay for 3 days, and received the following letter:

> Based on the events on 12-10-08 at 8:01 a.m. you instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty, and attempted to prevent VP/Operations Gary Isenberg from leaving the area as he attempted to try to do so.

Employees Lajunesse and Chan Juan Sun testified that they did not touch Isenberg. Lajunesse stated that she and the workers stood in a circle with Isenberg in front of them but they did not block him. She and Sun did not hear any yelling or chanting.

Antonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez were given a written warning, as follows:

> Based on the events on 12-10-08 at 8:01 a.m. you instigated and participated in a disturbance in a public area of the lobby of the hotel in full view of hotel guests, using a loud and inappropriate voice; you were away from your work station while on duty,

Regarding the infraction of being away from their work station while on duty, Mercurio stated that once the employees punched in to work, even before the start of their shift, and even if they had not gone to their work stations yet, she regarded them as being on duty. She testified that if the employee does not report to her workstation until 8:03 a.m., following the start of her 8 a.m. work day, she would receive a disciplinary notice. She noted that an employee may speak to a supervisor at the start of her workday even if she had not yet begun work without incurring discipline, but further noted that such communication should take place during a break or lunch hour.

F. The Employer's Handbook

The Respondent relies on certain parts of its handbook, which states as follows:

> Privacy – It is also requested that you maintain a high level of professionalism in your work stations by refraining from loud conversations and any distractive behavior that disturb the Hotel guests.
>
> Principle of Service -Project a professional image through appearance and conduct.
>
> - Problems and discussions should be resolved out of the guest's sight and hearing.
> - Commission of any one of the following acts may be considered just cause for immediate dismissal:
> - Refusing to obey direct instructions from supervisor. (Insubordination)
> - Coercion, intimidation or threats against customers, supervisors or fellow associates.
> - Disrespectful or discourteous conduct to customers or supervisors.
> - Harassment of fellow associates, supervisors or guests. . . .
>
> Commission of any of the following acts may be considered just cause for remedial action which could range from oral or written reprimand to suspension from work without pay to dismissal.
>
> - Unauthorized absence from assigned work area, or being in an unauthorized area. . . .
> - Discussing confidential company information in public areas where customers could overhear conversation.

Analysis and Discussion

A. The Legal Standard

Because the Respondent disciplined its employees for their conduct during the December 10 delegation, the threshold question is whether the workers engaged in conduct protected by the Act, and then, whether they lost that protection. *Tampa Tribune*, 351 NLRB 1324, 1325 (2007). The Board has noted that "the fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984), while at the same time acknowledging that although "employees are permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co*., 313 NLRB 1289, 1290 (1994).

I first find that the employees engaged in otherwise protected, concerted activities by presenting the petition to Isenberg. The petition demanded that the Respondent implement layoffs by seniority and not by reducing the schedules of all the workers. The presentation of the petition to Isenberg constituted protected, concerted activities in behalf of all the employees who participated in the delegation. *Superior Travel Service,* 342 NLRB 570, 574 (2004).

The Respondent argues that the petition itself and its presentation were not protected because the subject matter of the petition, the demand that layoffs be made by seniority, had already been agreed to by the Employer and the Union. Thus, there was evidence that agreement had been reached on the issue. Indeed, Union Agent Hoshida testified that although "official" agreement had been reached, the petition was presented to show solidarity and reiterate the Union's position at negotiations.

However, the employees' presentation of the petition directed at their working conditions constituted concerted and otherwise protected activity even if the subject of the petition, the demand that layoffs be by seniority, was unnecessary since it had already been agreed to, or inaccurate or lacked merit, unless it was undertaken in bad faith. *Hacienda Hotel, Inc*., 348 NLRB 854, 865 (2006); *Wagner-Smith Co.,* 262 NLRB 999 fn. 2 (1982). Here, there was no evidence that the presentation of the petition was made in bad faith. I accordingly find that the presentation of the petition by the delegation constituted concerted and otherwise protected activities.

