

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC MARITIME ASSOCIATION

and

Case No. 21-CA-39434

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL NO. 13, AFL-CIO

and

Case No. 21-CB-14966

ERIC ALDAPE, an individual

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF FACTS (Exceptions No. 6-9).....2

III. ARGUMENT.....13

 A. The Droege Grievance Allegations Should Not Be
 Timed-Barred, Because the Suspended Work Days Off Were a
 Non-Final, Conditional, Non-Self-Effectuating Penalty Subject
 to Review Within the 10(b) Period. (Exception 1).....13

 B. Aldape’s Dissident Activity Was Protected by Section 7 of the
 Act (Exceptions No. 4, 6, 15-16)..... 16

 C. Aldape’s Conduct Did Not Lose the Protection of the Act
 (Exception No. 13)..... 24

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

<i>Barton Brands</i> , 298 NLRB 976 (1990).....	13, 14, 15, 16
<i>Carpenters Local 22 (Graziano Construction Co. (Graziano Construction Co.)),</i> 195 NLRB 1 (1972)).....	20
<i>Consolidated Diesel Co.</i> , 332 NLRB 1019 (2000), enfd. 263 F.3d 345 (4 th Cir. 2001).....	16, 17, 24
<i>El Mundo Broadcasting Corp.</i> , 108 NLRB 1270, 1278 (1954)	25
<i>Electrical Workers (Gregory Burns)</i> , 350 NLRB 258, 262 (2007).....	22, 24
<i>Fairfax Hospital</i> , 310 NLRB 299 (1993).....	18, 19
<i>Grimmway Farms</i> , 314 NLRB 73 (1994).....	13
<i>IBEW Local 2321, AFL-CIO</i> , 350 NLRB 258.....	20
<i>Independent Dock Workers Local 1</i> , 330 NLRB 1348, 1352 (2000).....	16
<i>Local 245, SEIU, AFL-CIO (Brandeis Univ.)</i> , 332 NLRB 118 (2000).....	20, 23, 24
<i>M.V.P. Inc.</i> , 352 NLRB 1165, (2008).....	25
<i>Mobile Oil Exploration & Producing, U.S., Inc.</i> , 325 NLRB 176 (1997).....	16
<i>OPEIU, Local 251 (Sandia Corp. d/b/a Sandia National Laboratories),</i> 331 NLRB 1417 (2000).....	2, 20, 21, 22
<i>Owl Constructors</i> , 290 NLRB at 384.....	14
<i>Postal Service Marina Center</i> , 271 NLRB 397 (1984).....	13, 15
<i>Roadway Express, supra; Teamsters Local 186 (Associated General Contractors),</i> 313 NLRB 1232 (1994).....	21
<i>Sheet Metal Workers Int'l Assoc., Local No. 75, AFL-CIO (Owl Constructors),</i> 290 NLRB 381 (1988).....	13
<i>Shenango, Inc.</i> , 237 NLRB 1355 (1978));	20
<i>Smithtown Hospital</i> , 275 NLRB 272 (1985).....	14

Stage Employees IATSE Local 769, 349 NLRB 71, 71 n. 2 (2007)..... 16

Teamsters Local 186 (Associated General Contractors), 313 NLRB 1232(1994).. 16

Teamsters Local 823 (Roadway Express) 108 NLRB 874 (1954))..... 20

Town & Country Supermarkets, 340 NLRB 1410 (2004)..... 16

United Parcel Service, Inc. 311 NLRB 974.....24, 27, 28

United Steelworkers of America Local 9292, AFL-CIO (Allied Signal Technical Service Corp.), 336 NLRB 53 (2001).....22

Valley Hospital Medical Center, 351 NLRB 1250, (2007).....25

I. INTRODUCTION¹

In this case, the Acting General Counsel contends that International Longshore and Warehouse Union, Local 13, herein Union, and the Pacific Maritime Association, herein Employer, have maintained in their collective-bargaining agreements a special grievance procedure, which is ostensibly intended to provide a remedy for the quick redress of harassing and discriminatory treatment under the equal employment opportunity laws, but which, in the facts of the instant case, has been utilized to interfere with the rights guaranteed to Eric Aldape, the Charging Party, by Section 7 of the Act. Moreover, the Union and the Employer in the present case have enforced the outcomes of this special grievance procedure, and maintained records thereof, despite their unlawful and coercive effect under the Act. The Acting General Counsel contends that the actions of the Union and the Employer violate Sections 8(b)(1)(A) and 8(a)(1) of the Act, respectively. In his decision, the ALJ dismissed the Complaint in its entirety, dismissing some of the allegations on the grounds that they related to events outside the 10(b) period and finding in any event that none of the Charging Party's conduct leading to his discipline, which was jointly imposed and executed by the Union and Employer herein, was protected under Section 7.

The ALJ erred in concluding that the allegations in question are barred by the 10(b) statute of limitations. The grievance process which forms the basis for the allegations in this case led to an arbitrator's decision, which the ALJ found to be a final employment decision. But the arbitrator's award was not self-effectuating, and therefore the decision did not become "final"

¹ The Administrative Law Judge is referred to as the ALJ or the Judge. All references to the transcript are noted by "Tr." followed by the page number(s). All references to the Acting General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to the Administrative Law Judge's Decision are noted by "ALJD" followed by the page and line and/or footnote number(s).

at the conclusion of the grievance process. Moreover, the arbitrator's decision that the ALJ found to be outside the 10(b) period imposed in part a suspended discipline, which was only enforced by the Union and the Employer after the conclusion of a later grievance process that undeniably fell within the 10(b) period. Since the discipline in the second grievance includes the imposition of a penalty that would not have existed but for the first penalty, the allegations related to the first grievance are not timed-barred.

The ALJ also erred in concluding that the dissident union member's activity was not protected by Section 7 because it did not on its face refer to collective bargaining or other employees' interests as employees. The ALJ reads too broadly the Board's decision in *OPEIU, Local 251(Sandia Corp. d/b/a Sandia National Laboratories)*, 331 NLRB 1417 (2000), erroneously construing it to overturn the Board's longstanding precedent that internal union dissident activity is protected under Section 7. Because he found that Charging Party's conduct was not protected by Section 7, he did not reach the issue that was litigated at the hearing, i.e., whether Charging Party's conduct was taken out of the protection of the Act by being defamatory or otherwise so extreme or egregious as to lose the protection of the Act. The Acting General Counsel excepts to the ALJ's failure to find that the nature of Charging Party's conduct did not cause him to lose the protection afforded by Section 7 of the Act. Finally, the Acting General Counsel excepts to the ALJ's failure to find that the conduct of the Union and the Employer herein violated Section 8(b)(1)(A) and Section 8(a)(1) of the Act, respectively, and to his failure to fashion an appropriate remedy for these violations.

