UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WAL-MART STORES, INC.

Respondent,

Cases 16-CA-096240
16-CA-105873
16-CA-108394
16-CA-113087
16-CA-122578
16-CA-124099
21-CA-105401
26-CA-093558
13-CA-107343

and

THE ORGANIZATION UNITED FOR RESPECT AT WALMART (OURWALMART),

Charging Party.

WAL-MART'S REQUEST FOR JUDICIAL NOTICE OF THE GENERAL COUNSEL'S MODEL BRIEF ACKNOWLEDGING THE STATUS OF CURRENT INTERMITENT WORK STOPPAGE LAW

On October 3-4, 2016, the Office of the General Counsel ("GC") posted a notice of Model Brief and Brief Insert Regarding Intermittent and Partial Strikes on the National Labor Relations Board's website. [Model Brief ("MB") attached as Exhibit A.] In the MB, the GC instructs all Regional Directors, Officers-In-Charge, and Resident Officers to "incorporate this model brief, as an alternative argument, into the counsel for the General Counsel's briefs to the Administrative Law Judge and the Board" on all intermittent work stoppage and partial strike cases. *Id.* The CG acknowledges that "existing Board law" "den[ies] protection to multiple strikes over the same labor dispute." [MB at 1; *see also* MB at 4.] Here, as described in Walmart's Brief in Support of Exceptions at 16, the Administrative Law Judge found – and the General Counsel does not dispute – that the alleged discriminatees at issue engaged in multiple

strikes over the same labor dispute. [*See* ALJ Dec. 54:46-47; 55:29-36, 67:2-4.] Indeed, the Charging Party *stipulated* to that fact. [Jt. Ex. 1.] Thus, the General Counsel acknowledges that Board law in 2013, the relevant time for this case, did not prohibit Walmart from applying its non-discriminatory attendance policy to employees who engaged in a long-running series of multiple strikes over the same labor dispute.

Consequently, Walmart requests that the Board take judicial notice of the Model Brief per Rules & Regulations § 102.48(b) and consider the General Counsel's acknowledgment regarding the existing state of Board law as it considers the above-referenced pending consolidated cases. *Harco Trucking, LLC*, 344 NLRB 478, 478 n.1 (2005) ("We grant the Charging Party's unopposed request to take judicial notice of a copy of the Respondent's corporate information printed from the website of the Nevada Secretary of State."); *U.S. Postal Serv.*, 2016 WL 5067149, at *2 n.3 (Div. of Judges Sept. 19, 2016) ("I have taken judicial notice of Respondent's administrative structure as set forth on its website"; citing *Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F.Supp. 2d 173, 179 n.8 (S.D.N.Y. 2006) ("A court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and it's capable of accurate and ready determination.")).[1]

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[1] The GC urges the Board to "modify the law regarding intermittent and partial strikes" and "extend the Act's protection to multiple strikes over the same labor dispute." [MB at 1.] The GC acknowledges that its request represents a "change in law" [MB at 14] and repeatedly asks the Board to "abandon" "existing Board law" and "adopt a new standard" and to "extend the Act's protection" beyond current Board law. [MB at 1, 8, 12, 13.] The GC proposes "a new standard" for analyzing and protecting IWS. [MB at 12.] As a rule, the Board does not "abandon" long-established precedent without the endorsement of at least three members. *See, e.g.*, Tr. of Joint Hearing, House Committee on Education and Labor, S. Hrg. 110-416 (Dec. 13, 2007) (NLRB Chairman remarks) ("[T]o decide a major issue, the Board must have at least a three-member majority who are willing to sign on to the opinion."). If it does abandon decades of precedence – as the GC urges here – it does not apply a new and different standard retroactively to parties who relied in good faith on the Board's existing precedence as Walmart did here (*see, e.g.*, Jt. Ex. 6(a) at 3, ¶¶ 6-9, where Walmart gave IWS participants notice of existing IWS law

Respectfully submitted this 17th day of October, 2016.

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The foregoing filed electronically
this 17th day of October, 2016 to:

Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
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Copy of the foregoing sent via email and
Federal Express this 17th day of
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before taking any action). *See Am. Baptist Homes of the West* (*Piedmont Gardens*), 362 NLRB No. 139, at *7-8 (2015) (refusing to apply new rule retroactively where employer "expressly relied on preexisting law" under which its conduct was lawful, as evidenced by the employer's citation to that Board law in a letter); *see also Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102–03 (D.C. Cir. 2001) ("[I]t would be a 'manifest injustice' to require the [employer] to pay damages to an employee who, without legal right, flagrantly defied his employer's lawful instructions."); *Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 393 (D.C. Cir. 1972) (retroactive application would work an injustice on employer, who "attempted to confirm its conduct" to the Board's "well established and long accepted" precedent).

