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A-NLV Cab Company d/b/a Las Vegas Limousine and Stephanie Maitland and Julio Cavalcanti and Michael Horrocks. Cases 28–CA–17748, 28–CA–17803, 28–CA–17965, 28–CA–18081, 28–CA–18309, and 28–CA–18313

November 20, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 22, 2003, Administrative Law Judge Lana H. Parke issued the attached decision. Charging Party Stephanie Maitland filed exceptions and supporting argument.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and argument and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

¹ The Respondent filed a motion to strike the Charging Party's exceptions. The motion is denied in part and granted in part, as explained below. The Charging Party's exceptions were timely filed pursuant to the Board's "postmark" rule. See Sec. 102.111(b) of the Board's Rule and Regulations. Additionally, the Board's Rules do not require a party to notify the other parties regarding when it submitted the exceptions to the Board. With respect to whether the exceptions meet the criteria of Section 102.46(b)(1) of the Rules, although the exceptions do not comply in all respects with the Board's Rule, they are not so deficient as to warrant striking, particularly in light of the Charging Party's pro se status. See generally *Phoenix Transit System*, 335 NLRB 1263 (2001). The Respondent's motion to strike is granted, however, with regard to those exceptions or those portions of exceptions that are based on an alleged audiotape recording of conversations. As the audiotape is not part of the formal record in this matter, the Board is unable to consider such evidence. *Electro-Tec, Inc.*, 310 NLRB 131 fn. 1 (1993).

² The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that Owner Charles Frias' May 2002 comment to Maitland that she was causing problems and he was going to get rid of her was not unlawful, because the judge found that the General Counsel had failed to show that Frias' remark was related to Maitland's union activity. The judge reached that conclusion in part because she found that Maitland had not been involved in any union activity for nearly a year when Frias made his comment. In fact, Maitland had filed an unfair labor practice charge, alleging that the Respondent had disciplined her because of her union activity, 3 months before Frias' remark. Despite the judge's error, we agree with the judge that Frias' comment reflected his dissatisfaction with Maitland's job performance and record

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. November 20, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

John Giannopoulos, Atty., for the General Counsel.
Kevin C. Efrogmson, Atty., of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Las Vegas, Nevada, June 9-12, 2003.¹ Pursuant to charges filed by Stephanie Maitland (Maitland), an individual, Julio Cavalcanti (Cavalcanti), an individual, and Michael Horrocks (Horrocks), an individual, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued an order further consolidating cases, third consolidated complaint and notice of hearing (the complaint) on January 29, 2003.² The complaint alleges that A-NLV Cab Company d/b/a Las Vegas Limousine (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

Issues

1. Did Respondent violate Section 8(a)(3), and (1) of the Act by suspending Maitland on December 21, 2001?

of discipline—at least three suspensions in a 6-month period—rather than her union activity, especially given the absence of any other record evidence that Frias was referring to the latter. In these circumstances, we affirm the judge's finding that the allegation should be dismissed.

We agree with the judge's dismissal of the allegation that employee Michael Horrocks was coercively interrogated, on the basis that the allegation was time-barred under Sec. 10(b) of the Act. However, the 10(b) period is not jurisdictional, as the judge stated, but rather is a statute of limitations for filing unfair labor practice charges. *Paul Mueller Co.*, 337 NLRB 764 (2002).

¹ All dates are in 2002 unless otherwise indicated.

² At the commencement of the hearing, counsel for the General Counsel amended the complaint to allege Art Rosson and Anita Bernholtz, marketing director, as supervisors of Respondent during relevant periods. Respondent admitted these amended allegations and further amended its answer to admit par. 1(h). At the close of his case, counsel for the General Counsel's motion to withdraw pars. 5(a) and (b) of the complaint because of Cavalcanti's failure to appear at the hearing was granted.

2. Did Respondent violate Section 8(a)(4), (3), and (1) of the Act by suspending and discharging Maitland on May 29 and October 17, respectively?

3. Did Respondent violate Section 8(a)(4), (3), and (1) of the Act by imposing more onerous conditions of employment on its drivers?

