

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

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

and

WAREHOUSE WORKER RESOURCE  
CENTER.

Case Nos. 21-CA-160242  
21-CA-162991

**CHARGING PARTY WAREHOUSE WORKER RESOURCE CENTER'S**  
**RESPONSE TO EXCEPTIONS FILED**  
**BY RESPONDENT CALIFORNIA CARTAGE, INC.**

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## I. INTRODUCTION

In its exceptions, Respondent California Cartage Company (“Cal Cartage”) argues that Administrative Law Judge Ariel L. Sotolongo (“ALJ”) erred in two unfair labor practice (ULP) findings regarding coercive acts by Cal Cartage General Manager (“GM”) Hermann Rosenthal and another high-ranking supervisor, when, on August 18, 2015, some of the company’s employees exercised their right under California law to take a heat break to prevent illness in high heat conditions. The ALJ determined that Cal Cartage, through these agents, engaged in three acts of interference that day in violation of section 8(a)(1): (1) two coercive interrogations, in the form of questions by the highest-ranking management officials conveying “a tone of suspicion if not hostility toward the employees’ protected activity” [ALJD at 17:19-32]; and (2) a physically and verbally aggressive confrontation by the GM after the employees initially took a heat break together, in which the GM used profanity and got so physically close to an employee that his belly bumped against him and spittle sprayed him [ALJD at 5:19-9:38; 18:10-16].<sup>1</sup>

Cal Cartage does not challenge these factual findings or that its actions were coercive. Cal Cartage also admits it treated the workers’ activity as protected under California law (in the words of its brief, the company “permitted the activity” and “honored [employees’] claimed entitlement to heat breaks under California law.” *See* Brief in Support of Exceptions (“Br.”) at 3, 7). And Cal Cartage admits workers took heat breaks in a concerted fashion. Br. at 6. Yet Cal Cartage claims something about the heat breaks, despite being permitted under California law,

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<sup>1</sup> Cal Cartage does not take exceptions to two other ULPs the ALJ found, that: (1) it previously engaged in unlawful interrogation of Manuel Reyes by hauling him into the General Manager’s office before “a phalanx of supervisors” to question him after his image and words appeared in a flyer regarding wages and health and safety laws [ALJD at 15-16]; and (2) later implicitly threatened Jose Rodriguez with a threat of job loss [ALJD at 19].

caused the workers to lose protection under the National Labor Relations Act (“NLRA” or “Act”) and privileged the company’s coercive interference.

Notably, this is *not* the argument Cal Cartage made to the ALJ, and to that extent the argument is waived.<sup>2</sup> But even so, its new legal theory has no basis in existing law. To be clear, Cal Cartage is *not* arguing that the heat breaks in question were intermittent strikes – its representative made this explicit at the hearing [*see* Tr. 279:22-24], and its post-hearing brief did not argue that the intermittent strike doctrine applied. Nor could it, because the record evidence shows the intermittent doctrine would not apply even if that argument had not been waived.

Rather, its theory is that the Board should find a new exception placing these activities outside of the Act’s protection to privilege its interference. Besides waiver, Cal Cartage’s argument should be denied for three reasons. First, it is clear that the employees’ taking of heat breaks met the elements of protected concerted activity, because (a) the heat breaks were part of a broader campaign to improve working conditions by, in part, asserting California legal rights, (b) when employees took heat breaks at the hottest times of the day they acted in concert by assisting one another and asking if other employees needed a heat break, and (c) the object of the heat breaks was for mutual aid or protection, quite literally protection from overheating by taking breaks authorized by California law, and as part of a campaign to improve safety and health conditions in the warehouse.

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<sup>2</sup> Cal Cartage’s argument has shifted from seeking permission to gather information to permission to coerce. In its post-hearing brief, Cal Cartage merely asserted it was privileged to (1) ask specific innocuous questions “sufficient to ascertain that the employee actually qualified for a heat break” [Excerpt of Post-Hearing Brief attached to Exceptions, at p.5, ¶ 2]; and (2) “making legally-mandated inquiries about the employee’s condition” as part of its monitoring duty [*id.*]. Now, because the ALJ found Cal Cartage engaged in hostile and physically aggressive questioning rather than innocuous inquiries, the company argues the NLRA permits even coercive interrogations or other threatening activity because the underlying heat breaks were not protected. As discussed *infra* in Section III.A, the Board should decline to address this new argument.

