

UNITED STATES OF AMERICA  
NATIONAL LABOR REATIONS BOARD  
REGION 12

In the Matter of  
TRANSPORT WORKERS UNON OF AMERICA, 12-CA-072141. 12-CA-072148, 12-  
CA-074078

CASE NOS.:

AFL-CIO  
CHARGING PARTY

v.  
ALLIED MEDICAL TRANSPORT, INC.  
RESPONDENT

**RESPONDENT ALLIED MEDICAL TRANSPORT, INC'S EXCEPTIONS TO  
THE ALJ'S RECOMMENDED ORDER WITH INCORPORATED  
MEMORANDUM**

COMES NOW, the RESPONDENT, ALLIED MEDICAL TRANSPORT, INC.  
(AMT), by and through their undersigned counsel and files their Exceptions to the  
Administrative Law Judge's Recommended Order and state as good cause therefore the  
following:

**RESPONDENT'S EXCEPTIONS IN NUMERICAL ORDER**

Respondent's Exception No. 1. 'Footnote No. 2, Page, 2 of the ALJ's  
Recommended order (ALJ RO)<sup>1</sup>. The receipt generated by the ATM is affixed  
to the Driver's Daily Manifest which is generated by the County detailing the  
Driver's route, pick ups and drop offs and whether or not the client has a  
client fare due at the time of pick up and what fares should be collected.  
Evidentiary Hearing Transcript (EHT)<sup>2</sup>Page 25:9-20

Respondent's Exception No. 2. 'Union's Campaign began in June 2011 ALJ  
RO 2:25-30 according to George Exceus' Affidavit signed on December 28,

---

<sup>1</sup> ALJ RO PAGE NUMBER: AND LINE NUMBERS – refers to the ALJ's Recommended Order with page numbers and line numbers.

<sup>2</sup> EHT refers to the Evidentiary Hearing Transcript with page and line numbers

2011 the Union campaign did not begin until August or September of 2011 not June of 2011 as stated in the ALJ's Recommended Order. EHT:81-82:1-21, 84:7-8 and the first meeting with Respondent's employees was not until September 24, 2011 EHT 87:9-11. Furthermore, Allan Toby testified it wasn't until October 24, 2011 that he began union campaigning as the lead internal employee organizer. EHT:101:5-8. Paul Beauvais testified the first meeting was in August. EHT 114: 15-18. As such the Union campaign with the employees of Respondent occurred after Respondent's audit of client fare audits. A second meeting was conducted October 6, 2011 EHT 87:12-14. The first time Respondent became aware of the union campaign was in the later part of September October when Wayne Rowe received notice from the NLRB. EHT 405:9-20.

Respondent's Exception No. 3. 'October 26 Telephone Call ALJ RO 3:5-15 Rowe failed to expressly recall the conversation and only offered a general denial and the denial was procured by a highly leading interrogation by counsel, which rendered it worthy of only minimal, if any, weight citing Tr. 410 . There was no examination of Mr. Rowe regarding the October 26 telephone call with Allan Toby as such the findings should be struck from the record. Any examination of Mr. Rowe was direct examination regarding the charges lodged against Respondent which he unequivocally denied. EHT 409:24-25; 410:1-25; 411:1-13

Respondent's Exception No. 4. 'November Union Meeting ALJ RO 3:15-20. Beauvais did not testify regarding seeing W. Rowe seated in a Toyota Sequia as alleged in the ALJ RO. EHT: 105-122 as such the ALJ RO's findings should be struck.

Respondent's Exception No. 5. 'Nicholas testified that after he left Mr. Rowe continued to linger. ALJ RO pg 3:35-40. Testimony was W. Rowe started to drive his care slowly and Nicholas did not know whether he exited to the street or stay inside the parking lot. EHT: 105-122. W. Rowe saw Nicholas stopped and talked to him talked and laughed and W. Rowe made a u-turn and pulled into his parking lot across the street. EHT 406:16-19 as such the ALJ RO's findings should be struck.

