

[po-UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

LAND AIR EXPRESS  
OF NEW ENGLAND, INC.

and

Case Nos. 3-CA-26198  
3-CA-26199

TEAMSTERS LOCAL 317

*Ron Scott, Esq.*, for the General Counsel.  
*Fred B. Grubb, SPHR*, for the Respondent.

DECISION

Statement of the Case

**GEORGE ALEMÁN**, Administrative Law Judge. This case was tried in Syracuse, NY on October 16-17, 2007,<sup>1</sup> pursuant to an Amended Consolidated Complaint issued on September 24, by the Regional Director for Region 3 of the National Labor Relations Board (the Board).<sup>2</sup> The complaint alleges that Land Air Express of New England, Inc. (the Respondent)<sup>3</sup> violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening an employee with unspecified reprisals because of his union activity, and violated Section 8(a)(3) and (1) of the Act by discharging employees Kenneth Lindsley and Milton Camby for their union activities. In a timely-filed answer to the complaint, the Respondent denies engaging in any unlawful conduct.

At trial, all parties were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

Land Air Express of New England, Inc., a corporation, with an office and principal place of business in East Syracuse, New York, is engaged in the business of the air transport of freight, from which location it annually purchases and receives goods valued in excess of \$50,000 directly from points and places located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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<sup>1</sup> All dates are in 2007, unless otherwise indicated.

<sup>2</sup> The charges underlying the complaint were filed on February 15, by Teamsters Local 317 (the Union).

<sup>3</sup> The Respondent operates several terminals, including an East Syracuse, NY facility, the only one involved in this proceeding.

## II. Alleged Unfair Labor Practices

### A. Factual Background

5 The Respondent, as noted, operates several terminals throughout the Northeast section of the United States, in addition to its East Syracuse, NY facility. William Spencer serves as its president, and Charles Eaton as the terminal manager at the East Syracuse facility. Leonard Potts was made the working foreman at that facility sometime in January.

10 The Respondent operates a mechanics shop at the East Syracuse facility where needed maintenance and repairs are made by mechanics, classified as either Class A or Class B, on vehicles used for transporting freight. The Respondent also employs dockworkers who load and unload trucks entering and leaving the terminal. Alleged discriminatee Lindsley was  
15 employed as a Class A mechanic from early 2006, until discharged on January 25. Alleged discriminatee Camby was a dockworker from September 2005, until discharged on February 7.

20 Lindsley testified that his day-to-day job duties consisted of doing repairs or routine maintenance on Company vehicles, such as oil changes, tires, working on motors, alternators, and generally anything that required attention. He generally worked a 3:00 pm-11:30 pm shift, along with mechanics Daniel Trifoso and Lawrence Holbdy.

25 Roy Wilson worked as a driver for the Respondent for almost three years until he retired on April. He testified that in 2005, the Union made an unsuccessful attempt to organize the Respondent's employees at the East Syracuse facility, and that it renewed its efforts in December 2006. Wilson, who apparently was a Union supporter, claims that around the time the Union's renewed effort began, he asked both Camby and Lindsley if they would be willing to solicit their fellow workers into signing authorization cards on the Union's behalf, and both agreed to do so. (Tr. 45-47). Camby signed an authorization card on January 18, and recalled  
30 being one of the last employees to do so.

35 Camby and Lindsley both confirmed being asked by Wilson, and agreeing, to distribute and Union authorization cards to other employees at the facility. Lindsley testified that he approached other employees, including Potts, about signing cards. He recalls asking both Potts and another employee, Don Spalsbury, if they would sign. Lindsley claims that Potts previously had expressed an interest in signing a card but when approached by Lindsley, declined to do so stating that he was now in management (Tr. 97).<sup>4</sup> Lindsley, however, recalled having another  
40 conversation with Potts on January 23, the day before his discharge, during which the latter cautioned Lindsley to "watch" his back, that "they" were on to him, that "they" knew he was handing out Union cards, and were going to make it rough on him. Asked if Potts ever explained who "they" were, Lindsley replied that he "knew" Potts was referring to Eaton. He did not, however, claim that Potts specifically identified Eaton or anyone else as the source of the

