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 ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

This case is about Orient Tally, Inc. and California Cartage LLC, a single employer ("Respondent") who committed multiple violations of Section 8(a)(1) of the National Labor Relations Act ("the Act") in response to workers' protected concerted activity – the act of collectively taking heat breaks. Respondent operates out of a warehouse facility which receives merchandise from retail customers. Respondent employs warehouse workers ("workers") who physically load and unload merchandise to and from steel containers. Starting about late 2014 or early 2015, workers became involved with an organization called Warehouse Worker Resource Center ("WWRC"), also known as Warehouse Workers United. As part of their involvement with WWRC, workers wore blue t-shirts bearing the WWRC logo on them, learned about their work rights, and began to engage in protected concerted activities to improve the terms and conditions of their employment. Specifically, starting about August 18, 2015, workers engaged in a classic example of protected concerted activity: when temperatures inside the steel containers became really hot, workers began taking heat breaks together in order to protect their health. In response, Respondent—who was upset by the fact that workers started to collectively take heat breaks—interrogated workers about the concerted manner in which they took heat breaks, and aggressively confronted workers who took heat breaks.

On February 28, 2018, Administrative Law Judge Ariel L. Sotolongo ("ALJ") issued his decision in this matter properly finding that warehouse workers engaged in protected concerted activity by taking heat breaks. The ALJ also appropriately found that Respondent violated Section 8(a)(1) of the Act by, amongst other conduct:[1] interrogating workers about the manner in

[1] The ALJ also found that Respondent violated Section 8(a)(1) of the Act by discouraging employees from engaging in concerted activities by telling employees not to do so, and by implicitly threatening employees with termination because of their protected concerted activity. (ALJD 16:35-37; 19:33-37) Respondent did not except to the ALJ's findings and conclusions with respect to these Section 8(a)(1) violations.

which they took their concerted heat breaks, including by asking workers why only workers wearing blue WWRC t-shirts were taking heat breaks, and by asking workers why everyone was taking a heat break at the same time. Moreover, the ALJ appropriately found that Respondent violated Section 8(a)(1) of the Act by implicitly threatening workers with unspecified reprisals by confronting workers taking a heat break, in a physically aggressive manner.

In sum, the majority of Respondent's exceptions relate to Respondent's argument that workers did not engage in protected activity by taking collective heat breaks. However, Respondent's arguments are baseless because the activity at issue—taking concerted heat breaks— was for workers' mutual aid or protection as workers were protesting the heat at Respondent's warehouse where they were employed. Additionally, by arguing that workers did not engage in protected activity when taking concerted heat breaks, Respondent also attacks: the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) of the Act by interrogating workers about the manner in which they took their concerted heat breaks, and by threatening workers with unspecified reprisals for taking heat breaks; the ALJ's failure to find that the act of taking pre-arranged concerted heat breaks was not protected under the Act; and the ALJ's remedy, and order, based on the aforementioned challenged findings and conclusions. As set forth below, Respondent's exceptions are meritless because the ALJ's findings are well-supported.

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)

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, during the summer and early fall of 2015,[3] 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)

At all material times, 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) Workers knew how high temperatures inside the steel containers could reach because they carried thermometers inside the containers to read the temperatures. (Tr. 41, 85, 121, 160-161)

B. About 2014 Through Early 2015, Warehouse Workers Become Involved with 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, including: picketing Respondent; distributing flyers; presenting employee-signed petitions; and participating in delegations to present Respondent with such signed petitions. (ALJD 3:4-8) Additionally, workers provided information to WWRC who filed a complaint against Respondent with Cal-

[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.