In *Stanford Hotel*, 344 NLRB 558, 558 (2005), the Board described the type of analysis, set forth in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979), required where employees are disciplined for conduct occurring during the course of protected, concerted activities:[8]

> When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. . . . In making this determination, the Board examines the following factors: (1)

[8] Counsel for the General Counsel argues that *Atlantic Steel* is the appropriate standard, but also urges that *Burnup & Sims*, 379 U.S. 21, 23–24 (1964), should be applied. *Burnup & Sims* held that an employer violates Section 8(a)(1) of the Act by disciplining an employee based on its good faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. Here, the result would be the same even if *Burnup & Sims* was applied inasmuch as I find that the Respondent correctly believed that the employees who were disciplined engaged in misconduct.

the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Applying the *Atlantic Steel* factors, the first factor, the place of the discussion, weighs heavily against protection because the confrontation with Isenberg took place in the public lobby of the Hotel. While the incident occurred in a hallway off the main lobby near the exit to the garage, and not at the front desk, it was in clear sight of the Hotel's guests, and in fact, two guests could be seen in the video approaching and then moving around the employees as they engaged Isenberg. The Board considers whether customers were exposed to the alleged misconduct. *Wal-Mart Stores, Inc*., 341 NLRB 796, 808 (2004). Here, although the two guests exited the area without interference by the employees, they were nevertheless in very close proximity to the incident having to walk around the group of employees. In this connection, the Board has considered as a factor weighing against protection the "public nature of the misconduct which commenced in plain view of employees under [the supervisor's] authority." *Starbucks Coffee Co*., 354 NLRB No. 99, slip op. at 5 (2009). Clearly, a hotel lobby in which guests pass is an inappropriate place for the discussion.

It is true, as counsel for the General Counsel asserts, that the employees did not intend to meet with Isenberg in the public hallway but instead went to his office to speak to him. But nevertheless they were determined to present the petition to him wherever they could find him. Clearly, they could have waited until he was in his office or requested an appointment to meet with him there, but they did not. Further, I cannot find that the employees may be excused for meeting with Isenberg in the lobby because guard Hassanein allegedly directed the group to Isenberg or acted as their escort. The most that could be said is that Hassanein, when told that the workers were looking for Isenberg, told them that he was near the garage. Clearly, his advice cannot be deemed permission for the employees to meet with him there. A careful viewing of the video and photos show that he followed the employees when they approached Isenberg. He did not lead them there or act as their guide.

As to the second factor, the subject matter of the discussion, the petition and its presentation, weighs in favor of protection. As set forth above, the petition involved the employees' working conditions concerning layoffs by seniority, an important consideration in the working lives of the employees. Many were long term employees whose seniority with the Employer was substantial. Accordingly, the workers did not want their hours reduced and instead desired layoffs by seniority. Thus, the Union sought to show that employees supported the Union's position on layoffs by seniority. The petition was presented to emphasize that the Union had the employees' support in the Hotel and that a delegation of workers sought to openly show their support for the Union and its position on this issue. I accordingly find that the subject matter of the discussion, the petition and its presentation, weighs in favor of protection.

The third factor, the nature of the outburst, weighs heavily against protection. As set forth above, Manager Isenberg was confronted in the public hallway of the Hotel by a group of 13 workers after they had punched in to work at 8 a.m. and were on duty, their work day beginning at 8 a.m. As a group, it was their intention to have employee Riley read the petition to Isenberg and ask him to take the petition.

It is undisputed that Isenberg told the group that he could not speak to a group of workers, especially not in the lobby, but would meet with one person in his office. Nevertheless, Riley persisted, saying that only one worker, he, was talking with Isenberg. I credit Isenberg's testimony that he directed them to return to work and they did not. Employee Sun stated that the workers were advised to return to work, although he could not say who issued that directive. Thus, we have a situation where Isenberg sought to disengage from the workers who surrounded him and directed them to go back to work. Rather than obey that direct order, Riley persisted in continuing to read the petition.

It is clear that Isenberg wanted to leave the area and that he was prevented from doing so. The images in the video and photographs clearly show his attempt to move away from the group of workers. As noted above, he moved one way only to be blocked by an employee, and then another way, again having his egress obstructed by another worker. I credit Isenberg's testimony that, upon attempting to leave the area, the workers said "no, you're gong to listen to us" and "you're not going anywhere." His testimony was corroborated by employee Robinson who told him "we are all together you would have to speak to all of us." Indeed, employee Lopez stated that the workers did not want Isenberg to leave until he took the petition. Further, employee Valera asked Isenberg if he was afraid of the workers.

