

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**LAGUARDIA ASSOCIATES, LLP d/b/a CROWNE
PLAZA LAGUARDIA**

and

Case No. 29-CA-29347

**NEW YORK HOTEL & MOTEL TRADES
COUNCIL, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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On December 28, 2009, Administrative Law Judge Steven Davis issued a Decision and Recommended Order in Case No 29-CA-29347 with respect to a Complaint issued against LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia (“Respondent”).

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel, for the reasons discussed in the attached Brief in Support of Exceptions, respectfully takes exception to the Decision of the Administrative Law Judge as enumerated below:

1. In concluding that the employees lost the protection of the National Labor Relations Act (“Act”), the Administrative Law Judge erred in his application of *Atlantic Steel*, 245 NLRB 814 (1979), to the record evidence. In particular, the Administrative Law Judge erred with respect to his application of two *Atlantic Steel* factors: the place of the discussion, and the nature of the outburst, to the facts of this case.
2. In the alternative, the Administrative Law Judge erred by ignoring other well-established precedent safeguarding the fundamental rights of employees guaranteed by Section 7 of the Act.
3. Although the Administrative Law Judge properly found that Respondent violated Section 8(a)(1) of the Act by conducting an interview with an employee without providing the proper safeguard warnings, he erred in misstating his first Conclusion of Law.

Dated at Brooklyn, New York, February 5, 2010.



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INTRODUCTION

The issue in this case is whether an employer can lawfully discipline a group of elderly housekeeping employees who, while handing a petition protesting layoffs to an employer representative, detained him for less than 38 seconds. To so conclude, as the Administrative Law Judge did, is to send the dangerous message to employees that their protected concerted activities will be so closely scrutinized that they are taking a substantial risk anytime they protest their terms and conditions of employment. Such a finding is not only incorrect under the law, it also flies in the face of common sense and upsets a fundamental purpose of the Act—to protect employees' Section 7 rights.

It is axiomatic that Section 7 of the Act safeguards the fundamental right of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. While there are certain parameters within which employees may act when engaged in concerted activities, decades of Board law have made it clear that employees are permitted leeway when engaging in concerted activities, and the protections afforded by the Act are not easily lost. In *Washington Aluminum*, for example, the Supreme Court explained that concerted activity is protected under Section 7 of the Act unless it is unlawful, violent, in breach of contract, or “indefensible.” The Board later articulated the stringent standard as whether the misconduct was “opprobrious” or “so violent or of such serious character as to render the employee unfit for further service.”

As anyone viewing the video of the incident will see, the actions of the diminutive housekeeping employees, even if considered inappropriate, improper, or confrontational, are a far cry from the level of misconduct sufficient to forfeit the protection of the Act.

First, the incident was very brief—any alleged impropriety lasted less than 38 seconds. Second, any loud noise was brief and unaccompanied by chanting, screaming, threats or profanity. Third, any touching or blocking, if it even occurred at all, was brief, unintentional, incidental, non-violent, and caused no injury. Finally, the incident had no effect whatsoever on Respondent's business.

If the Board were to adopt the Administrative Law Judge's finding that the employees lost the protection of the Act, the Board would be creating an unduly restrictive interpretation of Section 7 which would place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities. Employees would be most reluctant to engage in any concerted activity for fear that it might not be protected. The Administrative Law Judge's Decision, in essence, unreasonably asks employees to act as attorneys and decipher the legal boundaries within which they are permitted to exercise their rights.

Therefore, for the reasons discussed herein, it is respectfully submitted that the Board reverse the Administrative Law Judge's finding that the employees lost the protection of the Act and the finding that Respondent was privileged to discipline them for engaging in concerted activities. As it stands now, the Decision will have dire consequences and undoubtedly cause a severe chilling effect on employees and their willingness to exercise their Section 7 rights in the future.

STATEMENT OF THE CASE

On December 19, 2008, the New York Hotel & Motel Trades Council, AFL-CIO (“Union”) filed an unfair labor practice charge in Case No. 29-CA-29347 against LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia (“Respondent”), alleging certain violations of the National Labor Relations Act. GC Ex. 1(a).¹

On May 15, 2009, the Acting Regional Director of Region 29 issued a Complaint and Notice of Hearing alleging that Respondent unlawfully disciplined 13 employees in violation of Section 8(a)(3) and 8(a)(1) of the Act. GC Ex. 1(e).

A hearing was held before Administrative Law Judge Steven Davis on July 20, 21, and 24, 2009.²

On December 28, 2009, the Administrative Law Judge issued a Decision in which he found, *inter alia*, that Respondent’s discipline of the 13 employees did not violate the Act.³

¹ References to the official record of the Hearing are abbreviated as follows: “Jt Ex.” denotes Joint Exhibits. “Resp. Ex.” denotes Respondent’s exhibits. “CP Ex.” denotes Union’s exhibits. “GC Ex.” denotes General Counsel’s exhibits. “Tr.” denotes references to the official transcript of the Hearing. “ALJD” denotes references to the Decision of the Administrative Law Judge.

² At the outset of the hearing, the Administrative Law Judge granted Counsel for the General Counsel’s Motion to Amend the Complaint to proceed only on the 8(a)(1) theory of the case. GC Ex. 1(j); Tr. 10.

³ The Administrative Law Judge also found that Respondent violated Section 8(a)(1) of the Act by conducting an interview with an employee without advising her of the purpose of the interview as required by *Johnnie’s Poultry*. ALJD p. 17, ln. 9-11. Because it is clear that during the interview, Respondent failed to provide one of the safeguards required by *Johnnie’s Poultry* (i.e., the purpose of the interview), Counsel for the General Counsel does not except to the Judge’s finding on this allegation. However, the Judge erred in misstating his Conclusion of Law with respect to his finding. Conclusion of Law number one should be amended to read as follows:

By conducting an interview with an employee without advising 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.