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s/ Elizabeth Alvarado

EXHIBIT A

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 17-02 October 3, 2016

TO: Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Beth Tursell, Acting Associate to the General Counsel

SUBJECT: Model Brief Regarding Intermittent and Partial Strikes

Employees seeking to improve their working conditions are more frequently engaging in multiple short-term strikes in disputes with employers The Board's present test for determining whether multiple short-term strikes are protected is difficult to apply to these situations, and exposes employees to potential discipline for activities that should be considered protected under Section 7 of the Act. The General Counsel has therefore decided to ask the Board to clarify and modify the law regarding intermittent and partial strikes.

If the issue of whether an intermittent or partial strike is protected should arise in one of your cases, please use the analysis in the attached model brief to help you make a determination. If you determine that complaint is warranted under extant law, you should incorporate this model brief, as an alternative argument, into the counsel for the General Counsel's briefs to the Administrative Law Judge and the Board. If you determine that complaint is not warranted under extant law, but might be appropriate under the analysis in the model brief, please submit the case to the Division of Advice.

If you have any questions, please contact the Division of Advice.

B.T.

Attachment: Brief Insert -- Intermittent Strikes

Brief Insert: Intermittent Strikes

I. Alternatively, the Board should clarify its jurisprudence on intermittent and partial strikes and extend the Act's protection to multiple strikes over the same labor dispute, except in certain limited circumstances

The Board's jurisprudence concerning intermittent and partial strikes has been imprecise, and legal scholars have questioned the justification for denying protection to intermittent strikes.[1] Under extant Board law, employees who strike multiple times risk being subject to discipline for having engaged in unprotected intermittent strikes, especially when the strikes relate to the same labor dispute.[2]

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[1] *See* Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act*, 61 U. Chi. L. Rev. 351, 355 n.23, 356 n.24, 376-93 (1994) (arguing that neither the Board nor the courts have articulated a theory to justify withholding protection from partial and intermittent strikes, especially those that occur sporadically, and observing that the Board has failed to clearly define intermittent strikes); Richard Mittenthal, *Partial Strikes and National Labor Policy*, 54 Mich. L. Rev. 71, 94-100 (1955) (arguing that there is good reason to hold some intermittent strikes protected and encouraging the Board to consider the question in light of changing industrial conditions); Julius G. Getman, *The Protected Status of Partial Strikes After* Lodge 76*: A Comment*, 29 Stan. L. Rev. 205, 206, 211 (1977) (arguing that the Board should protect both intermittent and partial strikes); Wesley Kennedy, *Intermittent Strikes: An Overview from the Union Perspective*, 14 Lab. Law. 117, 125-26 (1998) (urging the Board to seriously consider extending protection to partial and intermittent strikes); Michael H. LeRoy, *Creating Order Out of CHAOS and Other Partial and Intermittent Strikes*, 95 Nw. U. L. Rev. 221, 227, 239 (2000) (finding that "[a] doctrine that exposes partial and intermittent strikers to firing is wholly inconsistent with a core NLRA policy, the protection of concerted activity by workers," and that "[t]he legality of partial and intermittent strikes under the NLRA is muddled"); W. Melvin Haas III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 Lab. Law. 91, 91 (1998) ("the practical application of the law of intermittent strikes remains elusive").

[2] *See Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1547-50 (1954) (waves of short strikes at different offices over nine days during contract negotiations unprotected); *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807-11 (1954) (employer's attempts to compel employees to "work full time or not at all" by suspending intermittent strikers for short periods were lawful where multiple weekend strikes in support of contract negotiations were unprotected); *Swope Ridge Geriatric Center*, 350 NLRB 64, 64 n.3, 68 (2007) (multiple weekend strikes in support of contract negotiations unprotected); *Embossing Printers*, 268 NLRB 710, 711-12, 722-24 (1984) (employer lawfully locked out strikers who engaged in three unprotected walkouts to attend union meetings during contract negotiations), *enforced mem.*, 742 F.2d 1456 (6th Cir. 1984) (table decision); *New Fairview Hall*

Yet neither the Board nor the Supreme Court has articulated a compelling rationale for depriving such employees of the protection of the Act. Given that multiple, short-term strikes are a tactic increasingly utilized by employees seeking to improve their working conditions, the time is ripe for the Board to address the uncertainties in the law and provide employees and employers much-needed guidance as to the boundaries of protected conduct.[3]

Convalescent Home, 206 NLRB 688, 701-02, 708, 746-747 (1973) (three mid-day walkouts about three weeks apart in support of demand for speedy election unprotected), *enforced sub nom. Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975); *Western Wirebound Box Co.*, 191 NLRB 748, 761-62 (1971) (two surprise 15-minute work stoppages four weeks apart in support of contract negotiations unprotected). *But see United States Service Industries*, 315 NLRB 285, 285-86 (1994) (where no evidence that there was strategy to harass the company into a state of confusion, "mere fact that some employees may have struck more than once [as part of a nationwide campaign] does not render their conduct intermittent striking"), *enforced mem. per curiam*, 72 F.3d 920 (D.C. Cir. 1995) (table decision); *Robertson Industries*, 216 NLRB 361, 362 (1975) ("While there is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature," two work stoppages involving a total of two days' absence from work did not constitute unprotected intermittent strike; to hold otherwise "would . . . disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved."), *enforced*, 560 F.2d 396 (9th Cir. 1976).