Second, when analyzing whether an employer's response to Section 7 activity violates the Act, the Board regularly relies on state law to evaluate the respective interests at stake. *See, e.g., Indio Grocery Outlet*, 323 NLRB 1138 (1997); *Bristol Farms, Inc.*, 311 NLRB 437 (1993). Here Cal Cartage *concedes* that it permitted the heat breaks based on California law, and does not challenge them on that basis. Moreover, California law does not provide employers any right to engage in coercive questioning or confrontational behavior – as opposed to certain innocuous questions about heat conditions the law does permit. As such, nothing in the interplay of state law and the Act removes protection for the concerted heat break activity.

Third, Cal Cartage's plea to remove protection in this instance lacks any other factual or legal basis. Factually, the record does not support a conclusion that the heat breaks in this case were "pre-arranged" "in advance of need," as Cal Cartage's thesis appears to contend [Br. at 2, 9]. Legally, none of the circuit court cases it cites support the conclusion that the employees' conduct was unprotected. Each of the cases is factually distinguishable and concerns well-developed areas of law where loss or protection results from either a protest's lack of connection to a workplace demand or the specific area of limitations under the Act for employee protests regarding managerial personnel. Neither body of law applies to this case.

For these and the reasons that follow, Cal Cartage's exceptions should be denied and the ALJ's decision adopted in full.

## **II. THE ALJ WAS CORRECT THAT EMPLOYEES' CONCERTED TAKING OF HEAT BREAKS WAS PROTECTED ACTIVITY UNDER THE ACT**

Though Cal Cartage admits the heat breaks were concerted, it asserts a novel theory for loss of protection. However, as shown below, the breaks are well within the types of collective employee actions that the Board has found to be protected time and again.

**A. The Employees' Exercise of Heat Break Rights was the Fruition of a Broader Campaign of Worker Education and Complaints About Health & Safety Conditions in the Warehouse**

First, the heat breaks were protected activity because their exercise grew out of a multi-faceted worker campaign assisted by the Warehouse Workers Resource Center (“WWRC”) which focused, *inter alia*, on health and safety issues including excessive heat in the warehouse. *See, e.g.*, Tr. 27:2-5 (describing activities: “Making delegations, petitions, strikes, picket lines, complaints, like with Cal/OSHA”).<sup>3</sup> One component of the campaign was education about workers’ rights under California health and safety law, including the acknowledged right to take a heat break under Cal-OSHA regulations. *See* Tr. 120:2-14 (Jose Rodriguez describing that he would “speak to all of my coworkers that are there to tell them what their rights are and I took the liberty to ask for a break” and that he “told them what they need to do” in order to take a heat break); *see also* Tr. 265:9-15 (Victor Gonzales describing training regarding heat breaks). The evidence also shows that WWRC and workers, including Jose Rodriguez, engaged in the protected act of filing at least one OSHA complaint with Cal-OSHA,<sup>4</sup> and that part of the complaint concerned heat issues and heat breaks. *See* Tr. 116:7-18 (“Q. Was part of the OSHA complaint about heat breaks? A. Yes.”).

As Cal Cartage concedes, it is protected for employees to act in concert to claim the benefit of other laws establishing minimum labor standards. *See, e.g., Salt River Valley Water Users Ass’n*, 99 NLRB 849, 853-54 (1952), *enforced*, 206 F.2d 325 (9th Cir. 1953). The Act also protects employees’ right to concertedly assert their entitlement to state law protections

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<sup>3</sup> “Cal-OSHA” is shorthand for the California Division of Occupational Safety and Health, which administers the OSHA-approved California state plan for occupational safety and health standards.