OSHA ("OSHA") in June 2015, to enforce workers' rights at the warehouse including the right to take heat breaks. (ALJD 3:10-13; Tr. 116)

To demonstrate their support, 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; 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. Workers Learn About Their Right to Take Heat Breaks

Sometime after WWRC filed a complaint against Respondent with OSHA in June 2015, officials[4] visited the warehouse and informed workers about their rights to take heat breaks. (ALJD 3:10-13; Tr. 116) Respondent also periodically provided trainings about heat stress prevention at the warehouse to both workers and supervisors.[5] (Tr. 265; 412) Upon learning about the California heat break law, workers believed that Respondent was required to provide workers with heat breaks if temperatures reached 80 degrees and if workers experienced symptoms related to heat. (ALJD 6: fn. 14; Tr. 117-122, 265)

D. About August 18, 2015, Workers Begin to Take Heat Breaks Due to High Temperatures

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. (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

[4] Jose R testified that after the OSHA complaint was filed, "the law" visited the warehouse and informed workers of their rights to take heat breaks. (Tr. 116)
[5] The record does not reflect when Respondent provides such trainings to supervisors and workers. (Tr. 265; 412)

break. (ALJD 6:1-2; Tr. 39; GC Exh. 2 at 1; GC Exh. 5 at 1) There is no evidence in the record showing that WWRC prompted or organized workers to take this first heat break.

Workers believed that Respondent had a duty to protect its workers by granting heat breaks, but that Respondent refused to accept such duty. (Tr. 88; 117) Consequently, workers took matters into their own hands – on about August 18, 2015, prior to taking a heat break, workers agreed that if temperatures reached a certain degree, workers would collectively take a heat break.[6] (Tr. 121-122) Some of the workers who were going to participate in the heat break on about August 18, 2015, asked other workers if they also needed one. Specifically, on this day, moments before worker Victor Gonzalez ("Gonzalez") took a heat break, a worker asked Gonzalez ("Gonzalez") if Gonzalez needed a heat break. Gonzalez, feeling tired and dizzy due to the extreme heat that day, decided to take a heat break to prevent his health from getting worse. (Tr. 231)

E. Respondent's Response to Workers Taking a Heat Break About August 18, 2015

While workers were taking a heat break on about August 18, 2015, Operations Manager Rivera arrived where workers had gathered and asked what was going on. (ALJD 6:7-8) Worker Jose Rodriguez ("Jose R") responded that workers were taking a heat break. (ALJD 6:8) Rivera, who did not deny this, then asked how come the only workers taking a heat break were wearing the WWRC blue t-shirts. (ALJD 6:10-11; 9:31-33) Jose R responded that workers were taking a heat break to prevent illness caused from the heat. (ALJD 6:11-12)

While Rivera was talking to the workers taking a heat break, General Manager Rosenthal arrived looking mad or upset. (ALJD 6:12; 6: fn. 15) Rosenthal came so physically close to worker Manuel Reyes ("Reyes") that Rosenthal sprayed Reyes with spittle as he yelled at him

[6] There is no evidence of workers directly raising a concern about heat in the warehouse to Respondent, immediately prior to taking their first heat break.

and others, "get back to work." (ALJD 6:13-14; 6:25-27; 9:11-14; 9:37-39) Rosenthal proceeded to approach worker Juan Figueroa ("Figueroa"), then approached worker Gonzalez. (ALJD 7:3-4) Rosenthal, still upset and yelling "get back to work," came within one foot of Gonzalez to the point that Rosenthal prompted Gonzalez to hold his hands up, indicating that Rosenthal should stop before they had physical contact. (ALJD 6:13-14; 7:4-6; 9:11-14; 9:37-39)

About ten minutes later, after Gonzalez had returned to work, Manager John R arrived where Gonzalez was working, and told Gonzalez to join him. (ALJD 7:6-8) John R and Gonzalez walked to the lunch area where workers had taken a heat break earlier; General Manager Rosenthal and Operations Manager Rivera were waiting there. (ALJD 7:8-9) Rosenthal asked Gonzalez why he had taken a heat break. Gonzalez replied that it was very hot and he had been feeling tired and dizzy. (ALJD 7:10-11) Rosenthal then asked Gonzalez why everyone was taking a heat break at the same time. (ALJD 7:11-12; 9:33-35) Gonzales responded that he and others were tired and hot. (ALJD 7:12) Rosenthal did not deny asking Gonzales why workers were taking a heat break at the same time. (ALJD 9:35)

