UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FONTAINEBLEU FLORIDA HOTEL, LLC
d/b/a FONTAINBLEAU MIAMI BEACH

and Case No. 12-CA-328671

CESAR AUGUSTO MAINARDI, SR.,
An Individual

Susy Kucera, Esq.
for the General Counsel.
Charles E. Engeman, and John T. Merrell, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart, LLC, St. Thomas, U.S. Virgin Islands and Greenville, South Carolina)
for the Respondent.
Cesar Augusto Mainardi, Sr., Pro Se, (Miami Beach, Florida)
for the Charging Party.

DECISION

STATEMENT OF THE CASE
JURISDICTION
STATEMENT OF FACTS

IRA SANDRON, Administrative Law Judge. This case was tried in Miami, Florida on March 27, 2025. Cesar Augusto Mainardi, Sr. filed the charge giving rise to this case on October 25, 2023. The General Counsel issued the complaint in this matter on March 21, 2024. This matter was tried previously before the late Administrative Law Judge Donna Dawson. Judge Dawson was unable to issue a decision. Thus, I conducted a trial de novo. I have considered only the record made before me on March 27.

Respondent operates a hotel in Miami Beach, Florida. In the year prior to the issuance of the complaint, Respondent derived gross revenues in excess of $500,000. It also purchased and received at its Miami Beach hotel goods valued in excess of $50,000 from points outside the State of Florida. I find that Respondent was at all material times an employer within the meaning of Section 2 (2),(6) and (7) of the Act. UNITE HERE Local 355 (the Union) has at all

material times been a labor organization within the meaning of Section 2(5) of the Act. Cesar Mainardi, the Charging Party, was a member of a bargaining unit represented by the Union.

On June 12, 2023 , Kristal Swaby, Respondent's Director of Labor Relations, sent Charging Party Mainardi an email discharging him, G.C. Exh. 2. Respondent terminated Mainardi for refusing to cooperate in an internal investigation. The email cited Respondent's Team Member Handbook regarding internal investigations and searches. The email specifically mentioned Mainardi refusing to provide Respondent with a written statement. It also cited a civil tort action that Mainardi filed against one of Respondent's customers. The email concluded:

> …you understood that the CBA prohibits employees from contacting guests about or involving them in workplace disputes …

On July 18, 2023, Mainardi filed charge 12-CA-322014 alleging that Respondent violated the Act in discharging him. On October 17, 2023, Region 12 sent Mainardi a letter dismissing this charge.

Mainardi then filed the instant charge on October 25, alleging that Respondent is violating the Act by maintaining a provision in its collective bargaining agreement with the Union which prohibits bargaining unit employees from engaging in protected concerted activity and interferes with employees' Section 7 rights.

The Complaint alleges that Respondent has been violating Section 8(a)(1) by maintaining Article 32, Section 5 of its collective bargaining agreement with the Union and enforcing the rule by citing Mainardi's knowledge of the rule as a basis for its decision to discharge Mainardi.

Thus, the only issue in this case is the facial legality of Article 32, Section 5. There are no factual issues in this case. Mainardi did not testify at the hearing. The General Counsel introduced his discharge letter and the collective-bargaining agreement. Respondent introduced evidence as to the bargaining history surrounding Article 32, Section 5, the competitive nature of its business, and the importance of Article 32, Section 5 to its competitive position.

Article 32, G.C. Exh. 2, at 28, is entitled Guest Service Commitment. Section 5 in its entirety reads as follows:

> The Union and the Employer agree that dissatisfied guests simply will not return to the hotel, and therefore it is in the parties' mutual interest to provide premier guest service. Toward this end, the Employer must train bargaining unit employees on how to provide premier guest service and the Employer should not employ or continue to employe bargaining unit employees who are either unable or unwilling to provide, or who do not provide, premier guest services. Therefore:
>
> 1) The Employer has the right to establish guest service standards, as well as appropriate grooming and dress standards.
> 2) The Employer may apply progressive discipline, up to and including discharge, against employees who are the subject of legitimate guest complaints.

3) The Employer may apply progressive discipline, up to and, including discharge, against employees who fail to receive a passing score on a service audit regarding the Hotel's required guest service standards at the conclusion of a training session on such standards.

Discipline administered under this Section is subject to the grievance and arbitration provisions of the Agreement.

The Employer shall not be required to compel any guest to testify during the grievance and arbitration procedure nor to reveal the guest's contact information, including address, e-mail, or telephone number to the Union or the employees. Where the Union wishes to investigate a written guest complaint, the Employer shall cooperate in working with the Union in investigating the matter. It is the intent and meaning of this Agreement that the Union and its members, nor any agents thereof, shall not contact any Hotel guest directly during an investigation or processing of any grievance. Nothing in this section shall prevent a guest from reaching out to the Union or its members.

Section 5 of Article 32 was negotiated at the behest of Respondent. The last sentence of Section 5 was included at the behest of the Union.

Analysis

The General Counsel relies largely on the Board's decisions in *PAE Applied Technologies, LLC,* 367 NLRB No.105, slip op. 2, fn. 6 (2019), and *Kinder Care Learning Centers,* 299 NLRB 1171 (1990) for the proposition that Article 32, Section 5 violates the Act. These cases stand for the proposition that employees have a Section 7 right to communicate with their employer's customers about the terms and conditions of employment for their mutual aid and protection.

Respondent submits that those cases are distinguishable, R. brief at 32 fn. 11. I agree in that Section 5 is limited to situations in which an investigation, grievance or arbitration is pending. It does not generally prohibit employees from communicating with guests about the terms and conditions of their employment. Moreover, it merely prohibits the Union or a unit employee from initiating contact with a hotel guest. Section 5 also leaves it open for the Employer and Union to agree to the Hotel contacting a guest whose input is relevant to a grievance. If input from a guest is completely prohibited, despite a request for such from the Union or the grievant, this may violate the Act. However, that is not the instant case. I conclude that Section 5 is not facially invalid. Respondent has a legitimate interest in preventing an employee under investigation for misconduct from attempting to intimidate a hotel guest.[1]

First, I conclude that Section 5 does not explicitly restrict Section 7 activity. Secondly, assuming Section 5 has a reasonable tendency to chill employees' exercise of Section 7 rights, I find that Respondent's interest in preventing the Union or an employee from initiating contact

[1] The employer in *PAE Applied Technologies* had a far less compelling reason for its prohibition. The "customer" in that case was the United States Air Force, a "customer" far less vulnerable to intimidation or interference than a hotel guest.

with a hotel guest outweighs the employee's Section 7 rights, *Stericycle, Inc.* 372 NLRB No. 113 (2023). The record does not establish that Respondent would be able to protect that interest with a more narrowly tailored rule.[2]

CONCLUSION OF LAW

Respondent is not and has not violated the Act by maintaining Article 32, Section 5 of its collective bargaining agreement with the Union and enforcing the rule by citing Mainardi's knowledge of the rule as a basis for its decision to discharge Mainardi.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 14, 2025

Ira Sandron
Administrative Law Judge

[2] Article 32, Section 5 would clearly be legal under the previous Board decision in *Apogee Retail LLC d/b/a Unique Thrift Store,* 368 NLRB 144 (2019)--see Member Kaplan's dissent in *Stericycle*..

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