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

SUN CAB, INC. DBA NELLIS CAB
COMPANY,

Respondent,

vs.

ABIY AMEDE, an Individual,

Charging Party.

CASE 28-CA-079813

**RESPONDENT'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW
JUDGE**

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I. ISSUES

The issue before the Board in the work stoppage allegation is whether employees, in a planned work stoppage, can commandeer the Respondent's property, taxicabs, in a manner that prevents other employees from performing the work the striking employees choose not to perform, at a time calculated to have the greatest economic impact on Respondent and adverse impact to the public, in order to lobby a governmental agency.

The Judge referred to the two to three hour work stoppage as both an "extended break" and as a strike. It did not have anything to do with an extended break and was, in fact, a strike.

There are several factors that the Board reviews to determine whether a work stoppage that includes a seizure of employer property or on the job work stoppage is protected. The criteria should be weighed in each case to determine the proper balancing between employee Section 7 rights and employer property rights. The Judge failed to properly weigh, or even weigh at all, the various factors to determine whether the employee strike was protected.

The Board cases that address issues of work stoppages on employer property or seizure of employer property, note that such work stoppages may be protected if they encourage employees and employers to address the immediate issues causing the work stoppage. "Interrogation" of employee issues is considered a positive and, accordingly, the allegation of interrogation does not apply. In any event, the work stoppage was unprotected, and, therefore, the questioning about unprotected conduct was not unlawful interrogation.

Respondent agrees with the Judge that the Charging Party Abiy Amede was not discharged in violation of Section 8(a) (1) and (3) of the Act. However, the Judge

improperly considered the discharge issue to be a dual motivation issue and improperly determined that General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980) that Amede's discharge was motivated by union animus. There is no evidence of union animus.

The Judge's reliance on the fact that the strike was a one occurrence event implies that a repeat of the conduct may be unprotected. Accordingly, the posting of a notice would encourage employees to engage in conduct that would possibly, even probably, be unlawful, even if the Board finds the one time work stoppage to be protected in this case. Accordingly, the Board should not require the posting of a notice. It also should not require expunging its records of the past conduct.

The Judge also made certain inadvertent errors. He addressed interrogation concerning concerted activity but then inadvertently referred to the interrogation as applying to union activity in his Conclusions of Law. The Judge also found that Respondent did not violate Section 8(a)(3) of the Act but inadvertently noted a finding of such in his proposed Notice. The Judge dismissed the 8(a)(3) allegation but failed to note such dismissal in his proposed Order. The Board should order the allegation dismissed.

II. THE WORK STOPPAGE ALLEGATIONS

A. The Strike

The Complaint alleges that on February 4, 2012, seventeen drivers of Respondent engaged in a strike to protest the number of taxicabs authorized by the Nevada Taxicab Authority. Respondent's First Amended Answer to Complaint admitted that certain employees engaged in an unprotected work slowdown/sit down strike. The Complaint also alleges that Respondent suspended the employees for engaging in the strike, and to discourage the employees from engaging in such activity. Respondent admitted that it

suspended certain employees for, *inter alia*, engaging in the unprotected strike and that it did so to, *inter alia*, discourage the employees from engaging in such conduct again.

Despite General Counsel’s assertion in the Complaint that the employees engaged in a strike, Counsel for General Counsel, time after time, referred to the employees’ conduct as taking an “extended break.” This was not an “extended break.” It was a three hour strike. The employees are required to take a one hour lunch break, and, as the handbook notes, such should be taken at the middle of their shifts. (GC Exh. 2, page 43). The employees who engaged in the strike had staggered shifts: 12:00 noon to 12:00 midnight; 2:00 p.m. to 2:00 a.m.; 3:15 p.m. to 3:15 a.m.; 3:30 p.m. to 3:30 a.m. (TR pp. 333-338). The employees in these various shifts would normally have their mandatory lunch hours at differing times. Below is a list of the seventeen drivers who were suspended, listing the lunch hour claimed on their trip sheets, and the actual time they were on the strike. The lunch hours claimed by Ermias Mehanzel and Abinate Bekele have nothing to do with the time they were on the strike, although Mehanzel did have a six minute overlap. Mehanzel’s claimed lunch hour was 6:00 p.m. to 7:00 p.m. He was engaged in the strike from 6:54 p.m. to 8:57. Bekele’s claimed lunch hour was 10:30 p.m. to 11:30 p.m. He was engaged in the work stoppage from 6:59 p.m. to 9:26 p.m.