F. 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 jointly took 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) Each heat break lasted between approximately five to ten minutes. (GC Exh. Nos. 2, 5, and 8) Workers took heat breaks when they needed them and did not pre-arrange to take them. (Tr. 232, 240) When it was very hot, workers sometimes took a heat break twice per day. (Tr. 291) On most occasions,

workers single-handedly decided to walk over to the break area and take a heat break.[7] (Tr. 241-242) As a result, workers took heat breaks at different times every day in the late morning or early afternoon. (GC Exh. Nos. 2, 5, and 8) There were some days when some workers took heat breaks and others did not, resulting in fewer workers taking heat breaks on certain dates or at certain times. (Tr. 242; GC Exh. Nos. 2, 5, and 8)

There is no evidence showing that WWRC was behind workers' decision to take any of the heat breaks. Moreover, worker Gonzalez—an avid WWRC supporter since about March 2015—testified that after about August 18, 2015, some men he had never seen before, took heat breaks when he took heat breaks. (Tr. 193-197; 240-241)

Some workers were scared to take heat breaks because they feared retaliation by Respondent. Thus, workers who were knowledgeable about the California heat break law, like Jose R, informed other workers about their right to take heat breaks. (Tr. 120) Upon informing workers about their right to take heat breaks, Jose R never told workers that they should take a heat break at a certain time, or summoned workers to take a heat break with him; rather, Jose R informed workers about what they individually needed to do to take heat breaks. (Tr. 119-120, 245) Workers learned that Jose R had a thermometer with him and could read the temperature to determine whether a heat break was appropriate, and, that if the temperature was high, Jose R was going to take a heat break. After seeing workers, including Jose R, gathered taking heat breaks, other workers would join the group of workers taking a heat break. (Tr. 119-120)

Each time workers took a heat break, Respondent issued each worker who took a heat break, a "report" documenting the occurrence. (ALJD 6:14-16; 6: fn. 16; 10:4-6; GC Exh. Nos. 2, 5, 8) The reports Respondent issued to workers from August 18, 2015, to before September 8,

[7] Worker Gonzalez testified that on about three occasions, someone asked him something to the effect of taking a heat break. On all other occasions, he walked over to take a heat break on his own. (Tr. 241-242)

2015, all included a heading in bold, underlined, capital letters which read "**EMPLOYEE WARNING REPORT**." (ALJD 10:17-18; GC Exh. 2 at 1-5; GC Exh. 5 at 1) Respondent removed the heading "**EMPLOYEE WARNING REPORT**" from all reports it issued to workers starting September 8, 2015. (ALJD 11:15-17; GC Exh. 2 at 6-9; GC Exh. 5 at 2-13; GC Exh. 8)

III. ARGUMENT

A. The ALJ Appropriately Found that Workers Engaged in Protected Concerted Activity (PCA) by Taking Heat Breaks (Respondent's Exceptions to Findings and Conclusions Nos. 1, 3-9, and 11; Respondent's Exceptions to Failures to Find No. 1; Respondent's Exceptions to the Remedy Nos. 1 and 3; and Respondent's Exceptions to the Order Nos. 1 and 3)

1. Warehouse Workers Engaged in PCA by Taking Heat Breaks

The ALJ properly found that the workers engaged in protected activity by taking concerted heat breaks. (ALJD 5: fn. 13; 17:22-23; 18:13-15) Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, "[t]o be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).

