UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ORIENT TALLY COMPANY, INC., AND CALIFORNIA CARTAGE COMPANY LLC, A SINGLE EMPLOYER

And **Cases 21-CA-160242**
21-CA-162991

WAREHOUSE WORKER RESOURCE CENTER

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DECISION

STATEMENT OF THE CASE

Ariel L. Sotolongo, Administrative Law Judge. At issue in this case is whether certain alleged conduct by Orient Tally, Inc. and California Cartage LLC, a single employer (Respondent or Employer), in the wake of protected concerted activity by employees was coercive and thus in violation of Section 8(a)(1) of the Act.

I. Procedural Background

Based on charges filed by Warehouse Workers Resource Center (WWRC), also known as "Warehouse Workers United," in Cases 21–CA–160242 and 21–CA–162991, the Regional Director for Region 21 of the Board issued a consolidated complaint on March 21, 2016, alleging that Respondent had engaged in certain conduct in violation of Section 8(a)(1) of the Act.[1]

[1] These two cases were later consolidated with Cases 21–CA–173328 and 21–CA–175491 for hearing, cases which were in turn later severed from the first two cases pursuant to a settlement agreement and withdrawal of some of the charges, leaving the original cases in the above caption to proceed to hearing. (See, GC Exh. 1(ee) and (hh).)

The complaint was later amended during the course of the hearing, over which I presided in Los Angeles, California, on June 12–14, 2017.[2]

II. Jurisdiction

Respondent admits, and I find, that at all material times it has maintained a principal place of business in Long Beach California, and a facility in Wilmington, California, where it is engaged in the business of providing labor services, transloading and deconsolidation services. Respondent further admits, and I find, that in the past fiscal year, in the course of conducting its business operations, it has derived gross revenues in excess of $500,000 and has performed services valued in excess of $50,000 directly to customers located outside the state of California. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

Respondent admits, and I find, that the Charging Party, WWRC, is a person within the meaning of Section 2(1) of the Act.

III. FACTS

A. Background[4]

Respondent operates a warehouse and yard in Wilmington, California, where it loads, unloads, and stores merchandise in steel shipping containers that arrive in nearby ports. The employees of Respondent involved in the instant dispute primarily work as lumpers and forklift operators who load, unload and otherwise move or sort the merchandise in the containers. As will be discussed below, these steel containers are stored outside, not inside a warehouse, and are thus exposed to the elements, and the workers spend much of their time inside the containers. The field of containers is organized by department or sections, each dedicated to a specific client such as Kmart, Sears, Amazon, etc. The warehouse houses administrative and supervisory offices, as well as break areas (lunch tables) and restrooms.

At all material times during the events at issue in the instant case, Herman Rosenthal (Rosenthal) was Respondent's general manager, in charge if the Wilmington facility. Reporting to him was Freddy Rivera (Rivera), the operations manager. Reporting to Rivera was John Rodriguez (John R), the warehouse manager.[5] As discussed in more detail below, John R is the

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[2] See GC Exh. 6.

[3] As briefly mentioned in the preamble, and as reflected in the pleadings, although Orient Tally Company Inc. and California Cartage Company, LLC, bear different names and are nominally engaged in different lines of business, it is admitted in the answer to the complaint that these two entities constitute a single-integrated business enterprise and single employer within the meaning of the Act. Accordingly, they are jointly referred to as "Respondent."

[4] The evidence summarized in this section is either undisputed or based on uncontroverted testimonial or documentary evidence. Accordingly, I will not cite the transcript page(s) or exhibit number(s) relating to these facts, unless there is a specific reason to do so.

[5] The reason for using "John R" when referring to John Rodriguez is because there is another individual whose last name is also Rodriguez who is frequently mentioned throughout the record, employee Jose Rodriguez, who will referred to as "Jose R" in order to avoid confusion.

front-line supervisor who was the immediate supervisor for most of the employees involved in this case. All three of the above-named managers are admitted Section 2(11) supervisors.

Sometime in late 2014 or early 2015 a group of Respondent's employees became involved in activities supported and organized by WWRC, which is also known as Warehouse Workers United (WWU). These activities included picketing various employers including Respondent, distributing leaflets (flyers), presenting employee-signed petitions, and taking part in "delegations" to present such petitions to Respondent. Some of the employees also started to wear blue T-shirts and fluorescent colored safety vests with WWU logos (or emblems) to work on a regular basis.[6] Additionally, WWU, with information provided by Respondent's employees, filed at least one complaint with Cal-OSHA (OSHA) in June 2015 regarding alleged health/safety violations at work, a complaint that resulted in State of California OSHA inspectors visiting Respondent's facility in late June 2015 and thereafter issuing a report. As discussed in more detail below, this complaint and resulting visit by OSHA inspectors, among other things, was featured in a WWU flyer distributed at Respondent's facility.

In light of the above-summarized background, I will now discuss the series of events that are the subject of the allegations of the complaint.

B. The events alleged in the complaint

1. The July 23, 2015 incident[7]

As discussed briefly above, sometime between July 20 and July 23, WWU-affiliated workers distributed a flyer at Respondent's facility (GC Exh 4). The flyer, printed in English and Spanish, reported among other things that OSHA had conducted an inspection of Respondent's facility on July 20. The flyer also contained a prominent photograph of Respondent's employee Manuel Reyes (Reyes), who is quoted as saying that Respondent "keeps disrespecting us with low wages and ignoring health & safety laws," and that Respondent "needs to follow the law by paying us our living wage and having the right equipment to do our jobs safely."[8]

Reyes testified that on July 23, shortly after he arrived at work, his supervisor, Reyes Ramos (Ramos), informed him that Rosenthal wanted to speak with him, and they both went to Rosenthal's office. Present at Rosenthal's office when Reyes and Ramos arrived were Rosenthal, Rivera, Diana West (West) who is Respondent's director of administration. According to Reyes, Rosenthal threw (or tossed) the WWU flyer across the desk at him and asked him if that was him in the photograph on the flyer, and Reyes replied that it was. Rosenthal then asked why he was doing "this," referring to complaining to OSHA.[9] Rosenthal

[6] Indeed, Rivera admitted that this group of employees was referred to as the "blue shirters" by Respondent (Tr. 457).

[7] All dates hereafter shall be in calendar year 2015, unless otherwise specified. This event or incident is alleged in par. 6(a) of the complaint.

[8] The living wage reference refers to a Los Angeles ordinance, cited in the flyer, which directs employers in the area to pay their employees certain minimum wages and/or benefits.

[9] According to Reyes, Rosenthal spoke partly in English and partly in Spanish, and with the assistance of Rivera, who translated for Reyes.

further asked why they were making complaints to OSHA, and stated that they should bring any complaints to him directly so that he could make any necessary improvements. Reyes told Rosenthal that he had had an accident in the past which caused him to miss work, for which he was never compensated. Rosenthal asked Reyes how long he had worked there, and when Reyes replied that he had been there 15 years, Rosenthal replied that he should have known where the potholes were. (Tr.150–156; 174–176; 177.)

Rosenthal testified that he was upset because of the flyer, and called Reyes in because of what he said in the flyer, because he "wanted to hear from the person who lives it, an employee who is there every day." He denied having thrown the flyer at Reyes, but did point at the flyer which was on the desk between him and Reyes. He asked Reyes why he was on the flyer and told him to address his concerns about health and cleanliness. According to Rosenthal, Reyes stated that he was concerned about the bathrooms being unclean, and Rosenthal told him that he needed to bring his concerns to "us" (Respondent), so that they could correct the situation. Rosenthal specifically denied telling Reyes not to go to OSHA, and denied mentioning OSHA at all.[10] (Tr. 327; 329–332; 354; 356; 368; 372.)

