UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC MARITIME ASSOCIATION	Case No. 21-CA-39434
And	
ERIC ALDAPE, an Individual	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL NO. 13, AFL-CIO	Case No. 21-CB-14966
(Pacific Maritime Association)	
And	
ERIC ALDAPE, an Individual	

RESPONDENT PACIFIC MARITIME ASSOCIATION'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ALJ'S DECISION

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I. INTRODUCTION

In this case, the General Counsel alleged that Respondents Pacific Maritime Association ("PMA") and the International Longshore and Warehouse Union, Local 13 ("Local 13") violated Sections 8(a)(1) and (8)(b)(1) of the National Labor Relations Act (the "Act") by taking certain actions against Charging Party Eric Aldape. The Judge dismissed the Complaint against both Respondents solely on the ground that none of Mr. Aldape's conduct was protected by Section 7 of the Act. Although PMA agrees that the Complaint was properly dismissed, it cross-excepts to the Judge's failure to find that PMA did not violate Section 8(a)(1) of the Act even if Mr. Aldape's conduct was protected. PMA submits that, assuming for the sake of argument that Mr. Aldape's conduct fell within the scope of Section 7, the General Counsel failed to establish a Section 8(a)(1) violation.

The General Counsel's theory is that PMA violated Section 8(a)(1) by "allowing" an independent arbitrator to investigate and adjudicate a complaint by a longshore worker claiming that Mr. Aldape harassed him in violation of the labor agreement. Section 13.2 of that agreement contains a special expedited procedure allowing any individual to have his or her harassment claim against a co-worker heard promptly by an independent arbitrator – without any interference by PMA or the Union. The Section 13.2 process is fair to both the accused and the accuser, and it works well. Section 13.2 also is one of the vehicles through which PMA and the Union discharge their affirmative duty under federal law to promptly and thoroughly investigate harassment complaints and take all appropriate remedial action. The General Counsel has not cited one decision which finds a Section 8(a)(1) violation in circumstances similar to those here.

It is true that, once in a great while, an employee will raise a harassment claim under Section 13.2 that occurs in the context of activity that is potentially protected under Section 7 of the Act. However, the Section 13.2 process works, and *in no instance at issue in this case did Mr. Adalpe suffer any adverse employment action due to any action by PMA.* Indeed, as is the case here, often it is not clear until an investigation or even a hearing whether the activity that might be Section 7 protected was, in fact, protected. In the one dispute in this litigation

involving PMA, a longshore mechanic complained that a flyer Mr. Aldape distributed at the longshore hall falsely maligned mechanics and created a hostile work environment. The independent arbitrator promptly conducted a full and impartial hearing and determined that Mr. Aldape was *not guilty*. Mr. Aldape was not disciplined in any way, and in fact has continued to engage in the same conduct that gave rise to the harassment complaint against him. The Section 13.2 process worked as it was supposed to work.

There is no merit to the allegation that this somehow violated the Act. Unlike the one or two decisions relied on by the General Counsel as supposedly controlling, here PMA had no role whatsoever in filing or prosecuting the Section 13.2 complaint against Mr. Aldape and had no power under the contract to block a hearing or to decide the outcome. The General Counsel's theory is that merely holding a hearing violates Section 8(a)(1). But the hearing here occurred promptly, was fair, afforded Mr. Aldape all procedural protections, and resulted in a *not guilty* finding. Merely conducting a hearing to determine whether Mr. Aldape was guilty of harassment – a step that is obviously necessary to determine all the relevant facts and make the right decision – is not unlawful under Board precedent. Moreover, prohibiting such a hearing would unnecessarily chill employees' rights to file harassment claims under the anti-discrimination laws. Further, again contrary to the General Counsel's allegations, PMA did not and does not retain any record that could be used against Mr. Aldape for any reason in the future, including disciplinary actions or promotions.

In short, PMA did not violate Section 8(a)(1) of the Act. Even if Mr. Aldape's conduct was protected by Section 7, PMA did nothing to violate the Act. PMA therefore requests that the Board affirm the Judge's dismissal of the Complaint in its entirety.

