

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ORIENT TALLY COMPANY, INC. and
CALIFORNIA CARTAGE COMPANY, LLC,
single employers

CASE NOS. 21-CA-160242
21-CA-162991

and

WAREHOUSE WORKER RESOURCE CENTER

**RESPONDENT CALIFORNIA CARTAGE COMPANY, LLC'S
AND ORIENT TALLY COMPANY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS**

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I. INTRODUCTION

Charging Party Warehouse Worker Resource Center (“WWRC”) concedes Respondent Cal Cartage’s key point: The small group of WWRC supporters who took over 30 heat breaks together were engaged in “a form of protest” as part of “a broader campaign” against their employer. (WWRC Br. at 8-9.) Counsel for the General Counsel likewise concedes that the WWRC supporters’ concerted taking of heat breaks “was an act of protest.” (GC Br. at 11.) Neither the General Counsel nor the WWRC disputes, however, that the right to take a heat break under California law turns upon each individual employee’s health condition.

The legal question for the Board, therefore, is whether the WWRC supporters can claim both the individual right to take heat breaks under California law and the NLRA’s protection when heat breaks are taken in concert as “a form of protest.” Cal Cartage respectfully submits that the Board should not countenance the weaponizing of heat breaks as an NLRA-protected “form of protest.”

II. WWRC SUPPORTERS TOOK HEAT BREAKS AS “A FORM OF PROTEST,” AND AS PART OF “A BROADER CAMPAIGN” AGAINST CAL CARTAGE.

Charging Party WWRC states:

“Because WWRC supporters taking heat breaks were also engaged in *a broader campaign* to improve working 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.”

(WWRC Br. at 8-9; emphasis added.)

“[T]he heat breaks were *part of a broader campaign* to improve working conditions by, in part, asserting California legal rights . . .

(WWRC Br. at 2; emphasis added.)

“[T]he heat breaks grew out of *a multi-faceted campaign* assisted by the Warehouse Workers Resource Center . . . (describing

activities: “[m]aking *delegations, petitions, strikes, picket lines, complaints, like with Cal/OSHA*’.”

(WWRC Br. at 4, quoting in part Tr. 27:2-5; emphasis added.)

“Here, the exercise of heat breaks . . . was *connected to broader demands* for workplace improvements.”

(WWRC Br. at 15; emphasis added.)

Similarly, Counsel for the General Counsel states:

“Here, workers’ activity alone --- taking heat breaks --- was *an act of protest*.”

(GC Br. at 11; emphasis added.)

“[W]orkers . . . took concerted heat breaks *to protest* heat in the warehouse.”

(GC Br. at 12; emphasis added.)

“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.”

(GC Br. at 3; emphasis added.)

Thus, Charging Party WWRC and the General Counsel both concede --- indeed, argue vigorously --- that the small band of WWRC supporters took concerted heat breaks as a form of protest, and did so as part of a broader WWRC campaign against Cal Cartage.

Having conceded this, it is odd that the WWRC and General Counsel spill so much ink denying that the heat breaks were pre-arranged in advance of individualized determinations of need. It is obvious that these “protests” did not occur spontaneously on 30-plus occasions. They were *organized*. General Counsel witness and WWRC activist Jose Rodriguez gave the game away in his exchange with Judge Sotolongo. Judge Sotolongo asked, “*How did it happen that all the employees took the heat break at the same time?*” Jose Rodriguez answered, “*We were*

the ones that were organized in that department.” Continuing, Rodriguez said they had a “schedule” of when it would be hottest, and a thermometer, and would “come together because it was the group and it was *very organized*. Not the rest.” Judge Sotolongo specifically asked if “*you had all agreed beforehand that at 1:45 you were going to take a heat break* if it was --- is that correct?” Jose Rodriguez’s answer: “*Yes. We knew that.*” Tr. 121:15-122:4 (emphasis added).

The WWRC and General Counsel suggest that Jose Rodriguez’s testimony is limited to the very first heat break. But there is no reason to believe that the subsequent heat break protests were any less organized than the first one. As the WWRC says in its brief, the heat breaks were “*not ad hoc.*” (WWRC Br. at 15; emphasis added.) Records maintained by Cal Cartage in the course of monitoring the heat breaks (as required by California law) show that the concerted heat breaks were taken between 11:00 and 11:30 a.m., and again between 1:45 and 2:15 p.m., with only slight variations. GC Exhibits 2, 5, and 7. Notwithstanding his denial that the heat breaks were prearranged, General Counsel witness and WWRC supporter Victor Gonzalez took *all* of his heat breaks at exactly the same times as Jose Rodriguez. And Gonzalez took *no* heat breaks without Rodriguez. GC Exhibits 2, 5, and 7. *All* of the employees who took heat breaks together were “blue shirts,” that is, WWRC supporters who wore the WWRC’s blue tee-shirts. Tr. 120:25-121:2.