QUESTIONS PRESENTED

1. Did the Administrative Law Judge err in his application of *Atlantic Steel*, 245 NLRB 814 (1979), to the record evidence? Specifically, did the Judge err with respect to his application of two of the four *Atlantic Steel* factors: the place of the discussion, and the nature of the outburst, to the facts of this case?
2. Did the Administrative Law Judge err by ignoring other well-established precedent safeguarding the fundamental rights of employees guaranteed by Section 7 of the Act?

STATEMENT OF THE FACTS⁴

1. The Events of December 10, 2008

On December 10, 2008,⁵ as a group of employees arrived at work and punched in prior to their scheduled start time of 8:00 a.m.,⁶ Franklin Riley, a 64-year-old, 20-year-employee of Respondent, informed them that they were going to be presenting a petition to management that morning protesting Respondent's proposed layoffs and implementation of a reduced work week. Tr. 55, 80, 130, 187, 206, 231-232. The group consisted of about 15 housekeeping employees, most of them in their 50s and 60s, and small in stature. See Tr. 210, 229, 437-438. Almost all of them were long-term employees, some of them having worked for Respondent for over 20 years. *Id.*

When the group assembled, before they began working, they went to the office of Respondent's 6'1", 240-pound Chief Operating Officer (COO), Gary Isenberg, but he was not there. Tr. 55, 130, 187, 189, 206, 231. The group then encountered Yasser "Tony" Hassanein, a 39-year-old, 6-foot-tall, 310-pound security guard, employed by Respondent for almost six years. Tr. 55, 365, 469. Hassanein asked the group if they were looking for Isenberg, and they responded, "Yes." Tr. 55. Hassanein said, "Let's go," and indicated that Isenberg was somewhere in the lobby area, the restaurant, or outside. Tr. 55-56, 130, 188, 206. Hassanein accompanied them as they walked to find Isenberg, and remained near Isenberg throughout the incident. Tr. 206-207.

⁴ Inasmuch as the Judge correctly outlined the relevant facts with respect to the background and events leading up to the incident, those facts are not repeated herein. See ALJD II.A and II.B.

⁵ Unless otherwise indicated, all dates herein refer to 2008.

⁶ Respondent's Human Resources Manager, Lorraine Mercurio, acknowledged that the employees had not begun working at the time they met with Isenberg on December 10th. Tr. 300.

The group proceeded toward the exit near the parking garage, where they first observed Human Resources Manager Lorraine Mercurio, and two police officers, standing near the restaurant. Tr. 215, 252. Mercurio said, “Good day ladies” or “Good morning,” but no one else said anything to the group. Tr. 215. The employees were not making any noise at the time. Tr. 254.

a. The Employees Present the Petition to Gary Isenberg

The group then encountered Isenberg speaking on his cell phone. Tr. 56, 207. After waiting for Isenberg to finish his call, Riley approached him and said, “Good morning Mr. Isenberg. I have a petition here to read. I’m just asking that you take it.” Tr. 56, 207. Riley began reading the petition, but Isenberg said, “Wait. Wait. Wait. I’m not going to speak to all you guys. I will only speak to one person.”⁷ Tr. 56, 130-131, 188, 191, 232. Riley said, “That’s fine. I’m the only person speaking.” Tr. 56. Maerene Robinson added, “No, we [are] all together; you will have to speak to all of us.”⁸ Tr. 232-233. Riley again started to read the petition and asked Isenberg to take it. Tr. 232.

The incident was witnessed by the employees, Isenberg, Hassanein, as well as Respondent’s Human Resources Manager Lorraine Mercurio, and Officer Javier Centeno, a community affairs police officer, who was present because of a rally outside of the Hotel that morning.⁹ Tr. 100, 102, 294.

⁷ Isenberg testified that he said, “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.” Tr. 406. Isenberg and Hassanein both testified that Isenberg told the employees, on a few occasions, to go back to work. Tr. 418, 467.

⁸ Isenberg testified that some of the employees said, “No, you’re going to listen to us, you’re not going anywhere,” and several variations of that. Tr. 406. All of the employees who testified denied saying this. Tr. 133, 189, 192, 207, 232.

⁹ In addition, Respondent’s Director of Guest Services, Effie Mikedis, and Respondent’s Front Desk Agent, Carol Lynn Mears, witnessed parts of the incident.

b. The Incident is Captured on Video By Respondent's Security Camera

Fortunately, many of the facts are not in dispute because the incident was captured on video by Respondent's security camera. *See* Jt Ex. 1. Although the video does not have audio, it clearly portrays what happened during the incident. As the Administrative Law Judge explained, 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. ALJD p. 8, ln. 12-13. Thus, any alleged inappropriate behavior would have taken place in a span of only 38 seconds.

c. The Allegations of Physical Contact

The video demonstrates that there was no physical contact during the incident. In this regard, the employees' testimony corroborates the video. All of the employees who testified denied touching Isenberg or Hassanein, or seeing any employees touching them. Tr. 59, 133, 170-171, 189-190, 208, 210, 234, 327. Moreover, neutral witness Officer Centeno, and Respondent witnesses Mercurio, Mears, and Mikedis, did not see any employees touch Isenberg or Hassanein. Tr. 125, 262, 349-350, 374.

In spite of the overwhelming evidence demonstrating that there was no touching, Isenberg testified that he was touched by Franklin Riley,¹⁰ Julieta Varela, a 5'3", 52-year-old, 18-year employee of Respondent,¹¹ and Maerene Robinson, a 65-year-old, 20-year employee of Respondent.¹² Hassanein testified that he was touched by Esmerelda Lopez,

¹⁰ Isenberg alleged that Riley touched him between 8:01:17 and 8:01:20. Tr. 435, 436, 455-456.

¹¹ Specifically, he testified that Varela touched him at around 8:01:07 and 8:01:10, and possibly at the end of the incident. Tr. 136, 159-160, 410, 430-432.