Driver	Lunch Claimed	Actual
Alemu, Dawit	7:30 – 8:30	7:01 – 9:48
Amede, Abiy	8:00 – 9:00	7:21 – 9:55
Asheber, Tadesse A.	7:30 – 8:30	7:00 – 9:00
Bekele, Abinate	10:30 – 11:30	6:59 – 9:26
Beyene, Getachew A.	7:50 – 8:50	7:20 – 9:00
Biru, Daniel	7:39 – 8:40	7:11 – 9:09
Dirar, Abraham	8:30 – 9:30	7:23 – 9:06
Gebreyesus, Kifelemarko	8:00 – 9:00	7:14 – 9:52
Haileselassie, Getachew B.	8:00 – 9:00	6:52 – 9:11
Hasen, Akmel	8:00 – 9:00	7:43 – 9:43
Mehanzel, Ermias	6:00 – 7:00	6:54 – 8:57
Terefe, Senait	8:00 – 9:00	7:00 – 10:00

Terffa, Abrham H.	8:40 – 9:40	7:33 – 9:40
Wolde, Hailemariam G.	7:00 – 8:00	7:00 – 10:00
Woldemariam, Getadegu	7:15 – 8:15	6:59 – 9:08
Yadessa, Yonas H.	7:10 – 8:10	7:59 – 9:55
Yezengaw, Leuseged W.	7:40 – 8:40	7:14 – 9:11

The actual time that Senait Terefe and Hailemariam Wolde were involved in the work stoppage was three hours, from 7:00 p.m. to 10:00 p.m. Each of the other drivers engaged in the work stoppage during this time period. Jaime Pino testified that he informed each striking employee of the time that they were on the work stoppage and that, other than Getadegu Woldemariam, every employee agreed with such calculation. (TR pp. 332-340). He also testified that Respondent had never experienced that many employees taking their “lunch hour” all at the same time. (TR p. 343). It should also be noted that the organizers of the work stoppage obviously planned for it to take place at the optimum time to have the greatest impact on the taxicab companies and the public. It is also uncontradicted that other taxicab drivers from other companies took part in this organized strike at precisely the same time as the drivers from Respondent. (TR p. 232). There is no evidence that the organizers made any effort to coordinate the breaks or lunch hours of the other companies’ drivers with the drivers from Respondent.

It should also be noted that each of Respondent’s drivers who took part in the strike used Respondents’ taxicabs with the medallions that permitted their use to pick up passengers pursuant to the Nevada Revised Statutes. Respondent had numerous other taxicabs at its disposal, but it could not use them to continue the work of the striking employees because it is against the law to operate a taxicab for hire without the appropriate medallion. (NRS 706.756(j); TR p. 340).

This is relevant on two counts. First, even though Respondent did not usually dictate when drivers would take their precise lunch hour, it had the power to do so. The handbook also allows for two 15 minute breaks. Respondent has the right to dictate when those breaks are to be taken. By engaging in the strike, with the medallions, for up to three hours, Respondent was deprived of the ability to call-in its extra board drivers to drive the taxicabs sitting at Respondent's yard. (TR pp. 119-120, 341). Respondent was also deprived of the ability to use replacement employees or its supervisors to drive available taxicabs because of the absence of the medallions. This is true regardless of whether any attempt to use an extra board driver would have occurred in the portion of the strike that was labeled a break by the striking employee, or the asserted "extended" break portion of the strike. The entire three hour period of the strike should be considered to be just that – a strike.

Secondly, even if a portion of the strike were considered to be a permitted lunch break, and even if two fifteen minute breaks noted in the handbook were tacked on to make a one and a half hour permitted break, the fact that the strike was "added on" to the breaks, in the manner that the strike took place, coupled with the fact that Respondent was deprived of operating replacement taxicabs for the entire three hour period, should be factored into the analysis of the criteria utilized by the Board in determining whether the strike was protected. As will be seen, *infra*, one of the criteria considered is the duration of the work stoppage. Another criteria is whether employees interfered with production or deprived the employer of access to its property. In this case, even if the strike were to be considered to be only the hour and a half tacked on to the lunch break and both 15 minute breaks, the intended, and in this case realized, impact of the entire three hour

work stoppage should be considered in balancing the Section 7 rights of employees with Respondent's property rights.

B. Work Stoppage was an Unprotected "Sit-down Strike".

The analysis of this case should start with the basic proposition that sit down strikes, where the employees remain at their station and prevent others from performing their work, is unprotected. In *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 at 255-56 (1939) the Supreme Court stated:

This was not the exercise of the "right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner . . .

Conversely, the Supreme Court and the Board have noted that not all on-the-job work stoppages are unprotected, and has sought, under certain circumstances, to protect a spontaneous, short work stoppage on an employer's premises by unrepresented employees seeking to address grievances to their employer. The Board has developed numerous criteria to analyze when weighing the Section 7 rights of employees versus the property rights of employers in these cases. As will be seen, these factors clearly establish that the work stoppage in this case was unprotected. But the facts of this case go further. This case does not even fit into the type of spontaneous work stoppage the Board has sought to protect in certain on-the-job work stoppages. This work stoppage was far from spontaneous, and it did not even involve an effort to address employee grievances to Respondent. It was an organized, calculated strike involving employees of several taxicab companies, designed to financially harm the companies and to deprive the public

of service, in an effort not to address grievances to their employers, but to lobby a governmental agency. Even the Counsel for General Counsel, in his opening statement stated that it was an organized strike (TR p.19, line 6).

The Board in *Quietflex Manufacturing Co.*, 344 NLRB 1055 (2005) found that the discharge of 83 employees that engaged in an on-the-job work stoppage was not unlawful because the conduct of the employees was unprotected. The Board noted that some on-the-job work stoppages can be protected, but noted, citing *Cambro Mrg. Co.*, 312 NLRB 634 at 635 (1993), that at “some point, and employer is entitled to exert its private property rights and demand its premises back.” The Board then noted that “the precise contours” of when a work stoppage is protected cannot be defined by “hard-and-fast rules” but instead involves the weighing of “many relevant factors.” *Quietflex, supra*, at 1056. The Board then listed ten factors “that the Board has considered in determining which party’s rights should prevail in the context of an on-site work stoppage.” *Quietflex, supra*, at 1056:

- (1) the reason the employees have stopped working;
- (2) whether the work stoppage was peaceful;
- (3) whether the work stoppage interfered with production, or deprived the employer access to its property;
- (4) whether employees had adequate opportunity to present grievances to management;
- (5) whether employees were given any warning that they must leave the premises or face discharge;
- (6) the duration of the work stoppage;

(7) whether employees were represented or had an established grievance procedure;

(8) whether employees remained on the premises beyond their shift;

(9) whether the employees attempted to seize the employer's property;

and

(10) the reason for which the employees were ultimately discharged.

Respondent will address each of these criteria and their application to this case.

1) The reason the employees have stopped working;

In commenting on this criterion in *Quietflex*, the Board noted that in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the employees' on-the-job work stoppage to protest the lack of heat during a harsh winter was held protected. Yet it should be noted that in *Washington Aluminum*, and in virtually every case where the Board has held on-the-job work stoppages to be protected, the protests were directed at the employers involved. In each case the employer involved controlled the issue which was the concern of the employees involved. Neither of these factors is present in this case.

The General Counsel alleged in paragraph 5(a) of the Complaint that the striking employees engaged in a strike to "protest the number of taxicabs permitted by the Nevada Taxicab Authority. . ." In this regard, Counsel for the General Counsel asked Yonas Yadera why an increase in medallions would be important to him. Yadera stated:

Because if they got another medallion, they can cut us so just get together to ask the TA what they would do to stop. (Emphasis added herein.)

(TR p. 314).

Furthermore, Respondent did not have the power to remedy the concerns of the striking employees. Indeed, even the Judge found that Respondent did not have the ability to remedy this concern. (JD p. 4, lines 40-41). The Taxicab Authority controls the number of medallions that are allocated to the various taxicab companies in Clark County. NRS 706.8824(6) requires the Taxicab Authority to annually review the existing allocation of medallions. Whenever “circumstances require” a change in the allocations, Nevada law requires the Taxicab Authority to “consider the interests, welfare, convenience, necessity and well-being of the customers of taxicabs.” NRS 706.8824(1). The same considerations of the public welfare are required when the Taxicab Authority determines whether to temporarily increase medallion allocations. NRS 706.8825(1).

It is clear that the protests were, as alleged by the General Counsel, directed at the Taxicab Authority, and not to Respondent. It is also clear that Respondent does not have the power to increase the allocations of medallions in Clark County. General Counsel may argue that Respondent could respond to the protests by deciding to support the position of the employees. In theory, Respondent could choose to not urge the Taxicab Authority to increase allocations of medallions in Clark County, but that would not stop other taxicab companies from seeking such increases and would not negate the obligation of the Taxicab Authority to increase the allocation of medallions when the public interest requires such. State law mandates that the Taxicab Authority consider the interests of the public when considering an increase in medallions. The interests of taxicab companies and the drivers are not even mentioned. That is not to say that such concerns would not be addressed, but the overriding obligation of the Taxicab Authority is to serve the needs of the public.

In theory Respondent could also, pursuant to NRS 706.8824(4), refuse to put any additional allocated taxicabs with medallions in service within thirty days of an increase in the allocation of medallions and thereby void its share of the increased allocations. But again, that would not negate the Taxicab Authority's obligation to address the public need by increasing the allocations of other taxicab companies if needed. The increase of allocations of medallions to other taxicab companies impacts the drivers of Respondent just as much as any increase in the allocation of medallions for Respondent. This is why the protests of the taxicab drivers of all of the companies in the work stoppage were directed at the Taxicab Authority, not to any of the taxicab companies.

