

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

EYM KING OF KANSAS, LLC	§	
D/B/A BURGER KING®,	§	
	§	Nos.: 14-CA-148915
AND	§	14-CA-150321
	§	14-CA-150794
WORKER’S ORGANIZING COMMITTEE—	§	
KANSAS CITY,	§	

EYM’S REPLY BRIEF TO THE GENERAL COUNSEL’S ANSWERING BRIEF

I.

AS A MATTER OF LAW, THE APRIL 15TH STRIKE WAS AN UNPROTECTED INTERMITTENT WORK STOPPAGE.

A work stoppage is unprotected “*when . . . the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.*” *Polytech, Inc.*, 195 NLRB 695, 696 (1972) (emphasis added). Only *two* factors are necessary for a work stoppage to constitute an intermittent strike: “(1) . . . more than two separate strikes, *or threats of repeated strikes*, and (2) they are not responses to distinct employer actions or problems, but rather part of a strategy to use a series of strikes, in support of a single goal, because this would be more crippling to the employer and/or *would require less sacrifice by employees than a single strike.*” *Land Mark Elec.*, 1996 WL 323648 (N.L.R.B. G.C. Advice Mem. May 17, 1996) (emphasis added). What makes “a work stoppage unprotected is . . . the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced.” *Vencare Ancillary Servs., Inc. v. NLRB*, 352 F.3d 318, 324 (6th Cir. 2003) (quoting *First Nat’l Bank of Omaha*, 171 NLRB 1145, 1151 (1968)), *enf’d*,

423 F.2d 921 (8th Cir. 1969).

As a matter of law, the April 15th strike was an unprotected intermittent work stoppage.

A. THE GC AND THE UNION ARE BOUND BY THE ALJ’S FINDINGS:

Neither the GC nor the Union filed any exceptions or cross-exceptions to the following findings of the ALJ and they are, therefore, now bound by them (ALJD, pp. 4, 7; emphasis added):

[p. 4]: WOCKC is a *local outpost* of the national Workers Organizing Committee (WOC).¹ *WOCKC, with assistance from the WOC, conducts local campaigns for higher wages, better working conditions, and unionization.*

. . . Wise began participating in *WOCKC sanctioned strikes* in spring 2013. He has participated in strikes on July 29-30, 2013; August 29, 2013; December 15, 2013; May 15, 2014; September 4, 2014; December 4, 2014; and April 15, 2015. *Only one of the strikes has lasted more than a day. WOC coordinated the nationwide 1-day strikes.*

. . . Prior to going out on strike, a third-party representative and one or more workers would give the general manager a strike notice listing the names of striking workers. Strike notices were also posted to the WOC Facebook page which listed upcoming strike dates. After the strikes, a third-party representative would return to the workplace with the workers and present the manager with a return to work notice that noted their unconditional offer to return to work.

[p. 7]: . . . *WOC has been responsible for coordinating nationwide strikes in the campaign to set the minimum wage at \$15 an hour for fast food workers.* On a strike day, community organizations and local unions provide food and help to register strikers for the day’s action. Prior to the strike, WOC uses individuals from the local community to deliver strike notices to employers. *The strike notices contain the name and signature of the striking employees, date of the strike, and an offer to unconditionally return to work after the strike. . . .*

¹ “On the national level, WOC is also referred to as ‘Fight for \$15.’” [The footnote is part of the ALJD.]

On April 15, WOCCK engaged in a 1-day strike *as part of a nationwide campaign organized by WOC.*

Despite these undisputed findings of (1) a *nationwide* union campaign for common purposes; (2) a series of intermittent one-day work stoppages, not only nationally but also seven in Kansas City, in furtherance of that common strategy; (3) a common plan in each stoppage of attempting to dictate when employees would walk off and back on to the job; and (4) the April 15th strike was *part of* that nationwide campaign organized by the union, the Union and GC nevertheless contend the April 15th strike was not an unprotected intermittent one. They do so solely by attempting to polish the judicial gloss imposed by the ALJ on the sole two requirements necessary to establish that a work stoppage is an unprotected intermittent action.