II. STATEMENT OF FACTS (Exceptions No. 1-3, 10-12, 14)

About ten years ago, the International Longshore and Warehouse Union, herein ILWU, and the Employer agreed to a special grievance procedure regarding discrimination and

harassment that is currently embodied in Section 13.2 of the Pacific Coast Longshore & Clerk's Agreement, herein Agreement. GC Exh. 6. The parties published an "ILWU-PMA Handbook," which sets forth the policies, procedures, and remedies under Section 13.2. GC Exh. 2. Section 13.2 is a special grievance procedure to handle alleged incidents of discrimination or harassment (including hostile work environment) "in connection with any action subject to the terms of this Agreement based on race, creed, color, sex (including gender, pregnancy, sexual orientation), age, national origin, or religious or political beliefs, or alleging retaliation of any kind for filing or supporting a complaint of such discrimination or harassment..." GC Exh. 6 (emphasis added). Remedies issued under Section 13.2 are enforced by the Union and the Employer.² (Tr. 312-13) Other types of discrimination, including discrimination based upon one's "activity for or against the Union or absence thereof," are specifically exempt from Section 13.2 and must be processed under the regular grievance procedures set forth in Section 17 of the Agreement. *Ibid.*

Eric Aldape has been a member of the Union for thirteen years and is currently a Class A longshoreman. He works as a crane operator and gets his assignment from the dispatch hall. As a Class A longshoreman, he is entitled to priority in dispatch over Class B and casual longshore workers, both of which classes are not members of the Union. Tr. 45-48 Casuals are elevated to Class B status, and Class B workers are elevated to Class A status, depending upon the needs of the individual employers who comprise the Employer. Tr. 48-49 The dispatch hall is jointly operated by the Union and the Employer; the dispatchers are elected by vote of the Union's membership but 85% of their pay is paid by the Employer. Tr. 57-58.

Aldape is an activist in the Union. Although he has never held union office (Tr. 55), he has many times expressed his views, including endorsements, on candidates for internal union

² It is abundantly clear to any impartial observer that the conduct for which the Charging Party was charged in the three Section 13.2 grievances herein have nothing to do with the purposes, policies, and language of Section 13.2. The ALJ did not address this misapplication of the special grievance procedure to the Charging Party.

positions and elections by distributing flyers which he has prepared to the Union's membership. Tr. 58 He has distributed hundreds of copies of 10-12 different flyers over the past three years, and he always identifies himself on the flyers. Tr. 58, 66. According to Aldape, his efforts have significantly increased the number of members who turn out for union elections. Tr. 68. In 2008, former president Frank Ponce de Leon was running for the office of Secretary-Treasurer. Aldape distributed a flyer opposing his candidacy and alleged he had a conflict of interest by owning a company that dealt with the Employer. Ponce de Leon brought an internal union charge, i.e., not under the negotiated Section 13.2, against Aldape for "conduct unbecoming a Union member." Aldape was found guilty by a grievance committee but, on appeal to the general membership, had his conviction overturned by a vote of 1800 members. Tr. 53-55.

The subject of this unfair labor practice proceeding are three Section 13.2 grievances that were filed against Aldape. The parties stipulated to the admission of three grievance packages, pertaining to the grievances filed by Margarite Jurisic-Droege on September 10, 2009 (GC Exh. 3), Steven (Mike) Bebich on October 2, 2009 (GC Exh. 4), and Mark Realini on May 19, 2010 (GC Exh. 5).

Shortly before the Union election scheduled for September 8-10, 2009, Aldape distributed a flyer entitled "This is my Style, The Click and their Cronies are in Denial." GC Exh. 8. In the middle of the flyer, he attacks Mark Jurisic, a political opponent. Jurisic was not running for office in the fall of 2009, but was a current member of the Executive Board (Tr. 181) and a perennial candidate for that office, the elections for which are held each spring. Tr. 187. Further, he was the campaign manager for Frank Ponce de Leon and Joe Cortez, two of Aldape's opponents. GC Exh. 8. Aldape wrote:

...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, an active casual card? (Yes or No.)
I know it is yes in my opinion. You can give your answer at the next
membership meeting...

GC Exh. 8. Aldape testified that he distributed this flyer because he wanted to show that Jurisic was not a good executive board member. The flyer insinuates that Jurisic obtained special treatment for a family member who otherwise would have been disqualified from being dispatched as a casual. The flyer does not identify the family member by name or by sex. As it turns out, there were three possibilities: Margarite Jurisic-Droege and two of her brothers are casual longshore workers. Tr. 183. The basis for Aldape's assertions was the existence of rumors out on the docks (and written in a bathroom) that a Jurisic family member had failed a drug test but was still dispatched as a casual. Tr. 69-70. Union witness Mark Mendoza confirmed there were "rumors everywhere" about a member of Mark Jurisic's family testing positive on a drug test. Tr. 213.

Shortly after the flyer was distributed, Jurisic-Droege was shown a text blast message by a family member. Tr. 246. The message read in part: "... (mark jurisic) daughter failed her drug test & covered up by jurisic click! Eric will hit mic." GC Exh. 3-71. Jurisic-Droege assumed that this text message was sent by Aldape because that is what she was told by her father, Mark Jurisic. Tr. 248. Her father also suggested she file the Section 13.2 grievance. Tr. 182. Aldape denied that he sent the message (Tr. 316), and neither the Union nor the Employer offered any evidence that he had. Aldape's communications herein never referred to Jurisic-Droege by name or sex.

After being notified that the grievance had been filed against him, Aldape visited Chris Viramontes, the Union's secretary-treasurer, and was told by Viramontes that the Union possessed a letter to the effect that Jurisic-Droege had indeed failed a drug test. Tr. 72, 260.

That letter was subpoenaed and introduced as General Counsel Exhibit No. 9. That letter, dated March 27, 2007, was addressed to Jurisic-Droege and states that she failed the drug test that was administered on March 23, 2007. Aldape wanted Viramontes to offer this letter into evidence at his Section 13.2 grievance hearing, but Viramontes said the Arbitrator would not let him do so. Tr. 74, 264. The Union and Employer apparently took seriously the possibility that Jurisic-Droege had been improperly issued a casual card because they conducted an investigation. As a result of this investigation, Viramontes was notified by the Employer that Jurisic-Droege was allowed to take a retest because the urine specimen collector had erred. Viramontes received this notification in October 2009, after the September 24 grievance hearing. Tr. 263. Viramontes does not believe he ever related this information to Aldape. Tr. 264.

The bottom line is that Aldape published his flyer based upon waterfront rumors. After the grievance was filed against him but before the grievance hearing, he learned that Jurisic-Droege had received a letter from the PMA stating she had failed a drug test. He was never informed that the Union learned in October 2009 that she had been granted a retest, which she passed.