I find that the delegation acted to confront Isenberg and thwart his egress from their group until the petition was read to him and until he took the petition. The General Counsel's argument that the confrontation lasted a short time, only about one minute, is of no moment. The only reason the incident ended is because Isenberg broke free of the group and, as he was leaving the area, took the petition. It is clear that if Isenberg had not moved forcefully to depart the scene, he would have been engaged by the workers much longer.

Certainly, Isenberg could have left the area earlier, but as he stated he did not want to force himself through the crowd, possibly "escalating" the encounter. General Counsel's other argument that Isenberg could not have been frightened or intimidated because the workers were much older and shorter than he and Hassanein is of no consequence. Isenberg genuinely felt intimidated. His report to the police made immediately after the event corroborates his version of the incident. "Harassment/victim states … a group of employees surrounded [him] and prevented him to pass through the lobby. Victim states he had to push through the employees at which point three employees grabbed his arm causing alarm and annoyance."

Based on the testimony of Isenberg and Hassanein I find that they were touched by the employees accused of doing so. I cannot credit the employees' denial that they touched the two men. Clearly, as set forth above, the workers' intention was to demand that Isenberg listen to them and prevent him from leaving until he did so and accepted the petition. As noted above, although the video and photographs do not clearly show Isen-

berg being touched in every instance he claims, the employees are face to face with him and their plan to prevent him from leaving the area supports a finding that they did touch him as he asserted. Further, the police report he made contemporaneously with the incident stating that three employees touched him, supports his version of the events.

In finding certain employee conduct protected, the Board is careful to note that the worker's outburst was "unaccompanied by any threat or physical gestures or contact." *Felix Industries,* 331 NLRB 144, 145 (2000). In contrast, in *National Semiconductor Corp*., 272 NLREB 973, 974 (1984), the Board found unprotected an employee's making "moderate physical contact" and "bumping and shoving" a supervisor in order to retrieve a petition unlawfully taken from the employee, and also his momentary blocking of the supervisor's egress from his office to attend to an emergency.

Further, the nature of the conduct toward Isenberg would reasonably tend to affect workplace discipline by undermining his authority. *Daimler Chrysler Corp*., 344 NLRB 1324, 1329 (2005). It is clear that by confronting him in a public place, insisting that he must listen to the workers and could not leave until he did, Isenberg's authority and respect was impaired. "Employers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum. Disorder can have a detrimental impact on morale, productivity, and discipline." *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004). An objective view of the confrontation must lead to the conclusion that the behavior of the employees disciplined exceeded what could be expected or tolerated.

Starbucks Coffee, above, slip op. at 4, may provide some guidance here. In that case, an employee left a concerted, protected rally and, accompanied by a group of people, followed a company official down a public street shouting profanities and threats. The Board found that the employee's deliberate intimidation "distinguished her behavior from the type of spontaneous, provoked, and nonthreatening outbursts that the Board has found protected in other cases."

With respect to the loud noises or chanting testified to by the Respondent's witnesses, the evidence establishes that employees were speaking loudly. I cannot credit the employees' testimony that no one spoke except Riley. Clearly, other employees stated that they spoke to Isenberg. Further, the credible testimony of neutral witness Officer Centeno was to the effect that he heard loud voices from many people, prompting him to confront the group.

It must be noted that the Respondent's handbook contains certain provisions which were violated by the employees involved for which discipline is prescribed. Those transgressions, as applicable here, include employees having from loud conversations and distractive behavior that disturb Hotel guests, airing problems and having discussions within guests' sight and hearing, refusing to obey direct instructions from a supervisor, disrespectful or discourteous conduct to supervisors, and unauthorized absence from an assigned work area.

The fourth factor, whether the outburst was provoked in any way by an unfair labor practice committed by the Employer, does not favor protection. There was no evidence of any unfair labor practice engaged in by the Respondent. It should be noted that the Union and the employees were understandably frustrated by the lack of progress in bargaining inasmuch as the Union was certified 4 years earlier. Indeed, the Union took lawful steps to encourage movement in bargaining by soliciting public support by engaging in rallies outside the Hotel and delegations. However, this delegation went beyond the activity permitted the Board in *Atlantic Steel.*

Thus, the only factor favoring protection is the subject matter of the discussion while the other three factors weigh against protection, with the subject matter of the outburst weighing heavily against protection. I accordingly find and conclude that the employees' actions were not protected and that the Respondent did not unlawfully discipline them for engaging in such unprotected activities during the delegation.