[3] *See* Victor Luckerson, *The One-Day Strike: The New Labor Weapon of Last Resort*, Time, Dec. 7, 2013, *available at* http://nation.time.com/2013/12/07/the-one-day-strike-the-new-labor-weapon-of-last-resort (reporting fast-food strikes in 100 cities as culmination of year-long movement encompassing a series of one-day protests; "[A]s declining union membership makes protracted strikes increasingly rare, a new model of labor agitation is emerging . . . . With both union membership and traditional strikes on the decline, these flash tactics may be the only recourse left for labor organizers."); Shelly Banjo & Melanie Trottman, *Wal-Mart Challenges Labor Board's Complaint*, Wall Street Journal, Feb. 2, 2014, *available at* http://www.wsj.com/articles/SB10001424052702304851104579359042604153758 ("sporadic, short-term protests" at Wal-Mart and "similar walkouts at other companies" are a "phenomenon that is reshaping relations between companies and labor"); Robert M. Schwartz, *One-Day Strikes: A Word to the Wise*, Labor Notes, Oct. 2, 2013, *available at* http://www.labornotes.org/2013/10/one-day-strikes-word-wise ("More and more unions are turning to one-day or other short-term strikes to add punch to contract campaigns. Walmart, fast food, and other non-union workers have also used the tactic to demand changes in wages, working conditions, and safety, and to protest discharges."); Josh Eidelson, *Truckers Who Haul for Wal-Mart and Forever*

Accordingly, the General Counsel urges the Board to clarify this area of law by drawing clear conceptual distinctions between partial and intermittent strikes and redefining the circumstances under which intermittent strikes become unprotected. Under the General Counsel's proposed framework, multiple strikes (even those over the same labor dispute) would be protected if: (1) they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; (2) they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and (3) the employer is made aware of the employees' purpose in striking. Such a framework more effectively protects the right to strike, dispenses with the unpersuasive rationales relied on in the past, and better addresses Supreme Court precedent.

A. The Board should clarify that partial and intermittent strikes are different, and they are distinguishable based on whether strike and work coincide or are separate in point of time

One point of confusion in this area of law stems from blurring of the line between partial and intermittent strikes.[4] Sometimes the Board treats partial strikes as a distinct category from intermittent strikes. Under this approach, partial strikes involve a refusal to perform tasks while accepting pay or remaining on the employer's premises[5] or a situation where employees continue working on their own terms.[6] In contrast, intermittent strikes involve a plan to strike, return

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21 Plan Surprise Strikes Today, Salon, Nov. 18, 2013, *available at* http://www.salon.com/2013/11/18/breaking_truckers_who_haul_for_wal_mart_and_forever_21_plan_surprise_strikes_today (one-day strikes by non-union port truckers, including some allegedly misclassified as independent contractors); Bart Jansen, *U.S. Airport Workers Stage One-Day Strike*, USA Today, Nov. 19, 2015, *available at* http://www.usatoday.com/story/travel/flights/todayinthesky/2015/11/19/us-airport-workers-stage-one-day-strike/76062612 (one-day strike at seven airports by airline contractor employees, including "baggage handlers, cabin cleaners, ramp workers, wheelchair attendants, janitors and other workers").

[4] *See* Haas & Lockwood, *supra* note 1, at 116 ("[t]he law of intermittent work stoppages has become blurred by confusion with partial strike cases"); Kennedy, *supra* note 1, at 122-23 (questioning whether the Board treats intermittent strikes as distinct from, or a mere subset of, partial strikes).

[5] *See Audubon Health Care Center*, 268 NLRB 135, 136 (1983).

[6] *See Vencare Ancillary Services*, 334 NLRB 965, 970 (2001), *enforcement denied*, 352 F.3d 318 (6th Cir. 2003).

to work, and strike again.[7] Other times, the Board seems to use partial strike as an umbrella term, encompassing anything less than a total, traditional strike, i.e. a strike where employees completely withdraw their labor and refuse to work until the parties settle the dispute.[8] Under this rubric, intermittent strikes are merely a subset of partial strikes.

The General Counsel urges the Board to draw a clear conceptual distinction between partial and intermittent strikes. We propose defining each category according to whether strike and work coincide in point of time. Thus, we would define a "partial strike" as the concerted withholding of some aspect of labor while continuing to perform other work, and use the term "intermittent strike" to refer to situations where employees are not simultaneously working and striking.[9] Accordingly, we use these terms in this manner throughout our discussion below, and we use the term "limited strikes" to refer to both categories.

