

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

**SUN CAB, INC. d/b/a  
NELLIS CAB COMPANY**

**and**

**Case 28-CA-079813**

**ABIY AMEDE, an Individual**

**ACTING GENERAL COUNSEL'S REPLY BRIEF**

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Jay R. Pollack (ALJ) in the above-captioned case.

**I. Introduction**

In its Answering Brief, Respondent makes numerous broad arguments in support of its position that the exceptions filed by General Counsel lack merit. In making its arguments, however, Respondent overlooks the basis of General Counsel's exceptions, the reasoning behind the well-established Board principles upon which such exceptions rely, and the factual distinctions in the instant case. Further, Respondent fails to support its assertions partly because it cannot counter the evidence of disparate treatment raised in General Counsel's exceptions, due, in part, to Respondent's failure to provide sufficient evidence at hearing that it would have terminated its employee in the absence of Union or concerted activities.

## II. Argument

### A. Respondent's Assertion that Abiy Amede was not Discharged for Union or Protected Concerted Activities

Respondent contends that it did not unlawfully terminate its employee Abiy Amede (Amede) for Union or concerted activities. In support of its position, Respondent asserts, contrary to the finding of the ALJ, that employee Amede's participation in an earlier work stoppage was unprotected. (RAB 1; ALJD 5:26-34)<sup>1</sup> It then attempts to draw a division between Amede's participation in the protected strike and his termination before leaping to its assertion that Amede was terminated for accidents consistent with other employees. (RAB 2-3) Respondent essentially claims that Amede's termination was consistent with terminations issued to several other drivers for frequency of accidents. Respondent asserts that it adopted new approaches including the implementation of the "Smith Safety Training Course" as a means to caution drivers who had frequent accidents. It claims that its new approach was less forgiving and resulted in termination of drivers including Amede for frequency of accidents regardless of fault. (RAB 4) Respondent concedes that there are examples of other employees who were not fired for accidents in comparison to Amede, yet asserts that Amede's termination was consistent with "a multitude of other terminations" and that there is insufficient evidence of disparate treatment. (RAB 5-6; 8)

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<sup>1</sup> RAB \_ refers to Respondent's Answering Brief to General Counsel's Exceptions followed by the page number. General Counsel's exhibits are shown as GCX followed by the exhibit number and exhibit page, if applicable. RX refers to Respondent's Exhibit followed by exhibit number. Transcript references are (Tr.\_\_:\_\_) showing the transcript page and line, if applicable. ALJD\_\_ refers to JD(SF)-57-12 issued by the ALJ on December 27, 2012, followed by the page number.

Respondent admits that, following the discipline issued for what it considers an unprotected work stoppage, and its receipt of an organizing letter from the International, Technical & Professional Employees Union (Union), that it “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.” (RAB 2) It then suggests that there is no evidence of any union animus in the absence of independent Section 8(a)(1) allegations relating to union conduct. (RAB 1) Respondent asserts that “[i]t should also be noted that Counsel for the General Counsel did not argue in his brief in support of exceptions that the discharge of Amede was in retaliation to [his] participation in the work stoppage.” (RAB 2)

As properly found by the ALJ, General Counsel established a prima facie case that Amede was terminated for his Union activity. (ALJD 6:49-50) Consequently, there was no need for General Counsel to file exceptions to the ALJ’s finding that General Counsel established a prima facie case that Union or protected activities were a motivating factor in Respondent’s decision to terminate Amede. Therefore, it is Respondent’s burden, not General Counsel’s, to show that it would have issued the discipline in the absence of Union or protected concerted activity. It is Respondent’s failure to establish that it would have issued the discipline in the absence of Union or protected concerted activity which is at issue in General Counsel’s exceptions, given the ALJ’s finding that Union activity was a motivating factor in the decision to terminate Amede. The existence of Union or protected activity is not in question by General Counsel’s Exceptions as the ALJ described Amede’s concerted activities at the Taxicab Authority meeting, the protected strike, his participation as an identified Union organizer, and his distribution of Union information to Respondent’s drivers. (ALJD 3:15-27) Accordingly, the issue raised in General Counsel’s exceptions is

whether Respondent demonstrated that it would have issued the discipline in the absence of Union or protected activities. For the reasons stated in General Counsel's Exceptions, Respondent has not met its burden. Further, Respondent's Answering Brief fails to negate the evidence of disparate treatment.