4. Did Respondent violate Section 8(a)(1) of the Act by threatening employees with discharge because of their union activities and because they had filed charges or given testimony under the Act?

5. Did Respondent violate Section 8(a)(1) of the Act by interrogating employees about their union activities?

On the entire record and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Nevada corporation, with an office and place of business located at 5010 South Valley View Boulevard, Las Vegas, Nevada (Respondent's facility), is engaged in the business of furnishing limousine and other transportation services to the public. During the representative 12-month period ending February 19, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$5000 directly from points outside the State of Nevada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Professional, Clerical & Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.³

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business Operations

Respondent provides limousine, sedan, and shuttle bus transportation services in Las Vegas, including transportation from Las Vegas-McCarran International Airport, under an operating agreement between Respondent and Clark County, Nevada. The operating agreement sets a specific staging and loading area for Respondent's use at the airport outside door 14 of the airport baggage claim area. As potential customers exit the airport from door 14, they pass by Respondent's podium located on the sidewalk directly in front of door 14 where Respondent's employees, responsible for assigning transportation at the airport (starters), are placed. To the left, Respondent maintains a ticket/cashier booth. On each shift Respondent employs two starters, a cashier, and a shift supervisor. Starters greet potential customers, describe the services available (limousine, sedan, shuttle bus) and the relative rates (e.g., standard limousine \$38 per hour, sedan \$30 per hour), and direct customers to the desired service. Driver solicitation of customers is illegal. Drivers wait in line at the airport staging area for trip assignments (charters.) The limousines wait in the area imme-

³ Where not otherwise noted, these findings are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

diately outside door 14 and the sedans in an area across the street.

Respondent also regularly assigns prearranged limousine or sedan trips (office charters) to drivers. Respondent generally makes such assignments by giving the designated driver a written reservation/trip sheet when the driver reports to the facility for work. The charter is not to be "passed off" to another driver without supervisor approval. Although it appears to have been a common practice among drivers to pass off charters without supervisor approval, there is no evidence that Respondent has condoned the practice. Employee Sandra Ellen Smith (Smith) testified she did not think Respondent was aware that drivers passed off charters without approval. In each instance that Smith passed off a charter or accepted one from another driver, the drivers involved "contacted the company right away" and notified the office of the change. In May 2000, Respondent suspended Horrocks for passing off an office charter.⁴

B. Union Activity, Alleged Union Animus, and 8(a)(1) Statements

Respondent originally hired Maitland in September 1997. For reasons unrelated to the issues herein, Respondent terminated Maitland on July 13 and rehired her on December 29, 2000.

The Union filed a representation petition with the Board for a unit of all full-time and regular part-time limousine drivers employed by Respondent at its facility on September 25, 2000 (Case 28-RC-5891). The parties entered into a stipulated election agreement on October 2, 2000. The Board conducted a representation election on November 2 and 3, 2000, which the Union won by a vote of 182 to 4. The Board issued a certification of representative dated November 15, 2000. Commencing in December 2000, Respondent and the Union engaged in collective bargaining. Employee participants for the Union in the collective-bargaining sessions included Daryl B. DeShaw (DeShaw), limousine driver and union activist, and several other employees. Respondent and the Union entered into a collective-bargaining agreement on January 29, effective by its terms January 29 to February 29, 2004 (the agreement).⁵ In March, DeShaw voluntarily terminated employment with Respondent in 2000, shortly before Respondent rehired Maitland. DeShaw and Maitland began living together.⁶ DeShaw accompanied Maitland when she met with Charles Frias (Frias), owner of Respondent, and DeShaw spoke to Frias about her reemployment. After her rehire, Maitland participated in collective-bargaining negotiations for the Union and passed out

⁴ While counsel for the General Counsel attempts to distinguish Horrocks' discipline on the basis that it involved a VIP account, no evidence was adduced to show that Respondent condoned any unapproved charter pass-off.

⁵ Among other provisions, art. X, sec. 3 established that "just cause for discharge without prior discipline included (m) Abusive, disruptive or improper behavior toward a supervisor (n) Refusal to follow an order of a supervisor or other representative of the Employer, and (o) Insubordination of any nature."