II. STATEMENT OF FACTS *(Cross-Exception No. 1)*

A. The Parties

PMA is the collective bargaining agent for the stevedore companies and terminal operators that employ longshore workers and marine clerks at ports in California, Oregon, and

Washington. These workers are represented by the ILWU and, at the Los Angeles-Long Beach Ports, by Local 13. PMA and the ILWU negotiate and administer a collective bargaining agreement entitled the Pacific Coast Longshore Contract Document ("PCLCD" or "CBA"), which governs the terms and conditions of employment for longshore workers. (GC Ex. 7, ¶¶ 2, 3.) The PCLCD is administered at the port level by the Joint Port Labor Relations Committee ("JPLRC"), on which the local employers and Local 13 each have an equal say on all matters before it. (GC Ex. 6, pp. 84-90.)

B. The Special Section 13.2 Procedures

Section 13 of the PCLCD prohibits any discrimination or harassment at a worksite or the dispatch hall on the basis of various enumerated protected characteristics. (GC Ex. 6.) Section 13.2, in effect since 2001, provides a special expedited grievance procedure for complaints of discrimination or harassment because of race, creed, color, sex (including gender, pregnancy, sexual orientation), age (forty or over), national origin, religious or political beliefs, or in retaliation for filing a filing or supporting a Section 13.2 claim. (GC Ex. 6.) Unlike the normal contractual grievance procedure,[1] under Section 13.2 any individual worker may file a complaint of discrimination or harassment directly with the Area Arbitrator. (GC Ex. 2, p. 8; Fresenius 292:23-25; 293:1-2.) The Area Arbitrator then determines whether to hold a hearing on the complaint. (Fresenius 293:6-22; 308:17-24.)

At a Section 13.2 hearing for a complaint brought by an individual against a co-worker, both the accusing party and the accused party are entitled to representation provided by the Union, regardless of the Union's position (if any) on the complaint.[2] (GC Ex. 2, pp. 9-10.) All aspects of the Section 13.2 process, including the decision whether to hold a hearing, the conduct

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[1] Grievances that are outside the scope of Section 13.2 (including complaints alleging that a contractual rule is discriminatory as written or applied) are processed under Section 17.4 of the PCLCD. These grievances are first heard by the JPLRC. If the JPRLC cannot agree, either side may refer the issue to an Area Arbitrator, and in some cases, directly to the Coast Labor Relations Committee. Disputes not resolved at that level may be referred to the Coast Arbitrator, the last step in the arbitration process. (GC Ex. 6.)

[2] This case does not involve Section 13.2 complaints brought by or against PMA, an employer, or the union.

of the hearing, and the decision itself, are controlled solely by the Area Arbitrator; PMA and Local 13 have no contractual ability to block or screen Section 13.2 complaints and do not decide the complaint or determine what punishment to assess. (GC Ex. 2, pp. 8-9; Fresenius 292: 9-22.) Thus, at Section 13.2 hearings on those complaints, PMA and Local 13 are mere observers, not participants.

After the Area Arbitrator issues his written decision on the complaint, the losing party may appeal to the Coast Appeals Officer, who has the authority to affirm, reverse, vacate, or modify the award. (GC Ex. 2, pp. 11-12.) The Coast Appeals Officer's decision is final and there are no further avenues of appeal under the contract. (*Id.*)

The JPLRC maintains certain records of Section 13.2 complaints, but if a worker is found not guilty by the Area Arbitrator, the fact that a complaint was filed cannot be used as the basis for any future discipline or job action, including promotion, and the complaint would not be included in any complaint history provided to the Union or the employers. (Fresenius 295:9-22.)

C. Section 13.2 Complaints Against Aldape

Mr. Aldape is a Class A longshore worker at the Los Angeles-Long Beach Ports. Mr. Aldape is very politically active in Local 13 and is known for expressing his views through fliers that he distributes at the dispatch hall. (Aldape 58:18-23.) Four Section 13.2 complaints were filed by individual longshore workers against Mr. Aldape in 2009 and 2010.

