UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

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

and

Cases 21-CA-160242
21-CA-162991

WAREHOUSE WORKER RESOURCE CENTER

COUNSEL FOR THE GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) hereby excepts to limited portions of the decision of Administrative Law Judge Ariel L. Sotolongo ("ALJ"), issued in the above-captioned cases on February 28, 2018.

Specifically, the General Counsel files the following exceptions to the Administrative Law Judge's Decision (ALJD):[1]

To the ALJ's findings and conclusions that:

Exception No.

No. 1	The form was modified yet again starting on the afternoon of September 25, 2015. 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. (ALJD 11:20-24)
No. 2	On balance, however, and for the following reasons, I am persuaded that the Respondent did not violate the Act in this instance. (ALJD 20:9-11)
No. 3	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. (ALJD 20:24-26)
No. 4	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. (ALJD 20:38-43)
No. 5	In as much as the burden of proof lies with the General Counsel to establish by a preponderance of the evidence that a violation took place, I am not persuaded that such burden has been satisfied in this instance. (ALJD 20:43-21:2)

[1] ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(SF)-04-18 (February 28, 2018).

No. 6 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. (ALJD 21:4-8)

No. 7 The evidence, circumstantial as it may be as to those employees who did not testify, suggests that they so understood. (ALJD 21:8-9)

No. 8 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. (ALJD 21:20-22)

No. 9 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. (ALJD 21:22-24)

To the ALJ's failure to find and conclude that:

Exception No.

No. 10 Respondent violated Section 8(a)(1) of the Act since about August 18, 2015, by issuing reports to workers which appeared to be disciplinary in nature in response to workers engaging in protected concerted activity.

To the ALJ's conclusion of law that:

Exception No.

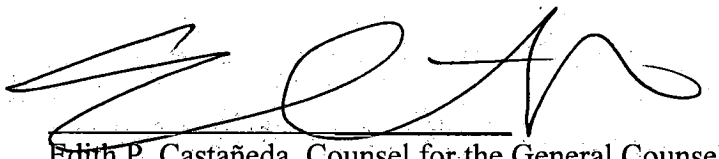
No. 11 Respondent has not otherwise violated the Act as alleged in the complaint. (ALJD 22:36)

To the ALJ's recommended order that:

Exception No.

No. 12 IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found. (ALJD 24:11-12)

Respectfully submitted,



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DATED at Los Angeles, California, this 30th day of May, 2018.

STATEMENT OF SERVICE

I hereby certify that a copy of the **Counsel for the General Counsel's Limited Cross Exceptions to the Administrative Law Judge's Decision and Order** has been submitted by e-filing to the Executive Secretary to the National Labor Relations Board on May 30, 2018, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of the **Counsel for the General Counsel's Limited Cross Exceptions to the Administrative Law Judge's Decision and Order** was served by e-mail, on May 30, 2018, on the following parties:

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Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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WAREHOUSE WORKER RESOURCE CENTER

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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I. INTRODUCTION

On February 28, 2018, following a hearing on the Consolidated Complaint in the above-captioned cases, Administrative Law Judge Ariel L. Sotolongo ("ALJ") issued his decision properly finding that Orient Tally, Inc. and California Cartage LLC, a single employer ("Respondent") violated Section 8(a)(1) of the Act by: interrogating a worker about his protected activity—expressing his concerns about wages and working conditions on a flyer distributed at Respondent's facility—and dissuading the worker from engaging in protected activity; interrogating workers about the manner in which they took concerted heat breaks; implicitly threatening workers with unspecified reprisals by confronting workers taking a heat break in a physically aggressive manner; and by implicitly threatening a worker with termination because of his protected activity.

The Consolidated Complaint upon which the ALJ's findings and conclusions are based also alleged, amongst other things,[1] that Respondent violated Section 8(a)(1) of the Act by, since about August 18, 2015, issuing reports to workers which appeared to be disciplinary in nature in response to workers engaging in protected concerted activity. The ALJ erred in concluding that the reports Respondent issued to workers who took heat breaks were not coercive since any potential impression of their being disciplinary in nature was cured by Respondent's assurances that they were not, and, therefore, Respondent did not violate Section 8(a)(1) of the Act. The ALJ's incorrect conclusion is premised on an erroneous finding that Respondent cured any impression that the reports were disciplinary in nature, and that workers understood the reports were not disciplinary.