⁶ The relationship continued at least through the dates of the hearing and was known to Respondent's supervisors.

prounion paraphernalia and membership cards to fellow employees.

In early 2001, DeShaw obtained a permit to picket at Respondent's airport staging area and organized rotation of drivers to maximize the number of picketers. Both he and Maitland participated in the picketing which lasted an hour or two.

In June 2001, drawing on members of other Teamster locals and with Maitland's assistance, DeShaw organized a rolling, semitruck demonstration of union support in front of Respondent's facility. During the demonstration, many of Respondent's employees including Maitland, picketed with signs reading, inter alia, "Respect Workers' Rights TEAMSTERS."

On an unspecified date sometime after the union election but before Respondent and the Union signed a collective-bargaining agreement, Alex Kahalehili (Kahalehili), Respondent's general manager since July 15, 2001, and admitted supervisor, asked Horrocks, who was wearing a union button, "What the hell are you doing in that Union?" Horrocks replied that he was one of the Union's strongest members, and Kahalehili told Horrocks that if he were still driving he would not want the Union representing him.

In July 2001, DeShaw, attended a disciplinary meeting concerning two of Respondent's secretaries as their *Weingarten*⁷ representative. Frias, Kahalehili, inter alia, were present. Frias asked DeShaw who he was. When DeShaw identified himself, Kahalehili interjected that DeShaw was a union man. Frias waved his arms, told DeShaw he had no right to be there, and demanded he leave "before I shoot you." According to DeShaw, Frias added, "You'll never see a union in my f— company."⁸

In mid-July 2001, shortly after Kahalehili became Respondent's general manager, DeShaw delivered a copy of a representation petition covering Respondent's office employees to Kahalehili at Respondent's office. With apparent sarcasm, DeShaw told Kahalehili that without his help, the petition would not have been possible. Kahalehili answered, "F— the Union."

According to DeShaw, in the fall of 2001 or 2002, Kahalehili confronted DeShaw as he was reporting to work and told him to put on his jacket. DeShaw pointed out that it was 115 degrees that day and that he was not yet on duty. Kahalehili told him to put on his jacket or go home. When DeShaw protested that Kahalehili was changing working conditions, Kahalehili said, "You're never going to see a f— union in my company as long as I am here."⁹

⁷ *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

⁸ I cannot accept DeShaw's testimony as to Frias' latter statement. By the date of this alleged statement, the parties were fully involved in collective bargaining. It is inherently incongruous for Frias to have said there would never be a union in his company.

⁹ I cannot accept DeShaw's testimony in this regard. By the first of the dates DeShaw claimed for this incident, the Union had already won the election and the parties were bargaining. By the second date, the parties had executed a collective-bargaining agreement. It is as inherently incongruous for Kahalehili to have said there would never be a union in the company as it was for Frias as set forth above. Further, the statements attributed by DeShaw to both Frias and Kahalehili bear such a similarity that they ring false.

In late 2001 or early 2002, unit employee Edward Lindsay (Lindsay) requested DeShaw to be present at a disciplinary meeting with Kahalehili. When the two employees entered Kahalehili's office, Kahalehili told DeShaw that he had no business there. DeShaw said he was serving as Lindsay's *Weingarten* representative. Kahalehili told him the Union had no authority there and to get out. When DeShaw protested that Lindsay had representation rights, Kahalehili said Lindsay could have any witness he wanted except DeShaw.¹⁰

During her May 29 suspension (set forth below), Maitland went to Respondent's office to get her suspension papers. She arrived wearing shorts and a tank top. Supervisor Adam Lopez said to her, "Oh, hello. Topless and bow-tie today, but I better not say that because you'll tell the union."

Either before Maitland's suspension or after she returned from it,¹¹ she reported to Respondent's facility at the end of her shift where she conversed with Supervisor Art Rosson (Rosson). Frias appeared and asked Rosson what he was doing with Maitland, saying, "You're not supposed to be hanging around with her." Rosson said Maitland had just come to copy a paper. Frias said, "Who is she? I thought we got rid of her." Rosson said, "No, no, that's the girl that goes to college that you liked." Maitland understood Rosson was trying to stick up for her. Frias asked Maitland's name. When she identified herself, he said, "Yeah, you. You, I thought we got rid of you. Don't worry about it, I'll get rid of you; don't worry, I'll get rid of you."¹² Maitland left the office without replying.