B. Existing Board law unjustifiably dilutes the right to strike

Section 7 protects the right to strike as a concerted activity as well as an economic weapon that "in great measure implements and supports the principles of the collective bargaining system."[10] Pursuant to Section 13, this right is "to be given a generous interpretation within the scope of the labor Act."[11] To date, no compelling reasons have been advanced to justify depriving employees of the right to engage in multiple strikes over the same labor dispute. The Supreme Court did

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[7] *See Farley Candy Co.*, 300 NLRB 849, 849 (1990); *City Dodge Center*, 289 NLRB 194, 194 n.2 (1988), *enforced sub nom. Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

[8] *See Embossing Printers*, 268 NLRB at 723 (three walkouts "established a pattern of intermittent partial strikes"); *New Fairview Hall Convalescent Home*, 206 NLRB at 747 (three mid-day walkouts were unprotected "recurrent, intermittent and partial work stoppages"). *See also Textile Workers Union of America, Co. (Personal Products Corp.)*, 108 NLRB 743, 746 n.9 (1954) (union's harassing tactics produced a disruption that "is not concomitant of a strike; there, after the initial surprise of an unannounced walkout, the company knows what it has to do and plans accordingly"), *enforcement denied in part*, 227 F.2d 409 (D.C. Cir. 1955).

[9] *See* Mittenthal, *supra* note 1, at 71-72 (distinguishing between the two types of strikes on this ground).

[10] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963). *See also NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal . . . .").

[11] *Erie Resistor*, 373 U.S. at 234-35.

not explain why it considered the intermittent strike tactics at issue in its seminal *Briggs-Stratton*[12] decision to be indefensible, and it has invited the Board to confine that case to its unique facts. The rationales the Board has articulated for finding limited strikes unprotected are either unfounded or inapplicable to intermittent strikes. Thus, the Board has unjustifiably narrowed the definition of the protected strike, restricting the "multiplicity of ways in which workers may collectively withhold their labor, rendering the strike a brittle instrument of labor protest rather than one continually capable of being deployed in new ways so as to meet changing circumstances in the workplace."[13]

1. The Supreme Court's *Briggs-Stratton* decision does not mandate treating intermittent strikes over the same labor dispute as unprotected and its facts are distinguishable from most intermittent strike situations

In *Briggs-Stratton*, the Supreme Court determined that a union's "recurrent or intermittent unannounced stoppage of work to win unstated ends" was neither protected nor prohibited by the Act, and was therefore subject to state regulation.[14] There, against a backdrop of "considerable injury to property and intimidation of other employees by threats," the union repeatedly called special meetings during working hours to put pressure on the employer during negotiations for a new contract.[15] In total, the union caused 26 work stoppages over four and a half months.[16] It was essential to the union's plan that these meetings were a surprise and that the employer had no notice as to when or whether the employees would return to work.[17] Furthermore, the union did not disclose "any specific demands which these tactics were designed to enforce nor what concessions [the employer] could make to avoid them."[18] In all these circumstances, the Court determined that the work stoppages were "so indefensible" that they were unprotected, without

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[12] *Auto Workers Local 232 v. Wis. Emp. Relations Bd. (Briggs-Stratton)*, 336 U.S. 245 (1949), *overruled by Lodge 76, Machinists v. Wis. Emp. Relations Comm'n*, 427 U.S. 132 (1976).

[13] Becker, *supra* note 1, at 371.

[14] 336 U.S. at 264-65.

[15] *Id.* at 249, 253.

[16] *Id.* at 249.

[17] *Id.*

[18] *Id.*

explanation as to which elements of the strategy were offensive,[19] based on its concern that the employer would be helpless to defend itself.[20]

In *Machinists*,[21] the Court explicitly suggested that the Board might confine *Briggs-Stratton* to its unique facts in determining the extent to which limited strikes deserve protection under the Act.[22] Thus, the Court observed:

> [t]he assumption, arguendo, in [*NLRB v. Insurance Agents' International Union*[23]] that the union activities involved were "unprotected" by § 7 reflected the fact that those activities included some bearing at least a resemblance to the "sit-down" strike held unprotected in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and the "disloyal" activities held unprotected in *NLRB v. Electrical Workers* [*(Jefferson Standard)*], 346 U.S. 464 (1953). . . . The concerted refusal to work overtime presented in this case, however, is wholly free of such overtones.
>
> It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial [i.e. limited] strike activities such as the concerted ban on overtime in the instant case, when unaccompanied by other aspects of conduct such as those present in *Insurance Agents* or those in *Briggs-Stratton* (overtones of

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[19] *Id.* at 256 (quoting *Harnischfeger Corp.*, 9 NLRB 676, 686 (1938)). *See* Becker, *supra* note 1, at 377 ("What the *Briggs-Stratton* Court failed to explain was the wrong embodied in repeated work stoppages. Nor did it indicate whether all such stoppages were subject to state regulation.").

[20] *See* 336 U.S. at 264 (If intermittent stoppages were protected, "management . . . would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands. . . . [Given the Act's prohibition on dismissing or disciplining employees for protected activities,] it is hard to see how the management can take any steps to resist or combat [the union's tactics] without incurring the sanctions of the Act.").

[21] 427 U.S. 132.

[22] *Id.* at 152 n.14.

