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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

PACIFIC MARITIME ASSOCIATION Case No. 21-CA-39434

And

ERIC ALDAPE, an Individual

INTERNATIONAL LONGSHORE AND Case No. 21-CB-14966
WAREHOUSE UNION, LOCAL NO.
13, AFL-CIO
(Pacific Maritime Association)

And,

ERIC ALDAPE, an Individual

**RESPONDENT ILWU, LOCAL 13'S ANSWERING BRIEF
TO GENERAL COUNSEL'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. Introduction

General Counsel attempts to portray Charging Party Eric Aldape's ("Aldape") conduct, which gave rise to these charges, as political opposition to the union leadership and its policies protected under Section 7 of the National Labor Relations Act. The reality is that Aldape's conduct consisted of engaging in unsubstantiated, damaging attacks against non-officers. As a result, the longshore workers Aldape attacked exercised their contractual rights to file complaints against him under the collectively bargained ILWU-PMA Equal Employment Opportunity Policy & Procedures ("the 13.2 Policy").

The first complaint, filed by Marguarite Droege ("Droege"), arose after Aldape published 1500 copies of a flier wrongly accusing her of having failed an employment-related drug screening. The second complaint, filed by Steven Michael Bebich ("Bebich"), occurred after Aldape left a profanity laced voice message on Bebich's cell phone maliciously threatening to publish fliers containing unsubstantiated criminal accusations against him. The third complaint, filed by Wallace Realini ("Realini"), a longshore mechanic, arose after Aldape published a false and misleading flier complaining of how his ideas were received in an internal union committee meeting and questioning the legitimacy of longshore mechanics as union members.

The Complaint issued by the Regional Director, dismissed, in its entirety, by the Administrative Law Judge (ALJ), alleged that the International Longshore and Warehouse Union, Local 13 ("Local 13" or "Union") restrained and coerced employees in violation of Section 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "the Act") through its involvement in the processing of these complaints.

To begin with, the 13.2 Complaint filed by Droege was filed, heard, decided and implemented beyond the statute of limitations. Thus, the ALJ correctly found that it could not be the basis of an unfair labor practice charge against Local 13.

Further, General Counsel failed to sustain the burden to prove that the conduct Aldape was engaged in was concerted activity engaged in for the mutual aid and protection of employees and that the activity did not lose the protection of the act because of its nature. *Holling Press, Inc.*, 343 NLRB 301, 302 (2004); *HCA Health Services of New Hampshire, Inc.*, 316 NLRB 919, 919 (1995). General Counsel also failed to sustain the burden to show that Local 13 engaged in some type of conduct vis-à-vis Aldape that had a tendency to restrain or coerce employees in the exercise of their Section 7 rights. *National Association of Letter Carriers, Branch # 47*, 330 NLRB 667, 667 fn. 1 (2000).

The ALJ's dismissal of the Complaint was based on his correct finding that Aldape's flier accusing Droege of failing the drug screen test, the threatening voice message for Bebich, and the flier regarding the mechanics, all fall outside the protections of Section 7 because all lack the nexus with the employer relationship required for activity to be considered for collective bargaining or other mutual aid and protection. While the issue was not reached specifically by the ALJ's decision, Aldape's allegations against Droege and Bebich also lost the protection of the Act because Aldape admitted to making the allegations recklessly with no knowledge of their truth or falsity. Additionally, Aldape's voice message for Bebich did not constitute concerted action as it was a unilateral act with no connection to group activity.

As mentioned above, the ALJ dismissed the entire Complaint because of his finding that the activity engaged in Aldape was not protected by Section 7. Because of

this legal finding, the ALJ did not make any findings as to whether if Section 7 activity had been involved, Local 13 engaged in conduct which would have the tendency to restrain and coerce employees in violation of Section 8(b)(1)(A). Local 13 firmly maintains the position that even if Section 7 activity were involved, its conduct still did not violate Section 8(b)(1)(A) of the Act.¹

This is not a traditional 8(b)(1)(A) case. It does not involve intra-union discipline or union inducement of employer discipline. Nor does it involve union violence, union threats, union interrogation, or a breach of the duty of fair representation. Respondent Local 13 has been charged with violating Section 8(b)(1)(A) for doing nothing other than following the contractual mandate of the 13.2 Policy, which permits individuals to take their complaints directly to arbitration without the agreement of the union or the employer. Following the dictates of a valid policy is not the union restraint and coercion contemplated by Section 8(b)(1)(A) of the Act.

II. Statement of Facts

A. The Collective Bargaining Parties and Their Relationship

The Pacific Maritime Association (“PMA” or “Employer”) is a nonprofit association that serves as a collective bargaining agent for stevedoring, shipping, and marine terminal companies which employ longshore workers at ports along the West

¹ Local 13 does not except to any of the ALJ’s findings or to the ALJ’s decision to dismiss the Complaint in its entirety on the basis that Aldape’s activity was not protected by Section 7. (ALJ Dec. 10). However, Local 13 does wish to make clear that if it was found that Aldape’s activity were protected by Section 7, Local 13 wishes to preserve its right to argue to the Board that its conduct did not have any tendency to restrain and coerce in violation of Section 8(b)(1)(A) as further outlined below. See *Pay Less Drug Stores Northwest*, 312 NLRB 972, 973 (1993) *enf. denied on other grounds*, 57 F.3d 1077 (9th Cir. 1995) (Holding that a judge’s failure to rule on a contested matter does not come within the ambit of Rule 102.46(b), which applies to rulings, findings, etc. and therefore that a party does not waive the right to argue the matter before the Board by failing to file exceptions).

Coast of California. (GC Ex. 8).² PMA, on behalf of its member companies, is a party, with the International Longshore and Warehouse Union (“ILWU”) on behalf of itself and its affiliated local unions (including Local 13), to a collective bargaining agreement covering the wages and other terms and conditions of longshore employment on the West Coast. *Id.* The agreement that covers the wages and other terms and conditions of employment for longshore workers is the Pacific Coast Longshore Contract Document (“PCLCD”). *Id.*

B. Longshore Classifications and Registrations

The longshore industry is “casual,” using the services of dispatch halls in each port to distribute work where available, depending on the flow of vessels and cargo. PMA and the ILWU affiliate locals jointly operate the dispatch halls, through Joint Port Labor Relations Committees (“JPLRC”). (GC Ex. 6, pg.84-85; Aldape 46:21-24; 57:19-23). Every longshore worker begins as a Casual nonregistered longshore worker (“Casual”). Through seniority and hours worked, Casuals can become Class B limited registered longshore workers. Eventually, a Class B worker can become a Class A fully registered longshore worker. With each increase in classification, a longshore worker receives a higher dispatch priority and increased benefits. (Aldape 48:13-49:15).

C. The Joint Labor Relations Committees

Pursuant to Section 17 of the PCLCD, every port on the West Coast maintains a JPLRC. (GC Ex. 6, pg.84-90). The PCLCD also establishes four regional Joint Area

² References General Counsel’s Exhibits are noted as “GC Ex.” followed by the exhibit number. References to Respondent PMA’s Exhibits are noted as “PMA Ex.” followed by the exhibit number. References Respondent Local 13’s Exhibits are noted as “Local 13 Ex.” followed by the exhibit number. References to the transcript include the name of the individual testifying followed by the page and line numbers of the testimony. References to the Administrative Law Judge’s Decision are noted as “ALJ Dec.” followed by the page number.

Labor Relations Committees (“Area LRCs”), and a single Joint Coast Labor Relations Committee (“Coast LRC”). *Id.* at 85. The JPLRC and the Area LRC are each composed of representatives from the local unions as well as representatives from PMA member companies. *Id.* at 85. These committees preside over issues of dispatch, registration, elevation, discipline, grievances, and similar issues at the local and regional levels. (GC Ex. 6, pg.84-90). The Coast LRC is an overseeing, coast-wide joint labor-management committee composed of representatives of the ILWU (International Union) and representatives designated by PMA member companies. *Id.*

D. ILWU-PMA Equal Employment Opportunity Policy & Procedures

ILWU and PMA jointly maintain a policy prohibiting discrimination and harassment related to employment covered by the PCLCD. (GC Ex. 2). The current policy has been in place since 2001. (Fresenius 291: 21-25). The *ILWU-PMA Equal Employment Opportunity Policy & Procedures* (“the 13.2 Policy”) is memorialized in Section 13 of the PCLCD and further outlined in the *ILWU-PMA Handbook-Special Section 13.2 Grievance Procedures and Guidelines for Remedies*. (GC Ex. 6; GC Ex. 2).