The Jurisic-Droege grievance was heard by Area Arbitrator David Miller on September 24, 2009. See GC Exh. 3. Jurisic-Droege claimed that she had been discriminated or harassed by Aldape on account of her sex. GC Exh. 3-2. Miller found Aldape guilty of violating Section 13.2 policy and assessed a work suspension of 30 days (21 days suspended), confined him to the first shift until October 30, 2009, and required him to attend diversity training without pay.³ GC

³ Miller found that each of Aldape's flyers (see GC Exh. 3-70 to 75) violated Section 13.2 policy. There was no explanation how the other flyers involved Section 13.2 policy. As for the initial flyer (GC Exh. 8), Miller's analysis was based on the following: "How about gender? She's a woman; he's a man." GC Exh. 3-60. When Aldape's representative pointed out that the flyer made no references to the family member being a woman, Miller stated: "Save it for your appeal." GC Exh. 3-61. Under Miller's analysis, whenever any person filed a Section 13.2 grievance against any other person of the opposite sex, for whatever reason, gender discrimination would be involved.

Exh. 3-77. On October 5, 2009, Miller revised the penalty to confine Aldape to the first shift until December 5, 2009. GC Exh. 3-80.

Aldape appealed the ruling to Coast Appeals Officer Rudy Rubio. Aldape correctly pointed out that his fliers had nothing to do with Section 13.2 policy. He also pointed out that the confinement to the first shift had nothing to do with Jurisic-Droege but was specifically related to Mark Jurisic. GC Exh. 3-82 to 91. Despite these clearly meritorious arguments, Rubio sustained Miller's decision but increased the actual suspension from nine to fifteen days. GC Exh. 3-125. Rubio's decision is all the more incomprehensible, because he had been specifically instructed in 2002 by the Joint Coast Labor Relations Committee that Section 13.2 applied to harassment and retaliation due to one of the eight, specific categories set forth in Section 13.2 and not threatening, intimidating, embarrassing or offensive conduct in general. PMA Exh. 5.

On September 24, 2009, after the hearing concluded, or the next day, Aldape left a voicemail message containing profanity and a threat to expose wrongdoing on Mike Bebich's telephone. Tr. 83-84. A transcript of the message is contained at GC Exh. 4-82 and 84. Bebich filed a Section 13.2 grievance as a result of this voicemail, alleging discrimination and/or harassment on the basis of his race, sex, national origin, political beliefs, and prohibitive conduct. GC Exh. 4-2. Bebich testified he filed the grievance because he believed the voicemail to be threatening and that he was being blackmailed. Tr. 224. Aldape testified he left the message because he was irritated that, whereas he published his flyers with his identify included for all to see, Bebich was showing a flyer to only a few individuals and then taking it back so that he was, in effect, making an anonymous attack. Tr. 84.

Bebich was a political opponent of Aldape. He ran for Secretary-Treasurer in the September 2009 elections while Aldape supported Chris Viramontes, the successful candidate.

Tr. 92, 114, 217. Bebich was also running for caucus delegate, and it is unclear from both the testimony of Aldape and Bebich whether that election was ongoing at the time of the voicemail message.⁴ Tr. 115, 218. In his flyer that attacked Mark Jurisic, Aldape also opposed Bebich and insinuated that something had occurred in San Francisco when he was a caucus delegate. GC Exh. 8.

Bebich filed his Section 13.2 grievance on October 2, 2009. GC Exh. 4-7. In his grievance, Bebich stated his belief that “Aldape has verbally harassed me, created a hostile work environment, and threatened me in a retaliatory manner. His prohibitive conduct should be punished and I believe it should be done under section 13.2.”⁵ GC Exh. 4-6. Miller initially dismissed the grievance as not meeting the criteria of a Section 13.2 violation. GC Exh. 4-10. On appeal, Rubio reversed and remanded for a hearing. GC Exh. 4-18. On remand, Miller found that Aldape’s actions in leaving the voicemail were “illogical and demonstrates Aldape’s complete aversion as it pertains to 13.2 policy. GC Exh. 4-84. His opinion did not address the inconsistency between his finding that Section 13.2 did not apply and his ultimate decision. He made no finding that Aldape acted for reasons based on race, sex, national origin, political beliefs, or prohibitive conduct.⁶ As a penalty, he activated the fifteen days off work held in suspension by Rubio in the first case, assessed an additional 45 days work suspension for a total suspension of 60 days, and confined Aldape to the first shift for a period of two years. GC Exh. 4-85.

⁴ Bebich responded “maybe” when asked whether he was running for caucus delegate at the time. Tr. 218.

⁵ As in the case with the Jurisic-Droege grievance, Bebich filed under Section 13.2, whereas an objective person would most likely conclude that the grievance should have been brought under Section 13.3 or in an internal union proceeding for conduct unbecoming a union member. However, under Section 13.3, there would be a right to appeal to the Coast Arbitrator, a professional labor arbitrator, who presumably would be cognizant of the rights guaranteed by Section 7 of the Act whereas Miller and Rubio have demonstrated herein either their unawareness of such rights or their refusal to address them. An internal union complaint would be subject to appeal to the Union’s membership, where Aldape had previously demonstrated his overwhelming support.

⁶ “Prohibitive conduct” is not a specified based under Section 13.2.

Aldape appealed both Rubio's decision to remand and Miller's decision. GC Exh. 4-88 to 89. On December 28, 2009, Rubio issued his decision upholding Miller's decision and remedy. GC Exh. 4-100 to 105. Rubio concluded that Aldape's actions could only be described as a retaliatory violation of Section 13.2. Neither Rubio nor Miller found that Bebich had filed a prior Section 13.2 grievance against Aldape or had provided testimony, supported, or was in any way involved with the Jurisic-Droege grievance.

As a result of these two decisions, Aldape was placed on a non-dispatch status meaning that the jointly-operated dispatch hall could not and did not dispatch him to jobs for the sixty days of his suspension. Further, he has been restricted from the better-paying night shift and graveyard shift for a period of two years.⁷ He has been required to undergo diversity training without pay. Both the Union and the Employer maintain records of these grievance proceedings.⁸

Regarding Bebich, Aldape based his insinuation in the flyer and his assertions in the voicemail message on rumors heard on the waterfront and on what he had been told by Union officials. Aldape asserted two separate matters in the voicemail, one, that Bebich had been arrested while a caucus delegate in San Francisco, and, two, that Bebich had stolen a computer. Regarding the arrest, Aldape testified that Mark Mendoza, another caucus delegate and a past-President of the Union, had told him in 2008 about the arrest. Tr. 87. Bebich testified that he had been arrested while serving as a caucus delegate in San Francisco; in other words, what Aldape was threatening to expose was true. Tr. 223, 226.

⁷ Charging Party testified that the night shift pays approximately \$53 per hour whereas day shift pays \$39 per hour. Tr. 49.

⁸ The records are maintained by the Joint Port Labor Relations Committee, which is jointly established and maintained by the Union and the Employer. See the Pacific Coast Longshore Contract Document at 84.(Tr. 291, 294-95).