Any theoretical ability of Respondent to address the protests of the striking employees is just that – theory. Furthermore, the General Counsel's witnesses confirmed the allegation of the Complaint that their protests were directed at the Taxicab Authority.

This is a basic distinction that separates this case from cases where the Board has held on-the-job work stoppages to be protected. The striking employees in this case took Respondent's property, the taxicabs, during their work time, to engage in an orchestrated political protest directed at a public agency.

2) Whether the work stoppage was peaceful;

Of the ten criteria listed in the *Quietflex* decision, this is the ONLY one that is in the striking employees' favor.

3) Whether the work stoppage interfered with production, or deprived the employer access to its property;

At one point Counsel for the General Counsel objected to the questioning of witnesses concerning the economic impact of the strike, contending that the economic impact of a strike does not factor into the lawfulness of the strike. This may be true in a

strike that does not command an employer's property, but it is, as noted by the Board, extremely relevant in determining the lawfulness of on-the-job work stoppages.

The work stoppage in this case substantially interfered with Respondent's productivity and clearly deprived Respondent access to its property, the taxicabs with medallions. In fact, this work stoppage was designed to financially impact Respondent and inconvenience the public to the greatest degree possible. There is no dispute that the busiest demand for taxicab service is on a Saturday evening around 7:00 p.m. to 9:00 p.m. (TR pp. 343-345). This is precisely the time which the organizers of the strike chose to strike. Furthermore, this particular Saturday night was on Super Bowl weekend, one of the busiest times of the year for taxicab companies. (TR p. 345).

It is also clear that the strike was designed to, and did, interfere with Respondent's "production." The striking employees did more than simply withhold their services. They prevented other drivers from performing the work they chose not to perform. The striking drivers maintained control of the medallions which prevented Respondent from taking any action to perform the work. Extra board drivers, supervisors, or replacements, could not be utilized to drive the taxicabs sitting at Respondent's yard because it would be against the law to utilize them without medallions. (TR pp.119-120).

These facts clearly differentiate this case from all, or almost all, of the cases where the Board has found on-the-job work stoppages to be protected. In said cases the Board found that the work stoppages were limited in time and had little or no impact on production. In this case, the impact was designed to be exactly the opposite, and the intended consequences were realized. Jaime Pino testified that revenue for that Super Bowl weekend should have been \$50,000.00 to \$100,000.00 greater. (TR p. 116). The inconvenience to the public was also maximized. Pino testified that "every hotel" was

suddenly calling for service and Respondent could not serve “our public.” (TR pp. 81-82).

The interference with production, preventing others from operating taxicabs to perform the work the striking employees chose not to perform, makes this case a classic “sit down strike.” In commenting on this criteria, the Board in *Quietflex* noted that interfering with production is more than withholding services. (344 NLRB at 1056 n. 6). Indeed, in *Quietflex*, the employees who withheld services gathered in the employer’s parking lot and did not prevent others from working. This case, however, is like the classic sit down strike where a striking production worker sits at his machine preventing others from operating it.

It should also be noted that the productivity reports for February 4 reveal the dramatically poor productivity of the striking employees. Of the 88 drivers on the “Night” shift Abraham Dirar, Akmel Hasen, Abrham Terffa, Getachew Beyene, Getadegu Woldemariam, Abinate Bekele, Senait Terefe, Yonas Yadessa and Daniel Biru were ranked numbers 80 through 88 respectively. (GC Exh. 10, page 5). Of the 28 drivers on the “Night – 2/2” shift Hailemariam Wolde, Leuseged Yezengaw and Ermias Mehanzel were numbers 24, 25 and 28 respectively. (GC Exh. 10, page 6). Of the 23 drivers on the “Night – 12/12” shift, Dawit Alemu, Abiy Amede and Tadesse Asheber were numbers 19, 21, and 22 respectively. (GC Exh. 10, page 7).

The Judge did find that the work stoppage interfered with Respondent’s ability to serve the public (JD p. 4, lines 42-43), but did not discuss the severity of the ability to serve the public or that the strike was calculated to have the greatest impact in depriving the public of taxi cab service based on the timing of the work stoppage.

4) **Whether employees had adequate opportunity to present grievances to management;**

Again, the “grievances” of the striking employees were directed at the Taxicab Authority, not to management. As will be noted, *infra*, the employees had, and have, ample opportunity to address their “grievances” to the Taxicab Authority pursuant to the Nevada Open Meeting Laws.

Nevertheless, it should be noted that the employee handbook addresses employee grievances in a section entitled “**Problems,**” which provides:

Let’s talk it over! If you have a problem or concern about your work or anything relating to your association with Nellis Cab Company, we would like to work with you in resolving it; most of the time we can work it out.