The 13.2 Policy contains a special grievance procedure under which all longshore workers have the right to file complaints concerning incidents of discrimination or harassment (including hostile work environment). (GC Ex. 2, pg. 2; Fresenius 292: 23-25; 293:1-2). Complaints filed under the 13.2 Policy (“13.2 Complaints”) are processed very differently from traditional grievances filed under Section 17 of the PCLCD. Under Section 17, complaints filed by longshore workers are first investigated and adjudicated by the JPLRC. (GC Ex. 6, pg. 87 § 17.2-17.23). If disagreement is reached over the complaint at the JPLRC either the union or PMA, but not the individual grievant, may

refer the complaint to an Area LRC, Coast LRC, or an Arbitrator. (GC Ex. 6, pg. 87 § 17.24-17.26).

Under the 13.2 Policy however, the JPLRC is completely bypassed. Individual longshore workers file their complaints directly with the Area Arbitrator. The JPLRC has no contractual ability to screen grievances or choose whether particular grievances should move on to arbitration. (GC Ex. 2, pg.8-9; Fresenius 292: 9-22). Rather, the Area Arbitrator has the sole authority to make the threshold determination of whether the complaint alleges a violation of the policy and merits a hearing. (Fresenius 293: 6-9). Assuming the Area Arbitrator finds that a violation of the 13.2 Policy has been alleged, the Area Arbitrator will hold a hearing on the complaint. (GC Ex. 2, pg. 9; Fresenius 293:3-16). Neither the PMA nor Local 13 may dictate whether or not a hearing will be held. (Fresenius 293:7-22; 308:17-24).

Another unique aspect of the 13.2 Policy is that unlike in the traditional grievance process, the union does not generally take a “position.” Both the filing party and the accused may choose a longshore worker to represent them thereby reducing the union’s role to that of an observer. (GC Ex. 2, pg.9-10). Alternatively, both the filing party and the accused are entitled to request their local union to appoint a union representative to assist them. The policy dictates that the union representation must be provided “in all cases where requested regardless of whether the Union agrees or disagrees with the merits of the complaint and such representation shall not be considered an indication of the Local’s position concern the complaint.” *Id.*

If the filing party or the accused are unsatisfied with the decision of the Area Arbitrator, either may file an appeal with the Coast Appeals Officer, who may affirm,

vacate or modify the decision of the Area Arbitrator, but no other appeals or proceedings are allowed in order to ensure the final resolution of 13.2 Complaints with all due speed. (GC Ex.2, pg.11-12).

The JPLRC has an obligation under the 13.2 Policy to promptly enforce any penalty issued by the arbitrator. (GC Ex. 2, pg. 12; Fresenius 312: 20-313:3). Regardless of the union or the employer's opinion on a decision of the arbitrator on a 13.2 Complaint, the JPLRC cannot vacate a decision by the arbitrator. (Fresenius 297:22-23; 311:15-18).

If an individual is found not guilty of a 13.2 Complaint, the fact that such a complaint was filed cannot be used against them for future discipline. In fact, no record of the 13.2 Complaint would be included in the individual's complaint history file as distributed to the union or employer-member companies. (Fresenius 295:9-22).

The provisions of the policy are subject to modification only by the Joint Coast Labor Relations Committee. (GC Ex. 2, pg. 12).

E. Eric Aldape

Aldape is a longshore worker who has been a member of ILWU, Local 13 for thirteen years. (Aldape 45: 21-24). He considers himself to be an "activist." (Aldape 55:9-10; 58:14-17). He describes his activism as "giving views and opinions upon candidates and elections" through the distribution of fliers at the jointly administered longshore dispatch hall. (Aldape 58:18-23).

F. Droege v. Aldape 13.2 Complaint

On approximately September 4, 2009, a few days before the fall union election which was scheduled for September 8 through 10, 2009, Aldape distributed about 1500

copies of a flier entitled "THIS IS MY STYLE, THE CLICK AND THERE CRONIES ARE IN DENIAL" (sic) in the joint longshore dispatch hall. (Aldape 71: 9-15; 71:22-72: 9). The flier made references to various union members and officers including Mark Jurisic ("Jurisic"), a member of Local 13's executive board. Specifically, the flier 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. (sic) (GC Ex. 8, Bold in original).

Shortly after Aldape distributed the above referenced flier, a text message was circulated among the membership of Local 13 which stated in relevant part:

Th truth is here: (EVIDENCE every1 encouraged 2 att;work stop meeting (mark jurisic) daughter failed her drug test& covered by Jurisic click! Eric will hit mic. (sic)(GC Ex. 3, pg.71; Droege 245:23-246:16).

On September 10, 2009, Margarite Droege (maiden name Jurisic) filed a 13.2 Complaint against Aldape. (GC Ex. 7). Margarite Droege ("Droege") is Mark Jurisic's only daughter in the longshore industry. (Droege 251:5). She is new to the industry, in the "casual" classification, and a non-member of the union. (Droege 242:4-6; 244:5-7). Her complaint, in part, stated:

I am Mark Jurisic's only daughter in this industry and I have never tested positive for drugs or alcohol in my life. Now my reputation has been smeared and I am humiliated. ... I am humiliated and I cannot deal with this intimidation any longer. There is no other job in this country where a woman would be subjected to this kind of harassment. I am asking for this harassment to end immediately. (GC Ex.3 pg.108).

Droege did not fail the drug test she took as a part of the casual screening. (PMA Ex. 2; Droege 251:23). In fact, the drug screen test results show she tested negative for all drugs but that the temperature of her urine was "outside of normal range." (PMA Ex.

2, pg.1). When Droege received the negative drug test results along with the letter from the JPLRC noting she failed her drug test, she contacted her father to ask him what to do. (Droege 242: 22-25). Jurisic, who had some knowledge of drug testing procedures due to a background in law enforcement, suspected there had been some sort of lab error because, typically, off temperature urine samples are considered invalid and not even sent through the drug testing process. (Jurisic 193: 23-194:1; 198:23-200:7). He advised her to call PMA and explain her situation. (Jurisic 192: 2-5; 199:9-200:7). Droege followed her father's advice and called PMA. She was set up for a retest which she completed without issue. (Droege 243: 1-5, PMA Ex. 1, pg.1). The testing lab later confirmed in a letter to PMA that a collection error had been the cause of the invalid urine sample. (PMA Ex.1, pg.2).

A full hearing on Droege's 13.2 Complaint was held before the Area Arbitrator, David Miller. (GC Ex. 7). Per the 13.2 Policy both Aldape and Droege asked the union to provide them with representation. (GC Ex. 3, pg. 1). Aldape chose to be represented by Local 13's Secretary-Treasurer, Chris Viramontes. (Aldape 134:19-21). Droege was represented by Mark Mascola ("Mascola"), Local 13's Labor Relations Committee representative. (GC Ex. 3, pg.18).

On October 5, 2009, Arbitrator Miller issued a decision in which he found Aldape guilty of violating the 13.2 Policy. (GC Ex. 7). Arbitrator Miller ordered that Aldape should be penalized with 30 days off work with 15 suspended, confinement to the first shift until December 5, 2009, and mandatory attendance at diversity training. *Id.*

Aldape, with the assistance of Chris Viramontes, appealed Arbitrator Miller's decision to the Coast Appeals Officers, Rudy Rubio. (GC Ex. 7; Aldape 134: 1-4). On

October 27, 2009, Rubio issued a decision confirming Arbitrator Miller's decision and increasing the penalty from 7 days off work to 15 days off work with 15 days suspended. (GC Ex. 7). Aldape received a copy of Rubio's decision concurrently. (GC Ex. 3, pg. 117-125).