As for the computer theft, Aldape's basis were rumors he had heard on the waterfront that Bebich had lost his job as a steady crane operator because he had stolen a computer from SSA Marine, his employer. Tr. 87-88, 90. He heard these rumors before he wrote the flyer, although the computer theft is not referenced in the flyer. Tr. 91. Further, he testified that Business Agent Joe Donato, in the context of a discussion of Bebich's candidacy for a union office, told him that Bebich had been caught stealing a computer from SSA Marine and that the employer had filed a complaint based thereon. Donato even gave him the complaint number. Tr. 92-93. On the basis of this complaint number, documents pertaining to this alleged theft were subpoenaed from the Union and the Employer and entered into evidence as General Counsel Exhibit No. 10. This exhibit establishes that Bebich was accused of stealing a computer by his employer and even references a videotape showing him in the act. Donato confirmed that he told Aldape that "allegedly it happened" and that the rumors were "all over the docks" that Bebich had stolen the computer. Tr. 235, 237.

Bebich testified that, although he had been accused by an employer of doing so, he did not steal any computer.⁹ Tr. 223. He also testified on direct that there was never a decision by an arbitrator or the labor relations committee finding him guilty of stealing the computer. Tr. 224. On cross-examination, he testified essentially that he resigned his employment with the employer involved and the employer complaint was dropped on that basis. Tr. 229-30.

The third Section 13.2 grievance against Aldape that is the basis for this unfair labor practice proceeding was filed by Wallace Realini on May 19, 2010. See GC Exh. 5. On September 15, 2010, after the unfair labor practice charges were filed herein and after two hearings, Miller issued a decision finding Aldape not guilty. Realini alleged discrimination or harassment based upon his political beliefs. GC Exh. 5-2. He was offended by a flyer

⁹ Of course, admitting the theft might have exposed Bebich to criminal liability.

distributed by Aldape wherein he stated his position that mechanics were being given underserved priority in being dispatched. GC Exh. 11. There are no personal attacks on any individuals, and no corruption is alleged. No mechanic, including Wallace Realini, was named. In the absence of any alleged defamation herein, the Union sought to establish that this flyer was so egregious or offensive as to lose the protection of the Act.

The Union called one witness, Don Taylor, in this attempt. Taylor testified he was a longshore mechanic and a member of the Dispatch Rules Committee along with Aldape. The purpose of the Dispatch Rules Committee was to bring proposals to the Executive Board on how to better dispatch the mechanics out of the dispatch hall. Tr. 268. Taylor testified that, in his opinion, Aldape's flyer contained some false statements. The first one he identified was ruled not to be relevant by the Administrative Law Judge upon the Employer's objection. Tr. 270-71. The second "fact" he identified as false was Aldape's statement that the union lawyer "said that this was the best motion he heard. With a little bit of tweaking it could work." Tr. 272. According to Taylor, the union lawyer stated that "it was a good motion, but he didn't think it would work the way the motion was presented." Tr. 273, 279. Assuming that Taylor accurately quoted the lawyer and Aldape did not, is there any difference? The second falsity in Taylor's opinion was Aldape's statement: "My motion went nowhere. Maybe it was the make of the motion, not the motion itself." Taylor thought this was false because everyone had the opportunity to make motions. Tr. 273. On cross-examination, however, Taylor admitted that the term "went nowhere" was the same thing as saying that his motion did not pass and was, therefore, not a false statement after all. Tr. 279. He then admitted that the second sentence, which speculated as to why the motion did not pass, was a matter of opinion, not fact. Tr. 280.

Taylor then testified that Aldape's statement to the effect that the union lawyer was present and said they should listen to him when he spoke against a particular motion was false. He testified he was sitting next to the lawyer and the lawyer said no such thing. He identified the lawyer as Steve Holguin. Tr. 281. After first stating there was one attorney present, he corrected himself to state there were two. *Id.* Taylor did not know to which of the two attorneys Aldape was referring. *Id.* On rebuttal, Aldape testified without challenge that he was referring to union attorney John Ken, a member of the Holguin firm at the time, and provided the context in which the attorney made the statement. Tr. 317. Finally, although the Administrative Law Judge ruled the issue not to be relevant, the Union introduced two documents purporting to establish that Aldape lied when he stated in his flyer that he could find nothing in the minutes given to him "where we adopted the mechanics in our local or even how they were supposed to be elevated." Taylor testified that the two documents (Union Exh. 6 and 7) did cover both subjects. However, on cross-examination, he had to admit that the Supplementary Agreement (Union Exh. 6) did not discuss how or where or when the mechanics were adopted in the local. Tr. 282-83. He further testified that his understanding of Aldape's term "elevated" as used in the flyer referred to completing a probationary period, becoming a Class B longshoreman, and then a Class A member. Tr. 284-85. However, Aldape's use of the term "elevated" referred to being elevated to a five-year board, not to passing probation or becoming a Class A or B member. It was the mechanic's elevation to the five-year board that gave them the priority in dispatch that Aldape was complaining about. Tr. 318. It was this elevation to a five-year board that was at issue in the Dispatch Rules Committee Proposal. See Union Exh. 3. In other words, Taylor did not know what Aldape was talking about in his flyer and was, therefore, not competent to offer an opinion as to whether Aldape had stated a falsehood.

As for "The History of M&R," (Union Exh. 5), this is nothing more than a brief written by mechanics seeking more favorable treatment from the PMA and/or the Union. It is not a source document and the hearsay statements contained therein lack foundation.

.III. ARGUMENT

A. The Droege Grievance Allegations Should Not Be Timed-Barred, Because the Suspended Work Days Off Were a Non-Final, Conditional, Non-Self-Effectuating Penalty Subject to Review Within the 10(b) Period. (Exception 5)

In the instant case, the Acting General Counsel agrees that the unsuspended portion of the penalty in the Droege grievance, in which Coast Appeals Officer Rubio issued his decision on October 27, 2009, is outside the Section 10(b) limitations period for purposes of remedial relief. However, the suspended portion, which was reinstated by Arbitrator Miller in the Bebich grievance and affirmed on appeal by Rubio on December 28, 2009, is within the 10(b) period, as is the additional penalty of 45 days suspension and two years confinement to the day shift. Thus, the Acting General Counsel contends herein that the penalty of 60 days suspension and two years' confinement to day shift is within the 10(b) period. Further, if the suspended portion of the Droege penalty is within the limitations period, it must necessarily follow that the events giving rise to the penalty must be considered in this proceeding. *See, e.g., Grimmway Farms*, 314 NLRB 73 (1994).

In determining when the 10(b) period commences, the Board focuses on the date of the alleged unlawful act rather than the date its consequences became effective, provided that a final and unequivocal adverse employment decision is made and communicated to the employee. *Postal Service Marina Center*, 271 NLRB 397, 400 (1984); *Sheetmetal Workers Int'l Assoc., Local No.75, AFL-CIO (Owl Constructors)*, 290 NLRB 381, 383-84 (1988); *Barton Brands*, 298 NLRB 976, 978 (1990). But neither an arbitrator's award nor a decision subject to an internal

union appeals process constitutes a final and unequivocal adverse employment decision.

Therefore, the ALJ erred in finding the Droege grievance allegations were time-barred.