Rivera's testimony about this meeting generally corroborated that of Rosenthal. He admitted that management had seen the flyer and was concerned about what Reyes had said in the flyer, which was the reason they had the meeting with him. They wanted to talk to Reyes about health and safety and asked him what his concerns were, so that management could address those. According to Rivera, Reyes mentioned the dirty restroom, with urine "all over" the toilet, and also brought up his prior injury at work. Rivera testified that Rosenthal never "threw" the flyer at Reyes, and denied that OSHA ever came up during the meeting, which lasted 5–7 minutes (Tr. 397–402; 451). West also generally corroborated what Rosenthal and Rivera testified to, testifying that Reyes was called into the meeting because of the flyer, and was asked about what he said in the flyer. Reyes mentioned the dirty bathrooms, as described earlier. OSHA was never brought up, and Rosenthal did not throw the Flyer at Reyes—indeed, West did not recall the flyer being present during the meeting (Tr. 461; 463–464; 466–467; 470).

Credibility Resolutions

In this particular instance, I have concluded that there is little need to resolve the few disparities between the witnesses' testimony, because those disparities are ultimately not relevant in reaching a determination as to whether Respondent's conduct violated the Act, as will be discussed below. The witnesses all agree on the *salient* facts, particularly as admitted by Respondent's witnesses, which are as follows:

- A flyer discussing the alleged working conditions at Respondent's facility was distributed there, a flyer which bore Reyes' photograph and which quoted him voicing concerns about those conditions;

[10] Rosenthal admitted, however, being aware that OSHA had conducted an inspection of Respondent's facility a few days before. He also admitted that he spoke to no other employees regarding health & safety at this time. (Tr. 372).

- Respondent's management team, which included the highest-ranked supervisors in the facility, saw the flyer, was upset by it, and called Reyes into a meeting because of the contents of the flyer;
- During the meeting, Respondent's officials questioned Reyes about what he said on the flyer, and told him to bring any concerns to management.

The only two issues where the testimony of the witnesses digresses: whether Rosenthal "threw" the flyer at Reyes, and whether the subject of OSHA was ever broached during the meeting. I conclude that the flyer was present during the meeting, and that Rosenthal pointed or referred to it, as he admitted. I find it unnecessary, and legally irrelevant, to decide whether the flyer was thrown. Likewise, I find it unnecessary to make a finding as to whether OSHA was ever brought up, because it will ultimately not affect the legal conclusions I reach, as discussed below.[11]

Accordingly, I find that the facts as to this event are as described above.

2. The "Heat Break" incidents and Respondent's alleged reaction to them

(a) The heat breaks[12]

It is undisputed that beginning about August 18, several of Respondent's employees jointly began taking "heat breaks" at certain times of the day and on various different dates, for the next several weeks until about the beginning of October.[13] What is disputed is what was said and by whom to these employees, and what Respondent's supervisors did in response to such activity. In support of its allegations, the General Counsel (GC) proffered the testimony of 3 witnesses: Jose Rodriguez (Jose R), Manuel Reyes (Reyes), and Victor Gonzalez (Gonzalez).

Jose R, who has worked for Respondent loading and unloading containers for about 25 years, testified that he and other employees began participating in activities with the support of WWU in late 2014 or early 2015. As described earlier in the background section, these activities included strikes and picketing, leafleting, filing OSHA complaints, collecting signatures for petitions, and forming delegations to present such petitions to Respondent's managers. He and other also frequently wore the blue WWU T-shirts to work, as well as the safety vests with WWU logos. According to Jose R, on August 18, about 1 p.m., when the temperature inside the containers reached 80 degrees, he and about 6–7 other employees—who were all wearing the

[11] Should the Board decide that making a credibility finding regarding the OSHA issue is material or makes a difference, I conclude as follows: I credit the testimony of Reyes that he was asked why a complaint had been filed with OSHA and told to bring any complaints directly to management. In so doing, I take into account all the circumstances, particularly the fact that OSHA had conducted an inspection of Respondent's facility only 3 days earlier (which Rosenthal admitted being aware of), as described in the flyer, and that Rosenthal admitted being upset when he read the flyer. I thus find it highly plausible that OSHA's visit was fresh in Rosenthal's mind and was a factor in his questioning of Reyes, who I infer was likely blamed by Rosenthal for the OSHA visit, despite his denials.

[12] As alleged in pars. 6(b) and (c) of the complaint.

[13] Nor is it disputed by Respondent that these activities by its employees constituted protected concerted activity under the Act.

blue "WWU" T-shirts-—first began taking "heat breaks." [14] They stopped working and gathered by the lunch tables (and water cooler) in the warehouse near supervisor John R's office. Jose R and a fellow worker, Rafael Quintero, went inside John R's office and informed him they were taking a heat break. John R said it was fine, but that they had to "clock out," which the employees proceeded to do. John R then came out of his office with a clip clipboard, and proceeded to ask each of the employees how they felt, whether they were fatigued, and wrote down their answers. A couple of minutes later, Rivera arrived in a golf cart, and asked the group what was going on. Jose R answered that they were taking a heat break, and in response Rivera asked if the employer had ever denied them water or bathroom breaks, to which they replied no. Rivera then asked how come the only employees taking a heat break were wearing the blue (WWU) T-shirts. Jose R replied that they were taking a break to prevent getting ill because of the heat. Shortly thereafter, according to Jose R, Rosenthal arrived, looking very mad or upset.[15] He approached Reyes and Gonzalez and in a loud voice told them to go back to work, a command he repeated in the same manner to all other employees taking the break. Later, John R, the supervisor, asked Jose R and the other the employees who took a break that day to sign a "report" describing what had occurred.[16] Finally, Jose R testified that he and the other employees took about 30 additional heat breaks in the following few weeks. (Tr. 20; 26–28; 31–33; 35–36; 38–50; 118–121.)

Reyes testified that he worked for Respondent as a forklift driver from 2000 until March 2016, when he was discharged. He was one of the participants in different group activities with the support of WWU, such as strikes and petitions, and was part of the group that took heat breaks on August 18 and other dates thereafter.[17] On August 18, according to Reyes, he had been taking the heat break alongside others for about 2 minutes, when Rosenthal arrived and came right up to him. According to Reyes, Rosenthal came very close to him physically, so close that Reyes was sprayed with Rosenthal's spittle as he yelled at him, and then others, "Bullshit, Bullshit, get back to work." John R then told him to go back to work, because Rosenthal was mad, and he returned to work. (Tr. 145–148; 158; 160–164; 166; 170–171.)

Gonzalez testified that he has worked for Respondent for about 8 years, first as a lumper and then as a forklift driver. During 2015, he was involved with other coworkers in activities supported by WWU, including strikes, picketing, forming part of delegations to the employer, and wearing the blue WWU T-shits and vests to work. He also took part in taking heat breaks along coworkers when it was hot, beginning on August 18. On that date, he joined his co-workers as he saw them stop their work, and gathered with them by the lunch tables and drinking

[14] Jose R testified that he learned that under California law, when the temperature reached 80 degrees and if symptoms related to heat were present, employees could take certain actions to protect themselves and employers had to monitor them (Tr. 120–121). This does not appear to be disputed, but may not ultimately be relevant, as discussed below..

[15] Jose R explained that he could tell Rosenthal was mad based on his facial expression and demeanor, as well as his loud voice. (Tr. 46.)

[16] Although there is no dispute that Respondent handed the employees a series of these "reports," which it asked them so sign, over the next several weeks, the parties dispute the nature and intent of these documents, which were introduced into evidence. The General Counsel alleges these were disciplinary warnings, while Respondent contends there were merely "observation reports" documenting what occurred during the heat breaks. These documents, and their contents, will be discussed in detail below.