1. Marguerite Droege Complaint

The first complaint was filed by casual longshore worker Marguerite Droege on September 10, 2009. (GC Ex. 7, ¶ 4.) Ms. Droege alleged that a flyer Mr. Aldape distributed to hundreds of longshore workers on September 4 falsely accused her of having failed the industry's pre-employment drug screen. Part of Mr. Aldape's flyer was directed at Droege's father, Mark Jurisic, and stated: "Mark are you going to let this membership know, what I already know? Did one of your family members fail the **drug and alcohol screen** test and does that same family member retain, a **active** casual card? (Yes or NO). I know it is **yes** in my

opinion." (GC Ex. 8) (bold in original.) In fact, Ms. Droege did not fail the test. The lab technician incorrectly noted that the temperature on Ms. Droege's urine sample was outside the normal range. The lab acknowledged its error and Droege passed a re-test. (PMA Exs. 1, 2; Droege 243:1-5, 251:23.) Droege alleged in her Section 13.2 complaint that Mr. Aldape's flyer caused her to feel humiliated and intimidated due to her gender. (GC Ex. 3, p. 108.) On October 5, 2009, after a hearing, Area Arbitrator David Miller found Mr. Aldape guilty and assessed 30 days time off without pay (with 21 days suspended), diversity training without pay, and confinement to the first shift until December 5, 2009. (GC Ex. 7, ¶ 4.) Mr. Aldape appealed. The Coast Appeals Officer affirmed the guilty finding but increased the time off penalty to 30 days with only 15 days suspended. (*Id.*)

2. Steven Bebich Complaint

On October 2, 2009, longshoreman Steven Bebich filed the second Section 13.2 complaint against Mr. Aldape, alleging that Mr. Aldape had left him a threatening voicemail message on September 24, 2009, just hours after the hearing on the Droege complaint. (GC Ex. 7, ¶ 5.) The message stated, in part, "[j]ust remember that I know about the fucking computer you stole, about why you got arrested. I don't have a problem writing it bro, to the [union] membership bro." (Local 13 Ex. 4; GC Ex. 4, p. 84.) Mr. Aldape admitted that this was a threat to publicize that Mr. Bebich had been arrested in San Francisco while a union caucus delegate and had stolen a computer from a longshore employer. (Aldape 85:15-86:12.) In his Section 13.2 complaint, Mr. Bebich stated that Mr. Aldape "violated my rights by threatening to reveal confidential information about me" that was "never substantiated" and is "nothing less than blackmail." He also stated that "Mr. Aldape has verbally harassed me, created a hostile work environment and threatened me in a retaliatory manner." (GC Ex. 4, p. 6.) Mr. Miller held a hearing on November 17, 2009, and issued a decision on December 2, 2009, finding Mr. Aldape guilty. (GC Ex. 7, ¶ 5.) Mr. Miller assessed Mr. Aldape a total of 60 days off without pay

(including activation of the previous 15 days suspended) and ordered him to work only the first shift for two years. (*Id.*) The Coast Appeals Officer denied Mr. Aldape's appeal. (*Id.*)

3. Mark Jurisic Complaint

The third Section 13.2 complaint against Mr. Aldape was filed by longshoreman Mark Jurisic on March 6, 2010. Mr. Miller dismissed the complaint as not meeting the criteria of a Section 13.2 violation. No hearing was held and no appeal was filed. (GC Ex. 7, ¶ 6.)

4. Wallace Realini Complaint

The fourth Section 13.2 complaint was filed against Mr. Aldape by longshore mechanic Wallace Realini on May 19, 2010. (GC Ex. 7, ¶ 7.) The complaint was based on Mr. Aldape's distribution of a flyer entitled "Ex-Officer's Family's A Mechanic That's Why There's No Panic." (GC Ex. 11.) Mr. Aldape was upset about longshore mechanics receiving what he perceived to be preferential treatment in dispatching. (Aldape 95: 23-96:15.)