C. Maitland's December 21, 2001 Suspension

On December 20, 2001, Respondent assigned Maitland a charter to pick up client Abu Ali (Ali charter) from the baggage area of the Las Vegas McCarran Airport (the airport) and drive him to his destination. In Maitland's view, such charters "take up a lot of your time, and lower your book [revenue]." Maitland drove to the airport and, without supervisory approval, passed off the Ali charter to employee Roman Stadelman. Although Maitland said she had a conflicting personal charter, her trip sheet reports no trip for time of the Ali charter. On December 21, 2001, Respondent suspended Maitland. The employee action notice given to Maitland read, "Failure to follow order of supervisor, improper action towards a customer or potential customer. Violation of any company rule or policy. Passing off office charter."

Maitland's May 29 Suspension

On the evening of May 23, Maitland awaited a limousine charter assignment at Respondent's airport staging area. At around 10 p.m., a group of customers requested a limousine for

¹⁰ In cross-examination, DeShaw expanded his account of this incident to include a statement by Kahalehili that "the union had no rights." I find this alleged statement to be an afterthought, which I do not credit.

¹¹ Maitland could not say when this incident occurred, only that it was "around the area of the suspension time."

¹² Maitland's testimony of this incident was not entirely consistent. Under cross-examination, Maitland testified that Frias also said, "You're the one causing the problems." In an affidavit given to the Board on June 11, 2002, Maitland did not relate that Frias had said he was going to get rid of her but did testify that Frias referred to her as "the one causing the problems."

an hour (the Rio charter). Tabitha Grant (Grant), the starter, attempted to assign the Rio charter to Maitland as the first in line.¹³ Maitland objected, saying she had a personal, prior engagement.¹⁴ The matter was referred to Respondent's airport supervisor who ordered Maitland to take the Rio charter. When she refused, the supervisor gave the Rio charter to the driver behind Maitland and thereafter declined to "load" Maitland who had to leave "empty" to perform her personal charter, which was scheduled for "11:00-ish."¹⁵

Respondent again suspended Maitland. The suspension notice dated May 29, reads, "#1 Refusing to perform assigned work during a shift. #2 refusal to follow an order of a supervisor or other representative of the company." In the Employee Comments section, Maitland noted, "had personal to pick-up 5 other people turned down."¹⁶

E. Other Discipline of Maitland

Although the General Counsel has alleged only Maitland's December 21, 2001, and May 29 suspensions as pre-discharge discipline violative of the Act, Respondent has taken other disciplinary action against Maitland, including the following:

On December 7, 2001, Respondent suspended Maitland for 3 days for incomplete paperwork.

On March 13, Respondent suspended Maitland for 5 days. The suspension notice reads, "2nd violation, failure to accept & perform assigned charter #229661. Subsequent violation will result in termination." In Employee's Comments, Maitland wrote, "Forced to sign this was never a policy everyone else gets to give back charters. And refuse charters. I had a personal that day. I'm the only one that gets written up for this and suspended."

On June 30, Respondent issued Maitland a written warning for failure to complete required shift/failure to complete paperwork

F. Maitland's October 17 Discharge

On October 16, Respondent issued Maitland an office sedan charter to pick up a customer, Catledge, in the Delta baggage area of the airport and to display an identifying greeting sign reading, "Mr. Catledge." The trip sheet noted Catledge's arrival time as 2215 (10:15 p.m.) Maitland reported to the airport Delta baggage area as instructed at about 10 p.m., parking as was customary one level below Respondent's staging area. In the baggage area, Maitland sported the specified greeting sign

¹³ According to Maitland, Grant attempted to assign the Rio charter to four limousine drivers parked ahead of Maitland, but each declined. Grant testified that Maitland's limousine was the first in line. I do not find Maitland's testimony to be reliable. In her testimony, she initially confused the December and May suspensions. She further testified she was the last limousine in line but also said the "guy behind me did [the charter]." I accept Grant's testimony that Maitland was first in line.