[1] The Consolidated Complaint also alleged that Respondent violated Section 8(a)(1) of the Act by, on about September 4, 2015, interrogating a worker about his protected concerted activity; and by, on about October 8, 2015, discouraging workers from engaging in protected concerted activity. The ALJ found that Respondent did not violate Section 8(a)(1) of the Act with respect to these two allegations. (ALJD 19:1-4; 22:12-16) Counsel for the General Counsel does not except to the ALJ's findings with respect to these two allegations.

Through these Limited Cross Exceptions and Brief in Support of Limited Cross Exceptions, Counsel for the General Counsel respectfully submits that the ALJ's decision finding that the written reports Respondent issued to workers who took heat breaks were not coercive, should be reversed because the facts demonstrate that the reports were coercive in violation of Section 8(a)(1).

II. STATEMENT OF FACTS

A. Respondent's Business

Respondent operates a warehouse and yard in Wilmington, California ("warehouse"), where it receives merchandise from retail customers. The merchandise arrives in steel shipping containers in nearby ports. (ALJD 2:22-23)[2] Respondent employs workers who are responsible for offloading merchandise from the steel containers, sorting the merchandise, and loading it to trailers. (ALJD 2:23-25; Tr. 340) At all material times, during the summer and early fall of 2015,[3] workers spent most of their time working inside the steel containers. The steel containers were stored outside the warehouse and were not air conditioned. (ALJD 2:25-27; Tr. 22-23, 192-193)

Respondent's warehouse is divided by department for different retail customers, and houses supervisory offices, as well as a break area with lunch tables. (ALJD 2:28-30) At all material times, Herman Rosenthal ("Rosenthal") was Respondent's general manager in charge of the warehouse; Freddy Rivera ("Rivera") was an operations manager reporting to Rosenthal; and John Rodriguez ("John R") was a warehouse manager reporting to Rivera. (ALJD 2:32-35)

[2] ALJD__:_ refers to page followed by line, lines, or footnotes (fn.) of the ALJ's decision in JD(SF)-04-18 (February 28, 2018); Tr. __refers to pages of the Transcript of the hearing from June 12, 2017, to June 14, 2017; and GC Exh.__ refers to General Counsel exhibit followed by exhibit number and page number if applicable.
[3] Hereinafter, the phrase "all material times" refers to the summer and early fall of 2015.

B. About 2014 Through Early 2015, Warehouse Workers Become Involved with Warehouse Workers Resource Center (WWRC)

Starting in about late 2014 or early 2015, a group of Respondent's workers became involved with the organization WWRC. (ALJD 3:4-6) As part of their involvement, workers participated in activities that were organized and supported by WWRC, to improve their working conditions at the warehouse. (ALJD 3:5-8; 3:10-13; Tr. 116) To demonstrate their support of WWRC, starting about early 2015, almost daily, some workers wore a blue t-shirt and fluorescent safety vest to work, both bearing the WWRC logo. (ALDJ 3:8-10; ALJD 3: fn. 6; Tr. 31-37, 146-148, 195-197, 334, 457) Respondent referred to such workers as "blue-shirters" or "blue-shirts." (ALJD 3: fn. 6; Tr. 334, 457)

C. About August 18, 2015, Respondent Becomes Upset by Workers Who Take a Heat Break Due to the Hot Temperature

About August 18, 2015, as a result of working in hot temperatures, workers started to feel fatigued, tired, and dizzy. (Tr. 43, 231, 262-263) About August 18, at about 1:00 p.m. when the temperature inside the containers reached 80 degrees, about six or seven workers, all wearing the WWRC blue t-shirt, took a "heat break" for the first time.[4] (ALJD 5:34-6:1) The workers taking the heat break clocked out and gathered by the lunch tables and water cooler, to take a heat break. (ALJD 6:1-2; Tr. 39; GC Exh. 2 at 1; GC Exh. 5 at 1) While workers were taking a heat break, Operations Manager Rivera arrived where workers had gathered and asked what was going on, and how come the only workers taking a heat break were wearing the WWRC blue t-shirt (ALJD 6:7-11). While Rivera was talking to workers, General Manager Rosenthal arrived looking mad or upset. (ALJD 6:12; 6: fn. 15) Rosenthal yelled at workers, "get back to work"

