

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 ANSWERING BRIEF TO COUNSEL  
FOR GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

On this issue, the ALJ got it right: California Cartage Company, LLC and Orient Tally Company’s (collectively, “Cal Cartage”) distribution of “Observation Reports” to a handful of union supporters who started to take heat breaks in August 2015 did not violate the Act. The Complaint had alleged that the Observation Reports violated Section 8(a)(1) because they “appear[ed] to be disciplinary in nature in response to employees engaging in protected concerted activity.” (GC Ex. 1(s) at 5.) In rejecting that claim, the ALJ found that the General Counsel failed to carry the burden of establishing that the reports appeared disciplinary in nature. And even if the reports initially appeared disciplinary, Cal Cartage “cured or mitigated such impression.”<sup>1</sup> (ALJD 20:43-21:24.)

Now, in challenging that decision, Counsel for the General Counsel attempts to (i) implicitly contest the ALJ’s credibility conclusions with no basis to do so, and (ii) shoehorn this case into an inapplicable analysis under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Both efforts must be rejected.

- *First*, the ALJ was correct in finding that the General Counsel failed to establish that the Observation Reports appeared to be disciplinary in nature to the employees who received them—because they did not. The judge credited the

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<sup>1</sup> For purposes of this Answering Brief, Cal Cartage responds to the General Counsel’s Cross Exceptions within the analytical framework used by the ALJ. Specifically, Cal Cartage assumes *arguendo* that the WWRC supporters’ taking heat breaks was protected concerted activity. Cal Cartage does so without waiving its position and arguments that the underlying heat breaks at issue were not protected under the Act, as articulated in its exceptions to the ALJ’s Decision. *See* California Cartage’s Brief in Support of Exceptions, filed April 25, 2018, and Reply Brief, filed June 13, 2018. Should the Board agree with Cal Cartage’s position that the WWRC supporters’ taking heat breaks was not protected under the Act, then there can be no claim arising from the Observation Reports distributed in response thereto. The Board’s analysis of the General Counsel’s Cross Exceptions could end there.

testimony of supervisor John Rodriguez in concluding that employees who received the Observation Reports *were told* and *understood* that they were not disciplinary. In arguing that the ALJ got it wrong, the General Counsel must somehow overturn those credibility determinations of the ALJ. The General Counsel offers no basis on which to do so.

- *Second*, as the ALJ also found, Cal Cartage cured or mitigated any subjective impression an employee *may* have had that the Observation Reports were disciplinary in nature. The General Counsel’s arguments that this case should be analyzed under *Passavant* are misdirected; this is not a *Passavant* case.

## **II. CAL CARTAGE PREPARED THE OBSERVATION REPORTS AT ISSUE TO MEMORIALIZE THE HEALTH STATUS OF WWRC SUPPORTERS TAKING HEAT BREAKS UNDER CALIFORNIA LAW.**

Starting on or about August 18, 2015, a small group of employees within a single department at Cal Cartage, who were known WWRC supporters or “blue shirts,”<sup>2</sup> started taking “heat breaks” by invoking California’s heat illness prevention regulations. (*See, e.g.*, Tr. 116:12-16; 117:17-118:7; 120:21-121:2.)

Relevant here, California’s heat illness prevention regulations, then in effect, provided that, “[e]mployees shall be allowed and encouraged to take a preventative cool-down rest in the shade *when they feel the need to do so to protect themselves* from overheating. . . .” 8 C.C.R. 3395(d)(3); Respondents’ Ex. 1 at 2 (emphasis added). The regulations continued by requiring that any individual taking a heat break “(A) *shall be monitored and asked if he or she is*

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<sup>2</sup> As witnesses for the General Counsel and Charging Party Warehouse Worker Resource Center (“WWRC”) testified, the only individuals who took a heat break on August 18, 2015, were known supporters of the WWRC. They were sometimes called “blue shirts,” because they wore blue WWRC shirts. (*See* Tr. 116:12-16; 117:17-118:7; 120:21-121:2.)

*experiencing symptoms of heat illness; . . . ; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.” Id. (emphasis added.)* Accordingly, when an individual takes a heat break, an employer is required to both (i) monitor the employee during the heat break; and (ii) ask questions to ascertain the underlying need for the heat break—such as whether the employee is suffering from a heat illness or needs medical attention.<sup>3</sup>

Consistent with these regulatory requirements, Cal Cartage monitored the employees taking heat breaks and questioned them regarding whether they were suffering any heat-related symptoms or needed medical attention. (Tr. 43:1-9; 285:15-286:3.) Cal Cartage kept records of the heat breaks taken by employees and their responses to questions regarding the underlying need for the heat breaks and any symptoms. Cal Cartage did so because it wanted “to document that they were taking the heat break, who it was and how long they took it.” (Tr. 420:7-13, F. Rivera.) Cal Cartage called these records “Observation Reports.” (See GC Exs. 2, 5, and 7.)