B. “WHETHER STRIKE TAKEN TO ADDRESS DISTINCT ACTS OF THE RESPONDENT”:

Both the Union (*Brief*, pp. 34-36) and the GC (*Brief*, pp. 12-13) contend the April 15th strike cannot be an unprotected intermittent one because, according to them, the strike was motivated by all manner of reasons different from the economic motivation of the previous strikes.² The contention is without merit.

First, the contention ignores the fact that it is immaterial to the intermittent strike analysis whether the strike was motivated by economic reasons or by some other (or additional) reasons. *E.g.*, *Embossing Printers, Inc.*, 268 NLRB 710, 723 (1984) (“[I]t is immaterial whether [the work stoppage] would have been considered an unfair labor practice strike. . . . They did not have a right under the Act to come and go as they pleased. They were entitled to strike. But

² The Union admits the prior strikes were economically motivated. *Union Brief*, p. 35.

they were not entitled to walk out and return and to engage in this activity repeatedly.”).

Second, the GC and the Union are judicially estopped from contending the strike was for any purpose *other* than seeking higher wages. Specifically, the *Consolidated Complaint* alleges (GC Ex. 1-EE; emphasis added):

[¶7(a)]: About April 15, 2015, Respondent’s employees . . . engaged in concerted activities with other employees for the purposes of mutual aid and protection, by engaging in a protected strike *in support of a wage increase*.

[¶7(d)]: Respondent engaged in the conduct described above in paragraph 7 (b), because the named employees engaged in concerted activities . . . *in support of wage increases*.

No purpose for the strike *other than* increased wages was alleged by the GC. The GC and the Union are bound by these judicial admissions and cannot, now, attempt to contradict them. *See, e.g., McKenzie Eng. Co.*, 326 NLRB 473, 480 (1998), *enf’d sub nom. McKenzie Eng. Co. v. NLRB.*, 182 F.3d 622 (8th Cir. 1999) (“[A] complaint, no less than an answer, constitutes ‘a judicial admission that is binding on the party making that admission.’” (citation omitted)); *Random Acquisitions, LLC*, 357 NLRB No. 32 (2011), *enf’d* 360 NLRB No. 1 (2013) (“The judge was correct in holding that a statement in a party’s pleading is an admission. It is also true that a statement in a pleading constitutes a ‘judicial’ admission that is binding on the party making the admission.” quoting *D.A. Collins Refractories*, 272 NLRB 931 (1984)). Thus, the contentions of the GC and the Union asserting other belatedly alleged motivations for the strike must be disregarded.³

³ Additionally, in inventing new post-hearing motivations for the strike, the Union spends several pages of its brief discussing alleged changes in the national workforce and irregular hours. *Union Brief*, pp. 21-22. This discussion, too, must be disregarded both because the extra-judicial sources on which the **Footnote continued on next page**

C. “UNION INVOLVEMENT AND WHETHER STRIKE PART OF A COMMON PLAN”:

Like the ALJ, both the Union (*Brief*, p. 33) and the GC (*Brief*, p. 8) argue that a work stoppage cannot be unprotected unless (1) the workers are represented by a union; and (2) the stoppage occurs during collective bargaining or other negotiations with the union. Both, notions are, simply, wrong. *Excavation-Constr., Inc. v. NLRB*, 660 F.2d 1015, 1022 (4th Cir. 1981); *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 604–05 (1st Cir. 1979); *W. Wirebound Box Co.*, 191 NLRB 748, 762 (1971); *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1000–01 (8th Cir. 1965); and *Davies, Inc. d/b/a Dallas Glass*, 2013 WL 703258, at 6 (N.L.R.B. Div. of Judges Feb. 26, 2013), are all examples of unprotected intermittent work stoppages in non-collective bargaining, non-unionized employee contexts. *Blades* and *Davies*, in particular, involved non-unionized employees acting, as here, at the behest of an interested union.

D. “FREQUENCY AND TIMING OF STRIKES”:

Both the Union (*Brief*, pp. 29-33) and the GC (*Brief*, pp. 6-9) contend the frequency and timing of the strikes are not sufficient for the April 15th strike to constitute an unprotected intermittent strike. The contention is without merit.