III. THE WWRC SUPPORTERS’ HEAT BREAKS WERE NOT PROTECTED UNDER THE NLRA.

This Board should not permit the right to take heat breaks under state law, which must be based upon an individual determination of the need for a heat break, to be weaponized as a form of protest under the NLRA. By invoking California’s heat break law, the employees avoid all the risks that normally attend work stoppages. They avoid the risks of economic strikes

(replacement, either permanent or temporary). They avoid the risks of intermittent or partial strikes and occupation of the employer's premises (discipline, including possible termination).

The General Counsel and WWRC fail to grapple with Cal Cartage's argument that the weaponization of heat breaks as a form of protest impermissibly deprives Cal Cartage of its rights under the Act to respond to work stoppages. Only at the end of its answering brief, in the penultimate paragraph, does the WWRC address this issue. There, the WWRC dismisses Cal Cartage's argument out of hand, saying "this theory has no analogue in Board or circuit court case law, and would have to be invented out of whole cloth." (WWRC Br. at 16-17.)

Not so. While Cal Cartage has acknowledged from the outset that the present case is unique, there are plenty of "analogues." Tactics such as slowdowns and partial or intermittent strikes are deemed unprotected precisely because the employees "'neither strike nor work'" and "thus deny [the] employer the opportunity to replace them." *New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973).

The WWRC stresses that taking heat breaks together is "lawful" (WWRC Br. at 16), and so it is. But there is nothing *un*lawful about slowdowns and partial and intermittent strikes, either. They are not against the law, but are *unprotected* by the Act. The WWRC's using heat breaks as an admitted "form of protest," and as part of an admitted "broader campaign" against Cal Cartage, should be unprotected for the same reason: Cal Cartage cannot be deprived of the economic weapons it has under the Act.

Charging Party WWRC tries to distinguish the circuit court cases Cal Cartage cites in its initial brief at page 8. The WWRC first says that "[s]everal of the cases concern walkouts unconnected to any discernible demand for change." (WWRC Br. at 14.) But the same is true here. As Counsel for the General Counsel admits in her brief, "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.” (GC Br. at 5 n.6.) In fact, no “discernible demand for change” was *ever* made in connection with the concerted heat breaks. The General Counsel acknowledges the “fact” that “workers may not have explicitly discussed their concerns about heat in the warehouse with Respondents, or made a demand that Respondent install air conditioning.” (GC Br. at 11.) None of the WWRC supporters who took heat breaks ever reported symptoms of heat-related illness. (GC Exhs. 2, 5, 8.) In reality, the heat breaks served as cover for pressuring Cal Cartage with work stoppages as part of the WWRC’s “broader campaign.”

Otherwise, the WWRC attempts to distinguish the circuit court cases by pointing to factual distinctions that make no legal difference. (WWRC Br. at 15-16.) The common legal thread remains, as Cal Cartage said in its initial brief (p. 8): “[T]hese circuits have held that work stoppages ---even when concerted and arguably for ‘mutual aid or protection’ --- are not necessarily entitled to the Act’s protection.” The General Counsel also points to the Board’s general policy of non-acquiescence to circuit decisions. (GC Br. at 14 n.10.) But of course the present Board Members are entitled to --- and should --- rethink extant Board law in light of circuit authority.

The General Counsel and the WWRC cite Board cases holding that the Act protects employees’ demands that their employer comply with other federal and state laws establishing minimum labor standards. These cases extend the Act’s protection to such activities as contacting OSHA; complaining about sex harassment; and complaining about alleged noncompliance with state laws concerning breaks and compensation. (See cases cited in GC Br. at 9-10; WWRC Br. at 4-5). Counsel for the General Counsel and the WWRC need not have

bothered with these citations. Cal Cartage acknowledged in its opening brief that the Act generally protects such activities. (See Cal Cartage’s initial brief, at 7.)

But in none of the cases cited by the General Counsel and WWRC did the Board or the courts address what happened here. Here, employees stopped work 30-plus times, claiming the right to do so under a state law affording heat breaks to individuals who feel the need for them.¹ The question before the Board is whether the individual right to stop work for heat breaks can be weaponized as a “form of protest” in a “broader campaign” against the employer, under the protection of the NLRA. Cal Cartage says not. And this specific issue has not been addressed anywhere else.

The General Counsel also cited cases in which employees refused to perform work for safety-related reasons. (GC Br. at 10). But in each of the cited cases, there was a walkout that the Board held protected by *Washington Aluminum*. As Cal Cartage acknowledged in its opening brief, the WWRC supporters could have engaged in a walkout under *Washington Aluminum*, **but that’s not what they did**. “Rather, they invoked California’s protective labor legislation to claim a right to take heat breaks.” (See Cal Cartage’s initial brief, at 6.)

The General Counsel lays particular stress upon *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), citing it repeatedly. In *Fresh & Easy*, the majority held that an employee’s soliciting co-workers’ help with an individual sexual harassment complaint was both concerted and protected. There are a couple of points to be made about *Fresh & Easy*.