Amede was terminated following a minor accident on April 23, 2012,<sup>2</sup> for Respondent's documented reason of "too many at fault acc[idents.]" (ALJD 3:29-33; GCX 31(a), (b)) Respondent's summarized evidence undermines its claimed defense as it fails to establish that it would have terminated Amede in the absence of his Union or protected activities. Respondent's failure to provide evidence in support of its claim is even more troubling considering that an objection was timely raised at hearing that the evidence was insufficient as it provides a mere summary without the underlying documentation upon which to draw a meaningful comparison. (Tr. 360:2-6; 384:7-25; Cf. GCX 60-65)

Respondent essentially admits that it cannot establish a firm rule regarding accident terminations.<sup>3</sup> There are several problems with Respondent's attempts to establish some type of rule based on the evidence provided at hearing. Respondent endeavors to include 11 terminations which occurred after Amede was terminated on April 23, and references terminations issued through July 31.<sup>4</sup> Thus, Respondent could easily have attempted to mask Amede's termination by its subsequent terminations. Further, five of the terminated employees meet Respondent's category of probationary employees who have less than

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<sup>2</sup> All dates are in 2012, unless otherwise noted.

<sup>3</sup> "[I]t would be impossible to provide universal [answers to why such [examples of accidents where terminations did not occur] with the limited data that was presented to [Pino] on the witness stand." (RAB 8)

<sup>4</sup> Subsequent drivers terminated include Severo Causing (May 3); Tefera Damtew (June 8); Thomas Hardy (July 12); Samuel Liben (May 18); Taureen Medina (July 9); Ilda Moreno (May 22); Isidoro Palmeri (May 8); Louis Rago (July 2); Yoh Weldemariam (May 17); Yongxing Zhen (May 22); and Goran Zuza (May 14). (RX 7)

90 days of service.<sup>5</sup> (See Tr. 196:19-23) Moreover, the eight employees who Respondent references in its Answering Brief do not aid its claim that Amede would have been terminated in the absence of his activities. Based on the cursory evidence Respondent provided at hearing, Peter Alexandrov (Alexandrov) was terminated for frequency and severity of accidents, with two more accidents than Amede and accidents which were more severe than any of Amede's. (RAB 6; RX 7) The summarized exhibit combined with the lack of any supporting evidence fails to show any meaningful comparison which aids Respondent, such as whether Alexandrov attended the Smith training, and any other circumstances considered in the accident file when Respondent terminated him. However, it is clear that there is at least one stark difference to Amede as Alexandrov was terminated in part for severity of accidents, including a previous \$326,737.72 accident. (RX 7)

Respondent references Kevin Banks (Banks) as an employee who was terminated the same day as Amede. (RAB 6) In comparison to Amede, Banks had two more accidents, although he worked for Respondent for two less years. (RX 7) Further, Banks' final accident was his sixth accident in just over six months. (RX 7) In comparison, Amede's last "accident" occurred five months before his termination when a pedestrian ran into his cab. (Tr. 263:9-14; GCX 31(i)-(o)) Similarly, Respondent presents Marco Gonzalez (Gonzalez) as an employee who had fewer accidents than Amede. (RAB 7) However, Gonzalez, like Alexandrov and unlike Amede, was terminated for severity in addition to the number of accidents. (RX 7) Gonzalez had a prior \$63,732.53 accident in addition to two others which were over \$1,000. (RX 7) Respondent references driver Amha Haile (Haile), and Halile's two accidents, but omits that Haile had those two accidents in just over six and one-half

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<sup>5</sup> Mario Garcia-Pereyra (February 13 to February 23); Louis Rago (April 4 to July 2); Frank Roth (December 16, 2011 to January 11); Li Yen Wang (January 25 to February 27); and Genet Yilma (December 9, 2011 to January 23). (RX 7)

months of service. (RAB 7; RX 7) While Haile was technically not a probationary employee, the six months of service does not make for a ready comparison to Amede's three years. Dereje Kedanemariam (Kedanemariam) was mentioned by Respondent, but he had 13 accidents at the time of termination, one of which involved almost \$6,000 in damage. (RX 7) Ilda Moreno (Moreno) does not aid Respondent as she had 15 accidents prior to her termination and was terminated after Amede. (RX 7) Further, Moreno had several accidents with over \$1,000 in damage, including one which caused \$15,000 in reserves and \$10,278.37 in expenses. (RX 7) Goran Zuza also had 15 accidents prior to his termination and was fired after Amede. (RX 7) For each of the drivers with whom Respondent attempts to establish a pattern of terminations for accidents, it failed to provide the corresponding circumstances, such as whether there was a past discipline history which was taken into account, and whether the drivers were allowed to partake in the "punitive" Smith training.

