

Hacienda Hotel, Inc. and UNITE HERE, Local 11.
Case 31–CA–26945

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

On May 31, 2006, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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, and to adopt his recommended Order as modified and set out in full below.²

ORDER

The National Labor Relations Board adopts the Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Hacienda Hotel, Inc., El Segundo, California, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union and engaging in direct dealing with its bargaining unit employees by involving itself in an unauthorized ratification vote on its own contract proposal.

(b) Issuing warning notices to its employees because they engaged in protected concerted activities that it believed were authorized by the Union.

(c) Threatening its employees with reprisals or negative consequences because they engaged in activities in support of the Union.

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

Given our affirmation of the judge's credibility determinations, we find no merit to the Respondent's exceptions that Valentin Hernandez lost the protection of the Act. In view of these findings, Hernandez's conduct, which resulted in his discipline, was also part of the *res gestae* of otherwise protected concerted activities. In this context, the "pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel*, 344 NLRB 558, 558 (2005); see generally *Atlantic Steel Co.*, 245 NLRB 814 (1979). The Respondent has failed to make such a showing.

² We shall modify the judge's recommended Order to correct an inadvertent error in paragraph numbering and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container*, 325 NLRB 17 (1997).

(d) Threatening its employees with disciplinary hearings for engaging in protected concerted activities that it believed were authorized by the Union and thereby impliedly threatening its employees with reprisals if they engage in activities in support of the Union.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning notice issued to its employee, Valentin Hernandez, and, within 3 days thereafter, notify Hernandez, in writing, that this has been done and that the warning notice will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in El Segundo, California, copies of the attached notice marked "Appendix."³ Copies of this notice, in Spanish and English, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 June 20, 2004.

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

³ 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."

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 bypass UNITE HERE, Local 11 (the Union), their exclusive bargaining representative, and deal directly with our bargaining unit employees by becoming involved in an unauthorized ratification vote on our contract proposal.

WE WILL NOT issue warning notices to our employees who engage in any of the above-stated protected acts, such as delegations, that we believe are authorized by the Union.

WE WILL NOT threaten our employees with reprisals or negative consequences for engaging in activities in support of the Union.

WE WILL NOT threaten our employees with disciplinary hearings and, thereby, impliedly threaten them with reprisals for engaging in activities that we believe are authorized by the Union.

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, remove from our files any reference to the unlawful warning notice given to Valentin Hernandez, and WE WILL, within 3 days thereafter, notify him, in writing, that this has been done and that the disciplinary notice will not be used against him in any way.

HACIENDA HOTEL, INC.

Nathan Laks, Esq., for the General Counsel.
Myron R. Harpole, Esq. (Witter and Harpole), of Pasadena, California, and *Warren L. Nelson, Esq. (Fisher & Phillips)*, of Irvine, California, appearing on behalf of the Respondent.
Ellen Greenstone, Esq. (Rothner, Segall & Greenstone), of Pasadena, California, appearing on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and amended unfair labor practice charges in the above-captioned matter were filed by UNITE HERE, Local 11 (the Union) on July 26 and September 1, 2004, respectively,¹ and, on May 21, 2005, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint alleging that Hacienda Hotel, Inc. (Respondent) engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, which accompanied the instant complaint, a trial was conducted before the above-named administrative law judge on November 14 through 18, 2005, in Los Angeles, California. At the trial, all parties were afforded the opportunity to call witnesses, to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. Counsel for each of the parties filed a posthearing brief, and I have carefully considered each of the documents. Accordingly, based upon the entire record, including my conclusions as to the testimonial demeanor of each of the several witnesses and the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a California corporation, with an office and principal place of business located in El Segundo, California, has been engaged in the operation of a full-service hotel, providing food and lodging. During the calendar year ending December 31, 2004, a representative time period, in conducting its business operations described above, Respondent derived gross revenues in excess of \$500,000 and purchased and received, at its hotel facility described above, goods and services, valued in excess of \$50,000, directly from suppliers located outside the State of California. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹ Unless otherwise stated, all dates herein occurred during calendar year 2004.

III. THE ISSUES

The complaint alleges, and the General Counsel argues, that Respondent violated Section 8(a)(1) and (5) of the Act through its supervisors and agents by participating in the distribution of copies of “ballots” to its bargaining unit employees so as to enable the employees to vote in favor of an employer contract proposal and by placing of copies of the ballots next to the timecards of bargaining unit employees at the housekeeping department timeclock; violated Section 8(a)(1) and (3) of the Act by issuing a written warning letter to employee, Valentin Hernandez, because he assisted the Union and engaged in protected concerted activities; and violated Section 8(a)(1) of the Act through its agents and supervisors by advising a bargaining unit employee to leave the Union because the Company does want people who are in the Union and by threatening a bargaining unit employee with a disciplinary hearing because the employee had been the leader of an employee delegation to a supervisor in order to speak about a work-related problem. Respondent denied engaging in the alleged unfair labor practices and specifically asserted that the warning letter to Valentin Hernandez was justified by the employee’s misconduct and violation of its work rules.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates an “all-service” hotel with 627 guest rooms, 19 meeting rooms for business conferences and banquets, a coffee shop, a dining room, and a bar, in El Segundo, California. Myron Harpole, the attorney for Respondent’s owner, is the chairman of Respondent’s board of directors and its chief operating officer, is responsible for the hiring and firing of its executive officers, and “monitors” the performance of the hotel. Joseph Harding is Respondent’s general manager² and is responsible for all aspects of the hotel’s operations including guest issues, public relations, employment issues, and union-related issues.³ Gerald Katzman is Respondent’s president and comptroller and is responsible for day-to-day accounting matters at the hotel. Carmen Perez is the head of Respondent’s housekeeping department, and Francisco Orozco is the manager of Respondent’s food and beverage department.⁴ Respondent and the Union have had a longstanding collective-bargaining relationship since 1970 and have had successive collective-bargaining agreements, the most recent of which expired by its terms on October 15, 2003, and extended through January 2004, with the Union as the exclusive representative of Respondent’s food and beverage department, housekeeping, and guest services department employees. The record establishes that, with the expiration of their collective-bargaining agreement, the parties engaged in bargaining for a successor

agreement throughout 2004.⁵ Robin Brown-Rodriguez, who is a “director” for the Union, was its lead negotiator during the bargaining, and she was normally accompanied by an employee negotiating committee. Harpole, Harding, Katzman, and Attorney Warren Nelson participated in the bargaining for Respondent, and department heads, including Perez, occasionally accompanied them.

The instant alleged unfair labor practices occurred in the context of fervent and arduous negotiations during the summer months of 2004,⁶ and Harpole testified that relations with the Union, normally “congenial,” become particularly “contentious” during such periods of intensified collective bargaining.⁷ In this regard, the record establishes that, as a pressure tactic during difficult bargaining, such as occurred during 2004 with Respondent, the Union encourages bargaining unit employees to engage in so-called “actions,” and Brown-Rodriguez defined these as “. . . anything where workers get together and do something.” Such conduct includes delegations, petitions, picketing, and wearing buttons. Brown-Rodriguez, who stated delegations are “. . . something that we frequently do,” testified that these are groups of employees who desire to address an incident or raise a matter of common concern to them and to confront a hotel manager over the issue. According to her, “[W]e train [the employees] to have a clear spokesperson or spokesperson . . . to back each other up and not allow the company to try to talk to one person or another and split people off . . .” and “to . . . present a cogent message to the company in a way that gets that message across.” She added that “we train [the participating employees] to say we are members of the Union” and “. . . as a union, we want x” and that “we expect [management] to deal with them as employees . . . who have a concern.” Brown-Rodriguez stated that the usual issues, over which delegations arise, are ones which “can easily be fixed, like a safety issue . . .;” although “I think they have happened around discipline . . .”⁸ With regard to bargaining unit petitions, she stated the purpose of these is “to let the hotel management know di-

⁵ The most significant bargaining sessions herein were held on July 16 and 23.

⁶ Brown-Rodriguez agreed that the 2004 bargaining with Respondent was contentious.

⁷ Harpole testified that, during collective bargaining, there have been public “confrontations,” including threats of “fistfights” and other incidents necessitating telephone calls for police assistance, and that one such incident, involving a confrontation inside a hotel work area which resulted in the suspension of an employee, occurred during bargaining over the successor to the contract, which expired in 1999.

⁸ The record reveals that, during the summer prior to July 23, Respondent’s bargaining unit employees had engaged in three delegations. One was to Gerald Katzman’s office during which as many as 12 employees, one at a time, walked in, dropped pennies onto his desk, and said “. . . the increases that we were offering . . . were in the pennies and . . . were not sufficient.” The other two were to Joseph Harding. The first occurred in the hotel lobby when approximately 8 employees approached him as he was on his way to lunch and handed him some documents and the second occurred when approximately 20 employees approached him during a lunch in a banquet room with regard to an offer made by Respondent during bargaining. Each of these incidents lasted for a short time and no employees were disciplined for participating.

² Harding has been the general manager since 2002. Prior to him, Frank Godoy was the general manager and was in the position for 30 years.

³ Respondent admitted that both Harpole and Harding are supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act.

