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 REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Edith P. Castañeda, Counsel for the General Counsel
Cecelia Valentine, Counsel for the General Counsel
National Labor Relations Board, Region 21
888 S. Figueroa St., Ninth Floor
Los Angeles, California 90017
Tel. 213-634-6516
Fax 213-894-2778
edith.castaneda@nlrb.gov
cecelia.valentine@nlrb.gov

Counsel for the General Counsel ("General Counsel") submits the following Reply Brief to the Answering Brief filed by Orient Tally, Inc. and California Cartage LLC, a single employer ("Respondent"). For the reasons described below, the arguments asserted by Respondent in its Answering Brief are without merit, and the Board should grant the General Counsel's Limited Cross Exceptions to the decision issued by Administrative Law Judge Ariel L. Sotolongo ("ALJ") on February 28, 2018.

I. RESPONDENT'S REPORTS APPEAR DISCIPLINARY IN NATURE

Respondent inaccurately argues that by challenging the ALJ's finding that Respondent did not violate Section 8(a)(1) of the Act by issuing observation reports that appeared disciplinary to workers who took concerted heat breaks, the General Counsel implicitly contests the ALJ's credibility determinations. That is incorrect. Although the General Counsel pointed out in its limited cross exceptions that workers believed Respondent disciplined them by issuing the reports to them, that was not to contest the ALJ's credibility findings with regards to what Manager John Rodriguez ("John R") told workers about whether the reports were disciplinary. Rather, the General Counsel challenges the ALJ's finding that the record suggests the workers understood that the reports were not disciplinary. The issue of whether workers understood that the reports were not disciplinary is not determined by assessing Manager John R's credibility. Irrespective of what Manager John R told workers about the purpose of the reports, Respondent's conduct supported a reasonable impression that the reports were disciplinary.

Despite the ALJ finding that Manager John R. told two workers on different dates that the reports were not disciplinary, employees still perceived them to be disciplinary. For example, as argued in the General Counsel's Brief in Support of Limited Cross Exceptions,[1] weeks after Respondent started issuing reports to workers who took concerted heat breaks, worker Victor

[1] Hereinafter referred to as, "GC's CEX Brief."

Gonzalez ("Gonzalez") marked on the reports that he did not agree with them. (GC Exh. 5 at 6-7, 9-10)[2] In fact, the record reflects that after Manager John R told workers that the reports were not disciplinary, Respondent took additional steps of removing language from the reports to allegedly clarify the purpose of the reports. Respondent's efforts—like waiting to delete the language in bold capital lettering, "**EMPLOYEE WARNING REPORTS**," and further waiting to delete the language in bold, underlined, and italic lettering, "***Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination***[,]"—clearly indicated the reports were disciplinary. (ALJD 10:17-34; 20:14-17) These actions demonstrate that initially the reports contained language explicitly noting they were disciplinary, and despite later on deleting some language from the reports, Respondent still issued versions of the reports with disciplinary language.[3] Respondent's conduct clearly indicated that despite Manager John R's comments to two workers, workers still perceived the reports as disciplinary. For these reasons, the ALJ correctly found that "by itself, these edits would not cure the reasonable impression that such forms/reports were disciplinary in nature." (ALJD 20:22-24)

A. The ALJ Found that the Reports Appeared in Disciplinary in Nature

Respondent argues that the General Counsel failed to prove that the reports appeared disciplinary in nature. However, the ALJ admitted this point. Specifically, the ALJ found that, "[w]ithout a doubt, at first glance, the pre-printed language in these forms looks ominous, and as counsel for Respondent conceded, these were 'bad forms' (Tr. 127). Bold-lettered language that

---

[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] As General Counsel argues in its GC CEX Brief, the record reflects that Respondent removed language starting with "Any Further Incidents of this Type" from the reports it issued to worker Jose Rodriguez starting September 16, 2015, but continued issuing reports to worker Gonzalez including this cautionary language until September 25, 2015. (GC Exh. 5 at 8-10; GC Exh. 7 at 4-5; GC Exh. 8 at 4-5)

states 'Immediate Termination Violations' and warns that 'Any Further Incidents of this Type could Result in further Discipline'... stand out, among others, **and could reasonably create the impression on the recipient of such form that he/she is indeed being disciplined.**" (ALJD 20:13-17) (emphasis added) The ALJ's conclusion that Respondent did not violate Section 8(a)(1) by issuing such reports was based instead on an erroneous determination that the "ultimate issue . . . is whether Respondent cured or mitigated such impression. I conclude that it did . . . ." (ALJD 21:5-7)

B. Respondent Did Not Cure the Appearance that the Reports Were Disciplinary Pursuant to *Passavant*

Respondent argues that the General Counsel attempts to "shoehorn th[is] case into an inapplicable analysis under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978)." That is incorrect. The General Counsel's application of the *Passavant* criteria to determine that the Respondent did not properly cure the impression that the reports were disciplinary is premised on **the ALJ's own reliance on *Passavant*.** The ALJ stated that, "In that regard, the Board has often noted that a timely retraction or reassurance that no adverse consequences will follow can cure or negate an initial coercive statement or act, as Respondent did in this case." (ALJD 21:16-18) In his decision, the ALJ references two of the *Passavant* criteria for an effective cure: the cure must be timely and provide assurance of no future violations. Ibid; 237 NLRB at 138. However, the ALJ, in applying two of the *Passavant* factors, incorrectly concluded that Respondent cured the appearance that the reports it issued to workers who took heat breaks were disciplinary.