¹² Isenberg testified that Maerene Robinson reached out with her right hand and stuck her arm out, and "kind of made like a hook with her hand around [his] waste, not allowing [him] to get past her." Tr. 408.

a 5'3", 66-year-old, 16-year employee of Respondent.¹³ Neither Isenberg nor Hassanein testified that the employees' alleged touching caused them any physical harm.

d. The Incident Ends and the Employees Begin Working

As seen on the video, Isenberg took the petition, and the incident ended at 8:01:21, when Isenberg left the area with it. ALJD p. 8, ln. 12-13; Jt Ex. 1; Tr. 56, 132, 169, 190, 410. The employees are no longer visible in the video at 8:01:30. ALJD p. 5, ln. 1-2. After the incident concluded, the group immediately proceeded to their workstations to begin working. Tr. 58, 133, 189, 209.

e. There Are No Injuries, Arrests, Citations, Guest Complaints, or Effects on the Hotel's Business

No one was injured during the incident. Tr. 437. Isenberg (6'1", 240 pounds) acknowledged that most of the housekeepers are older than he is, they were not carrying any weapons, and security guard Hassanein (6'0", 310 pounds) was present during the entire incident. Tr. 411-412, 437-438. Isenberg also acknowledged that he has known many of these housekeepers for years, as some of them have worked for the Hotel for almost 20 years. Tr. 438-439.

Officer Centeno, who witnessed the incident, did not make any arrests or issue any citations. Tr. 108, 123. In fact, he did not even intervene as the incident occurred. Tr. 108. Officer Centeno testified that at the point after he heard a commotion, it was over in a matter of seconds. Tr. 109. Isenberg did not file complaints against the individuals. Tr. 414.

¹³ Hassanein testified that "some lady" grabbed his arm and pulled him down for a couple of seconds. Tr. 467-468. Presumably, based on the identification of Esmerelda Lopez as being next to Hassanein in 8:01:20, and her "corrective communication notice," Respondent is alleging that it was Lopez who touched Hassanein. See Jt Ex. 1, 2, 3(c).

There were no written or oral complaints from guests about the incident. Tr. 374-375. No guests indicated that they would not stay at the Hotel again, and no meetings scheduled for December 10th had to be cancelled as a result of the incident. Tr. 347.

f. The Allegations of Loud Noises

The employees testified that throughout the conversation, Riley spoke in a very low, quiet, or normal tone of voice. Tr. 57, 190, 234. The employees testified that they were not yelling or chanting. Tr. 59, 133, 171, 190, 234. Officer Centeno, when asked if it was loud, stated that it was “not screaming,” but loud enough to get his attention. Tr. 103. When asked if the employees were chanting, Officer Centeno responded: “I don’t recall the chanting.” Tr. 108.

Respondent’s witnesses, on the other hand, testified about the loud noise level. For example, Lorraine Mercurio testified that she heard “very loud voices,” Tr. 255, while Effie Mikedis, Respondent’s Director of Guest Services, testified that she heard “just loud, loud noise, like loud, people talking loud.” Tr. 338. When asked if the employees were chanting, Mikedis answered, “loud noise, like loud speaking” but said that it was not a rhythmic chant. Tr. 358. Similarly, Front Desk Agent Carol Lynn Mears¹⁴ characterized the noise as “loud talking, loud,” and stated that she heard the noise only for a “couple of seconds.” Tr. 366-67. Isenberg testified that the employees were not loud at 8:00:42, but became loud at around 8:01:01. Tr. 424, 427. Hassanein testified that it was “like loud.” Tr. 468.

2. The Employees Are Disciplined

¹⁴ Mears is in the bargaining unit, but does not think the Union is necessary. Tr. 371. In the past, she reported two fellow bargaining unit employees to management, and the employees were disciplined as a result. Tr. 372-373.

On December 15th, the employees involved were issued disciplinary notices. *See* Jt Ex. 3. Four of the employees were discharged; five were suspended, and four received written warnings. Insubordination is not listed on the notices as a reason for any of the discipline. *See Id.*

ARGUMENT

It is well-settled that Section 7 of the Act safeguards the fundamental right of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Retaliation for engaging in concerted activities, including the use of the ultimate penalty of discharge, strikes at the very heart of the Act. *American Motors Corp.*, 214 NLRB 455 (1974).

Of course, not all concerted activities are protected. There are certain parameters within which employees may act when engaged in concerted activities. *Consumers Power Co.*, 282 NLRB 130, 132 (1986). The Board and the courts have recognized that even an employee who is engaged in protected concerted activity can, by opprobrious¹⁵ conduct, lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) (citing *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 766 (1975)).

Although the Administrative Law Judge correctly found that the 13 employees engaged in “concerted and otherwise protected activities under Section 7 of the Act,” ALJD p. 11, ln. 26-28,¹⁶ he erred in his application of *Atlantic Steel*, *Washington Aluminum*, and other Board precedent, when he concluded that the employees, by their conduct, lost the protection of the Act.

¹⁵ The Random House Dictionary defines “opprobrious” as “outrageously disgraceful or shameful.”

¹⁶ This finding should be affirmed, as the Board has found that employees who participate in an employee delegation or present a petition to management regarding terms and conditions of employment engage in protected, concerted activity. See e.g., *Hacienda Hotel, Inc.*, 347 NLRB 854, 864 (2006) (employees who participated in employee delegation engaged in protected, concerted activity); *Superior Travel Service, Inc.*, 342 NLRB 570, 574-575 (2004) (employees engaged in protected, concerted activity by presenting a petition to employer complaining about employee handbook provisions). Any attempt by Respondent to portray the employees’ protest and petition as mistaken or misguided, and therefore not protected, is misplaced. It is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee’s conduct is protected under the Act, so long as the complaint was not made in bad faith, or with malice. *Wagner-Smith Co.*, 262 NLRB 999 fn. 2 (1982).

1. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE EMPLOYEES LOST THE PROTECTION OF THE ACT AFTER HE PERFORMED A FLAWED *ATLANTIC STEEL* ANALYSIS

Under *Atlantic Steel*, in deciding whether the employee's conduct crossed the line into unprotected conduct, the Board balances four factors: (1) 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. 219 NLRB at 816.

a. The Board's *Starbucks* Decision is Instructive and Clearly Distinguishable

The Board recently performed an *Atlantic Steel* analysis in *Starbucks Corp.*, 354 NLRB No. 99 (2009). In *Starbucks*, the Board looked at the conduct of a Starbucks' employee who participated in a "boisterous" union rally of at least 15 union members and supporters, both inside and outside of a Starbucks' store, where Starbucks was holding an event, at night, at which its executives were scheduled to appear. As one of the executives, a Regional Vice President (VP), exited the store, the demonstrators began shouting and taunting him. The group made intimidating statements such as, "We are following you now boy," and "We know where you live." The employee in question said, "Spit on him" and, along with five others, followed him for two city blocks and shouted, chanted, and laughed at him as he turned a corner and walked toward his home. The employee was terminated by the Employer as a result of the incident.

The Board applied *Atlantic Steel* and concluded that the employee lost the protection of the Act, finding that only the subject matter factor weighed in favor of protection. In concluding that the employee lost the protection of the Act, the Board emphasized that the element of deliberate intimidation distinguished the employee's

behavior from the type of spontaneous, provoked, and nonthreatening outbursts that the Board has found protected in other cases. *Id.* (citing *Stanford Hotel*, 344 NLRB 558 (2005) (spontaneous, provoked outburst of profanity protected)); *Alcoa, Inc.*, 352 NLRB 1222, 1226 (2008) (spontaneous profanity in grievance meeting protected as it was not the product of a conscious decision to degrade supervisor)).¹⁷

The lack of deliberate intimidation is precisely what distinguishes our case from *Starbucks*. Prior to the incident on the morning of December 10th, employee Franklin Riley communicated to his coworkers the purpose of that morning's event. As the Administrative Law Judge correctly noted, he told the delegates that he would read the petition to Isenberg and ask him to take the petition and make layoffs by seniority. ALJD p. 4, ln. 5-7. It is not in dispute that the employees' purpose was to present the petition to Isenberg. Unlike in *Starbucks*, there is no evidence in the record to support a finding that the employees deliberately sought to engage in any unlawful, or even inappropriate, behavior. The only alleged inappropriate conduct was spontaneous, provoked only by Isenberg's refusal to take the petition, and nonthreatening, considering the diminutive appearance of the employees. As such, based on the Board's recent pronouncement in *Starbucks*, the employees' actions here would clearly be protected.

With *Starbucks* in mind, the following analysis details how the Administrative Law Judge erred in his application of *Atlantic Steel* to the facts of our case. Specifically,

¹⁷ In *Starbucks*, the Board also found that two other employees who engaged in protected concerted activity did not lose the protection of the Act by their actions. 354 NLRB No. 99, slip op. at 1. One such employee who used hand gestures, and profanity, including telling an assistant manager from another Starbucks to "go fuck [him]self," did not lose protection, even if the first (place) and fourth (whether the outburst was provoked by unfair labor practices) factors weighed against protection. *Id.* at 53-56. The Board did not disturb the Administrative Law Judge's conclusion that the employee's actions, while unwise and intemperate, did not cross the line so as to lose the protection of the Act. *Id.* at 56.

the Administrative Law Judge erred in his analysis of two factors in particular: the place of the discussion, and the nature of the outburst.¹⁸

b. The Administrative Law Judge Erred in Finding that the first *Atlantic Steel* Factor—the Place Of The Discussion—Weighed Against Protection

There is no dispute that the employee incident occurred in a public area of the Hotel. The mere fact that protected concerted activity occurs in a public area, without more, should not automatically cause this factor to weigh against protection. The Administrative Law Judge, therefore, erred in reaching such a conclusion without considering the lack of effect on the Hotel's business and by minimizing the fact that the employees did not intend to meet with Isenberg in a public area.

i. The Incident Had No Effect On The Hotel's Business or Operations

While it can be argued that an incident in a public area certainly had the *potential* to disrupt the Hotel's operations or damage its reputation, the record is devoid of any *actual* impact whatsoever on the Hotel.

It is undisputed that the incident had no adverse impact on the Hotel's guests. Although two guests can be seen passing the group in the video, the guests exit the area without interference by the employees. ALJD p. 12, ln. 6-8. There is no contention that the guests were blocked from passing by the group of employees, or that any guests complained about the employees' conduct during the incident.

¹⁸ The Judge's finding with regard to the second factor, the subject matter of the discussion, should be affirmed, as it is supported by the record evidence. The employees protest concerned proposed layoffs and reduced schedules, which revolve around the core Section 7 right to protest changes in employees' terms and conditions of employment. Counsel for the General Counsel does not contest the Judge's conclusion with respect to the fourth factor: whether the outburst was provoked by the employer's unfair labor practice.

Moreover, the incident had no adverse impact on the Hotel's business or operations. No guests checked out or failed to stay at the Hotel because of the incident, and previously scheduled meetings went on uninterrupted and unaffected by the incident. Tr. 347.

ii. The Employees Did Not Intend To Meet With Isenberg In A Public Area and Security Guard Hassanein Accompanied Them To The Place Where The Incident Ultimately Took Place

The Administrative Law Judge incorrectly minimized the significance of the fact that the employees did not intend to meet with Isenberg in the public hallway, but instead went to his office to speak to him. When the employees discovered that Isenberg was not in his office, they encountered Hassanein, who said to the employees, "Let's go," and accompanied them as they walked to find Isenberg. Tr. 55-56, 130, 188, 206-207. Based on the videotape, there is no doubt that Hassanein was present with the employees as they confronted Isenberg, and there has been no suggestion that he voiced any objection to their actions that morning.

In downplaying this fact, the Administrative Law Judge, in essence, places blame on the employees for being "determined to present the petition to Isenberg wherever they could find him." ALJD p. 12, ln. 16. The Administrative Law Judge would have had the employees wait until Isenberg was in his office or request an appointment to meet with him there. ALJD p. 12, ln. 17-18. Under the Administrative Law Judge's inappropriately stringent standard, these employees would essentially have to either wait around, or schedule an appointment, to engage in protected concerted activity. If the Board were to place such a burden on employees, the protections afforded by Section 7 of the Act would be stripped of their effectiveness.

