

**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

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**RESPONDENT'S REPLY TO CHARGING PARTY'S OPPOSITION TO  
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

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## **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

On February 17, 2021, Charging Party International Brotherhood of Teamsters filed its Opposition to Respondent's Motion for Summary Judgment. Respondent replies here.

### **I. The Board should decide now, in this case, whether the *de minimis* doctrine is alive or dead.**

The Teamsters oppose Respondent's motion on policy grounds. They say the *de minimis* doctrine set forth in *Jimmy Wakely* is a "relic," a "dead letter," and should stay that way. CP Opp. at 3 and 4. They cite the views of former Chairmen Fanning, Truesdale, and Liebman, and former Member Jenkins. CP Opp. at 4.

We say the *de minimis* doctrine should not be a "dead letter," but to the contrary, should be revitalized. We cite statements to that effect by former Chairman (now Member) Ring, former Chairmen Hurtgen and Miller, and former Members Schaumber, Cowen, Penello, and Kennedy. See cases collected in Respondent's MSJ at 2. Thus, the policy differences are sharply drawn.

The question therefore becomes: Is this case the right vehicle for the Board to decide whether the *de minimis* doctrine is dead or alive? Following the Charging Party's Opposition, it is clearer than ever that this case *is* the right vehicle.

### **II. The Charging Party's Opposition does not dispute any of the facts upon which Respondent's motion is based.**

The Charging Party's lawyer, Julie Gutman Dickinson, submitted a declaration in support of the Charging Party's Opposition. Ms. Dickinson says, yes, she represents the Teamsters in this unfair labor practice case, and yes, she also happened "separately" to represent the 14 drivers (who are the alleged discriminatees in this unfair labor practice case) in negotiating their individual settlement agreements. Dickinson Dec., at ¶¶ 2 & 3. She adds that Respondent knew

that the Union was not a party to the 14 drivers' settlement agreements. Dickinson Dec. at ¶ 4. Ms. Dickinson need not have bothered to submit a declaration on these points. As Respondent acknowledged at the outset, "The Teamsters Union is the charging party here, not the drivers themselves, and the Union has persisted with its charge." Respondent's MSJ, at 3.

What Ms. Dickinson does *not* do in her declaration is dispute any of the facts set forth by Respondent's declarant, Steve Berry. In his declaration, Mr. Berry provides a full account of his and Ms. Dickinson's discussions about the drivers' contract duration. Respondent's MSJ, Exh. C. Ms. Dickinson disputes none of Mr. Berry's account.

Thus, it is undisputed that Mr. Berry shared with Ms. Dickinson the Company's rationale for placing the then-active drivers on month-to-month contracts, rather than six-month contracts ---- namely, that the scheduled mediation was less than six months away. Respondent's MSJ, Exh. C, Berry Dec. at ¶¶ 8 & 9. Two additional undisputed facts go straight to the heart of Respondent's *de minimis* argument:

1. Mr. Berry "***assured [Ms. Dickinson] that there would be no non-renewal of her clients' contracts prior to the mediation.***" Respondent's MSJ, Exh. C, Berry Dec. at ¶ 10. (emphasis added).

2. And as promised, "***[n]one of the active drivers' month-to-month contracts was terminated or non-renewed*** prior to the driver's entering into a settlement agreement." Respondent's MSJ, Exh. C, Berry Dec. at ¶ 13 (emphasis added).

The drivers therefore knew (or could have known, had their lawyer told them) that their business relationship with Respondent was guaranteed to continue at least through the mediation – as indeed it did. So much for the supposed "chill" that the Charging Party would attribute to the month-to-month contracts (CP Opp. at 11).

### **III. Respondent had no obligation to rescind the month-to-month contracts.**

The Charging Party argues that, in order to take advantage of the *de minimis* doctrine, Respondent was obliged to issue some sort of “watered-down repudiation” of its action. CP Opp. at 8. Contrary to the Charging Party’s contention, the Board has never held that “remedying” or “repudiating” an alleged violation is a prerequisite. The relevant question is whether the alleged violation, if found, would be *de minimis*. If so, the Board need not find the violation.

Consider *Detroit Plastic Molding Co.*, 209 NLRB 763 (1974), where the Board granted summary judgment on *de minimis* grounds. In that case, the employer 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. The Board held it “unnecessary to determine” whether even the admittedly unlawful rule constituted a violation, because the rule’s 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.” 209 NLRB at 764.<sup>1</sup>

Here, it is “unnecessary to determine” whether the drivers were statutory employees, and if so, why they received month-to-month contracts. That’s because, in the real world, the duration of the drivers’ contracts simply did not matter.