Further, other than acknowledging that General Counsel had identified examples of employees who had not been terminated, and acknowledging that it could not provide universal answers as to why certain other terminations did not occur, Respondent nonetheless claimed that it would address those examples, but failed to do so other than its newly spawned "number of days between accidents" rule.<sup>6</sup> (RAB 5, 7-8) Specifically, Respondent failed to address the evidence of disparate treatment raised in General Counsel's exceptions, including the fact that Amede was found faultless in his accident, the refusal to allow Amede to attend the "punitive" Smith Training course, the lack of progressive discipline for Amede, and the absence of severity of accidents for Amede. Moreover, it failed to even remotely

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<sup>6</sup> In its Answering Brief, Respondent proposes that the number of days employed per accident should be a consideration. (RAB 7-9) There was no testimony where the number of days employed per accident was a consideration, and no such rule is identified in any of the discipline of any of the employees. Respondent's attempt to create a new rule is an impermissible attempt to expand the record and should be ignored by the Board.

address several examples raised by General Counsel, including in part: Tefera Damtew who had 14 accidents, 4 of which occurred in 2012 (GCX 63(a), (i), (p), (u); RX 7); Isidoro Palmeri who was allowed to accumulate five accidents in 2012 during his three months of employment (GCX 65; RX 7); Jon Perdomo who had two at-fault accidents in 2012 during his six months of employment which caused damage claims of over \$30,000 but yet was allowed to pay for damage and attend the Smith Training (GCX 61(a), (e)-(i), (m); RX 7); and Thomas Hardy who had three accidents in 2012 including over \$23,000 in damage in his 18 months of employment, and was allowed to attend the Smith Training (GCX 64(a), (h), (l), (m)). Respondent failed to counter the evidence of disparate treatment other than to acknowledge that there are examples of other drivers who were not terminated.

Respondent's assertions, in response to General Counsel's exceptions, lack merit.

Additionally, the fact that there are no independent Section 8(a)(1) allegations related to Union conduct may be explained by the training Respondent received after delivery of the organizing letter. The lack of Section 8(a)(1) allegations following the training may simply be the product of learning how to mask its unlawful actions which it openly displayed in response to the protected strike.

#### **B. Respondent's Threats**

Respondent contends that in the absence of a finding by the ALJ on whether its Owner Ray Chenoweth (Chenoweth) threatened an employee because of his alleged protected concerted activity, that the activity should be considered unprotected, and, therefore, Owner Chenoweth's statements did not violate the Act. (RAB 11) Respondent adds that even if the activity was protected, "the innocuous statements do not rise to the level of a threat." (RAB 11) Respondent does nothing more than make a sweeping assertion

without any substance upon which to counter the arguments made by General Counsel in his Exceptions. Respondent does nothing to explain how, in the context of a disciplinary meeting in response to a protected concerted strike, Chenoweth's asking Amede how long he worked there, whether he liked working there, and whether he received a Christmas bonus should not be considered threats, or how such statements could be considered "innocuous." Respondent's bare assertions should be rejected, and the Board should find that Chenoweth's statements were unlawful as urged in General Counsel's Exceptions.

**C. Respondent's Suggested Remedy**

Respondent contends that it should not be ordered to expunge records regarding the strike which the ALJ found was protected, and that it should not be required to post a Notice as it "would give the employees the potentially false idea that a repeat of the work stoppage activity would also be protected." (RAB 11) Aside from pointing out that Respondent's argument demonstrates the lack of respect which Respondent has for the rights of its employees, its argument is not addressed again here as it was previously raised in its exceptions, and which were addressed in General Counsel's Answer to Exceptions.

### **III. Conclusion**

Respondent's Answering Brief to General Counsel's Exceptions, as discussed above, lacks merit and is not supported by the record or by legal precedent. It is respectfully requested that the Board should grant General Counsel's exceptions and otherwise affirm the decision of the ALJ.

Dated Las Vegas, Nevada, this 20<sup>th</sup> day of February 2013.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in SUN CAB, INC. d/b/a NELLIS CAB COMPANY, Case 28-CA-079813 was served by E-Gov, E-Filing, E-Mail, and facsimile mail on this 20<sup>th</sup> day of February 2013, on the following:

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