⁴ Respondent admitted that both Perez and Orozco are supervisors within the meaning of Sec. 2(11) of the Act.

rectly from the workers what the workers [are] most concerned about.” She added that petitions are presented to management either across the bargaining table or directly to a manager.⁹

B. *The Adelina Escobar Incident*

Adelina Escobar, a housekeeper, testified that, at approximately the time she attended a bargaining session in June,¹⁰ she was approached on the floor, on which she was working, by Marisa Mejia, a lead housekeeper, who told Escobar that Perez was quite upset because the former had failed to clean an assigned room. Escobar¹¹ said she would meet with Perez at 4 p.m. and asked Mejia to accompany her. At the scheduled time, Escobar finished her assigned work, and she and Mejia found Perez in the cafeteria. “I told [Perez] . . . that I had not left the room out because I did not have enough time because there were 15 doubles. . . . She told me that I should not leave the room like that because she had to keep her schedule and not to do that and that I [had] better tell her . . . whenever I was going to leave a room out.” Then, “. . . at the end of the conversation, she . . . was advising me to leave the Union because the company did not want people who were in the Union.” Subsequently, Escobar apparently disclosed Perez’ comments to her coworkers, who believed Perez’ conduct was sufficiently egregious so as to warrant a delegation to the housekeeping manager, and to Brown-Rodriguez, who believed Perez’ conduct was serious enough to raise during bargaining with Respondent. Thus, at the parties’ July 23 bargaining session, according to the union official, she¹² raised Escobar’s name and said, “. . . that there had been an incident in housekeeping where Carmen Perez . . . had told [Escobar] that she shouldn’t be participating in the Union because the hotel didn’t like people who participated in the Union.”¹³ Carmen Perez, who testified that she was aware Escobar was active in the Union “because there are employees that comment that she passes out Union literature and solicits signatures on petitions” and that she once asked Escobar not to engage in union activities during her “working hours,” specifically denied the comments, which Escobar attributed to her. Notwithstanding that she testified on behalf of Respondent, Mejia failed to deny the occurrence of the conversation or to corroborate the testimony of Perez.

As between Escobar and Perez, I believe the former was a more credible witness. Thus, Escobar’s demeanor, while testifying, was that of an honest witness, and I note that she is a current employee and testified with Myron Harpole, Respon-

dent’s chief operating officer, directly in front of her and that I have difficulty believing she would have paltered to her coworkers and to Brown-Rodriguez about what Perez told her. In contrast, Perez, whose testimony was not corroborated by Mejia, did not appear to be a particularly truthful witness and impressed me as one who would readily fabricate testimony in order to buttress her employer’s legal position. Therefore, I find that, on or about June 20, in the context of onerous bargaining and union-encouraged delegations and petitions, Perez did, in fact, advise Escobar to leave the Union “. . . because [Respondent] did not want people who were in the Union.” While the complaint alleges that Perez’ comment was violative of Section 8(a)(1) of the Act, in his posthearing brief, other than asserting the statement was coercive, counsel for the General Counsel neglected to explicate any underlying rationale for the allegation. However, in her posthearing brief, counsel for the Union argued that Perez’ comment constituted an implied threat of discharge or other negative consequences. I agree. Thus, Escobar felt threatened by Perez’ remark, and I believe Perez meant not that Respondent did not want union members as employees but, rather, that Respondent did not appreciate employees, who were *active* in the Union. Consequently, Perez’ comment was, and should be viewed as, an unlawful, implied threat of reprisals or negative consequences to Escobar for engaging in activities in support of the Union. *Merit Contracting, Inc.*, 333 NLRB 562, 563 (2001); *Overnight Transportation Co.*, 332 NLRB 1331, 1335 (2000). Accordingly, I find that Perez’ comment to Escobar was violative of Section 8(a)(1) of the Act.

C. *The Disciplinary Warning Letter Issued to Valentin Hernandez*

The record reveals that, having attended union meetings and monthly training sessions, participated in the collective bargaining with Respondent during the summer of 2004 as a member of the Union’s employee negotiating committee,¹⁴ and made “visits” to other employees to inform them of the state of the negotiations between Respondent and the Union, Valentin Hernandez¹⁵ was active in union-related matters and specifically that he was active in the two delegations to Harding and the one to Katzman’s office during the summer. In the latter regard, according to the alleged discriminatee, as a member of the delegation which encountered Harding in the hotel lobby as he was going to lunch, Hernandez was the individual who handed a petition, signed by employees, to Harding. The re-

⁹ According to Brown-Rodriguez, during 2004, employees presented petitions to Respondent, regarding insufficient linens and the need for jackets to be worn by drivers.

¹⁰ Escobar recalled the date of the incident as June 20.

¹¹ According to Escobar, at the time of her hiring by Respondent, Perez interviewed her and, referring to the Union, warned “. . . not to get involved with a small group of revolvers who are in the Union.” Perez denied the warning attributed to her by Escobar.

¹² What she had been told of the Escobar incident was that Perez “. . . had told her she shouldn’t participate in the Union . . . the company didn’t like people who participated in the Union and [Escobar] felt that that was threatening and inappropriate.”

¹³ Harpole, who was sitting across the bargaining table from Brown-Rodriguez during the July 23 bargaining session, failed to deny that the latter raised the Escobar-Perez incident.

¹⁴ According to Hernandez, he attended bargaining sessions in June and July at which Katzman, Harding, and Harpole were present on behalf of Respondent. At one bargaining session, on July 16, Hernandez spoke out during a discussion of economic issues. According to Brown-Rodriguez, the former “. . . asked Mr. Harpole . . . why the hotel made certain decisions about running the business. He asked [Harpole] why, for example, the hotel didn’t charge for parking. . . . He asked why there weren’t more promotions to try to bring more people into the restaurants, and he said . . . he had to get a second job just to buy a car and . . . with prices of things like food and gas going up, making it [on \$6.50 an hour].” Brown-Rodriguez added that Harpole listened politely to Hernandez and replied in a “pleasant manner.”

¹⁵ Hernandez is employed by Respondent as a cashier and waiter in its coffee shop and works an evening shift, which commences at 5 p.m..

cord further reveals that, as a result of bargaining unit employee meetings, which Hernandez attended and at which Adelina Escobar informed the employees of “. . . what transpired with Carmen Perez,” and an incident, during which Perez allegedly “mistreated” another housekeeper, Vicky Flores, several employees, including Hernandez, decided to engage in a delegation to Carmen Perez in order “. . . to demonstrate our dissatisfaction with the mistreatment.” Hernandez notified the Union of the employees’ intent, and Brown-Rodriguez confirmed that the Union was, at least, aware that employees were “upset” by Perez’ alleged misconduct and were disposed to address their concerns directly to the housekeeping manager. Hernandez testified that the delegation to Perez was timed to occur “. . . during the lunch period for the housekeepers” on July 23.

That morning, at approximately 11:30 a.m., Hernandez, accompanied by 9 or 10 other employees, including his brother Salvador, Roberto Reyes, a mechanic, and housekeepers Paula Casillas and Adelina Escobar, went to confront Perez in the housekeeping office,¹⁶ which is located on the floor beneath the main floor of the hotel—“I went there mainly as a petition. . . . on the respect toward my co-workers.” During direct examination, Hernandez testified that, upon arriving at the hotel, “I went to the lunchroom and the other employees saw me, and they went with me” to Perez’ office. “We entered . . .,” and, acting as the spokesperson, “. . . I greeted her and she . . . greeted me and asked . . . what she could help me in. . . . The only thing I told her is the reason for me being there was because Vicky had told us that she had mistreated [Vicky], like raising her voice to [Vicky] and we wanted . . . her . . . not to mistreat the employees, that they only go there to work, not to be yelled at. Then, Carmen [asked] . . . why I was there when I only knew one side of the story? . . . I responded . . . that I was not there to confront her or argue the facts, only to ask her to respect the employees, nothing more. So, at that time, we left her office.”

Carmen Perez testified that the housekeeping office is normally a busy place with housekeepers and maintenance employees punching in and out on the timeclock and housekeepers bringing in reports and picking up towels. She added that no employee meetings are held there “. . . because there is no room . . . for the employees to sit down and that she does not use the room for discussions with individual employees because it is a work area where many people go in and out.” In this regard, she normally requires employees to schedule appointments with her in order to discuss “workplace” issues, and “I do tell them the time at which I can meet with them. If I can do it at that

¹⁶ The housekeeping office is a 17-foot-by-7-foot room with an alcove in the back, which is utilized by Perez as her personal office area. As viewed from the doorway, the timeclock for the housekeeping and maintenance department and racks of timecards are to the immediate right of the door. Along the left-hand wall are tables, shelves for towels, and shelves for various other items; and, along the right side of the room are a table and chairs, a basket of towels, and a door. The back of the housekeeping office is divided between what appears to be a glass-walled closet and Perez’ office alcove. Her desk faces a wall of the closet, and a photocopying machine is located directly in front of it. Thus, sitting at her desk, Perez would look to the left in order to see anyone entering the housekeeping office.