Former Chairman Ed Miller posed the pertinent question: “[W]as any employee substantially adversely affected here?” *Gray Line, Inc.*, 209 NLRB 88 (1974), *rev’d in part*, 512 F.2d 992 (D.C. Cir. 1975) (Miller, dissenting). The answer is plainly “no.” To paraphrase Chairman Miller, “it is plain as a pikestaff” that whether the drivers were on month-to-month

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<sup>1</sup> Contrary to the Charging Party’s argument, where the Board finds it “unnecessary to determine” whether there has been a violation, Section 10(c)’s language about the Board’s responsibility to remedy violations never comes into play.

contracts or six-month contracts “had no effect whatever on any policy with which this Act is concerned.” *Id.* at note 2.

#### **IV. The Charging Party’s other arguments also fail.**

The Charging Party contends that whether a violation is *de minimis* cannot be determined on summary judgment. CP Opp. at 10. We submit, to the contrary, that it is precisely at the summary judgment stage that the question should be resolved. That the question has usually been addressed only after a trial and ALJ decision is unfortunate. At that point, the parties and the Board will already have incurred the sheer economic waste of litigating a *de minimis* case.

The Charging Party contends that the Board’s reduced caseload since 1973, when *Jimmy Wakely* was decided, obviates the need for the *de minimis* doctrine. The other side of the coin --- that the level of NLRB staffing and other resources (adjusted for inflation) are not what they were in 1973 --- goes unmentioned. In any event, this Board should categorically reject the suggestion that a declining caseload affords the Board the luxury of spending the taxpayers’ money on inconsequential cases.

The Charging Party also contends that the *Jimmy Wakely* doctrine was intended to encourage the General Counsel to exercise more prosecutorial discretion. CP Opp. at 7. No doubt that was one objective. But when the General Counsel’s office nevertheless brings a case that should not have been brought (as here), Chairman Miller’s words are again apt: “The complaint, in my view, should never have issued, and once issued should, long since, have been *summarily dismissed.*” *Gray Line, supra* (emphasis added).

Finally, the Charging Party argues that it is “central to the case and its context” to determine whether the drivers are employees or independent contractors. CP Opp. at 15-16. A trial is supposedly needed to determine whether the drivers are “misclassified.” CP Opp. at 16. This argument fails for two reasons. First, whether the 14 drivers were misclassified under

California wage/hour law --- the very issue that was mediated and settled --- is irrelevant to whether the drivers are employees under the NLRA. *See Super Shuttle DFW, Inc.* 367 NLRB No. 75 at note 23 (2019). Second, even if the drivers were misclassified under the NLRA --- which Respondent strongly denies --- that would not constitute an unfair labor practice. *Velox Express, Inc.*, 368 NLRB No. 61 (2019).

**V. Conclusion**

Following the Charging Party's failure to dispute any of the facts upon which Respondent's motion for summary judgment is based, it is clearer than ever that this case is the right vehicle for a much-needed revitalization of the *de minimis* doctrine. The Board should vacate the March 15 hearing date, and grant Respondent's motion for summary judgment.

Dated: February 20, 2021

Respectfully Submitted,

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By:   
\_\_\_\_\_  
J. AL LATHAM, JR.

Attorneys for Respondent  
CAL CARTAGE TRANSPORTATION EXPRESS,  
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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 February 20, 2021, I served the foregoing document(s) described as:

**RESPONDENT'S REPLY TO CHARGING PARTY'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: <a href="mailto:William.Cowen@nlrb.gov">William.Cowen@nlrb.gov</a>	Hector De Haro, Esq. Julie Gutman Dickinson, Esq. Bush Gottlieb, A Law Corporation 801 North Brand Blvd., Suite 950 Glendale, CA 91203-1260 Email: <a href="mailto:hdeharo@bushgottlieb.com">hdeharo@bushgottlieb.com</a> Email: <a href="mailto:jgd@bushgottlieb.com">jgd@bushgottlieb.com</a>  Attorney for Charging Party
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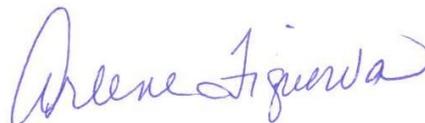
**VIA EMAIL:**



The email was transmitted to the email addresses listed above on February 20, 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 20, 2021, at Los Angeles, California.



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Arlene Figueroa