The person to see with your problem is an Office Shift Supervisor. If there is some reason you do not feel comfortable doing that, talk with a Road Supervisor or the Director of Operations. (Emphasis added herein).

GC Exh. 2, page 16).

Jaime Pino is the Director of Operations. (TR p. 23). Jaime Pino stated that he meets with employees every day and has an open door policy. (TR p. 24). No one contradicted him in such assertion and not one General Counsel witness stated that they made any attempt to address their concerns about the medallions to Respondent’s management.

...

...

5) Whether employees were given any warning that they must leave the premises or face discharge;

The employees were not discharged. In their suspension warning notices they were informed that repeating the conduct would result in termination. As noted in Respondent's Amended Answer, Respondent took its action to discourage such unprotected activity in the future.

6) The duration of the work stoppage;

The work stoppage lasted, as Counsel for General Counsel noted in his opening argument, for two to three hours. More importantly, it was designed to, and did, occur at the time in which it would cause the most economic damage to Respondent and the greatest adverse impact to the public. Even if the Board finds that the strike during working time was an hour and a half (by subtracting the mandatory lunch hour and two fifteen minute breaks from the three hour work stoppage), the fact that the strike during working time was intentionally added to the alleged breaks, and that it was intentionally taken at the optimum time to adversely affect Respondent's productivity and to adversely affect the public, should be considered. A ninety minute work stoppage during Saturday night on Super Bowl weekend would have a greater impact on Respondent's productivity and the public welfare than a ninety minute work stoppage in the middle of the afternoon on a Wednesday.

As noted, the Board has stated that the locus of the accommodation between employee and employer rights may fall at differing points on the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights in any given context. In this case, where the strike occurred, by design, at the optimum time to adversely impact Respondent and the public, the weighing of the duration of the strike

should be measured accordingly. The three hour strike lasted through almost 100% of the prime time for receipt of business revenue and the providing of public service on a Saturday night on Super Bowl weekend. Conversely, if looking only at the minutes involved when analyzing this criterion, then the criterion should not carry the same weight when compared to the criteria of seizure of property and the interference with productivity.

The Judge apparently relied upon the alleged shortness of the strike, but, in doing so, did not analyze or discuss the timing of the event to maximize the impact to the public of such strike, regardless of its length. (JD p. 5, lines 29-31). In failing to do so, the Judge failed to address the locus of the accommodation between employee and employer rights by failing to evaluate the nature and strength of the respective rights in the context of this case.

7) Whether employees were represented or had an established grievance procedure;

Once again, the employees were protesting to the Taxicab Authority, and not Respondent. However, as noted above, the employees have an avenue, as outlined in their handbook, to address their concerns to management. Again, it should be emphasized that there is no evidence that the employees made any attempt to address their concerns about the number of medallions to Respondent's management. The Judge failed to discuss this in the Decision when he simply found that the employees were not represented and did not have an established grievance procedure. (JD p. 4, lines 47-48).

More importantly, the Judge did not discuss the fact that the employees did have an established procedure to address the Taxicab Authority. The employees had, and have, an established procedure to address the agency through the Nevada Open Meeting

Laws. NRS 241.020(1) provides that “all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies.” The Taxicab Authority is a “public body” within the meaning of the Open Meeting Laws. NRS 241.015(3) provides that a public body includes any board, commission or committee consisting of at least two persons appointed by the Governor. NRS 706.8818 provides that the Taxicab Authority has five members all of which are appointed by the Governor. The awarding of taxicab medallions must be done pursuant to a public meeting. NRS 241.015(2)(a)(1) and (2) provide a broad definition of the term public meeting. Whenever there is a “public meeting” the Nevada Open Meeting Laws mandate that public comments will be heard. NRS 241.020(2). The notice and agenda of the meeting must describe when public comments will be heard and what restrictions will be placed on public comments. Any restrictions must be reasonable restrictions on the “time, place and manner of the comments, but may not restrict comments based upon viewpoint.” NRS 241.020(2)(c)(7). There is no dispute that numerous taxicab drivers from numerous companies addressed the Taxicab Authority in its public meeting of February 28, 2012. Abiy Amede noted that he was permitted to speak for three minutes. (TR pp. 255, 286). In fact, he had a statutory right to do so.

8) Whether employees remained on the premises beyond their shift;

The employees did not remain on the premises or in their taxicabs after their shift. However, if the Board finds that a portion of their time in the strike was a “break” or a “lunch hour” then it should be noted that the employees continued to occupy Respondent’s taxicabs, with the medallions, beyond their breaks or lunch hour.

...

...