Respondent's Exception No. 6. 'The Lauderdale Lakes facility's parking lot is near the Comfort Inn. ALJ RO pg. 3:40-45 The Lauderdale Lakes facility was across the street from the Comfort Inn. EHT 404:18-23 You could easily see both parking lots for either parking lot EHT 404:21-23 and the employees of AMT<sup>3</sup> returned their vehicles to the AMT lot and said hello to W. Rowe engaged in casual conversation and proceeded to their meeting. EHT 406:9-15 as such the ALJ RO's findings should be struck.

Respondent's Exception No. 7. 'Beauvais partially corroborated Nicholas statement. Beauvais did not testify regarding seeing W. Rowe seated in a Toyota Sequia as alleged in the ALJ RO 4:1-4. EHT: 105-122. As

---

<sup>3</sup> AMT refers to Allied Medical Transport, Inc. Respondent

such there is no corroboration and the statement should be struck from the Recommended Order.

Respondent's Exception No. 8. 'If W. Rowe were solely concerned with protecting his fleet, it is implausible that he would have stationed himself at the Comfort Inn, in lieu of viewing the scene from his own facility. ALJ RO 4:5-10. W. Rowe did not station himself at the Comfort Inn nor does the testimony indicate or state this misstatement of facts. His interest was protecting his property and he was in his parking lot for approximately one half hour at the beginning of the meeting EHT 407:4-5 as many drivers came up to him and engaged in casual conversation EHT 406: 9-19. The testimony elicited from W. Rowe was not prompted by a "leading interrogation" but by W. Rowe's own account of events. EHT. 406:1-25, 407:1-10. As such the ALJ RO's findings should be struck.

Respondent's Exception No. 9. 'W. Rowe did not specifically address the conversations. ALJ RO 5:25-35. W. Rowe went into specific detail regarding the meeting which stressed the importance of the employees exercising their right to vote regardless of how they wanted to vote and an explanation of the comparison to high school students. EHT 397:1-25; 398:1 As such the ALJ RO's findings should be struck.

Respondent's Exception No. 10. 'Fertil distributed Union flyers to coworkers in the Lauderdale Lakes parking lot, and averred that Latoya White, Route Supervisor observed his activities. ALJ RO 8:23-25. Fertil alleged he had distributed flyers one time in the afternoon at the end of his

shift in the parking lot EHT 127:11-17 The alleged observer Latoya White standing 15 feet away never said anything to Fertil. EHT 128: 10-16 Fertil also stated that no supervisor, which would include Latoya White saw him sign union authorization cards, wear union T-shirts, talk to him about union activity. EHT 159:2-20. Fertil further testified that no one management had ever made any comments or threats to him about the union or union membership. EHT 165:25, 166:1-24 and had no direct knowledge of any alleged surveillance of employees' union activity. EHT 170:10. There is no evidence to support the ALJ's factual allegation that W. Rowe had any knowledge of Fertil's union activity. As such the ALJ RO's findings should be struck.

Respondent's Exception No. 11. 'On November 28, [W.Rowe] told Toby that he knew that he had started the Union's organizing drive. These comments, which omitted a source, left Toby to reasonably conclude that management was monitoring his Union activities. ALJ RO 11:12-14. W. Rowe received a couple of phone calls the day after the employee meeting, on W. Rowe's day off, from different drivers and he spoke to Toby as normal as they would talk often 5-6 times per day. Toby told W. Rowe there was going to be a union and W.Rowe told Toby it is your right to vote, just do what you have to do. EHT 408: 9-25. This conversation does not rise to the level of management monitoring of Union activities under Stevens Creek Chrysler, 252 NLRB 1294, 1295-1296 (2009) as the calls were initiated by Toby and there was no unusual monitoring and W. Rowe was visible and present in his

lot conducting business as usual when the meeting was being held. EHT 406:9-24. As such the ALJ RO's findings should be struck.