In his complaint, Mr. Realini alleged that Mr. Aldape's flier was "false, misleading and morally wrong" and created a "hostile work environment" for longshore mechanics. (GC Ex. 5, p. 9.) In particular, he objected that Mr. Aldape attempted to marginalize mechanics by falsely suggesting that they were not legitimate members of the local and were being dispatched in violation of the rules. (*Id.*) Mr. Realini alleged that Mr. Aldape's inflammatory statements were creating a harassing and intimidating atmosphere for mechanics at the dispatch hall. (*Id.*) Arbitrator Miller promptly conducted a hearing on the complaint, on June 1, 2010. (GC Ex. 7, ¶ 7.) Mr. Aldape informed the arbitrator that he was medically unable to attend the hearing, but his representative was present. The arbitrator allowed both sides to present evidence and testimony, but stated on the record that he would resume the hearing with Mr. Aldape present once he was able to return to work. (GC Ex. 5-108.)[3]

[3] Mr. Aldape was given a full opportunity to attend the hearing on June 1. Just minutes before the hearing, Mr. Aldape sent a representative in his place and faxed a doctor's note stating that he was not able to attend. (GC Ex. 5-120.) At the end of the hearing, the Arbitrator gave Mr. Aldape a choice: let the arbitrator issue a decision on the record as it stood, or hold a second hearing with Mr. Aldape present, provided Mr. Aldape provided a doctor's note stating he was again able to work. (GC Ex. 5, pp. 71-72.) Mr. Aldape chose to have a second hearing so that he

PMA's Assistant Area Manager, Steve Fresenius, attended the hearing, although PMA was not a party to the proceeding. Mr. Fresenius made a statement on the record as to the employers' position. He stated that "we maintain that it should be through Section 17 [of the CBA] that disputes like this are heard" because "mechanics are not a category protected by Section 13 of the PCLCD." Mr. Fresenius added that "making disparaging or controversial comments about the terms and conditions of employment for mechanics is not discrimination or harassment in violation of Section 13, even if those comments are allegedly untrue, offensive, especially when the comments are made in connection … with Union-related activities." (GC Ex. 5, pp. 65-66.) In response, Mr. Miller told Mr. Fresenius that "[t]his is between two Union members" and to "stay out of it …." (GC Ex. 5, p. 67.)

The hearing resumed on September 7 after Mr. Aldape informed the arbitrator that he was well enough to work and wanted to attend the hearing. At the hearing, Mr. Miller stated that he would find Mr. Aldape not guilty. (GC Ex. 5-155.) He issued a written decision to that effect on September 15, 2010. (GC Ex. 5-157, GC Ex. 7, ¶ 7.) Since the time he was found not guilty, Mr. Aldape has continued to distribute his fliers at the dispatch hall. (Aldape 100:2-13.)

III. THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE PMA DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT *(Cross-Exception No. 1)*

A. The Allegations Against PMA

The General Counsel did not allege that Section 13.2 is unlawful on its face. (Tr. 5:25-6:7; 42:16-44:4.) Nor did the General Counsel allege that PMA violated the Act in any way with respect to the Droege or Bebich Section 13.2 complaints or proceedings, which resulted in

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could be present, and he provided a doctor's note releasing him to work. (GC Ex. 5-122, 5-124.) After the follow-up hearing on September 7, the arbitrator issued his decision, finding Mr. Aldape *not* guilty. (GC Ex. 5-157, GC Ex. 7, ¶ 7.) After the hearing in this case, counsel for the General Counsel indicated that he will seek backpay for the period in which Mr. Aldape was on disability, on the theory that Mr. Miller prohibited him from working until he provided a doctor's note releasing him to work. PMA strongly disputes that, but in any event it is a matter solely for compliance, to be addressed only if PMA is found to have violated Section 8(a)(1).

discipline to Mr. Aldape well outside the six-month period before Mr. Aldape filed his charge against PMA.[4] (Tr. 11:18-22.)