time, I do it and, if not, I make an appointment with them,” depending upon “the case.” According to Perez, prior to July 23, she had never met Valentin Hernandez but had spoken to him on the telephone regarding food orders. At approximately 11 a.m. on the above date,¹⁷ she was working at her office computer, completing a standard room cleaning report, with her back to the housekeeping office door when, “suddenly,” she felt several people standing by her desk. She turned and observed Hernandez, who was already speaking and whose voice she recognized, and, at least, six other individuals standing close enough to block her view of the door to the office. Hernandez, who was no more than a foot or two from her, was saying in a loud voice, “. . . Carmen, I am here to tell you that you have no right to mistreat employees. We have learned . . . what you did to Vicky Flores and I am here to tell you that we are no longer going to tolerate that. I was trying to tell him to calm down . . . but he wouldn’t listen. He was pointing at me with his finger almost right at my face. I had to pull back from the desk. . . . He was very, very close.” Perez, who asserted she was “scared” because Hernandez was speaking so loud and was much larger than her,¹⁸ continued, stating that “I told him please lower your voice. I don’t know what you are talking to me about. Please go and inform yourself and then come back if you wish to speak to me. This is not the proper manner. . . . whenever you wish to speak to me, call me and I will give you an appointment. At this time, I cannot because I am very busy. Please leave my office.” Rather than leaving, Hernandez “. . . continued saying the same thing. . . . I am here to prohibit you [from mistreating] the employees. Make sure this is the last time you do it or suffer the consequences. . . . I asked him several times please leave, I am busy. And he continued talking and talking.”¹⁹ At that point, Perez abruptly turned her back to Hernandez and started working again at the computer, and Hernandez and the others left the housekeeping office. Perez testified further that Hernandez did not use any profanity while speaking to her, that, although she had been sitting when the incident began, she stood up as Hernandez continued talking, and that the entire incident occurred between 11 and 11:30 a.m., lasting “between ten and fifteen minutes.” Rosa Hernandez, a housekeeper, ostensibly corroborated Perez, claiming that she was present in the housekeeping office for a portion of the confrontation between Hernandez and Perez.²⁰ According

¹⁷ Perez testified that 11 a.m. “. . . is one of the . . . busiest times in housekeeping” because employees “. . . bring their reports to punch out to lunch. Another bunch comes back from lunch. So there is much movement at that time.” Nevertheless, as will be discussed infra, on another occasion, Marta Lara and other housekeeping employees came to her office at approximately the same time of day as did the Hernandez delegation and discussed with her holding an employee vote on a Respondent contract proposal.

¹⁸ Hernandez is 6-feet tall and over 200 pounds, and Perez is just 5-feet tall and slight.

¹⁹ In her pretrial affidavit account of the incident, Perez failed to mention that Hernandez continually repeated himself regarding mistreating employees.

²⁰ Rosa Hernandez stated that she had returned to the housekeeping office in order to clock in after lunch, and, at that point, she witnessed what was occurring. However, her timecard for the day shows her

to her, upon entering the room, she observed a group of six hotel employees, including Valentin Hernandez, whom she knew as a restaurant employee, standing around Perez' desk, and, while she could not hear what was said, Hernandez, whose face had an angry look, was yelling and thrusting his hand toward Perez., who was sitting in her desk chair and appeared to be scared.²¹

Testifying on rebuttal, Valentin Hernandez, who stated his visit to Perez was, in effect, a "verbal petition,"²² testified that, as he and the other employees entered the housekeeping office, Perez only seemed "a little surprised" when she turned her head and saw the group; that, rather than confrontationally warning Perez, "I said we hope that this would be the last time that you mistreat one of the co-workers;" and that he had no idea as to how Perez perceived him or what he said. He further testified that Perez arose from her chair after observing the group of employees enter the housekeeping office and stood during the entire time Hernandez spoke to her; that he stood 3 to 4 feet from the photocopying machine and "about seven feet from Perez;" that he did waive his arms as he spoke; and that the entire incident lasted for just 2 minutes. Also, Hernandez specifically denied that he gestured or thrust his arm toward Perez; that he yelled or screamed during the incident,²³ that Perez attempted to back away from him, or that he used any profanity.²⁴ Paula Casillas also testified in rebuttal. According to her, she was a member of the group of employees, who accompanied Hernandez to speak to Carmen Perez. They arrived at the housekeeping office at 11:30 a.m., which is the time she normally clocks out for lunch, and, as they entered the housekeeping office, Perez, who was seated at her desk, turned and looked toward them. Inside the room, she stood against the door opposite from the towels, and Hernandez stood near the photocopying machine approximately 10 feet from Perez. Hernandez spoke first, saying good morning to Perez. She greeted him and asked how she could help him. "He said to her . . . we have learned of what occurred to Vicky. We come . . . representing our employees to be treated with more respect. . . . [Perez] . . . said do you not know the other side version?" Hernandez said, no and she was never again to engage in that sort

punching in at 12:11 p.m. long after, according to all other accounts, the incident had concluded.

²¹ Valentin Hernandez had papers in the hand which he was thrusting toward Perez. Believing she had to get help for Perez, who seemed to be frightened, Rosa Hernandez immediately left the housekeeping office and commenced a floor by floor search for Perez' sister, a housekeeper. Hernandez found her on the eighth floor and, together, they returned downstairs to the housekeeping office. However, they arrived just as the group of employees was departing from the room. She estimated 5 or 6 minutes elapsed while she searched for Perez' sister.

²² During cross-examination, he specifically denied carrying a petition to Perez' office.

²³ According to Hernandez, ". . . I believe I only spoke kind of sternly, but I don't . . . think that I . . . would've shouted. I am not a person who usually shouts."

²⁴ During cross-examination, Hernandez conceded he spoke "seriously" to Perez and added "I know that I was not yelling or shouting." Further, he admitted cutting Perez off ". . . when she said you did not hear the other side of the story. . . . and I said that I was not there to argue . . ." with her.

of conduct. At that point, Hernandez and the others turned and left the housekeeping office. Stating that the entire incident took no longer than 2 minutes, Casillas then clocked out and went to her lunch. She testified that Perez appeared "calm" and "relaxed" while Hernandez spoke and that the latter waived his right hand and pointed it while he spoke. Finally, while recalling that Perez remained seated during the entire incident but unable to recall if he held anything in his right hand while he spoke, she denied that Hernandez ever raised his voice or moved toward Perez.

Perez testified that, after Hernandez and the other employees left the housekeeping office, she immediately telephoned Joe Harding, and "I only related to him the account of [what] occurred." Harding recalled that the telephone conversation occurred "around lunchtime" on July 23 and ". . . that she was just harassed by a group of employees that came in and they were loud and threw papers at her. And she has a petition." He asked if she could identify any of the employees, and "she mentioned Valentin Hernandez, Roberto Reyes, Adelina Escobar, and Paula Casillas." The conversation lasted for no more than a minute, and, according to Harding, concerned about Perez, he immediately went to the housekeeping office and found her "a little frazzled." She showed him the petition, which had been given to her, and "she . . . went through the motions of how it occurred and where they were standing and . . . told me what had occurred."²⁵ Speaking to Perez convinced Harding that further investigation was necessary in order to determine whether discipline should be given to any of the employees involved in the incident that morning, and he then telephoned Myron Harpole to inform him of what, Perez said, had occurred. Harpole agreed that Harding should continue his investigation; however, unaccountably, solely based upon Harding's report and without any corroboration or knowledge of Hernandez' version of the incident, he immediately became convinced that Hernandez should be disciplined for misconduct.

Robin Brown-Rodriguez testified that, at the parties' bargaining session later that afternoon, after she raised the Escobar-Perez incident, Harpole responded that he was glad she had raised such a "serious incident" inasmuch as ". . . I believe we had a very serious incident in housekeeping where an employee—and he pointed at [Hernandez] . . . went into housekeeping unauthorized with a group of employees and had a threatening confrontation with Carmen Perez." She replied that Hernandez "had every right" as a bargaining unit employee to participate in union activities on his day off from work. Harpole responded that Hernandez had no right to go to the housekeeping department from the food and beverage area, that Hernandez had violated a company rule about being on hotel property 30 minutes prior to or after a shift, and that his confrontation with Perez was a threatening one. He added that Respon-

²⁵ According to Harding, what Perez told him was that Hernandez ". . . was loud and very close to her and shaking papers." She said that Hernandez was the only member of the group who said anything and that he said to her ". . . you have been abusing the employees. We want you to stop." Significantly, Perez failed to corroborate Harding with regard to Hernandez having any papers in his hand, throwing papers at her, or handing her a petition, and, if such a document existed, Respondent failed to offer it as corroboration of Harding's testimony.

dent would hold a disciplinary hearing “around his actions” and repeated his statement “a couple of times” while looking directly at Hernandez. Harpole then asked Brown-Rodriguez whether she or another union agent had authorized Hernandez’ conduct, and she replied that Hernandez was on the union negotiating committee, as well as other employees, and he had the right to engage in union activities, which our delegations were. Harpole did not dispute the foregoing version of events. According to him, Brown-Rodriguez’ comments regarding Carmen Perez’ alleged harassment of an employee “disturbed” him, and he interrupted her, saying he had heard enough about your complaints about Perez and he was going to permit Harding to call Valentin Hernandez to a hearing and determine if discipline was warranted regarding an incident that morning involving Hernandez and Perez. Harpole testified he added that Hernandez could be represented and would be permitted to present “his side” of what occurred and that the alleged misconduct “. . . on a supervisor is unacceptable if true.”²⁶

That evening, at approximately 8 or 9 p.m., while working, Hernandez telephoned Perez at the housekeeping office. During direct examination, the former testified that he made the telephone call because “I was . . . unsure . . . as to whether the . . . matter may have been misconstrued by her and that, during the conversation, he . . . [told] her what had happened was nothing personal, that I had nothing against her personally. In a certain way, I apologized just in case that matter was . . . misconstrued.” According to Perez, “[H]e told me that he was calling . . . to apologize, that his action he had taken earlier that morning was incorrect. . . . You don’t deserve that . . . disrespect. . . . So I want you to forgive me but I felt pressured by . . . those assholes at the Union.” She replied that she accepted his apology. During rebuttal, Hernandez denied saying his actions were “incorrect,” rather, “I said that perhaps this is not the best manner to resolve things. . . . She said that there was no problem, that she was accepting the apologies and that there [were] no problems.” Asked why he telephoned Perez, Hernandez said, “. . . when I did it, I did not feel I did anything wrong. But, when I arrived at work . . . Mr. Orozco called me into his office. . . . and he told me that Mr. Harpole was very upset. . . . And he asked me why I had gone over to [Perez] when she had not done anything wrong to me. He told me that she was a little bit shook up for what had happened and that is what prompted me to call her.”