Respondent's Exception No. 12. 'AMT engaged in unlawful surveillance at the Union's Comfort Inn meeting. An employer unlawfully "surveys employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary' and thereby coercive" Indicia of coerciveness include the duration of the observation, the employer's distance from employees while observing hem, and whether the employer engaged in other coercive behavior during its observation. In November, w. Rowe parked his car 10 feet away from the Comfort Inn's entrance for a 30 minute period and watched, as drivers entered to attend a Union meeting. His appearance was out of the ordinary, and as will be discussed, was accompanied by other coercive statements...constituting unlawful surveillance. ALJ RO 11:18-27. The evidentiary hearing record does not support the ALJ's RO. 'If W. Rowe were solely concerned with protecting his fleet, it is implausible that he would have stationed himself at the Comfort Inn, in lieu of viewing the scene from his own facility. ALJ RO 4:5-10. W. Rowe did not station himself at the Comfort Inn nor does the testimony indicate or state this misstatement of facts. His interest was protecting his property and he was in his parking lot for approximately one half hour at the beginning of the meeting EHT 407:4-5 as many drivers came up to him and shook his hand on his lot and engaged in casual conversation EHT 406: 9-19. The testimony elicited from W. Rowe was not prompted by a "leading interrogation" but by W. Rowe's own

account of events. EHT. 406:1-25/ 407”1. W. Rowe only turned in to the Comfort Inn lot to speak to Nicholas, he stopped talked to him and made a U turn and drove into his own parking lot across the street EHT 406:16-19 from the Comfort Inn, 3660 West Commercial Blvd. (e.g. 4 lanes of traffic separate the Comfort Inn from Respondent’s parking lot on Commercial Blvd, 3601 W. Commercial Blvd.). EHT 404:18-23 W. Rowe had no idea about the length of the meeting and stayed on his lot for only 30 minutes left and went home. 407:2-5. The ALJ RO findings of fact are unsupported under Aladdin Gaming LLC, 345 NLRB 585, 586 (2005) as it does not meet the surveillance criteria, duration criteria and there is no evidence and at a minimum conflicting evidence of “other coercive behavior” as such the finding of surveillance should be struck. Mr. Rowe’s presence on his company property is lawful under the Act. *Albertsons v. NLRB*, 161 F.3d 1231, 1238 (10<sup>th</sup> Cir. 1998). At all times under the Act where employees openly engage in protected activities on the employer’s premises, management officials may lawfully observe those activities but they may not do anything out of the ordinary to keep employee protected activities under watch. Id. By the Charging Parties own admission, they were not even aware if anyone (e.g. Respondent’s management team, supervisors or agent’s) witnessed their “union or protected activities”. It is well settled that an employer, and by extension, the employer’s agents and supervisors may “communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain

a “threat of reprisal or force or promise of benefit”. NLRB v. Gissel Packing Co., 395 US 575, 618 (1968). Respondent never threatened job loss, discontinue benefits, fire union adherents, interrogated employees, or changed any long standing policy or procedure. Id.’Futility of Bargaining and Unionizing. ALJ RO 11:29-43 and 12:1-3. The Respondent did not at any time encourage or discourage membership in the Union and continued to treat all employees consistently even to the extent of paying both Charging Parties Holiday bonuses while on suspension. EHT 412-414:1-7 *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278, 76 S.Ct. 349, 355, 100 L.Ed. 309 (1956). There is furthermore, no evidence that the disciplinary action taken against Charging Parties had a tendency to coerce other employees in the exercise of their protected rights since multiple witness and the Charging Parties own testimony no one knew of their Union support or lack of support. *NLRB v. Gold Standard Enter., Inc.*, 679 F.2d 673 (7<sup>th</sup> Cir. 1982). None of the evidence submitted by the General Counsel rises to the standard that any of Respondent’s comments or campaign were coercive, threatening, or intimidating to support a violation under the Act. *LM Waste Service, Corp and Union De Tronquistas De Puerto Rico, Local 901, IBT and Marvin J. Cardona and DS Employment Agency, Inc.* 24-CA-10837, 24-CA-10894 (October 22, 2010)