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45 <sup>4</sup> Lindsley's description of this particular exchange is somewhat confusing, for, when asked to describe his conversation with Potts, he alluded to the fact that Spalsbury was also involved in the exchange. Thus, he explained that Potts "and Don [Spalsbury] both" were up for signing authorization cards. Lindsley recalled hearing one of them say, "I'm in management, I can't sign." However, when asked by the General Counsel if that was what "he" said to you, presumably referring to what Potts may have said, Lindsley answered, "Yes, and that's all Dan  
50 Spalsbury said, he's in a position he can't." Thus, it is not clear who said what to Lindsley during this particular exchange, creating some ambiguity in his testimony (Tr. 97).

comment. (Tr. 98).

5 Trifoso, a Class A mechanic, testified to seeing Lindsley sometime in January, during break time, trying to solicit signed authorization cards from other employees. At one point, he observed Lindsley trying to solicit a signed card from Potts, and Potts declining to do so. He recalled Potts telling Lindsley during this encounter that he did not want anything to do with signing a card because he was "pretty much management," and overheard Potts tell Lindsley to "watch your back." Unlike Lindsley, however, Trifoso did not place this conversation as occurring the day before Lindsley was discharged. Thus, asked by the General Counsel if he heard another conversation between Potts and Lindsley the day before Lindsley was discharged, a reference I am convinced to the date Lindsley claims Potts purportedly made his threat of reprisal and told Lindsley management was aware of his union activity, Trifoso denied overheard any such exchange between the two that day. (Tr. 57- 58).

15 Potts recalled Lindsley asking him, some 2-3 weeks before the latter's discharge, if he would sign a Union card. Potts, without explanation, declined to sign one. That, Potts contends, was the extent of the conversation. (Tr. 86). Potts denied ever telling Lindsley in any subsequent conversation that Eaton and a Mr. Burns were aware of his card solicitation activity, or saying that they would make things tough on him. (Tr. 86).

20 As between Potts and Lindsley, I credit Potts and find that he never made the "watch your back" remark or any other similar comment to Lindsley. From a demeanor standpoint, Potts was the more believable of the two. He came across as sincere, honest, and wholly trustworthy. Lindsley, on the other hand, was not very convincing. His account of what Potts may have said to him, for example, was somewhat vague and confusing. Thus, Lindsley did not give a straightforward answer to the General Counsel's query on whether he knew who Potts was referring to when he told Lindsley "they" were watching his back. Lindsley instead answered only that he "knew" who Potts was referring to, without explaining how he knew who "they" were. Further, his description of what Potts and/or Spalsbury said to him when he asked them to sign cards was, as previously discussed, somewhat confusing. Finally, Lindsley's claim that Potts made his "watch your back" remark the day before he was discharged, as noted, was not endorsed by Trifoso, who testified only that Pott's alleged remark occurred sometime in January, but not the day prior to Lindsley's discharge. While there is the likelihood that the "watch your back" remark may have been made by Potts on two separate occasions, which might explain the discrepancy between Lindsley and Trifoso's testimony as to the timing of Potts' alleged remark, Lindsley never asserted that Potts made the remark on two separate occasions. Given these circumstances, and Potts' overall more reliable demeanor, I am inclined to accept as true, and consequently credit, Potts' claim that he did not make the remarks attributed to him by Lindsley.

40 Eaton took over as terminal manager of the East Syracuse facility in September 2006, with instructions from Respondent's upper management to, among other things, improve the performance of the maintenance shop at the facility which was having problems. (Tr. 162). Within a month or so, Eaton realized that the then manager of the shop, Al Brynien, was incompetent, in over his head, and was not running the shop properly, causing the shop to be in "turmoil." He explained that the morale among shop employees was low, the equipment was in terrible shape, and that, despite complaints from employees about the equipment, Brynien was unable to fix the problems. Eaton also realized that while Brynien was classified as a Class A mechanic, he lacked the Class A mechanic's knowledge and skills, and had been placing other employees, including Lindsley, in that same classification despite his apparent lack of knowledge as to what was expected and required of a Class A mechanic. (Tr. 164).