B. The Discipline Imposed

As set forth above, employees Lopez, Riley, Robinson, and Varela were discharged for instigating and participating in a disturbance in the Hotel lobby, using a loud and inappropriate voice, and being away from their work station while on duty. In addition, Riley, Robinson, and Varela were cited for grabbing and physically attempting to prevent Isenberg from leaving the area, thereby engaging in threatening, intimidating, and inappropriate behavior. Lopez was cited for grabbing the arm of Hassanein and attempting to prevent him from assisting Isenberg from exiting the area.

The evidence as set forth in the testimony of the Respondent's witnesses, the video tape and the photographs fully supports the reasons for the discharge. First, there was evidence that employees were speaking loudly during their confrontation with Isenberg as confirmed by Officer Centeno and the front desk agents. Regarding the allegation of touching Isenberg and Hassanein, although the video tape and photographs are not precise since the employees' backs faced the camera, it is clear that the group of workers was in a tight semicircle around Isenberg, sometimes two and three deep, with the closest group face to face with him. As set forth above, the photographs do, in fact, show contact by Lopez, Riley, and Robinson.

As to the suspensions imposed on employees Fernandez, Lajeunesse, Mejia, Rossi and Sun, the evidence supports a finding that they did, in fact, participated in the confrontation and were part of a group that used loud voices, were away from their work stations, and attempted to prevent Isenberg from leaving the area. The evidence further supports a finding that the warnings issued to Napoletano, Perez, Rocha, and Sanchez based on their participation in the confrontation and being part of a group that use loud and inappropriate voices were based on their actions during the incident and were not improperly issued.

Accordingly, the Respondent's approach to applying discipline to the employees engaged in the delegation was careful, measured, and explicitly tailored to the conduct it believed the employees engaged in. Thus, the employees who touched Isenberg and Hassanein were discharged, others who attempted to impede Isenberg's egress from the area were suspended for 3 days, and others who engaged in the delegation and were loud were issued warnings. Thus, it cannot be said that the Employer engaged in a deliberate effort to discharge everyone who par-

ticipated in the delegation, but rather determined the nature of each employee's participation therein and imposed the discipline warranted by his or her actions.

C. The Alleged Unlawful Interview

At the hearing the complaint was amended to allege that on July 22, 2009, the Employer, in the presence of its attorney, conducted an interview with an employee regarding the issues in this case, in violation of *Johnnie's Poultry Co.,* 146 NLRB 770 (1964).

On December 12, 2008, employee Napoletano received a written warning for her participation in the incident. On the second day of the hearing, July 21, 2009, counsel for the General Counsel rested his case, and the hearing was scheduled to resume on July 24. Napoletano stated that on July 22, she was cleaning a guest room when Housekeeping Manager Bruce Falcetti entered and told her that Human Resources Director Mercurio wanted to speak with her. She entered a conference room where Mercurio, security guard Hassanein, Respondent attorney Andrew Hoffman, and a woman whose name she did not know were present. They asked if she wanted bottled water or cookies, an offer never made to her before or after that day.

Napoletano testified that the meeting lasted about 10 minutes, during which Hoffman mentioned that his grandfather was from Naples, and that he and Mercurio were of Italian ancestry. Hoffman asked her what happened on the day of the incident. She replied that Riley held a paper and "we" asked Isenberg to look at it, and the group said nothing else to Isenberg. He asked if anyone touched Isenberg and she answered "no." She said that the group was talking individually and not together, and that no one was shouting.

Napoletano stated that no one told her that her participation in the meeting was voluntary, and no one assured her that there would be no retaliation for anything she said. She also noted that no one told her why she was being questioned. She agreed that everyone was nice and polite to her and she did not feel frightened or intimidated. Napoletano testified that she did not recall Hoffman asking if she minded if they spoke about the incident, or that she need not worry about anything or her job.