The allegations as to PMA concern only the fourth Section 13.2 complaint by Wallace Realini. The Amended Complaint alleges that PMA violated Section 8(a)(1) of the Act by: (1) "its involvement in the prosecution of the [Realini] Section 13.2 complaint" (GC Ex. 1(*l*), ¶ 12(b)); (2) "allow[ing] the processing of [the Realini Complaint] to continue after becoming aware that the conduct of Aldape which was the subject of the complaint was protected by Section 7 of the Act," (*Id.*, ¶ 10(f); and (3) "maintaining records of the [Section 13.2] proceedings" (*Id.*, ¶ 14(b).)

The Act gives employees the right to form, join, or assist labor organizations and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection …." 29 U.S.C. § 157(a). It is unlawful for employers to "interfere with, restrain, or coerce" employees in the exercise of these rights. 29 U.S.C. § 158(a)(1). Even assuming for argument's sake that Mr. Aldape engaged in protected activity when he distributed the mechanics flyer, the General Counsel failed to establish that PMA took any action in violation of Section 8(a)(1).

B. PMA Had No Role In Prosecuting The Realini Section 13.2 Complaint Against Mr. Aldape

The General Counsel's allegation that PMA had some "involvement in the prosecution" of any Section 13.2 complaint against Mr. Aldape is simply false. As explained above, the Section 13.2 special grievance process was intentionally designed to be free of any influence by PMA or the union. PMA has no role in prosecuting or adjudicating Section 13.2 harassment complaints between co-workers. Nor does PMA have the power under the CBA to block a Section 13.2 complaint or reverse the arbitrator's decision. PMA had nothing to do with the

[4] Mr. Aldape filed his charge against PMA on August 4, 2010. (GC Ex. 1(d).) PMA agrees with Local 13 that there was no Section 8(b)(1) violation. But in the event Local 13 is found liable with respect to the Droege or Bebich Section 13.2 proceedings, that finding would not apply to PMA pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b), as the General Counsel concedes.

filing of Mr. Realini's complaint, the decision to hold a hearing, or Arbitrator Miller's decision. Indeed, PMA's only involvement in the Realini proceedings was to point out that the complaint did not appear to fall within the scope of Section 13.2. Contrary to the General Counsel's argument, there is simply no evidence that PMA took any action to prosecute the Realini grievance against Mr. Aldape.

C. PMA Did Not Unlawfully Allow A Hearing On The Realini Complaint

Nor can PMA be held liable for allegedly "allow[ing] the processing" of the Realini complaint. First, as already discussed, PMA had no power to allow or disallow the filing or processing of the Realini complaint. That power is held exclusively by the Area Arbitrator and the Coast Appeals Officer. Even if the filing and processing of the complaint here violated Section 8(a)(1) (and it did not, as discussed below), there is no authority holding that PMA can be held liable for the completely independent actions of a rank-and-file longshore worker and a neutral arbitrator.

Second, even if the filing and processing of Mr. Realini's complaint could somehow be attributed to PMA, those actions did not unlawfully interfere with Mr. Aldape's Section 7 rights. The Supreme Court has long held that Section 8(a)(1) violations cannot be analyzed in a vacuum. Almost any employer action to investigate or discipline employee conduct could be said to have some tendency, however slight, to "chill" Section 7 activity. But in the absence of any claim of anti-union animus (there is no such claim here), determining whether an employer violated the Act requires a careful balancing of the employer's legitimate interests and the employees' rights under Section 7. *See, Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 797-98 (1945).

The Board has recognized an employer's right to investigate and remedy claims of improper harassment by employees, even when the alleged harassment occurs in the course of potentially protected activity. In *BJ's Wholesale Club,* 318 N.L.R.B. 684 (1995), employee LaTorre complained to her employer that a co-worker, Cavliere, harassed her while soliciting union authorization cards, in violation of the employer's anti-harassment policy. The employer

issued a warning letter to Cavliere for "harassing [a] team member." The Board affirmed the ALJ's finding that the employer did not violate Section 8(a)(1). It held that the employer's conduct was lawful because it merely responded to the harassment complaint and "did not solicit complaints from employees about Cavaliere's union activity." *Id.* at 684 n. 2. The Board also noted that Cavaliere was not disciplined for violating an unlawful no-solicitation rule or falsely accused of misconduct. *Id.*

