

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CAL CARTAGE TRANSPORTATION
EXPRESS, LLC

CASE NO. 21-CA-247884

and

[Noticed hearing date: March 15, 2021]

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

**RESPONDENT'S REPLY TO GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

PAUL HASTINGS LLP
J. AL LATHAM, JR. (SB# 071605)
allatham@paulhastings.com
RYAN D. DERRY (SB# 244337)
ryanderry@paulhastings.com
515 South Flower Street
Twenty-Fifth Floor
Los Angeles, California 90071-2228
Telephone: 1(213) 683-6000
Facsimile: 1(213) 627-0705

Attorneys for Respondent
Cal Cartage Transportation Express, LLC

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On February 3, 2021, Counsel for the Acting General Counsel (hereafter “the General Counsel”) filed an Opposition to Respondent’s Motion for Summary Judgment. Respondent responds here to each of the General Counsel’s arguments.

1. No Factual Dispute Precludes Summary Judgment.

The General Counsel argues that disputed issues of material fact preclude summary judgment. For support, the General Counsel quotes Respondent’s statement, “If required to go to trial, Respondent will vigorously defend its position both on the drivers’ status as independent contractors and on the underlying merits.” Opp. at 2, quoting Motion at 4.

But the General Counsel’s argument misses the whole point of Respondent’s motion: It is precisely to *avoid* a lengthy, costly trial over an alleged *de minimis* violation that summary judgment is warranted. The factual issues to which the General Counsel points are indeed in dispute, but they are not *material*. They are not material because, given the *de minimis* nature of the alleged violation, the disputed factual issues need not be resolved.

Detroit Plastic Molding Co., 209 NLRB 763 (1974), where the Board granted summary judgment on *Jimmy Wakely* grounds, makes this point clearly. The respondent employer had “inadvertently” posted an “admittedly unlawful” no-solicitation rule for six months, and then replaced it with another rule that the employer rescinded when a Board Agent questioned its lawfulness. 209 NLRB at 764. In granting the employer’s motion for summary judgment, the Board reasoned:

“In all these circumstances, *it is unnecessary to determine whether the past maintenance of the . . . rules might otherwise violate Section 8(a)(1) of the Act*, because we believe that their maintenance was so minimal and isolated in character that it does

not furnish a sufficient basis for either a finding of a violation of the Act or the issuance of a remedial order.”

Id. (emphasis added). Likewise, here it is “unnecessary to determine” whether the drivers were employees or independent contractors. It is also “unnecessary to determine” whether month-to-month contracts were discriminatory or --- as Respondent contends --- simply facilitated a forthcoming mediation. That’s because any violation that might be found, at the end of an extended trial, would be *de minimis*.

Importantly, although the General Counsel points to factual issues that would be disputed if there were to be a trial, the General Counsel does not dispute the material facts upon which Respondent bases its motion. In particular, the General Counsel does not dispute that (1) all of the month-to-month driver contracts continued in force until settlement was reached, when the drivers voluntarily severed their ties with Respondent; and (2) all 14 drivers, represented by Teamsters Union counsel, settled all their claims.

2. The Alleged Violation Is *De Minimis*.

The General Counsel argues that the alleged violation is not *de minimis*. Pointing to Respondent’s position that the drivers were independent contractors rather than employees, the General Counsel says they should be “brought under the ambit of the Act.” Opp. at

3. According to the General Counsel, “Vindicating the discriminatees’ rights not only benefits the discriminatees, but also those drivers that remain misclassified.” *Id.* There are two problems with this argument, each of them fatal to the General Counsel’s position.

First, nothing that could possibly happen in this case would “benefit[] the [alleged] discriminatees.” They have all settled whatever claims they may have had and severed their relationship with Respondent. They have released not only the wage/hour misclassification claims upon which they prevailed before the California Labor Commissioner, but also any claims

they may have had under the NLRA. And they did so with the assistance of Teamsters Union counsel. While the 14 drivers have nothing to gain by the continuation of the present litigation, they could be substantially burdened by it if called to testify.

Second, the General Counsel gratuitously claims that continued litigation would benefit “those drivers that remain misclassified.” Opp. at 3. Exactly which drivers are those? The Complaint does not allege any violation of the Act based upon misclassification, nor could it under current Board law. See *Velox Express, Inc.*, 368 NLRB No. 61 (2019). And it is only the 14 drivers specifically named in the complaint who are alleged to have had wage/hour misclassification claims --- claims that, once again, were fully settled and released.

In sum, *nobody* would benefit from the continuation of this case. As in *Jimmy Wakely*, “even if not entirely moot, . . . the alleged misconduct here is of such obviously limited impact and significance” that it does not “rise[] to the level of constituting a violation of our Act.” *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973).¹

3. The *De Minimis* Doctrine Is Not Contingent Upon The Board’s Caseload.

The General Counsel contends that, because the Board’s caseload has declined substantially since the Board decided *Jimmy Wakely* in 1973, the *de minimis* principle should no longer apply. Opp. at 4-5. This argument fails for two reasons.