Aldape testified that when he published the statement in his flier about Droege he did not know whether she had in fact failed her drug and alcohol screen test. (Aldape 108:8-15). He stated that he published the statement based on a rumor which he had heard from five union members, only four of whom he could remember by name.³ (Aldape 108:16-21).

Aldape claimed to have heard the rumor from Mark Mendoza ("Mendoza"), a former Local 13 President, Chris Viramontes ("Viramontes"), who was the Local 13 Secretary-Treasurer at the time, David Ross, a one-time executive board member, and Mark Espinoza, a rank and file longshore worker.⁴ (Aldape 108:22-109:5).

Aldape testified that Mendoza told him that one of Jurisic's family members had failed the drug screen, that a JPLRC hearing had been held over the issue and that the paperwork from the hearing had been hidden by the clerical staff. (Aldape 142: 19-25; 145:1-11; 146:1-16). Mendoza's testimony about this conversation differed significantly. Mendoza testified that Aldape approached him to find information he could use against candidates in the union election. (Mendoza 211:15-25; 212:1-6). He confirmed that he

³ In the affidavit Mr. Aldape gave to the Board Agent, he stated, under oath, that he could not remember the names of the individuals with whom he discussed the rumor about Droege. (Aldape 140:23-142:2). However on direct examination, Counsel for the General Counsel elicited testimony from Aldape in which Aldape claimed the Board Agent told him he did not have to include the names of the individuals with whom he spoke about Droege's drug test in his sworn statement. (Aldape 178:16-24). While the ethics of the Board Agent who took Aldape's sworn statement are not at issue in this case, Aldape appears to have been led to believe, by at least one Board Agent, that making false statements under oath is permissible. This certainly calls into question Aldape's credibility as a witness.

⁴ Neither David Ross nor Mark Espinosa testified.

told Aldape that he had heard a rumor about Jurisic's family member failing the drug screen but that he suggested to Aldape that he should find proof of wrong doing before making any statements regarding the rumor. (Mendoza 211:15-25; 212:1-6). In "General Counsel's Brief In Support Of Exceptions To The Decision Of the Administrative Law Judge" (hereinafter, "GC's Brief"), General Counsel refers to Mendoza's testimony "there's rumors everywhere" to mean that the rumor about the drug screen was "everywhere." (Mendoza 213:13). But General Counsel ignores the redirect examination in which Mendoza states that he had heard this rumor from less than five individuals. (Mendoza 214:2-11). The redirect testimony makes it clear that Mendoza was making a general statement "there's rumors everywhere," rather than saying that the drug screen rumor was "everywhere."

As to Aldape's conversation with Local 13 Secretary-Treasurer Viramontes, Aldape stated that he also went to Viramontes to find out information about candidates in the union election and that Viramontes told him that he had heard a rumor that one of Jurisic's family members failed the drug screen test. (Aldape 146:24-147:2; 147:19-148:25). Viramontes testified that he discussed the drug screen rumor with Aldape only after Aldape distributed his flier regarding the drug test. (Viramontes 258:14-17). Viramontes also stated that only after Aldape distributed his flier, Viramontes informed Aldape that he found a copy of a letter from the JPLRC to Droege informing her that she had failed the drug screen test. (Viramontes 258:8-13).

Aldape never attempted to verify the drug test rumor by discussing it with Droege or Jurisic. (Aldape 158: 9-21). Nor did he contact the PMA to investigate whether the rumor was true. (Aldape 158: 22-159:1). Aldape did request Local 13

investigate the rumor but not until after he published the flier in which he leveled the accusations against Droege and her father. (Aldape 77:13-22; 78:22-79:11).

G. Bebich v. Aldape 13.2 Complaint

On September 24, 2009, a few hours after the arbitration hearing on Droege's 13.2 Complaint had adjourned; Aldape left a voice message on the cell phone of Steven Michael Bebich ("Bebich") a Class A longshore worker and union member. (Aldape 168:25-169:19). The voice message states as follows:

Hey what's up Mike? I heard you are coming out with a letter on me bro. You've got no balls bro. If you had balls you would have told me when you saw me today. Feel free to write that I am stupid bro. Just 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 membership bro. You've got my number you call me. Don't waste your time calling me write your fucking shit bro I'll write my shit about you bro. You'll see that no one will waste their time picking up your fucking letter bro but you watch how many people pick up mine. Later. (Local 13 Ex. 4; GC Ex. 4, pg.84).

At the hearing, Aldape confirmed that he was threatening to expose that Bebich had been arrested in San Francisco and that Bebich had stolen a computer from one of his longshore employers. (Aldape 85:15-23). Aldape did not follow through with his threat to publish the flier regarding Bebich. (Aldape 86:4-6).

Regarding General Counsel's Exceptions to the Decision of the Administrative Law Judge, Exception Number 12, failure to find that "Steven Bebich was a candidate for union office (caucus delegate) when Aldape left a voicemail message on September 24, 2009" (ALJD 5:25): Bebich was not a union officer, nor was he running for union office when Aldape left him the voice message. (Aldape: 115:5-20; Bebich 219: 2-4). Rather, Bebich had run for union office in the election that occurred on September 8, 9 and 10,

2009 and lost. (Aldape 114:19-25). Aldape left the voice message for Bebich two weeks after the election was over.

On October 2, 2009 Bebich filed a 13.2 Complaint against Aldape which states, in part:

I believe that Mr. Aldape has violated my rights by threatening to reveal confidential information about me. Information that he had never substantiated nor does have any firsthand knowledge of. What Mr. Aldape is attempting to do it nothing less than blackmail. ... I am asking that you hear this complaint under Section 13.2 because I believe that Mr. Aldape has verbally harassed me, created a hostile work environment and threatened me in a retaliatory manner. (GC Ex. 4, pg.6).

Arbitrator Miller initially dismissed the grievance as not meeting the criteria of a 13.2 violation but the Coast Appeals officer, upon Bebich's appeal, remanded the grievance back to Arbitrator Miller for a hearing. (GC Ex.7).

On November 17, 2009, Arbitrator Miller held a hearing on the 13.2 Complaint. (GC Ex. 7). At the hearing, Secretary-Treasurer Viramontes again represented Aldape. Bebich was represented by Mascola. (GC Ex. 4, pg.24). On December 2, 2009, Arbitrator Miller issued a decision in which he found Aldape to have violated the 13.2 Policy. (GC Ex. 7).

Aldape appealed Arbitrator Miller's decision on Bebich's 13.2 Complaint to the Coast Appeals Officer. The Coast Appeals Officer affirmed Arbitrator Miller's decision on December 28, 2009. (GC Ex. 7). The time off penalty from the Droege 13.2 Complaint was also activated at this time. *Id.*

Regarding General Counsel's Exceptions to the Decision of the Administrative Law Judge, Exception Number 3, "It is undisputed that Aldape's insinuations and threats to Bebich on September 24 were based [solely] on rumor" (ALJD 6:1-2): Aldape's stated

basis for believing that that Bebich had stolen a computer from his steady employer was a “rumor on the waterfront”.⁵ (Aldape 87: 20-24). Aldape claimed to have heard this rumor from approximately 20 individuals in late August, early September 2009. (Aldape: 89:20-90:6; 91:9-16). However the only source of this rumor Aldape named was Joe Donato (“Donato”), Local 13’s Business Agent. (Aldape 90: 7-8). Just as Aldape solicited information to use against Jurisic, Aldape admitted he approached Donato to get information on Bebich to use against him in the union election of September 8-10, 2009. (Aldape 92: 18-24). Aldape stated that Donato told him that Bebich had been caught stealing a computer from one of the PMA-member companies and gave Aldape the reference number for an employer complaint in which Bebich was accused of the theft. (Aldape 93:7-8).