Hoffman testified that he was at the Hotel on July 22 preparing certain witnesses for the hearing. He asked Hotel officials whether any employees who were present at the incident who had not been called by the General Counsel were at work that day. He was told that Napoletano was present. Hoffman asked Supervisor Falcetti to ask her if she would be willing to speak to them.

Hoffman testified that he told Napoletano that he was the Hotel's attorney and Mercurio asked if she wanted water or cookies. He greeted her and they made small talk first, he asking her how she was. Hoffman noted that she spoke with an accent and asked what language she speaks. She said "Italian," and Hoffman asked where her family hailed from. When she said "Naples," Hoffman volunteered that his family was from Naples, also.

Hoffman testified that he then asked her if she would be willing to talk to him about the incident on December 10. She said that she did not mind speaking about it. Hoffman said that their conversation would not affect her job in any way and said in Italian that she should not worry. He stated that she seemed very relaxed. In response to seven or eight questions, including whether she heard any noise or employees talking or yelling, and whether she could see anyone touching Isenberg, she answered that she was standing in the back of the group and could not see what anyone did or where anyone was standing.

Hoffman then thanked her, and again said that she did not have to worry about anything, and that their meeting would not affect her job in any way.

In *Johnnie's Poultry,* the Board recognized that an employer could properly question employees on matters involving their Section 7 rights "where such interrogation is necessary in preparing the employer's defense for trial of the case." However, the Board established "specific safeguards designed to minimize the coercive impact of" such interrogation. The employer "must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

As noted above, Napoletano was asked by her supervisor to report to a conference room in which the human resources director, security guard, and Hotel attorney were present. Counsel for the General Counsel's claim in his brief that the Respondent attempted to bribe Napoletano with water and cookies because such an offer had not been made to her before is meritless. Napoletano conceded that the Employer representatives were nice and polite and that she did not feel frightened or intimidated.

Nevertheless, an objective standard must be used. The question is whether the Respondent provided all the safeguards required in *Johnnie's Poultry* which stated that "when an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege." It is apparent that Hoffmann did not tell Napoletano the "purpose of the questioning." The purpose of the inquiry was apparent to Hoffmann—he sought to interview any employee who was present during the incident who had not been called by the General Counsel to testify to learn about the incident. That was a legitimate purpose. However, that purpose was not communicated to Napoletano.

Inasmuch as one of the three required safeguards had not been given to Napoletano I need not determine whether, as testified by Napoletano, she was not told that her participation in the interview was voluntary or that she would suffer no reprisals as a result of it. It should be noted that none of the other participants in behalf of the Employer testified as to this issue, so there is no corroboration by Mercurio or Hassanein of Hoffmann's testimony that he told her that her participation was voluntary or that her job would not be affected.

The Board has stated that it "has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding." *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987). The Board found in that case that by failing to administer all three warnings, including the purpose of the questioning, that the

respondent violated the Act.

I accordingly find and conclude that the Respondent unlawfully conducted an interview concerning the issues in this case in violation of Section 8(a)(1) of the Act by not advising Napoletano, as required by *Johnnie's Poultry,* of the purpose of the interview.

CONCLUSIONS OF LAW

1. By conducting an interview with an employee without failing to advise her of the purpose of the interview pursuant to *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), the Respondent has violated Section 8(a)(1) of the Act.

2. The Respondent has not violated the Act by disciplining employees Franklin Riley, Maerene Robinson, Julieta Varela, Esmeralda Lopez, Orfa-Nelly Fernandez, Marie Lajeunesse, Santiago Mejia, Gladys Rossi, Chan Juan Sun, Anatonia Napoletano, Amarilis Martinez Perez, Yaneth Rocha, and Lourdes Sanchez.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia, Elmhurst, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conducting interviews with employees concerning the issues in this case, without providing the safeguard warnings set forth in *Johnnie's Poultry Co*., 146 NLRB 770 (1964).

(b) 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) Within 14 days after service by the Region, post at its facility in East Elmhurst, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, 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 July 22, 2009.

(b) 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.

Dated, Washington, D.C., December 28, 2009.

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

WE WILL NOT conduct interviews with our employees concerning the issues in this case, without providing the safeguard warnings set forth in *Johnnie's Poultry Co*., 146 NLRB 770 (1964).

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

LAGUARDIA ASSOCIATES, LLP D/B/A CROWNE PLAZA LAGUARDIA

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] 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."