Here, PMA and the ILWU have an extremely strong interest in protecting the longshore workforce from harassment and discrimination. The law requires them to take steps to prevent such conduct at the workplace and they can face significant liability for failing to do so. *See*, Cal. Gov't Code § 12900 *et seq.*; 42. U.S.C. § 2000d-h. The Section 13.2 policy is the vehicle through which the parties vindicate that important responsibility. Section 13.2 provides a quick, efficient, and very fair process that is immune from interference from either the employers or the union. Again, the General Counsel does not allege that Section 13.2 itself is unlawful. (Tr. 5:25-6:7; 42:16-44:4.)

In light of the parties' important interest in protecting their workforce from harassment, the Realini Section 13.2 process did not unlawfully impinge on Mr. Aldape's Section 7 rights. Here, just as in *BJ's Wholesale,* the Section 13.2 hearing was merely a response to Mr. Realini's complaint that Mr. Aldape had harassed him. Neither PMA nor the Union encouraged or solicited Mr. Realini's complaint. Moreover, there is no evidence that the Section 13.2 hearing had any tendency to chill the exercise of Mr. Aldape's or anyone else's Section 7 rights. Mr. Aldape was not disciplined in any way. Indeed, after the hearing, he has continued to distribute provocative fliers at the dispatch hall, clearly undeterred by the Section 13.2 complaints lodged against him. If anything, the proceedings here – resulting in a dismissal of all charges – sends a strong signal to Mr. Aldape and his colleagues that longshore workers may engage in vigorous debates at the dispatch hall without fear of discipline under Section 13.2. In these circumstances, there are no grounds on which to find PMA liable for violating Section 8(a)(1).

The General Counsel's contrary position apparently is based on the Board's decision in *Consolidated Diesel Co.,* 332 N.L.R.B. 1019 (2000), but that case is distinguished easily on several grounds. In *Consolidated Diesel,* the employer maintained a policy prohibiting "[a]ny unwelcome action, intended or not, which is considered offensive to the receiver or a third party and may be labeled harassment." Under the policy, harassment charges were first investigated by the employer's employee relations representative, who would report the results to the Employee Relations Manager. The Employee Relations Manager then would decide whether to refer the complaint to a hearing/discussion before the Performance Management Process Committee, comprised of both employee and management representatives. The Committee had the power to impose discipline, including termination, for violations of the harassment policy. *Id.* at 1019.

During a union campaign, two employees, Losada and Wrenn, distributed a pro-union newsletter to two groups of workers, and Wrenn verbally expressed his views about the union. Several employees were offended and filed formal harassment charges. After receiving the complaints, employee relations representative Diane Whaley conducted interviews of the complaining employees and several witnesses. Losada and Wrenn were then required to appear before the Performance Management Process Committee, which conducted several meetings. Id. at 1020. Ultimately, the Committee imposed no discipline against either employee, but agreed to maintain records of the charges, which could be used as a basis for discipline in the future. *Id.* at 1020, n. 7.

The Board affirmed the ALJ's finding that the employer violated Section 8(a)(1). It held that the charging parties' conduct clearly was protected, and noted that "[t]he Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Id.* at 1020. The mere fact that "some person at one time claimed they felt harassed by that activity" did not justify infringing on those rights. *Id.*

In response to a dissent by Member Hurtgen, the Board clarified that its decision hinged on two critical facts. First, "the Respondent's policy gives responsibility for an initial investigation to the Respondent's Human Resources Department, which, through its employee relations manager, determines whether the process should continue through referral to its Performance Management Process Committee." *Id.* at 1020. Second, the Board emphasized that

> [o]ur finding of a violation here is based on the Respondent's continuation of its investigation into Losada's and Wrenn's conduct by subjecting the two employees to the Committee, with its power to document, discipline, or discharge, after the Respondent's initial investigation by its Human Resources Department disclosed that the employees had engaged in an exercise of their right to distribute union literature in a manner which *clearly* did not lose the Act's protection.