The issuance of an arbitrator's award is not a final employment decision for *Postal Service Marina Center* purposes. *Barton Brands*, 298 NLRB at 978. In *Barton Brands*, an employee who had been terminated for insubordination was granted conditional reinstatement under an arbitral award provided that he refrain from serving as a union officer for three years. A few months later the employee was elected union president, and subsequently terminated by the Employer. The Board found that the 10(b) period began when the employer "effectuated the award by terminating [the employee]." 278 NLRB at 978. In reaching this decision, the Board relied on *Smithtown Hospital*, 275 NLRB 272, 274 (1985), where the complaint alleged that the union violated the Act by petitioning a state court to enforce the arbitrator's award. In that case the Board held that the 10(b) period began to run when the union petitioned for enforcement, not when the award was made. Both *Barton Brands* and *Smithtown Hospital* implicitly recognize that the orders of an arbitrator in a grievance procedure are not self-effectuating. Instead, the parties must take actions to enforce or apply the arbitrator's award, such as the termination in *Barton Brands* or the state court action in *Smithtown Hospital*. Thus, where the penalty assessed through the contractual grievance procedure cannot be effectuated without the employer taking affirmative action, the arbitrator's decision is not a final adverse employment decision, and therefore the arbitrator's decision does not commence the 10(b) period.

Nor is an employment decision final if the employee seeks review through an internal union appeals process. *Owl Constructors*, 290 NLRB at 384. In *Owl Constructors*, two employees brought up on internal union charges were found guilty and were fined and barred from union meetings in a written decision issued on December 1, 1982. *Id.* at 382. The

employees appealed the decision, which was upheld by the union's reviewing body on June 1, 1983. The union then began enforcing the discipline order on June 7, 1983. *Id.* The ALJ in that case, applying *Postal Service Marina Center*, concluded that the charges were time-barred because the 10(b) period began to run on the date the initial decision issued, December 1, 1982. The Board reversed, holding the *Postal Service Marina Center* did not control, and that the 10(b) period did not begin to run until the June 7, 1983, the date parties received notice of the final decision in the appeal process. *Id.* at 384

The Union and the Employer were free to amend or set aside any aspect of the grievance process. (Tr. 314) Therefore, absent some explicit communication indicating intent to effectuate the award, Aldape had no clear and unequivocal notice of the adverse employment decision prior to the discipline actually being imposed. Because the fifteen days off work suspended by Arbitrator Miller in the Droege grievance were enforced only when the discipline was imposed after the denial of Aldape's final appeal of the Bebich grievance on December 28, 2009, under *Barton Brands* the allegations related to the Droege grievance should not be time-barred under section 10(b). Moreover, the suspended days off work hanging over Aldape's head from the Droege grievance were not enforced until they were activated by Miller in the Bebich grievance. The activation of the suspended discipline significantly increased the penalty in the Bebich grievance, an adverse outcome that could not have happened but for the underlying grievance by Droege. Imposing a 10(b) bar in this situation would create a rule that would force union members facing suspended punishments they deemed to violate the Act to press those cases before the Board before the punishments have been effectuated, wasting individuals' and the Board's resources on inchoate allegations.

B. Aldape's Dissident Activity Was Protected by Section 7 of the Act
(Exceptions No. 4, 6, 15-16)

It is well-established that the Act protects internal dissident activity as Section 7 activity. See, e.g., *Town & Country Supermarkets*, 340 NLRB 1410, 1410, 1430 (2004); *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997) and cases cited therein, *Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1232, 1234-35 (1994) and the twenty cases cited therein.¹⁰ In addition, anti-harassment policies that discourage protected activity by subjecting employees to investigation and possible discipline on the basis of others' subjection reactions violate the Act. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), *enfd.* 263 F.3d 345 (4th Cir. 2001). When anti-harassment policies interfere with protected dissident activities, Section 7 rights can be violated in at least three ways. First, disciplining or discharging an employee based on protected Section 7 activity violates the Act because it reasonably tends to decrease employee willingness to engage in such activities. See *Stage Employees IATSE Local 769*, 349 NLRB 71, 71 n. 2 (2007) (union's refusal to refer member because she challenged executive board's authority); *Independent Dock Workers Local 1*, 330 NLRB 1348, 1352 (2000), (union caused employee's discharge for complaints about operation of hiring hall). The fact that a party is merely implementing the decision of an arbitrator is irrelevant. Thus, in *Barton Brands*, 298 NLRB 976, 976-77 (1990), the Board found that an employer violated Section 8(a)(1) when it discharged an employee for participating in a union election, even though it did so pursuant to an arbitrator's order conditioning reinstatement and continued employment on a hiatus from union politics.

¹⁰ "For many years the Board has ruled efforts by a union member/employee to attempt to change current policies of the union which represents him or to politically oppose an incumbent union officer of that union are the exercise of rights guaranteed by Section 7 of the Act..." *Teamsters Local 186, supra* at 1234-35; this decision was not overturned or disproved by *Sandia*.

Second, processing a harassment grievance beyond the point at which an employer or union learns that the accused was engaged in protected activity violates the Act. *Consolidated Diesel, supra* at 1020. Subjecting an employee to a grievance process beyond this point would reasonably tend to discourage employees from engaging in such activities. In *Consolidated Diesel*, the Board held that an employer violated Section 8(a)(1) when it forwarded a harassment case to a joint employer-union committee for further investigation after discovering that the activities involved protected union solicitations. While the Board noted the employer's legitimate right to conduct an initial investigation into facially valid harassment charges, the employer violated the Act when it subjected employees to further investigation by a committee wielding disciplinary powers.

Third, the Board has found an employer's retention of harassment records that rest on protected activity to violate the Act. In *Consolidated Diesel, supra* at 1019-20, even though the harassment charges were eventually dismissed, the employer violated the Act by merely retaining a record of the proceedings.

The conduct of Eric Aldape that resulted in three Section 13.2 grievances being filed against him clearly falls within the purview of Section 7 of the Act. The first grievance, filed by Jurisic-Droege, was a result of Aldape's distribution of the *This is My Style* flyer. Aldape distributed this flyer as part of his dissident efforts, begun in 2007, to correct what he perceived to be anti-democratic and corrupt tendencies on the part of the entrenched union leadership. His efforts, and the efforts of the "New Change" faction in which he played an important leadership role, had succeeded in increasing voter turnout and electing new members to Union boards and offices. Although Mark Jurisic was not up for election in the fall of 2009, he was an incumbent Executive Board member, a perennial candidate for the Executive Board, for which the elections

were conducted every spring; and Jurisic was the campaign manager for Frank Ponce de Leon and Joe Cortez, past and current Union presidents, who have been political opponents of Aldape. GC Exh. 8. Aldape distributed the flyer because he did not believe that Jurisic was a good Executive Board member. Tr. 69. The third grievance, filed by Wallace Realini, was a result of Aldape's flyer that protested what he perceived to be the Union's unwarranted favorable treatment of mechanics in being dispatched. GC Exh. 11. As such, Aldape was protesting current Union policy.