<sup>4</sup> Concerted employee reports to OSHA or Cal-OSHA are clearly protected activity under the Act. *See Owens Illinois, Inc.* 290 NLRB 1193, 1204-05 (1988) *enforced* 872 F.2d 413 (3d Cir. 1989); *see also Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (employee’s use of administrative forums to improve working conditions is protected by the Act).

where the employer disputes their application. *See Plaza Auto Ctr., Inc.*, 355 NLRB 493, 494 (2010) (“[T]he discussion involved Aguirre's protected concerted activity of raising questions about terms and conditions of employment, particularly the Respondent's policies pertaining to breaks and compensation.”); *United L-N Glass, Inc.*, 297 NLRB 329, 343 (1989) (employee’s questioning of and complaints about whether employer was abiding by Kentucky labor laws relating to breaks and lunch was protected; discharge of worker violated the Act).

Similarly here, the evidence shows that employees exercised rights under California law as part of a group activity<sup>5</sup> after educating themselves about such rights and complaining in a Cal-OSHA complaint about heat conditions.

**B. The Heat Breaks Were Protected as Concerted Acts to Exercise State Law Rights and to Protest Unsafe Working Conditions**

The heat breaks were also protected because in practice employees took them together. Two points about how employees actually took heat breaks highlight their protected character. One, the breaks were permitted by the employer, as Cal Cartage admits [Br. at 3, 7]; the evidence indeed shows that when a heat break was taken, the employees first notified their supervisor and were told it was fine before proceeding. *See* ALJD at 6:2-5; Tr. 39:13-18; Tr. 247:2-14; General Counsel Exs. 2, 5, 7, 8 (Employer “observation reports” written by Cal Cartage supervisors showing that for each heat break on record, employee first requested to take a heat break, and then supervisor asked questions about how the employee was feeling and stayed with the employee to ensure they were okay until they returned to work).

Two, the evidence shows employees took heat breaks both (a) based on individual need, thus satisfying the conditions of the Cal-OSHA regulation that they felt symptoms of heat, and

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<sup>5</sup> Although the heat breaks in practice were taken jointly, the evidence does not support Cal Cartage’s assertion that they were pre-arranged “in advance of need” [Br. at 2] as detailed below in section II.B.

(b) as a concerted group activity where some employees proactively asked potentially reticent employees if they wished to join. As such, the factual premise in Cal Cartage's plea for loss of protection – that the breaks were pre-arranged “in advance of need, on a schedule that they pre-determined among themselves” [Br. at 2] – lacks basis in the record.

Rather, the evidence shows the breaks were acts taken in concert in response to changing conditions. When asked why employees took the breaks at the same time, employee Victor Gonzales explained: “Someone was going to take a heat break and asked me, did I need one, and I said, well, I feel tired and dizzy, and I said, very hot day. So I thought, you know what, this is a good time to prevent matters from getting even worse. Yes, sir.” Tr. 231:5-9; *see also* Tr. 231:20-24. Gonzales testified that sometimes he initiated the heat breaks on his own [Tr. 241:17-21], and that on the other occasions another employee (usually Jose Rodriguez) asked him about taking the heat break, stating: “you know, it's – it's hot, I'm going to go take a heat break; do you think you need one?” [Tr. 243:21-23]. *See also* Tr. 245:14 (describing the question as “Do you believe you need one?”). Jose Rodriguez consistently explained that: “All of them [his coworkers] know if it's hot, they know that I am going to take my break. When they see that we're taking a break, they come. And they get together with us.” Tr. 120:14-17. At all times multiple employees took the heat break together, but the number varied. Tr. 242:6-16. Some WWRC supporters also kept thermometers to ensure heat breaks would only be taken when the temperature in the containers exceeded 80 degrees Fahrenheit, in keeping with how both employer and employee witnesses understood the California law. *See* Tr. 41:19-42:3; 160:25-161:2; Tr. 339:3-4 (General Manager Rosenthal).

Cal Cartage focuses on one quote to suggest that all of the heat breaks were pre-arranged, but the cited testimony does not show pre-arrangement, and in any case only addresses the *first*

heat break. *See* Tr. 121:19 (“We knew that we were going to take our *first break* . . . .”