In crediting the testimony of supervisor John Rodriguez, the ALJ concluded that Rodriguez—who prepared and distributed the reports—told employees they were not disciplinary in nature “early on”: (ALJD 20:24-26.)

There is not much to determine, credibility-wise, inasmuch the forms for the most part speak for themselves. However, ***John [Rodriguez]’s testimony was by far the most detailed and consistent*** about what employees were told about what the purpose of the forms given to employees in the wake of the heat breaks. ***Thus, I conclude, for the reasons previously discussed, that John R told Jose [Rodriguez] and others on the first date that these forms were not warnings or disciplinary in nature***, and thereafter the employees begun signing the forms. I also note that ***[Victor]***

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<sup>3</sup> “Heat illness” is defined as “a *serious medical condition* resulting from the body’s inability to cope with a particular heat load, and includes heat cramps, heat exhaustion, heat syncope and heat stroke.” 8 C.C.R. 3395(b); Respondents’ Ex. 1 at 1 (emphasis added).

*Gonzalez was told the same thing, albeit later, on the second or third occasion when these forms were issued.*

(ALJD 12:19-25 (emphasis added).)

### III. THE GENERAL COUNSEL FAILED TO PROVE THE OBSERVATION REPORTS *APPEARED* DISCIPLINARY IN NATURE.

Attacking the ALJ's finding that the General Counsel failed to meet the burden of establishing that the Observation Reports *appeared* disciplinary in nature, the General Counsel implicitly contests the credibility determinations of the ALJ. As discussed below, the General Counsel's assertion of the facts and the ALJ's credibility determinations cannot coexist.

*First*, the claim is that the Observation Reports *appeared* disciplinary in nature (not that they *were* disciplinary). Therefore, the manner in which they were distributed is important. Here, the ALJ concluded that supervisor John Rodriguez took several steps to communicate the benign purpose of the reports from the beginning.

- As quoted above, the ALJ credited John Rodriguez's testimony and concluded that he told Jose Rodriguez and other employees that the reports were not disciplinary in nature "*on the first date that these forms*" were issued, and he told Gonzalez on the "*second or third occasion.*" (ALJD 12:19-25 (emphasis added).)
- In crediting the testimony of John Rodriguez as "by far the most detailed and consistent," the ALJ found that, "[t]he record shows, . . . that *early on* John [Rodriguez] told Jose [Rodriguez], Gonzalez, and other employees that these *reports were not disciplinary, and suggests that they so understood.*" (ALJD 20:24-26 (emphasis added).)
- The ALJ also found that, in distributing the Observation Reports, John Rodriguez "started highlighting (in yellow) the 'Other Observation Report' caption, after the

first report issued on August 18, so that employees understood this wasn't a warning, just an 'observation report.'" (ALJD 12:3-5.)

The ALJ expressly rejected employee Victor Gonzalez's testimony that John Rodriguez initially told him the reports *were disciplinary* in nature: "This testimony contradicts what Gonzalez said in his Board affidavit, taken much closer in time to the date(s) when the events occurred. . . Accordingly, I find that Gonzalez was *not* told these were disciplinary warnings." (ALJD at 11, n. 33 (emphasis in original); *see also* ALJD at 20, n. 48.)

The ALJ ultimately concluded that "[i]nasmuch as the burden of proof lies with the General Counsel to establish by a preponderance of the evidence that a violation took place, ***I am not persuaded that such burden has been satisfied in this instance.***" (ALJD 20:40-21:2 (emphasis added).)

The General Counsel, however, attempts to challenge the ALJ's decision by focusing on the testimony of individual employees, Gonzalez and Jose Rodriguez, arguing that *they believed or were concerned* the Observation Reports were disciplinary in nature. For example, the General Counsel argues: "Worker Jose R's comment to Operations Manager Rivera demonstrates that *he (Jose R) believed Respondent issued the reports* to workers to discipline and discourage workers from taking heat breaks." (GC Br. 12 (emphasis added).)

Similarly, the General Counsel argues: "Despite Manager John R's assurances regarding the non-disciplinary nature of the reports, about five weeks after Respondent started issuing the reports to workers, worker Jose R asked Operations Manager Rivera why, if Respondent was not

denying workers heat breaks, did Respondent issue workers the reports, and stated that the reports were meant to intimidate workers.” (GC Br. at 6.)<sup>4</sup>

Such arguments cannot coexist with the ALJ’s findings that supervisor John Rodriguez told Jose Rodriguez, *on the first incident* of providing an Observation Report, and Victor Gonzalez *by the second or third incident*, that they were *not disciplinary in nature* and that employees *so understood*. (See ALJD 12:3-5; 12:19-25.) They also cannot coexist with the ALJ’s express rejection of Gonzalez’s testimony. (See ALJD at 11, n. 33; ALJD at 20, n. 48.) Thus, the General Counsel’s arguments implicitly challenge the credibility findings of the ALJ. Yet, the General Counsel offers no basis for disturbing the judge’s credibility determinations.