The second grievance, filed by Mike Bebich, was a result of a voicemail message Aldape left on Bebich's phone that contained a threat to expose two incidents in Bebich's past to the general membership. The threat is implicitly conditional upon Bebich's coming out with a letter attacking Aldape. Bebich had just lost an election for Secretary-Treasurer at the time the message was left but was "maybe" running for caucus delegate at that time or in the near future. Aldape had supported Chris Viramontes, the successful candidate for Secretary-Treasurer. Aldape left the message because he was upset that, unlike his public distribution of flyers, Bebich was not putting his flyer out for everyone to see but just showing it to select individuals and retaining the document. Tr. 84. Aldape had been the target of flyers before. Three such letters, distributed by Mark Jurisic, were made a part of the record in the Jurisic-Droege grievance. See GC Exh. 3-98 to 100.

Counsel for the Acting General Counsel submits that the voicemail message is also within the purview of Section 7. It was made in the context of an ongoing exchange of election-related and union policy-related flyers. In *Fairfax Hospital*, 310 NLRB 299, 300 (1993), enfd. per curiam mem. 14 F.3d 594 (3rd Cir. 1993) cert den. 512 U.S. 1205 (1994), an employee was discharged for threatening her supervisor because, in a "heated exchange" with the supervisor,

she responded to the supervisor's remark that more anti-union propaganda would be forthcoming with a remark that the supervisor could expect "retaliation." The Board found that the employee was engaged in protected union activity and that her entire conduct, including use of the word "retaliation," was protected. The Board stated that "retaliation" could have meant nothing more than the union would respond to the employer's anti-union propaganda. *Fairfax Hospital, supra* at 300. In the present case, there was nothing ambiguous about Aldape's message – he was stating that he would respond to Bebich's attack with an attack of his own.¹¹ All of Aldape's conduct herein should also be viewed as concerted, because all of it, including the voicemail message, was in the context of the ongoing dispute between "New Change" and the entrenched union leadership. Aldape's conduct was, by definition, concerted, because he was acting not solely for himself but on behalf and with the approval of those members of the Union supporting this change.¹² He was also understood by the Union's leadership to be acting on behalf of the others identified as "New Change." See, e.g., the Mark Jurisic flyer: "...Adalpe [sic] and the "secret committee" like to use the words "New Change." Yet they tried to remove anyone with any experience from the B-UTR board that was serving on the Executive Board. How can this be "New Change"?" GC Exh. 3-98 to 100.

Union retaliation for internal union conduct violates section 8(b)(1)(A) if it impacts the member's relationship with the employer (category one), when it pertains to unacceptable methods of union coercion such as violence, when it impedes access to the Board's processes, or

¹¹ In *Fairfax*, the Board held that the employee's statement of "retaliation" would not lose its protection "[u]nless accompanied by threats of egregious or outrageous conduct..." *Id.* See discussion below.

¹² Charging Party's conduct—opposing the current union leadership in union elections and on policy grounds—is clearly within the protection of Section 7. This is most obvious in the Realini grievance, where Charging Party's conduct was to oppose what he perceived as preferential treatment in dispatch given to mechanics to the detriment of non-mechanics, i.e., crane operators like himself. This directly affects members rights as employees, i.e., the number of shifts they are assigned, which equates to the amount of pay they receive. What the ALJ has done is confuse Charging Party's conduct with the manner in which he exercised that conduct. This is relevant to the only issue that was heard at the hearing herein, i.e., whether the nature of Charging Party's conduct should remove his conduct from the protection of the Act. See discussion *infra*.

when it clashes directly with policy interests and prohibitions incorporated in the Act (category four). *Local 245, SEIU, AFL-CIO (Brandeis Univ.)*, 332 NLRB 118 (2000); *OPEIU, Local 251 (Sandia Corp. d/b/a Sandia Nat'l Laboratories)*, 331 NLRB 1417 (2000) (reversing *Carpenters Local 22 (Graziano Construction Co.)*, 195 NLRB 1 (1972)). Where the discipline impacts the employment relationship, the Board then determines whether the removal violated 8(b)(1)(A) by balancing the employee's Section 7 rights against the legitimacy of the union interest at stake in accord with longstanding precedent.¹³ *Brandeis Univ., supra* at 1122 (citing *Shenango, Inc.*, 237 NLRB 1355 (1978)); *IBEW Local 2321, AFL-CIO*, 350 NLRB 258 (applying *Sandia* and noting that "there is nothing tenuous about the employer–employee nexus" when an employee's ability to obtain overtime work is drastically reduced) (internal quotations omitted). *Sandia* reversed an earlier expansion in the scope of 8(b)(1)(A) to include union discipline with no impact on the employment relationship, 331 NLRB at 1420, returning to a construction that "faithfully reflected Congress' purpose." 331 NLRB at 1419. This original purpose was exemplified in cases where the Board found that a union violated 8(b)(1)(A) by threatening dissident members who sought an investigation of the union local with loss of employment and ultimately causing their discharge. *Sandia*, 331 NLRB at 1419 (citing *Teamsters Local 823 (Roadway Express)*, 108 NLRB 874 (1954)). Indeed the *Sandia* decision distinguished the *Graziano* line of cases it was overturning from those that were "precisely what Congress intended to reach when it passed 8(b)(1)(A): union violence and union conduct affecting job tenure." Driving the point home, the Board expressly "reaffirm[ed] the principle that Section 7 encompasses the right of employees to concerted[ly] oppose the policies of their union." *Id.* at 1425.

¹³ Since this case does not involve union-imposed discipline, but rather discipline imposed jointly by the Employer and the Union pursuant to the collective-bargaining agreement, *Sandia* does not, by its own terms, apply. See discussion *infra*.

The ALJ reads too much into the *Sandia* decision, imagining it to overturn the established Board precedent protecting efforts by a union member to oppose officials or union policies where those efforts lead to discipline impacting the employment relationship. See *Roadway Express, supra; Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1232 (1994). Indeed, the Acting General Counsel submits that *Sandia* does not apply at all herein, because this is not a union discipline case; the discipline imposed on Charging Party was jointly imposed by the Union and the Employer pursuant to a collectively-bargained special grievance provision which was clearly misapplied herein to Charging Party's conduct.

Even assuming *arguendo* that *Sandia* applies herein, the Acting General Counsel submits the ALJ misapplied it. The ALJ supported his overreach with dicta in the *Sandia* decision suggesting that conduct is "protected by Section 7 if that activity is 'bears some relation to the employees' interests as employees'" (ALJD 9:29). The passage quoted by the ALJ is, however, in response to a contention that the discipline clashed directly with policy interests incorporated in the Act (category four), not that it impacted the work relationship (category one). *Sandia*, 331 NLRB at 1424. Thus the ALJ predicates his decision on dicta, wholly removed from its proper context, which would extend the *Sandia* holding far beyond the bounds necessary to the decision of that case, which dealt with intra-union discipline that had no impact on the employment relationship.