(emphasis added).<sup>6</sup> The balance of the evidence shows that heat breaks were not taken on a pre-determined signal, nor were employees “summoned” to take the breaks, but that the timing was responsive to conditions and individual need. Jose Rodriguez testified consistently about this after extensive questioning from Cal Cartage’s counsel on cross examination:

- “Q. Okay. And did you in fact on one or more occasions tell others time for heat break? A. No. The only thing that I have done always . . . . I could speak to all of my coworkers that are there to tell them what their rights are . . .” Tr. 119:25-120:6.
- “Q. And when you’re telling people their rights, have you sometimes told them you should take a heat break now? A. No. I told them what they need to do.” Tr. 120:10-12.
- “Q. So is your testimony you have never summoned other employees to take a heat break? A. That’s not been done.” Tr. 120:18-20.

The other witness who testified about heat breaks, Victor Gonzales, also consistently explained – after the question was asked every which way – that heat breaks were not pre-arranged. *See* Tr. 231:3-9; 231:20-24; 232:11-13; 232:14-16; 240:15-19; 249:20-22; 245:3-9; 245:18-246:15. For example, when asked: “Did some person go up and down the dock saying, time for a heat break?” Gonzales answered “No.” Tr. 231:20-22. The testimony continued:

- “Q. All right. Had it been prearranged that you would take a heat break at a certain time? A. No.” Tr. 232:11-13.
- “Q. In any of the heat breaks that you took, was it prearranged that you would take a heat break at a certain time? A. No.” Tr. 232:14-16.

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<sup>6</sup> The testimony was also ambiguous because it came in response to an incomplete question, where Judge Sotolongo asked: “you had all agreed beforehand that at 1:45 you were going to take a heat break *if it was* – is that correct?” Tr. 122:1-3 (emphasis on incomplete question added). In Jose Rodriguez’s previous translated answer, he stated that “12, 1, 1:45 to 2 in the afternoon, the heat is strong,” Tr. 121:21-22, and explained that “[w]e knew that we were going to take our first heat break . . . we had the schedule which we knew when it was going to be the hottest.” Tr. 121:19-21. Therefore, when referencing in his answer “Yes. *We knew that*” [Tr. 122:4 (emphasis added)], it appears Rodriguez was referring to his earlier testimony that *he knew* that 1:45 would be one of the hottest times of the day.

- “Q. Was there after August 18 any agreement that you were going to take heat breaks at certain times? A. No. No. If I got your -- if I understood your question right, heat breaks were to be taken (sic) when a person needs them. Q. When that individual person feels the need; is that your testimony? A. Yes, sir.” Tr. 240:15-19.

Rather, Gonzales explained each time that someone told him they were taking a heat break and asked if he needed one. *See* Tr. 231:5-9; Tr. 231:22-24. Because the heat in the warehouse is an objective condition that applies equally to workers engaged in the same physical labor, it is logical that workers would take heat breaks in this manner at the same times.

The evidence thus shows the collective nature of the heat breaks on two levels, initially as the workers’ group decision to educate themselves in order to assert rights under California law more proactively and regularly, and then to actually help each other do so when they encountered hot working conditions. The testimony also established that some employees were scared to take the breaks, *see* Tr. 120:6-9, and thus the concerted nature of the heat breaks was essential to their exercise: workers acting together to exercise a pre-existing right, with some employees helping their fearful co-workers do so. *Cf. Meyers Industries Inc.*, 281 NLRB 882, 887 (1986) (concerted protected activity is that “engaged in with the object of initiating or inducing or preparing for group action”).

The heat breaks also find protection in well-established precedent holding that walking off the job or staging an in-plant protest over working conditions is protected by the Act. *See, e.g., NLRB v. Washington Aluminum*, 370 U.S. 9 (1962) (employees’ walk-out provoked by cold work conditions protected by Act, even though employees did not make clear demand on employer); *Magic Finishing Co.*, 323 NLRB 234 (1997) (employees’ walk-out instigated by hot working conditions protected by act). Because the WWRC supporters taking heat breaks were also engaged in a broader campaign to improve workplace conditions – and specifically health and safety conditions related to high heat – the heat breaks were a form of protest against the

company's failure to address excessive heat in the workplace.<sup>7</sup> The ALJ indeed determined this to be the case, in a finding unchallenged by Cal Cartage in its exceptions: "there can be no doubt that in a case such as this, employees were essentially complaining about having to work in conditions that could render them ill . . ." ALJD at 21 n.50.