[4] WWRC filed a complaint against Respondent with OSHA, in June 2015. (ALJD 3:10-12) Thereafter, officials visited the warehouse and provided a training regarding workers' right to take heat breaks. (Tr. 116) Based on their understanding of the California heat break law, workers believed that Respondent was required to provide workers with heat breaks if temperatures reached 80 degrees and workers experienced heat stress symptoms. (ALJD 6: fn. 14; Tr. 116-122, 265)

and came so physically close to workers that one worker could feel Rosenthal's spittle, and another worker put his hands up indicating that Rosenthal should stop before he and Rosenthal had physical contact. (ALJD 6:13-14; 6:25-27; 7:3-6; 9:11-14; 9:37-39)

D. About August 18, 2015, Manager John Rodriguez Issues a Report Which Appears to be a Warning, to Workers Who Took a Heat Break

About August 18, 2015, after workers returned to work from their heat break, Manager John R issued each worker who took a heat break, a report with the heading "**EMPLOYEE WARNING REPORT**" in capitalized and underlined bold letters. (ALJD 10:4-6; 10:15-18; Tr. 49-51, 125-126, 212, 305-306; GC Exh. 2 at 1; GC Exh. 5 at 1) Following the heading, the report included spaces for the worker's name, "date of warning," company name, and department and shift information. (ALJD 10:18-20; GC Exh. 2 at 1; GC Exh. 5 at 1) Immediately below, the report included a caption in bold capitalized letters which stated "**IMMEDIATE TERMINATION VIOLATIONS**," followed by a list of offenses warranting discipline, that Respondent could check off. (ALJD 10:20-27; GC Exh. 2 at 1; GC Exh. 5 at 1) Below the list of offenses, there was a category for "Other Observation Report," which Respondent could also mark. (ALJD 10:27-29; GC Exh. 2 at 1; GC Exh. 5 at 1) Towards the bottom half-of the report, there was a section for employer/supervisor remarks where Manager John R wrote a statement in English documenting that the worker requested to take a heat break, what symptoms the worker experienced, and the duration of the heat break.[5] (ALJD 10:30-32; 11:9-13)

Under the employer/supervisor remarks section, the following wording appeared in bold, italicized, underlined letters: "***Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination.***" (ALJD 10:30-34; GC Exh. 2 at 1; GC Exh. 5 at 1) Following the above-quoted cautionary language, the report

[5] Every report Respondent issued contained identical wording in this space, except for the different time and duration of the heat break the worker took. (ALJD 11: fn. 29)

included a box the recipient of the report could check off to indicate whether he agreed with the facts as described in the report; a space to describe why, if at all, the worker disagreed with the facts; and a space for the worker to sign and date the reports. (ALJD 10:35-11:2; GC Exh. 2 at 1; GC Exh. 5 at 1) Below the employee signature area was a caption stating "**ACTION TAKEN**" in bold letters followed by a list of possible discipline types that Respondent could check off including: "Verbal," "Warning/Reprimand," "Suspension," "Discharge," and "Other." (ALJD 11:2-5; GC Exh. 2 at 1; GC Exh. 5 at 1)

It is undisputed that Operations Manager Rivera and General Manager Rosenthal directed Manager John R to issue the reports to workers who took a heat break. (ALJD 2:32-35; 10:6-8) Worker Jose Rodriguez ("Jose R")—who worked for Respondent for approximately twenty-five years—testified that this was the first time Respondent issued this type of report to him. (ALJD 11:27-30; Tr. 20) Naturally, upon receipt of the report, workers believed that Respondent was disciplining them for taking a heat break and therefore refused to sign the report.[6] (ALJD 12: fn. 35; Tr. 221; GC Exh. 2 at 1; GC Exh. 5 at 1)