Donato, by contrast, testified that all he had told Aldape was that he had heard a rumor that Bebich had stolen a computer from his employer. (Donato 235:5-236:7). Donato emphatically denied having given Aldape an employer complaint number or even that he had any knowledge that such an employer complaint had been filed. (Donato 236:11-15; 239:5-8).

Bebich admitted to having been arrested in San Francisco and noted that all charges against him were subsequently dropped. (Bebich: 7-13). Bebich also admitted that he had been accused of stealing computer equipment by his employer in 2003 but vehemently denied the truth of the allegation. (Bebich 223:17-25).

An employer complaint had, in fact, been filed against Bebich in 2003 alleged that he engaged in pilferage (theft) of computer equipment, a charge that carries with it a

⁵ “Steady” longshore workers work on a daily basis for the same employer rather than being dispatched to different employers on a daily basis. (Aldape 88:3-19).

minimum penalty 60 days suspension from all longshore work with a discretionary maximum penalty. (GC Ex. 10; GC Ex. 6, pg. 99 § 17.8221). The employer complaint was never adjudicated; rather Bebich voluntarily resigned his steady position and returned to working out of the dispatch hall. (Bebich 224:1-4; 228:18-25; 229: 1-5; 19-24). He was rehired to a steady position by another longshore employer a few weeks thereafter. (Bebich 232:11-20).

H. Realini v. Aldape 13.2 Complaint

In May 2010, Aldape distributed copies of a flier entitled “Ex-Officer’s Family’s A Mechanics That’s Why There Is No Panic” in the joint longshore dispatch hall. (Aldape 95:8-22). The text of the flier, in relevant part, is as follows:

Let’s talk mechanics and B-UTR, the way there are being dispatched. I was one of 9 members who volunteered on the dispatch rules committee to come up with a motion for the B-UTR mechanic issue. I was told I had all the minutes and special LRC’s pertaining to the mechanics. I could not find nothing in the minutes given to me where we adopted the mechanics in our local or even how they were supposed to be elevated. Have we ever taken a vote adopting mechanics in our local? I guess they didn’t give us all the minutes or do they even exist. We had at least 10 meetings. One meeting the floor was open for any motion. My motion was to place the mechanics with less than 5 years on their own board at the end of the B-UTR board for dispatch, with no come backs. It would be only for one month, therefore creating a flip flop every other month. Our lawyer said, this was the best motion he heard with a little bit of tweeking this motion could work. My motion went nowhere, maybe it was the maker of the motion, not the motion itself. I missed one meeting. All of a sudden, the chair with his right hand man brought a motion and said this is the one we are going to vote on. Our lawyer was present. When I spoke on this motion, I was strongly against it. This was not the motion that we should pass and submit to the executive board. Our lawyer said that they should listen to me. The 3 senior members, 3 B-UTR members and 1 mechanic were out voted by the dispatch rules committee which consists of executive board members. Not 1 of these members is a mechanic, but yet this motion was passed by this committee. This motion would eventually be voted down by the executive board. It is not all

the mechanics. Our newer mechanics are the ones that take the clerking and they think we owe them something. They are even getting dispatched before the ADA members. I want every member know that any motion is a good motion as long as it is passed at a membership meeting. I will bring the motion, you bring the vote and will make it fair together. If our leaders make no move, we will! (GC Ex.11).

On May 19, 2010, Wallace Realini (“Realini”) a Class A longshore mechanic, and a rank and file member of the union filed a 13.2 Complaint against Aldape over the flier. (GC Ex. 7). In his complaint, Realini alleged that the flier was “false, misleading and morally wrong” and created a “hostile work environment” for longshore mechanics. (GC Ex. 5, pg.9). Essentially, Realini’s complaint appears to allege that Aldape’s flier made numerous false comments which implied that longshore mechanics were not legitimate members of the union. (GC Ex. 5, pg. 9-10). The complaint further alleged that the flier pitted longshore mechanics against regular longshore workers and continued to an environment in which mechanics were being threatened and harassed at the dispatch hall. *Id.*

Don Taylor (“Taylor”), a longshore mechanic who was on the dispatch rules committee along with Aldape testified that he found a number of the statements in Aldape’s flier to be false. (Taylor 267: 22-268:8). Regarding Aldape’s statement “I was told I had all the minutes and special LRC’s pertaining to the mechanics. I could not find nothing in the minutes given to me where we adopted the mechanics in our local or even how they were supposed to be elevated. Have we ever taken a vote adopting mechanics in our local? I guess they didn’t give us all the minutes or do they even exist” Taylor explained, and Aldape confirmed, that all the members of the dispatch rules committee had received a packet of documents regarding the mechanics history in the union.

(Taylor 269:18-24; Aldape 124: 10-16). One of the documents distributed to the dispatch committee members was the current section of the collective bargaining agreement pertaining to longshore mechanics. The committee members also received a document entitled "The History of M&R" which outlined how the mechanics were integrated into the ILWU bargaining unit. (Taylor 270: 2-6; Local 13 Ex. 5 & Local 13 Ex. 6).

Nor did Taylor find accurate Aldape's statement in his flier that "All of a sudden, the chair with his right hand man brought a motion and said this is the one we are going to vote on." Taylor explained that several motions were voted on and brought before Local 13's executive board. (Taylor 273: 9-22). Finally, Taylor found misleading Aldape's statement that "[t]he 3 senior members, 3 B-UTR members and 1 mechanic were out voted by the dispatch rules committee which consists of executive board members."

Taylor testified that all the members of the dispatch rules committee had an equal vote on motions which were discussed. (Taylor 274: 12-18).

A hearing on Realini's 13.2 Complaint was held on June 1, 2010 which Aldape did not attend for medical reasons. The hearing resumed on September 7, 2010, two weeks after Aldape informed the arbitrator that he was able to return to work. The Arbitrator found Aldape not guilty of a violation of the 13.2 Policy. (GC Ex. 7).

III. Argument

A. The ALJ Accurately Concluded That The Alleged Unlawful Acts Surrounding Droege's 13.2 Complaint Occurred Over Six Months Beyond The 10(b) Period And Thus Must Be Dismissed As Untimely (Regarding Exception 5)

Section 10(b) of the Act dictates that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" It is well established that the 10(b) period commences when a party has

clear and unequivocal notice of a violation of the Act. *Leach Corp.*, 312 NLRB 990, 991 (1993) (citing *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1998)). In determining when the 10(b) period begins, the National Labor Relations Board (“the Board”) focuses on the date of the alleged unlawful act rather than the date its consequences become effective, provided that a final and unequivocal adverse employment decision is made and communicated to an employee. *Postal Service Marina Center*, 271 NLRB 397, 399-400 (1984); ALJ Dec. pg. 7: 10-13.

Aldape filed his charge against Local 13 on June 1, 2010, and it was served on June 2, 2010. (GC Ex. 1(a);1(b);1(c)). Thus, a complaint may not issue on a violation of the Act regarding which Aldape had clear and unequivocal notice before December 2, 2009. Here, the final decision surrounding the Droege 13.2 Complaint was issued by Coast Appeals Officer Rubio and communicated to Aldape on October 27, 2009, and the disciplinary penalty accompanying that decision was implemented immediately by the JPLRC. The disciplinary penalty included immediate time off work as well as “suspended” time off that would be activated in the case of future disciplinary proceedings. Thus, Aldape had clear and unequivocal notice of the decision which issued him both time off and suspended time off well before December 2, 2009, yet he did not file his charge against Local 13 within 6-months of being put on notice of this final adverse employment decision.

General Counsel argues that Coast Appeal’s Officer Rubio’s decision was not a final employment decision triggering the running of the 10(b) period because the portion of the discipline that was suspended did not activate until it was triggered by a new disciplinary action during the 10(b) period. General Counsel essentially argues that

Local 13 and PMA “enforced” the suspended portion of the Droege arbitration award on December 28, 2009 and this re-started the statute of limitations as to the unlawful acts surrounding the Droege claim. *Barton Brands*, 298 NLRB 976 (1990) and *Hospital Employees (Smithtown Hospital)*, 275 NLRB 272 (1985), cited by the General Counsel in support of this argument, are distinguishable.

