Woodbury Partners, LLC d/b/a The Inn at Fox Hollow *and* Ana Hernandez *and* Berta Luz Garcia. Cases 29–CA–28122, 29–CA–28164, and 29–CA–28235

August 22, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 5, 2007, Administrative Law Judge Howard Edelman issued the attached decision and, on December 31, 2007, he issued an erratum modifying the notice. The Respondent, the General Counsel, and the Charging Parties each filed exceptions and supporting briefs, and the Respondent and the Charging Parties filed answering briefs.

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 only to the extent consistent with this Decision and Order.[2]

The judge found that the Respondent violated Section 8(a)(1) of the Act by photographing employees while they were engaged in lawful picketing. He dismissed the consolidated complaint allegations that the Respondent violated Section 8(a)(1) by:

(1) threatening employees with loss of employment and hotel closure if they supported Local 1102, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union); (2) making statements indicating that support for the Union would be futile; and (3) discharging employee Berta Luz Garcia. The judge did not address the consolidated complaint allegation that the Respondent violated Section 8(a)(1) and (3) by discharging Supervisor Alicia Arvelo.

For the reasons explained below, we remand to the judge the Arvelo discharge allegation, and we reverse the judge and find that the Respondent unlawfully discharged Garcia. We otherwise adopt the judge's findings with certain modifications, as set forth below.[3]

1. *Arvelo's discharge.* The consolidated complaint alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Supervisor Alicia Arvelo in order to induce employees to abandon their support of the Union. The judge failed to address this allegation and the General Counsel excepted to the judge's failure to do so. We find merit in the General Counsel's exception.

The Respondent operates a hotel in Woodbury, New York. In the summer of 2006,[4] the Respondent's housekeeping employees, most of whom do not speak English fluently, sought assistance from the Workplace Project, a nonprofit organization that provides low cost or pro bono legal representation to immigrant workers, regarding complaints about the quality of supervision and working conditions at the hotel. With the help of the Workplace Project, the employees drafted a letter to the Respondent outlining their complaints. The letter stated that the recent increase in the number of rooms the employees were required to clean each day from 13 to 14 made it difficult to maintain the expected level of quality. The letter also

[1] We correct the following factual errors in the judge's decision: (1) although the judge correctly found that the August 17, 2007 picketing "took place on the sidewalk on the opposite side of Respondent's facility," the record demonstrates that the picketers also crossed the street at times and picketed on the public sidewalk directly in front of the Respondent's facility; (2) the Respondent informed its employees of Supervisor Alicia Arvelo's discharge at a group meeting held on about October 20, 2006, not "sometime after November 7," as found by the judge; and (3) the Respondent's fourth written warning to employee Berta Luz Garcia is dated February 6, 2007, not February 6, 2006, as found by the judge.

The General Counsel, the Charging Parties, and the Respondent have 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] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

The judge recommended a broad Order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted and substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods,* 242 NLRB 1357 (1979).

Because the record indicates that many of the Respondent's employees do not speak English fluently, we shall order the Respondent to post the notice to employees in both English and Spanish. *North Hills Office Services,* 346 NLRB 1099 fn. 4 (2006).

[3] We agree with the judge, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) by photographing employees while they were engaged in lawful picketing. In adopting this finding, we reject the Respondent's argument that its photographing was justified to protect Arvelo and her vehicle as she left the hotel. The record establishes that the picketing was entirely peaceful and nonviolent, and General Manager Franklin Manchester testified that Arvelo remained *inside* the hotel while he took the photographs, and that she did not depart until after the picketers had dispersed.

We also agree with the judge, for the reasons he stated, that the Respondent did not violate Sec. 8(a)(1) by allegedly threatening employees with loss of employment and closure of the hotel if they supported the Union.

[4] All dates are in 2006, unless otherwise indicated.

stated that Arvelo, who was the employees' immediate supervisor, threatened them with discharge "using extremely vulgar and offensive" language if they failed to clean the required number of rooms. It concluded, "We would like to have a meeting with you as soon as possible, with all of us present, to discuss this situation." The employees mailed the letter to General Manager Franklin Manchester on about July 20.

Manchester testified that on receipt of the letter he immediately interviewed Arvelo and the housekeeping inspectresses. However, the Respondent did not take any action against Arvelo or arrange the requested meeting with the housekeeping employees.