E. After About August 18, 2015, Workers Continue to Take Heat Breaks

After about August 18, 2015, through about the beginning of October 2015, several of Respondent's workers continued taking heat breaks at certain times of the day and on various different dates. (ALJD 5:21-23; 6:16-18; GC Exh. Nos. 2, 5, and 8) Workers took heat breaks when they needed them. (Tr. 232, 240) Each heat break lasted a couple of minutes, and when it was very hot, workers sometimes took a heat break twice per day. (Tr. 291; GC Exh. Nos. 2, 5, and 8) However, workers did not continue taking heat breaks without concern; in light of Respondent's response to workers taking their first heat break on August 18, after August 18,

[6] According to Manager John R., workers also refused to sign the report because it was in English. (ALJD 12:10-11)

worker Victor Gonzalez ("Gonzalez") did not take a heat break for about a week because he did not think it was wise to do so. (Tr. 203-204; GC Exh. 5 at 1-2)

F. In Response to Workers' Heat Breaks, Respondent Continues Issuing Reports to Workers but Changes the Content of the Reports

After August 18, 2015, through at least, October 8, 2015, Respondent issued written reports to workers each time workers took heat breaks. Each separate report corresponded to the date when the worker took a heat break. (ALJD 10:4-6; GC Exh. Nos. 2, 5, 8)

Manager John R claimed that he told workers—albeit some much later than others—that the reports were just "observation reports." (ALJD 20:28-34) In fact, Manager John R told worker Jose R that the reports were just "observation reports" on the first occasion that he issued a report to Jose R. (ALJD 11:29-31; 12:22-23; 20:28-30) However, Manager John R did not tell worker Gonzalez that the reports were not disciplinary until the second or third time he issued a report to Gonzalez, only after Gonzalez asked Manager John R why he was given the "Immediate Termination Violations" when he took heat breaks. (ALJD 11:31-35; 12:24-25; 20:32-34)

Despite Manager John R's assurances regarding the non-disciplinary nature of the reports, about five weeks after Respondent started issuing the reports to workers, worker Jose R asked Operations Manager Rivera why, if Respondent was not denying workers heat breaks, did Respondent issue workers the reports, and stated that the reports were meant to intimidate workers. (Tr. 83-88; GC Exh. 2) Additionally, Gonzalez demonstrated his disagreement with Respondent's issuance of the reports by, in the reports he received from September 10, 2015, to September 25, 2015, checking the box "No" to indicate he did not agree with the supervisor's statement of the facts, and by writing, "it was hot!" in the explanation section of the report. (GC Exh. 5 at 6-7, 9-10)

Over time, Respondent modified the reports. (ALJD 11:15) Starting September 8, 2015, Respondent removed the heading "Employee Warning" and the section of the report beginning with "Action"—including the list of disciplinary actions—from all reports it issued to workers. (ALJD 11:15-19; GC Exh. 2 at 5-9; GC Exh. 5; GC Exh. 8) By this time, Respondent had issued worker Jose R five reports. (GC Exh. 2 at 1-6) Additionally, starting September 10, 2015, Respondent wrote the employer/supervisor remarks in Spanish in the forms it issued to Spanish-speaking employees.[7] (ALJD 12:11-12; GC Exh. 7)

Starting September 16, 2015, Respondent issued worker Jose R a form which omitted the language: "Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination" from the report. By that time, Respondent had issued Jose R 13 reports. (GC Exh. 2; GC Exh. 8 at 1-5) Starting on the afternoon of September 25, 2015, Respondent issued worker Gonzalez a report which omitted the same quoted cautionary language starting with "Any Further Incidents."[8] (ALJD 11:20-23; GC Exh. 5 at 8-10)

III. ARGUMENT

A. The ALJ Erred in Finding that the Written Reports Respondent Issued to Workers Who Took Heat Breaks Were Not Coercive in Violation of Section 8(a)(1) of the Act