9) Whether the employees attempted to seize the employer's property;

There is no doubt that the employees commandeered the taxicabs with the medallions and engaged in a strike during their working time in a manner that made it impossible for Respondent to operate the allotted cabs afforded it by the Taxicab Authority. This is what makes this case a classic "sit down strike." Furthermore, the striking employees used Respondent's gasoline to operate the taxicabs in the orchestrated demonstration. (TR pp. 58, 328-329).

10) The reason for which the employees were ultimately discharged.

The employees were not discharged. The Complaint alleges that the employees engaged in a strike to protest action by the Taxicab Authority and the Answer admits that Respondent disciplined the strikers for engaging in an unprotected strike.

...

The Board in *Quietflex* reviewed other Board cases that found on-the-job work stoppages to be unprotected, including *Waco, Inc.*, 273 NLRB 746 (1984) and *Cambro Mfg. Co.*, 312 NLRB 634 (1993). In *Waco*, the employees remained in the employer's lunchroom for three and one-half hours after being told to return to work or leave the premises. The Board acknowledged that unrepresented employees, without an established grievance procedure, have the right to "engage in spontaneous concerted protests concerning their working conditions," but that the conduct of the employees overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected." *Waco*, 273 NLRB at 746.

The spontaneity of on-the-job work stoppages is present in almost all of the cases that address such work stoppages. A common theme in the cases that analyze on-the-job work stoppages is the concept that unrepresented employees, without other means of

addressing work issues, sometimes engage in spontaneous concerted activity to address their issues with management, and they should not lose the protection of the Act if they remain on the employer's premises for a short period of time in an unobtrusive manner. Such spontaneity is not present in this case. This was an organized work stoppage that involved employees from numerous cab companies which was designed to impact the taxicab industry in a critical time in an effort to advance the position of the employees before the Taxicab Authority. Flyers were circulated among the employees of the taxicab companies, and substantial "texting" among the employees took place. (TR pp. 224-225). Television news reporters interviewed striking employees and the event made the evening news. (TR pp. 114, 228-231). This had all the characteristics of a well planned orchestrated event. The General Counsel, in his opening statement, said that the strike was organized. (TR p. 19, line 6). The Judge failed to address in his Decision the non-spontaneous nature of the orchestrated strike and the corresponding distinction between this case and those cases which found spontaneous conduct protected.

In *Waco*, the Board also found that the employees failed to "communicate the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns." *Waco*, 273 NLRB at 747. In this case the "particulars" of the employee "grievances" were directed at the Taxicab Authority, not to Respondent. Not only did the employees not address these issues to Respondent, Respondent would not have been able to resolve their "grievances" if the employees had presented them to Respondent. It is the Taxicab Authority, not Respondent, that determines the proper allocation of medallions to serve the public.

C. The Interrogation Allegation in the Context of Seizure of Employer Property

In this regard, it should be noted that General Counsel's allegation in paragraph 5(b), that Jaime Pino unlawfully interrogated the striking employees concerning their work stoppage, is inconsistent with General Counsel's contention that the strike itself was protected. As noted in *Waco*, the Board tries in these types of cases to protect spontaneous efforts of unrepresented employees to address grievances to their employer through peaceful, unobtrusive conduct. This concept envisions communication between employees and management concerning such grievances. Conversely, the concept of unlawful interrogation is based on the premise that an employee has the right to maintain secrecy about his Section 7 activity and that the employer is not even allowed to inquire about such. The General Counsel has not only alleged that protests of the striking employees were intended to be addressed to the Taxicab Authority rather than Respondent, he has alleged that Respondent cannot even ask questions concerning the striking employees' work stoppage. In a review of the cases where the General Counsel has alleged on-the-job work stoppages to be protected, there does not appear to be corresponding allegations of interrogation concerning the communications that ensued between management and the employees engaged in the work stoppages. Again, this case does not even fit the type of conduct the Board seeks to protect when weighing Section 7 rights against employer property rights in on-the-job work stoppages. The Judge did not address this issue in his Decision.

D. Impact of this Case

It is important to understand what is at stake in this case. The tourist industry is obviously the key economic engine of Las Vegas. Saturday evenings are prime times to conduct work stoppages that would affect the tourist industry as well as the taxicab

companies. In addition, there are numerous events, such as Super Bowl weekend, which would increase the number of tourists to the Las Vegas Strip. If the conduct of the employees is found to be protected in this case, there is nothing to prevent the same acts from taking place again. Organizers could again call on taxicab drivers, while on their shifts, to take their taxicabs with the corresponding medallions, to a particular location at a particular time, to engage in a three hour work stoppage at the optimum time to adversely impact the taxicab companies and the public, in order to send their message to the Taxicab Authority, a public agency which must, by statute, provide the employees with an opportunity to address the agency when it conducts its annual review of allocation of medallions, or when it considers an increase in medallions, either on a long term basis or on a temporary basis. Such conduct would not leave the taxicab companies with any lawful means to respond to this activity. They could not call extra-board drivers, replacements or supervisory staff to operate the taxicabs.