First, both the Union and the GC contend the April 15th strike was only the first one against EYM and, therefore, it can't be deemed intermittent. For the reasons cited in EYM's opening *Brief*, pp. 21-24, the contention is without merit. It is the inherent character of the strike—employees arrogating to themselves when they will and won't work, in support of a common plan or pur-

. . . footnote continued from previous page:

Union relies were neither introduced into evidence, *e.g.*, *All Am. Sch. Bus Corp.*, 2014 WL 317197, at 1 (N.L.R.B. Jan. 28, 2014); *Re: Ozburn-Hessey Logistics, LLC*, 2011 WL 3585241, at 1 (N.L.R.B. Aug. 15, 2011) nor are they proper subjects for judicial notice. *Fed. R. Evid.* 201(b).

pose—which is critical. Moreover, the GC fails to address or even acknowledge his *own* prior advice memorandum, stating that a work stoppage can constitute an unprotected intermittent one in conjunction with the *threat of repeated strikes*. *Land Mark Elec.*, 1996 WL 323648 (N.L.R.B. G.C. Advice Mem. May 17, 1996). Both the Board and the courts have held that a one-time work stoppage can constitute unprotected activity where it (1) is part of a broader, overall union strategy; or (2) is combined with the threat of additional ones. See *Pac. Tel. & Tel. Co.*, 107 NLRB 1547 (1954); *Kohler Co.*, 108 NLRB 207, 218 (1954) (affirming ALJ finding that the Act did not protect a single work stoppage protesting lack of ventilation coupled with a threat to engage in repeated work stoppages over the same, unchanged grievance), *enfd. sub nom. NLRB v. Kohler Co.*, 220 F.2d 3 (7th Cir. 1955); *Valley City Furniture Co.*, 110 NLRB 1589, 1594 (1954) (“The Union in fact engaged in one stoppage and intended regularly to continue such tactics. . . This evidence, realistically viewed, establishes both the Union’s plan to engage in a series of partial strikes and its effectuation of that plan.”). Here, the Union and the employees have engaged in repeated one-day strikes on the installment plan and have both stated and demonstrated their intent to continue to do so.

Second, regarding “frequency,” just as there is no “magic number” of strikes or threats of strikes required; neither the Union nor the GC can cite any authority which requires a particular minimum frequency with which strikes must occur for a strike to be deemed an unprotected intermittent stoppage. In this regard, by the Union’s peculiar calculation, there have only been four strikes over the course of a year. *Union Brief*, p. 30. In fact, the April 15th

strike was the seventh in Kansas City between July 2013 and April 2015, and since the hearing there has been an eighth one-day strike.⁴

E. “WHETHER THE STRIKE’S INTENT WAS TO HARASS”:

Both the Union and GC argue the April 15th strike cannot be deemed an unprotected intermittent stoppage because it was neither intended to cause, nor did cause, sufficient harm or “chaos” to EYM. Union *Brief*, p. 32-33 (“Because management knew which workers had participated in past strikes, they were well positioned to develop contingency plans to address labor shortages.”); GC *Brief*, pp. 10-11 (“This was not a high impact strike[.]”). The contention is without merit.

First, it is the *inherent character* of the methods used, not the *success* of those methods which makes an intermittent work stoppage unprotected. See *NLRB v. Blades Mfg. Corp.*, 344 F.2d at 1005 (“[T]he fact that the Company was first informed of the planned walkouts and what it could do to avert them is unimportant.”); *Pac. Tel. & Tel. Co.*, 107 NLRB at 1549-50 (“it’s the ‘inherent character’ *rather than the impact of the strikes* that are probative of whether the strikes are protected concerted activity” emphasis added); *Swope Ridge Geriatric Center*, 350 NLRB 64, 66 (2007) (union’s intermittent work stoppages were unprotected notwithstanding that there was little actual impact on the employer’s operations).

Second, the Union’s contention (*Brief*, p. 32) “the strikes were not part of an intentional effort to create chaos” is directly contrary to Wise’s own testimony. Tr. 105/18 to 110/16 (e.g., “Q. Okay. And a corollary of the strategy of having as many people as possible, as many fast-food workers as possible show up at

⁴ See <http://news.yahoo.com/fight-15-strike-details-tuesdays-160416096.html>;

those events at those times is to cause as much disruption and put as much economic pressure as possible on the employers, true? A. Yes.”).