Id. (emphasis added).

Neither of these bases for the Board's decision is present here. First, PMA has no role in investigating harassment complaints between co-workers or referring them to a hearing to determine whether discipline should be imposed. As described above, the Section 13.2 process is completely independent of any interference by PMA or the Union. Thus, unlike the employer in *Consolidated Diesel*, PMA had no power under the policy or the contract to unilaterally block Mr. Realini's complaint at any point in the process.[5]

Second, the employer in *Consolidated Diesel* was liable only because it subjected the two employees to further disciplinary proceedings after the initial investigation made it *clear* they had engaged in protected activity. In holding only that *further* proceedings were unlawful, the

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[5] At the hearing, counsel for the General Counsel stated that PMA and the Union, "through a collective bargaining agreement, can agree to and do practically anything they want" (Tr. 20:5-7), suggesting that respondents had the power to block Mr. Realini's complaint before it went to a hearing. But the mere fact that PMA and the ILWU had the power to modify the CBA is irrelevant. Under Section 13.2 – the policy both parties negotiated and agreed to enforce – neither had any authority to intervene in the proceedings. Neither party had the power to block the Realini complaint without modifying the Section 13.2 policy itself, which would have required the agreement of the other party. Moreover, modifying Section 13.2 to allow PMA and the ILWU to influence the proceedings would defeat one of the best and most important features of the policy, which is to facilitate a prompt, fair, and *independent* evaluation of harassment claims. Most importantly, the parties' ability to agree to a wide variety of procedures does not signify the Board's power to require them to modify their contract. *See, N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements").

Board recognized that employers may conduct initial investigations without running afoul of the Act. This only makes sense – the Board has held repeatedly that it can be difficult to determine whether activity is protected or not protected, especially in the context of a harassment claim. *See ARAMARK Servs., Inc.*, 344 N.L.R.B. 549, 551 (2005) ("[T]he line between protected and unprotected in this context is not a clear one"); *Lutheran Heritage Village*, 343 N.L.R.B. 646, 648, n. 14 (2004) ("Harassment in any given context must be determined based on the facts and by balancing the respective legal rights to be protected or vindicated").

Thus, while it may appear at first blush that alleged conduct falls squarely within Section 7's ambit, an investigation could reveal just the opposite. The General Counsel's sweeping theory of liability here – that any Section 13.2 hearing is unlawful merely because the complaint suggests on its face that the conduct may be protected – is inconsistent not only with common sense, but with Board precedent.

For example, in *Kvaerner Phila. Shipyard*, 347 N.L.R.B. 390 (2006), an employee wrote a letter to his co-workers accusing his employer of improperly deducting certain funds from employee paychecks and keeping the money for itself – concerted activity that ordinarily would be protected by Section 7. The employer fired the employee and the employee filed a grievance. An arbitrator held a hearing and upheld the discharge. The General Counsel here would argue that the employer violated the Act because it held a disciplinary hearing regarding conduct that on its face might be protected. But the Board reached a different conclusion and affirmed the judge's dismissal of the Section 8(a)(1) allegation. The Board upheld the deferral to the labor arbitrator's finding "that Smith had acted with reckless disregard for the truth" and thus that his conduct was unprotected. *Id.* at 393. Thus, what on its face appeared to be "clearly" protected Section 7 activity turned out to be – after a hearing before an arbitrator – unprotected. Merely holding a hearing did not violate the Act.

Similarly, in *Exxon Mobil Corp.*, 343 N.L.R.B. 287 (2004), five days before a decertification election, the union's chief steward, Slusher, distributed to other employees a court abstract showing that an anti-union co-worker had been charged with driving under the

influence. After the co-worker filed a harassment complaint against him, Slusher filed a grievance, claiming that he distributed the abstract to demonstrate the disparate application of the employer's drug and alcohol policy. *Id.* at 287. The employer discharged Slusher for harassment. At first glance, Slusher's conduct appeared to be classic Section 7 union activity. But the Board dismissed the complaint, holding that Slusher acted in retaliation for his co-worker's decertification activity, which is not protected under Section 7. *Id.* at 288. *See also, BJ's Wholesale Club, supra,* 318 N.L.R.B. 684.