Barton Brands concerned an arbitration award that awarded an employee conditional reinstatement premised on the condition that he did not seek union office. The employer then discharged the employee when the employee subsequently won union office. 298 NLRB at 978. The Board found that the adverse employment decision did not occur until the employer discharged the employee. *Id.* In *Smithtown Hospital*, the employer refused to implement an arbitration award affording the union recognition based on tainted cards. 275 NLRB at 272. The union then petitioned the state court to enforce the arbitrator’s award. The Board held that the 10(b) period began to run when the union petitioned to enforce the award, not on the issuance of the award. *Id.*

Unlike the situation in *Barton Brands* and *Smithtown Hospital* in which the only adverse employment action (the discharge and the petition to enforce) occurred during the 10(b) period, here, Aldape was issued discipline and the discipline was enforced outside of the 10(b) period. He was also on clear notice on October 27, 2009 that there was suspended discipline arising from the Droege 13.2 Complaint that would be automatically activated if he was disciplined again triggering his obligation to file a timely NLRB charge.

General Counsel also cites to *Owl Constructors*, 290 NLRB 381(1988), for the proposition that an allegedly unlawful decision is not final “if the employee seeks review

through an internal union appeals process.” (GC Brief pg. 14). In that case, union members were brought up on internal union charges, were found guilty and appealed. The Board held that due to the appeal, the decision was not final until the union notified the union members that the appeal had been upheld, which occurred within the 10(b) period. 290 NLRB at 384. *Owl Constructors* does nothing to advance General Counsel’s argument in this case since Aldape was notified on October 27, 2009, that Coast Appeals Officer Rubio was upholding Arbitrator Miller’s decision and no further appeal was available to Aldape.

General Counsel also argues that “the Union and the Employer were free to amend or set aside any aspect of the grievance process” and so Aldape did not have clear notice that the suspended discipline from the Droege 13.2 Complaint would later be implemented. (GC Brief pg. 15). This statement by the General Counsel is unsupported by the evidence. The reference to the transcript is misleading and it refers to a comment made by the ALJ. The collectively bargained 13.2 Policy requires the JPLRC to promptly enforce any penalty issued by the arbitrator, including suspended penalties. Further, Respondent Local 13 has no power to alter the 13.2 Policy bargained by the International Union. Here, the JPLRC followed the directive contained in the 13.2 Policy and immediately implemented the penalty associated with the Droege 13.2 Complaint. That part of the suspended penalty resulting from the decision on the Droege 13.2 Complaint was triggered by new discipline during the 10(b) period does not alter the fact that this discipline was clearly and unequivocally communicated to Aldape on October 27, 2009.

General Counsel also claims that *Grimmway Farms*, 314 NLRB 73 (1994), supports the assertion that because the suspended portion of the Droege penalty occurred within the limitations period, it must necessarily follow that the events that give rise to the penalty must be considered in this proceeding. *Grimmway Farms* does not support that assertion. In *Grimmway Farms*, employees engaged in a concerted work stoppage on Memorial Day of 1990. Subsequently, during the last six months of 1991 employees were purposely not rehired because of their 1990 union activity. The Board held that while the Memorial Day event occurred outside the 10(b) period, it could properly be considered as “background evidence” to demonstrate that the failure to rehire during the 10(b) period was a violation of the Act. 314 NLRB at 74. Here, Coast Appeals Officer Rubio’s decision and its immediate application were not “background evidence,” giving meaning to unlawful activity occurring during the 10(b) period—rather the decision and its immediate application were the unlawful acts complained of. Therefore, *Grimmway Farms* is inapplicable.

The General Counsel’s final argument that imposing a 10(b) bar in this case “would create a rule that would force union members facing suspended punishments they deem 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” (GC’s Brief pg. 15) ignores that in this case, Aldape had clear and unequivocal notice on October 27, 2009, of the essential unlawful act (the discipline and suspended discipline arising from the Droege 13.2 Complaint) yet did not file a charge until June of 2010.

Accordingly, the ALJ correctly decided that the alleged unlawful acts surrounding the Droege 13.2 grievance occurred over six months before the filing and service of the charge against Local 13, and therefore should be dismissed.

B. Respondent Local 13 Did Not Violate Section 8(b)(1)(A) Because The Conduct Aldape Was Disciplined For Was Unprotected By Section 7 (Regarding Exceptions 2,4,6,8,9,15,16)

Section 7 of the Act permits employees the right “to self-organization, to form, join or assist labor organizations, to bargaining collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

Section 8(b)(1)(A) of the Act states that “It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]; Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein,” 29 U.S.C. § 158(b)(1)(A).

Thus, to show a violation of Section 8(b)(1)(A) of the Act, it must be determined, as a threshold issue, that Aldape’s conduct was concerted activity protected by Section 7 of the Act and that the conduct did not lose the protection of the Act because of its nature.

Holling Press, Inc., 343 NLRB 301, 302 (2004)(Termination lawful where based on activity unprotected by Section 7 of the Act); *see also, HCA Health Services of New Hampshire, Inc.*, 316 NLRB 919, 919 (1995).⁶

⁶ While the cases reference here are cases in which an Employer was charged with a violation of Section 8(a)(1) of the Act for disciplining an employee for engaging in protected activity, the analysis is equally applicable to 8(b)(1)(A) cases charging a union has violated the Act by issuing discipline in response to a member’s protected activities. *See Local 254, Service Employees International Union, AFL-CIO (Brandeis University)*, 332 NLRB 1118, 1122 (2000)(While finding first that employee was engaged in activity

1. The ALJ Correctly Found That To Be Protected By Section 7, An Employee's Activity Must Bear Some Relation To Employee's Interests As Employees And That Aldape's Conduct Was Unprotected Because It Dealt Solely With Intra-Union Issues (Regarding Exceptions 2, 4,6,15, 16)

Dissident union activity comes within the ambit of activity protected by Section 7 only if that activity is “for the purpose of collective bargaining or other mutual aid and protection...” In other words, in order to fall within the protection of Section 7, the dissident union activity in question must relate to employee interests in improving terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *OPEIU, Local 251 (Sandia Corp. d.b.a Sandia National Laboratories)*, 331 NLRB 1417, 1424 (2000); *Trover Clinic and Communications Workers of America*, 280 NLRB 6, 6 (1986); *Lutheran Social Service of Minnesota, Inc.* 250 NLRB 35, 42-43 (1980); *Firestone Steel Products Company and Local 174, International Union, UAW*, 244 N.L.R.B. 826, 826-827 (1979).

The requirement that activity bear some nexus to the employment relationship in order to be protected under Section 7 of the Act was articulated by the Supreme Court in *Eastex, Inc., v. NLRB*. In that case, decided under Section 8(a)(1), the employer refused to permit employee distribution of a union newsletter which discussed a proposal to incorporate a “right-to-work” law into the state constitution and a Presidential veto of a bill increasing the federal minimum wage. 437 U.S. at 558. The newsletter called upon workers to take action to protect their interests as employees in regards to these matters. *Id.* The Supreme Court noted that Section 7 of the Act provides protection for employee attempts to seek to improve their terms and conditions of employment and that the

protected by Section 7, 8(b)(1)(A) Complaint was still dismissed because the union had a legitimate interest in restraining the employee's Section 7 rights).

portions of the newsletter that concerned matters beyond the direct employment relationship still fell under the protection of Section 7 because they were related to employees' interests as employees. *Id.* 565-567. However, the Supreme Court acknowledged that at some point the relationship between certain concerted activity and employees' interest as employees becomes so attenuated that an activity cannot fairly be deemed to come within the protection of Section 7. *Id.* 567-568. The Supreme Court left the precise delineation of the boundaries of the relationship to the Board. *Id.*

In *Lutheran Social Service of Minnesota, Inc., and Dennis Johnson*, the Board adopted the Administrative Law Judge's decision that the discharge of two employees for opposing the policies of management at a home for troubled youth did not violate Section 8(a)(1) of the Act. 250 NLRB 35 (1980). The employees were discharged for their protest against the direction and philosophy of treatment for children at the home which had manifested in several instances of vulgar characterization of management and its capacities. *Id.* at 40. The Administration Law Judge determined that the protests of the employees, while directed towards the policies of management, were not directly related to improving their lots as employees and thus the protests were unprotected by Section 7 of the Act. *Id.* 42-43. As a result, Section 8(a)(1) was not violated by their discharge.