In sum, although it is undisputed that the incident took place in a public area of the Hotel, that alone should not mean that this factor should be weighed in favor of a loss of protection. Instead, after considering that there was no effect on the Hotel's business, and that the employees intended to meet with Isenberg in a more private area, this factor should be weighed in favor of a finding that the employees did not lose the protection of the Act. The Administrative Law Judge, therefore, erred in concluding that this factor weighed "heavily" against protection without properly considering these points.

c. The Administrative Law Judge Erred in Finding that the third *Atlantic Steel* Factor—the Nature of the Outburst—Weighed Against Protection

Just as he did in regard to the first factor, the Administrative Law Judge erred by failing to consider certain facts, many of which are undisputed, relating to the third factor, which clearly support a finding that the employees did not lose the protection of the Act.

i. The Entire Incident Lasted Less Than 57 Seconds

The Administrative Law Judge correctly found that the entire incident lasted about 57 seconds, and the actual confrontation with Isenberg took approximately 38 seconds. ALJD p. 5, ln. 4-6. In spite of recognizing the short duration of the incident, the Administrative Law Judge improperly concluded that the short duration of the incident is "of no moment." ALJD p. 13, ln. 11-12.

In failing to give sufficient weight to the short duration of the incident, the Administrative Law Judge ignored well-established Board law, which clearly gives weight to the duration of concerted activity in determining whether it is protected. *See e.g., Research Management Corp.*, 302 NLRB 627 (1991) and *Turnbull Cone Baking*

Co., 271 NLRB 1320 (1984) (emotional outbursts of short duration and no long-lasting effects protected by the Act); *Goya Foods of Florida*, 347 NLRB 1118 (2006) (disruption of less than four minutes inside a supermarket did not lose protection); *Fortuna Enterprises, D/B/A The Los Angeles Airport Hilton Hotel And Towers*, 354 NLRB No. 17 (2009) and *Benesight, Inc.*, 337 NLRB 282 (2001) (finding work stoppage of a short duration protected); *Compare Quietflex*, 344 NLRB 1055 (2005) (approximately 12-hour stoppage not protected); *Cambro*, 312 NLRB 634 (1993) (approximately 4-hour stoppage resulted in forfeiture of Act's protection); *Waco, Inc.*, 273 NLRB 746 (1976) (3-1/2-hour stoppage overstepped the boundary of a protected, spontaneous work stoppage). In *Goya Foods*, 347 NLRB at 1125, fn. 8, Member Schaumber, concurring, specifically emphasized that employees who participated in a “highly disruptive” rally captured on video did not lose Act’s protection where it was a single incident and the disruption lasted just under one minute before the police intervened.

Therefore, contrary to the Administrative Law Judge’s assertion that the duration of the incident is “of no moment,” it must be emphasized that any alleged misconduct in this case, whether it is the noise level, blocking, incidental touching, or refusal to comply with Isenberg’s directive to return to work, was of such a limited duration that, when considered with other factors discussed below, should not cause the employees to lose the protection of the Act. Thus, the Administrative Law Judge erred by failing to consider the very short duration of the incident.

- ii. Even If The Employees Were Loud, The Noise Lasted For A Matter of Seconds, And The Employees Did Not Chant, Scream, Make Threats, or Use Profane Language

Even if the employees were “speaking loudly” during the incident, as the Administrative Law Judge concluded, ALJD p. 14, ln. 9-10, the Board has held that merely speaking loudly or raising one’s voice while engaging in protected, concerted activity generally will not deprive an employee of the Act’s protection. *See United States Postal Service*, 251 NLRB 252 (1980), *enfd.* 652 F.2d 409 (5th Cir. 1981) (two employees did not forfeit protection of the Act by loud language, including use of one profane word by one of them); *Firch Baking Co.*, 232 NLRB 772 (1977) (employee did not forfeit protection of the Act by his loud and excited comments).

Here, the Administrative Law Judge failed to recognize that while the employees were “speaking loudly”: (1) the noise lasted only a matter of seconds, (2) the employees were not chanting or screaming, and (3) they neither made threats nor used profane language.

First, it is not in dispute that any noise made by the employees lasted only a short duration. Neutral witness Officer Centeno testified that even after he heard the commotion, “it was over in a matter of seconds.” Tr. 109. Even crediting Respondent’s witnesses, the noise did not last long. Isenberg testified that the employees were not loud at 8:00:42, that they “probably started to get loud” at around 8:01:04, but the noise level seemed to have dissipated at the end of the incident. Tr. 424, 427. Respondent’s front desk attendant, Carol Lynn Mears, stated that the employees were not as noisy when they exited toward the ballroom after the incident. Tr. 369. Therefore, at best, the noise appears to have lasted for approximately 26 seconds, the time from when Isenberg testified they “probably started to get loud” until the time the employees are seen exiting the area captured on video.

Not only was any loud noise very brief, but there was no chanting or screaming. Neutral witness Officer Centeno testified that the employees were “not screaming” but rather, “loud enough to be more than just normal conversation.” Tr. 103. When asked if employees were chanting, Respondent’s Director of Guest Services, Effie Mikedis, answered, “loud noise, like loud speaking” but said that there was no rhythmic chant. Tr. 358. Finally, there is no record evidence to suggest that the employees, at any time, made threats or used profane language.

In sum, by failing to consider the short duration, the lack of chanting, screaming, threats or profanity, the Administrative Law Judge erred by finding that the employees’ “speaking loudly” weighed in favor of a loss of the Act’s protection within the nature of the outburst *Atlantic Steel* factor.

iii. The Employees Did Not Touch Isenberg Or Hassanein

All of the employees who testified denied touching Isenberg or Hassanein, or seeing any employees touching them. Tr. 59, 133, 170-171, 189-190, 208, 210, 234, 327. Moreover, neutral witness Officer Centeno, and Respondent’s witnesses, Mercurio, Mears, and Mikedis, did not see any employees touching Isenberg or Hassanein. Tr. 125, 262, 349-350, 374. In addition to those witnesses, the video absolutely confirms the testimony and does not show the employees touching anyone.