Based on his observations and his own experiences in managing similar shops, Eaton concluded that Brynien had to go, and so informed Spencer. Both he and Spencer agreed that rather than fire Brynien, they would offer to let him stay on as a Class B mechanic on the evening shift. Brynien, however, chose not to accept the position and resigned a few days later.

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Regarding the vacant shop manager's position, Eaton discussed the matter with Spencer and offered to run the shop himself, pointing out that he did not need a "salaried" employee manager to run the six-man mechanics shop because he was already overseeing some 50-60 employees at the terminal and had more mechanical aptitude than the previous managers. He suggested to Spencer that, with a strong working foreman, there was no reason why he, Eaton, could not run the shop himself. Spencer apparently agreed to this arrangement.

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Eaton then approached Spalsbury, who had expressed an interest in the working foreman's position, and offered him the position on a 2-3 month trial basis, with the understanding that, if it did not work out, he could return to his position as a Class A mechanic. However, by early January, Eaton concluded that Spalsbury simply lacked the leadership qualities needed to manage the mechanic's shop. During his frequent discussions with the mechanics while Spalsbury held the position, Eaton focused in on Potts as a replacement for Spalsbury as working foreman, explaining that Potts had had some prior experience as a working foreman at a print shop years earlier, and thus had some management experience.

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After discussing it with Potts, the latter expressed interest in the position. Eaton then made Potts the same offer previously made to Spalsbury, e.g., that he would continue as a Class A mechanic but with a \$1.00 increase in pay over what Class A mechanics generally earned, with a 2-3 month trial period, and the option of returning to his former position if it did not work out. Potts assumed the working foreman's position during the second week in January. Eaton testified that Potts lacks the authority to hire or fire, to discipline employees, or to determine an employee's rate of pay. (Tr. 168-169).

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Potts testified that he spends about 65% of his time doing Class A mechanic work. His shift usually runs from 7 a.m. to 3 p.m. His daily duties include preparing a list of work that needs to be done, preparing "driver vehicle inspection reports" or DVIRs, and helping out and doing whatever needs to be done, including ordering and picking up parts. He gets paid for overtime worked, and is not salaried. As to requests for overtime or time-off, Potts testified that Eaton has to authorize any such requests. Potts recalled that before making his decision to fire Lindsley, Eaton asked him who was the least productive of the mechanic shop employees, and that he pointed to Lindsley. Potts claims that he reached this conclusion by reviewing employee work orders, and suggested implicitly that he was unable to directly observe Lindsley's work because the latter worked a different shift, from 3 p.m. – 11:30 p.m. (Tr. 83-84; 87; 92).

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According to Lindsley, Potts "did a lot of paperwork," and has his own office. Asked how he knew what assignment to do when he reported for work every day, Lindsley testified that on arriving to work, there would be driver vehicle reports in a box by the office door and that he would simply pull one out and perform the work shown on the report as needing to be done, such as an oil change. There was also a list prepared by Potts of work that needed be done from which Lindsley got his assignments. Trifoso gave a similar account of how mechanics knew what work to do. (Tr. 93-94; 52).

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Lindsley's assertion that Potts' has his own office is at odds with the view expressed by employee Chris Jacobson. Jacobson testified that the office in question is used for printing work orders after vehicles are serviced, that he and other employees, along with Potts, use the office, and that he did not view this area as Potts' personal office. According to Jacobson, Potts

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also does mechanic work, and estimated that Potts spends about half his time in the office. (Tr. 153).