Similarly, in *OPEIU, Local 251 (Sandia Corp., d/b/a/ Sandia National Laboratories)*, the Board examined whether Section 7 of the Act protected opposition to the policies of union officials. 331 NLRB 1417. The Union was alleged to have violated Section 8(b)(1)(A) of the Act when it imposed internal union discipline on elected officers for opposing the union president's actions in endorsing a check from the International Union to a law firm in settlement of a lawsuit against the union. *Id.* at

1417. The Board noted that union conduct violates 8(b)(1)(A) where the conduct at issue “impacts the employment relationship, impairs access to the Board’s process, pertains to unacceptable methods of union coercion ... or otherwise impairs policies imbedded in the Act.” *Id.* at 1418. In determining whether the union discipline at issue impaired policies imbedded in the Act, the Board specifically rejected the dissent’s argument that the Act contains a Section 7 right to concertedly oppose the policies of union officials. Citing *Eastex, Inc.*, the Board stated:

[T]he right to concertedly oppose the policies of union officials is protected by Section 7 *if* that activity is ‘for the purpose of collective bargaining or other mutual aid and protection....’ That protection is broad but not unlimited and it assumes that the activity bears some relations to the employees’ interests as employees.” Emphasis in original. 331 NLRB at 1424.

The Board found that because the primary issue underlying the opposition to the union president was the disbursement of a settlement check, which bore no clear link to employee interests, the opposition was not protected by Section 7 of the Act and thus the discipline did not impair policies imbedded in the Act. *Id.* at 1425.

Like the opposition to management in *Lutheran Social Services* over the quality of care for youth and the opposition to union officials in *Sandia National Laboratories* over the disbursement of the settlement check, Aldape’s reckless publication of the drug testing rumors regarding Droege is unprotected by Section 7 because it is utterly unrelated to employee interests as employees.

Nor did Aldape’s threatening voice message to Bebich demonstrate even an attenuated link to the employer-employee relationship. Bebich was not even a union officer when Aldape maliciously threatened to publish rumors about his alleged criminal

history. Thus, Aldape's threat to Bebich did not even relate to opposing the policies of the union or to union officers.

Aldape's voice message for Bebich was also, an un-concerted, solitary act. While a conversation can be considered concerted "if was engaged in with the object of initiating or inducing or preparing for group action or had some relation to group action in the interest of the employees" the language of Aldape's message makes clear that it was just a gratuitous threat. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). If Aldape was planning to distribute a flier disparaging Bebich, he did not need to leave a voice message for Bebich letting him know that the disparaging flier was forthcoming. The purpose of the message was clearly just to antagonize and intimidate, not to prepare for group action.

Finally, Aldape's flier which was the subject of the Realini grievance dealt with the legitimacy of longshore mechanics as members of the union and his personal frustration with how his ideas were received in internal union committee meetings. These internal union topics lack a nexus with the employer-employee relationship and are thus unprotected by the Act.

General Counsel argues that the ALJ should not have applied the statement in *Sandia National Laboratories* that to be protected under Section 7, activity must bear some relation to "employees' interests as employees" because the statement occurred in the context of a discussion of whether the discipline in that case violated a policy of the Act, and not in the context of whether the discipline at issue affected the employment relationship--this distinction is of no consequence. The statement in *Sandia National Laboratories* that opposition to policies of union officials must relate to "employees'

interests as employees” to be protected reflects the Board’s rejection of the dissent’s argument that any opposition to the policies of union officials, whatever its nature, is protected by Section 7. Because there can be no violation of 8(b)(1)(A) without a finding that Aldape engaged in Section 7 activity, Sandia’s clarification that Section 7 does not protect purely intra-union activity is directly on point.

Additionally, while the discussion of the requirement that the union dissident activity bear a relation to employees’ interests as employees to be protected under Section 7 is clearly articulated in the context of an 8(b)(1)(A) violation for the first time in *Sandia National Laboratories*, this distinction was established by the Supreme Court in *Eastex Inc. v. NLRB* and has regularly been cited in 8(a)(1) cases since then. *Eastex, Inc.* at 565; *Trover Clinic*, 280 NLRB at 6; *Lutheran Social Service of Minnesota, Inc.* 250 NLRB at 42-43; *Firestone Steel Products Company*, 244 N.L.R.B. at 826.

Further, *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997), and *Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1232 (1994), cited by the General Counsel for the proposition that dissident union activity is protected under Section 7 regardless of its nexus with employer-employee relationship, were decided prior to the Board’s clarification in *Sandia National Laboratories* of the scope of the protection of opposition to union officials under Section 7. Other cases cited by General Counsel where opposition to union officials or policies was found protected by Section 7 are inapposite as they involved opposition to union officials related to the union’s collective bargaining with the employer, an issue unquestionably linked to employees’ interests as employees. For example, in *Teamsters Local 823 (Roadway Express, Inc.)*, the employees protested the local union’s collective bargaining practices

to the international union. 108 NLRB 874 (1954). In *Town & Country Supermarkets*, a dissident union member was opposing the union president's efforts to ratify a successor collective bargaining agreement. 340 NLRB 1410 (2004).

The Board cases decided both pre- and post-*Sandia National Laboratories* demonstrate that union dissident activity is only protected if it relates to employees' interest as employees.

General Counsel also argues that the attack on Droege was part of Aldape's larger opposition to Jurisic as an executive board member and thus should be considered protected under Section 7. However, this argument is unavailing as none of Aldape's opposition to Jurisic in the "This Is My Style" flier has any connection with union policies regarding employment issues. Rather, it focuses entirely on his daughter's drug test and issues such as free travel and hotel accommodations, which are entirely unrelated to collective bargaining or terms and conditions of employment.

General Counsel argues that Aldape's threatening voice message to Bebich should be considered protected because it occurred in a wider context of protected activity in which Aldape was engaged. Specifically, General Counsel states that Aldape's conduct "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."⁷ To begin with, there no evidentiary support for such a statement in the trial record. Neither Aldape nor General Counsel called any witnesses in this case and Aldape himself described his activism simply as "giving views and opinions upon candidates and elections." Further, even if there was support for General Counsel's assertion that Aldape was engaged in "a

⁷ In fact, it is impossible for Local 13's leadership to be "entrenched" because its Constitution provides that all positions are limited to a one year term and titled officers may only be elected for three consecutive years.

campaign to correct what he perceived to be the anti-democratic and corrupt tendencies of entrenched Union leadership,” opposing union corruption and autocracy is not activity protected under Section 7 unless such opposition relates to the improvement of employee working conditions.⁸ Finally, it is unclear how leaving a profanity-laced, threatening voice message to a non-union officer has anything to do with Aldape’s alleged campaign against autocracy and corruption.

General Counsel cites to *Fairfax Hospital* in support of his assertion that Aldape’s threatening voice message should be viewed as protected because of the wider context of that voice message, but *Fairfax Hospital* does not support his argument. 310 NLRB 299 (1993). In that case, a nurse was engaged in a discussion with her supervisor over the employer’s distribution of anti-union literature while prohibiting union supporters from distributing pro-union materials. *Id.* at 299. The supervisor stated that more anti-union literature would be forthcoming. The nurse responded that the supervisor could expect “retaliation.” The nurse was discharged for the threat and the Board determined that the discharge violated Section 8(a)(3) and (1) of the Act. *Id.* The Board noted that her exchange with her supervisor over the distribution of union literature was protected activity and that while ambiguous, her threat of “retaliation” must have meant that the union would respond with more pro-union literature and thus since it was unaccompanied by threats of egregious or outrageous conduct, the statement was protected. *Id.* at 300.