[23] 361 U.S. 477, 480-81, 492-94 (1960) (holding that union's use of "'slow-down,' 'sit-in' and arguably unprotected disloyal tactics" did not violate its duty to bargain in good faith; agreeing "arguendo" that *Briggs-Stratton* established that the tactics were not protected concerted activities).

> threats and violence . . . and a refusal to specify bargaining demands . . .), are "protected" activities within the meaning of § 7, although not so protected as to preclude the use of available countervailing economic weapons by the employer.[24]

Accordingly, *Briggs-Stratton* does not provide an adequate justification for depriving employees of the right to strike multiple times over the same labor dispute in every circumstance. *Machinists* invited the Board to limit that case to its facts and to consider on a case-by-case basis whether novel tactics that lacked the offensive features of those employed in *Briggs Stratton*, i.e. threats, violence, and a refusal to specify demands, might warrant protection.

2. The Board's rationales for withholding protection from limited strikes are unfounded or inapplicable to intermittent strikes

None of the rationales relied upon by the Board provide a satisfactory basis for denying protection to multiple strikes over the same labor dispute. There are essentially three bases for finding that a partial or intermittent strike is unprotected. First, the Board has held such work stoppages unprotected where they are part of a planned strategy to "harass the company into a state of confusion," such as through intermittent "'hit and run' strikes."[25] Second, the Board has held striking employees unprotected when they engage in quasi-strikes that are "intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement."[26] Finally, the Board has found that employees exceed the scope of Section 7 protections when they exert pressure on their employer in such a way as to dictate

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[24] 427 U.S. at 152 n.14.

[25] *Pacific Telephone*, 107 NLRB at 1548-50.

[26] *WestPac Electric*, 321 NLRB 1322, 1360 (1996) (finding no such quasi-strike condition). *See also New Fairview Hall Convalescent Home*, 206 NLRB at 747 ("[T]he Board and the courts have deemed it an 'indefensible' tactic for employees to refuse to work on the terms prescribed by their employer, and yet to remain on their jobs and thus deny the employer the opportunity to replace them with workers who will accept these terms."); *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968) ("[W]hat makes any 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. Employees who choose to withhold their services because of a dispute over [terms and conditions] may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working."), *enforced*, 413 F.2d 921 (8th Cir. 1969).

their own terms and conditions of employment.[27] For the reasons detailed below, none of these rationales justify depriving employees of the right to engage in multiple strikes over the same grievance.

a. Judging a strike tactic based on whether it harassed an employer into a "state of confusion" is antithetical to the basic concept of a strike

Withholding protection from multiple strikes when they harass an employer into a "state of confusion" places undue emphasis on the effectiveness of a strike tactic in disrupting operations. Although the Board continues to recite this standard,[28] it has only found such a circumstance in a single case, *Pacific Telephone,*[29] where the Board's conclusion as to the unprotected nature of the strike was dicta.[30] The Board should abandon this standard in assessing whether multiple strikes warrant protection.

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[27] *See, e.g.*, *Honolulu Rapid Transit*, 110 NLRB at 1807-11 & n.3 (weekend strikes unprotected on this basis); *Valley City Furniture*, 110 NLRB 1589, 1594-95 (1954) (overtime strike unprotected on this basis), *enforced*, 230 F.2d 947 (6th Cir. 1956); *Audubon Health Care Center*, 268 NLRB at 136-37 (refusal to perform certain work unprotected on this basis); *Elk Lumber Co.*, 91 NLRB 333, 336-38 (1950) (work slowdown unprotected on this basis). *See also Embossing Printers*, 268 NLRB at 723 (noting that employees "did not have a right under the Act to come and go as they pleased" in finding three walkouts unprotected).

[28] *See United States Service Industries*, 315 NLRB at 285-86 (employees were not "engaged in a campaign to harass the [c]ompany into a state of confusion"); *WestPac Electric*, 321 NLRB at 1360 (strikes were not part of "'hit and run' tactics intended to 'harass the company into a state of confusion'").

[29] 107 NLRB 1547. Although the ALJ in *National Steel & Shipbuilding Co.*, 324 NLRB 499, 510 (1997), *enforced*, 156 F.3d 1268 (D.C. Cir. 1998), found a strike unprotected because it was calculated to create a state of confusion, exceptions were not filed to the dismissal of allegations related to striker discipline. *See id.* at 499 n.1.

[30] In *Pacific Telephone*, the employer delayed strikers' return to work when they had offered to return just as replacement crews were gathering or beginning work, and the Board found that the employer was motivated by a desire to maintain operations and that it was appropriate to delay reinstatement where the strikers were unwilling to give assurances that they would work for the remainder of the day. 107 NLRB at 1549, 1551. Employers have always been permitted to lock out strikers until they give assurances that they will work on the employer's terms. *See International Shoe Co.*, 93 NLRB 907, 908-10 (1951) (employer justified in refusing to reopen plant until union signed a contract with a no-strike clause in view of recurrent work stoppages

First, concern in the case law for an employer's ability to maintain operations during intermittent work stoppages is misplaced. Strikes, by their nature, are designed to apply economic pressure by disrupting operations.[31] Their success should not be a factor in determining whether they deserve protection.[32]