5 Spencer testified that on January 10, he held a meeting with all his terminal managers to address an overall corporate-wide decline in revenues for the preceding 13-month period, and a 4<sup>th</sup> quarter drop in business. A document containing the Respondent's monthly revenues for the Syracuse facility from January 2006-April 2007 was received into evidence, without objection, as Respondent's Exhibit (RX) 14. It reflects, consistent with Spencer's testimony, that the Respondent experienced a sharp decline in revenues during the last quarter of 2006. Because 10 Respondent's operations are labor intensive, Spencer directed his terminal managers to remedy the problem by finding ways to reduce the labor costs at the terminals by any means necessary, including employee attrition, reduction in work hours, or through layoffs. The decision as to how this was to be done was left up to the individual terminal manager. (Tr. 142-143).

15 Eaton attended the January 10, meeting and recalls Spencer instructing all terminal managers "to drastically cut payroll" through any means necessary, including reducing the number of employee work hours, letting personnel go, getting individuals who may not need to work to take leave without pay, or to ultimately conduct layoffs. (Tr. 171) According to Eaton, Spencer directed the terminal managers to make the necessary cuts by the following week.

20 Eaton testified that in response to Spencer's directive, he looked at where he could reduce labor costs in three main areas of the East Syracuse facility -- the driver pool, the dockworkers, and the mechanics. As to the driver pool, Eaton placed all the drivers at the East Syracuse facility, numbering around 20, on a four-day work week, effectively reducing the 25 overtime pay that was typically paid to employees who worked more than 40 hours a week.

30 As to the dock workers, Eaton instructed his dock supervisor, Rich Gardner, within a day or so of Spencer's terminal manager's meeting, to notify Camby and Will Scott (Camby's cousin), both of whom Eaton contends were the two least productive employees, to call in each night to see if they would be needed that evening. He cautioned Gardner that if Camby and Scott were asked to report for work, he should be prepared to justify each morning why they were needed. Eaton told Gardner that if Camby and/or Scott had any questions regarding his call-in decision, they could speak to him directly the next morning.

35 Eaton explained that his conclusion regarding Camby and Scott was based on his own personal observations. Thus, he described himself as a "hands-on boss" who likes to get out and see what employees are doing. He contends that he often watched the dock workers, and had been paying close attention to Camby and Scott and noticed that they were not performing well. Eaton explained that sometimes, when he arrived at 6 a.m., he would often see the two 40 outside the building smoking. (Tr. 177).

45 Camby testified that sometime in January, Gardner approached him and Scott as they worked on the dock and told them that they would have to call in before reporting for work the following evening to find out if they would be needed. Gardner, he claims, did not give him any reason for this new call-in requirement, explaining only that it was slow. Camby did not think much of it at the time but became concerned after discussing it with other dockworkers and learning that they had not been given similar call-in instructions. He became upset at this and asked Gardner why he and his cousin, Scott, were the only dockworkers being asked to call in to find out if they could report for work. Gardner purportedly told him he was only following 50 Eaton's instructions. The next day, Camby met with Eaton to discuss the matter and, according to Camby, was told by Eaton the call-in procedure had been instituted because Camby and Scott were the "least two productive [employees] on the shift. Camby contends that no further

explanation was given by Eaton and that the matter was pretty much left at that. (Tr. 114).

5 Eaton recalled that the day after instructing Gardner on the call-in procedure for Camby and Scott, both employees came to see him, and complained that they had been working there longer than anyone on the evening shift, and found the call-in requirement unfair. Eaton told them that while this might be their opinion, he had had meetings and conversations with all dockworkers and had made clear that those who smoked were not entitled to any more breaks than nonsmokers. He pointed out that he had seen them outside on smoke breaks during the busiest time, and that the trucks they loaded were the last ones to get done every day. He informed them that, in his opinion, they were the least productive employees, that he had an obligation to try and salvage the jobs of the other 80 or so employees at the facility, and that, if the terminal was unable to make money, it would cease to function causing everyone to become unemployed. He explained that he had already placed the drivers on a 4-day work week, and that, while Camby and Scott disagreed with his decision regarding their call-in procedure, it was his decision to make, and that he had chosen them because he deemed them to be the two least productive employees of the dock crews. Eaton further told them that they were not being laid off, and that if work was available for them they would work, but that he did not want to see them when he arrived at 6 a.m. as the only two guys out on a smoke break. (Tr. 179).