It should also be noted that taxicab companies would not be able to provide service in such situations even if they had advance knowledge of the work stoppage. Jaime Pino testified that he had heard rumors of the work stoppage. Counsel for the General Counsel asked him why he did not prepare for such activity if he had advanced knowledge, and he responded that he never thought it would really happen. (TR p. 120). Yet what could he plan to do? He could have extra-board drivers ready to take over any taxicab with a medallion that was returned, but as long as the striking employees remained in possession of the taxicabs with medallions, any “planning” would be futile.

The employees could, of course, engage in a lawful strike by leaving their taxicabs, with the medallions, at Respondent’s yard. They could then participate in any demonstration permitted by law. In such case Respondent could take whatever action

employers are provided under the law to attempt to continue to operate during a strike, including calling in other drivers to operate the taxicabs with the medallions, seeking replacement drivers, or using qualified supervision to drive the taxicabs. If such had occurred in this case, Jaime Pino testified that he would have gotten drivers for at least one-half of the taxicabs with medallions. (TR p. 120).

But even if General Counsel argues that Respondent may not have been able to get any replacements, any extra-board drivers, or any qualified supervisors to drive taxicabs when the employees engaged in their work stoppage, such argument misses the point. The point is, the striking employees prevented Respondent from even trying to get extra-board drivers, or replacement drivers or qualified supervisors to drive the taxicabs. The striking employees, with the medallions in their possession, prevented Respondent from even considering such options.

E. The Allegation of Interrogations

General Counsel alleged that Jaime Pino interrogated employees when he questioned employees about the work stoppage. Of course, if the work stoppage was unprotected, then it certainly lawful to ask employees questions about their unprotected activity. It is respectfully submitted that the work stoppage was unprotected and therefore there was no unlawful interrogation.

In the Judge's Conclusions of Law he apparently inadvertently referred to the alleged interrogation as interrogation of union activities and union sympathies. (JD p. 7, lines 30-31). This is inconsistent with his recommended Order directing Respondent to cease interrogating employees about protected concerted activities. Respondent takes the position the conduct did not constitute unlawful interrogation, but in the event the Board disagrees, it should make clear that the alleged interrogation did not involve union

activity.

F. Alleged Prior “Extended Breaks”

Counsel for General Counsel sought to present evidence that employees in the past had occasionally taken breaks of longer than an hour and were not disciplined for such. Respondent takes the position that such evidence is irrelevant. However, it should be noted that the evidence of such past history is extremely weak. Senait Tereffe testified that most of the time she never even takes breaks, and that “maybe” she might take a longer break. (TR pp. 300-301). Yonas Yadessa stated that he does not usually take longer breaks. (TR pp. 319). In view of the substantial testimony of Amede, Yadessa and Tereffe of their extraordinary efforts to maintain “book” it is unlikely that any extended breaks ever occurred, or, if they did, they were rare.

In any event, there is no evidence that anyone in management even knew of such alleged extended breaks. Pino testified that he never knew of anyone taking extended breaks and, accordingly, never disciplined anyone for such, other than for the strike. (TR pp. 73-74, 341-342). Even Counsel for General Counsel elicited testimony from Pino that a GPS read out of no fares for over an hour would not establish that the employee was taking a break. Respondent would have to do further investigation, as Pino did in the case of the strike, to establish that an employee was taking an extended break. (TR pp. 364-365). In this regard, Pino “waived” any further suspension for Getadegu Woldermariam when he convinced Pino that he took his hour lunch at home and then was waiting for rides at the airport. (GC Exh. 24; TR pp. 338-339).

G. Faulty Conclusion of Administrative Law Judge

The Judge noted the Supreme Court case of *Easter, Inc. v. NLRB*, 437 U.S. 556, 558-566 (1978) for the proposition that Section 7 protects employees for engaging in

concerted activity to improve working conditions by resorting to judicial forums. Yet that case did not involve the seizure of employer property. No one contested the right of Respondent's employees to address their concerns to a public entity. The issue is whether such conduct fits into the narrow cases involving spontaneous action of employees in seizing employer property or remaining on employer property in limited efforts to address their grievances to their employer. The reliance on such a case would be like citing a case where employees are permitted in a traditional strike to attempt to stop all production of their struck employer. Such obviously is a permitted purpose of a strike. But when employees seize the property of the employer in a strike whether such strike interferes with production is one of the criteria used to analyze whether the work stoppage is unprotected.