¹ That the employees invoked the protection of the state heat break law is clear throughout the record. In her opening statement at the hearing, Counsel for the General Counsel said that the employees were “exercising their rights under state law to take extra breaks while working in excessive heat.” Tr. 14:25-15:10. The WWRC says “the heat breaks” were “based on state law and employer permission.” (WWRC Br. at 15.) The “employer permission,” of course, was only because Cal Cartage complied with state heat break law.

First, *Fresh & Easy* did not involve a work stoppage. Cal Cartage's concern --- the loss of an employer's opportunity to respond to work stoppages --- was not before the Board and was not addressed. Therefore, *Fresh & Easy* does not govern the present case.

Second, although *Fresh & Easy* is not controlling authority here, Cal Cartage respectfully submits that it was wrongly decided and should be revisited by this Board. Of particular note, both then-Member Miscimarra and then-Member Johnson emphasized in their dissenting opinions that the Act should not be interpreted to add additional layers of "process" protection to the substantive rights already afforded employees under state and federal laws. Member Miscimarra stated:

"The NLRA focuses primarily on the *process* by which employees can decide whether to have union representation and engage in collective bargaining. By comparison, other employment statutes primarily require a desired *outcome*: they mandate safe workplaces with freedom from unlawful discrimination or harassment where employees are treated in compliance with other applicable laws. Every employee affected by my colleagues' holding *already* enjoys non-NLRA statutory protection with *existing* enforcement machinery under the substantive statute(s) implicated in an employee's individual complaint."

Fresh & Easy, 2014 NLRB LEXIS 627 at * 95 (emphasis in original) (footnote omitted).

Similarly, Member Johnson stated:

"Section 7 of the Act does not confer authority on the Board to act as an "uberagency" without due regard for and proper accommodation of the enforcement processes established by these other laws and agencies. Indeed, if searching for some logical policy presumption in this case, it would be best to begin and end with the presumption that Congress and the various states, having populated the field with these laws in spite of the Act's existence, perceived Section 7's substantive rights and the Board's processes as inapplicable to, or at least ill-suited to, effectuating the protections intended by their enactment."

Id. at *124 (footnote omitted).

Here, to add the Act's protections to a pre-existing state-law right to take heat breaks would distort the balance of rights that Congress wrote into the NLRA.

Analogizing cases in which employers rely upon property rights derived from state law, the WWRC suggests that Cal Cartage's argument fails because California's heat break law does not give the employer "any legitimate state law interest in restricting the activity." (WWRC Br. at 10-12). But the WWRC's analogy to the property cases is inapt. Where, for example, an employer removes an organizer from its property, it is axiomatic that the employer's claimed right to do so derives from state trespass law. But here, Cal Cartage's position does not rest upon rights given the employer by state law, as in the property cases. Rather, Cal Cartage relies upon the NLRA, not state law, as the guarantor of an employer's rights to respond to work stoppages. Having claimed heat breaks under the individually-determined health standards set by state law, the WWRC supporters cannot *also* claim the protection of the NLRA for heat breaks as a "form of protest" in a "broader campaign." Affording the protestors protection under *both* the state heat break law and the NLRA would deprive Cal Cartage of *its* rights under the NLRA.

IV. CAL CARTAGE PRESERVED ITS POSITION BEFORE THE ALJ.

Charging Party WWRC --- but significantly, *not* the General Counsel --- asserts that Cal Cartage waived its position that the concerted heat breaks were unprotected by failing to raise the issue before the ALJ. This assertion is absurd. The post-hearing brief to the ALJ contained a whole section of argument, seven pages in length, under the heading: "The Employees' Concerted Heat Breaks Under the California Heat Break Law Were Not Protected Under the NLRA." Also, in its introduction to the post-hearing brief, Cal Cartage stated, "Cal Cartage submits, in the circumstances of this case, that the employees' taking heat breaks in concert was not protected under the Act." The relevant portions of the post-hearing brief to the ALJ are attached to Cal Cartage's exceptions.

Ignoring these facts, the WWRC appears to contend that Cal Cartage's argument before the Board has been adjusted to account for the judge's credibility resolutions. It is true that Cal Cartage has elected not to contest the judge's credibility resolutions. But the legal position then and now remains unchanged: the concerted heat breaks were not protected under the Act.

V. CONCLUSION

For all of the foregoing reasons, Cal Cartage's exceptions should be sustained in their entirety.

Dated: June 13, 2018

Respectfully Submitted,

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By: 

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Attorneys for Respondent
ORIENT TALLY COMPANY and CALIFORNIA
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CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On June 13, 2018, I served the foregoing document(s) described as:

RESPONDENT CALIFORNIA CARTAGE COMPANY, LLC'S AND ORIENT TALLY COMPANY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

on the interested parties by electronic service as follows:

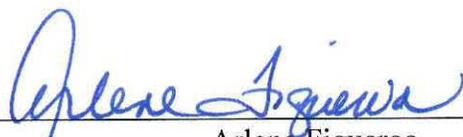
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VIA EMAIL:

The email was transmitted to the email addresses listed above on June 13, 2018. The email transmission was complete and without error.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on June 13, 2018, at Los Angeles, California.



Arlene Figueroa