

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21

CAL CARTAGE TRANSPORTATION EXPRESS, LLC

Case 21-CA-247884

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR  
SUMMARY JUDGEMENT**

Submitted By:  
Phuong Do  
Counsel for the Acting General Counsel

## **I. Introduction**

On January 8, 2021, Respondent Cal Cartage Transportation Express, LLC filed its motion moving for summary judgement. Counsel for the Acting General Counsel (General Counsel) respectfully opposes Respondent's motion for the reasons stated below. First, Respondent's motion to transfer this case to the Board is both inappropriate and improper. Second, its argument for the revival of the *de minimis* principle as outlined in *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973) is unpersuasive and should be rejected by the Board.

## **II. The Instant Complaint**

On December 10, 2020, a Complaint and Notice of Hearing issued in the present matter alleging that in about August 2018, fourteen of Respondent's employees engaged in protected concerted activity by filing a wage claim against Respondent with the California Department of Labor Standards Enforcement (Labor Commissioner). On or about December 28, 2018 the Labor Commissioner issued its Order, Decision or Award finding that the fourteen employees who filed the wage claim were employees and were entitled to a significant monetary payment. On July 2019, Respondent unlawfully discriminated against the fourteen employees who filed the Labor Commissioner claim by requiring that they sign month-to-month work agreements with Respondent instead of six month agreements, which were offered to all other employees.

On December 22, 2020, Respondent filed its Answer to the Complaint contesting the employees' employee status, denying that it took any actions against them because of the Labor Commissioner's claim, but admitting that in July 2019 it required the fourteen employees to sign month-to-month work agreements instead of six-month work agreements. In the Answer, Respondent also raised three affirmative defenses: (1) that the alleged discriminates were

independent contractors and not employees, (2) that even if there were a violation of the Act, such violation is *de minimis*, and (3) that the alleged discriminatees have entered into settlement agreements with Respondent releasing their claims against Respondent.

**III. Respondent's Motion Fails to Show an Absence of Genuine Issues of Material Fact.**

Rule 56 of the Federal Rules of Civil Procedure provides that:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment *if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.* The court should state on the record the reasons for granting or denying the motion. (*emphasis added*)

As identified within Rule 56 and as recognized by the Board, a moving party is only entitled to a judgment as a matter of law by showing that there is an absence of genuine issue of any material fact. *Regency Grande Nursing & Rehab. Ctr.*, 347 NLRB 1143, 1145 (2006). In Respondent's filing, it states emphatically that "[i]f required to go to trial, Respondent will vigorously defend its position both on the drivers' status as independent contractors and on the underlying merits." Naturally, the General Counsel opposes these positions and argues that consistent with the Act, the drivers at issue in this case are employees under the Act and were unlawfully discriminated against by Respondent. The divergence in Respondent and the General Counsel's positions demonstrates that this case presents genuine issues of fact. Issues that are not properly before the Board at this time and are more appropriately resolved by an Administrative Law Judge with a developed factual record. Based on this reality, summary judgement is wholly inappropriate.

Therefore, General Counsel respectfully urges the Board to deny Respondent's Motion for Summary Judgement.

**IV. Respondent's Violations of the Act were not *De Minimis*, and the Doctrine advanced in *Jimmy Wakely* does not apply.**

Despite the facts of the instant case presenting real issues of material fact, Respondent in support of its Motion to Dismiss argues that the Board should use this case to "revitalize" the *de minimis* violation principle created in the *Jimmy Wakely Show* decision. 202 NLRB at 620.

Respondent argues that this case would be an "excellent vehicle" for this doctrine essentially because pursuant to a mediation settlement, the discriminatees no longer work for Respondent, and they have executed general releases waiving any remedy claim that they may have against Respondent. Based on these facts, Respondent analogizes the current litigation as a "'useless exercise' of 'litigat[ing] *ad nauseam*' a case that would not advance any 'recognizable facet of Federal labor policy' by even 'a single millimeter.'" *Gray Line, Inc.*, 209 NLRB 88 (1974) (Miller, E., dissenting), *rev'd in part*, 512 F.2d 992 (D.C. Cir. 1975).