The Judge simply failed to weigh the various criteria listed in *Quietflex* to determine the locus of the accommodation between employee rights and employer rights. The Board has noted that such locus may fall at different points on the spectrum depending on the nature and strengths of the Section 7 rights and the private property rights of the employer. By noting the alleged shortness of the strike, the Judge ignored the timing of such allegedly short duration that caused its impact on the "production" of the employer to be extremely great. By noting that the employees were not represented and allegedly did not have an established grievance procedure, the Judge ignored the facts that the employees were addressing a public agency and that they did have an established procedure to communicate their concerns directly to the public agency.

H. No Posting of Notice or Expunging of Records is Appropriate in this Case

The Judge seemed to emphasize the fact that the strike only occurred once in making his determination that the striking employees did not lose the protection of the Act. (JD p. 5, lines 29-30). This would imply that a repeat of such action would lose the protection of the Act. There is some support for the concept that a repeat of such action would be considered in the evaluation of the criteria listed in *Quietflex*. Accordingly, even if it is found that the strike was protected in this one instance, it is inappropriate to require Respondent to post a Notice that would mislead the employees into believing that they can engage in the same conduct again. It is also inappropriate to require the expunging of records that would show who would potentially repeat any action in the future. Any requirement to post a Notice or to expunge records should be dispensed with in this case.

III. THE DUAL MOTIVE ALLEGATION

The Judge improperly found that the allegation involving the alleged discharge of employee Amede for union activity constituted a dual motive case. The Judge improperly found that the General Counsel established a prima facie case that Amede was discharged because of his union activities. (JD p. 6, lines 15. 46-50). In discussing the law of dual motive cases, the Judge noted the General Counsel's obligation under *Wright Line*, 251 NLRB 1083 (1980) to first establish a prima facie case that the employee engaged in union activity and that the union activity was the motivating reason for the employer's action. He then cited *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004) for the proposition that unlawful motivation may be found based upon direct evidence of employer animus toward union activity and that it can also look at circumstantial evidence, such as inconsistencies between the proffered reasons for the

discipline and other actions of the employer, disparate treatment, deviations from past practice, and proximity in time of the discipline to union activity. (JD p. 6, lines 23-33).

Yet only the timing of the discharge to union activity is somewhat present in this case. There is no evidence of disparate treatment. Indeed, the Judge specifically found that the discharge for excessive accidents was consistent with other discharges of employees involved in accidents in 2012. (JD p. 7, lines 13-14).

Amede's name was listed along with 9 other employees on correspondence from the Union to the Employer naming its organizing committee. (GC Exh. 29a). Later Amede, one of many on the list, had an accident and was terminated. There is no causal connection between the discharge and the union activity.

In this regard, there is no independent 8(a)(1) allegation involving union issues. There is no background of union animus. Going even further, there is no evidence of any reaction at all by Respondent to the apparent union organizing campaign. There is absolutely nothing to establish union animus or that union animus was a motivating factor in the discharge of Amede.

The Board has held that the General Counsel did not establish his initial burden under *Wright Line*, in both *Cardinal Home Products, Inc.*, 338 NLRB 1004 (2003) and *Abramson, LLC*, 345 NLRB 171 (2005). In both cases there was evidence of union animus by the employers but the Board still found that there was insufficient evidence to establish that certain discipline was motivated by the employees' union activities. In *Cardinal*, at page 1009, the Board stated:

While the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a "mere

suspicion” that union activity was a motivating factor in the decision. . . Here, the General Counsel’s case rests on little more than suspicion, surmise, and conjecture.

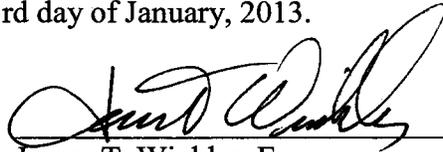
The evidence of union animus was existent in these cases, but the Board held that the General Counsel did not establish his initial burden under *Wright Line*. In our case, there is no evidence of union animus at all.

Finally, the Judge found that the discharge of Amede did not violate the Act, but failed to include in his recommended Order the dismissal of said allegation. The Board should order the allegation dismissed.

IV. CONCLUSION

Based on the above, the entire Complaint should be dismissed.

Dated in Las Vegas, Nevada, this 23rd day of January, 2013.



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On January 23, 2013, I served the within document(s):

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

VIA EMAIL

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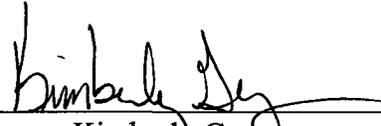
VIA E-FILING

National Labor Relations Board
Executive Secretary's Office
1099 14th Street, N.W.
Washington, D.C. 20570

VIA U.S. MAIL

Abiy Chance Amede
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Las Vegas, NV 89103-7431

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 2013 at Las Vegas, Nevada.



Kimberly Gregos

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