On August 17, the employees peacefully picketed on the public sidewalks near the Respondent's facility after working hours. They carried signs and chanted "no more unjust firings, no more disrespect and no more Alicia Arvelo."

On October 3, the Union filed a petition for an election. On about October 6, at a management-initiated meeting with employees, Owner Anthony Scotto announced that he had heard the employees were trying to bring in a union and asked why they felt that was necessary. Employee Berta Luz Garcia responded that the employees contacted the Union because Arvelo was mistreating them. Scotto then said that the Respondent was investigating the employees' complaints about Arvelo and that it could not discharge her without proof of misconduct. He also said that he was going to give her "another opportunity."

At another group meeting on about October 20, Scotto announced, "Well, I have done something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a union here."

On October 24, Garcia informed the Union that the employees had decided to stay the petition. The Union withdrew the petition on November 7.

The Respondent denies that it discharged Arvelo in order to induce employees to abandon their support of the Union. It asserts that it initiated an investigation on receipt of the July 20 letter; the investigation revealed numerous instances in which Arvelo made vulgar and insulting comments to the housekeeping employees; and that it would have discharged Arvelo even in the absence of the union campaign.

The Board has long held that an employer violates Section 8(a)(1) where it discharges an unpopular supervisor in order to influence its employees' choice in an election.[5] Such a discharge is viewed as the conferral of a benefit, and the circumstances may support an inference that the benefit is for the purpose of interfering with or coercing employees in their choice of representative. An employer may rebut this inference, however, by establishing an explanation other than the pending election. *Stanadyne Automotive Corp.*, 345 NLRB 85, 91 (2005), affd. in relevant part 520 F.3d 192 (2d Cir. 2008); *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979).

"Similarly, an employer cannot time the announcement of [a] benefit in order to discourage union support, and the Board may separately scrutinize the timing of [a] benefit announcement to determine its lawfulness." *Stanadyne*, supra, quoting *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 545 (2002). The standard for determining whether the announcement of a benefit during the critical period is unlawful is the same as the standard for determining whether the grant of the benefit itself violates the Act. Thus, the Board will infer that an announcement of benefits during the critical period is motivated by an intent to influence the employees' choice in the election. However, an employer may rebut the inference by demonstrating a legitimate business reason for the timing of the announcement. *Stanadyne*, supra; *Mercy Hospital*, supra.

As indicated above, although the issue was clearly alleged in the consolidated complaint and fully litigated at the hearing, the judge failed to determine whether the Respondent violated the Act by discharging Arvelo. Accordingly, we shall sever and remand this allegation to the judge for further consideration.

On remand, the judge shall apply the standard set forth above and determine, on the existing record,[6] whether the Respondent violated Section 8(a)(1) and (3) of the Act by timing Arvelo's discharge or the announcement of her discharge to interfere with or coerce its employees in their choice of representative. In making this determination, the judge may be required to resolve credibility issues that were not addressed in his previous decision.

2. *Threat of futility*. We affirm the judge's dismissal of the consolidated complaint allegation that the Respondent violated Section 8(a)(1) by threatening employees that unionization would be futile. However, we do not rely on the judge's rationale.

The judge found that the General Counsel was relying on testimony pertaining to Scotto's announcement of Arvelo's discharge to establish the violation. He concluded that the testimony did not establish a threat of futility, and dismissed the allegation on that basis.

[5] See, e.g., *Burlington Times, Inc.*, 328 NLRB 750, 750–751 (1999) (employer violated Sec. 8(a)(1) by forcing the resignation of a supervisor about whom employees complained, for the calculated purpose of influencing the election); *Ann Lee Sportswear, Inc.*, 220 NLRB 982 (1975) (same), enfd. 543 F.2d 739 (10th Cir. 1976).

[6] The judge may not reopen the record to take additional evidence.

The General Counsel excepts, arguing that the judge erred by failing to consider unrebutted testimony that establishes the futility threat.[7]

Inspectress Anna Hernandez testified that, at a management-initiated meeting sometime in October, Scotto told employees:

> [The Union] can guarantee neither your job nor your money, nor your pay. It's not a guarantee, it's just a blank piece of paper. The only thing that the Union will do is take away your money from you. There is no guarantee.[8]

We agree that the judge erred by not considering this testimony. Nevertheless, for the reasons that follow, we affirm the judge's dismissal of the allegation.