20 In the mechanics department, Eaton, in furtherance of his cost-cutting measures, chose to terminate Lindsley's employment because of Lindsley's overall poor performance. Eaton explained that when he first became manager of the facility in September 2006, he began looking into ways to improve the mechanic's shop. He soon realized, and contends it was common knowledge at that shop, that while classified as a Class A mechanic, Lindsley did not belong in that classification. Eaton testified that, in his estimation, Lindsley was, at best, a borderline Class B mechanic. (Tr. 42). He nevertheless insisted that had the Company's revenues not been down, Lindsley would not have been terminated but would instead have been offered a Class B mechanic's position which paid around \$3.00 less than a Class A mechanic. (Tr. 28).

30 In deciding to terminate Lindsley, Eaton initially testified that he did not solicit anyone's opinion as to Lindsley's performance and generally based his decision on his own observations. Potts, however, testified that Eaton did consult with him before making his decision. Thus, he recalled Eaton asking him who was the least productive mechanic in the shop, and he identifying Lindsley as the one. Potts explained that his opinion as to Lindsley being the least productive mechanic was based on the number and type of work being completed by Lindsley. (Tr. 83). Presented with Potts' contradictory testimony, Eaton explained that he simply did not recall asking Potts for his opinion as to the lowest producing mechanic, but concedes he might have done so. (Tr. 170).

40 Several employees who testified gave their opinion as to Lindsley's ability and performance. Jacobson, for example, testified that while he and Lindsley worked different shifts, their shifts overlapped one or two hours each day, and that from what he was able to observe of Lindsley's performance, he did not consider the latter to be a Class A mechanic because of Lindsley's poor work. He explained that "every time" Lindsley filled out a work order or worked on a vehicle, something "would get messed up and I'd have to go back or another mechanic" and do the work over again. (Tr. 151).

50 Spalsbury, a Class A mechanic, claims to have observed Lindsley at work and, like Jacobson, expressed the view that Lindsley was not a Class A mechanic despite being classified as one. Employee Holbdy, also a Class A mechanic, testified that Lindsley was a "hard working" employee but that, in his view, Lindsley was not qualified to be a Class A

mechanic. On the other hand, employee Trifoso, another Class A mechanic, described Lindsley as a “good” and “hard” worker, who “liked to be precise and did a fairly well job.” (Tr. 56; 78; 159).

5 Lindsley was notified of his termination on January 24. He testified that within 5 minutes  
of reporting for work that day, Eaton, with Potts behind him, called him into his office. Once  
inside, Eaton, according to Lindsley, explained “how rough it is and how slow things are going,”  
and then told Lindsley they were going to have to let him go. Lindsley, admittedly upset at this  
10 notice, asked Eaton if this was the real reason he was being let go. When Eaton answered in  
the affirmative, Lindsley admitted looking Eaton in the eye and angrily responding, “Excuse me,  
sir, fuck you; that’s bullshit.” Lindsley repeated his remark several times and, as he turned to  
walk out of the office, was instructed to turn in his key, which he did. Lindsley claims that at no  
time was his productivity or performance ever raised or discussed during this meeting. He  
15 further testified, and the Respondent so stipulated, that at no time prior to his discharge was he  
ever warned, counseled, or spoken to regarding the quality or quantity of his work. (Tr. 100;  
104). The “Employee Status Change Form” prepared in conjunction with Lindsley’s discharge  
lists “Poor Performance and Lack of Work” as the reasons for his termination. (See GCX-3).

20 Camby was discharged on February 7. His Employee Status Change Form lists  
“Unavailable for Work” as the reason for the termination. (See, GCX-2). The events leading up  
to Camby’s termination were, according to the Respondent, precipitated by Camby’s failure to  
report for work on his February 6, evening shift.