[17] Reyes confirmed that they informed John R just as they were starting their heat breaks. He also testified that he wore the blue WWU T-shirt during the period of time they were taking the heat breaks.

fountain in the warehouse, near John R's office, who they notified about the break. About 3–4 minutes into their heat break, he saw Rosenthal, who looked very mad, arrive and approach Reyes, getting physically close to him and yelling "get back to work."[18] Rosenthal then approached another employee, Juan Figueroa, then approached Gonzalez, coming within 1 foot of him, to the point that Gonzalez held his hands up, indicating to Rosenthal, who was upset and yelling "get back to work," that he should stop before they had physical contact. Gonzalez went back to work. About 10 minutes later, according to Gonzalez, his supervisor, John R, came to where he was working and told him to come with him. They went to the same lunch table area where he and the others had earlier taken their heat break, and Rosenthal and Rivera were there. Rosenthal asked Gonzalez why he had taken a heat break, and he replied that it was very hot and he had been feeling tired and dizzy. Rosenthal then asked why was everyone taking a heat break at the same time, and Gonzalez said that he (and the others) were tired and hot. Rosenthal then told him that they could not all take a heat break at the same time, but only if they were sick, throwing up or exhausted. Rosenthal asked Gonzalez if the supervisors were not treating him well, and ask if they did not give him enough breaks (of 15 minutes rather than the standard 10). Gonzalez then received a written note from John R, which he thought was a warning—as will be discussed below. Finally, Gonzalez testified that he and the others did not take heat breaks for another week (Tr. 190; 194-200; 202-206; 208-212; 231-232; 258-259; 261-264).

Testifying for Respondent with regard to the above-described incident(s) were John R, Rosenthal and Rivera. John R testified that the interactions between himself, Rivera and Rosenthal with the employees taking heat breaks did not occur on August 18, the first date when such breaks were taken, but rather on the *second* occasion on a later date, the exact date which he could not recall. On August 18, John R testified, he was approached by Jose R, who told him that he and about 5 other employees were taking a heat break. John R said fine, and proceeded to ask each of them if they were okay, and whether they needed water or medical attention. The employees responded that they were fine, but he stayed with them.[19] After the employees returned to work, John R called Rivera and Rosenthal to inform them of what just occurred. They told him to alert them next time this occurred. The second time the group of employees came to him to announce they were taking a heat break, he alerted Rivera and Rosenthal, who arrived shortly thereafter. Rosenthal, according to John R, approached Reyes and asked him what he was doing, and he replied that he was drinking water. Rosenthal told Reyes to go back to work when he finished drinking water.[20] According to John R, Rosenthal's demeanor was "normal," and he never said "bullshit" during his exchange with Reyes. John R testified that these employees took a number of heat breaks during the following weeks, typically twice a day, in the morning and afternoons (Tr. 283-291; 302; 323-324).

Rosenthal testified that he initially believed that his (and Rivera's) interactions with the employees taking a heat break had occurred on August 18, but after listening to John R's testimony he agreed that this had occurred during the second heat break, for the reasons

[18] Gonzalez testified that Rosenthal made physical contact with Reyes (whose work nickname is "Simba") with his belly, although Reyes did not corroborate this (Tr. 207; 260–261).

[19] In addition to asking the employees how they were feeling, he also documented their responses and then gave them a written "report" which he asked them to sign, as will be discussed further below.

[20] John R testified that it was "strange" that Reyes was there, since he worked in a different department from the others, adding that he indeed asked Reyes "what are you doing here?" (Tr. 289.)

explained by John R.[21] On the second occasion the employees took a heat break, John R alerted Rivera, who in turn alerted him, and they headed to "bay 3" in the warehouse, where the employees were gathered. When he arrived, he saw 4-5 employees, all wearing the blue WWU T-shirts, standing by the water cooler. He approached and asked them what is going on, to which Jose R, speaking for the group, replied that they were taking a heat break. He then asked them if they had any symptoms, to which they replied that they did not, and then he walked away, letting Rivera talk to them in Spanish—since most of the employees were Spanish-speaking. He did not yell, although he spoke in a louder than normal tone because of the ambient noise in the warehouse. He did not recall approaching Reyes, but testified that he did not speak to him nor bump him with his belly, nor spray him with spittle. He further testified that as he was leaving, he saw (Victor) Gonzalez approaching, and asked him what he was doing. Gonzalez replied that he was taking a heat break, and Rosenthal then asked if he had any symptoms, to which Gonzalez replied that he did not. Rosenthal then went back to his office. He testified that he did not tell Reyes or any other employee to get back to work. (Tr. 332-338; 360-362; 364; 374.)

Rivera testified that he received a call from John R on August 18 after the employees had finished taking their heat break, and he told John R to alert him next time it happened. On the next occasion, after John R alerted him, he alerted Rosenthal and headed to the area where the employees had gathered. Rivera, who testified he arrived shortly before Rosenthal, observed several employees sitting on the tables by the water cooler. He asked them if they were okay or needed any medical attention, to which they replied no, that they were only taking a "preventative" heat break. According to Rivera, Rosenthal then arrived and started talking with the employees, but he could not recall what Rosenthal said, nor recalled Rosenthal's demeanor.[22] Nonetheless, Rivera testified that Rosenthal did not seem angry, and did not recall him saying "bullshit" or "get back to work." He saw Rosenthal interact with Reyes by the water cooler, but did not hear him yell or raise his voice, adding that nothing stood out about that interaction. He added that he did not recall Rosenthal bumping Reyes with his belly, and did not recall any interaction between Rosenthal and Gonzalez. He testified that the heat breaks lasted about 5-6 minutes, and less than 10. (Tr. 403-411; 436-438; 452-455; 457.)

Credibility Resolutions

As can be discerned from the testimony of the witnesses described above, there is a conflict between the version of events testified to by the General Counsel's witnesses (Jose R, Reyes, and Gonzalez) and those called by Respondent (John R, Rosenthal and Rivera) regarding the heat break events. In assessing credibility, I must look to a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed

[21] Rosenthal was present in the hearing room during John R's testimony, as the designated representative of Respondent. All other witnesses were sequestered.

[22] During cross examination, Rivera admitted he could not *hear* what Rosenthal was saying to the employees, but then, in an apparent contradiction, testified that Rosenthal did not say bullshit," because he would have remembered that (Tr. 437-438).

Appx. 516 (D.C. Cir. 2003). Moreover, in making credibility resolutions, it is well established that the trier if fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). I must also take into account that the testimony of current employees may be deemed as particularly reliable when their testimony contradicts that of their supervisors, because such witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978). In the present case, I have also taken into account the effects of the passage of time on memory, given that the testimony in this case took place about 2 years after the events in question.

In reviewing the above-described testimony, I note that the testimony of Jose R, Reyes, and Gonzalez is consistent is describing the aggressive nature of Rosenthal's demeanor toward the employees taking a heat break, including his loud tone of voice and his insistent directive that they cease what they were doing and return to work. While there are some minor inconsistencies in describing the exact words and conduct by Rosenthal—for example his use of the word "bullshit," and whether or not he "bumped" his belly against Reyes—the testimony was nonetheless consistent in describing the salient points described above. The fact that Jose R and Gonzalez were current employees at the time of their testimony also enhances their credibility.[23] The testimony of Respondent's witnesses, on the other hand, was inconsistent and at times contradictory. For example, while Rosenthal could not recall any interaction with Reyes, both John R and Rivera testified that had seen him interacting with Reyes. John R confirmed the account of the employees that Rosenthal told Reyes to go back to work, something denied by Rosenthal. Rivera either could not remember or could not hear what Rosenthal said—although he denied that Rosenthal had used the expression "bullshit," which is contradictory. Moreover, I find that the inherent probabilities under the circumstances favor the accounts of the employees. In that regard, I note that there is strong circumstantial evidence that Respondent viewed the employee heat breaks with suspicion if not hostility, as reflected in its asking why only those wearing blue t-shirts were engaged in these activities, and in asking how come employees appeared to be acting in coordinated fashion—testimony that was not denied or contradicted. In these circumstances, I conclude that it is highly likely that Rosenthal acted in the belligerent manner described by the employee witnesses in order to get them to cease their activity.[24] I also credit the testimony of Jose R that Rivera asked him how come only the employees wearing blue shirts were taking heat breaks, which Rivera did not deny. Finally, I specifically credit and the testimony of Gonzalez, who testified he was asked by Rosenthal—along with Rivera and John R—why everyone was taking a heat break at the same time, which was not denied by Rosenthal.

