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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 REPLY BRIEF

Pursuant to Section 102.46(h), Respondent files this reply brief to the General Counsel's Answering Brief.

I. CREDIBILITY RESOLUTIONS

In the beginning of his Answering Brief, Counsel for the General Counsel asserts that Respondent seeks to have the Board ignore "well-reasoned credibility determinations" concerning the work stoppage issue, the interrogation issue and the termination of Abiy Amede. However, nowhere in his brief does he describe any credibility resolutions in issue. Respondent did not object to any credibility resolutions of the Judge. The Judge made certain rulings which Respondent excepts to as a matter of law.

Indeed, the only credibility resolution that has been noted by Respondent concerns the Judge's determination that Respondent changed its discipline procedure

concerning accidents at the first of the year due to rising insurance costs. It was General Counsel who urged that no such change had taken place. The Judge's ruling was based not only on the documentary evidence, but also on the testimony of Jaime Pino and Matt Habeger, Respondent witnesses. It is General Counsel who seeks to overturn credibility resolutions, not Respondent.

II. DISCHARGE FOR CONCERTED ACTIVITY

Counsel for General Counsel, in the first page of his Answering Brief, asserted that the Judge made findings concerning the "dual motivation which included his Union and protected concerted activities." The Judge made no finding that the discharge was motivated, even in part, in retaliation for Amede's concerted activities. The Judge's finding that General Counsel met its initial burden under *Wright Line*, only addressed Amede's union activities. (JD p. 6, lines 46-50)

III. ASKING THE IDENTITY OF WORK STOPPAGE LEADER

At page 5 of General Counsel's Answering Brief, General Counsel notes several issues addressed in meetings with Pino and the employees who engaged in a work stoppage, including asking the identity of the leader of the work stoppage. Similarly, in General Counsel's brief in support of his exceptions, at page 5, he implies that the drivers were asked in each of their various meetings with Pino about the identity of the leader of the work stoppage. General Counsel cited page 3, lines 10-13 of the Judge's decision in support of this statement. The Judge in his Decision recited that Pino held several meetings with the employees that engaged in the work stoppage. The Judge noted that a request was made for the identity of the leader of the work stoppage. But the Judge did not say that the question was made at more than one meeting. There is no dispute that Amede testified to being asked that question when he was called in to see Pino. But none

of the other General Counsel witnesses testified to such a question being posed to them and there is no such evidence anywhere in the record.

IV. SEIZURE OF RESPONDENT'S PROPERTY DURING WORK STOPPAGE

General Counsel cites numerous cases to support his position concerning the work stoppage. Most of the cases cited have nothing to do with a work stoppage that involves the seizure of an employer's property. General Counsel asserts that the Board case of *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) does not apply, but the Judge noted the case and reviewed its criteria. Also, at pages 14 through 16 of his Answering Brief, General Counsel argues that the impact of the work stoppage should not be considered. Yet in doing so General Counsel cites *Bethany Medical Center*, 328 NLRB 1094 at 1095 (1999); *Daniel Construction Co.*, 277 NLRB 795 (1985); *Tamara Foods, Inc.*, 258 NLRB 1037, 1308 (1981); and *Atlantic Scaffolding Co.*, 356 NLRB No. 113 (2011). None of those cases involve the seizure of an employer's property during a work stoppage.

Said cases cited by General Counsel support propositions to which Respondent concedes. In cases that do not involve a seizure of an employer's property, a work stoppage by employees is generally protected regardless of its impact on an employer's business and regardless of the timing of the strike. Indeed, it is conceded that a tactic of strikes usually includes an effort to bring economic harm to the employer in order to force the employer to meet the demands of the striking employees. Furthermore, Respondent concedes that the Board does not inquire as to the objective reasonableness of concerted activity where the activity does not involve seizure of the employer's property. Those issues are generally irrelevant in determining the protected status of

concerted work stoppages. **They are, however, very relevant in cases involving seizure of an employer's property.**

General Counsel also asserts that Respondent has not cited a case which recites that a work stoppage that involves a seizure of employer property has to be spontaneous. Yet Respondent cited *Waco, Inc.*, 273 NLRB 746 (1984) which emphasized the spontaneous nature of concerted activity to address grievances with employers in these types of cases and Respondent stands by its assertion that most of the cases protecting the concerted activity of employees in these types of cases involve spontaneous activity.