### **III. CAL CARTAGE'S COERCIVE ACTIVITY IN RESPONSE TO EMPLOYEES' CONCERTED HEAT BREAKS VIOLATED THE ACT**

#### **A. Cal Cartage Waived Any Argument that *Coercive Acts In Response to Heat Breaks – Rather than Innocuous Questions As It Argued to the ALJ – Did Not Violate the Act***

Although Cal Cartage makes much of the fact that California law contemplates "an individualized assessment" when an employee feels "the need to do so to protect themselves from overheating" [Br. at 2, 4] (citing 8 C.C.R. § 4495(d)(3); Resp. Ex. 1 at 2), the company *does not challenge* the ALJ's findings that its officials reacted in a coercive manner – both through interrogation and physically aggressive confrontation – in response to the heat breaks. While it could be the case that non-coercive questioning (a) to determine whether employees met the conditions of California law to qualify for a heat break, or (b) questions afterwards to assess how they felt, would be lawful under the Act, that is no defense to the coercive questioning here.

Indeed, to this extent Cal Cartage has waived its current argument, because its post-hearing argument to the ALJ only addressed basic questions about individual eligibility and

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<sup>7</sup> As numerous Board cases show, such protests are protected even when no clear demand is made, particularly where employees are not represented by a labor organization as is the case here. *See Tamara Foods*, 258 NLRB 1307, 1308 (1981), *enforced* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983). Here the demand for employer responsive action to high heat conditions, or at least to respect the right under California law to exercise heat breaks, was implied. *See South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977) ("[I]f from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walk off, it may not penalize the employees involved without running afoul of Section 8(a)(1)."); *see also Eaton Warehousing Co.*, 297 NLRB 958 (1990) ("We agree with the judge that the evidence supports a finding that the Respondent did have knowledge of the employees' concerns. We further note that the employees' failure to make any specific demand or to notify the Respondent of their reasons for their cessation of work does not render their conduct unprotected.").

health. *See* Excerpt of Post-Hearing Brief (attached to Exceptions), p.5, ¶ 2 (describing employer’s entitlement “to make inquiries sufficient to ascertain that the employee actually qualified for a heat break” and, after a break is taken, to “mak[e] legally-mandated inquiries about the employee’s condition” as part of its monitoring duty). Focusing on these two types of inquiries, Cal Cartage defended such questioning as “permissible, and to some extent mandatory, once the California heat break law is invoked.” *See id.*, p. 6, ¶ 1; *see also id.*, p. 6, ¶ 2 (admitting that “it questioned whether the employees who took heat breaks in a concerted manner were all entitled to do so under the California heat break law.”). However, it did not argue in its post-hearing brief that it could engage in coercive questioning such as that found by the ALJ, and did not seek to defend the physical confrontation by Rosenthal on these grounds. These arguments are therefore waived.

**B. The Conceded Lawfulness of Employees’ Heat Breaks Under California Law Means Cal Cartage Had No Basis to Coercively Challenge Their Concerted Exercise Under the NLRA**

In any event, to the extent Cal Cartage relies on California law to excuse its interference with protected activity, it gets the interplay between state law and the Act precisely backwards. Notably, California law does not prohibit, and indeed does not say *anything* about whether groups of workers can take heat breaks at the same time, or whether workers can ask others if they desire heat break in the manner that occurred here. Somehow then, Cal Cartage argues that what it treated as a protected exercise of California law [*See Br.* at 3,7] transforms into a concerted but unprotected act under the NLRA.