As set forth below, in the present case, both the "concerted" and "mutual aid or protection" elements are satisfied. For that reason, throughout the decision, the ALJ reaffirmed the conclusion that workers' act of collectively taking heat breaks was protected concerted activity. (ALJD 17:22-23; 18:13-15)

a. Workers' Heat Breaks Were Indisputably Concerted

Respondent does not dispute that workers' heat breaks were concerted. In fact, Respondent's exceptions admit as much. The facts demonstrate that employees jointly acted together by taking heat breaks due to the extreme, hot working conditions. (ALJD 5:21-23; 6:11-12; 6:16-18) Accordingly, the ALJ properly found that it was undisputed that beginning about August 18, 2015, workers began taking concerted heat breaks. (ALJ 5:21-23; 5: fn. 13)

b. Workers Concerted Heat Breaks Were for the Purpose of Mutual Aid or Protection

Although Respondent does not challenge the concerted nature of workers' heat breaks, Respondent argues that workers' heat breaks were not protected. Respondent's argument is unfounded because even if workers took heat breaks pursuant to the California heat break law, workers protested heat in the warehouse, for their mutual aid or protection.

"Conditions of employment are indisputably a matter for which the statutory umbrella of concerted activities for mutual aid and protection was designed." *Sargent Electric Company*, 237 NLRB 1545, 1548 (1978). "[T]he 'mutual aid or protection' clause encompasses '**much legitimate activity** [by employees] that could improve their lot as employees.'" *Fresh & Easy Neighborhood Market*, 361 NLRB at 153 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. at 567) (emphasis added). **"[T]he Board [has] 'acknowledged that efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of "mutual aid or protection."'"** Id. at 155 (quoting *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)) (emphasis added). In that regard, the Board has found that a broad range of employee activities concerning terms and conditions of employment—wherein employees' actions are pursuant to statutory laws—satisfy the "mutual aid or protection" element. See *Owens Illinois*,

290 NLRB 1193, 1204-1205 (1988), enfd. F.2d 413 (3d Cir. 1989) (employees' action in contacting OSHA was protected); *Ellison Media Co.*, 344 NLRB 1112, 1113-1114 (2005) (employees' conversation was protected because two employees had a common interest in eliminating sexually offensive remarks from the workplace); *Fresh & Easy Neighborhood Market*, 361 NLRB at 154-155 (employee's act of seeking assistance from co-workers in raising a sexual harassment complaint to her employer, was held protected); *Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965) (employees' protest of employer's racially discriminatory hiring practices was held protected by the Act).

Additionally, it is a longstanding Board principle that employees engage in protected activity when they take action to protest unsafe conditions in their workplace. See *Sargent Electric Company*, 237 NLRB at 1549 (Board found that employees engaged in PCA when they refused to go up to a silo and work in what they regarded as unsafe working conditions and which were in fact abnormally dangerous working conditions.); *Magic Finishing Co.*, 323 NLRB 234 (1997) (Board found that three employees engaged in PCA when they walked out in protest of their unbearably hot working conditions); *In re Odyssey Capital Group, L.P.*, 337 NLRB 1110, 1111 (2002) (Board found that the refusal of three employees to enter and perform work at an apartment because of a collective concern about asbestos was protected activity).

Respondent argues that workers' activity was not protected because workers were not protesting their working conditions, or making demands upon Respondent such as installing air conditioning in the warehouse, but rather were invoking a right to take heat breaks under California law. Respondent's argument is flawed. First, by taking heat breaks, workers were protesting unsafe conditions in their workplace—heat in the warehouse—in order to protect their health. In fact, the ALJ correctly found that "employees were essentially complaining about

having to work in conditions that could render the[m] ill . . . ." (ALJD 21: fn 50) Furthermore, workers testified that the OSHA complaint that WWRC filed in June 2015, about two months before workers started taking heat breaks, concerned heat breaks. (ALJD 3:10-13; Tr. 116-122, 265) Certainly, the temperature in the warehouse and impact on their health was a concern of the workers for some time, as this was one of the issues addressed in the OSHA complaint. The fact that workers may not have explicitly discussed their concerns about heat in the warehouse with Respondent, or made a demand that Respondent install air conditioning is irrelevant, as the Act does not require that workers use "words of art and say in precise words" that they are protesting unsafe conditions. *Sargent Electric Company*, 237 NLRB at 1548. Protected concerted activity is protected even if the employer was unaware of its purpose, for as the Court said in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), "[w]e cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." Here, workers' activity alone—taking heat breaks—was an act of protest.