Accordingly, I conclude that Rosenthal acted in a physically and verbally aggressive manner when he confronted the employees taking a heat break, and that he ordered them to cease their activity immediately and return to work—as the employees described in their testimony.[25]

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[23] Reyes was no longer employed by Respondent by the time he testified, but his testimony was consistent with that of Jose R and Gonzalez.

[24] In that regard I note that Rosenthal admitted being upset by the flyer that was distributed by WWU, which precipitated his interview of Reyes a few weeks earlier. It is therefore reasonable to infer that Rosenthal viewed the heat breaks as a continuation of activities by employees that he found irritating, to say the least.

[25] It is not crucial to determine whether this incident occurred on August 18, the day of the first heat break, as claimed by GC's witnesses, or occurred shortly thereafter, on the day of the second heat break, as claimed by Respondent's witnesses. The important factor is that it did occur, as described above. Nonetheless, I would note

(b) The written "observation reports" given to employees engaged in the heat breaks[26]

It is undisputed that beginning on August 18, and through October 8, Respondent issued written reports to employees that engaged in heat breaks, with each separate report corresponding to the date(s) when the heat break was taken (GC Exh. 5; 7; 8). It is also undisputed that supervisor John R wrote and issued these reports to the employees, as directed by his superiors. What is in dispute, however, is what was said—or not said—to the employees who were issued these reports, and consequently what the intent behind these reports was and the possible impact they had—if any—on the employees who received them. Notably, the complaint does not allege that Respondent disciplined these employees, but rather that the reports created the *appearance* of discipline.[27]

The form used for these reports needs to be described—and reviewed—in order to understand the context of the allegations regarding these notifications. As mentioned above, the first time this report or notification was issued to employees was on August 18, the first time employees took a heat break (GC Exh. 5, p. 1). At the very top of the form, in capitalized and underlined bold lettering, it says "**EMPLOYEE WARNING REPORTS**," followed by spaces for the employee's name, "date of the warning," company name, and department and shift information. Immediately below, there is another caption in bold capitalized letters that says "**IMMEDIATE TERMINATION VIOLATIONS**," followed by a list of offenses meriting such penalty, such as fighting, insubordination, theft, use or possession of drugs or alcohol, etc., each with a box next to them to mark, if applicable. Below that, after a double line of asterisks (***) below the above-described list of offenses, there is another list of offenses listed, such as absenteeism, tardiness, leaving early, and others, each with a box next to them to mark as applicable , that appear to be separated from the more serious offenses listed above these as cause for immediate termination. Immediately below the list of apparently less-serious offenses, in bold lettering, there is another category, in bold letters, which says "**Other Observation Report**," apparently meant to cover other conduct not listed, next to a box to be checked, if applicable.[28] Below that, in bold capitalized letters, it says "**EMPLOYER/SUPERVISOR REMARKS**, followed by three lines for a supervisor to describe the conduct or violation observed, followed by a space for the supervisor's signature and date. Immediately below that, in bold, underlined letters, is the following wording: "***Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination."*** Immediately Below, there is an area for the employee to insert his remarks, and a box to check

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that Respondent's witnesses' version is plausible and even makes sense, inasmuch the first heat break took them by surprise and Rosenthal and Rivera did not find out until it was over—but they were ready to pounce on the second occasion. Accordingly, if necessary, I would conclude that this incident occurred on the day the employees took their second heat break.

[26] As alleged in par. 8 of the complaint

[27] Thus, GC did not establish that these reports constituted a form of discipline that was contained or reflected in the employees' personnel files, and consequently GC did not request, as a remedy, that any such disciplinary records be expunged from the employees' records.

[28] In the exhibits, the "Other Observation Report" wording is highlighted in yellow, but as discussed below, it is not clear if the highlight existed at the time the reports were given to the employees. John R testified he created the "Other Observation Report" portion of the document for use in the heat break incidents.

indicating whether or not the employee agrees with the facts as described. Below this is an area for the employee's signature and date, and below a caption that reads "**ACTION TAKEN:"** followed by boxes to be checked indicating the type of action taken, such as "Verbal" "Suspension," "Discharge," etc., and a line describing the action taken (GC Exh. 5, p. 1).

The above description belongs to the notification or report given to Gonzalez by his supervisor, John R, on August 18. The box next to the caption that says "Other Observation Report" was marked, and below that, under the caption "Employer/Supervisor Remarks," contained the following remarks (by John R): "Mr. Gonzalez requested to take a heat break. I asked him if he felt okay and if he needed medical attention. Asked if he was feeling dizzy, nausea, or light headed, and he said only tired because it was hot. Reminded him to drink water. I stayed there to make sure they were okay. After 7 minutes (2 to 2:07) he returned back to work."[29]

As discussed below, these forms were modified for subsequent incidents. Starting with the next incident, on September 8, the wording at the very top of the form, which says "Employee Warning Report," in bold capital letters, was omitted (GC Exh. 5, p. 2). Also omitted was the part at the very bottom of the form, the portion beginning with "Action Taken," and everything else below that (the boxes indicating what type of action was taken). The rest of the form remained identical.[30] The form was modified yet again starting on the afternoon of September 25. At that time, the wording that stated, in bold italic type, "Any further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination" was also deleted. The form used for these reports/notifications thereafter remained the same until the last one was given to employees on October 8 (GC Exh. 5; 7; 8).[31]

The General Counsel's witnesses testified as follows with regard to these reports/notifications: Jose R did not testify at length about the reports, other than to acknowledge he received them, and did not recall if the part of the report captioned "Other Observation Report" was highlighted when he received them.[32] He testified this was the first time he had been issued these types of reports or notifications, but admitted that John R told him they were just observation reports (Tr. 61; 70-71; 126; GC Exh. 2). Gonzalez testified that John R initially told him these reports were a warning, but also testified that he asked John R, after the second or third time he had received one, why he was given these "Immediate Termination Violations" (language contained in the actual notification/reports), and that John R explained that these were only "observations" for their own records (Tr. 248-249; 253-254; 257-258).[33]

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[29] Every report or notification thereafter contained identical wording in this space, except for the different time and duration of the break taken.

[30] Thus, such modification was in place for the reports/notifications given to employees on September 8, September 9, September 10, September 11, and the *morning* report on September 25.

[31] GC Exh. 7 were the forms is Spanish given to Jose R and other Spanish speaking employees, and GCX8 is their English version

[32] Accordingly, I admitted the exhibits (GC Exh. 2) without the highlighted portion, since such highlight was not authenticated at the time.

[33] This testimony contradicts what Gonzalez said in his Board affidavit, taken much closer in time to the date(s) when these events occurred. In his affidavit, Gonzalez states that John R "didn't tell me that it was or was not disciplinary in nature," referring to the so-called observation reports. Accordingly, I find that Gonzalez was *not* told these were disciplinary warnings.