The ALJ found that whether Respondent violated the Act with respect to the reports it issued to workers who took heat breaks, "**is a close issue in the midst of a deeply gray zone**." (ALJD 20:8-9) (emphasis added) However, although the ALJ found that the reports appeared to

[7] From August 18, 2015, to September 9, 2015, Respondent wrote the identical employer/supervisor remarks in English. (ALJD 12:11-12; GC Exh. Nos. 2 and 5)

[8] The ALJ found that Respondent modified the report again starting on the afternoon of September 25, 2015, when it deleted the wording that stated "Any further Incidents of this Type Could Result in Further Disciplinary Action Up to and Including Suspension and/or Termination" from the report. (ALJD 11:20-23) However, it appears that the ALJ only reviewed the reports issued to worker Gonzalez when he made such finding, as Respondent issued worker Jose R a form which omitted this same language, as early as September 16, 2015. (GC Exh. 5 at 8-10; GC Exh. 7 at 4-5; GC Exh. 8 at 4-5)

be disciplinary in nature, the ALJ incorrectly concluded that Respondent did not violate the Act with respect to the written reports it issued to workers who took heat breaks because any potential impression of the forms being disciplinary in nature was cured by Respondent's assurances that the forms were not. (ALJD 20:9-11; 21:20-24)

1. The Written Reports Respondent Issued to Workers Who Took Heat Breaks Gave an Impression that the Reports Were Disciplinary

The ALJ correctly found that the reports Respondent issued to workers who took heat breaks gave an impression that they were disciplinary in nature. (ALJD 20:13-20) Specifically, the ALJ found that "[w]ithout 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." (ALJD 20:13-17)

In fact, the Board has found that warnings stating language almost identical to the language included in the reports issued to workers in the present case—"Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination"—violated Section 8(a)(1) of the Act. See *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003) (Board found that warning stating "Any further activity that results in a counter-productive work situation will be dealt with in the form of disciplinary action, up to and including discharge of employment," violated Section 8(a)(1) as an employee would reasonably have interpreted the quoted language as a threat that the employee could be disciplined for engaging in protected activity). In the instant case, the ALJ found that the reports were

disciplinary in nature, but ultimately concluded that Respondent's verbal assurances cured any doubt that the reports were disciplinary. (ALJD 20:17-26)

2. The ALJ Erred in Concluding that Respondent Cured the Impression that the Reports Were Disciplinary

The ALJ incorrectly concluded that Respondent cured the impression that the reports it issued to workers who took heat breaks were disciplinary. (ALJD 21:6-8; 21:20-22) Notably, although the ALJ found that the "ultimate issue . . . is whether Respondent cured or mitigated such impression [that the reports were disciplinary,]" and further found that "a timely retraction or reassurance that no negative consequences will follow can cure or negate an initial coercive statement or act," the ALJ provided no legal support for such proposition. (ALJD 21:5-6; 21:16-18) Nevertheless, Board law supports the conclusion that Respondent did not make an effective repudiation to cure the impression that the reports were disciplinary.

An effective repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (internal citations omitted). Furthermore, to be effective, there must be adequate publication of the repudiation to the employees involved, and there must be no proscribed conduct after the publication. Ibid. Additionally, the repudiation should give assurances to employees that, in the future, their employer will not interfere with their Section 7 rights. Id. at 138-139 (internal citations omitted).

In *Passavant Memorial Area Hospital*, 237 NLRB at 138, following an employer's unlawful threats to employees, an employer made a single statement in a newsletter to employees, disavowing its earlier unlawful conduct. Applying the criteria for an effective repudiation, the Board found that the employer's purported disavowal of the threats to employees was ineffective to relieve the employer of liability as it was "far from certain that all employees

were adequately informed of Respondent's retraction." Id. at 139. The Board further considered that there was no evidence that the employer made any additional specific effort to communicate its attempted disavowal to the employees who heard the employer's threats. Ibid. Moreover, in finding that the employer's statement was not an effective repudiation, the Board considered that the employer's statement did not admit any wrongdoing. Ibid.; see also *Pride Ambulance Co.*, 356 NLRB 1023, 1028 (2011) (finding that an employer failed to satisfy the standard for repudiation set forth in *Passavant* because the employer's letter aimed to cure its unlawful conduct did not admit wrongdoing and failed to give assurance to employees that the employer would not interfere with employees' Section 7 rights).