Three or four days later, Harding concluded his investigation of what transpired between Hernandez and Perez by meeting with the employee and Brown-Rodriguez for approximately 25 minutes. According to Hernandez, “[H]e only asked me what had [occurred]. I [gave my version] . . . about the meeting with Carmen Perez and he said that he was going to investigate and that he would let me know whether I would be disciplined or not” According to Harding, Hernandez did nothing less than “. . . [admit] what he had done. . . . that he had gone downstairs to the housekeeping office. . . . and that [what occurred]

²⁶ Harpole conceded that he characterized what occurred between Hernandez and Perez as a “threatening confrontation” but denied directing any comments to the employee—“. . . I was speaking to the Union negotiating committee but principally to [Rodriguez].”

. . . was done in the confrontational manner.” With regard to the latter point, Harding testified, Hernandez admitted “that he confronted Carmen down in the office and gave her the papers. He said he did what had occurred.”²⁷ However, Harding conceded that, in presenting his version of the incident, Hernandez did not admit to shouting, yelling, or raising his voice at Perez, to waving papers at her, or to his demeanor. He further conceded that he failed to confront Hernandez with any of Perez’ assertions as to his behavior so as to afford the employee an opportunity to admit or deny them²⁸ and that Hernandez’ version of the incident contained nothing of what Perez alleged. During rebuttal, asked what he admitted to Harding during this investigatory meeting, Hernandez said that he admitted entering the hotel on the morning of July 23, visiting the housekeeping office with other employees, informing the Union of the delegation, and subsequently apologizing to Perez. Whatever he learned from Hernandez, according to Harding, immediately after the meeting concluded, “I called Mr. Harpole and gave him the facts, my findings.”²⁹

Harding admitted that Perez’ report of what occurred³⁰ and his meeting with Hernandez and Brown-Rodriguez constituted the extent of his “investigation” of the July 23 incident. He further admitted that he failed to interview any of the employee witnesses and that his predisposition was to accept Perez’ version of what occurred as “I find her very trustworthy.” In any event, the next day, Harding and Harpole again spoke about Hernandez, and, according to Harding, they reached a decision to reprimand the employee with a warning. Harpole testified that Hernandez deserved discipline as “this group, who were . . . relatively inexperienced people, came in there to surprise her, They were intruding on her in the midst of her work. . . . They were there to . . . chew her out. . . . for her treatment of Vicky Flores. . . .they were there to discipline her, criticize her and warn her.”³¹ As to the warning notice itself, during his

²⁷ During cross-examination, Harding listed as Hernandez’ admissions—coming onto the property, gathering with others, confronting Perez, informing the Union of his intentions that day, and apologizing to Perez.

²⁸ Subsequently, Harding changed his testimony, stating that he did explain to Hernandez that Perez had accused him of being “overly aggressive” and that his actions made her feel threatened and scared. Hernandez responded that “he did not know.”

²⁹ According to Harpole, with regard to the investigation, “It was pretty much agreement on . . . some of the basic facts but it was more a matter of degree. In other words, they both said that he was there. They both said that he was there as the leader of a group of several other people.” They disagreed (“the he said, she said”) as to how “loud” he was and how “abusive” he was.

³⁰ Perez stated that she did draft a written report with regard to what occurred on July 23, and Harding testified that she gave it to his secretary. Whether said document exists and is corroborative of Perez’ version of events can not be determined; for Respondent failed to produce it at the hearing.

³¹ Asked if Perez reported to him that other employees overheard the confrontation, Harpole testified he believed so, and “. . . that was part of the humiliation happening in front of her subordinates.” There is nothing in Perez’ testimony regarding the presence of other employees in the housekeeping office during the incident, and she admitted being unable to see whether any employees entered or left the room while Hernandez was there.

direct examination, Harding stated that Harpole was to draft the reprimand letter and that the latter did so and faxed a copy to him, which they then discussed but not “line-by-line.”³² He added that he concurred with the stated reasons for the warning and that the final version of the reprimand was drafted by him “on my computer,” and “I presented it to Hernandez.” During cross-examination, Harding contradicted himself, egoistically taking credit for the warning letter, stating he drafted it from “my notes. All the facts were found by myself. I did the interviews. I did the questioning.” However, when asked if Harpole had, in fact, drafted the document, Harding reversed himself, stating, “He did, yes But . . . he sent it to me,” and “. . . I retyped it.” Asked, then, whether Harpole drafted the warning letter and he merely retyped it, Harding replied, “correct.”

The disciplinary warning letter, dated August 3, 2004, and signed by Harding, was given to Hernandez. The letter lists four reasons for the reprimand. These are:

1. interrupting and interfering with the head of the Hacienda Hotel’s housekeeping department during the course of her duties;
2. attempting to usurp, and interfere with, the sole right of the Hacienda Hotel’s General Manager to direct and to discipline, the head of the hotel’s housekeeping department in connection with the performance and conduct of her duties;
3. entering upon the premises of the Hacienda Hotel more than 30 minutes prior to the beginning of your shift, in violation of the provisions of the last Union Contract, without prior consent from the General Manager; and
4. failure to bring your complaint of supposed misconduct of the head of the hotel’s housekeeping department direct to the General Manager. . . .

The disciplinary letter then continues with the following:

It is found that, on July 23, 2004, at approximately 11:30am, you initiated a contentious confrontation of the Hotel’s Head Housekeeper, Carmen Perez, while she was working in her office in the Housekeeping Department. In front of her subordinates in the Housekeeping Department, you accused her of mistreatment of an employee and threatened her.

You are an employee in the Food and Beverage Department and not of the Housekeeping Department. Your work station is hundreds of yards from the office of Carmen Perez. Your work shift on July 23rd did not begin until 5pm; and your presence on the hotel’s property at the time of the confrontation was in violation of Section 6.4.2(b) of the most recent Union Contract and of the rules regarding Employees, which include that Employees are not to enter the hotel premises more than 30 minutes before their work shifts.

It is noted that you said the paid officials of your Union . . . knew beforehand of your plan for this conduct. Under the circumstances, it is concluded that you were in

fact encouraged by them. In view of your relative inexperience and immaturity, this is an aspect of mitigation. . . .

According to Harpole, the first stated reason for the reprimand is “. . . the most serious aspect of the matter and goes to the heart of it.” According to him, what rendered it such a “severe” transgression was Hernandez’ “. . . intrusion into the work area of an extremely busy executive in the midst of her duties and in front of her subordinates,” berating her. Asserting that Perez is always busy and “. . . particularly so at checkout time which is around eleven o’clock in the morning,” he added that, “. . . if employees can act in the manner that Mr. Hernandez did at the time and place of their choosing with senior supervisors at the most intense time they’re working, then any employee at any time could disrupt the activities of the hotel.”³³ Likewise, Harding testified that the first stated reason constituted the essence of Hernandez’ misconduct on July 23—“he was harassing and disrupting and refused to leave, He harassed and disrespected to the point of scaring a manager,” With regard to Hernandez and the employee delegation, which both Harpole and Harding characterized as a “gang,” assertedly interrupting Perez’ work, Harpole testified that Respondent’s only concern regarding employee delegations is that they “. . . be conducted in a proper manner” and that delegations, such as the one to Perez, are conducted in an “inappropriate” manner when they “. . . intrude the people who are busy at work, carrying out the operating functions of the hotel or intruding with the enjoyment of the Hotel by guests, either of those.” He added that even a mere two minute interruption of her work would have been “impermissible.” Harpole’s strict view must be contrasted with that of Frank Godoy, who was the general manager of Respondent’s hotel prior to Harding and who stated that he “. . . always had the policy that any employees or group of employees were welcome in my office at any time as long as it was not disrupting something” and that he would only discourage groups of employees from meeting with department heads if done in an unorganized manner. Likewise, Harding never requires employees to make appointments to see him, stating, “My office door is open. That is an open door policy” Finally, Carmen Perez testified that, whether she immediately meets with employees, who ask to speak to her, depends upon the “importance” of the matter. Thus, if it is a “serious” matter necessitating a lengthy conversation, she requires employees to make an appointment; however, if relatively “simple,” she “. . . will just sit . . . and discuss it there.”

Concerning the second reason for disciplining Hernandez, Harpole explained that it referred to “. . . the report to me . . . that [Hernandez] attempted to instruct Carmen Perez on how she should direct and discipline her employees. In particular, how she should instruct and direct Vicky Flores” He added that, while doing so, Hernandez spoke “harshly” to her and that, if employees perceived Perez as acting improperly, they should

³² Rather than taking credit for the document, Harpole averred that he merely “participated” in the drafting.