The Board has held that statements that bargaining will start from a blank sheet of paper or from zero violate Section 8(a)(1), if, in context, they would reasonably lead employees to believe that their current benefits will be lost or reduced and can only be regained through negotiations with the employer.[9]

In the present case, Scotto's statements did not reasonably imply that employees would suffer a loss of benefits or a reduction in wages if they voted for the Union. Rather, his remarks, in context, would clearly be understood to mean that the Union's "guarantee" was no better than a blank piece of paper and that the Union cannot guarantee improvements in wages or benefits. Such statements are legitimate campaign propaganda. See, e.g., *Riley-Beaird, Inc.*, 271 NLRB 155 (1984) (absent threat to reduce existing benefits, employer's remarks comparing union to a "blank piece of paper" constituted "permissible partisan propaganda protected by Section 8(c)"). Consequently, we find that Scotto's statements did not violate Section 8(a)(1).[10]

3. *Garcia's discharge*. Finally, for reasons explained below, we reverse the judge's dismissal of the consolidated complaint allegation that the Respondent violated Section 8(a)(1) by discharging Berta Luz Garcia.

Garcia was the principal catalyst behind the July 20 letter to Manchester and the employees' decision to contact the Union. She was also very vocal during group meetings with Scotto, acting as the chief spokesperson for employees regarding their complaints about mistreatment by supervisors and the increase in the number of rooms the employees were required to clean.

The consolidated complaint alleges that "on February 6, 2007, the Respondent held a group meeting with housekeeping employees, including [Berta] Luz Garcia, to discuss their work related complaints concerning housekeeping inspector Delmi Nolasco," and that the Respondent discharged Garcia because she "participated with other employees in making concerted complaints about working conditions at the meeting . . . and because she engaged in other protected concerted activities."

The Respondent claims that Garcia was discharged pursuant to its progressive disciplinary system after she received four written warnings. In support, the Respondent introduced into the record warnings dated October 25 and 28, December 5, and February 6, 2007.

The judge found that the General Counsel met his initial *Wright Line*[11] burden of establishing that protected conduct was a "motivating factor" in the Respondent's decision to discharge Garcia. However, he further found

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[7] The Charging Parties except to the judge's failure to find an unlawful threat of futility based on Scotto's announcement of Arvelo's discharge. However, that theory was not specifically alleged or litigated. Further, the fact that the General Counsel has not excepted to the judge's failure to find the violation on the basis of that testimony supports the view that he did not intend to proceed on that theory. The General Counsel controls the complaint, and the Charging Parties cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006).

[8] Two other employees testified, in less detail, about Scotto's remarks. Garcia testified that Scotto said:

> The Union is just paper. It's doesn't–it's not worth anything. They're just going to take away your money, and you are okay with me.

Anna Torrez testified:

> He said that the union, the union was, was, it was like a blank piece of paper. . . . He said basically the union didn't have any benefits for us.

[9] See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 618 fn. 22 (2007) (statement that bargaining would start from a "blank page" was unlawful in context of employer flyers implying that the forfeiture of a customary wage increase was a "lawful and ineluctable consequence" of bargaining); *Lear-Siegler Management Service*, 306 NLRB 393 (1992).

[10] In exceptions, the Charging Parties contend that the General Counsel failed to introduce documentary evidence establishing that the Respondent threatened and coerced employees in violation of Sec. 8(a)(1). In support, the Charging Parties submitted what they contend are campaign flyers distributed by the Respondent. Although no party has filed a motion to strike, we have not considered the documents because they are not a part of the record, and the Charging Parties have not moved to reopen the record. Moreover, even if we were to construe the Charging Parties' exception as a motion to reopen the record, we would deny the motion on the ground that the Charging Parties have failed to show that the documents in question are newly discovered and previously unavailable. See *Transit Management of Southeast Louisiana,* 331 NLRB 248 fn. 2 (2000); Sec. 102.48(d)(1) of the Board's Rules and Regulations.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must prove that protected activity was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. 127 F.3d 34 (5th Cir. 1997).

that the Respondent established that it would have made the same decision to discharge Garcia, even in the absence of her protected conduct. In essence, the judge found that the Respondent would have discharged Garcia pursuant to its progressive disciplinary system for having accumulated four written warnings, even if she had not engaged in protected conduct. The judge discredited Garcia's testimony that she never received the warnings, because he found it "hard to believe that the records were fabricated" for the trial.