The inquiry in these types of cases should begin with the concept that seizure of an employer's property is unprotected conduct. If the seizure of property occurs in the context of concerted activity involving wages and terms and conditions of employment, the conduct should be analyzed to determine whether there are mitigating circumstances that would protect the conduct despite the unprotected activity of seizure of employer property. The spontaneous nature of such conduct would support the proposition that some leniency might be given to the employees while evidence that the conduct was premeditated would certainly not be a mitigating factor in the employees' favor. If the conduct involved trying to redress grievances with the employer that suddenly arose, leniency might be called for, but if the grievances were not even with the employer, and the employer had, as noted by the Judge (JD p. 4, lines 40-41), no ability to address the grievances, there would be no mitigating factor in the employees' favor. If the seizure of the property and the attempt to address grievances with the employer did not impact the production of the employer, leniency would be in issue. However, if the seizure of property was premeditated and calculated to harm the employer and the public to the greatest degree possible, then leniency should not even be considered. If the employees

had no established grievance procedure to address their concern, leniency might be in order. But if the “grievance” was with a public agency and the public agency had an established procedure for direct communication between the employees and the Governor’s appointees to the public entity, for the employees to address their concerns, and, in fact, the employees utilized those procedures, then there is no justification for the seizure of the employer’s property.

General Counsel quarrels with the asserted amount of damages suffered by Respondent due to the work stoppage, yet there can be no dispute that the work stoppage was designed to, and did, occur at the time that it would have the greatest negative impact on Respondent and the public as well. General Counsel also contends that Respondent had knowledge for a week about the pending work stoppage. First, it should be noted that Pino said he had heard rumors about a work stoppage but that he did not pay any attention to them. (TR p. 81, line 22). In any event, no advanced knowledge would have helped Respondent prepare for the work stoppage. If Respondent had 100 stand-by drivers ready to work, they could not have used the available taxicabs because the required medallions were in the possession of those engaged in the work stoppage.

General Counsel also states that the drivers did not refuse a demand to return to Respondent’s yard, yet this is misleading. Jaime Pino was informed of the work stoppage when he received a call at his home from his dispatcher on a Saturday. (TR p. 82). He was informed that drivers were clustered at one location. His dispatcher told him that it was “crazy,” that the whole town was calling for cabs, that there must be a strike and that he did not know what to do. (TR p. 113). Pino got his road supervisor to go to where the GPS showed the drivers to be to confirm that they were there. (TR pp. 82-85). It was

also clear that the drivers in the work stoppage cut off communication and did not respond to Respondent's requests to serve the public. Pino testified:

“... every hotel was calling for service, our accounts were calling for service, and we couldn't get anybody to serve our public, our customers.

So when the – the dispatchers looked at the GPS, they realized that all of these drivers were empty and they were always – I mean all of them were in one location, which was somewhere around Twain and Paradise, and none of them were answering the radio; we couldn't serve anybody.

...

There was nobody to be found to pick up calls and the hotels were calling constantly.”

(TR pp. 81-82).

It is clear that the drivers were cutting off communication with Respondent's dispatchers during the work stoppage and were certainly refusing to pick up passengers during the work stoppage. (TR pp. 82-83, 89-90, 113).

V. NO NOTICE OR RELATED REMEDIES SHOULD BE ORDERED

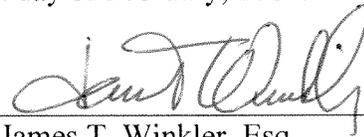
Respondent continues to urge the Board, in the event the Board considers the work stoppage to be protected, that warnings to employees who engaged in the work stoppage should not be removed from their files and that no Notice to Employees should issue. As noted, such a notice and/or removal of warnings could lead the employees to believe they could engage in the exact same conduct and that it would be protected, when, in fact, no such assurance can be given.

General Counsel did not address this issue, other than noting that the posting of a Notice to Employees is a traditional remedy. It should be noted that the General Counsel did not contend that the employees could engage in the same conduct and such would again be protected. Indeed, if the Board holds that a repeat of the exact conduct by the same employees may not be protected, then it would be inappropriate to order the posting of a Notice to Employees.

VI. CONCLUSION

Based on the above, and the record as a whole, the complaint should be dismissed in its entirety.

Dated in Las Vegas, Nevada, this 21st day of February, 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 February 21, 2013, I served the within document(s):

RESPONDENT'S REPLY BRIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2013 at Las Vegas, Nevada.



Kimberly Gregos

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