³³ Harpole introduced another element into the discipline of Hernandez, asserting that it was improper for him to have taken a complaint, regarding an employee who worked in a different department of the hotel, directly to the head of that department. However, he conceded that there is no work rule in the employee handbook which renders such an act as misconduct warranting discipline.

have gone to the general manager—"you do not criticize [Perez] in her face. You go to someone who . . . has the authority to instruct her." In this regard, according to Harpole, Hernandez could have addressed the matter by leading a delegation to Harding, for it was solely within the province of the general manager to speak to a department head regarding treatment of a subordinate.

The third reason for Hernandez' discipline concerns the undisputed fact that, notwithstanding his work shift was not scheduled to begin until 5 p.m. on July 23, Hernandez entered the hotel shortly before 11:30 a.m. that day in order to lead the delegation to Perez' office. In this regard, listed in Respondent's employee handbook³⁴ are various types of "unacceptable" employee conduct, which may result in discipline,³⁵ and the eleventh of the stated misbehaviors is "being on the premises more than [a half] an hour before your shift begins or after it ends."³⁶ Harding testified that the policy behind rule 11 is that "it helps us maintain order and control and further issues that may arise from employees being on the hotel property before or after their shifts." Asked when Respondent does not want employees on the property when not scheduled to work, he replied, "[A]ll of the time."³⁷ As to this, the record discloses just one prior instance of an employee being disciplined for violating rule 11, and this occurred in 1997 only after the employee had been verbally warned several times regarding coming to work early and, after work, remaining on the property in order to "chit-chat" with other employees. Harpole conceded that prior to disciplining an employee for violating this rule, Respondent would first consider the conduct, in which the employee engaged, on its property and, when asked if Hernandez had done nothing more than violating the above work rule would he have been disciplined, he replied, ". . . probably not. They don't arrest people for jaywalking all the time." On this point, while Harding mentioned that employees are not prohibited from arriving at work early in order to obtain their paychecks, Harpole conceded that the hotel has never set forth any of the permissible reasons for employees to be in the hotel so as

³⁴ Each employee receives a copy of the employee handbook during his or her orientation after hire and is expected to read it.

³⁵ Respondent maintains a disciplinary policy with levels of discipline ranging from a verbal warning to termination. The severity of the discipline to be utilized in any given situation is determined after an investigation and after consideration of eight listed factors including the impact of the misconduct on other employees, the employee's prior disciplinary record, the quality of his or her job performance, the employee's job tenure, the circumstances surrounding the misconduct, and existing precedents.

³⁶ Similar language appears in the parties' expired collective-bargaining agreement.

³⁷ Asked if Respondent maintained a work rule prohibiting employees from being on hotel property on their days off, notwithstanding the wording of the eleventh work rule, Harpole insisted that the provision also pertained to such conduct. According to him, the rule is "explicit" on this point, and employees know not to be at the hotel on their days off. When asked the same question, contradicting Harpole, Harding pointed to the "use of facilities" provision of the employee handbook. Moreover, he added that there is no absolute ban on employees being at the hotel on their days off; they can do so after seeking and being granted permission.

not to be in violation of rule 11. Asserting he has never read the employee handbook, Valentin Hernandez claimed ignorance of rule 11 prior to receiving the written reprimand. Nevertheless, while conceding he may have been in violation of the rule on July 23, he testified that each of the prior delegations, in which he took part, occurred in the morning and he was not spoken to by either Katzman or Harding or disciplined for violating rule 11,³⁸ and that he is aware of, at least, two other employees who habitually arrive early at work.

With regard to Respondent's fourth stated reason for disciplining Hernandez, there is no dispute that the alleged discriminate and the delegation of employees went directly to Carmen Perez regarding her alleged mistreatment of Vicky Flores. According to Myron Harpole, ". . . it's expressed in the . . . contract that matters of criticism of a supervisor are to go to the next highest supervisor." In this regard, paragraph 27.3 of the parties' most recent collective-bargaining agreement³⁹ states, "Any employee who believes that he or she has been harassed or discriminated against in any way, including but not limited to sexual harassment, shall report such harassment . . . to an Employer supervisor or officer who is senior in authority to any employee of the Employer who the Employee believes is engaged in such harassment or discrimination." Harpole added that, if other employees acted as did Hernandez on July 23, ". . . then we have potential chaos in the operation of our hotel and that's just intolerable." During cross-examination, when asked who is senior in authority, he stated that this means senior "to the employee who the employee believes engaged in the harassment." However, when asked if an employee could be disciplined for informing his or her supervisor that his harassment is unwelcome, Harpole replied, "We wouldn't construe it that way." Further, paragraph 27 is quite specific as to its areas of concern and does not appear to apply to general complaints of mistreatment by a supervisor, and, while Harpole asserted that employees are subject to discipline for acting in violation of paragraph 27.3, Harding conceded that there is no work rule in the employee handbook advising employees regarding possible discipline for bringing a complaint to the wrong supervisor. Finally, Hernandez testified he had never been told either that the July 23 delegation, regarding Vicky Flores, properly should have gone to Harding or that he could be disciplined for bringing the matter directly to Perez.

The complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) and (3) of the Act, by issuing its August 3 disciplinary warning letter to Valentin Hernandez. In his posthearing brief, counsel for the General Counsel poses alternate theories underlying the alleged violation of the Act—

³⁸ In this regard, Salvador Vasquez, a houseman for Respondent, testified that he participated in two delegations in 2004, each occurring more than a half hour after the end of his work shift, and that he knows of other employees who also participated in the delegations after the end of their work shifts. According to Vasquez, neither he or the other employees received discipline for violating rule 11.

³⁹ Par. 27 deals with prohibitions on Respondent and the Union from engaging in discrimination because of race, religion, color, sex, age, national origin, or ancestry. Thus, in context, sec. 3 deals with the proper individual to whom complaints of discrimination or harassment, based upon the above factors, should be brought.

that, rather than for legitimate business concerns, Respondent issued the warning letter to Hernandez in order to discourage him from engaging in activities in support of the Union—a violation of Section 8(a)(1) and (3)—or that the alleged misconduct, in which Hernandez engaged and for which he received discipline, was, in reality, protected concerted activity—a violation of Section 8(a)(1) of the Act. Contrary to the General Counsel, Respondent argues that its discipline of Hernandez was motivated by legitimate business concerns, his insubordination and violations of work rules. At the outset, I must determine what occurred on July 23 after the employee delegation, led by Hernandez, entered the housekeeping office and, in order to do so, resolve the conflicting testimony of the several witnesses. Initially, with regard to credibility, I was impressed by the testimonial demeanor of Hernandez, who is, of course, a current employee and was testifying contrary to the interests of his employer. He appeared to be always testifying in a direct and candid manner and, therefore, I shall rely upon his version of what occurred while he was inside the housekeeping office and, later, during his telephone conversation with Perez. Further, Paula Casillas impressed me as being an honest witness, and I note that, as did Hernandez, she testified directly in front of Myron Harpole. While contradictory regarding one point,⁴⁰ they generally corroborated each other as to what occurred in the housekeeping office on July 23—particularly regarding Hernandez' demeanor and actions, what he said, where he stood while speaking to Perez, and the length of time the employees remained in the room, and I, likewise, shall rely upon Casillas' account of what occurred. Also, Robin Brown-Rodriguez impressed me as being a trustworthy witness, and I shall rely upon her herein. With regard to the witnesses who testified on behalf of Respondent, inasmuch as her timecard shows her clocking in from lunch on July 23 at 12:11 p.m., approximately 45 minutes after Hernandez' delegation arrived at the housekeeping office and, at least, 40 minutes after Perez, who asserted the delegation remained in the housekeeping office for just 15 minutes, herself said the employees left her office, I believe it was impossible for Rosa Hernandez, who claimed she was inside the housekeeping office in order to clock in after lunch, to have observed Hernandez interacting with Perez, and, therefore, I completely discount her feigned testimony. As I previously stated, Carmen Perez failed to impress me as being a straightforward witness, and, in comparison to Hernandez, she was much less frank and trustworthy, always appearing to be attempting to buttress Respondent's position. In particular, I note that she was impeached by her pretrial affidavit as to her assertion Hernandez continually repeated himself regarding her mistreatment of employees, an important point given her assertion concerning the amount of time Hernandez remained in the housekeeping office, and that her assertion of being too busy to meet with his delegation was undercut by her willingness, at approximately the same time on another

day, to meet with another group of employees to discuss their plan to hold an employee vote on a Respondent contract proposal. By his demeanor while testifying, Joseph Harding appeared to be duplicitous and a disingenuous witness, and I am unable to credit any portion of his testimony. In this regard, I note his utterly contradictory testimony regarding Respondent's preparation of the disciplinary warning letter issued to Hernandez. Moreover, while he asserted that, on July 23, Perez reported to him that Hernandez "threw papers at her" and gave her some sort of a petition, Respondent offered no such document as corroboration and Perez failed to mention any of the foregoing during her testimony. Finally, while, during his testimony, Myron Harpole acted as a forceful advocate of Respondent's legal position, his demeanor, in my view, was that of a witness who was not squeamish about tailoring his testimony in order to buttress said position. Thus, I found inconceivable his assertion that, notwithstanding its clear wording and Harding's belief that another rule governs the subject, rule 11, in the employee handbook, is "explicit" with regard to not permitting employees to be in the hotel on their days off and, unconscionable, if true, his tropism, without any investigation, to have immediately, and unequivocally, accepted Perez' version of her encounter with Hernandez and concluded the latter had engaged in misconduct, and I note that his assertion, regarding Hernandez berating Perez in the presence of other employees, who may have been in the housekeeping office on July 23, was not corroborated by Perez.