For Respondent, John R testified that he was directed by Rivera and Rosenthal to use these particular forms. He started highlighting (in yellow) the "Other Observation Report" caption, after the first report issued on August 18, so that employees understood this wasn't a warning, just an "observation report." He initially testified that explained this to employees, although he could not recall the names of individuals he had explained this to. During cross-examination, however, he testified that several employees asked if these reports were warnings, including Jose R on the first occasion he issued one, and that he informed them it was just an observation report.[34] He also testified that disciplinary warnings are forwarded to the front office, whereas these reports were kept in his office. According to John R, Jose R and others refused to sign the first report because it was in English, so he started writing them is Spanish so that they could understand.[35] (Tr. 292-296; 304-306.) Finally, Rivera testified that he was the one who modified the reports, first adding "Other Observation Reports" and later taking out the "Employee Warning Report" and "Action Taken" portions out, and later the portion starting with the phrase "Any Further Incidents of this Type." (Tr. 416-417.)

Credibility Resolutions

There is not much to determine, credibility-wise, inasmuch the forms for the most part speak for themselves. However, John R's testimony was by far the most detailed and consistent about what employees were told about what the purpose of the forms given to employees in the wake of the heat breaks. Thus, I conclude, for the reasons previously discussed, that John R told Jose R and others on the first date that these forms were not warnings or disciplinary in nature, and thereafter the employees begun signing the forms. I also note that Gonzalez was told the same thing, albeit somewhat later, on the second or third occasion when these forms were issued.

3. The events on or about September 4

Jose R testified that about 4-5 weeks after the first time the employees began taking heat breaks, John R came to the container where he was working and asked him why he signaling the other workers to start taking their heat breaks. Jose R asked him if he had seen him do that, to which John R replied that he had not (Tr. 82-83). In his testimony, John R never addressed whether or not he had asked Jose R why he was signaling other employees to take heat breaks, but testified that he had seen him beckoning other employees to do that (Tr. 297-298). In these circumstances, I credit Jose R's testimony, since John R did not deny this allegation, and the fact that John R's admission that he had seen Jose R signal other employees makes it more likely that he asked him about it.

Later on the same day, according to Jose R, John R came by in his golf cart and took him to the office, where Rivera and Rosenthal awaited. According to Jose R, Rosenthal showed him

[34] Jose R did not rebut this testimony, and accordingly I find that he asked and was told on the first occasion that these reports were issued that they were not disciplinary warnings.

[35] He also testified that the employees initially did not sign the forms because they thought they were warnings (Tr. 318). The record shows, however that the employees signed all the reports after August 18. Additionally, it should be noted that only the portion under "Employer/Supervisor Remarks" of the reports issued to Jose R was in Spanish; the rest of the document was in English (GC Exh. 7). The English versions were admitted as GC Exh. 8

a cell phone indicating that the temperature in that area was 75 degrees that day, and therefore employees should not be taking heat breaks. Jose R explained that he had a thermometer inside his container which showed it was 84 degrees in there. Rosenthal then said he did not want hear his name through loudspeakers used by picketers, and Jose R replied that was another matter altogether, that this meeting was about heat breaks. Rosenthal then asked Jose R, if he did not like the company, why he did not go somewhere else. Jose R responded that he had been there many years and liked his job, adding that he was a good worker. Rosenthal again asked if he did not like the company, why he didn't go to a different company. Jose R responded "are you firing me or what?" Rivera then stepped in and said that all they were saying was, if he did not feel comfortable here, why was he still there. Jose R responded that he needed the money, and that he was too old to get work from a different company. Rosenthal then asked Jose R why he had "thrown" OSHA on him. Jose R answered because of safety, health and lack of respect. Rosenthal asked when had had been disrespected, and Jose R answered many times, proceeding to give some examples. Jose was asked if they had ever been denied heat breaks, and he said no, but they were made to "clock out" and made to sign papers about it, which he called intimidating.[36] (Tr.84-88; 136-137.)

Rosenthal, Rivera, and John R testified about the above-described meeting with Jose R in Rosenthal's office, and they confirmed the salient facts in Jose R's account of the meeting. They thus confirmed that Rosenthal asked Jose R why they were taking heat breaks when it was only 75 degrees, and confirmed Jose R's reply that it was over 80 degrees inside the containers where they worked.[37] All three witnesses for Respondent also confirmed that Rosenthal asked Jose R why he did not go work elsewhere if he was unhappy, and that Jose R in response asked if he was being fired—and that they told him he wasn't. (Tr. 300-301; 339; 341-342; 427-429.)

In view of the above, and taking into account the allegations in the complaint, I conclude no credibility findings need to be made regarding the above-described meeting between Jose R and Rosenthal, Rivera, and John R. All witnesses confirm that Jose R was asked why employees were taking heat breaks when it was only 75 degrees, and that he was asked why he did not go work elsewhere if he was unhappy, and that he responded by asking if he was being fired.

4. The events of October 8

Jose R testified that on October 8, he and about 30 other employees gathered outside Rosenthal's office during lunchtime, and knocked on his door to present him with a petition (GC Exh. 3).[38] According to Jose R, initially employees Edelberto Zamorra (Zamorra) and Carlos

[36] Other topics were briefly discussed during this meeting, but these topics are not material to the allegations of the complaint.

[37] Rosenthal testified that they asked these questions of Jose R because they perceived him to be the group's "leader." Rosenthal denied saying anything about OSHA, however. (Tr. 339; 342.)

[38] In reality, immediately outside Rosenthal's office and separated by a door, is a larger office of various supervisors (including Rivera), and this office in turn has a door that leads to the warehouse. Thus, there is a "buffer" area comprised of supervisors' offices between Rosenthal's office and the warehouse. The 30 or so employees were gathered by the supervisors' office door (see RX 1, a drawing made by Jose R depicting Rosenthal's office ["R"] and the supervisors' office immediately outside Rosenthal's office [H, S, O, E, R], as well as the door to the warehouse, with [X] marking the spot where the employees were gathered by the door. (V) marks a window next to the door leading to the warehouse

Rodriguez (Carlos R) went into Rosenthal's office, and then Rosenthal had Reyes come in, and then Jose R was invited in, but only after Reyes and Zamorra exited Rosenthal's office. Jose R explained what the petition, which requested a wage raise, sick pay, equipment in better conditions and clean restrooms and dining rooms, was all about. Rosenthal responded that he would not accede to these demands, and the delegation left and returned to work after lunch was over. A short while thereafter, John R came by and took him to Rosenthal's office. According to Jose R, Rosenthal told him he would be sending the petition to the "general office," which had the authority to respond. Rosenthal then told Jose R that he did not want everyone to gather in front of his office, that he wanted them outside the warehouse in the dock—but not inside the warehouse where he could see them. In an "aggressive" tone of voice, according to Jose R, Rosenthal said "I'm going to speak only with one, man to man."[39] During cross examination, he testified Rosenthal's office was too small to accommodate 30 persons (Tr. 91-97; 111-112; RX-1.)

Rosenthal testified that the group of about 30 employees knocked on the door of the supervisors' office, and that he came out of his office to meet them there. He told them to "back off" because other people might need to use that door to come in or out, and then told them that only one of them could come in—not all 30. Jose R then came in, handed him the petition, and told him they needed an answer by Friday (October 8 was a Thursday). Rosenthal further testified that he was somewhat taken by surprise, and is not sure what answer he gave Jose R—but said he could have said no. He specifically denied telling Jose R that he did not want to see the employees gathered in the warehouse or within his line of vision, reiterating that he only told them not to gather in front of the door. He did not recall telling Jose R that he only wanted to speak "man to man" to one person, only that he wanted to speak only to one, not the entire group. After Jose R left his office, he reviewed the petition more closely and decided to send it to corporate headquarters. He later called Jose R back to his to inform him that he would be sending the petition to corporate headquarters, and Jose R nodded—and nothing else what said.