The Respondent has not excepted to the judge's finding that the General Counsel satisfied his initial burden to show that Garcia's protected conduct was a motivating factor in her discharge.[12] Accordingly, the focus of our inquiry is whether the Respondent sustained its burden of proving that it would have discharged Garcia even in the absence of her protected conduct. For the reasons explained below, we find that it did not.

Even assuming, as found by the judge, that Garcia was discharged pursuant to the Respondent's progressive disciplinary system because she had accumulated four written warnings, the preponderance of the evidence establishes that the final warning and discharge on February 6 were unlawfully motivated. Although not discussed by the judge in his decision, Garcia testified that on February 6 she told Manchester that her coworkers had asked her to request a meeting with him to discuss their concerns about Supervisor Nolasco. She reminded Manchester that "when the Union wanted to enter," Scotto promised that the employees could go to management "to fix any problem that may occur."

Manchester asked Garcia to name the coworkers. He summoned three of them and asked if it was true that they were having problems with Nolasco. The first employee responded, "Yes, she yelled at me." The second responded, "She speaks to us very bad, treats us bad." The third responded that Nolasco "does not let us work in peace."

After Manchester finished speaking with the third employee, admitted Supervisor Maria Garcia (no relation), who was translating during the meeting, told Garcia that she was discharged, stating:

> Manchester is saying that he has come to the decision to let you go because instead of helping and working, you are against your coworker in the hotel. And people like you we do not need at this workplace. And I noticed that [instead of] putting out the fire, you raise it up and make it stronger. Before, . . . the problem was with Alicia Arvelo. And now I see that the problem is with Delmi Nolasco.

(Berta Luz) Garcia gave the only testimony regarding the February 6 meeting. Although the judge did not make specific factual findings or credibility resolutions regarding the meeting, he stated that he was "impressed with [Garcia's] overall demeanor," and he concluded that "she is a credible witness with the sole exception of her denial of Respondent's written warnings to her."

The Respondent did not question Manchester or any of its witnesses about the February 6 meeting. Nor did the Respondent mention the meeting in its answering brief, despite the fact that it is clearly the centerpiece of the General Counsel's discharge case.[13] The only evidence adduced by the Respondent to explain Garcia's discharge are the written warnings and Manchester's testimony that Garcia was discharged for "not following hotel procedures and standard operating procedures, being insubordinate, and being in places which she was not supposed to be." Manchester further testified that Garcia had been warned several times for similar behavior and she did not seem to heed the warnings.

In our view, the warnings and Manchester's testimony, which conspicuously avoided the specific events leading to Garcia's final warning and discharge, are insufficient to rebut the strong inference of unlawful motivation. This inference is created by the timing of Garcia's discharge and the statements of Manchester and Maria Garcia at the February 6 meeting, which directly link Garcia's discharge with her protected conduct. In these circumstances, we find that the Respondent has failed to show by a preponderance of the evidence that it would have discharged Garcia even in the absence of her protected conduct. Accordingly, we reverse the judge and find that the discharge violated Section 8(a)(1).[14]

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[12] Although the Respondent argues in its answering brief that the General Counsel failed to carry his initial *Wright Line* burden, the Board's Rules and Regulations do not permit a party to assert cross-exceptions in an answering brief. See *Bohemian Club,* 351 NLRB 1065, 1066 fn. 6 (2007); *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005). Accordingly, the Respondent has waived the argument that the General Counsel failed to make an initial showing that protected conduct was a motivating factor in its decision to discharge Garcia.

[13] As noted above, the consolidated complaint specifically alleges that the Respondent unlawfully discharged Garcia because she "participated with other employees in making concerted complaints about working conditions" at the February 6 meeting.