Respondent's Exception No. 13. 'Interrogation ALJ RO 12:5-35. There is no background or history of employer hostility and discrimination in the instant case. The conversations between W. Rowe and the employees was

like any other conversation he had for the many years the employees had been employed by Respondent and were all conducted in an informal manner during normal conversations during the day as evidence in Respondent's Exceptions 1-12 above. None of the actions of the Respondent resulted in taking disparate treatment of employees because of union activity or lack of union activity. All the employees were treated equally and as they had been prior to Union activity. Wal-Mart Stores, Inc., NLRB Div. of Judges, Case Nos. 28-CA-16831, et al. (September 24, 2002). See also Respondent's Exceptions Nos. 11-12 above incorporated herein by reference. As such the ALJ RO's findings should be struck.

Respondent's Exception No. 14. 'Soliciting Grievances ALJ RO 12:37-44; 13:1-13. Respondent has had a long tradition of relationships with its employees as evidenced by their minimal turnover rate of 2%.; employees working for the company for over 10 years.[EHT 395:1-25] In fact W. Rowe testified that during his original interviews with all of the drivers in 2010 when he took over the contract he met individually with each one of them and asked about their job comfort, gave them his personal cell phone number, if any problems expressing his desire to be called if there are any problems and they can call him any time. EHT 401:1-24. W. Rowe further testified that he created an atmosphere wherein his employees would feel comfortable to talk to him and work with him because they are the first front of the business asking them if they were comfortable with their manager, comfortable with the work conditions, comfortable with their vehicle, comfortable with their

day to day activities and whether any obstacles exist. EHT 402:1-7. This evidence clearly rebuts the ALJ RO regarding Respondent's past practice of soliciting employee grievances as such ALJ RO Soliciting Grievances should be struck as it is in contradiction to the findings in Reliance Electric, 191 NLRB 44, 46 (1971). In fact W. Rowe when drivers call him and he would love to be able to address their situation but instead refers them to their union representative. EHT 404:9-13. Prior to the election W. Rowe had a comfortable environment with his workers and they were like a family EHT 419: 1-7 As such the ALJ RO's findings should be struck. The Respondent's Employee Handbook reiterates the long standing policy of Respondent regarding open communications encouraging employees to speak freely regarding job-related concerns. [Respondent's Exhibit 7 -AMT Handbook BS 000400-00041 pg.4]The rule of law requires the application of *Wal-Mart Stores, Inc.*, Case 21-CA-34515 (August 21, 2003) wherein the NLRB ruled that an employer which had a longstanding practice of soliciting employee grievances was permitted to continue to do so during the pre-election period without violating the NLRA. *Wal-Mart Stores, Inc.*, Case 21-CA-34515 (August 21, 2003). As such the ALJ RO's findings should be struck.

Respondent's Exception No. 15. 'ALJ RO 13:15-22 Soliciting Campaign Assistance. See Respondent's Exception No. 11 above reasserted herein by reference. As such the ALJ RO's findings should be struck.

Respondent's Exception No. 16. 'Promising Benefits and Implicitly Promising Benefits AL RO 13:24-43;14:1-6. Any alleged promises did not at