Credibility Resolutions

I do not view the testimony of Jose R and Rosenthal about the events on October 8 as mutually exclusive, except in the limited way described below, and I found them both equally credible with regard to this instance. In the circumstances described, I conclude that Rosenthal, as he testified, told Jose R and the others not to gather as a group (of 30 or more) at the entrance to the supervisors' office, because they were blocking—or could block— people from coming in or out.[40] As testified to by Jose R, Rosenthal then met with 2 or 3 of the employees, including him, in his office—which was admittedly too small to accommodate a large group. Jose R then testified that later on, when he and Rosenthal met alone (along with John R, who translated), Rosenthal said that he did not want to see employees gathered in the warehouse where he could "see them," which Rosenthal specifically denied. In the context of these events, I conclude that

[39] Jose R testified that John R, his supervisor, was present during this meeting and translated for him and Rosenthal. John R did not testify about this meeting during his testimony.

[40] In its post hearing brief, the General Counsel argues that it is not credible that anyone's access was being blocked, because it was "lunchtime" and, presumably, all the supervisors were out to lunch and there was therefore no one present to block. No evidence whatsoever was introduced as to whether the supervisors were indeed at lunch or were present in the office or nearby, and thus I reject such argument. Even assuming that the supervisors had indeed stepped out to have lunch, it is not inconceivable that one or more of them could have returned at any moment and found the door blocked by the large group of employees gathered there.

to the extent the Rosenthal again said something about the group of employees gathering, it was just to reiterate what he had said earlier—that he didn't want the group gathering at the entrance to the supervisor's office because they were potentially blocking egress and ingress. I believe that something was likely "lost in translation" and that Jose R may have misinterpreted what Rosenthal actually said regarding the group gathering nearby. Likewise, I credit Rosenthal that he told Jose R that he wanted to speak to only one, not the entire group, and that the "man to man" statement attributed to him by Jose R, whom I also credit, was in reference to that. Accordingly, because I find both witnesses equally credible in this instance, I conclude that the General Counsel has not sustained its burden of proof as to this allegation.

IV. DISCUSION AND ANALYSIS

A. The July 23 incident

Paragraph 6(a) of the complaint alleges that Respondent discouraged employees from engaging in concerted activities by telling them not to do so. The language of this pleading does not fully cover the precise conduct engaged in by Respondent, because what actually occurred was slightly different. Nonetheless, for the reasons discussed below, I conclude that Respondent's conduct in this instance was coercive and violated Section 8(a)(1) of the Act.

As I concluded in the facts section, above, what occurred in this instance was as follows:

- A flyer discussing wages and working conditions at Respondent's facility was distributed there, a flyer which bore Reyes' photograph and which quoted him voicing concerns about those issues;[41]
- Respondent's management team, which included the highest-ranked supervisors in the facility, saw the flyer, was upset by it, and called Reyes into a meeting because of the contents of the flyer;
- During the meeting, Respondent's officials questioned Reyes about what he said on the flyer, and told him to bring any concerns to management.

There can be no question that Reyes, along with fellow employees of Respondent, was engaged in protected concerted activity by taking part in WWU-related activities and expressing his concerns about wages, hours, and working conditions, as described—and quoted—in the flyer. Indeed, Respondent admits as much. At issue, then, is whether Respondent violated the Act when it called Reyes into a meeting to inquire into the contents of the flyer and his participation therein—and what the precise nature of the violation is, if any. Both the General Counsel and Charging Party emphasize the OSHA aspect of the meeting, arguing that employee participation or involvement in the filing of an OSHA complaint is protected, and that consequently any restrain or coercion directed at an employee for such involvement violates Section 8(a)(1). While this is certainly correct, see, e.g., *Michigan Metal Processing Corp.,* 262 NLRB 275, 276 (1982); *Owens Illinois, Inc.*, 290 NLRB 1193, 1204-1205 (1988), enfd. 872 F.2d 413 (3d Cir. 1989), this emphasis is misplaced, and perhaps unnecessary. This is because a violation would exist in these circumstances even if OSHA was never mentioned, indeed even if

[41] The flyer was prepared and distributed by WWU in conjunction with, and the assistance of, Respondent's employees. (GC Exh. 4.)

OSHA did not *exist*. Reyes lent his name, along with his opinions and photograph, to be used in a flyer discussing employee wages and working conditions, a flyer that was distributed at Respondent's facility and which admittedly upset Rosenthal. In response, Reyes was summoned to Rosenthal's office, where he faced an entire phalanx of supervisors—indeed, an entire cross-section of the supervisory hierarchy at the facility, including his direct supervisor (Ramos), Ramos' supervisor (Rivera), and Rivera's supervisor, Rosenthal, the highest authority in the facility. As if this weren't enough, present was also West, an administrative manager, who may not have had supervisory authority over Reyes, but whose presence added gravitas to the situation. They questioned Reyes about his role in the flyer, and about the contents therein, specifically about the complaints or concerns he had. In addition, he was told to bring any concerns directly to management, presumably rather than voice his concerns elsewhere—in this case, OSHA.

It is well-settled that the circumstances surrounding the questioning of an employee about his protected activity—that is, the time, place, manner and rank of those involved-- is crucial in determining whether it is coercive and thus in violation of the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom, *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 48 (2d. Cir. 1964). The coercive nature of the circumstances described above is palpable. It involved not a low-level supervisor casually asking a question of an employee on the shop floor, but rather the summoning of an employee to the office of Respondent's principal authority, where he was questioned by an entire group of supervisors about his protected activity. Such conduct cannot avoid but having a chilling effect on Reyes and other like-minded employees, because it sends an indelible message: "this is what you get for sticking your neck out."

Respondent argues that it had a valid reason for questioning Reyes, because an employer needs to be made aware of dangerous or unhealthy conditions so that it can take corrective action. Such goal is arguably a valid one, but Respondent had a myriad of ways it could have conveyed such message in a non-coercive manner. For example, an announcement, either via a memorandum or in a general meeting, informing all employees to bring any problems or concerns to management's attention (i.e., "if you see something, say something") would have achieved such goal without singling out an employee in a coercive manner because he chose to speak out.

Accordingly, I conclude that by engaging in the above-described conduct, Respondent both interrogated an employee about his protected activity and dissuaded him from engaging in it, and thus violated Section 8(a)(1) of the Act.[42]

[42] I am aware that the complaint did not allege an interrogation in this instance. I note, however, that this matter was fully litigated and that Respondent had a full opportunity to cross-examine the General Counsel's witness and to present its own evidence regarding this event. In these circumstances, I am permitted to find a violation on a different theory than explicitly plead by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op at 2 fn. 6 (2015); *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015); *Noel Canning*, 364 NLRB No. 45, slip op. at 5 (2016).

B. The August 18 interrogations by Rivera and Rosenthal

Paragraph 6(b) of the complaint alleges that about August 18 Rivera and Rosenthal interrogated employees about the manner they took their concerted heat breaks. This allegation refers to two separate incidents on the same day—which the employees testified occurred on/about August 18, the first time they took a heat break, but which Respondent's witnesses testified actually occurred at a later date, when the employees took their second (or perhaps third) heat break.

I credited the testimony of Jose R, who testified that shortly after the group of 5-6 employees started taking their heat breaks that day, Rivera arrived in a golf cart, and asked him (among other things) how come the only employees taking heat breaks were the ones wearing the blue tee-shirts.[43] I also credited the testimony of Gonzalez, who testified that about 10 minutes after he and the other employees had returned to work after taking the heat break, John R came by his container and took him to meet Rosenthal and Rivera, who were at the lunch area were they had earlier taken their breaks. Rosenthal asked him why they had taken a heat break, and then asked why everyone was taking a heat break at the same time.