Based upon the foregoing, I find that, as a result of incidents involving Vicky Flores and Adelina Escobar and after informing union officials of their intent, Valentin Hernandez, who had been an active supporter of the Union and had participated in the collective bargaining between Respondent and the Union, and other employees participated in a delegation to the housekeeping office on July 23 in order to present an oral petition to Carmen Perez regarding, what the employees perceived as, her mistreatment of the two housekeeping employees; that Hernandez was the leader of the delegation; that the employees arrived at the housekeeping office at approximately 11:30 in the morning and, once inside the room, Hernandez moved to a position a few feet from the photocopying machine next to Perez' desk and, at least, 7 feet from her and the other employees stood nearby; and that, upon noticing the employees, Perez, who appeared calm and relaxed, greeted them and asked how she could help them. I further find that Hernandez, who had nothing in his hands but waved his arms while speaking, replied that the employees were there because Vicky Flores had informed them of Perez' mistreatment of her, including raising her voice at Vicky; that the employees wanted Perez to immediately stop mistreating the employees who she supervised; and that those employees were at the hotel to work and not to be yelled at. Also, I find that Perez, who arose from her desk chair at some point, responded, asking why the employees in the delegation were there if they knew just one side of the story; that Hernandez, obviously bent upon lecturing to Perez in a stern and perhaps unwelcome manner, interrupted her, saying they were not there to confront her or to argue with her but, rather, only to ask her to respect the employees and nothing more; that, then, Hernandez and the other employees abruptly turned and left the

⁴⁰ They did disagree as to whether Perez sat throughout the meeting (Casillas) or stood at some point (Hernandez). However, inasmuch as Perez admitted that she did, in fact, stand up while Hernandez was speaking to her, I find this minor contradiction not particularly significant.

housekeeping office; that, during the incident, Hernandez neither ever raised his voice, used profane language, repeated his words, waved his hand in her face, nor moved toward Perez in a threatening manner and the latter never backed away from him in a frightened manner; and that the entire incident lasted no longer than 2 minutes.⁴¹ Next, I find, during a bargaining session later in the day, that, while pointing directly at Hernandez, Myron Harpole accused him and the other members of the delegation of making an unauthorized visit to Perez' office earlier in the day and engaging in a "threatening confrontation" with her; that Harpole added that Respondent would hold a disciplinary hearing "around his actions;" and that Harpole then accusingly questioned Brown-Rodriguez as to whether the Union had authorized the delegation to Perez. Furthermore, I find, at some point after beginning work and after his supervisor, Francisco Orozco, informed him Harpole was upset at what occurred during the delegation to Perez' office and Perez herself was "a bit shook up;" that, while he believed he had done nothing wrong, Hernandez telephoned Perez at the housekeeping office; that he told her what he had said was not directed personally at her and he had nothing against her personally; that he also told her, if she had misconstrued what he said, perhaps the best way to resolve things was to apologize to her; that Perez replied there was no problem and she accepted his apology; and that the conversation then ended. Finally, I find that Respondent issued a disciplinary warning letter to Hernandez on July 23 and that, as admitted by Harpole and Harding, the crux of Respondent's rationale for disciplining him was the timing of the delegation to Perez' office on July 23, the manner in which Hernandez acted, and what he said to Perez, and that Harpole and Harding believed Union officials were aware of and encouraged Hernandez and the other participants to engage in their delegation that day.

While contrary to Respondent, the General Counsel and the Union contend that, based upon the foregoing matrix of facts, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act, all parties agree as to the applicable analytical approach for this allegation. Thus, as explained by the Board in *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983), in order to have established a violation of Section 8(a)(1) and (3) of the Act, the General Counsel must have proven, by a preponderance of the evidence, that antiunion animus was a motivating factor in Respondent's conduct. Once such a showing was made, the burden shifted to Respondent to demonstrate that the same action would have taken place in the absence of, or notwithstanding, Hernandez' activities in support of the union. To have sustained its initial burden, that of persuading the Board Respondent acted out of antiunion animus, the General

⁴¹ I need not and do not make any findings as to whether Perez alone concocted her duplicitous version of what occurred between Hernandez and her in her office on July 23 or whether she and Harding together decided upon a version which best suited Respondent's interests. Further, I do not and need not decide whether Harpole was aware of any of Perez' or Harding's embellishments.

Counsel must have shown (1) that Hernandez was engaged in activities in support of the union; (2) that Respondent was aware of or suspected his union sympathies or activities; and (3) that Hernandez' activities in support of the union were a substantial or motivating factor underlying Respondent's actions. Such motive may be established by circumstantial evidence as well as by direct evidence and is an issue of fact. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 936, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994). Four points are relevant to the above-described analytical approach. First, in determining whether the General Counsel has established a prima facie showing of unlawful animus, the Board will not quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make the acts and conduct at issue violative of the Act. *Wright Line*, supra at 1089 fn. 4. Second, once the burden shifted to Respondent, the crucial inquiry was not whether Respondent could have engaged in the alleged unlawful acts and conduct but, rather, whether Respondent would have done so in the absence of Hernandez' support for the Union. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene's Bargain Basement*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which ". . . the defense of business justification is wholly without merit" (*Wright Line*, supra at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1998). Finally, regarding the latter point, "it is . . . well settled . . . when a respondent's stated motive for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal. *Flour Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Shattuck Den Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

In these regards, Hernandez was a strong supporter of the Union and participated in the collective bargaining between Respondent and the Union as a member of the latter's employee bargaining committee. While the record is uncertain as to whether the Union actually authorized the July 23 delegation to Carmen Perez' office, union officials, including Brown-Rodriguez, were aware of the underlying reasons for and of the delegation itself, and union officials trained Hernandez and other employees as to their behavior during delegations. Also, it is clear that, while participating in the delegation and meeting with Perez, Hernandez and the other employees were engaged in protected concerted activities. As to this, Hernandez and the other employees went to Perez in order to protest her alleged mistreatment of two housekeeping employees, whom she supervised, and the Board has long held that group complaints about the quality of supervision are directly related to working conditions and fall within the "rubric" of protected concerted activities. *Rhee Bros., Inc.*, 343 NLRB 695 fn. 3 (2004); *Astro Tool & Die Corp.*, 320 NLRB 1157, 1162 (1996); *Brother Industries*, 314 NLRB 1218 (1994). Moreover, notwithstanding whether or not the Union authorized the July 23 delegation to Perez, as, in his August 3 reprimand letter to Hernandez, Harding specifically stated his belief that the Union encouraged the July 23 delegation, for which Hernandez was the spokesperson, Respondent obviously suspected that Hernandez had participated in a union-sponsored activity. While these facts are clear,

the fundamental issue is, of course, whether the General Counsel has established that Respondent was motivated by union-related concerns in disciplining the alleged discriminate—Hernandez. On this point, while no direct evidence of motive is extant in the record, I have previously concluded that Respondent, through Perez, unlawfully threatened reprisals against an employee for engaging in activities in support of the Union. Further, I have found that, during the bargaining session between the parties in the afternoon of July 23, after pointing at the alleged discriminatee, who, along with other members of the employee negotiating committee, was present, and warning that a disciplinary hearing, involving his conduct earlier in the day, would be held,⁴² turned to Brown-Rodriguez and demanded to know if the delegation to Perez had been a union-authorized event and that, as stated above, in his disciplinary letter to Hernandez, Harding stated that union officials knew of the delegation “beforehand” and encouraged it but that, in view of his “relative inexperience and immaturity,” such would be viewed as a mitigating factor insofar as the severity of discipline afforded to Hernandez. As argued by counsel for the Union, one may justifiably infer, from both Harpole’s accusation and Harding’s comment, that Respondent disciplined Hernandez, in part, because it believed the Union had encouraged and persuaded him to lead the delegation to Perez while a more mature employee, a less fervent supporter of the Union, would have resisted the Union’s entreaties. Finally, concerning motivation, as Harpole and Harding conceded that Hernandez’ conduct inside the housekeeping office was the predominant underlying reason for disciplining him and as, in accord with my credibility resolutions and findings of fact, I believe that Respondent’s version of Hernandez’ behavior and actions while meeting with Carmen Perez was a canard, justifying the discipline given to him, the inference is warranted that Respondent’s true motivation was to discourage employees from engaging in lawful union activity. Accordingly, I am convinced that the General Counsel has established that Respondent was unlawfully motivated in administering discipline to Hernandez.