25 Camby gave the following account of the events preceding his discharge. According to  
Camby, on the evening of Monday, February 5, a scheduled work night, the water pipes in an  
apartment adjacent burst at around 10 p.m. due to prevailing extremely cold temperatures,  
causing damage to his kitchen and living room. On contacting his landlord, the latter told him  
that because of the late hour, it would take some time for an emergency plumber to show up to  
make the necessary repairs, and that he would have to wait around for the plumber to arrive.  
30 Camby called Gardner to inform him of the situation, and was told by Gardner to do what he had  
to do and to keep him (Gardner) apprised of the situation. Camby contends that the plumber  
did not show up until almost 6 a.m. the next morning, right around the time Camby’s work shift,  
which ended at 8 a.m., would have been winding down. When Camby called Gardner to update  
him on the situation, he asked Gardner if he should report for work since his shift would be  
35 ending shortly, and Gardner purportedly told him not to come in. (Tr. 121).

40 Camby reported for work the following evening, Tuesday, February 6, and handed  
Gardner a letter, purportedly from his landlord, explaining that Camby had been asked to wait  
around for the plumber the night before when the water pipes burst. (GCX-16). Camby,  
however, did not complete his February 6, night shift, explaining that midway through his shift,  
at around 3 a.m., he received a call from his girlfriend who shares his apartment, telling him that  
his bathroom pipe had burst. Camby told Gardner that he needed to go home right away to  
take care of this problem, and Gardner, he contends, gave him permission to do so. Camby did  
not return to work that evening to finish his shift. When he called Gardner to ask if the latter  
45 wanted him to return to work, Gardner purportedly told him that everything was pretty much  
squared away and that he did not need Camby back that night. (Tr. 123-124)

50 When Eaton arrived for work Tuesday morning, Gardner told him of the note Camby had  
given him from the landlord regarding the frozen pipes, and that Camby had left his shift early  
that evening again due to a frozen pipe. Eaton apparently concluded at that point that Camby’s  
attendance and performance problems would no longer be tolerated. Eaton testified to having  
some reservations about Camby’s alleged frozen pipe emergencies, and expressed the view

that Camby may have been trying to avoid working in the bitter cold weather that was gripping the area. He explained that if this was the case, he could understand why Camby might not want to work in such weather, because he too would not want to work in -15 degree temperatures. Nevertheless, he went on to explain that other employees did show up for work in such conditions, and that Camby's absence placed a greater burden on the employees who reported for work. Eaton then decided to terminate Camby for his absences.

On reporting for work on Wednesday, February 7, Camby was met by Gardner and another shift supervisor, Chad Bigness. Gardner handed Camby an "Employee Warning Notice," and told him that because he had missed work "these past couple of days," "they don't want you back."<sup>5</sup> Other than requesting a copy of the Employee Warning Notice, Camby claims that not much else was said after that. (Tr. 125-126). Gardner did not testify in this proceeding.

The record reflects that Camby had previously been warned about his absences. Thus, Camby received an "Employee Warning Notice" on January 30, 2006 for a "No call-No Show" absence four days earlier, and another such warning on October 13, 2006 for an "Unexcused Absence" the day before. This latter warning advised Camby that if this conduct persisted, "it will result in further disciplinary action up to and including termination." (See GCX-6, attachments 2 and 3).<sup>6</sup> In fact, Camby himself recalled that on or around January 18, some three weeks before he was discharged, he arrived late to work and was told by Gardner that if he was late for work again, he should just not come back. Gardner, he contends, had never said anything like this to him before. Gardner explained that the message actually was from Eaton, and when he asked why Eaton had not conveyed the message himself, Gardner simply told him Eaton was the boss. (Tr. 111-112).

The General Counsel contends that the Respondent, through Potts, unlawfully, and in violation of Section 8(a)(1) of the Act, threatened Lindsley with unspecified reprisal for soliciting Union cards by telling him to "watch his back," and that the discharges of Lindsley and Camby were motivated by their involvement in Union activity and violated Section 8(a)(1) of the Act. I find no merit in these allegations.