Second the ALJ never found that workers invoked the California heat break law by taking heat breaks.[8] However, even if workers took heat breaks pursuant to the California heat break law, such actions satisfy the "mutual aid or protection" element as established in *Fresh & Easy Neighborhood Market*, 361 NLRB at 155, because workers' act of taking heat breaks—arguably

[8] There is also no evidence in the record showing that workers informed Respondent that they were invoking the California heat break law, prior to taking any heat breaks.

pursuant to the California heat break law[9]—benefitted all workers; such activity reinforced workers' ability to take heat breaks when they felt heat stress symptoms. *Meyers II,* 281 NLRB at 887 (Stating that "proof that an employee action inures to the benefit of all" is "proof that the action comes with the 'mutual aid or protection' clause of Section 7").

Accordingly, it follows that workers acted for their "mutual aid or protection" when they took concerted heat breaks to protest heat in the warehouse. As both the "concerted" and "mutual aid or protection" elements are satisfied, workers' act of taking joint heat breaks was protected concerted activity under the Act.

2. Workers' Heat Breaks Were Not Pre-Arranged

The ALJ found that beginning about August 18, 2015, several of Respondent's workers jointly began taking "heat breaks" at certain times of the day and on various dates, for the next several weeks until about the beginning of October 2015. (ALJD 5:21-23) Contrary to Respondent's argument, the evidence does not support a finding that workers pre-arranged to take heat breaks.

Starting with the first heat break on about August 18, 2015, Jose R explained that the workers that took the heat break all took the heat break at the same time because such workers were organized and had discussed that when the temperature was the hottest that day, workers would take a heat break. (Tr. 121-122) Respondent attempts to manipulate an excerpt of Jose R's testimony to argue that based on the first incident when workers took a heat break, workers pre-arranged group heat breaks in advance **every time** that workers took heat breaks. That was not the case. Jose R clarified his testimony—and worker Gonzalez corroborated— by explaining that he never told workers it was time for a heat break or that workers should take a heat break at

[9] The record reflects that on **some** occasions, workers took heat breaks pursuant to their understanding of the California heat break law as workers took heat breaks when temperatures reached 80 degrees and they experienced heat stress symptoms. (ALJD 5:34-6:1; 6: fn. 14; GC Exh. Nos. 2, 5, 8; Tr. 209; 231; 262-264)

a certain time. (Tr. 119-120, Tr. 245) Instead, Jose R equipped workers with knowledge so that they could individually determine when they could take a heat break. (Tr. 120) Ultimately, what resulted was that workers—who assumed that Jose R was going to take a heat break if the temperature reached a certain degree— would decide on their own whether or not to join the group of workers taking a heat break. (Tr. 120, 240)

Worker Gonzalez, who participated in the first heat break on about August 18, 2015, testified that on that day, a worker asked him if he needed a heat break. Gonzalez decided to take a heat break because he felt tired and dizzy, and he wanted to prevent his health from getting worse. (Tr. 231-232) Gonzalez made an individual assessment about his need for a heat break in light of the extreme heat that day. However, the mere fact that a question prompted a worker to consider whether to participate in the collective heat break, does not take away from the protected nature of his activity, as "solicitation of support from co-workers" should be treated as acting for the purpose of 'mutual aid or protection.'" See *Fresh & Easy Neighborhood Market*, 361 NLRB at 155 (Board found that employee's solicitation that co-workers sign a piece of paper that employee intended to use to prove the employee's harassment to the employer, was protected activity).