a. Respondent's Modifications to the Reports Did Not Cure the Impression that the Reports Were Disciplinary

Here, the ALJ concedes that alone the Respondent's "edits would not cure the reasonable impression that such forms/reports were disciplinary in nature[,]" as Respondent did not edit out some of the most offensive language in the reports until many reports had been issued to workers. (ALJ 20:20-24) In fact, contrary to the *Passavant* criteria, here, Respondent did not publicize an "unambiguous" message that the reports were not disciplinary in nature as Respondent did not make all edits to the forms at the same time; rather Respondent issued forms omitting the language "Employee Warning" starting September 8, 2015, but did not remove the language starting with "Any Further Incidents of this Type Could Result in Further Disciplinary Action" from the reports until September 16, 2015, at the earliest.[9] Furthermore, the fact that starting September 16, 2015, after Respondent removed the language starting with "Any Further Incidents of this Type" from reports, Respondent still issued workers reports including this same

[9] The record reflects that Respondent removed this cautionary language from the forms it issued to Jose R starting September 16, 2015, but continued issuing forms to worker Gonzalez including this cautionary language until September 25, 2015. (GC Exh. 5 at 8-10; GC Exh. 7 at 4-5; GC Exh. 8 at 4-5)

quoted language demonstrates the ambiguity of Respondent's "cure," as instead of sending a uniform message to all workers about the nature of the reports, Respondent sent a mixed message to workers about whether the reports were in fact disciplinary.

b. Respondent's Statements to Workers Did Not Cure the Impression that the Reports Were Disciplinary

The ALJ erred in finding and concluding that Respondent cured or mitigated the impression that the reports were disciplinary in nature when Manager John R initially informed workers that the reports were observation reports and not disciplinary, and that workers understood the reports were not disciplinary in nature. (ALJD 20:24-26; 21:4-9)

Here, like in *Passavant*, there was no adequate publication about the non-disciplinary nature of the reports, as Respondent did not tell all workers on the same date that the reports were not disciplinary. Instead, Respondent told some workers that the reports were not disciplinary on the first occasion that it issued reports, but did not tell others such as worker Gonzalez that the reports were not disciplinary until after the second or third time Respondent issued him a report. Gonzalez was informed of this **only after** he questioned why Respondent issued him the "Immediate Termination Violations" when he took heat breaks. (ALJD 11:29-35; 12:22-25; 20:28-34) The fact that Respondent did not inform Gonzalez that the reports were not disciplinary until after Gonzalez asked why he was issued the reports, further demonstrates Respondent's lack of intent to cure the appearance that the reports were disciplinary in nature. In fact, instead of clearing any confusion about the purpose of the reports by explicitly stating on the reports that they were not disciplinary, Respondent told workers—some workers later than others—that the reports were not disciplinary. Nevertheless, the evidence does not support that the workers understood that the reports were not disciplinary.

The ALJ credited Manager John R's testimony that he told worker Jose R on the first occasion that he issued Jose R a report, that the report was not disciplinary. (ALJD 20:28-30) The ALJ further found that it cannot be assumed that workers like Jose R understood that the pre-printed "ominous" language on the forms was of a disciplinary nature because it was in English. (ALJD 20:38-41) However, contrary to the ALJ's findings, and irrespective of whether Jose R understood the pre-printed language on the reports, the evidence supports that Jose R believed the reports were of a disciplinary nature. In fact, during a meeting that occurred about five weeks after Respondent started issuing reports to workers—and after Manager John R made any assurance to Jose R about the purpose of the reports—worker Jose R asked Operations Manager Rivera why, if Respondent was not denying workers heat breaks, did Respondent issue workers the reports, and stated that the reports were meant to intimidate workers. (Tr. 83-88; GC Exh. 2) Worker Jose R's comment to Operations Manager Rivera demonstrates that he (Jose R) believed Respondent issued the reports to workers to discipline and discourage workers from taking heat breaks.