[14] In view of our finding that Manchester's testimony and the written warnings are insufficient to rebut the General Counsel's strong prima facia case, we find it unnecessary to pass on the General Counsel's and the Charging Parties' exceptions to the judge's credibility resolution regarding Garcia's denial that she ever received the written warnings.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Berta Luz Garcia because she engaged in protected concerted activity, we shall order the Respondent to offer her 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 and privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[15] The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Garcia, and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Woodbury Partners, LLC d/b/a The Inn at Fox Hollow, Woodbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Placing employees under surveillance by photographing without justification their lawful picketing or other protected concerted activities.

(b) Discharging or otherwise discriminating against employees because they engage in protected concerted activities, or to discourage employees from engaging in such activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 from the date of this Order, offer Berta Luz Garcia 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 and privileges she previously enjoyed.

(b) Make Berta Luz Garcia whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Berta Luz Garcia and, within 3 days thereafter, notify her in writing that this has been done and that the discharge 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 Woodbury, New York facility, copies of the attached notice marked "Appendix"[16] in both English and Spanish. 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 August 17, 2006.

(f) 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint allegation that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Supervisor Alicia Arvelo in order to induce employees to abandon their support of the Union is severed from this case and

[15] In the consolidated complaint, the General Counsel requests that interest on any money owed Garcia be computed on a compounded quarterly basis. The General Counsel does not further explain or provide argument in support of this request. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Tech Valley Printing, Inc.,* 352 NLRB No. 81, slip op. at 3 fn. 5 (2008); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

[16] 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."

remanded to the administrative law judge for the purpose described above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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, without justification, place you under surveillance by photographing you while you are engaged in lawful picketing or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities, or to discourage you from engaging in such activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Berta Luz Garcia 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 Berta Luz Garcia whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, 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 references to the unlawful discharge of Berta Luz Garcia, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WOODBURY PARTNERS, LLC D/B/A
THE INN AT FOX HOLLOW

Kevin Kitchen, Esq., for the General Counsel.
Jeffrey Meyer, Esq. (Kaufman, Dolowich & Voluck, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried on September 25 and 26, 2007, in Brooklyn, New York, based on charges filed by Ana Hernandez, in Case 29–CA–28122 on January 16, 2007, and in Cases 29–CA–28164 and 29–CA–28235 by Berta Luz Garcia on February 7 and March 29, 2007, respectively. Thereafter, a consolidated complaint issued on June 29, 2007, against Woodbury Partners, LLC d/b/a The Inn At Fox Hollow (Respondent).

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

It is admitted that at all times material Respondent is a domestic corporation, with its principal office and place of business located at 7755 Jericho Turnpike, Woodbury, New York 11797 (the Fox Hollow facility), and has been engaged in the operation of a hotel providing hospitality services to the general public.

During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, derived gross annual revenues in excess of $500,000 from the operation of the Fox Hollow facility; and purchased and received at the Fox Hollow facility products, goods, and materials valued in excess of $5000 directly from firms located outside the State of New York.

Respondent admits it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits that at all material times Local 1102 Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent further admits that at all times material the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents thereof, acting on its behalf:

Anthony Scotto	Co-Owner
Franklin Manchester	Manager
Alicia Arvelo	Housekeeping Supervisor (until November 2006)

Maria Garcia	Housekeeping Supervisor (since November 2006
Delmi Nolasco	Housekeeping Inspectress

Sometime during the spring and summer of 2006, the housekeeping employees, led by Luz Garcia, complained among themselves about their supervisor, Alicia Arvelo. General Counsel witnesses Luz Garcia, Ana Hernandez, Maria Ayala, and Ana Torres credibly testified that Arvelo frequently complained about the employee work ethic and told them "to take a stick and shove it up her ass." Other times "she told them to use condoms so that they could work harder and not have children." She made these statements individually and in groups. In addition the employees complained about having to clean 14 rooms rather then the 13 rooms they usually cleaned.

Somewhere around June, the employees, led by Garcia, sought help by contacting the Workplace Project, an organization to help employees. The Workplace Project is admittedly not a union, as defined in Section 2(5) of the Act. Sometime in early July a group of employees met with Jaime Vargas, a representative of the Workplace and discussed their complaints. On or about July 20, Vargas sent a letter to Respondent describing the working conditions and the specific complaints concerning Arvelo as set forth in the paragraph above.