I conclude, taking into account all the circumstances surrounding these events, that these particular interrogations as to why only employees wearing the WWU blue t-shirts were taking such breaks, and how come they all took the break at the same time, were coercive and violated the Act.[44] These questions, asked in the manner and under the circumstances they were, conveyed a tone of suspicion if not hostility toward the employees' protected activity, further underscored by the physically aggressive manner in which Rosenthal conducted himself during his initial encounter with the employees taking heat breaks, as discussed below. Indeed, it can be reasonably inferred from Respondent's conduct that at the time it likely considered the employees' heat breaks as illegitimate and unprotected work stoppages, brought about by employees conspiring with WWU, and hence the repetitive nature and scope of the questions. I also take into account that these interrogations were not conducted by low-level supervisors during casual shop-floor bantering, but were rather conducted by Rosenthal and Rivera, the two highest- ranked management officials, who went literally out of their way to confront these employees.

Accordingly, and in view of the above-described circumstances and factors, I find that Respondent violated Section 8(a)(1) of the Act by interrogating Jose R. and Gonzalez on this occasion. *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 17 (2016); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182-1183 (2011).

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[43] This refers to the blue T-shirts with the WWU logos. Rivera admitted referring to these employees as the "blue shirters"

[44] On the other hand, I do *not* find the question as to *why* they were taking a heat break to be coercive. Given the fact that these breaks were an unusual occurrence, particularly the first or second time they occurred, I conclude that Respondent, as any employer, would be entitled to know why there was a work stoppage. This is particularly true in light of the fact that these employees were ostensibly basing their actions on the temperature reaching 80 or more degrees, which they believed was permitted under California law—as discussed below.

C. The August 18 conduct by Rosenthal

Paragraph 6(c) of the complaint alleges that about August 18 Rosenthal implicitly threatened employees with unspecified reprisals. Specifically, this allegation refers to Rosenthal's conduct in confronting the employees taking heat breaks, which the employees testified occurred on the first day they took such breaks. Rosenthal denied engaging in such conduct, although he and the other employer witnesses admitted there were encounters between Rosenthal and the employees on the second occasion they took heat breaks. I credited the testimony of the employee witnesses, all of whom consistently described Rosenthal act in a physically aggressive fashion toward the employees, getting physically close to employees and commanding them to return to work in a loud manner. The employees described Rosenthal as being upset or angry, based on his facial expressions and body demeanor, and I conclude that indeed he was. I find that he used his physically aggressive manner, and raised voice, to project and impose his managerial authority on the employees in order to get them to cease their protected activity, and that such conduct was implicitly threatening—and coercive—under the circumstances. See, e.g., *Covanta Bristol, Inc.*, 356 NLRB 246 (2010).[45]

Accordingly, I conclude that Rosenthal's conduct had the tendency to reasonably coerce employees in their exercise of their Section 7 rights, and thus violated Section 8(a)(1) of the Act.

D. The September 4 interrogation by John R

Paragraph 6(f) of the complaint alleges that on September 4, John R interrogated an employee about his protected concerted activities. Jose R testified than on that date, John R, his supervisor, came by the see him in the container where he was working and asked him why he was signaling other employees to take heat breaks. Jose R replied, asking John R if he had ever seen him do that, and John R replied that he had not. I credited Jose R's testimony, since John R never denied this occurred.

The General Counsel and Charging Party allege that Respondent had no valid reason to ask Jose R about the heat breaks, and thus that this interrogation, like the others described above was unlawful. I disagree. Taking into account the factors discussed in *Rossmore House* and *Bourne*, supra, I do not view this particular interrogation as coercive. In that regard I note that this conversation took place in Jose R's container, the functional equivalent of a "shop floor" conversation, and that it was conducted by his immediate supervisor, a low-level supervisor.[46] Moreover, the record clearly suggests that by this time Jose R, due to his seniority and active participation in WWU activities, was seen as a "leader" by his coworkers, and one that had not been shy about expressing his views to management. He challenged John R about the assertion that he had been signaling others, and John R conceded that he had not seen him do that—and left it at that.

[45] The manager's conduct in *Covanta*, which involved banging his hand on a table and stating "I'll show you intimidation," had a stronger and more ominous verbal component than the current situation, which involved Rosenthal raising his voice and a command to return to work. Nonetheless, I find that *Covanta* suggests that the combination of physically and verbally aggressive conduct can reasonably be seen as coercive by employees.

[46] I note that although John R's official title is "manager," he is a front-line, first level supervisor.

Accordingly, and in view of these factors, I conclude that this particular conversation would not reasonably tend to coerce an employee in these circumstances, and therefore did not violate Section 8(a)(1) of the Act. I recommend that this allegation of the complaint be dismissed.

E. The September 4 implicit threat by Rosenthal and Rivera

Paragraph 7 of the complaint alleges that on September 4, Rosenthal and Rivera implicitly threatened employees with termination because of their protected concerted activity. This allegation refers to what occurred during a meeting in Rosenthal's office on that day between Rosenthal, Rivera, John R, and Jose R. I credited Jose R's testimony as to what occurred during this meeting, particularly in view of the fact that all the salient facts were confirmed by Rosenthal, Rivera, and John R. Thus, I found that during the course of the meeting, Rosenthal asked Jose R why he did not leave and go work elsewhere if he was unhappy with the way things were at the company. In response, Jose R asked "are you firing me, or what?"

The Board has long found statements like the ones made by Rosenthal to be unlawful because such statements imply a threat of job loss. *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 10 (2017); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 3 fn. 4 (2016); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997). The Board explained its rationale in *Jupiter Medical Center*, at 651:

> The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with continued employment . *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

While Jose R was not engaged in *union* activity, but rather in protected concerted activity, this is a difference without a distinction. Indeed, Jose R's reaction to Rosenthal's statement, asking whether he was being fired, perfectly illustrates the point made by the Board in *Jupiter*, as cited above. Accordingly, I conclude that Respondent violated Sec. 8(a)(1) of the Act by making the above statement, as alleged in paragraph 7 of the complaint.

F. The reports prepared by Respondent

Paragraph 8 of the complaint alleges that commencing on August 18 Respondent issued reports/documents to employees that appeared to be disciplinary in nature in response to employees engaging in protected activity, namely taking heat breaks. As described earlier, it is not alleged that employees were actually disciplined, but rather that these reports created the appearance of discipline. It is undisputed that beginning on August 18, and through October 8,

John R wrote these reports every time that the employees took heat breaks, and gave a copy to each of the employees which had taken a heat break. The General Counsel and Charging Party argue that these reports, because of the disciplinary language contained in the pre-printed forms—in fact these forms were typically used by Respondent for disciplinary purposes—reasonably created the appearance that discipline was being imposed, an intentional act to coerce the employees. Respondent argues that it was only documenting the employees' reported symptoms in these unusual circumstances, essentially in order to protect itself, and that it reassured these employees that they were not being disciplined. Both sides make valid arguments, and in my view it is a close issue in the midst of a deeply gray zone. On balance, however, and for the following reasons, I am persuaded that the Respondent did not violate the Act in this instance.

Without a doubt, at first glance, the pre-printed language in these forms looks ominous, and as counsel for Respondent conceded, these were "bad forms" (Tr. 127). Bold-lettered language that states "Immediate Termination Violations" and warn that "Any Further Incidents of this Type could Result in further Discipline…" stand out, among others, and could reasonably create the impression on the recipient of such form that he/she is indeed being disciplined. The question then becomes what Respondent did, if anything, to cure such impression, and to re-assure the recipients that they were not being disciplined, and whether such reassurances were made in a way that any reasonable individual would so understand. The evidence shows that Respondent did—over time—edit out some of the pre-printed language in the form that was the most offensive, but did not do so until many such reports had been issued. Accordingly, by itself, these edits would not cure the reasonable impression that such forms/reports were disciplinary in nature. The record shows, however, that early on John R told Jose R, Gonzalez, and other employees that these reports were not disciplinary, and suggests that they so understood.

