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SUN CAB, INC. DBA NELLIS CAB COMPANY

**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 ANSWERING BRIEF
TO GENERAL COUNSEL'S
EXCEPTIONS**

I. INTRODUCTION

In evaluating the alleged discharge for union activity allegation, it should be noted that there is no allegation of any independent 8(a)(1) allegation concerning an apparent union organizing campaign, there is no evidence of such conduct, and there is no evidence of any union animus by Respondent. But the background painted by the General Counsel is even barer than that. There is no evidence of any overt response by Respondent to the apparent union organizing campaign at all.

II. THE DISCHARGE FOR UNION ACTIVITY ALLEGATION

The union activity discharge allegation is totally separate from the February 4, 2012 work stoppage issue. The work stoppage was unprotected and the Employer's response to the work stoppage was lawful. On March 2, 2012, almost one month after the work stoppage, and well after all suspensions for the unprotected activity had ended,

Respondent received a letter from the International, Technical & Professional Employees Union, AFL-CIO, advising Respondent of the Union's organizing drive and listing the names of ten employees of Respondent as members of a committee to unionize Respondent. Abiy Amede was one of those listed.

Respondent then underwent training for its management and supervision by labor counsel to address what the company could and could not do in response to the union organizing activity. (TR p. 346). Jaime Pino of Respondent also became aware of the December 28, 2011 decision of Administrative Law Judge Lana Parks involving Lucky Cab Company in Las Vegas, in Case No. JD (SF)–51–11. (TR pp. 346-347). In said case the Judge ordered reinstatement and back pay for 6 employees, finding that their discharge violated Section 8(a)(3) of the Act, rejecting the assertion of the employer that it had legitimate reasons for discharging each employee. The Judge also set aside an election where the employees had voted against union representation. Pino testified that this decision made him want to be sure that Respondent did everything right in dealing with the union organizing campaign at Respondent. (TR p. 347).

It should be emphasized, that there is absolutely no allegation or evidence of any independent 8(a)(1) statement involving union activity. Furthermore, the record is totally bare of any union animus by Respondent. General Counsel put on witnesses that had their names on the Union letter and they testified to absolutely no action of any kind by Respondent concerning the Union, or concerning union activity in general.

It should also be noted that Counsel for the General Counsel did not argue in his brief in support of his exceptions that the discharge of Amede was in retaliation to Amede's participation in the work stoppage. His entire argument concerning Amede's

discharge is based on the allegation that the discharge was in retaliation for Amede's union activity, activity that started after the work stoppage.

General Counsel's case is based entirely on surmise. General Counsel presented evidence that Amede had previous accidents and was not terminated for accidents until after the receipt of the Union correspondence by Respondent. Yet Respondent has presented evidence that shows that Amede's discharge is consistent with the discharges of numerous other employees in 2012. Indeed, the Judge so found. (JD p. 7, lines 13-14).

Prior to 2012, Respondent was fairly forgiving to employees for having accidents. (Respondent Exhibit No. 7 lists numerous employees who were terminated for accidents in 2012 and who had multiple accidents prior to 2012.) This changed in 2012 based on the devastating impact Respondent's lax discipline for accidents had on its insurance costs. (TR pp. 273-279, 347-349). Indeed, the Judge so found. (JD p. 3, lines 37-39; JD p. 7, lines 10-11).

Respondent had an automobile insurance policy from November 2010 to November 2011 that cost \$1,107,528. (TR pp. 271-272; R. Exh. No. 1). In November 2011, Respondent was faced with increased insurance costs based on Respondent's high accident rate. If Respondent would have maintained the same insurance coverage with the same deductible, its cost would have more than doubled to \$2,340,240. (TR pp. 274-275; R. Exh. No. 3). Matt Habager of B. H. Gold Insurance testified concerning his conversations with Respondent officials, including Jaime Pino, as they addressed Respondent's insurance dilemma in late 2011. Habager emphasized that "frequency leads to severity," that the more accidents Respondent had, the more likely there would be severe accidents and severe consequences to its insurance rates. Habager emphasized

that this was true regardless of whether the number of accidents were at fault accidents, or accidents where the employee was not considered to be at fault. Habager urged Respondent to address the frequency of its accidents. (TR pp. 274-276). Eventually Respondent's coverage was adjusted in March of 2012. The insurance coverage was cut in half from \$2,000,000.00 to \$1,000,000.00 and the standard deduction per accident was increased from \$10,000.00 to \$25,000.00. (TR p. 279; R. Exh. 1 and R Exh. 4).