any time suggest the benefits would be forthcoming after the election and are as such lawful. Noah's New York Bagels, 324 NLRB 266, 267 (1997). These general discussions with employees never reached the level of any implicit or express promise rising to the level of a "fist inside the velvet glove" or promise raises, extra vacations, benefits, promotions or otherwise. NLRB v. Exch. Parts Co., 375 US 405, 409 (1964) particularly since W. Rowe had a long standing relationship on both a personal and professional level prior to any Union campaign efforts wherein discussions regarding employee satisfaction was common place. EHT 401-403:1-20. W. Rowe also expressed his on-going challenge to insure minimal employee turnover and his desire to maintain his workforce and it would have been impossible for him to replace his workforce because it is a very small industry, he is the largest company and all the people who work with him work with the other companies as well. EHT 398:2-13. Under Blue Flash Express, Inc. 109 NLRB 591,593 the Respondent has not nor has the evidence submitted established that any alleged "questioning" or alleged "promises implied or express" were coercive because there is no evidence that said alleged communications indicate or prove discriminatory intent and effect. Id. As such the ALR RO's findings should be struck.

Respondent's Exception No. 17. 'Replacement Threats 14:8-23. See Respondent's Exception No. 16 above incorporated herein by reference. W. Rowe testified to the unfair labor practice charges and unequivocally and denied telling employees that it would be futile to select a union to represent

them; never promised them benefits if they voted against the Union; never made threats to replace them even if they chose to be represented by the Union, never made any promise or make any benefits to any employee if they voted no on the Union organization; never engaged in surveillance of his employees, and never hired a spy to spy at union meetings. EHT 410:1-23; 411:2-10 W. Rowe also expressed his on-going challenge to insure minimal employee turnover and his desire to maintain his workforce and it would have been impossible for him to replace his workforce because it is a very small industry, he is the largest company and all the people who work with him work with the other companies as well. EHT 398:2-13. Under Blue Flash Express, Inc. 109 NLRB 591,593 the Respondent has not nor has the evidence submitted established that any alleged “questioning” or alleged “promises implied or express” were coercive because there is no evidence that said alleged communications indicate or prove discriminatory intent and effect. Id. As such the ALR RO’s findings should be struck.

Respondent's Exception No. 18. 'Section 8(a)(5) Violations ALJ RO 16:25-29, 17:1-33, 18:1-2. The ALJ RO’s analysis under this section is inconsistent with the ALJ RO’s holding that the audit of all drivers for business reasons was and is disconnected from the Union’s organizing drive. ALJ RO 15:28-33. The longstanding policy regarding client fares pre-existed any union presence or union campaign which all drivers were aware could result in termination [294:5-13], audit, posted on company bulletin boards and contained within the employee handbook. ALJ RO 7:2-29 Such

documents were published and the process was initiated prior to any union campaign or union presence Respondent's Exhibit 7 dated January 1, 2010. As such there were no substantial or unilaterally changed disciplinary policies or procedures concerning driver fare shortages. The application of the audit policy was conducted at least two other times prior to the presence of the Union (e.g. May 2011[EHT 286-287:1-2] and July 2011 EHT:6-15 and the third audit was initiated in July of 2011 of the entire fleet which extended through October of 2011 also predating any union presence or union campaign as a result of significant financial impact to the Respondent and the audit of the full fleet was initiated based on the billing by the County in June of 2011 evidencing shortages in client fare collections. EHT 327:2-24 Driver's collecting fares from clients has been on-going since the existence of the Paratransit contract. EHT:20-24. In fact prior practice also permitted Respondent to deduct client fare shortages from employees' payroll. EHT:347:2-5. The County has always invoiced Respondent deducting the client fares from the trip fees. EHT 349:8-15. Changes in the contract were made by the County in June of 2011 (e.g. predating any union presence or campaign) EHT 349:19-25, 350:1-7. The first deduction for client fares occurred in June of 2011. EHT 350:10-11 As a result of the deductions the amount of the deductions from the invoices was hugely different than the money being collected and deposited by the drivers having a significant financial impact on the Respondent. EHT 350:19-24 Furthermore, the employees were noticed that a full audit of their client fares would be initiated

in July of 2011 from the time you were hired to the present [Respondent's Exhibit No. 5] EHT 360:1-22 Respondents had also distributed memos to all employees letting them know they were subjected to an audit at any time regarding client fares dated November 5, 2010 at least a year prior to any union presence or union campaigning. EHT:366:2-16 Respondent's Exhibit 17. For all of the foregoing reasons the ALJ RO's is flawed as Respondent did not significantly tighten the enforcement of its pre-existing fare shortage policies and procedures and therefore did not enact a material, substantial or significant change in the unit members terms and conditions of employment as defined under Crittenton Hospital, 342 NLRB 686 (2004). As such, the ALJ RO's findings should be dismissed as to Section 8(a)(5) violations.