Respondent did not properly cure the appearance that the reports it issued to workers who took concerted heat breaks were disciplinary. Although Respondent argues that it took four different actions to communicate to workers that the reports were not disciplinary, Respondent did not make a proper cure because it did not adequately publicize an unambiguous message to

all workers that the reports were not disciplinary and that no adverse consequences would follow.

First, Respondent argues that when Manager John R provided workers the observation reports, he told workers that the reports were not disciplinary. However, as the ALJ noted, Manager John R did not tell all workers on the first occasion when he issued a report to them, that the reports were not disciplinary. The ALJ found that Manager John R did not tell worker Gonzalez until the second or third time that he issued a report to Gonzalez, that the report was not disciplinary. This response came only after Gonzalez inquired why Manager John R issued an "immediate termination violation" to him when he took heat breaks. (ALJD 11:31-35; 12:24-25; 20:32-34)

Second, Respondent argues that Manager John R highlighted the language "observation report" on the form to apprise workers that the reports were merely observation reports. However, the ALJ determined that it was not clear if the highlighted section on the reports existed at the time the reports were provided to workers. (ALJD 10: fn. 28) For such reason, the ALJ admitted some observation report exhibits without the highlight. (ALJD 11: fn. 32) Accordingly, Respondent's argument that Manager John R highlighted sections of the observation reports to inform workers that the reports were not disciplinary lacks support.

Third, Respondent argues that it cured any impression that the reports were disciplinary in nature because when Spanish-speaking employees refused to sign the reports because they did not understand the comments Manager John R wrote in English, John R started writing his comments on the reports in Spanish. However, the record reflects that worker Jose Rodriguez started receiving the reports as early as August 18, 2015, but that Manager John R did not start writing his comments in Spanish until September 10, 2015 – almost one month after Respondent

first started issuing the reports to workers who took heat breaks, hardly a timely retraction. (ALJD 12:11-12; GC Exh. Nos. 2 and 7)

Lastly, Respondent argues that to further eliminate any confusion as to the purpose of the reports, Respondent made several changes to the report including on September 8, 2015, deleting the text "**EMPLOYEE WARNING REPORT**," and still in September, deleting the text: "***Any Further Incidents of this Type Could Result in Further Disciplinary Action Up To and Including Suspension and/or Termination.***" Respondent conveniently omits the fact that it did not delete the text starting with "Any Further Incidents of this Type" until September 16, 2015, at the earliest. In fact, the record reflects that even after Respondent claims it deleted the language starting with "Any Further Incidents of this Type" from reports, it still issued reports with that language on it to workers. (GC Exh. 5 at 8-10; GC Exh. 7 at 4-5; GC Exh. 8 at 4-5) In sum, Respondent's alleged efforts to try and demonstrate that the reports were not disciplinary in nature fall short of curing any appearance that they appeared disciplinary, as their efforts were haphazard, inconsistent and not timely. As a result, the reports continued to appear disciplinary in nature.

II. CONCLUSION

Based upon the foregoing and the reasons set forth in the General Counsel's Limited Cross Exceptions Brief, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ and find that Respondent violated Section 8(a)(1) of the Act by since about August 18, 2015, issuing reports to workers which appeared to be disciplinary in nature in response to workers engaging in protected concerted activity.

Respectfully submitted,

Edith P. Castañeda, Counsel for the General Counsel
Cecelia Valentine, Counsel for the General Counsel
National Labor Relations Board, Region 21
888 S. Figueroa St., 9th Floor
Los Angeles, CA 90017

DATED at Los Angeles, California, this 17th day of July, 2018.

STATEMENT OF SERVICE

I hereby certify that a copy of the **Counsel for the General Counsel's Reply Brief to the Respondent's Answering Brief** has been submitted by e-filing to the Executive Secretary to the National Labor Relations Board on July 17, 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 Reply Brief to the Respondent's Answering Brief** was served by e-mail, on July 17, 2018, on the following parties:

Eli Naduris-Weissman, Attorney at Law
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101
enaduris-weissman@rsglabor.com

J. Al Latham, Jr., Attorney at Law
Ryan D. Derry, Attorney at Law
Paul Hastings LLP
515 South Flower Street, 25th Floor
Los Angeles, CA 90071-2228
allatham@paulhastings.com
ryanderry@paulhastings.com

Respectfully submitted,

Mara Estudillo
Office Manager
National Labor Relations Board
Region 21