Despite all of the evidence against a conclusion that the employees touched Isenberg or Hassanein, the Administrative Law Judge somehow reached the conclusion that the employees touched them. ALJD p. 13, ln. 26-27. He does so based on Isenberg’s and Hassanein’s testimony, noting that he cannot credit the employees’ denial

that they touched them. ALJD p. 13, ln. 27-28.¹⁹ The Administrative Law Judge's conclusion would be understandable if the only evidence against touching came from the employees themselves. However, the Administrative Law Judge ignored that fact that four neutral and Respondent witnesses did not see any touching and moreover, the video corroborates that testimony.

In sum, the Administrative Law Judge erred by concluding that all four employees (Riley, Varela, Lopez, and Robinson) alleged to have touched Isenberg or Hassanein actually touched them considering the weight of the evidence against such a finding.

iv. Even If They Did Touch Isenberg Or Hassanein, Any Touching Was Brief, Unintentional, Incidental, Non-violent, And Caused No Injury

Assuming *arguendo* that the employees came into physical contact with Isenberg or Hassanein, there is no evidence to suggest that the touching was intentional, violent, or that it caused any injury. Moreover, the touching would have been incidental, lasting for only a few seconds. Isenberg alleged that Riley touched him between 8:01:17 and 8:01:20, or 8:01:21, a matter of three or four seconds. Tr. 435, 436, 455, 456. He alleged that Varela touched him at around 8:01:07 and 8:01:10, and possibly at the end of the incident. Tr. 136, 159-160, 430-432. Once again, the touching would have been for three or four seconds. Hassanein claimed that "a lady," presumably Lopez, grabbed his arm and pulled him down for a couple of seconds. Tr. 468. Finally, Isenberg alleged that Robinson touched him from 8:01:13 to 8:01:14, a total of two seconds. Tr. 229, 432,

¹⁹ Counsel for the General Counsel is mindful of the Board's established policy 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). In this case, however, a clear preponderance of all the relevant evidence (i.e., four neutral and Respondent witnesses did not see any touching, and the video does not show any touching) demonstrates that the employees did not touch Isenberg or Hassanein.

433. Therefore, the most an employee is alleged to have touched Isenberg or Hassanein is four seconds.

The employees did not intend to touch Isenberg or Hassanein; their goal was to give him the petition. ALJD p. 4, ln. 5-7. Yet the Administrative Law Judge concluded that because the employees were “face to face” with Isenberg and their “plan was to prevent him from leaving the area,” the employees must have touched Isenberg. ALJD p. 13, ln. 31-32. To conclude that any touching was intentional not only is illogical, it is also inconsistent with the evidence, which showed that the employees’ plan was not to prevent Isenberg from leaving the area, but rather simply to read him the petition and then hand it to him.

Moreover, besides being brief and unintentional, there is no suggestion that any touching was violent or caused any injury. It is inappropriate for the Administrative Law Judge to conclude that the 6’1”, 240-pound Isenberg, who at all times was accompanied by a 310-pound security guard, genuinely felt intimidated after he was surrounded by a group of elderly housekeepers for less than one minute.

National Semiconductor Corp., 272 NLRB 973 (1984), cited by the Administrative Law Judge, is clearly distinguishable. In that case, the Board found that an employee making “moderate physical contact” and “bumping and shoving” a supervisor in order to retrieve a petition unlawfully taken from the employee lost the protection of the Act. There, the employee, over the course of a 10 to 20 minute period, made repeated attempts to retrieve the petition. The location of some of the attempts was a room in which there were several dangerous chemical containers, and the employee in question knew of the chemicals’ presence and their dangerous nature. The Board, in

finding the actions unprotected, specifically noted how the employee's maneuver constituted "reckless conduct," reflecting "a conscious disregard for the safety of others." *National Semiconductor Corp.*, 272 NLRB at 974. In our case, just as the element of deliberate intimidation from *Starbucks* is missing, there is no evidence of "recklessness" or "a conscious disregard for the safety of others."

In sum, even if the employees did touch Isenberg or Hassanein, the Administrative Law Judge erred by failing to consider that any touching was brief, unintentional, non-violent, and caused no injury. As such, it was incorrect for the Administrative Law Judge to conclude that any touching contributed to a finding that the nature of the outburst *Atlantic Steel* factor weighed against protection.

v. Any Blocking Was Unintentional, Incidental, Brief, And Caused No Injury

After reviewing the video frame by frame, some of the employees acknowledged that they were standing in front of Isenberg at times. As discussed above, the record evidence demonstrates that the employees' goal was to present Isenberg with the petition; not to block his egress as the Administrative Law Judge erroneously concluded. Any blocking that occurred, therefore, was unintentional.

Not only was the blocking unintentional, it was very brief. After Riley begins to read him the petition, Isenberg appears to start moving at 8:01:04. He is free of the group at 8:01:18. Therefore, any blocking that occurred would have been less than 14 seconds. Based on the video, it does not appear that Isenberg is truly blocked from exiting for the entire 14 seconds. Moreover, there is no allegation that the employees' blocking caused any injury to Isenberg, Hassanein, or any guests.