Nevertheless, workers stressed that they did not pre-arrange the heat breaks they participated. (Tr. 232, 240) The evidence supports the fact that workers collectively took heat breaks when they decided they needed them. (Tr. 240, 291) For example, the reports documenting workers' heat breaks show that workers took heat breaks at different times every day; there were some days when workers took heat breaks and others did not; and that while some workers took heat breaks twice on a particular day, other workers only took one heat break that same day. (GC Exh. Nos. 2, 5, and 8) The fact that workers took heat breaks at similar

times on a given day can be explained by the fact that temperatures were likely highest at that time of day, as the record reflects that workers usually took heat breaks sometime between 11:00 a.m. and 12:00 p.m., and between 1:30 p.m. to 3:00 p.m. on a given day. (GC Exh. Nos. 2, 5, and 8)

Moreover, contrary to Respondent's argument that workers used heat breaks as an "arsenal of organizing tactics that WWRC had been employing," there is simply no evidence in the record reflecting that WWRC prompted or organized workers to take heat breaks. In fact, as worker Gonzalez testified that he had never seen some of the workers who participated in the heat breaks, it follows that such unknown workers were not previously involved with WWRC otherwise Gonzalez likely would have recognized them. (Tr. 193-197; 240-241) Accordingly, the evidence does not support a finding that workers pre-arranged to take heat breaks.

3. Workers' Work Stoppages Were Protected

Furthermore, regarding Respondent's argument that the workers' act of taking heat breaks is a work-stoppage, Respondent concedes that if workers had been protesting working conditions by taking heat breaks—which they did—their work stoppages initially would have been protected. Respondent also argues that in a variety of circumstances, circuit courts have held that work-stoppages, even when concerted and for "mutual aid and protection" are not necessarily entitled to the Act's protection. However, the cases that Respondent cites to support this proposition are all distinguishable from the present case.[10] Additionally, irrespective of the

[10] Respondent cites to several circuit court cases in support of its argument, **none of which** assert that workers protested unsafe conditions in the workplace like in the present case. Furthermore, the Board has a long-standing policy of refusing to acquiesce in decisions of the Court of Appeals that are contrary to Board law, until the Supreme Court has ruled otherwise. *Pathmark Stores, Inc*., 342 NLRB 378, fn. 1 (2004); *Iowa Beef Packers*, Inc., 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957)); *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988).

California heat break law, workers' heat breaks did not constitute intermittent strikes as workers' heat breaks were protected, and there is no evidence in the record reflecting workers' engagement in a continued "strategy" of work stoppages or refusal to work. *New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973) (An intermittent strike occurs "only when employees adopt a continuing strategy of work stoppages or refusals to perform assigned tasks . . . .") To the contrary, here, workers simply clocked out for a few minutes when they needed a heat break and thereafter returned to work. (Tr. 39, 240; GC Exh. Nos. 2, 5, and 8)

4. Respondent Was Not Entitled to Unlawfully Interrogate or Implicitly Threaten Workers Who Took Protected Heat Breaks

The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by interrogating employees about the manner they took their concerted heat breaks, including by asking workers why only workers wearing blue WWRC t-shirts were taking heat breaks, and by asking workers why everyone was taking a heat break at the same time. (ALJD 17:34-36) The ALJ also appropriately found that Respondent violated Section 8(a)(1) of the Act by implicitly threatening workers with unspecified reprisals by confronting workers taking a heat break, in a physically aggressive manner. (ALJD 18:18-19) In fact, Respondent's exceptions admit that if the act of taking concerted heat breaks is protected, then the conduct establishing Respondent's aforementioned 8(a)(1) violations was unlawful, as Respondent challenges the ALJ's findings only to the extent that such findings are premised on the determination that workers engaged in protected activity by taking concerted heat breaks. However, Respondent argues that it was entitled to "push back" on the concerted nature of workers' invocation of the heat break law because the California heat break law calls for an individualized assessment of the need for a heat break. Respondent's argument is flawed for two main reasons: 1) as discussed above, workers' act of taking concerted heat breaks was protected by the Act; and 2) Respondent was

not entitled to engage in unlawful conduct when "push[ing] back" on workers' ability to take heat breaks.