¹⁴ Personal engagements are those arranged directly with the driver. The personal charter Maitland had arranged involved relatives of her brother-in-law.

¹⁵ Maitland's trip sheet shows she picked up her personal charter, two people, at 11:20 p.m., and the trip lasted an hour.

¹⁶ Maitland did not explain why, in her employee comment, she numbered her personal charter customers as five when her testimony and her trip sheet show only two customers.

and waited until all bags from the identified Delta flight had been picked up but was unable to find Catledge.¹⁷

At Respondent's staging area, Catledge approached Respondent's cashier station at 10:55 p.m. and complained to cashier Kelly Bolognese (Bolognese) that his pickup had not appeared. Catledge was "irate . . . upset." Bolognese contacted Respondent's office, determined that the assigned driver was Maitland. Bolognese told the office the customer was outraged and that she would assign his charter to the next driver. The next available sedan driver in the staging area was David Kammerer (Kammerer) who left the airport with Catledge at 10:57 p.m. Catledge told Kammerer that he waited for Maitland in the baggage area but did not see her.¹⁸

At about 11 p.m., Maitland drove to Respondent's staging area, arriving about 11:05 p.m. Learning that Catledge had left with another driver, Maitland joined the sedan line at the staging area. According to Maitland, a starter and the supervisor at the staging area, Jimmy Irvine (Irvine) solicited potential customers as they exited the airport and loaded limousines but did not provide a load for her sedan. Maitland left her sedan and stood on the curb by a limousine. Irvine told her to get back to her car. She refused, saying, "You guys are not selling my car; I need to stay here and make sure you sell my car." Irvine said, "I am going to sell your car." Maitland said, "No, you haven't mentioned my car at all."

Irvine again told her to return to her sedan. Again, she refused. At least three times, Irvine then told her, "Since you won't go back to your car, return to the yard." Maitland refused those orders as well because she was "sick of being harassed." When Irvine thereafter assigned customers to Maitland's sedan, she left the airport to carry out the trip. Following her shift, Maitland reported to Respondent's office where Kammerer asked her for the Catledge trip sheet so he could present it for payment as he had completed the charter. Maitland refused to give the trip sheet to him. Irvine then asked her for the Catledge trip sheet, and she refused his request also. She insisted Respondent pay her for the Catledge trip.

Irvine prepared and gave to Kahalehili the following memorandum dated October 16:

I was informed by Diane (The reservationist) that Maitland missed her charter around 10:55 p.m. I went to the airport around 11:15 p.m. to close the airport booth and to find out why Maitland missed her charter. When I arrived Dennis (Starter) informed [me] that the customer waited 20 to 30 minutes for Maitland inside the airport, but could not find his driver. The customer finally came out the door 14 and rode with another driver, Dave Kammerer. I saw Maitland at the door 14 but she said nothing to me about the missed charter. Maitland, instead, came

¹⁷ Missing customer connections was not an uncommon occurrence for Respondent's drivers. However, company rules required the driver to contact the dispatch or reservations offices in that situation, which Maitland did not do, although she apparently had a cell phone.

¹⁸ Respondent argues the evidence shows Maitland did not report to the baggage area as assigned. I find it unnecessary to resolve that question as the discharge clearly relates to Maitland's conduct after the failed pickup.