Although two guests do enter the area where the incident takes place, the guests are seen on the video passing by without incident. The two guests pass by the group within 10 seconds of appearing in the video. Therefore, there is no reasonable argument to be made that the incident interfered with any guests by blocking their path.

vi. The Employees Had Not Begun Working

The Administrative Law Judge's emphasis on the fact that the employees had already punched in is not persuasive. While it is true that all of the employees had punched in by the time the incident began, all of them had also punched in early, prior to their scheduled start time of 8:00 a.m.²⁰ See Resp. Ex. 5. The video makes it clear that the employees have exited the area by 8:01:30, and they began working right afterward. Jt Ex. 1; Tr. 58, 133, 189, 209. Because the employees began working within two minutes of their scheduled start time, and because there was no disruption on the Hotel's operations, the fact that employees already punched in should have no bearing on whether they lost the protection of the Act in this case. See, e.g., *Benesight, Inc.*, 337 NLRB 282 (2001) (finding protest during working hours protected where effect was comparatively modest and employees returned to work promptly); *Cf. Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (7th Cir. 1998) (finding unprotected an employee strike undertaken at the peak dinner hour which "had the immediate effect of crippling the restaurant's ability to function").²¹

²⁰ Santiago Mejia worked the night shift and had not punched out at the time of the incident.

²¹ The Seventh Circuit, in a case subsequent to *Bob Evans*, held that a walkout which shut down an employer's second shift, was not unreasonable, and thus, the employees who participated in the walkout did not lose the protection of the Act. *Trompler, Inc.*, 338 F.3d 747 (7th Cir. 2003). The Court, in distinguishing *Bob Evans*, noted that in *Trompler*, there was essentially no impact on the employer's business. The walkout did not cause the employer to lose business, income, or customers. Moreover, the walkout created no threat to anyone's health or safety. The same reasoning applies in our case, where there is a complete lack of evidence showing that the incident had any impact on Respondent's business, or

vii. The Incident Had No Effect On The Hotel's Business or Operations

As discussed above in connection with the first *Atlantic Steel* factor, the incident had no impact on the Hotel's business or operations. Respondent's own witnesses testified that they received no complaints or cancellations because of the incident. Tr. 347. In addition, it is clear that the employees began working right after the incident ended. Tr. 58, 133, 189, 209. Therefore, not surprisingly considering the duration of the incident, the evidence does not support any argument that the nature of the incident somehow interfered with the Hotel's business or operations.

In sum, three out of the four *Atlantic Steel* factors (the place of the discussion, the subject matter of the discussion, and the nature of the employees' outburst) support a finding that the employees did not lose the protection of the Act. Even if the Board concludes that the place of the discussion weighs against protection, the balance still favors a finding of protection, especially after considering the Board's reasoning in *Starbucks*. As such, the Administrative Law Judge erred by concluding that the employees lost the protection of the Act under *Atlantic Steel*.

2. IN THE ALTERNATIVE, THE ADMINISTRATIVE LAW JUDGE ERRED BY IGNORING OTHER WELL-ESTABLISHED PRECEDENT SAFEGUARDING THE FUNDAMENTAL RIGHTS OF EMPLOYEES GUARANTEED BY SECTION 7 OF THE ACT

In *Washington Aluminum*, 370 U.S. 9 (1962) the Supreme Court explained that even if employees' concerted activity is unnecessary and unwise, it will lose the Act's protection only where it falls within four categories of unprotected activities: those that

created any threats to anyone's health or safety. Considering that the employees began working at 8:02 a.m., two minutes after their scheduled start time, Respondent cannot even argue that as a result of the incident, employees failed to complete their normal duties, or that productivity was compromised.

are unlawful, violent, in breach of contract, or indefensible. 370 U.S. at 17 (internal citations omitted). If the conduct does not come within these categories, the reasonableness of the employees' decision to engage in concerted activities is irrelevant. *Washington Aluminum*, 370 U.S. at 16.

In other subsequent cases, the Board has emphasized that the protections afforded by Section 7 are not easily lost. According to the Board, the standard for determining whether specified conduct is removed from the protections of the Act, is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Merry Healthcare Centers*, 350 NLRB 203, 204-205 (2007). The rationale behind such a stringent standard for assessing discipline for conduct occurring in the course of an employee's exercise of concerted activity is set forth by the Board in *Consumers Power Company*, 282 NLRB at 132:

The protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.

Thus, Board law, supported by the courts, establishes that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity, subject to the employer's right to maintain order and respect." *Tampa Tribune*, 351 NLRB 1324, 1324-25 (2007); *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994).

Although the Administrative Law Judge correctly found that the employees' presentation of the petition constituted "concerted and otherwise protected activities under Section 7 of the Act," ALJD p. 11, ln. 26-28²², he erred in ignoring the Board's

²² As discussed above in footnote 16, this finding should be affirmed, as it is clearly supported by the evidence adduced at the hearing.

standards cited above, and finding that the employees, in the manner in which they presented the petition to management, lost the protection of the Act.

Applying *Washington Aluminum* to the facts of our case, there was no suggestion by Respondent or the Administrative Law Judge that the employees in the incident engaged in any conduct that was unlawful, violent, or in breach of contract. The only remaining category that would cause them to lose the Act's protection, therefore, is whether their actions were "indefensible." In *International Protective Services, Inc.*, 339 NLRB 701, 703 (2003), the Board found that a protest in which security guards abandoned their posts met the Board's "indefensible" standard because it evinced a reckless disregard for the security of the buildings and their occupants. *See also Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (1998) (employee protest undertaken during the peak dinner hour unprotected because it "had the immediate effect of crippling the restaurant's ability to function").

As discussed above within the *Atlantic Steel* framework, the employees' actions here lasted just 38 seconds. Moreover, although the employees might have been loud, they did not scream, make threats, or use profanity. Even if the employees blocked or touched Isenberg or Hassanein, any blocking or touching was incidental in that it was brief, unintentional, and caused no injury. Finally, the incident had no effect on the hotel's business or operations. As such, even if the Board were to conclude that the employees' actions were unnecessary, unwise, or otherwise inappropriate, there is nothing these 13 employees did that would rise to the level of being "indefensible." Under *Washington Aluminum*, therefore, the employees did not lose the protection of the Act.