F. “WHETHER EMPLOYEES INTENDED TO REAP THE BENEFITS OF A STRIKE WITHOUT RISK”:

Neither the Union’s *Brief* (pp. 36-37) nor the GC’s *Brief* (pp. 10-11) add anything material to this discussion. They merely reiterate the same erroneous contentions as those of the ALJ. The facts and the law remain: (1) the *inherent nature* of one-day, hit-and-run strikes “minimize the risks of being out on strike for longer periods, and thus come closer to creating a condition that is neither strike nor work,” *Walmart Stores, Inc.*, 2016 WL 275280, at 51 & n. 61 (N.L.R.B. Div. of Judges, Jan. 16, 2016) (citing *Honolulu Rapid Transit Co., Limited*, 110 NLRB. at 1807–11); (2) no proof of employees’ *actual* intent is required to prove this self-evident fact; and (3) Wise expressly testified that the one-day, installment plan strikes were designed to reduce risk and require less sacrifice than a true strike. Tr. 110/21 to 111/16.

As a matter of law, the April 15th strike was an unprotected intermittent work stoppage. Accordingly, EYM acted lawful in disciplining the six 47th Street restaurant employees.⁵

⁵ Again, there is no § 8(a)(3) allegation in this case regarding discipline of the six employees and no suggestion whatsoever that the no-call/no-show policy was disparately applied.

II.

BECAUSE THE ALJ DISMISSED THE CLAIM REGARDING ALLEGATIONS OF VIOLATIONS AT THE MAIN STREET RESTAURANT AND NEITHER THE GC NOR THE UNION FILED ANY EXCEPTIONS OR CROSS-EXCEPTIONS, THERE IS NO BASIS FOR ANY POSTING AT THE MAIN STREET RESTAURANT.

The *Consolidated Complaint* claimed that the manager of a second restaurant on Main Street in Kansas City had allegedly committed a § 8(a)(1) violation by telling an employee that “higher management” wanted to discipline employees who participated in the April 15th strike. GC Ex. 1-EE, ¶¶ 5(b) and 8. The ALJ found no credible evidence to support that contention and dismissed the claim. ALJD pp. 8-9. Neither the Union nor the GC have excepted to those findings.

In the ALJ’s initial decision, issued on February 9, 2016, the ALJ inadvertently included in the conclusions and order section of the decision paragraphs inconsistent with her factual finding of no violation. She therefore issued an amended decision on February 12, 2016, to correct those errors. Despite correcting those two errors, the ALJ inadvertently still left in the *Order* a requirement for notice and posting at the Main Street restaurant. ALJD p. 25/13-15. Given the ALJ’s determination that no violations occurred at the Main Street restaurant and that no exceptions have been taken to that determination, there is no basis for a notice posting at the Main Street restaurant.

CONCLUSIONS AND REQUESTED RELIEF

For the reasons stated in EYM’s exceptions and related briefing, the *Complaint* should be, in all things, dismissed.

Respectfully submitted,

/s/ John L. Ross

JOHN L. ROSS⁶

Texas State Bar No. 17303020

THOMPSON, COE, COUSINS & IRONS, L.L.P.

700 North Pearl Street, Suite 2500

Dallas, Texas 75201

Telephone: (214) 871-8200

Facsimile: (214) 871-8209

Email: jross@thompsoncoe.com

Email: jweber@thompsoncoe.com

**ATTORNEYS FOR EYM KING OF
KANSAS, LLC**

CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2016, a copy of the foregoing document was served by email and by certified mail, return receipt requested, on:

Lynn R. Buckley
National Labor Relations Board
Fourteenth Region
Subregion 17
8600 Farley Street
Suite 100
Overland Park, Kansas 66212-4677

Fred Wickham
Wickham & Wood, LLC
4317 South River Blvd.
Independence, Missouri 64055-4586

/s/ John L. Ross

JOHN L. ROSS

⁶ Board Certified in Labor & Employment Law and Civil Trial Law by the Texas Board of Legal Specialization