Moreover, the General Counsel’s citation to *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003), is misplaced. In *Jonesville*, the employee *was* issued a written warning. Unlike here, the document in *Jonesville* was intended to be and was, indeed, disciplinary. *Id.* at 102 (“[T]he Respondent issued a written warning[,]” which described “inappropriate business behavior and responses.”) Here, the claim is that the Observation Reports *appeared* disciplinary in nature—not that a warning was actually issued. Thus, *Jonesville* is inapplicable.

In sum, the ALJ correctly concluded that the General Counsel failed to meet the burden of proving that Cal Cartage’s reports created the appearance of discipline, as alleged in the complaint.

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<sup>4</sup> The General Counsel also contends that “Gonzalez demonstrated *he did not agree* with Respondent’s issuance of the reports by marking so on the reports . . .” (GC Br. 12 (emphasis added).)

**IV. CALIFORNIA CARTAGE APPROPRIATELY CURED OR MITIGATED ANY SUBJECTIVE IMPRESSION AN EMPLOYEE MAY HAVE HAD THAT THE OBSERVATION REPORTS WERE DISCIPLINARY IN NATURE.**

Next, the General Counsel challenges the ALJ's conclusion that, even if employees first considered the Observation Reports disciplinary, Cal Cartage sufficiently cured or mitigated any such impression. The General Counsel argues that the ALJ should have analyzed this case under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and that Cal Cartage failed to meet the *Passavant* factors.

*First*, this is not a *Passavant* case, and the General Counsel's attempts to shoehorn it into *Passavant* are misdirected. *Passavant* and its progeny focus on instances in which a respondent has committed *an actual violation of the Act* and claims to have effectively *repudiated that violation*. For example, if a respondent unlawfully issued an actual written warning in response to protected concerted activity, *Passavant* directs what must be done to repudiate that warning. But here, the ALJ never found a violation in the first instance, and there was no issue presented of whether a previous violation had been cured. There was no need to address *Passavant* at all.

As the ALJ correctly observed, "it is not alleged that employees *were actually disciplined*, but rather that these reports created *the appearance of discipline*." (ALJD 19:44-46 (emphasis added).) The two are not the same. The format of the Observation Reports and the manner in which they were distributed are necessarily interrelated. One cannot analyze whether the Observation Reports appeared disciplinary in nature without analyzing both the format and distribution (and efforts to ensure employees understood the purpose), concurrently. That's what the ALJ did. Thus, the General Counsel's efforts to force this case into a *Passavant* analysis are mistaken and should be rejected.

*Second*, the ALJ correctly weighed Cal Cartage's efforts to mitigate any potential impressions that the Observation Reports were disciplinary in nature. The evidence

demonstrates Cal Cartage did at least four different things to assist employees' understanding that the reports were merely observational:

- *First*, when supervisor John Rodriguez provided employees the Observation Reports, he told employees that they were not disciplinary in nature. (*See* ALJD 20:24-26.)
- *Second*, John Rodriguez highlighted the language "Observation Report" on the form to confirm it was just that. (Tr. 292:25-293:6; 294:10-18; *see, e.g.*, GC Ex. 2.)
- *Third*, when Spanish-speaking employees stated that they were not going to sign the reports because they did not understand the comments John Rodriguez had written (in English), John Rodriguez started to write his narrative comments in Spanish to aid their understanding. (Tr. 296:13-20; *see, e.g.*, GC Ex. 7.)
- *Fourth*, to further eliminate the risk of any confusion as to the purpose of the Observation Reports, Cal Cartage made several changes to the form. By September 8, 2015, it had deleted the text "EMPLOYEE WARNING REPORT" from the top of the form and "ACTION TAKEN:" from the bottom. (*Compare* GC Ex. 2, pages 5 and 6.) Still in September, Cal Cartage deleted additional text from the form: "Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and included suspension or termination." (*Compare* GC Ex. 5, pages 9 and 10; *see also* Tr. 422:10-424:18.)

Thus, as the ALJ concluded, if there were ever any misimpression that the Observation Reports were disciplinary in nature, Cal Cartage's assurances corrected the misimpression. (*See* ALJD 21:20-23.) ("Accordingly, and for the above reasons, I am not persuaded that the written reports issued to the employees who took heat breaks were coercive, since any potential

impression of their being disciplinary in nature was cured by Respondent's assurances that they were not.")

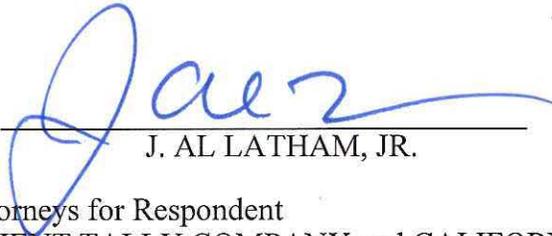
**V. CONCLUSION**

For all of the foregoing reasons, the General Counsel's Cross Exceptions should be denied in their entirety.

Dated: July 5, 2018

Respectfully Submitted,

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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 July 5, 2018, I served the foregoing document(s) described as:

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DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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

Executed on July 5, 2018, at Los Angeles, California.

  
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