However, outside areas where the Act preempts state law due to conflict – which is not the case here – the Board consistently accommodates the protections and limitations of state law when considering protections under the Act. And in doing so, the Board takes state law as it finds it. Thus, in determining whether an employer has a right to exclude non-employee

organizers from its premises – or whether such action violates derivative Section 7 rights – the Board must determine what state law allows. *See NLRB v. Calkins*, 187 F.3d 1080, 1087–88 (9th Cir. 1999) (“ ‘The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it.’ [quoting *NLRB v. Thunder Basin Coal*, 510 U.S. 200, 217 n.21 (1994)] . . . although the NLRA's protection of Section 7 rights does not trump state property rights, state property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1).”), *enforcing Indio Grocery Outlet*, 323 NLRB 1138, 1139 (1997); *see also Bristol Farms, Inc.*, 311 NLRB 437, 438 (1993) (“In cases arising under the Act, although employers' property rights must be given appropriate respect, an employer need not be accorded *any greater property interest than it actually possesses*. Thus, the analysis that applies when Section 7 rights and property rights conflict is not appropriately invoked as to an employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individuals.”).

This is also the teaching of *NLRB v. Fansteel Metallurgical Corp*, 306 U.S. 240, 249 (1939), where the Supreme Court found an extended sit-down strike in violation of state property and tort law (prior to the employees' ousting and firing, the employer had obtained a state court injunction requiring the strikers to surrender the property) lost protection under the Act. State law determined the extent of protections under the Act. *See id.*

Similarly, in evaluating employer justifications for policies that impinge on protected activity, the Board evaluates the weight of the state law interest to assess whether the Section 7 activity must yield. For example, in *T-Mobile USA, Inc.*, the Board rejected the employer's

defense that its prohibition on employee audio or video recording in the workplace was justified by (a) federal and state laws regarding avoiding harassment (because the recording prohibition was “not narrowly tailored to this interest” and did not cite such laws in its policies nor specify that the restriction is “limited to recordings that could constitute unlawful harassment”) or (b) state laws regarding unauthorized recording (because the rule applied to states where there was no such law and the rule likewise did not “indicate that the restriction is limited to recordings that do not comply with state laws”). *See* 363 NLRB No. 171, slip op at 5 & n.12 (Apr. 29, 2016), *enforced in relevant part*, 865 F.3d 265 (5th Cir. 2017). *See also Whole Foods Mkt., Inc.*, 363 NLRB No. 87, slip op at 4 n.13 (Dec. 24, 2015).

The fact that Cal Cartage *concedes* that the heat breaks were permitted under California law means it did not have any legitimate state law interest in restricting the activity. Indeed, the right to take heat breaks to avoid heat exhaustion and illness is simply a minimum labor standard which, as the Supreme Court has made clear, does not unlawfully interfere with the NLRA. *See also Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985) (“[W]e believe that Congress developed the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”) (internal quotation marks and citations omitted).

Nothing in the California law allows or mandates an employer to (a) coercively interrogate employees about why only certain employees were taking heat breaks or “how come they all took the break at the same time” in a “tone of suspicion if not hostility toward the employees’ protected activity” [ALJD at 17:19-32]; or to (b) “act[] in a physically and verbally aggressive manner when he confronted the employees taking a heat break” and to “order[] them

to cease their activity immediately and return to work” – both of which the ALJ concluded occurred. These acts thus lacked any basis in California law or the Act, and constituted interference with protected activity as the ALJ found [ALJD at 17-18].

#### **IV. THERE IS NO OTHER BASIS IN LAW TO DEEM EMPLOYEES’ CONCERTED HEAT BREAKS UNPROTECTED**

Cal Cartage’s brief raises the specter of “intermittent strikes,” but that doctrine is not implicated by this case. Cal Cartage admitted as much in its opening statement at the hearing: “[N]either intermittent striking nor Fansteel is being raised here by the Respondent.” Tr. 279:22-24 (emphasis added). Any such argument, therefore, is not properly before the Board.<sup>8</sup>

Rather, Cal Cartage calls for a new exception to protected activity based on its contention that the heat breaks were “weaponized” in an impermissible fashion on its theory that the heat breaks were pre-arranged in advance of need – a factual predicate not supported by the record as discussed above. In any event, no Board cases support such a theory. Cal Cartage appears to admit as much, explaining in its brief that the Board has not accepted “the ‘reasonableness’