First, despite Respondent's characterization, the instant case is anything but a useless exercise of frivolous litigation. Rather, as Respondent's position on the employee status of the discriminatees makes clear, the outcome of the instant case is inextricably linked to whether drivers of Respondent will be brought under the ambit of the Act. Vindicating the discriminatees' rights not only benefits the discriminatees, but also those drivers that remain misclassified. Respondent's unlawful conduct not only discouraged the protected activity of the discriminatees, but also of their fellow drivers. Drivers that to this day at best only know that a group of their fellow drivers filed a wage complaint against Respondent, then were penalized by being given short-term contracts by Respondent, and now no longer work for Respondent. Only

through a public notice posting and notice mailing can the Board ameliorate the public harm caused by Respondent's unlawful conduct. The Board should not have to wait for Respondent to violate the Act again, for more employees to be discriminated against, and for more erosion of its authority before it can seek the vindication of the employees' Section 7 rights.

Second, just because the discriminatees have released their claims against Respondent does not mean that the Board has exhausted its remedial powers. The Board recognizes that it holds the exclusive authority to prevent unfair labor practices and that "its function is to be performed in the public interest and not in the vindication of private rights." *Flyte Tyme Worldwide*, 362 NLRB 393 (2015). The Board has further held that it "routinely issues cease and desist orders to remedy the violations found[.]" When a violation is found, the Board holds that Section 10(c) of the Act mandates that it "shall" issue a remedial order to remedy and prohibit the repetition of unlawful conduct. *Hawaiian Telecom, Inc.*, 365 NLRB No. 36, slip op. 6-7 (2017). See also *Whirlpool Corp. v. NLRB*, 92 F. Appx. 224 (2004). By filing the instant complaint, the General Counsel is asking the Board to exercise the above authority not only for the interest of the identified discriminatees, but also for the public interest by vindicating the rights of those employees Respondent continues to misclassify and to ensure that Respondent cannot violate these employees' rights a second time.

Third, Respondent's appeal to the *de minimis* principle of *Jimmy Wakely* is misguided. The *de minimis* principle advanced in *Jimmy Wakely* came at a time when the Board's caseload outstripped its resources. In 1973, when *Jimmy Wakely* was decided, the Board issued 1463 decisions in contested cases, however, in 2020 the Board only issued 374 decisions in contested cases. This is a 74% decline. Similarly, in 1973 the General Counsel issued 2,729 formal complaints, however, in 2020 the General Counsel only issued 809 formal complaints. This is a

70% decline. THIRTY-EIGHT ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 1973 8 & 18 (1973); NLRB FY2020 PERFORMANCE AND ACCOUNTABILITY REPORT 19 (2020). The decline in Board decisions and formal complaints demonstrates that the judicial economy concerns advanced in the *Jimmy Wakely* decision are no longer pertinent to the practice of the modern Board.

Lastly, as readily admitted by Respondent, the dismissal of complaints based on being *de minimis* have been rare. In cases where that principle was utilized, there were often unique facts in those cases, such as effective withdrawal or repudiation of the unlawful conduct which made it so that remedial orders were unnecessary. *See e.g., Jimmy Wakely Show*, 202 NLRB at 621 (remedial order not necessary when unlawful conduct, threat to a supervisor, was minimal; was not acted upon; and was effectively withdrawn) and *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976) (remedial order to an unlawful solicitation rule unnecessary when the rule had been rescinded, replaced, and notice of new rule was posted throughout the Employer's facility). In the instant case, Respondent has not taken any action to repudiate its unlawful discrimination of the discriminatees such as offering the discriminatees replacement contracts. Respondent has not taken any action to inform other employee drivers that it would not similarly discriminate against them for engaging in protected concerted activity or protected union activity. Rather, Respondent's opposition of the current action, including by the filing of its motion for summary judgement, shows that Respondent wants to avoid Board adjudication solely so that it can continue to deny its employees their enshrined Section 7 rights. These facts demonstrate that Respondent's conduct is anything but *de minimis* under the Act. Accordingly, this case is one where a Board remedial order remedying the unlawful conduct and prohibiting it in the future is both essential and necessary.

**V. Conclusion**

As the complaint raises factual and legal disputes necessitating a hearing on the merits, summary judgment is unwarranted. Accordingly, General Counsel respectfully requests that Respondent's motion be denied.

Respectfully submitted,

/s/ Phuong Do

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Counsel for the Acting General Counsel  
National Labor Relations Board, Region 21

Dated at Los Angeles, California, this 3<sup>rd</sup> of February 2021.

## STATEMENT OF SERVICE

I hereby certify that a copy of General Counsel's Opposition to Respondent's Motion for Summary Judgement was submitted by E-filing with Executive Secretary of the National Labor Relations Board on February 3, 2021.

The following parties were served with a copy of that document by electronic mail on February 3, 2021.

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/s/ Aide Carretero

Aide Carretero  
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