The same result applies here. Mr. Realini alleged in a detailed Section 13.2 complaint that Mr. Aldape had made maliciously false statements regarding certain longshore workers and that his conduct created a "hostile and abuse working environment both within the Joint Longshore Dispatch Hall and at terminal workplaces amongst workers in the longshore industry." Mr. Aldape singled out longshore mechanics in particular, suggesting – recklessly – that they were not legitimate members of the union, when in fact Mr. Aldape himself had received the contract documents showing that accusation to be completely false. Mr. Realini thus alleged that Mr. Aldape had engaged in conduct that might or might not have been protected under Section 7. The only way to resolve this issue was by investigating the allegations. Section 13.2 provides that such an investigation be undertaken by the arbitrator. After a hearing, Arbitrator Miller assessed the testimony and evidence, and concluded that there was no basis to find Mr. Aldape in violation of Section 13.2. Unlike in *Consolidated Diesel,* Mr. Aldape was not subject to any further proceedings after this initial hearing. Nothing in the Act or Board precedent holds that an employer violates the Act merely by conducting an initial investigation of a harassment complaint. The General Counsel's theory therefore fails.

D. PMA Did Not Unlawfully Retain Records of the Realini Complaint

The General Counsel's final allegation was that PMA retained records of the Realini complaint in violation of Section 8(a)(1). This allegation also is based on the Board's decision in *Consolidated Diesel.* There, the Board held that the employer violated the Act because it

maintained employment records of the harassment charges after it became clear the two employees involved had engaged in protected activities. But in that case, the complaints were "part of an employee's 'history' and would be looked at subsequently in the event an employee was involved in a future incident of the same kind or if an employee was in contention for a promotion." 332 N.L.R.B. at 1020, n. 7. The employer conceded that the disciplinary committee could decide that the prior record of complaints was relevant in a future disciplinary process. *Id.* The Board was very clear that maintaining the records in that case was unlawful *only* because the charges could have been the basis for future discipline. *Id.*

The opposite is true here. Steve Fresenius, PMA's Assistant Area Manager for Southern California, testified that, although PMA maintains records of Section 13.2 proceedings, a finding that a worker is not guilty cannot be used in the future for any purpose, including hiring, promotion, or discipline. (Fresenius 295:9-22.) Mr. Fresenius explained that the Section 13.2 records are not even included in a worker's complaint history that individual employers periodically request from PMA. *Id.* The General Counsel did not present any evidence to refute this testimony. Therefore, the basis for the record-keeping violation in *Consolidated Diesel* – that the documentation could be used in future disciplinary actions – is completely absent in this case. Accordingly, there is no merit to the allegation that PMA violated Section 8(a)(1) by maintaining a record of the Realini complaint and the arbitrator's not guilty finding.

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IV. CONCLUSION

For all the reasons discussed above, the evidence and the law do not support the General Counsel's allegations that PMA violated Section 8(a)(1) of the Act. PMA therefore respectfully requests that the Board sustain its cross-exception and affirm the dismissal of the Complaint in its entirety.

Dated: November 28, 2011

Respectfully Submitted,

By / s / Clifford D. Sethness
Clifford D. Sethness, Esq.
Jason M. Steele, Esq.
Counsel for Respondent
Pacific Maritime Association

PROOF OF SERVICE

I, Shari Sanders, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, CA 90071-3132. On November 28, 2011, I served the within documents:

RESPONDENT PACIFIC MARITIME ASSOCIATION'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Gillian Goldberg, Esq.
Holguin, Garfield, Martinez & Quiñonez, APLC
800 West Sixth Street, Suite 950
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NLRB Region 20
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3524 Walnut Ave.
Long Beach CA 90807

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 28, 2011, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

By / s / Shari Sanders
Shari Sanders