In these circumstances, the burden shifted to Respondent to establish that it would have disciplined Hernandez notwithstanding the presence of unlawful animus underlying the discipline afforded to him. In this regard, I reiterate my view that, notwithstanding Hernandez may have lectured Perez in an unwelcome and stern manner, the initial, and concededly the pre-eminent, reason for its discipline of the alleged discriminatee, his asserted misconduct while speaking to Perez, was a sham. On this point, I note the absurdly deficient nature of Harding’s putative investigation of the incident, including the general manager’s failure to seek denials of Perez’ allegations from Hernandez or to locate and question potential witnesses, and

⁴² In the circumstances of his accusatory question to Brown-Rodriguez, I agree with counsel for the General Counsel that, rather than a mere statement of Respondent’s intent to undertake an investigation of what occurred inside Carmen Perez’ office, Harpole’s statement, that Respondent would hold a disciplinary hearing on Hernandez’ conduct, was nothing less than an implied threat of reprisals to Hernandez and to the other employees present if they engaged in activities in support of the Union. Accordingly, I find Harpole’s statement to have been in violation of Sec. 8(a)(1) of the Act.

believe Harding was merely camouflaging Respondent’s fervor to discipline the alleged discriminatee. Moreover, assuming Hernandez acted in an abrupt and disrespectful manner toward Perez, the Board has held that, while engaged in protected concerted activity, regardless of the inaccuracy of an employee’s comments or their lack of merit or even his usage of foul language or epithets directed toward a member of management, such would not be sufficient to require forfeiture of the protection of Section 7 of the Act. *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995); *Delta Health Center*, 310 NLRB 43 (1993). Also, while Harpole emphasized how busy Perez is before noon and the intrusive nature of the Hernandez delegation, as will be discussed infra, Perez was not too busy, at the same time on another day, to have met with a group of housekeepers and discussed the propriety of an employee vote on an employer contract proposal, and Harding admitted he never requires employees to make appointments to see him, even boasting of “an open door policy.” Turning to Hernandez’ violation of Respondent’s work rules, while he may have acted in violation of rule 11 when he entered the hotel shortly before 11:30 a.m. in order to lead the delegation to Carmen Perez, I have found nothing opprobrious regarding his behavior in the housekeeping office while meeting with Perez, and Harpole likened the matter to jaywalking, admitting that, if Hernandez had done nothing more than violating the work rule, he would “probably” not have been disciplined. Moreover, while participating in prior delegations to Harding and to Katzman, Hernandez seemingly had acted in violation of rule 11 but had never been disciplined for such. Further, Harding admitted that there are permissible reasons for employees to be in the hotel and not be in violation of rule 11 but that none of these are set forth in the employee handbook. Next, Harpole asserted that Hernandez had acted in violation of paragraph 27.3 of the most recent collective-bargaining agreement by going directly to Perez in order to complain about her alleged mistreatment of a subordinate rather than to her direct supervisor Harding. However, the provision, to which Harpole referred, specifically pertains to harassment and discrimination, including sexual harassment, and not to general complaints of mistreatment by a supervisor and, while Harpole also asserted that employees are subject to discipline for bringing complaints to the wrong supervisor, he conceded that there is no work rule in the employee handbook advising employees regarding possible discipline doing so. In these circumstances, I find that Respondent failed to establish that it would have disciplined Hernandez notwithstanding harboring unlawful animus and that, accordingly, it acted in violation of Section 8(a)(1) and (3) of the Act by issuing a written warning to the alleged discriminatee for leading the delegation to Perez on July 23.⁴³

⁴³ Even absent the existence of unlawful animus, under *Burnup & Sims, Inc.*, 379 U.S. 21 (1964), Respondent’s discipline of Hernandez was violative of Sec. 8(a)(1) of the Act. Thus, I have previously concluded that he engaged in protected concerted activities by leading a delegation of employees to Carmen Perez in the housekeeping office and meeting with her and that lecturing to Perez regarding how she should be treating her subordinates and not permitting her to speak did not constitute conduct which would have deprived him of the protection, afforded by Sec. 7 of the Act. Further, I have found that Hernan-

D. Respondent's Involvement with the Ballots During the Employees' Vote on Respondent's Contract Proposal

The complaint alleges that Respondent bypassed the Union and unlawfully dealt with its bargaining unit employees on two separate occasions involving their vote on an employer contract proposal. The genesis of these allegations occurred during the parties' bargaining session on July 23; there is no dispute that, in the midst of bargaining over wages and other economic issues, Myron Harpole turned toward the employee negotiating committee and announced a last, best, and final offer. According to Robin Brown-Rodriguez, he said that ". . . the company was pretty much at the end of the line, that they were going to be giving an offer to the Union . . . [which] was close to the end of the line and he wanted employees to vote on that offer. He . . . told employees that . . . they had paid over \$700,000 in dues . . . over the years and that they had a right to demand a vote from their leaders, they should ask [the Union] to put the hotel's offer to a vote, . . . within the next two weeks and that, if they did not, he would come back [with a lesser offer] . . . based on the wages and benefits of the surrounding El Segundo hotels." While it is unclear whether Brown-Rodriguez immediately rejected the offer, she apparently did reply that the Union reserved the right to consider how to respond to it. Nevertheless, faced with Harpole's demand for an employee referendum, the Union never scheduled a bargaining unit vote on acceptance or rejection of Respondent's proposal.

Lead housekeeper, Marta Lara, was among the bargaining unit employees present at the July 23 negotiating session, and, on the following Monday morning, dissatisfied with the Union's inaction, she met with a group of employees and informed them that Harpole wanted them to vote on Respondent's contract proposal, and "so that is when a group of employees [decided to] do a voting . . . to see if they want . . . the pay increase." Later, at approximately 11:30 a.m., Lara, lead housekeeper, Marisa Mejia, and two other housekeepers went to the housekeeping office in order to speak to Carmen Perez. According to Perez, the employees ". . . mentioned to me that there was a pretty large group of employees who were thinking of [organizing an employee vote on Harpole's contract proposal]." Also, ". . . they wanted to make sure they were not violating any company rule." Perez responded that she would get back to the employees as to whether conducting the vote would violate any company work rule and that she thought they could do so but only during their nonworking hours.⁴⁴ Accord-

dez engaged in none of the misconduct, which was attributed to him by Respondent. Therefore, in agreement with the General Counsel's alternate theory of the violation of the Act, I must conclude that Respondent simply disciplined Hernandez because he engaged in protected concerted activities—clearly, an unlawful act.

⁴⁴ During cross-examination, Perez said that, when Lara and the other housekeepers met with her, it was "more or less" the same time of day as when Hernandez and his delegation met with her. Also, she averred that, while she was busy when Lara and the others came to speak with her, they did not interfere with her work as ". . . they stayed there for about 5 minutes."

During cross-examination, Perez further testified that, later in the day, she spent 15 minutes reviewing the collective-bargaining agreement and then telephoned Harding, asking him the same question the

ing to Lara, later in the day, Perez informed her that conducting an employee vote was "not a problem" as all the employees were members of the Union, and that evening, after she told her what to write, Marisa Mejia's daughter drafted a handwritten ballot form, concerning accepting or rejecting Respondent's contract offer, for Lara. The latter further testified that, the next morning before Perez arrived at the housekeeping office, utilizing the housekeeping photocopying machine, she produced numerous copies of the ballot (GC Exh. 2), and began distributing these to bargaining unit employees; that, using paperclips, she also attached copies of the ballots to the housekeeping employees' timecards, which were located next to the timeclock in the housekeeping office;⁴⁵ and that she gave several copies of the ballots to Mejia, who was to distribute them to food and beverage department employees.

Houseman, Salvador Vasquez, testified that he first saw copies of General Counsel's Exhibit 2, the ballot, "with the timecards" in the housekeeping office one day in mid-July. According to him, "I came to punch out and [Perez] was there, putting the papers with the time cards, and she saw me and pulled back." What he observed was Perez putting the ballots and timecards together "with a paperclip." Vasquez added that, when he first observed her, Perez was standing in front of the timecards, and, as he approached, ". . . she left and went next to her desk, in her office." Then, Vasquez punched his own timecard, and, as he walked out of the housekeeping office, he observed Perez walking back toward the timecards, and "she had some folded papers in her hands." Perez testified that she observed Lara and Mejia producing the voting ballots on Harpole's contract proposal in the housekeeping office by cutting sheets of paper in half; that, one day upon arriving at work, she observed folded sheets of paper attached to the timecards by paperclips; that, while she did not see them doing it, she understood Lara and Mejia were the individuals who attached the papers to the timecards; and that, as she has responsibility to handle the timecards in order to ensure that employees are punching in and punching out, "if I had to touch the cards, I probably touched the ballots." However, while conceding the foregoing, Perez specifically denied the actions, attributed to her by Vasquez.

Marisa Mejia testified that she was responsible for distributing the ballots to the food and beverage department employees in the hotel's kitchen. According to her, she spoke to Francisco Orozco, the manager of that department, as "I was entering and he was leaving the coffee shop. . . . I asked him permission to place some ballots so employees would learn of the meeting that we had." Specifically, she asked if she could clip the ballots to the employees' timecards in the kitchen, and Orozco advised her not to do so. She then went inside the kitchen, and "I handed [ballots] out to about five or six people and they

employees had asked her regarding whether conducting a vote would violate any work rule. However, on this point, she was impeached by her pretrial affidavit, in which she stated that it was not necessary to speak to Harding because, at the bargaining session, Harpole said an employee vote was what Respondent wanted.

⁴⁵ Lara testified that she produced the copies of the ballots and attached them to the timecards without Perez' knowledge and before the latter arrived at work.

signed them and then I went back.” Denying leaving any of the ballots in the kitchen or with Orozco or clipping any to the employees’ timecards, Mejia further testified that she retained possession of all the signed and unsigned ballots, which she had in her possession that day.