Thereafter, led by Garcia, the employees contacted Local 1102, Retail, Wholesale, Department Store Union (the Union). On October 3, 2006, the Union filed a petition to represent the housekeeping staff. Thereafter, the employees lost interest and the Union withdrew its petition on November 7, 2006.

On August 17, 2007, not having taken any action concerning Arvelo's conduct, employees picketed Respondent after their work shift with signs concerning these complaints. Garcia was instrumental in leading the preceding. The picketing took place on the sidewalk on the opposite side of Respondent's facility. At this time, Arvelo was leaving work in her automobile and saw the pickets who were shouting her name in anger. There is no evidence that the pickets tried to block her way or damage her vehicle. Based on the credible testimony of Garcia, Hernandez, Ayala, and Torres, I conclude that she could have continued on her way home safely. However, Arvelo then returned to Respondent's facility and told Franklin Manchester, manager of Respondent, that she was frightened and afraid to go home. Manchester testified that the potential for misconduct was probable, and justified taking pictures of the pickets. When he took his pictures, the pickets were still on the sidewalk on the opposite Respondent's facility. Arvelo did not testify during this trial. Under these circumstances, I conclude that there was no reasonable belief by Manchester that Arvelo was in any danger.

In *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), the judge correctly observed that the fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in *Woolworth* affirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitutes more than mere observation because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woodworth* reaffirmed the principle that photographing in the mere belief that **something might happen** does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Id., *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. *Sunbelt Mfg., Inc.*, 308 NLRB 780 fn. 3 (1992), affd. in part 996 F.2d 305 (5th Cir. 1993). In the instant case, I find photographing the pickets had a reasonable tendency to interfere with the employees picketing.

Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint further alleges three 8(a)(1) violations as set forth below.

On October 13, 2006, at a meeting with employees at the Fox Hollow facility, Respondent, by its agent Scotto:

(a) Threatened employees with discharge if they continued to give support and assistance to the Union.

(b) Threatened employees with plant closure if they continued to give support or assistance to the Union.

(c) Informed employees that it would be futile to choose to be represented by the Union. On or about October 20, 2006, Respondent met with the employees. Garcia credibility testified:

> Q. What was said by Mr. Scotto at this meeting?
>
> A. Well, I have done (meaning Scotto) something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a Union here.
>
> Q. What, if anything, did Mr. Scotto say?
>
> A. Mr. Scotto said, "I promise. I promise all of you that from this day going forward the offices of Mr. Manchester, and Maria Garcia who is the new director, are going to be open for any problem that may occur. Everyone can solve their problems in that manner. "So I stood up and said, "How can you guarantee this? What can you give us to guarantee this, sir? You do not give us a document. You're not giving us anything"
>
> And he signaled me and said to me, "I give you my word," he said. And I said, "As before we don't have money," I said, "and our word is our honor. Our word is our bond on many occasions. My word is honor. I swear on my mother and God that the mistreatment and abuse that you have endured will no longer continue. And if you cannot resolve something with Ms. Garcia or Mr. Manchester, you're directed to come and speak to me, because

I do not want to have anymore problems at the hotel. And I do not want any Union, okay," and he left.[1]

Clearly, Garcia's testimony does not relate to paragraph 11(a) and (b) of the complaint. It appears that General Counsel is relying on Garcia's testimony to establish the violation set forth in paragraph 11(c). I find there is no evidence that it would be futile to choose to be represented by the Union. The General Counsel cites *Gold Kist, Inc.*, 341 NLRB 1040, 1041 (2004).

Gold Kist states as follows:

> It is a violation of Section 8(a)(1) of the Act for an employer to warn employees that there will be strikes and violence if they choose to be represented by a union. *Garry Mfg. Co.,* 242 NLRB 539, 542 (1979), enfd. 630 F.2d 934 (3d Cir. 1980). There, in a flyer entitled "It Could Happen Here," the employer unlawfully warned the employees about strikes and strike violence if the union won election. Specifically, the flyer listed several instances of violence as reported in local newspapers and warned the employees: "If you want the threat of strikes and violence and constant turmoil in our plant, vote for District 65." In *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982), the employer violated Section 8(a)(1) by warning its employees that strikes were inevitable. Specifically, the employer told the employees that it thought that the risk of a strike and job loss, or plant re-location, was especially real because the employer's wages and benefits were already so good.