up to the podium and refused to stand by her car. I repeatedly asked her to stand by her car like the other drivers but she refused. When I asked her what her problem was she said that she wanted to make sure that I mentioned her sedan and therefore she will not leave the podium! I then ordered her to go back to the yard and she refused to go back as well. I took a moment to walk down toward the end of the limo line, and when I turned around towards the podium, I was amazed to see Maitland soliciting customers by talking to them. I immediately went back to the podium and told her not to speak to the customers and once again asked her to go back to her car and once again she refused. It was obvious that Maitland was deliberately provoking a confrontation therefore I decided to speak with her in the yard. Maitland finally got a ride around 11:25 p.m. from the airport. At about 12:20 a.m., I spoke with Maitland along with Kammerer in front of the key room and asked her what happened with her charter. She told me that she will not speak to me without Stella (the union rep). I then asked her to give the charter papers to Kammerer, who actually did the run, and Maitland once again refused. She actually said that she did the charter therefore she will not turn over the charter to Kammerer. I then asked her to explain herself but she just reiterated that she would not speak to me without Stella. I told her that I am just trying to do my job and you are making it very difficult for me. Kammerer then said, "It's okay Jimmy, I don't need it." I then made a copy of the charter from our yellow copy for Kammerer to turn in to the cashier.

On October 17, Kahalehili met with Maitland and her union representative, Stella Havis (Havis). He gave Maitland an employee action notice dated October 17 with "TERMINATION" check marked. The notice read, "Refusal to follow an order of a supervisor or other representative of the Employer. Failure of a driver to perform an assigned charter."

F. Alleged Imposition of More Onerous Conditions

In October, Maitland complained to Havis that starters at the airport were carrying customers' bags across the street to chartered sedans and soliciting tips. While Maitland liked help with the baggage, she objected to the starters hustling tips. A meeting to discuss the problem was held among Havis, Maitland, Kahalehili, and Irvine. When Maitland explained the problem, Kahalehili agreed with her concerns. As a resolution, Irvine and Kahalehili proposed the substance of the following memorandum, which Havis said the Union could live with. On October 11, Respondent issued the memorandum to employees without first showing it to the Union:

If you are first up at the door 14, you must stand by your sedan and wait for an appropriate signal from a starter. When a starter gives you a signal, you must walk to the podium and bring the customers to your sedan. You, the Driver, will load the luggage, and do not have the customers load the luggage for you.

Maitland testified the memorandum directives constituted a change that made conditions more difficult for her as she often needed help with luggage either from the starters or from cus-

tomers. According to Smith, however, it was always the drivers' responsibility to take luggage to the vehicle and to load it.

III. DISCUSSION

A. Union Activity, Alleged Union Animus, and 8(a)(1) Statements

Maitland was indisputably involved in union activities at all times relevant to the issues herein. It is not clear that her activity level was higher than that of other employees, but she did live with DeShaw who was known to Respondent as the chief union proponent and toward whose union activities Respondent had evidenced animosity. Thus, both Frias and Kahalehili expressed hostility toward DeShaw's attempts to represent employees at disciplinary meetings. There is no evidence that Respondent projected its antagonism toward DeShaw's protected activities onto Maitland, but it is not unreasonable to infer that Respondent linked her with DeShaw, as counsel for the General Counsel argues. Moreover, a sort of animus, albeit mild, was directed specifically at Maitland in May, when Supervisor Adam Lopez said, essentially, that he had better not joke about her apparel, as she would complain to the Union. It is reasonable to conclude that his comment reflected Respondent's apparent opinion that Maitland was involved with the Union and likely to utilize their representational services.

Although I have accepted Maitland's testimony of her interaction with Frias sometime around her May 29 suspension, I cannot find Frias' statements evidenced union animus or constituted a threat in violation of Section 8(a)(1) of the Act as alleged in the complaint. The General Counsel has not met his burden of proof as to that. The evidence shows that Frias' comments may have been made during or after Maitland was suspended for the second time. His statements that she was causing problems and that he would get rid of her may have referred to the incidents giving rise to her suspensions and not to any union activity. Indeed, it is more likely that his comments referred to her recent work-related problems than her union activity since her last conspicuous union activity had been her involvement in the June 2001 semitruck demonstration and picketing nearly a year earlier. In any event, as part of his burden, the General Counsel must link Frias' May 2002 disapprobation to Maitland's union activity rather than unprotected conduct, and the General Counsel has not done so. Therefore, I shall dismiss the allegation of the complaint relating to Frias having threatened employees.