## B. Discussion and Analysis

### 1. The Section 8(a)(1) allegation

Regarding the alleged unlawful "watch your back" remark attributed to Potts by Lindsley, as previously discussed and found, Potts made no such threat or other similar remark, rendering this particular allegation meritless. However, even if Potts had made the remark, the finding of a Section 8(a)(1) violation would not be warranted, for Potts is not alleged to have been a supervisor within the meaning of Section 2(11) of the Act, and the record evidence, contrary to the General Counsel's assertion, fails to establish that Potts was an agent of the Respondent under Section 2(13) of the Act when the alleged remark was made, which could

<sup>5</sup> The "Employee Warning Notice," received in evidence as attachment 4 to GCX-6, describes Camby's failure to show up for work on February 5, "due to frozen pipes," and his early departure from work on February 6, again due to a burst pipe, as the reasons for his discharge. The Warning Notice states that Camby had been "counseled on attendance before," and that, "as of 2-7-07 [his] employment with Land Air is terminated."

<sup>6</sup> Attachment 1 of GCX-6 is also an Employee Warning Notice given to Camby on January 10, 2006 for arriving late to work. The notice cautions that Camby's next offense will result in a written warning and lead to suspension and/or termination.

have rendered the Respondent liable for Potts' actions.<sup>7</sup>

## 2. The Section 8(a)(3) allegations

### 5 (a) Lindsley's discharge

The General Counsel contends that Lindsley was unlawfully discharged for his Union activity. The Respondent counters that Lindsley was lawfully let go for economic reasons. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established a causation test to be applied in cases alleging a violation of Section 8(a)(3) or Section 8(a)(1) that turn on employer motivation. Under that test, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to discharge or otherwise discipline an employee. The General Counsel makes out a prima facie case by showing that the affected employee had engaged in union or other protected activity, that the Respondent was aware of such activity, that it harbored antiunion animus, and that the decision taken against the employee was motivated if not wholly at least in part by said animus. If the General Counsel is able to satisfy this initial burden, the burden will shift to the employer to demonstrate that it would have taken the same action even in the absence of any protected conduct.

The General Counsel has failed to make a prima facie showing that Lindsley's discharge was in any way motivated by antiunion animus. While the evidence does show that Lindsley engaged in Union activity prior to his discharge by distributing Union cards to employees and seeking to have Potts sign a Union card, there is no evidence to show that the Respondent

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<sup>7</sup> In determining the agency status of an individual, the Board looks at "whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that 'employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB No. 1, slip op. at 2 (2007). The burden of proving the existence of an agency relationship is on the party making the claim. *Suburban Electrical Engineers/Contractors*, supra, citing *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Here, Potts, as a working foreman, spends more than half his time working alongside other mechanics doing the same mechanic work. There is little evidence to indicate that Potts actually assigns work to individual mechanics. Rather, Lindsley described his work assignments as consisting simply of pulling a work order from a box on the office door and proceeding to perform the work, or reviewing a list prepared by Potts of jobs that need to be done. It is unclear how much assigning of work Potts actually does on a daily basis, if at all. It would appear that to the extent any such assignments are made by Potts, they are purely routine and ministerial in nature, requiring the exercise of little or no discretion by Potts. Potts, as noted, has no authority to hire, fire, discipline, or recommend an employee's rate of pay. Further, the fact that Potts may, as claimed by Lindsley, do a lot of paperwork is of no consequence as it is unclear what this alleged paperwork consists of or how it relates to the agency issue. As to the claim that Potts has his own office, that assertion, as noted, was disputed by Jacobson who claimed the office was used by all employees for work-related reasons, and that he did not consider it to be Potts' private office. In any event, the mere fact that Potts may have had his own office, a claim not fully established here, does not resolve the question of whether Potts was an agent of the Respondent when he allegedly made his remark. In sum, the General Counsel, I find, has produced no evidence to show that the Respondent had cloaked Lindsley with apparent authority to speak or act on its behalf, or that Lindsley or any other employee believed this to be the case.

knew or was aware of Lindsley's conduct or pro-Union sympathies, or, for that matter, that it harbored any animosity towards the Union and its supporters. The only evidence of animus proffered by the General Counsel was the alleged threat of reprisal purportedly made by Potts to Lindsley, conduct which, as found above, did not occur. However, even if Potts had made the remark attributed to him by Lindsley, knowledge by Potts of Lindsley's Union activity is not attributable to the Respondent since, as further found, Potts was neither a supervisor nor an agent of the Respondent when the remark was allegedly made.