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<sup>8</sup> Even if Cal Cartage had raised the intermittent doctrine, there are several reasons it would not apply to the heat breaks in this case. First, because an intermittent strike is a work stoppage which is a “part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance of the work normally expected of them by the employer,” *Polytech, Inc.*, 195 NLRB 695, 696 (1972), the doctrine cannot apply to breaks that California *requires* employers to allow employees to take (“when they feel the need to do so” and “at all times,” 8 C.C.R. § 3395(d)(3)), because such heat breaks are consistent with work “normally expected of them by the employer.” *See Polytech*, 195 NLRB at 696. Second, as reviewed *supra*, rather than a plan or pattern, the evidence shows that the heat breaks were responses to objective heat conditions applying equally to workers engaged in the same physical labor. Because each heat break was taken in response to the workplace being too hot at that particular time, the acts were not part of an intermittent plan but were direct responses to discrete issues – i.e., the changing heat conditions. Third, the evidence is undisputed that the interrogation and physical confrontation by Cal Cartage personnel took place after the first or second heat break. At this point, even if the intermittent strike doctrine applied, there was no apparent pattern so that Cal Cartage’s threatening behavior cannot be justified at that time as a response to unprotected activity. *See Crenlo, Division of GF Business Equipment, Inc.*, 215 NLRB 872, 878 (1974), *enforced in pertinent part*, 529 F.2d 201 (8th Cir. 1975) (finding two in-plant work stoppages about the amount of a wage increase were protected by the Act); *Robertson Industries*, 216 NLRB 361 (1975) (finding that two strikes were not intermittent work stoppages).

standard adopted in *Bob Evans* and other circuit cases” and also granting that “the circumstances of the instant case are unique.” Br. at 8 & n.8. Hence the cases are not binding.

And they are so factually distinct as to lack any application here. The Seventh Circuit’s *Bob Evans Farms v. NLRB* decision specifically concerned the limits of protection for walkouts to protest the firing of a supervisor, based on a body of caselaw finding that such limits are appropriate because of the strong employer interest in managerial choice. *See* 163 F.3d 1012, 1021-22 (7th Cir. 1988).<sup>9</sup> Also weighing in the court’s balance was what it found to be the “far-reaching effect” of the walkout on the restaurant’s operations, which included poor service, angry customers, unpaid bills, lost business, and repercussions over several days with continued customer service problems and further walkouts. *Id.* at 1016. In contrast, there is no evidence in the record that Cal Cartage’s compliance with California law disrupted its operations, much less caused its business to suffer in any measurable way. *Cf. id.* at 1023 (“Common sense dictates that an employer cannot object to a strike on grounds of mere inconvenience but that, at the other extreme, employees cannot run an employer out of business solely to make known a minor grievance.”).

Several of the cases concern walkouts unconnected to any discernible demand for change, and are thus distinguishable. In *NLRB v. Marsden*, the Second Circuit found unprotected

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<sup>9</sup> The First Circuit’s decision in *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cir. 1979) also concerned an employee walkoff (a two-day “sick-out”) to protest the firing of a Goodwill’s Director of Rehabilitation, and the court’s holding is finely calibrated to that context. As the court explained:

The decision whether or not an employee protest over a change in management personnel is protected under the Act is a difficult one which requires the balancing of competing interests. Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected employee activity. No court has ever held that the Act protects employee protests over changes in top level management personnel, nor has the Board previously advocated such a rule.

*Id.* at 8. Needless to say, these recognized employer interests are not at stake in this case.

an employee walkout because the walkout had no relation, express or implied, to any demand for change in the workplace, but rather was a decision “on an *ad hoc* basis, not to work on a particular day during a drizzle or light rain.” 701 F.2d 238, 243 (2d Cir. 1983). Here, the exercise of heat breaks was not *ad hoc* but based on state law and employer permission, and was connected to broader demands for workplace improvements. *See supra* Section II & n.7.