Orozco, who testified on behalf of the General Counsel, stated that, during the summer, he was aware that an employee vote was being conducted on an employer contract proposal and that “. . . I knew something was going on. . . . when I was approached by Joe Harding in my office” one afternoon. Harding asked “. . . if I would do him a favor,” and “. . . he had a whole bunch of those ballots . . . and asked me to distribute . . . those to the employees in the food and beverage area, and I said, sure.”⁴⁶ According to Orozco, he followed Harding’s instructions, but he did not “feel comfortable” being asked to distribute the ballots as Harding had “. . . put [him] in a spot when . . . approached by . . . employees,” who were “discouraged” and believed he was “forcing” them to sign the ballots because he was distributing them. Orozco testified he made it clear to the employees that he was “not forcing anybody” to sign a ballot and that if anyone did not want to fill out and execute a ballot, “do not do it.” Orozco estimated that he distributed 15 to 20 ballots between 1 and 2 p.m. and stated that each employee, to whom he gave a ballot, returned it to him. Upon receiving all the ballots which he distributed, Orozco immediately returned them to Joe Harding, who thanked him. Joseph Harding testified that he became aware of the distribution of ballots upon receiving a telephone call from a woman in Respondent’s sales office.⁴⁷ She told him that the employees were putting notices on timecards, that Steve Sainz, a cook, was ripping them down, and that the employees would like some help. He further testified that, later in the afternoon, he walked into Orozco’s office, sat down, told him what he had been told,⁴⁸ and said, “[P]lease help him out, see that they are able to get their message across.” Stating that he had not yet seen any of the ballots and denying ever giving any ballots to Orozco or receiving any written ballots, Harding averred that it is “possible” that he was aware of the names of the employees who were distributing the ballots and that he “might have” mentioned Lara and Mejia to Orozco. At this point in his testimony, Harding changed his version of his conversation with Orozco, stating he told the latter that “. . . the employees needed some help putting these on the timecards. Please help them out and make sure they are on their own time.”⁴⁹ Moreover, while Harding opined that Orozco’s version of events was wrong, he was then confronted with his pretrial affidavit wherein he stated he did not have any conversations with Orozco about the ballots prior to becoming aware of the instant unfair labor practice charge. Finally, examination of the ballots

discloses that, at least, 12 food and beverage department employees signed ballots.

The complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with bargaining unit employees when Perez allegedly “placed” copies of the ballots, regarding Respondent’s contract proposal, with employees’ timecards and when Harding and Orozco participated in the distribution of the ballots to bargaining unit employees. Again, the credibility of the several witnesses is crucial to a determination as to whether Respondent engaged in the alleged unfair labor practices, and, in this regard, I believe lead housekeepers, Marta Lara and Marisa Mejia, and houseman, Salvador Vasquez, were forthright witnesses, each testifying truthfully to the best of his or her recollection. Likewise, I found Francisco Orozco’s demeanor, while testifying, to have been that of a candid and conscientious witness, and, as an admitted supervisor, within the meaning of Section 2(11) of the Act, his testimony, adverse to the interests of Respondent, constituted admissions of fact. In contrast, I have previously stated my conclusions as to the mendacity of both Carmen Perez and Joseph Harding. As to the former, I particularly note her admission that she “probably” had touched the ballots, which were attached to the timecards, and, as to Harding, my conclusion concerning his guileful demeanor is enhanced by his contradictory testimony, ultimately impeached by his pretrial affidavit, regarding his conversation with Orozco. Accordingly, for my findings of fact regarding the above allegations, I shall rely upon the respective testimony of Lara, Mejia, Vasquez, and Orozco, and the admissions of Perez.

Based upon the foregoing, regarding the Perez allegations, I find that, shortly after Myron Harpole made his contract proposal to the Union and demanded an employee ratification vote, lead housekeeper, Marta Lara, who heard Harpole’s offer, met with fellow bargaining unit employees and discussed it; that, as a result of these discussions, Lara and other employees decided to conduct an employee vote; that Lara and other housekeeping employees met with Carmen Perez, who informed them that a vote would not violate any of Respondent’s work rules but that the vote could not be accomplished during worktime; that Lara prepared the election ballots, by which employees would ratify or reject Harpole’s contract proposal; and that, to ensure distribution to all housekeepers, Lara attached copies of the ballot to the housekeeping employees’ timecards with paperclips. I further find that, at a time subsequent to Lara attaching copies of the ballots to the housekeeping employees’ timecards, houseman, Salvador Vasquez, observed Carmen Perez handling the ballots and timecards; that the latter noticed Vasquez observing her and backed away; and that Perez continued what she was doing as Vasquez left the room. As to the allegations involving Orozco and Harding, I find that, sometime after Harpole made his contract proposal, Harding came to Orozco’s office, carrying copies of the ballot, which had been prepared by Lara; that Harding asked Orozco to do him a favor and distribute the ballots to the employees in his department; that Orozco agreed to do so and gave ballots to approximately 20 employees; that, in following Harding’s instructions, Orozco told the employees, most of whom believed he was forcing

⁴⁶ Orozco identified the documents as copies of GC Exh. 2.

⁴⁷ He identified his caller as either Sandra Sooklal or Marisa Vega, both of whom are sales managers.

⁴⁸ Harding testified he also told Orozco that employees were pulling “ballots” off the timecards and “its unfair.”

⁴⁹ During cross-examination, Harding said that he specifically told Orozco that “. . . if they put [the ballots] back on, let it happen. You know, just let them do their thing.”

them to fill out their ballots, he was not demanding that they do so and, if he or she was apprehensive about filling out a ballot, then, not to do so; and that, upon receiving the ballots from employees, who completed the documents, Orozco returned them to Harding, who thanked the former.

The Supreme Court and the Board have long held that an employer must bargain exclusively with the majority representative of its employees with respect to the terms and conditions of employment of its bargaining unit employees. *Medo Photo Supply Corp.*, 321 U.S. 678 (1944); *Permanente Medical Group*, 332 NLEB 1143, 1144 (2000). In this regard, the Supreme Court has stated that the obligation to bargain with the majority representative is an “exclusive” one and imposes a “negative duty” not to bargain with any other, including the bargaining unit employees themselves. *Medo Photo Supply Corp.*, supra at 684. For determining whether direct dealing with its bargaining unit employees, in violation of Section 8(a)(1) and (5) of the Act, has occurred, the Board utilizes a three-pronged test—(1) the respondent must have communicated directly with its union-represented employees; (2) the discussion was for the purpose of establishing or changing the employees’ wages, hours, or other terms and conditions of employment; and (3) the communication was to the exclusion of the union. *Permanente Medical Group*, supra. Applying this test to the Perez allegation, I do not believe her actions constituted communicating with bargaining unit employees. Thus, I have found that Marta Lara was the employee who attached the voting ballots to the housekeeping employees’ timecards, and I believe that, at most, Vasquez probably came upon Perez handling the timecards in her supervisory capacity, such as for monitoring time and attendance or ensuring employees were clocking in and out, and, by necessity, also handling the folded ballots. In these circumstances, while certainly problematic, Perez’ actions did not arise to the level of unlawful direct dealing. On the other hand, the actions of Harding and Orozco patently constituted direct dealing with bargaining unit employees. Thus, Orozco followed Harding’s instructions and communicated directly with Respondent’s bargaining unit employees by distributing to and collecting from them copies of the election ballots, the said ballots were for the purpose of ratifying or rejecting Respondent’s contract proposal regarding an increase in the bargaining unit employees’ wage rates; and the Union never authorized such a vote, which was originated by Marta Lara. Absent record evidence, divining why and how Harding became involved in the distribution of the ballots would be mere speculation. However, Respondent obviously had an interest in the outcome of the vote, and, by enmeshing itself in Lara’s and other employees’ unauthorized activity, Respondent clearly acted to erode the position of the Union. Accordingly, by the actions of Harding and Orozco, Respon-

dent engaged in direct dealing with its bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act. *Harris-Teeter Super Markets*, 310 NLRB 216, 217 (1993); *Allied Signal, Inc.*, 307 NLRB 752, 754 (1992).

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. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By involving itself in the bargaining unit employees’ unauthorized ratification vote on Respondent’s July 23, 2004 contract proposal, Respondent engaged in direct dealing with its bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act.

4. By issuing a warning notice to its employee, Valentin Hernandez, because he participated in a delegation to the office of the head of housekeeping, Carmen Perez, which act, it believed, was authorized by the Union, Respondent engaged in conduct, violative of Section 8(a)(1) and (3) and Section 8(a)(1) of the Act.

5. By threatening its employee, Adelina Escobar, with reprisals or negative consequences for engaging in activities in support of the Union, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

6. By threatening Hernandez with a disciplinary hearing for participating in the delegation to Perez, which act, it believed, was authorized by the Union, Respondent implied that employees would suffer reprisals if they engaged in activities in support of the Union in violation of Section 8(a)(1) of the Act.

7. Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist from engaging in said acts and conduct and to take certain affirmative actions, which I deem necessary to effectuate the policies and purposes of the Act. In particular, I shall recommend that Respondent be ordered to rescind the warning notice, which it gave to its employee, Valentin Hernandez, in August 2004, and to remove from Hernandez’ personnel file and its own files any reference to said warning notice. Further, I shall recommend that Respondent post a notice to its employees setting forth its obligations in order to effectuate the policies and purposes of the Act.

[Recommended Order omitted from publication.]