Moreover, the Board's apparent concern for an employer's ability to cope with intermittent strike tactics is unwarranted because an employer is not helpless in the face of such strikes. As the Court made clear in *Machinists*, there are countermeasures available to an employer to defend against even protected union activities.[33] Indeed, intermittent strikes "pale in significance when compared to the

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that made operations uneconomical). *See also Mt. Clemens Pottery Co.*, 46 NLRB 714, 715-16 (1943) (employer could refuse to permit overtime strikers to return until they pledged to accept the employer's terms and conditions), *enforced as modified*, 147 F.2d 262, 267 (6th Cir. 1945). Thus, the Board's initial observation in *Pacific Telephone* that the hit-and-run strikes were unprotected was unnecessary to its conclusion that the employer acted lawfully by essentially engaging in a lockout in response to the union's tactic.

[31] *See Allied Mechanical Services*, 341 NLRB 1084, 1102 (2004) ("a requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted"), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Swope Ridge Geriatric Center*, 350 NLRB at 67 ("It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations . . . .").

[32] *Cf. Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) (employer's argument that an effectively-timed, extremely disruptive work stoppage lost its protection "because of the economic harm inflicted" is "antithetical to the basic principles underlying the statutory scheme, i.e., the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the 'free play of economic forces' that should control collective bargaining"). *See also* Becker, *supra* note 1, at 387-88 (arguing that withholding protection because intermittent strikes are too effective is nonsensical because the purpose of all strikes is to make business operations impractical); Kennedy, *supra* note 1, at 125 (noting that Section 7 does not contain any exceptions for particularly effective concerted activities); LeRoy, *supra* note 1, at 269 ("If the expansive right to strike in [S]ection 13 means what it says . . . then the NLRB and the federal courts cannot justify a policy of their own creation that deprives employees of a peaceful economic weapon simply because that tactic often succeeds.").

[33] *See* 427 U.S. at 152-53 (observing that even if the activity at issue in *Machinists*, an overtime strike, were protected under Section 7, there were economic weapons, e.g. lockout and the hiring of replacements, at the employer's disposal).

impact of . . . employer strategies" such as permanent replacement, lockouts, subcontracting, double breasting, and relocation of operations.[34] Thus, the factual assumption that intermittent strikes unfairly disrupt employer operations is unfounded.

b. Intermittent strikers do not reap the benefits of a strike without losing pay or risking replacement

The General Counsel does not challenge the principle that the exertion of economic pressure without the attendant risks of a strike—i.e. loss of pay and possible replacement—does not warrant protection. But this rationale is simply inapplicable to intermittent strikes.

When employees engage in a series of strikes during which they completely cease work, they do not tread upon their employer's legitimate interests in receiving employees' full effort for compensated work time and in maintaining operations during a work stoppage. Employers are free to dock workers' pay for time not worked, including during a work stoppage to protest labor conditions.[35] Moreover, employees who strike multiple times for short periods are subject to replacement in the same manner as other short-term strikers.[36]

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[34] Kennedy, *supra* note 1, at 125-26.

[35] *See Solo Cup Co.*, 114 NLRB 121, 133-34 (1955) (employer would have been free to deduct pay for one-hour work stoppage), *enforced*, 237 F.2d 521 (8th Cir. 1956); Mittenthal, *supra* note 1, at 72, 95 (intermittent stoppages "do not involve a demand for pay for time not worked"); Becker, *supra* note 1, at 384, 388 ("employers [can] withhold wages from . . . strikers for work not performed"). *See also Honolulu Rapid Transit*, 110 NLRB at 1814 (Murdock, dissenting) (distinguishing cases involving "work stoppages by employees who were accepting pay for time not worked" from weekend strikes); *Pacific Telephone*, 107 NLRB at 1557 (Murdock, dissenting) (hit-and-run strikes not as objectionable as those where employees "refuse to perform part of all of their duties while remaining on the [c]ompany's payroll or on its premises").

[36] *See Jasper Seating Co.*, 285 NLRB 550, 550-51 (1987) (rejecting argument that employer had no choice but to discharge or discipline two employees who walked out one morning in protest over chilly working conditions because employer "could have exercised its lawful option to replace them without significant delay or disruption to business operations"), *enforced*, 857 F.2d 419 (7th Cir. 1988); *Swope Ridge Geriatric Center*, 350 NLRB at 67 (although finding weekend strikes unprotected, the judge rejected the argument that the employer had been deprived of the right to permanently replace employees where it was difficult to find replacements on the weekend because there was "no legal impediment" to permanent replacement). *See also* Becker, *supra* note 1, at 389 ("[O]nly slowdowns

c. Employees do not dictate their terms and conditions by engaging in multiple strikes where such tactics are a means to another end

The Board's concern that strikers not be permitted to effectively set their own terms of employment is unfounded where employees strike multiple times to exert economic pressure, as is commonly the case. The Supreme Court explicitly cast doubt on this rationale in *Insurance Agents*. There the Court rejected the argument that the union's limited strike tactics violated Section 8(b)(3) because they amounted to employees setting their own terms and conditions.[37] The Court deemed this argument "baseless" because:

> [t]here was no indication that the practices that the union was engaging in were designed to be permanent conditions of work. They were rather means to another end. The question whether union conduct could be treated, analogously to employer conduct, as unilaterally establishing working conditions, in a manner violative of the duty to bargain collectively, might be raised for example by the case of a union, anxious to secure a reduction of the working day from eight to seven hours, which instructed its members, during the negotiation process, to quit work an hour early daily. . . . But this situation is not presented here, and we leave the question open.[38]

Thus, where strikers merely cease work intermittently as a means to another end—for example, in support of a demand for better compensation or benefits—such conduct should not be viewed as treading on management's prerogative to set hours of work. Only in those rare circumstances where employees seek a change in their work schedule, and intend to permanently withhold their labor in accordance with their desired schedule, can employees truly be seen as dictating their hours of work.

Additionally, intermittent strikes cannot be meaningfully distinguished from traditional strikes on this basis. Intermittent strikers are no more attempting to dictate their hours of work than employees engaged in a total strike. In each case, employees choose when and for how long they cease performing work.[39] Indeed, a

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and other partial strikes not involving a full cessation of work actually preclude permanent replacement. Intermittent strikers are at risk of replacement, and the longer and more often they strike, the greater the risk.").

[37] 361 U.S. at 496 n.28.

[38] *Id.*

[39] *See* Becker, *supra* note 1, at 387 ("In some sense, of course, intermittent strikers invade their employer's prerogative to decide when employees shall work, but no more so than traditional strikers whose actions are clearly protected."); James B. Atleson,

refusal to work the hours dictated by the employer is an inherent aspect of any protected strike. Accordingly, the Board should not treat employees who strike multiple times as improperly setting their own working conditions when they are not aiming to unilaterally impose a desired work schedule in a permanent way.

3. Intermittent strikes do not implicate employers' property interests

Although certain strike tactics are justifiably unprotected on the grounds that they infringe on employers' property rights, strikes that are merely conducted multiple times do not implicate that concern by their nature. Thus, in *Fansteel*,[40] the Supreme Court ruled that strikers who seized their employer's property in violation of state law during a sit-down strike acted outside the boundaries of Section 7's protection.[41] In contrasting the sit-down strike with a protected strike, the Court noted that the latter involves the "mere quitting of work and statement of grievances in the exercise of pressure."[42] Similarly, in the context of partial strikes, the Board does not condone a refusal to perform certain job functions while remaining on the employer's premises.[43] Thus, in construing Section 7's protection of strike tactics, the Board appropriately accommodates employers' legitimate property interests.

Unlike sit-down strikes and partial strikes, intermittent strikes do not, by their nature, encroach on these property interests. They merely involve the repeated cessation of work.[44] Accordingly, the Board would be justified in distinguishing between intermittent versus sit-down and partial strikes in assessing which tactics warrant Section 7 protection.

C. The Board should adopt a new standard for intermittent strikes that appropriately respects employees' right to strike

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Values and Assumptions in American Labor Law 56 (1983) ("arguably a [full] strike is also inconsistent with employment, for the employer may not expect, and certainly abhors, strikes or any kind of work action").

[40] 306 U.S. 240.

[41] *Id.* at 252, 254-57. *See also Quietflex Mfg. Co.*, 344 NLRB 1055, 1056-59 (2005) (on-site work stoppage lost the protection of the Act where employer's property interests outweighed employees' rights).

[42] *Fansteel*, 306 U.S. at 256.

[43] *Audubon Health Care Center*, 268 NLRB at 136.

[44] *See Fansteel*, 306 U.S. at 256.

Although no adequate rationale has been advanced to justify withholding protection from intermittent strikers, extant law exposes employees to discipline and discharge for striking multiple times, especially over the same labor dispute. Accordingly, the General Counsel urges the Board to extend the Act's protection to such tactics, with limited exceptions. Thus, the General Counsel proposes that multiple strikes (even those over the same labor dispute) should be protected if: (1) they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; (2) they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and (3) the employer is made aware of the employees' purpose in striking.

The rationales for these proposed conditions are as follows. The first criterion ensures that employees do not reap the benefit of a strike without jeopardizing pay or risking replacement. In addition to requiring a complete cessation of work (as opposed to working while simultaneously refusing some tasks), this criterion recognizes that there is a point at which intermittent strikes are so frequent and brief that they enable employees to effectively reap the benefits of a strike without assuming the attendant risks.[45] An example of an intermittent strike that would be unprotected under this criterion might be a ten-minute strike every thirty minutes, or an hourly work stoppage once employees reach their desired production quota.[46] The second criterion accounts for the distinction drawn by the Supreme Court in *Insurance Agents* between setting terms and conditions of employment and the use of pressure tactics as a means to an end. The third criterion preserves the Supreme Court's concern in *Briggs-Stratton* that employers not be forced to deal with recurrent strikes to "win unstated ends."[47] Moreover, it recognizes that, from the employer's perspective, when employees walk off the job intermittently without making their grievances known, they appear to be

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[45] *See* Becker, *supra* note 1, at 385 ("Except when intermittent strikes are so brief and so constantly repeated as actually to constitute a slowdown, they do not create a condition that is 'neither strike nor work.'").