The complaint also alleges, at paragraph 5(d), that at about the end of July 2002, Kahalehili interrogated employees about their union membership, activities, and sympathies. The only evidence supporting that allegation was Horrocks' testimony of being asked by Kahalehili sometime between November 3, 2000, and January 29, what he was doing in the Union. His testimony creates, as counsel for the General Counsel concedes, a 10(b) problem. Horrocks filed the relevant charge on December 13 (Case 28-CA-18313), and Horrocks' testimony puts the alleged interrogation outside the relevant 10(b) period. Section 10(b) of the Act is jurisdictional and the General Counsel has the specific burden of establishing this statutory requirement, which he has not done. I shall, therefore, grant the

Respondent's motion to dismiss this allegation of the complaint.¹⁹ Notwithstanding the General Counsel's failure to establish a violation of Section 8(a)(1) by Kahalehili's interrogation of Horrocks, I find the interrogation is evidence of Respondent's animus toward the Union.

In sum, while the General Counsel has not established any independent violations of Section 8(a)(1) of the Act in this matter, the General Counsel has proven Respondent held animosity toward its employees union or other concerted protected activities. There is, however, no evidence of animosity toward employee activity protected by Section 8(a)(4) of the Act.

B. Maitland's December 21, 2001, and May 29 suspensions and October 17 discharge

The question of whether Respondent violated the Act in twice suspending and discharging Maitland rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*.²⁰ To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, in fact, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB 608 fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the first two elements are met: Maitland was actively involved in supporting the Union, and Respondent had to have been aware of her involvement. As to the third element, although Respondent expressed strong animosity toward DeShaw's union activities, there is no significant, direct evidence that Respondent bore animosity toward Maitland for her union support. However, such direct evidence is not essential. In determining whether the General Counsel has met his initial burden of proving that an employee's protected activity was a motivating factor in an employer's decision to discharge the employee, the Board has held that "a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp. of America*, 337 NLRB No. 13, at slip op. 1 (2001), citations omitted. Here, where Maitland was closely allied with DeShaw and partici-

pated with him in union activities, I find that the strong animosity expressed to him may reasonably reflect on Maitland. Even after DeShaw left Respondent's employ, Lopez' comment to Maitland shows Respondent pejoratively considered her to be likely to turn to the Union with work-related complaints. Accordingly, I find the General Counsel has met his initial burden of showing that Maitland's protected activity was a motivating factor in Respondent's decision twice to suspend and ultimately to discharge her.

The General Counsel having carried his initial burden, the burden shifts to Respondent to demonstrate that it would have twice suspended and ultimately discharged Maitland even in the absence of her protected activities. I find Respondent has met its burden as to all three disciplinary actions against Maitland.

Regarding Maitland's December 21, 2001 suspension for passing off an office charter, the evidence shows that Respondent prohibited drivers from passing off assigned charters to other drivers without prior supervisory approval. Counsel for the General Counsel accurately argues that witness testimony shows that unapproved charter pass-offs were not uncommon among Respondent's drivers. However, no testimony or other evidence established that Respondent condoned the practice. Smith, the General Counsel's witness, testified she did not think Respondent was aware that drivers passed off charters. In 2000, Respondent disciplined Horrocks for passing off a charter. Respondent's inability to deter all its drivers from passing off charters does not translate into condonation. When, therefore, in December 2001 Respondent found Maitland had passed off an assigned office charter without supervisory approval, Respondent's suspension of her was neither pretextual nor unreasonable. The evidence shows Respondent had a rule against passing off charters. There is no evidence that Respondent winked at violations of its rule. In the past, a driver had been suspended for violating the rule. Maitland also violated the rule, and she was disciplined. I conclude that Respondent would have so disciplined Maitland for violating its established policy even in the absence of her protected activities. Accordingly, I shall dismiss the allegations of the complaint relating to Maitland's December 21, 2001 suspension.