One of the suggestions of Habager that was adopted by Respondent was the use of the Smith Safety Training Course, which is an online driver safety course to be taken by Respondent drivers who had frequent accidents. (TR pp. 283, 347-348). As noted in the Smith Training Course Agreement Acknowledgement and Authorization Form, the test would be given at the employee's expense regardless of whether the accidents were at fault or not at fault. (GC Exh. 30(a)).

At the beginning of 2012, Respondent adopted a new approach to the termination of drivers who had accidents. Respondent would be less forgiving for having accidents. Respondent would weigh various factors when considering termination of drivers for accidents, but the most important factor would be the frequency of accidents, regardless of whether the accidents were at fault or not at fault. (TR pp. 348-349). Indeed, the Judge specifically found that Respondent's new policy in 2012 was to terminate employees based on the frequency of accidents. (JD p. 3, lines 37-39; JD p. 7, lines 10-12).

As a result of this new policy, 26 drivers were terminated for accidents from January 1, 2012 through July 31, 2012. The change in approach has been working. The

number of “incidents or accidents”¹ by Respondent’s drivers has been reduced by 28 percent from the corresponding time in the prior year. (TR pp. 281-282).

General Counsel asserted in opening argument that the asserted change in approach to discipline for accidents beginning in January 2012 never really occurred. The Judge credited Jaime Pino and Matt Habager in finding that such change in policy did occur. (JD p. 1, ftnt. 1). There is no reason to overturn the Judge’s credibility resolutions.

General Counsel contends that employee witnesses contradicted Jaime Pino’s testimony that employees were told of the new emphasis by Respondent in numerous meetings and also asserted that no new written policy was prepared for the Employer’s handbook. But there is no need to create a new written policy that employees should avoid accidents. The proof of the change is established not only by Pino’s and Habager’s testimony, but also by the actions taken by Respondent in 2012. In that regard, the evidence that many employees who were terminated for accidents in 2012 had 12, 13, 14 or 15 accidents over their employment history establishes that Respondent was certainly tolerant of accidents prior to 2012. As will be seen, *infra*, these employees are no longer there.

General Counsel attempted to present evidence of “disparate treatment” between Amede and other employees that had accidents in 2012. Indeed, Counsel for General Counsel found some examples of employees who had accidents at a particular time and were not terminated at that particular time even though Amede had fewer accidents when he was terminated. Before addressing those few examples, it should be noted that

¹ “There were going - - I think in 2010 to 2011, they had 429 incidents or accidents. These could be anything from backing over a valet sign at a hotel to running a red light and causing a serious, serious accident.” (TR p. 276).

General Counsel's attempt to show disparate treatment fails because Amede's treatment is consistent with the treatment of other employees who had accidents in 2012 when you consider the record as a whole. Respondent submitted the records of the 26 employees who were terminated in 2012 through July 31 because of accidents. (R. Exh. No. 7). Respondent also submitted the records of 46 employees who had accidents in 2012 through July 31 who were not terminated. (R. Exh. No. 8).

Amede had 8 total accidents when he was terminated. Of the 26 employees² who were terminated for accidents, 14 had more than 6 total accidents when they were fired. (R. Exh. No. 7). Amede certainly fits into that group. Of the 46 employees who had accidents in 2012 who were not terminated, not one employee had more than 6 total accidents. Not one. (R. Exh. No. 8). If Amede's name appeared on Respondent's Exhibit No. 8 instead of No. 7, it would stick out like a sore thumb. Almost all of the employees on Exhibit No. 8 had a total of one, two or three accidents through their entire employment. Only one had more than 4 total accidents.