Although the ALJ notes that some of the cases relied on by the Acting General Counsel are pre-*Sandia*, ALJD at 9, this observation misses the point. *Sandia* did not overturn the line of cases exemplified by *Roadway Express* and *Teamsters Local 186*, where the employee is subject to "work related penalties" as in the instant case ALJD at 7. The issue in *Sandia* was the narrower case of internal union discipline that did not affect the employment relationship. ALJD

at 8; 331 NLRB at 1418. Therefore, the mere fact that the cases on which the Acting General Counsel relied predate *Sandia* does not justify the conclusion that those cases are no longer valid.

The ALJ also relies on two cases the Board decided after *Sandia*. *United Steelworkers of America Local 9292, AFL-CIO (Allied Signal Technical Services Corp.)*, 336 NLRB 53 (2001), involved strictly internal union discipline, as in the *Sandia* case. In the other, *Brandeis University, supra*, the union removed the member from positions as a shop steward and union representative on a joint labor-management committee because of his dissident activity. The Board assumed without deciding that the union conduct impacted the member's relationship with the employer, but applied a balancing test and found that the restraint on the member's Section 7 rights was more than counterbalanced by the union's legitimate interest. But, in a case where the connection between the union discipline and the impact on the employment relationship was "not tenuous," as it was in both *Brandeis* and *Steelworkers*, the balancing test easily favored the employee's interests over the union's. Thus, in *Electrical Workers (Gregory Burns)*, 350 NLRB 258, 262-63 (2007), the issue was the legality of the Union's charging Burns (on the overtime accrual list which it maintained) with working overtime on days when the union was directing employees to refuse to work voluntary overtime while not charging employees who refused overtime (and would otherwise have been charged for declining it). The ALJ noted that there was "nothing tenuous" in the employer-employee nexus under these circumstances, where, because of the union's action, Burns' ability to obtain overtime was drastically reduced. *Electrical Workers, supra* at 262-63. Could there be an even more direct nexus that the facts in the instant case, where the discipline imposed on Aldape resulted in his not getting dispatched to work for 60 days and restricted to the day shift, costing him thousands of dollars in wages? The

Acting General Counsel would answer this question by stating only where the discipline was not imposed only by the union but by the union and employer jointly, as is the case herein.

The ALJ concluded that Aldape's statements at issue in the grievances bore no relation to collective bargaining or other mutual aid or protection or to "employees' interests as employees, and were therefore not protected by Section 7. (ALJD 9:44-10:3). This conclusion is in error because it rests on his overbroad reading of *Sandia*. Although the conduct leading to the grievances against Aldape may have been "purely intra local union factional quarrelling," (ALJD 9:37), they occurred as part of a sustained campaign by Aldape to correct what he perceived to be the anti-democratic and corrupt tendencies of entrenched Union leadership.¹⁴ The ALJ found that Aldape's conduct was not protected by Section 7 and, therefore, never reached the balancing of that conduct against the Union's interest under *Brandeis*.

The Union interest in this case is not the timely redress of harassment and discriminatory treatment based on race, creed, sex, political beliefs, or other protected characteristics. (ALJD 2:44-36; GC Exh. 4). Ms. Droege framed her grievance in the context of gender discrimination, but there is simply no evidence to support the conclusion that Aldape's flyer, alleging that one of Mark Jurisic's children had failed a drug test and was still working, was based in any way on sexual or gender harassment. The arbitrator's conclusion that gender discrimination was involved simply because Aldape was a man and his accuser was a woman is startling in its fundamental ignorance of the law. (GC Exh. 3-83-84). Likewise, Mr. Bebich's grievance makes no allegation that the conduct complained about involved any of the conduct prohibited by Section 13.2, and the resulting decision from the arbitrators shed no further light on why the grievance was allowed to proceed under that special grievance procedure. (GC Exh. 4-83-85).

¹⁴ The ALJ's use of many negative adjectives to describe Aldape's conduct also suggests that he may have been confusing his conduct with the way by which he engaged in such conduct. As stated *supra*, the way by which Aldape engaged in his protected conduct involves the *Consolidated Diesel* issue. See discussion *infra*.

With respect to the third grievance, even Arbitrator Miller recognized that Mr. Realini's grievance had nothing to do with the kind of harassment Section 13.2 was supposed to address.

So, in applying the *Brandeis* balancing test, on the one scale is Aldape's interest in opposing the entrenched union leadership and its policies which ultimately affect employment opportunities and terms and conditions of employment without fear of losing his dispatch rights and, hence, his livelihood. This is precisely the type of activity that Section 7 was intended to protect. Balanced against that clear interest on the other scale is the Union's interest in allowing a negotiated grievance procedure to run its course unsupervised where one member can affect the livelihood of another by pursuing clearly baseless grievances.¹⁵ The balance tips heavily in the favor of the employee's interest herein, as it most always or even necessarily will where the impact on the employee could be the loss of his employment. *See Electrical Workers, supra.*

The bottom line is that Aldape was engaged in dissident activity, for which the Union and the Employer allowed a negotiated special grievance procedure to be misapplied to him after they knew that it was being improperly utilized to chill his exercise of Section 7 rights. Moreover, they enforced the resulting awards causing Aldape to be suspended from being dispatched for 60 days and confined to the lower-paying day shift for two years; and they maintained records of these proceedings and discipline. The Acting General Counsel submits there could not be a clearer violation of rights guaranteed by Section 7 of the Act.

C. Aldape's Conduct Did Not Lose the Protection of the Act (Exception No. 13).

Under Board law, protected conduct must be egregious or offensive to lose its protection under the Act. *Consolidated Diesel, supra*; see *United Parcel Service, Inc.*, 311 NLRB 974

¹⁵ The arbitrator and Coast Appeals Officer utilized in these procedures are not impartial professional labor arbitrators. They are untrained and unschooled former ILWU officials. Thus, there is no appeal in Section 13.2 to the Coast Arbitrator, whom the parties have specifically provided "shall be a highly qualified neutral arbitrator with maritime experience, located on the West Coast." See GC Exh. 6, Section 17.512.

(1993) and cases cited therein. Where it is alleged that conduct otherwise within Section 7 has lost its protection because it is defamatory, the test for evaluating such a defense was recently set forth by the Board in *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Therein, the Board held that statements were unprotected if they were maliciously untrue, i.e., they were made with knowledge of their falsity or with reckless disregard for the truth. An employee is entitled to rely on rumors.

... Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act.... In addition, in the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected.