First, although the Board in *Jimmy Wakely* observed that the problems involved in handling its rising caseload “could be alleviated if cases of this type were not processed,”

¹ The *Jimmy Wakely* Board acknowledged the argument, which the General Counsel also makes here (Opp. at 4), that Section 10(c) requires that a remedial order be issued whenever a violation is found. 202 NLRB at 621. But *Jimmy Wakely*’s answer, equally applicable here, is that *de minimis* allegations “should not form the basis of either a proceeding or a remedy under our Act.” *Id.* See also *Detroit Plastic Molding Co.*, *supra*, declining to find a violation and granting summary judgment in a *de minimis* case.

202 NLRB at 621, a rising caseload was not essential to *Jimmy Wakely*'s holding. Nor has the General Counsel cited any authority since 1973 holding that the *Jimmy Wakely* doctrine is contingent upon a rising caseload. As Chairman Hurtgen observed, "the rationale of *Jimmy Wakely* rests on broad policy grounds." *Whirlpool Corp.*, 337 NLRB 726, 729 (2002) (Hurtgen, dissenting), *enf'd*, 92 Fed. Appx. 224 (6th Cir. 2004).

Second, in focusing solely on the demand side (caseload), the General Counsel ignores entirely the supply side (the Board's available resources). We need not remind the Board Members of the straightened circumstances under which the Board has had to fulfill its mission in recent years. Former General Counsel Griffin went so far as to say publicly that the agency was not sufficiently funded to meet its mission. GC Memo 17-02 (March 10, 2017). Whether the current Members agree with Mr. Griffin or not, the General Counsel's suggestion that the agency now has the luxury of processing inconsequential matters should be firmly rejected.

4. This Case Fits Squarely Within The *De Minimis* Doctrine.

Finally, the General Counsel argues that Respondent's failure to "repudiate" its "unlawful discrimination" forecloses summary judgment under *Jimmy Wakely*. (Opp. at 5.) The General Counsel suggests that Respondent was obliged to offer the drivers "replacement contracts" (*id.*) -- even though, as part of their settlements, all the active drivers severed their relationship with Respondent. But the General Counsel goes much farther. Counsel for the Acting General Counsel writes that, simply by defending itself in this case, Respondent shows its contempt for the Act:

"Respondent's opposition of the current action, including by filing of its motion for summary judgment, shows that Respondent wants to avoid Board adjudication solely so that it can continue to deny its employees their enshrined Section 7 rights."

(Opp. at 5.) This is no reasoned argument, but mere table-pounding.

As we said at the outset, this case presents an excellent vehicle for revitalizing the *de minimis* doctrine. In the brief run-up to mediation, month-to-month contract terms for the active drivers had exactly *zero* real-world impact. Represented by Teamsters' counsel, all the drivers settled, and the parties went away happy. The potential impact on Section 7 rights, even if a violation were to be found after a long trial, is less here than in *Detroit Plastic Molding, supra*, where summary judgment was granted on *Jimmy Wakely* grounds. There, an “admittedly unlawful” no-solicitation rule was posted for six months.

In short, if the present case is worthy of the Board's time and attention, then it is hard to imagine any case that would not be. Summary judgment should be granted.

Dated: February 5, 2021

Respectfully Submitted,

PAUL HASTINGS LLP
J. AL LATHAM, JR.
RYAN D. DERRY

By: 
J. AL LATHAM, JR.

LEGAL_US_W # 106932058.1

Attorneys for Respondent
CAL CARTAGE TRANSPORTATION EXPRESS,
LLC

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 February 5, 2021, I served the foregoing document(s) described as:

**RESPONDENT'S REPLY TO GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

on the interested parties by electronic service as follows:

William B. Cowen Regional Director National Labor Relations Board - Region 21 US Courthouse 312 N. Spring Street, 10th Floor Los Angeles, CA 90012 Email: William.Cowen@nlrb.gov	Hector De Haro, Esq. Julie Gutman Dickinson, Esq. Bush Gottlieb, A Law Corporation 801 North Brand Blvd., Suite 950 Glendale, CA 91203-1260 Email: hdeharo@bushgottlieb.com Email: jgd@bushgottlieb.com Attorney for Charging Party
Phuong Do Counsel for the Acting General Counsel National Labor Relations Board, Regional 21 312 N. Spring Street, 10th Floor Los Angeles, CA 90012 Phuong.Do@nlrb.gov	

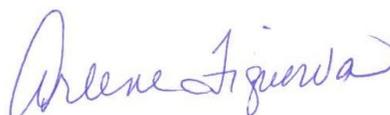
VIA EMAIL:



The email was transmitted to the email addresses listed above on February 5, 2021. 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 February 5, 2021, at Los Angeles, California.



Arlene Figueroa