General Counsel noted that Amede was terminated on his first accident in 2012. Again, when viewing the total record, Amede's termination is consistent with other terminations. Peter Alexandrov had 10 accidents by the time he was terminated. He had his first and only accident of 2012 on January 21 and he was terminated on January 24. Kevin Banks had 10 accidents by the time he was terminated. He had his first and only accident of 2012 on April 20, the same day that Amede had his first and only accident of 2012. Burns was terminated on April 24, the same day that Amede was terminated. Joel Dominguez had 15 accidents by the time he was terminated. He had his first and only accident of 2012 on March 9, 2012. It should be noted, that up to that time he had had no

² The employees noted on Respondent's Exhibit 7 as terminated for not reporting the accident were not used in any specific comparisons set forth in this brief.

accidents for almost 22 months. His last prior accident occurred on May 26, 2010. Nevertheless, he was terminated on March 12, 2012. Marco Gonzalez had 7 accidents by the time he was terminated – one less than Amede’s total. He had his first and only accident of 2012 on March 18 and he was terminated on March 20. Amha Haile had 2 total accidents when he was terminated. He had his first and only accident of 2012 on April 7 and was terminated on April 10. Dereje Kedanemariam had 13 total accidents by the time he was terminated. He had his first and only accident of 2012 on February 19 and was terminated on February 20. Ilda Moreno had 15 total accidents by the time she was terminated. She had her first and only accident of 2012 on May 19 and was terminated on May 22. Goran Zuza had 15 total accidents by the time he was terminated. He had his first and only accident of 2012 on May 13 and he was terminated on May 14. (R. Exh. No. 7 – the date for each accident for each employee is set forth in the far left column of the backup material for each employee listed on the first page of Exh. 7. The termination date for each employee is set forth on the first page of Exh. 7; TR pp. 381-386).

If analyzing frequency of accidents as the number of days employed per accident until terminated, then Amede fits in with that group as well. From the time he was hired until he was terminated, Amede had one accident every 147 days. Peter Alexandrov had one every 119 days. Joel Dominguez had one every 169 days. Marco Gonzalez had one every 166 days. Amha Haile had one every 101 days. Valko Haralambov had one every 115 days. Thomas Hardy had one every 107 days. Dereje Kedanemariam had one every 168 days. Ilda Moreno had one every 174 days. James Wang had one every 190 days. Goran Zuza had one every 167 days. (R. Exh. 7 – total days of employment for said employees calculated from page one of Exh. 7 which are then divided by total number of

accidents for said employees listed on page one, and confirmed by back up material set forth in Exh. 7).

Turning next to the few alleged examples of disparate treatment, it is again noted that when viewing the total record, Amede's discharge is consistent with Respondent's conduct involving other drivers with accidents. It is clear that Respondent's employees have a lot of accidents through the year. Respondent's Exhibits number 7 and 8 reveal that through the first seven months of 2012, 72 employees had accidents. Of these, 26 have been terminated because of their accidents and 46 remained employed. When determining when to terminate an employee, Respondent considers various factors, with the most important factor being frequency. Other factors include the costs to Respondent associated with the accidents or whether the accidents were at fault. Also considered is the productivity of the employee. If the employee was a high booker, he might get more leeway than others. (TR pp. 178-179).

In view of the high number of accidents, any comparison of all of the accidents to Amede's accidents will probably find some examples where questions can be raised as to why a particular person was not terminated at that particular time. Finding a few that fit such category does not negate the fact that when viewing the total record, Amede's termination was consistent with a multitude of other terminations and was consistent with such other terminations when addressing the primary factor that will support a termination – the frequency of accidents.

Jaime Pino noted that when viewing a few isolated examples of accidents where terminations did not occur at that precise time, it would be impossible to provide universal answers as to why such occurred with the limited data that was presented to him on the witness stand. (TR pp. 182). He did note that at the time Amede was

terminated he had eight total accidents and that his production had fallen off dramatically for two straight months. (TR pp. 182-183). Amede's production in February 2012 was 51% below the average of those in his shift and was 56% below the average in March. (GC Exh. 82, third to last page).

The fact that Amede was suspended for a few days in February could have factored into the low productivity for that month. However, there was no reason for the dramatically low productivity figure for March, the month before his termination. This is not to say that low productivity was the reason for his discharge. It is just that his recent low productivity did not give Respondent a reason to ignore the frequency of his accidents. Jaime Pino terminated Amede because of the frequency of his accidents, and his handwritten note at the time of the discharge confirms such. (TR pp. 361-63; GC Exh. 31(b)).