Similarly, the ALJ credited evidence that Manager John R told worker Gonzalez after the second or third occasion that Respondent issued him a report, that the reports were not disciplinary. (ALJD 20:32-34) Despite Respondent's assurances to Gonzalez and other workers about the purpose of the reports, Gonzalez did not understand that the reports were not disciplinary as evidenced by the fact that he did not take heat breaks for about a week because he did not think it was wise to do so. (Tr. 203-204; GC Exh. 5 at 1-2) Moreover, by September 10, 2015, and through September 25, 2015, Gonzalez demonstrated he did not agree with Respondent's issuance of the reports by marking so on the reports and explaining that "it was hot" in the employee remarks section. (GC Exh. 5 at 6-7, 9-10) Gonzalez' belief that the reports

were disciplinary can further be inferred from the fact that in a report dated September 25, 2015, above the section where Gonzalez indicated he did not agree with the report, he drew an arrow pointing up to the word "Termination." (GC Exh. 5 at 9) Gonzalez would not indicate disagreement with the reports unless he believed the reports to be disciplinary in nature.

c. Respondent Did Not Satisfy Other *Passavant* Criteria for an Effective Repudiation

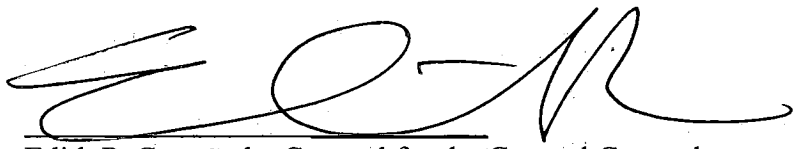
Moreover, the ALJ erred in finding that Respondent cured the impression that the reports were disciplinary in nature, because Respondent's actions did not satisfy other *Passavant* criteria for an effective repudiation. As discussed above, pursuant to *Passavant*, Respondent did not adequately publicize an unambiguous repudiation in order to cure the impression that the reports were disciplinary. Additionally, like the Board noted in *Passavant*, 237 NLRB at 139, there is no evidence here that Respondent "made any additional specific effort to communicate its attempted disavowal" of the disciplinary nature of the reports to workers. For example, there is no evidence that Respondent conducted a meeting or sent out a written notice to inform all workers **at the same time** that the reports they received when they took heat breaks were not disciplinary. Moreover, Respondent did not satisfy other *Passavant* criteria as there is no evidence of Respondent admitting that the reports gave an impression that they were disciplinary in nature or that the Respondent gave workers assurances that it would no longer issue reports that appeared to be disciplinary in nature to workers who took heat breaks. Id. at 138-139; *Pride Ambulance Co.*, 356 NLRB at 1028 (finding that an employer failed to satisfy the standard for repudiation set forth in *Passavant* because the employer's letter aimed to cure its unlawful conduct did not admit wrongdoing and failed to give assurance to employees that the employer would not interfere with employees' Section 7 rights). For such reasons, Respondent did not cure the impression that the reports it issued workers who took heat breaks were disciplinary.

Therefore, the ALJ erred in finding that the written reports Respondent issued to workers who took heat breaks were not coercive in violation of Section 8(a)(1) of the Act.

IV. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ and find that Respondent violated Section 8(a)(1) of the Act by issuing reports to workers who took heat breaks, that appeared to be disciplinary in nature.

Respectfully submitted,



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DATED at Los Angeles, California, this 30th day of May, 2018.

STATEMENT OF SERVICE

I hereby certify that a copy of the **Counsel for the General Counsel's Brief in Support of Limited Cross Exceptions to the Administrative Law Judge's Decision and Order** has been submitted by e-filing to the Executive Secretary to the National Labor Relations Board on May 30, 2018, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of the **Counsel for the General Counsel's Brief in Support of Limited Cross Exceptions to the Administrative Law Judge's Decision and Order** was served by e-mail, on May 30, 2018, on the following parties:

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Respectfully submitted,

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