Respondent's Exception No. 19. 'Conclusions of Law should be struck as follows from the ALJ RO 4(a)-(i) ALJ RO 18:18-38 19:1-13 as it relates to the aforementioned Respondent's Exceptions 1-18 and incorporated herein by reference.

Respondent's Exception No. 20. 'Remedy and Order pg. 19:15-42-20:1-43, 21:1-43, 22:1-43, 23:1-6. For all of the foregoing Respondent's Exceptions to the ALJ RO numbered Respondent's Exceptions No. 1-19 and incorporated herein by reference the ALJ RO's recommended remedy and order should be struck as unsupported by the facts and/or the law precluding the rescission of any disciplinary policy and procedure including but not limited to the driver fare shortages, expunging all reports, memoranda, disciplinary actions and termination notices, including the suspensions and

terminations of Fertil, Nicholas, Comon, and/or Frestal and any other similarly situated employees disciplined under the March to December audit; AMT should not be required to offer reinstatement or reimburse any employee of any loss of earnings and benefits or any damages as computed in or prescribed under F.W. Woolworth Co., 90 NLRB 289 (1950), New Horizons for the Retarded, 283 NLRB 1173 (1987) , Latino Express Inc., 359 NLRB No. 44 (2012), Consec Security, 325 NLRB 452, 4540455 91998), McAllister Towing 7 Transportation Co., 341 NLRB 894, 400 (2004) because the audit policy, practice, procedure and enforcement predate any union campaign initiative and/or union activity as expressly set out in Respondent's Exception No. 1-19 above. AMT should further not be required to read any Notice to Employees without a determination of violations under the act and unequivocal denial of the Respondent's Exceptions set out above. As such the ALJ RO's findings should be struck.

Dated: February 12, 2013

Respectfully Submitted By:

s/Lydia B. Cannizzo

Lydia B. Cannizzo, Esq.

Cannizzo & Chamberlin, P.A.

8759 SW 53<sup>rd</sup> Street

Cooper City, FL 33328

(954)680-1699 (Phone/Facsimile)

[Lydia.Cannizzo@CannizzoChamberlin.net](mailto:Lydia.Cannizzo@CannizzoChamberlin.net)

Attorney for the Respondent – Allied  
Medical Transport, Inc.

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 12th, 2013 I electronically filed the foregoing document by using the E-Filing system on the Agency's website. I also certify that the

foregoing document is being served this day via e- mail on all parties of record identified as follows: Marinelly Maldonado, [Marinelly.Maldonado@nlrb.gov](mailto:Marinelly.Maldonado@nlrb.gov) and Shelley Plass [Shelley.Plass@nlrb.gov](mailto:Shelley.Plass@nlrb.gov) , Counsels for the Acting General Counsel, National Labor Relations Board, Region 12, 51 S.W. 1<sup>st</sup> Avenue, Miami, FL 33130, Osnat K. Rind, Esq., ([orind@phillipsrichard.com](mailto:orind@phillipsrichard.com)), Phillips, Richard & Rind, 9360 SW 72<sup>nd</sup> St. Ste., 283, Miami, FL 33173-3283 on the same day as the E-Filing on the Agency's website and postmarked today via regular mail.

s/Lydia B. Cannizzo

Lydia B. Cannizzo, Esq.

Attorney for Respondent Allied Medical Transport

Inc.