⁸ The evidence that Aldape engaged in some speech in opposition to candidates for a union election, activity protected by the Labor Management Reporting and Disclosure Act (“LMRDA”), 29 U.S.C. §411, is irrelevant to this case. In *Sandia National Laboratories*, the Board noted that the authority to hear cases brought by union members to enforce rights under the LMRDA is vested in the federal courts and that “when the Board injects itself into matter regulated under the LMRDA it is not only acting in contravention of Congress’s decision to confer jurisdiction over LMRDA claims on the Secretary of Labor and the Federal district courts, rather than the Board, but is also creating the very real risk that its interpretation of the requirements of the LMRDA will conflict with those of the Secretary and the courts. 331 NLRB at 1426.

Contrary to General Counsel's assertion, *Fairfax Hospital* is not a case in which the wider context of protected activity cloaked an unprotected threat with protected status. Rather, in that case, the threat to distribute more union literature, standing alone, was found protected by the Board. But even if *Fairfax Hospital* did stand for the proposition that protected conduct could cloak unprotected conduct with protection, here, not only is Aldape's threat to distribute alleged criminal information about a non-officer unprotected, there is also no evidence of a wider context of protected activity.

2. Aldape's Statements For Which He Was Subject to The 13.2 Policy Were Not Protected By Section 7 Because Of His Reckless Disregard For The Truth (Regarding Exceptions 6,13)

While the ALJ did not reach the issue because of his decision that Aldape's conduct was, on its face, unprotected, Aldape's statements also lost the protection of the Act because of his reckless disregard for the truth. Concerted Activity engaged in for the purposes of collective bargaining or "other mutual aid or protection" can lose the protection of the Act because the activity's "offensive, defamatory or opprobrious" nature. *Ben Pekin Corp.*, 181 NLRB 1025, 1025 (1970). Specifically, a statement will lose the protection of the Act when made "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966). Under this standard, repetition of information or rumor without reasonable belief in its truth is unprotected. See *KBO, Inc.*, 315 NLRB 570, 511 (1994); *HCA Health Services of New Hampshire, Inc.* 316 NLRB at 919.

In *KBO, Inc.*, the Employer was charged with violating Section 8(a)(3) and (1) of the Act⁹ when, during an organizing campaign, it disciplined an employee for telling others that the Union representatives had a tape in which the Employer's operating manager stated that the Employer was "taking money out of the employees profit sharing accounts to pay the lawyers to fight the Union." 315 NLRB at 570. After finding the statement protected because it occurred in the context of a discussion over the Union's organizing campaign, the Board went on to analyze whether the statement lost the protection of the Act because it was made "with knowledge of its falsity, or with reckless disregard of whether it was true or false (internal citation omitted)." *Id.* at 570-571. The Board found that the employee was specifically told by a Union Representative about the tape recording and its contents and in telling other employees he was simply relaying to them in good faith what he heard and reasonably believed to be true. *Id.* at 571. The Board concluded that the Employer violated Section 8(a)(3) and (1) for disciplining the employee for his protected remarks. *Id.*

By contrast, in *HCA Health Services of New Hampshire, Inc.*, the Board found that the Employer did not violate Section 8(a)(1) of the Act by discharging a nurse for spreading disparaging rumors about her supervisor. 316 NLRB at 919. The nurse had been told by her previous supervisor that her current supervisor had been fired from another position for abandoning a patient, and shared this information with four other nurses. *Id.* at 923-924. After determining that the nurse's conduct was initially protected because she was seeking to enlist other employees in protesting their supervision, the

⁹ The cases referenced here are cases decided under Section 8(a)(1) of the Act rather than under Section 8(b)(1)(A) because only cases decided under Section 8(a)(1) of the Act contain factual scenarios that compare to the present case. However, the analysis in these cases of what constitutes activity unprotected Section 7 can be applied equally to this case under Section 8(b)(1)(A).

Board adopted the administrative law judge's reasons and findings that the employee's statements lost the protection of the Act because the rumors were likely false and potentially quite damaging to the supervisor's reputation and the nurse knew or reasonably should have known this. *Id.* at 919. Specifically, the administrative law judge found that the nurse had no proof that what her former supervisor told her was factual and that it was very unlikely to be true because a serious charge of abandoning a patient would likely have been a huge blemish on her employment record. *Id.* at 930. Because the nurse recklessly spread false rumors in an attempt to get her supervisor fired, the Board found that the Employer did not violate the Act by interrogating, suspending, or firing the employee for her rumor-mongering. *Id.* at 919.

Droege did not fail her drug test. Nor is there any evidence whatsoever that her father improperly influenced her hiring process. There is also no question but that the accusation of being a drug user and receiving a job improperly is defamatory. Thus, Aldape spread a false and defamatory rumor about Droege. The issue then is whether Aldape spread the rumor "with reckless disregard for its truth or falsity" or with reasonable good faith belief that it was true.

Unlike the employee in *KBO, Inc.*, who repeated information he was specifically told by a union representative and reasonably believed to be true, Aldape unabashedly admitted that when he printed and distributed 1500 fliers in the joint longshore dispatch hall accusing Droege of failing her drug screen test he had no knowledge of the truth or falsity of his accusations.¹⁰ Aldape's recklessness disregard for whether his accusations

¹⁰ General Counsel's assertion that there were rumors "all over the place, and these rumors were confirmed to Aldape by Mark Mendoza, a former Union president" was absolutely contradicted by Mendoza's own testimony at trial. Further, General Counsel's assertion that the rumors had a "basis in fact" because of the letter the JPLRC sent to Droege is irrelevant to the question of whether Aldape had a reasonable good faith

were true or false is further demonstrated by the fact that he published his accusations based on a rumor which he solicited from approximately five union members.

Like the nurse in *HCA Health Services of New Hampshire, Inc.*, not only did Aldape have no knowledge that the information about Droege was factual, he also had no reasonable basis for believing it to be true particularly considering that the union officers and ex-union officers he discussed the rumor with prior to publishing his flier could do no more than confirm that they had also heard a rumor. Further, given that life-threatening accidents can occur on the docks if longshore workers are working under the influence of drugs or alcohol, Aldape should have recognized the improbability that a union executive board member would have the power to get the employer to give an applicant a job as a longshore worker after failing a drug test. Finally, the fact that even at trial Aldape constantly referred to the information behind his accusation as “rumors” cuts against the assertion that he had a reasonable belief in the truth of his accusations. Because Aldape published a false and defamatory rumor about Droege with “reckless disregard for its truth or falsity” his activity loses the protection of Section 7 of the Act.

As for Aldape’s actions in leaving a threatening voice message for Bebich, Aldape admitted that he was threatening to expose that Bebich had stolen a computer from an employer and that Bebich had been arrested in San Francisco. As Bebich admitted to the arrest, the issue is whether Aldape’s threat to distribute fliers regarding the stolen computer allegation lost the protection of the Act due to Aldape’s reckless disregard for the truth or falsity of the allegation.

belief in the truth of the information because Aldape knew nothing of the letter until after he distributed the 1500 fliers about Droege.

Spreading information that a co-worker stole a computer from the employer is a defamatory statement. Here, again, Aldape freely admitted that he had no factual basis for the allegations against Bebich other than a rumor on the waterfront. The only source of this rumor cited by Aldape was union business agent Donato.¹¹ Further, Aldape had no reasonable basis for believing this information to be true considering the collective bargaining agreement requires a minimum of a 60 day suspension from work as a penalty for pilferage (theft) and no such penalty was imposed on Bebich.

Also similar to the nurse in *HCA Health Services of New Hampshire, Inc.*, who spread damaging information about her supervisor with the goal of getting her supervisor fired rather than in order to engage in any protected activity, Aldape's threat to spread damaging information about Bebich was purely malicious as Bebich was no longer even running for union office. This further lends support to the argument that Aldape was unconcerned with whether the information he was threatening to spread was true or not, as long as the information was damaging.