As to Maitland's May 29 suspension, there is no dispute that on May 23, Maitland refused a supervisory order to take the Rio charter at the airport. Counsel for the General Counsel argues, essentially, that it was unfair of Respondent's airport supervisor to give the order and that Maitland was justified in refusing it. But with employer work orders, like discipline, the Board will not substitute its judgment for the employer's. Rather, the Board's role is to determine if the employer's professed basis for its action is the actual one, rather than a pretext to disguise antiunion motivation.²¹ It is not extraordinary that an employer should expect employees to follow supervisors' directions. Indeed, Respondent and the Union provided in their collective-bargaining agreement that refusal to do so would constitute "just cause for discharge [even] without prior discipline." There is no evidence that Respondent's airport supervisor was motivated by considerations of union animus in direct-

¹⁹ Following Horrocks' testimony at the hearing, Respondent moved to dismiss par. 5(d) of the complaint, contending that the General Counsel had failed to show any unlawful interrogation within the 10(b) period.

²⁰ *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

²¹ See *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2002).

ing Maitland to take the Rio charter or that he wished to “create [an] incident,” as counsel for the General Counsel contends, on which Respondent might base discriminatory action. The simple facts are that on May 23, Maitland refused a direct order from a supervisor, and she was disciplined for doing so. There is no evidence that any other driver refused direct supervisory orders with impunity and no evidence as to why Maitland should have been buffered from the consequences of a refusal. I find that Respondent would have disciplined Maitland for her refusal to comply with a supervisory order even in the absence of her union or other protected activities. Accordingly, I shall dismiss the allegations of the complaint relating to Maitland’s May 29 suspension.

As to Respondent’s discharge of Maitland, an analysis similar to the one I have applied to her May 29 suspension pertains. The underlying issue surrounding Maitland’s discharge is not whether she excusably missed the Catledge charter, as counsel for the General Counsel argues, but whether she once again refused to follow supervisory orders.²² Even accepting Maitland’s testimony of what occurred on October 16, the evidence shows that Maitland blatantly and contentiously refused several direct orders from her supervisor. Her defiance of supervisory authority can in no way be justified, as counsel for the General Counsel urges, by the arguable “legitimacy” of her concern about the marketing of her sedan. Maitland’s October 16 refusals to follow orders constituted egregious misconduct. There is no evidence that any other driver ever flouted Respondent’s authority as Maitland did on October 16, and there is no evidence that Respondent would have tolerated such conduct if one had. Therefore, there is no basis for finding pretext in Respondent’s termination of Maitland. Accordingly, I find that Respondent has met its burden of showing that Maitland would have been discharged for her conduct even if she had engaged in no union or other protected activity, and I shall dismissed the allegations of the complaint relating to Maitland’s discharge.²³

C. Alleged Imposition of More Onerous Conditions

The General Counsel alleges Respondent’s October directive to sedan drivers to load their customers’ luggage without cus-

²² Although Maitland’s termination notice mentions her failure to perform an assigned charter, it is clear that Respondent’s review of her conduct centered on her refusal to follow her supervisor’s orders.

²³ The complaint alleges that Respondent’s May 29 suspension and October 17 discharge of Maitland was also motivated by her having filed charges or given testimony under the Act in violation of Sec. 8(a)(1) and (4) of the Act. The analysis herein applies equally to the 8(a)(4) allegations of the complaint.

tomor or starter assistance to violate Section 8(a)(3) and (4) of the Act. The directive came after consultation with the Union following Maitland’s complaints. There is no evidence to show that the directive had anything to do with, or was in any way motivated by, Maitland’s or other employees’ union activities or filing charges or giving testimony under the Act. Respondent showed no animosity toward Maitland for having taken her concerns to the Union and, in fact, agreed with her position. Moreover, the Union agreed with the terms of the directive. Accordingly, I shall dismiss the allegations of the complaint relating to imposition of more onerous conditions.

CONCLUSION

I conclude the General Counsel failed to meet his burden of proving that Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge or by interrogating employees and failed to meet his burden of proving that Respondent violated Section 8(a)(1), (3), and (4) of the Act by imposing more onerous conditions of employment on employees. I further find that Respondent has proven its affirmative defense under *Wright Line* of demonstrating that it would have suspended Maitland on December 21, 2001, and May 29, and discharged her on October 17, even in the absence of her protected activities. Therefore, I recommend the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The complaint is dismissed.

Dated: August 22, 2003

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.