[46] *See* Mittenthal, *supra* note 1, at 98 ("a stoppage of ten minutes every half-hour would create an intolerable situation under which production of any kind would be unlikely"). *See also Armour & Co.*, 25 NLRB 989, 993-96 (1940) (employee signaled others to stop work after reaching hourly slaughter quota set by the union).

[47] 336 U.S. at 264. *See also Machinists*, 427 U.S. at 152 n.14 (inviting the Board to consider whether limited strike tactics might be protected in cases where they are unaccompanied by other conduct present in *Briggs-Stratton*, namely, "overtones of threats and violence" and "a refusal to specify bargaining demands"). *Cf. NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) ("The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time [a specific] demand is made.").

permanently setting their own employment terms (i.e. coming and going as they please) rather than striking as a means to another end.

This change in law is justified on several grounds. First, it would more effectively guarantee the protection accorded to strikes under the Act while accounting for Supreme Court precedent. Second, it would remove the legal uncertainty regarding the protection of multiple strikes, thereby providing better guidance to employees and employers.[48]

Third, such a change is warranted to address changed industrial conditions.[49] One significant change is the rise of worker movements outside the traditional collective-bargaining model. These non-union workers do not have meaningful channels in which to air complaints about working conditions, such as through contract negotiation or a grievance procedure, and are increasingly resorting to multiple, short-term strikes to pressure their employers to improve their working conditions.[50] Such workers typically earn less than their unionized counterparts and do not have access to supports that make a protracted traditional strike a financially viable option, such as union strike funds.[51] Given these realities, the time is ripe for the Board to clarify the law on intermittent strikes and extend the Act's protection to such strikes, except in certain limited circumstances. At the same time, many more employers today have ready access to short-term staffing solutions during strikes as compared to the period following *Briggs-Stratton*, when

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[48] *See* LeRoy, *supra* note 1, at 258 ("ambiguous state of the law . . . is a detriment to unions and employers"); Haas & Lockwood, *supra* note 1, at 116 (elusive boundary between protected and unprotected intermittent strikes deters employers from disciplining such strikers); Joseph R. Landry, Note, *Fair Responses to Unfair Labor Practices: Enforcing Federal Labor Law Through Nontraditional Forms of Labor Action*, 116 Colum. L. Rev. 147, 151-52 (2016) (reducing confusion as to when intermittent strikes are unprotected would benefit employers and employees alike).

[49] *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) ("'[T]he primary function and responsibility of the Board' . . . is that 'of applying the general provisions of the Act to the complexities of industrial life . . . .'") (quoting *Insurance Agents*, 361 U.S. at 499 and *Erie Resistor*, 373 U.S. at 236); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[50] *See* sources cited *supra* note 3.

[51] *See* Gerald Mayer, Congressional Research Service, Union Membership Trends in the United States 6 (2004), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/174 (reporting that most studies find a 10 to 30 percent wage differential between union versus nonunion workers).

the Board adopted the view that intermittent strikes were generally unprotected.[52] As the Board recognized in its recent *BFI Newby Island Recyclery* decision, there has been a steady growth in the use of contingent workers, including temporary laborers.[53] In recent decades, the number of such workers has not only increased, but the availability of temporary labor has "expanded into a much wider range of occupations" as well.[54] This trend also supports this change in law.

For the foregoing reasons, the General Counsel urges the Board to revisit this area of law, dispense with the unpersuasive rationales relied on in the past, and adopt the new, proposed standard.

II. Applying the General Counsel's proposed framework, the one-day strikes at issue in this case are protected by the Act

INSERT SPECIFICS OF CASE

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[52] *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C.L.R. 351, 366 (2002) ("As late as the 1970s, the predominant employment model in the United States could be described as that of a 'core worker system' characterized by long-term employment relationships."); http://www.laborfinders.com/employers ("Labor Finders gives companies freedom and flexibility by providing quality temporary workers. . . . Whether you need someone for four hours or four months, we can help you find the most qualified temporary worker for the job."). Moreover, it is well-recognized that some firms have developed a specialty of providing temporary replacements for striking employees. *See, e.g.*, Kevin Kelly, *Picket Lines? Just Call 1-800-Strikebreaker*, Business Week, Mar. 27, 1995, *available at* http://www.bloomberg.com/bw/stories/1995-03-26/picket-lines-just-call-1-800-strikebreaker.

[53] 362 NLRB No. 186, slip op. at 11 (Aug. 27, 2015) (noting that contingent workers accounted for 4.1 percent of all employment in 2005 and temporary workers increased from 1.1 million in 1990 to 2.87 million in 2014).

[54] *Id.*