In that regard, I credited John R's testimony that the told Jose R on the first occasion that he issued such report—on August 18—that these were only observation reports related to their heat break, and not disciplinary warnings, which Jose R admitted—or at least did not deny.[47] John R also testified that he told several of the other employees, and there was no evidence submitted to rebut such testimony. Likewise, Gonzalez admitted that John R told him, albeit after the second or third occasion, that these reports were not disciplinary, only observation reports.[48] Additionally, I credited John R's testimony that the employees had initially declined to sign the initial report on August 18 because his observations were written in English, which they could not understand because they were Spanish-speaking. He then started to write the observations in Spanish beginning with the next report, which the employees then proceeded to sign (GC Exh.-7). This fact adds another layer of complexity to the General Counsel's (and Charging Party's) theory of a violation, since the "ominous" pre-printed language of the reports was in English, and therefore we cannot assume that the employees reasonably understood such language to be of a disciplinary nature. At best, in this particular instance, it can reasonably be said that there is an element of doubt as to whether the employees in question would so understand. Inasmuch the burden of proof lies with the General Counsel to establish by a

[47] See Tr. 126.

[48] I did not credit Gonzalez' testimony that John R initially told him these were disciplinary warnings, because such testimony was contradicted by his affidavit.

preponderance of the evidence that a violation took place, I am not persuaded that such burden has been satisfied in this instance.[49]

Even if we could assume that the employees understood the nature of the pre-printed language and reasonably believed that they were being disciplined, the ultimate issue, as mentioned above, is whether Respondent cured or mitigated such impression. I conclude that it did, when John R initially informed them on the first occasion that these reports were mere observations and not disciplinary. The evidence, circumstantial as it may be as to those employees who did not testify, suggests that they so understood. Further, the comments written by John R clearly described questions he asked them about their symptoms, and their answers, and suggested no disciplinary consequences. I find that the cases cited by the General Counsel and the Charging party are not clearly on point. For example, the General Counsel cites *Publix Supermarket, Inc.,* 347 NLRB 1434, 1436 (2006), for the proposition that threatening or suggesting discipline for engaging in protected activities is unlawful, which is correct. That very case, however, suggests that the employer's failure to *retract* or otherwise cure that threat is what ultimately proved fatal. In that regard, the Board has often noted that a timely retraction or reassurance that no adverse consequences will follow can cure or negate an initial coercive statement or act, as Respondent did in this case.[50]

Accordingly, and for the above reasons, I am not persuaded that the written reports issued to the employees who took heat breaks were coercive, since any potential impression of their being disciplinary in nature was cured by Respondent's assurances that they were not. In light of the above, I find that Respondent did not violate Section 8(a)(1) in this instance, and recommend that paragraph 8 of the complaint be dismissed.

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[49] Gonzalez testified in English and thus we can assume the significance of the pre-printed language, as he alluded to in his testimony. As discussed above, however, he admitted John R told him these reports were not disciplinary in nature.

[50] The General Counsel and Charging Party advance other arguments that I find unpersuasive or simply miss the point. For example, they argue that under California law, Respondent was not required or obligated to write reports about employees' symptoms (or lack thereof) during heat breaks, and therefore Respondent had no valid reason to do so, and thus it must be inferred that the only motive was intimidation. Regardless of what California law requires or not, there can be no doubt that in a case such as this, were employees were essentially complaining about having to work in conditions that could render then ill, and where Respondent could thus be exposed to civil if not criminal liability, it is eminently wise to keep a record of employee complaints and symptoms, lest something occur. Indeed, from a business and legal standpoint, if not out of sheer common sense, it would be negligent for Respondent not to do so in these circumstances. Another argument that is advanced, or at least implied, is that once employees engage in protected activity, it is automatically coercive for an employer to ask the employees any questions about such activity, essentially because it's none of their business. This is contrary to the teachings of *Rossmore House* and its progeny, and certainly not in a situation such as presented here. In this case, employees started taking heat breaks once the temperature reached 80 degrees inside the containers where they worked, ostensibly because that is what California law allowed them to do. Assuming that is correct—and regardless of whether in fact that is the law—the premise is that a threshold of 80 degrees is the triggering condition that allows them to take such breaks, and it is not unreasonable, let alone coercive, for an employer to inquire whether in fact such threshold had been reached. The General Counsel's and Charging Party's arguments suggest that once employees declared that it was 80 degrees inside the containers, the employer must acquiesce and accept, no questions asked, perhaps even if the temperature was 20 degrees and there were 10 foot snowdrifts outside. I reject such blanket assertions of unchallengeable employee privilege, because it is simply not a reasonable argument, nor supported by precedent.

G. The October 8 incident

Paragraph 6(g) of the complaint alleges that on October 8, acting through Rosenthal, Respondent discouraged employees from engaging in protected concerted activity. This refers to the alleged comments by Rosenthal to Jose R that he did not want employees gathered outside his door or in the warehouse where he could see them. As discussed in the facts section, however, I did not credit Jose R's version of this conversation, but rather credited Rosenthal's version that he told Jose R (and the others) not to gather in front of the supervisors' office door because they were blocking such entrance. Likewise, I did not credit the allegation that Rosenthal told Jose R that he would only meet with only one of them man-to-man. Indeed, according to Jose R's version, during their initial encounter that day, Rosenthal meet with him and 2 others, which tends to undermine the latter allegation. In any event, I have not found the facts in this instance to be as alleged by the General Counsel, and I do not find the statement by Rosenthal to Jose R and the others not to block the door as coercive or otherwise unlawful.

Accordingly, I recommend that paragraph 6(g) of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Orient Tally, Inc. and California Cartage LLC, a single employer (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Warehouse Workers Resource Center (WWRC) is a person within the meaning of Section 2(1) of the Act.

3. By interrogating employees about their protected concerted activities; by telling employees not to engage in protected concerted activity; by impliedly threatening employees with unspecified reprisals because of their protected concerted activities; and by suggesting to employees that those who were not satisfied with their wages, hours or working conditions should go work elsewhere, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. By the conduct described above, the Respondent has violated Section 8(a)(1) of the Act.

5. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the Section 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from interrogating employees about their protected concerted activities; from telling employees not to engage in protected concerted activity; from impliedly threatening employees with unspecified reprisals

because of their protected concerted activities; and from suggesting to employees that those who were not satisfied with their wages, hours or working conditions should go work elsewhere. Moreover, Respondent will be required to post a notice to employees, in English and Spanish, assuring them that it will not violate their rights in this or any other related matter in the future. Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[51]

ORDER

Respondent, Orient Tally, Inc. and California Cartage LLC, a single employer, Wilmington, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their protected concerted activities;

(b) Telling employees not to engage in protected concerted activities;

(c) Impliedly threatening employees with unspecified reprisals because of their protected concerted activities; and

(d) Suggesting to employees that those who were not satisfied with their wages, hours or working conditions should go work elsewhere.

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

(a) Within 14 days after service by the Region, post at its facilities Wilmington, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[52] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 21, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by

[51] 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.

[52] If this Order is enforced by a Judgment of the 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."

any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 September 18, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21, 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.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found

Dated: Washington, D.C. February 28, 2018

Ariel L. Sotolongo
Administrative Law Judge

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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT interrogate employees about their protected concerted activities.

WE WILL NOT tell employees not to engage in protected concerted activities.

WE WILL NOT impliedly threaten employees with unspecified reprisals because of their protected concerted activities.

WE WILL NOT suggest to employees that those who were not satisfied with their wages, hours or working conditions should go work elsewhere.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

Orient Tally, Inc. and California Cartage LLC, a Single Employer
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge

or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-160242 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 634-6502.