In these cases, the employer clearly created a reasonable impression in the minds of its employees that if they elected to be represented by the union a strike was inevitable, and that it was likely to be a violent one. Indeed, Crawford expressly told the employees that a strike was the union's only weapon to win the respondent's agreement to the union's proposals, and that such a strike was likely to be violent.

I find that Garcia's testimony does not establish the futility as described in paragraph 11(c). Accordingly, I find no violation as alleged in paragraph 11(c) of the complaint.

Paragraph 11(a) of the complaint alleges Respondent's threats to discharge employees. Paragraph 11(b) alleges a threat to close the shop if the employees engaged union activities.

In support of this allegation Ana Torres testified, pursuant to leading questions by General Counsel:

> BY MR. KITCHEN:
>
> Q. MS. TORRES, during this meeting, do you recall if Scotto said anything about closing the hotel?
>
> Q. What did he say?
>
> A. He said that if, that if a union entered there, and he could close the hotel at any hour he wants. Because he was the owner. And with him, nobody could tell him what to do.

I do not credit Torres' testimony. Her entire testimony was established through leading questions by General Counsel. As set forth below, I found Garcia to be a credible witness, with the exception of her discharge, as described below. Given her credibly, I find that had there been a threat to close the shop, Garcia would have testified to such threat. Moreover, Ana Hernandez and Maria Ayala, also a credible witness did not testify as to a threat to close the hotel. Accordingly I find no evidence to establish a threat to close the shop, and accordingly find no violation of Section 8(a)(1) of the Act.

I also find that there was absolutely no testimony in the record as to threatening employees with discharge because of their Union or concerted activities. Therefore I find there was no violation of Section 8(a)(1) as alleged in the complaint.

The complaint alleges that Luz Garcia was discharged because of her union and/or concerted activities.

In order to establish a prima facie violation of Section 8(a)(3), it must be established that the employee was engaged in union activity, that the Employer had knowledge of such activity, that the Employer exhibited animus or hostility toward said activity, and that the employee's protected activity was a "motivating factor" in the Employer's decision to take adverse action against the employee. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The evidence establishes that Garcia was the most active employee complaining about Arvelo's conduct during the course of four employee/employer meetings. She was a leader in the picketing on August 17 to force Respondent to discharge Arvelo. I have concluded Respondent's supervisor, Manchester violated Section 8(a)(1) of the Act by taking photographs of the picketers. I conclude by such conduct that General Counsel has met his *Wright Line* burden.

Once the General Counsel has established a prima facie case, the burden shifts to the Respondent to show that the same action would have taken place even in the absence of protected conduct. *Wright Line,* supra. This burden cannot be satisfied by a mere statement or demonstration of a legitimate reason for the action taken. Rather, Respondent must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316 NLRB 771 (1995).

Respondent placed into evidence four separate warnings between February 6 and December 6, 2007, alleging insubordination, substandard work, uncooperative attitude, violation of Company's policies, rudeness to employees and failure to follow instructions. Garcia testified that she never saw or received copies of these warnings.

In *Nu-Skin International, Inc.,* 320 NLRB 385, 400 (l995), the Board affirming the administrative law judge's decision held that, "Cook claimed that prior to being discharged on August 23 he had never been given a warning for being late. He

[1] I credit Garcia's testimony. Garcia testified in great detail concerning this meeting. Her direct testimony is consistent with Respondent's cross-examination. Moreover, her entire testimony was detailed and consistent with Respondent's cross-examination. I was impressed with her overall demeanor, and conclude that she is a credible witness with the sole exception of her denial of Respondent's written warnings to her.

denies receiving the written warning on July 30 and denies that the signature on the warning is his. I find Cook's denial of the July 30 written warning hard to believe."

While I find that Garcia was a credible witness, as described above, I find that Manchester's testimony that the written warnings were part of its business records. While these records may not be as definitive as payroll records, I find it hard to believe that Respondent's records were fabricated for this trial. Based on Manchester's testimony and the written warnings I find that Respondent has established its' *Wright Line* burden, and therefore I conclude Respondent has not violated an 8(a)(1) discharge violation as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by unlawfully taking photographs of a lawful employee picket line.

[Recommend Order omitted from publication.]