Similarly, in *Northeast Beverage Corp. v. NLRB*, the D.C. Circuit found there was no protection under the Act when a group of unionized truck drivers, concerned about their jobs after the company announced a plant consolidation, left work without permission to consult with a union representative who was about to meet with the company on the issue. 554 F.3d 133 (D.C. Cir. 2009). The D.C. Circuit concluded that the drivers were merely anxious and in seek of answers, but had no present “labor dispute” with the company. *Id.* at 139-140. For support, the Court relied on a series of Board decisions finding that when employees absent themselves from work to engage in union activities or to seek information unrelated to an ongoing labor dispute, their actions are unprotected because they can meet with the union during non-working time. *See id.* at 139 (citing *Gulf Coast Oil*, 97 NLRB 1513 (1952); *Terri Lee, Inc.*, 107 NLRB 560 (1953); *G.K. Trucking Corp.*, 262 NLRB 570 (1982)). Here, employees did not “absent themselves from work,” but merely took short heat breaks in compliance with California law, and their action was connected to an ongoing labor dispute over health and safety issues in the workplace. *Northeast Beverage*, and the prior Board cases it relies on, have no application here.

The same goes for *Vemco, Inc. v. NLRB*, 79 F.3d 526 (6th Cir. 1996), in which several employees left the job site after finding it to be inaccessible because racks, boxes, and other items had been moved into it from an adjacent area for a painting job. *Id.* at 530. The Sixth Circuit found that this was not protected because the employees were *not* being made to work

during this temporary disarray, and there was no evidence that the disciplined individuals sought to effect a change in company policy. *See id.*

One last case cited concerns a legal principle not at issue here. In *Tri-State Truck Serv., Inc. v. NLRB*, the Third Circuit did not address the means of protest at all, but decided the case on the common-sense ground that an employer does not violate section 8(a)(1) of the Act unless it has knowledge of the concerted activity at issue. 616 F.2d 65, 69 (3d Cir. 1980) (2-1 decision). *Tri-State* has no bearing on these facts.

Instead of reaching for guidance from these clearly distinct contexts, the Board can look to its well-established test to determine whether an in-plant work stoppage is protected from *Quietflex Mfg. Co., L.P.*, 344 NLRB 1055 (2005), recently affirmed in the context of an in-store work stoppage in *Wal-Mart*, 364 NLRB No. 118 (2016). Cal Cartage does not attempt to argue loss of protection under *Quietflex*, nor offers any reason to depart from that precedent.

The most important distinction from all of the cases Cal Cartage cites is that in none of them were employees exercising their right to take a break that was expressly permitted under state law. That fact cannot be overstated here. Indeed, if the Board were to examine this case under *Quietflex*, the Board's task would be to strike "an appropriate balance between employees' Section 7 rights and the employer's property rights, accommodating both with as little destruction of one as is consistent with the maintenance of the other." 344 NLRB at 1058 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Nothing in the balance between state law rights and the Act would cause the employees here to lose protection for their concerted heat break activity.

What's left is the employer's complaint, untethered to the NLRA or state law, that employees should not be allowed to take lawful heat breaks together, because otherwise Cal

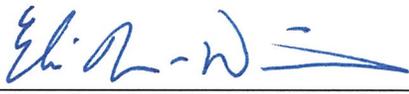
Cartage could not utilize its choice of economic weapons when its employees engage in this lawful activity. But for the reasons described, this theory has no analogue in Board or circuit court case law, and would have to be invented out of whole cloth. It also cannot be supported on this record, which does not support Cal Cartage's theory of pre-arranged weaponization "in advance of need," and where the coercive nature of the employer's actions is not in dispute.

**V. CONCLUSION**

For the reasons stated above, WWRC respectfully requests that Cal Cartage's exceptions be denied and the ALJ's decision adopted in full.

Dated: May 30, 2018

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By  \_\_\_\_\_

ELI NADURIS-WEISSMAN  
Attorneys for Warehouse Worker  
Resource Center

CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> of May, 2018, a copy of the foregoing CHARGING PARTY WAREHOUSE WORKER RESOURCE CENTER'S RESPONSE TO EXCEPTIONS FILED BY RESPONDENT CALIFORNIA CARTAGE, INC., was sent by e-mail to the following persons:

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