See also *El Mundo Broadcasting Corp.*, 108 NLRB 1270, 1278-79 (1954) (inaccurate and defamatory statements uttered in the course of otherwise protected activity cause that activity to forfeit the protection of the Act only if the remarks are "deliberately or maliciously false"), quoted in *M.V.M, Inc.*, 352 NLRB 1165, 1173 (2008). The burden of proof to establish the falsity of a statement is on the Respondent; and, if the Respondent can meet that burden, it then has the burden of establishing the statement to be maliciously untrue.¹⁶ *Id.*

Clearly, Respondents cannot meet these tests. With respect to the Jurisic-Droege grievance, Aldape's flyer, insinuating that a family member of Mark Jurisic, had failed a drug test, was based on rumors that were all over the place, and these rumors were confirmed to Aldape by Mark Mendoza, a former Union president. Respondents have not met their burden to establish that Aldape relayed those rumors knowing them to be false or with reckless disregard

¹⁶ Moreover, since the discipline herein was directed at alleged defamation committed in the course of protected activity, Respondents must prove that Aldape made maliciously false statements, not just that they had a good-faith belief that he did. See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); see also *Cadbury Beverages, Inc., v. NLRB*, 160 F.3d 24 (D.C. Cir. 1998) (applying *Burnup & Sims* to a defamation case); *Fisher Theatre*, 240 NLRB 678 (1979) (applying *Burnup & Sims* in charge against a union).

of the truth. Aldape thought they were true. As it turned out, these rumors had a basis in fact, inasmuch as the JPLRC had notified the family member in 2007 that she had failed a drug test. Later on, after the grievance was concluded, the Employer informed the Union that the test failure was due to a collector's error and that the family member was allowed to retest. This information could not have been known to Aldape, who did not name the family member or her sex when he distributed the flyer.

With respect to the Bebich grievance, Aldape threatened to expose that Bebich had been arrested in San Francisco while serving as a caucus delegate. Since this was true, it cannot be defamatory. He also threatened to expose that Bebich had, in the past, stolen an employer's computer. This was also based upon rumors that were all over the place that Bebich had lost his job as a steady crane operator because of it; further, Union Business Agent Joe Donato had confirmed these rumors to Aldape and given him the number and date of the employer complaint that had been made that resulted in Bebich's termination by that employer. These rumors were also true or, at the minimum, had a very strong basis in truth. Bebich based his denial that he had been discharged for this on the cartoonish "You can't fire me, I quit!" claim. Respondents have not met their burden to establish that Bebich did not steal the computer or that such a report, if made by Aldape, would have been knowingly or recklessly false.

Wallace Realini filed the third Section 13.2 grievance against Aldape because Aldape distributed a flyer that was critical of what he perceived as unwarranted favorable dispatch treatment of mechanics. As a result of this clearly protected activity, Aldape was summoned to attend two hearings before Arbitrator Miller, and, at the first hearing on June 1, 2010, was suspended by Miller from being dispatched between June 1, 2010, and August 23, 2010. GC Exh. 5-107 to 108, 126.

As stated above, protected conduct can lose its protection if it is extremely egregious or offensive. *United Parcel Service, Inc., supra.* In that case an employee used an accomplice to impersonate a law officer to conduct an investigation. The Board found this sufficient egregious to lose the protection the employee otherwise would have had for his investigative activity. So the question here is whether three statements made by Aldape in his flyer protesting the dispatch of mechanics were so egregious or offensive as to lose the protection of the Act. In the first statement, Aldape stated he heard the Union lawyer call his motion “the best motion he heard” whereas the Union’s witness claimed the attorney only said it was a “good motion.” Putting aside the issue of whose recollection was better, Aldape’s right after the event or Taylor’s sixteen months’ later after being prepped for his testimony, or issues of perception or understanding, it cannot be reasonably argued that Aldape’s use of the adjective “best” instead of “good” is so egregious as to forfeit the protections of Section 7. Obviously, Aldape’s remarks were not false, they were not egregious, and they were not offensive.

Second, the Union contends that Aldape’s statement that “my motion went nowhere” and “maybe it was the maker of the motion” is so egregious or offensive to lose the protection of the Act. The Acting General Counsel submits that the Union’s contention cannot be taken seriously. Next, the Union contends the same with respect to Aldape’s statement that the union lawyer stated the membership should listen to him when he spoke. The attorney made this remark to focus the membership’s attention on the issue at hand. It turns out that Taylor was referring to a different union attorney. But even if Taylor had been seated next to the attorney who made the remark and offered a tape recording to establish that attorney said nothing the entire meeting, this is simply not the type of egregious and offensive conduct discussed by the Board in *United*

Parcel.

Finally, Taylor took issue with Aldape's statement that he could not find anything in the minutes "where we adopted the mechanics in our local or even how they were supposed to be elevated." Taylor did not testify how he got inside Aldape's mind to understand how Aldape perceived and understood the two-inch stack of documents handed out at the committee meetings. Taylor was apparently testifying that the "minutes" referred to documents someone introduced at the meetings. This is not the commonly-accepted understanding of the term "minutes," and the Union did not introduce the Committee's minutes. The documents that the Union did introduce through Taylor did not support his testimony. Further, Taylor misunderstood the term "elevated" as used by Aldape. In any event, an employee's statement that he could not find anything in a bunch of documents to support a particular point of view is not the type of egregious or offensive conduct discussed in *United Parcel*. Moreover, the Administrative Law Judge ruled that the testimony on this alleged falsehood was not relevant. Tr. 270-71.

Aldape's flyer addressed a current, legitimate issue that was before the Union's membership. The distribution of the flyer was, regardless of the merits of the position he advanced, concerted activity for the purpose of the mutual aid or protection of Union members and, ultimately, collective bargaining. Even if his stated facts and opinions were established to be false, which is not the case herein, they would still be protected by the Act.

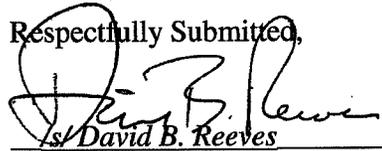
IV. CONCLUSION (Exceptions No. 7-9)

For the foregoing reasons, the Acting General Counsel respectfully requests the Board to reject the Decision of the Administrative Law Judge herein and, instead, issue a Decision and Order finding that the Union and the Employer violated Sections 8(b)(1)(A) and 8(a)(1),

respectively, when they permitted the special grievance procedure to proceed regarding the three grievances discussed herein, enforced the resulting awards, and maintained records of the proceedings. Acting General Counsel respectfully requests the Board to fashion an appropriate remedy, including notices and a make whole order directing both parties to make Aldape whole for any losses he suffered as a result of the Realini grievance and directing the Union to make Aldape whole for his losses suffered as a result of the Droege and Bebich grievances.¹⁷

Dated this 24th day of October 2011.

Respectfully Submitted,



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¹⁷ The charge against the Employer herein is untimely with respect to the Droege and Bebich grievances, so a make whole order is sought against the Employer for only the Realini grievance.

STATEMENT OF SERVICE

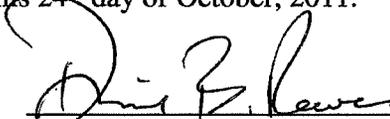
I HEREBY CERTIFY THAT A COPY OF the Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge in Cases 21-CA-39434 and 21-CB-14966 has been submitted by E-filing to the Executive Secretary, National Labor Relations Board, Washington, D.C., on October 24, 2011. The following parties were served with a copy of the same document by electronic mail on October 24, 2011.

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Dated at Los Angeles, California, this 24th day of October, 2011.



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