The ALJ properly distinguishes between the type of conduct that Respondent was, and was not allowed to engage in, in response to workers' heat breaks. Specifically, the ALJ found that Respondent's question as to **why** workers were taking heat breaks was not coercive, as Respondent was entitled to know why there was a work stoppage. (ALJD 17: fn. 44) In contrast, the ALJ appropriately found that, given the tone and manner in which Respondent asked about the concerted manner in which workers took heat breaks, and the circumstances under which the questions were asked, Respondent's questions as to why only employees wearing the WWRC blue t-shirts were taking heat breaks, and why all workers took heat breaks at the same time, were unlawful under the Act. (ALJD 17:22-25: 17:34-36)

Respondent cites to *Murphy Oil*, 361 NLRB No. 72, 2014 NLRB LEXIS 820 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), cert. granted, 137 S. Ct. 809 (2017), to further the proposition that it had the right to "push" back on protected activity. Specifically, Respondent provides the following quote from the majority in the Board's *Murphy Oil* decision with regards to what the majority regarded as PCA :

> [E]mployees have no Section 7 rights to class certification and, in turn, that employers may lawfully oppose class certification on any legally available ground **other** than an unlawful waiver in a mandatory arbitration agreement

2014 NLRB Lexis 820 at *67 (emphasis in original). Notably, the quote that Respondent cites is instructive on the relevant point that Respondent could not "push back" on workers' protected concerted activity by employing "unlawful" means. It follows that Respondent could not interrogate or make implicit threats of unspecified reprisals to workers who took heat breaks, in violation of the Act.

The ALJ seemingly did not find Respondent's argument that workers did not engage in protected activity by taking concerted heat breaks, persuasive, and therefore concluded, based on the facts in this case, that the activity at issue was protected under the Act and that the finding did not warrant a lengthy discussion. (ALJD 5: fn. 13) Nevertheless, as discussed above, the ALJ properly found that workers engaged in protected concerted activity by taking joint heat breaks, and that Respondent interrogated and made implicit threats of unspecified reprisals to workers who to took concerted heat breaks, in violation of Section 8(a)(1) of the Act. (ALJD 5: fn. 13; 17:22-23; 17:34-36; 18:13-15; 18:18-19)

B. The ALJ Appropriately Found that the Reports Issued to Workers Taking Heat Breaks Staring September 8, 2015, Omitted the Language "Employee Warning Report" (Respondent's Exceptions to Findings and Conclusions No. 2)

The ALJ appropriately found that "[s]tarting with the next [heat break] incident on September 8, 2015, the wording at the very top of the form, which says 'Employee Warning Report,' in bold capital letters, was omitted. (ALJD 11:15-17; GC Exh. 2 at 6-7; GC Exh. 5 at 2) Respondent mischaracterizes the ALJ's finding by arguing that the ALJ found that the "'next incident' of employees taking a 'heat break' . . . after August 18, 2015, was September 8, 2015. . . ." Respondent is incorrect. Notably, all reports Respondent issued to workers after August 18, 2015, but before September 8, 2015, included a bold heading which stated "Employee Warning Report." (GC Exh. 2 at 1-5; GC Exh. 5 at 1) All reports that Respondent issued to workers starting September 8, 2015, omitted the bold language "Employee Warning Report." (GC Exh. 2 at 6-9; GC Exh. 5 at 2-13; GC Exh. 8) Accordingly, the ALJ properly found that the reports were modified starting September 8, 2015, and not that the next incident of workers taking a heat break was September 8, 2015, as set forth by Respondent. For such reason, the ALJ's finding must stand.