Nor would the General Counsel prevail even if he had been able to sustain his initial burden of establishing a prima facie case, for there is sufficient record evidence to show that Lindsley's discharge would have occurred even without his involvement in Union activity. Thus, Spencer's uncontested testimony, which I credit and which is corroborated by RX-14, makes clear that it was the decline in revenues which led to the decision to reduce labor costs at, inter alia, the East Syracuse facility. As explained by Eaton, several measures were undertaken by him in the various departments at the facility in an effort to follow through with Spencer's directive. These included reducing the work hours of drivers, requiring that his two least productive employees in the dock working section call in to see if they would be needed before reporting for work, and in the mechanic department, letting the least productive employee, Lindsley, go. There is evidence, including testimony from various witnesses, to suggest that despite being classified as a Class A mechanic, Lindsley simply did not perform as one and lacked the skills of someone in that classification. In sum, I am satisfied that the decision to terminate Lindsley was motivated solely by economic and financial reasons, and that the selection of Lindsley for termination in the mechanics department resulted from performance, not union-related, reasons. Accordingly, I find no merit to the allegation that Lindsley was unlawfully discharged for his Union activity, and shall recommend its dismissal.

#### (b) Camby's discharge

As with Lindsley, the General Counsel contends that Camby was discharged for his Union activity. The Respondent, on the other hand, insists that Camby was lawfully discharged for cause, e.g., attendance problems. I agree with the Respondent.

The record shows that Camby's purported involvement with the Union was, at best, minimal. Although Wilson apparently asked Camby, and the latter presumably agreed, to distribute Union authorization cards to other employees, there is no evidence to suggest what, if any steps, Camby took in this regard, or if he, in fact, engaged in any such activity. The evidence shows only that Camby signed a card himself, admitting that he was one of the last to do so. Further, assuming that he did engage in such conduct, there is no evidence that the Respondent had knowledge, or was aware, of his alleged Union activities. Eaton credibly testified that when he fired Camby, he was unaware of the latter's union sympathies or involvement with the Union. (Tr. 183). Nor was any evidence produced, or claim made by the General Counsel, that Gardner, who informed Camby on February 7, of his discharge, knew or was aware of Camby's Union activity or sympathies. There is likewise no record evidence to show that the Respondent harbored animosity towards the Union or its supporters. Accordingly, I find that the General Counsel has failed to make a prima facie showing that Camby's rather limited involvement with the Union played a role in the Respondent's decision to discharge him.

As with Lindsley, no violation would be found even if the General Counsel had been able to sustain his initial prima facie burden of proof, for there is sufficient evidence to show that the Respondent would have discharged Camby even without regard to his Union activity. Thus, the record makes clear that Camby had previously been warned about his attendance problems, the most recent of which occurred, by Camby's own admission, some three weeks before his

5 discharge on February 7, during which he was cautioned that repeated offenses could result in his termination. There is no disputing, and Camby readily admits, that he failed to show up for work on February 5, because of an alleged frozen pipe incident, and that, the following day, he left work less than midway through his shift, presumably again because of another frozen pipe at his home. Thus, I find that when it notified Camby of his discharge on February 7, the Respondent was merely following through with its earlier warnings to Camby that any further attendance-related problem would lead to his termination. Accordingly, I am convinced, and so find, that Camby's discharge would have occurred regardless of any union activity he may have engaged in.

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Conclusions of Law

15 1. The Respondent, Land Air Express of New England, Inc, East Syracuse, New York, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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2. The Union, Teamsters Local 317, is a labor organization within the meaning of Section 2(5) of the Act.

20 3. The Respondent did not violate the Act in any manner alleged in the complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

ORDER

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The complaint is dismissed in its entirety.

Dated, Washington, D.C., November 28, 2007.

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George Alemán  
Administrative Law Judge

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50 <sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.