General Counsel argues that the termination of Amede was harsh for having just two accidents in his last 15 months of employment prior to his April 20, 2012 accident. Yet Joel Dominguez probably felt that his termination was harsh. He had been employed since 2005, and, even though he had a number of accidents early in his tenure, he had not had an accident for 22 months when he had one in March 2012 and was summarily terminated. Amede's accident rate was one every 147 days, but Dominguez's accident rate was one every 169 days. The plain fact is, Amede's termination was consistent with a multitude of other terminations.

The Judge made a finding that the General Counsel had met his burden under Wright Line to establish a *prima facie* case that the discharge was motivated by Amede's Union activity. Yet he did so based only on the facts that Amede engaged in Union activity and that Respondent was aware of it, having received notice from the Union that

Amede was on its campaign committee. (JD p. 6, lines 46-50). That's it – he found no other facts supporting such a finding. Indeed, he specifically found that the discharge was consistent with other discharges in 2012.

The Judge did find the evidence established that Respondent met its burden of establishing that the discharge would have been made regardless of Amede's union activity, but the Judge should have found that the General Counsel did not even meet its burden of establishing a *prima facie* case. The meager facts found by the Judge did not establish a *prima facie* case. Such facts do not support an inference that Amede's discharge was for union activity. They do not even raise a suspicion. But if they did raise a suspicion, that would not be enough to make a finding that the discharge was in retaliation for having his name on the correspondence from the Union naming him and nine others as members of an organizing committee. In *Cardinal Home Products, Inc.*, 338 NLRB 1004 at 1009 (2003) 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.

Accord, *Abramson, LLC*, 345 NLRB 171 at 175 (2005). In both the *Cardinal Home* and the *Abramson* cases, the Board found that the General Counsel did not meet his burden of establishing a *prima facie* case, and the General Counsel's cases were much stronger in said cases than they are in this matter.

The meager facts relied upon by General Counsel, in a background where there is no independent 8(a)(1) allegation involving union issues, no background of any union animus, and, going even further, no evidence of any reaction at all by Respondent

concerning the apparent union organizing campaign, do not even establish a suspicion that Amede's discharge was because of his union activity.

In any event, even if the Board sustains the finding that the General Counsel met its burden of establishing a *prima facie* case under Wright Line, the evidence is overwhelming that Amede would have been terminated anyway based on the frequency of his accidents.

III. THE ALLEGED THREAT

The Judge made no finding concerning the allegation that the owner of Respondent threatened an employee because of the employee's alleged protected concerted activity. It is respectfully submitted that the activity was not protected, and therefore the alleged statements were not a violation of the Act. Furthermore, even if the work stoppage was protected, the innocuous statements do not rise to the level of a threat.

IV. REMEDY TO EXPUNGE

The General Counsel filed an exception to the Judge's alleged failure to order Respondent to expunge records of any discipline regarding the walkout. Even if the Board should find the one time work stoppage to be protected, it should not order the posting of a Notice or the removal of discipline information or warnings. Such would give the employees the potentially false idea that a repeat of the work stoppage activity would also be protected.

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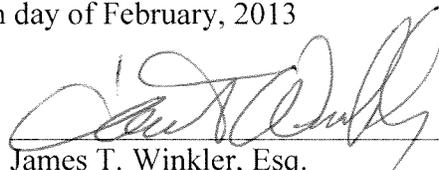
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V. CONCLUSION

Based on the above, and the record as a whole, the Complaint should be dismissed.

Dated in Las Vegas, Nevada, this 6th day of February, 2013

A handwritten signature in black ink, appearing to read "James T. Winkler", is written over a horizontal line.

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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 February 6, 2013 I served the within document(s):

**RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S
EXCEPTIONS**

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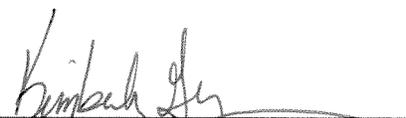
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 6, 2013 at Las Vegas, Nevada.



Kimberly Gregos

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