C. The ALJ Made a Proper Conclusion of Law that by Telling Employees Not to Engage in PCA Respondent Engaged in Unfair Labor Practices; Properly Found that an Appropriate Remedy Was for Respondent to Cease and Desist from Telling Employees Not to Engage in PCA; and Appropriately Recommended an Order that Respondent Cease and Desist from Telling Employees Not to Engage in PCA (Respondent's Exceptions to Findings and Conclusions No. 10; Respondent's Exceptions to the Remedy No. 2; Respondent's Exceptions to the Order No. 2)

The ALJ made a proper conclusion of law that "by telling employees not to engage in protected concerted activity," Respondent engaged in unfair labor practices. The ALJ properly found that an appropriate remedy in this matter was that "Respondent will be required to cease and desist . . . from telling employees not to engage in protected concerted activity;" and properly recommended an order that Respondent cease and desist from "[t]elling employees not to engage in protected concerted activities . . . ." (ALJD 22:26-31; 22:44-46; 23:21) Respondent excepted to these ALJ findings to the extent they are based on a conclusion that employees are engaged in protected concerted activity when taking heat breaks. However, these findings by the ALJ do not specifically pertain to employees taking heat breaks, but rather to another set of facts.

The ALJ's conclusion of law, remedy, and recommended order, noted above, all relate to an incident where a photograph of worker Reyes appeared on a WWRC flyer distributed at the warehouse. The flyer quoted Reyes voicing concerns about wages and working conditions at the warehouse. Respondent saw this flyer and on July 23, 2015, admittedly upset by the flyer, called Reyes in to a meeting with multiple members of management where they questioned Reyes about what he said on the flyer, and instructed him to bring any concerns to management rather than voice his concerns to OSHA. (ALJD 15:13-30; 16:3-7; 16:10-12) The ALJ found that by engaging in such conduct, Respondent both interrogated an employee about his protected concerted activity, and dissuaded him from engaging in protected concerted activity, in violation of the Act. (ALJD 16:35-37)

Thus, Respondent's exceptions to the ALJ's conclusion of law, remedy, and recommended order—all related to the July 23, 2015 situation with Reyes—erroneously link the ALJ's conclusion of law, remedy, and recommended order to the finding that workers engaged in protected concerted activity by taking concerted heat breaks, rather than to the finding that a worker engaged in protected concerted activity by expressing his work-related concerns on a flyer.

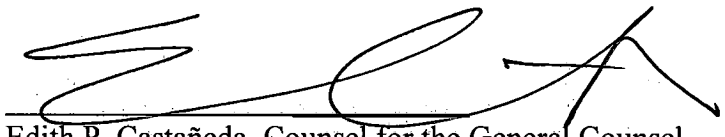
Notably, Respondent **did not** except to the ALJ's finding and conclusion that Respondent both interrogated an employee about his protected activity, and dissuaded him from engaging in it, and thus violated Section 8(a)(1) of the Act . (ALJD 15:15-44; 16:1-37) As such, Respondent waived its opportunity to except to the ALJ's findings and conclusions with respect to the July 23, 2015 incident involving Reyes. See Board's Rules and Regulations § 102.46(a)(1)(ii) (Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived).

As set forth above, the ALJ made a proper conclusion of law that "by telling employees not to engage in protected concerted activity," Respondent engaged in unfair labor practices; properly found that an appropriate remedy in this matter was that "Respondent will be required to cease and desist . . . from telling employees not to engage in PCA;" and properly recommended an order that Respondent cease and desist from "[t]elling employees not to engage in protected concerted activities . . . ." (ALJD 22:26-31; 22:44-46; 23:21)

IV. CONCLUSION

In summary, the evidence fully supports the ALJ's factual findings and conclusions that the workers engaged in protected concerted activity. Counsel for the General Counsel submits that Respondent's exceptions are without merit and respectfully request that they be denied.

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 Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** has been **s**ubmitted 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 Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** was served by e-mail, on May 30, 2018, on the following parties:

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Respectfully submitted,

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