Similarly, the employees did not lose the protection of the Act under the subsequent Board cases in which the Board emphasized the stringent standard for losing the Act's protection. The employees' conduct, even if considered impulsive, intemperate, or inappropriate, clearly was not so violent or of such serious character as to render them unfit for further service. *See St. Margaret Merry Healthcare Centers, supra*. After all, the employees promptly went to work just two minutes into the start of the shift. Considering the Board permits employees some leeway when engaging in concerted activity, the employees' conduct here was not so opprobrious (i.e., outrageously disgraceful or shameful) such that it interfered with Respondent's right to maintain order and respect.²³

In *Benesight*, 337 NLRB 282 (2001), the Board extended the Act's protection to employees who engaged in a considerably more vigorous act of protest. In that case, customer service employees became upset at newly imposed work procedures that they believed to be unduly burdensome. During a break period, they conferred with each other and decided to stop taking customer calls "until they could get a resolution of their problem from management." 337 NLRB at 286. Their work stoppage lasted for 15 to 20 minutes and resulted in a failure to respond to 56 customer calls. Subsequently, employees were discharged. The Board ordered their reinstatement concluding that,

²³ Counsel for the General Counsel does not seek to diminish Respondent's right to maintain order and respect. Rather, it is submitted that the employees' actions in this case simply did not interfere with such rights of Respondent. It is undisputed that the incident had no adverse impact on the Hotel's business or operations. Moreover, the Judge's characterization of the employees' actions as "insubordination" is exaggerated, considering the fact that the employees went to work within two minutes of their scheduled start time (the employees' shifts began at 8:00 a.m., and the incident ended at 8:01:20. ALJD fn. 3; p. 8, ln. 12-13) After all, Respondent did not even cite insubordination as a reason for the discipline in any of the disciplinary notices. *See* Jt Ex. 3.

when an in-plant [protest] is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are “entitled to persist in their in-plant protest for a reasonable period of time.”

337 NLRB at 282. The Board explained that the employees’ grievance involved a matter that directly changed their working conditions, the effect of their brief work stoppage was comparatively modest, and the employees returned to work promptly. 337 NLRB at 283. The Board reasoned that even assuming that employees have a “proportionality obligation” when engaging in lawful concerted activity, that obligation was satisfied in *Benesight*: the limited work stoppage clearly bore a reasonable relation to the underlying grievance. *Id.* The Board’s reasoning is strikingly applicable to the facts of our case. The employees’ grievance concerned layoffs, a matter that directly affected their working conditions. The effect of the incident was clearly modest, as it has been demonstrated that it was less than one minute and caused no harm to Respondent’s business. Finally, the employees returned to work promptly, within two minutes of their scheduled start time. Thus, just as it did in *Benesight*, the Board here should conclude that the employees did not lose the Act’s protection.

In many other cases, the Board has found that employees who engaged in conduct far worse than that engaged in by the employees in the instant case still did not lose the protection of the Act. *See e.g., Medite of New Mexico, Inc.*, 314 NLRB 1145 (1994) (employees who struck foreman’s car with picket signs did not lose the protection of the Act); *Preterm, Inc.*, 273 NLRB 683, 698, 704 (1984) (strikers’ pounding on nonstriker’s car insufficient to constitute serious misconduct); *Gloversville Embossing Corp.*, 297 NLRB 182, 194 (1989) (male striker who “pulled down his pants” and “pulled out his private parts,” while censurable, was not sufficiently grave to justify termination);

Calliope Designs, 297 NLRB 510 (1989) (in absence of threats or violence, striking employee who called nonstriking employee a “whore” and a “prostitute,” and accused her of having sex with the employer’s president, did not lose the protection of the Act). These cases buttress the conclusion that the employees’ conduct is not the type that would cause them to lose the protection of the Act.

3. THE ADMINISTRATIVE LAW JUDGE’S DECISION UPSETS A MAJOR PURPOSE OF THE ACT AND FLIES IN THE FACE OF COMMON SENSE

If the Board were to affirm the Administrative Law Judge and find that the employees lost the protection of the Act, the Board would, in essence, be announcing an unduly restrictive interpretation of Section 7 which would—in the words of the Supreme Court in *Washington Aluminum*—“place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects.” *Washington Aluminum*, 370 U.S. at 14. Employees would now have to “think twice” before engaging in any concerted activity for fear that it might not be protected. To apply Section 7 in the manner that the Administrative Law Judge has done in this case, not only is clearly inconsistent with Board law, but would also frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.

Finally, common sense dictates that the employees did not lose the protection of the Act. The best and most reliable account of the incident is the video of the incident. It is simply unreasonable to conclude, after watching the video, that these 13 employees—a group of elderly male and female long-term housekeeping employees—engaged in the type of conduct during the 38 second incident that should be found to strip them of their fundamental right to engage in concerted activities. There is nothing the employees did

that would come even remotely close to being “outrageously disgraceful or shameful” or “so violent or of such serious character as to render [them] unfit for further service.”

CONCLUSION

Counsel for the General Counsel respectfully submits that the evidence establishes that Respondent violated Section 8(a)(1) of the Act by disciplining the 13 employees involved in the protected conduct on December 10th. The employees were clearly engaged in concerted activity, and their behavior did not cause them to lose the protection of the Act.

Counsel for the General Counsel seeks an Order which requires Respondent to offer reinstatement to those employees who were discharged, make whole all employees involved in the incident, and post a cease and desist notice for 60 days. Counsel for the General Counsel further seeks all other relief as may be just and proper to remedy Respondent's unfair labor practices.²⁴

Dated at Brooklyn, New York, February 5, 2010.

Respectfully submitted,



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²⁴ As noted above, with respect to the remedy for Exception number three, the Judge's Conclusion of Law number one should be amended to read as follows:

By conducting an interview with an employee without advising 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.

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

**LAGUARDIA ASSOCIATES, LLP d/b/a CROWNE
PLAZA LAGUARDIA**

and

Case No. 29-CA-29347

**NEW YORK HOTEL & MOTEL TRADES
COUNCIL, AFL-CIO**

Date of E-Filing/E-mailing: February 5, 2010

**STATEMENT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE, AND BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

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