Because Aldape's phone call to Bebich was a purely personal threat to publish a defamatory rumor about Bebich with "reckless disregard for its truth or falsity" his activity loses the protection of Section 7 of the Act.

Realini alleged in his 13.2 Complaint against Aldape that the flier "Ex-Officer's Family's A Mechanic, That's Why There's No Panic" was false and misleading. Taylor, another member of the dispatch rules committee also found numerous statements in the flier to be false. There is no question that if Aldape's statements in his flier were false, they were knowingly and recklessly false as he attended the dispatch rules committee

¹¹ In The Brief in Support of Exceptions To The Decision Of The Administrative Law Judge, General Counsel completely ignores the direct witness testimony of Donato who testified that all he told Aldape is that he had also heard a rumor and denied giving Aldape any other information.

meetings and received information about the history of the mechanics in the union. While it is essentially impossible to determine whether Aldape simply misinterpreted the historical documents he was given and incorrectly recalled what occurred during the meetings he attended, or whether he intentionally misrepresented the history of the mechanics and the events at the dispatch committee rules meeting in order to escalate the current tensions between the mechanics and the regular longshore workers, the fact that two separate individuals found the flier to contain numerous false statements calls into question Aldape's honesty and whether the flier lost the protection of the Act due to its knowingly false contents.

C. Local 13 Did No More Than Follow The Collectively Bargained 13.2 Policy, Conduct Which Does Not Have The Tendency To Restrain Or Coerce (Regarding Exceptions 8,9,10)

Also not addressed by the ALJ, because of his decision on the issue of protected activity, is the fact that Local 13's conduct in this case is not of the type proscribed by Section 8(b)(1)(A). The Supreme Court has described Section 8(b)(1)(A) as providing only a limited prohibition relating to "union tactics involving violence, intimidation and reprisals or threats thereof." *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 290 (1960).

The test for a violation of Sec. 8(b)(1)(A) depends on whether or not the *union's conduct* would have a reasonable tendency to restrain or coerce an employee in the exercise of statutory rights (emphasis added)." *National Association of Letter Carriers, Branch # 47*, 330 NLRB 667, 667 *fn. 1* (2000). To determine the restraint or coerciveness of an action, context in which the action occurred is considered. *NLRB v. Gissel Packing Co*, 395 U.S. 575, 616-617 (1969).

This is not a traditional 8(b)(1)(A) case regarding union discipline of union members or union inducement of employer discipline. The Complaint issued by the Regional Director alleges that Local 13 restrained and coerced employees in violation of Section 8(b)(1)(A) of the NLRA by: (1) allowing the processing of 13.2 Complaints against Aldape to continue after becoming aware that the conduct which was subject of the complaints was activity protected by Section 7; (2) being involved in the prosecution of the 13.2 complaints against Aldape; (3) participating in the implementation of the arbitrations awards against Aldape; and (4) by maintaining records of the 13.2 complaints and hearings.

There is simply no showing in this case that Local 13's conduct in the case amounts to restraint or coercion of Aldape for engaging in Section 7 activities. As to the allegation that Local 13 violated Section 8(b)(1)(A) "by allowing the processing of 13.2 Complaints against Aldape to continue after becoming aware that the conduct which was subject of the complaints was activity protected by section 7 of the Act," General Counsel produced no evidence that Local 13 conducted any investigation or made any finding showing that Aldape's activity was clearly protected by Section 7. Further, there is no evidence that Local 13 had the power to stop the processing of the 13.2 Complaints against Aldape under the 13.2 Policy.

Local 13 is also alleged to have violated Section 8(b)(1)(A) by being "involved in the prosecution" of 13.2 Complaints against Aldape. All of the 13.2 Complaints against Aldape were brought not by Local 13, but by the individual longshore workers he attacked and antagonized. Pursuant to the 13.2 Policy, Local 13 had no choice in whether to permit these complaints to be heard by the arbitrator. Local 13's Secretary-Treasurer

even defended Aldape in the hearings on the first two 13.2 Complaints brought against him and Local 13's Vice-President and Business Agent defended Aldape in the last 13.2 Complaint brought against him. Local 13's involvement in the prosecution of the 13.2 Complaints was limited to what was mandated by the 13.2 Policy and thus cannot constitute union restraint and coercion under 8(b)(1)(A).

As to the allegation that Local 13 violated Section 8(b)(1)(A) through participating in the implementation of arbitration awards against Aldape, this allegation cannot stand because Local 13 had no power to refuse to implement the arbitration awards against Aldape—the 13.2 Policy explicitly requires the JPLRC to enforce all penalties issued by the arbitrator. Furthermore, the conduct for which Aldape was disciplined was not conduct protected by Section 7 of the Act. Thus, disciplining Aldape for this activity would not have the tendency to restrain or coerce employees in the exercise of their Section 7 rights.

Nor can the argument that Local 13 has a record of the 13.2 Complaint filed by Realini be grounds for a violation of 8(b)(1)(A) because there is no evidence that the records of the complaint dismissed by the arbitrator can or will be referred to or considered in the event of another charge against Aldape.

Because Local 13 did no more than follow the 13.2 policy, created by the International and PMA, it did not engage in any conduct with the tendency to restrain or coerce employees in violation of their Section 7 rights.

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D. Any Restraint That May Have Been Imposed On Aldape By The 13.2 Policy Is Outweighed By The Legitimate Interest In Having A Policy That Provides For The Rapid And Simultaneous Adjudication Of Discrimination And Harassment Complaints (Regarding Exceptions 8,9, 15)

In both Section 8(b)(1)(A) and Section 8(a)(1) cases, the Board uses a balancing test and finds a violation of the Act only where the infringement by the union or the employer on an employee's Section 7 rights outweighs the legitimate union or business reason for the infringement. *See Local 245, SEIU, AFL-CIO (Brandeis Univ.)*, 332 NLRB 1118 (2000)(Union's legitimate interest in ensuring undivided loyalty of union representatives outweighs Section 7 rights); *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001) (Employer's interest in anti-harassment policy did not outweigh Employee Section 7 rights after investigation established lack of harassment and clear Section 7 activity). Since the alleged violation of Section 7 rights in this case is the result of the application of an anti-harassment policy bargained by the International Union and Respondent PMA, rather than the application of an internal union rule, the Board's application of the balancing test in the 8(a)(1) context is more on point.

In *Consolidated Diesel Co.*, two employees filed harassment complaints after other employees distributing a newsletter supporting a union organizing campaign tried to get them to take copies. 332 NLRB 1019, 1024-1025 (2000). After an investigation by the human resources department, the harassment complaints were referred to a "Performance Management Process Committee" which had the power to issue discipline. These complaints were eventually dismissed but records of the charges were maintained in the employees' files and could be used as a reference for future discipline. *Id.* The Board held that while the Employer had a legitimate right to investigate the complaints,

the Employer violated Section 8(a)(1) because the Employer continued processing the harassment charges after the initial investigation revealed the activity upon which the charges were based, the distribution of a pro-union newsletter, was protected. *Id.*

In *Consolidated Diesel Co. v. NLRB*, the Fourth Circuit denied the Employer's petition for review of the Board's ruling. The Fourth Circuit found that because it was clear after the investigation that the employees were doing no more than engaging in activity protected by the Act, there was no legitimate reason for continuing to subject them to the Performance Management Process Committee. 263 F.3d at 353-354. Thus, applying the "balancing test," the Fourth Circuit determined that the employer had no legitimate interest to outweigh the Employee's Section 7 rights.

Consolidated Diesel Co. is distinguishable from the present case on numerous grounds. Most importantly, in that case, the Board's finding of a violation of 8(a)(1) rested on the fact that the employer's harassment policy required an initial investigation by the human resources department, an investigation which revealed that the employees accused of harassment were clearly engaging in section 7 activity. Nevertheless, the employer in *Consolidated Diesel Co.* referred the complaint on to its Performance Management Process Committee. Here, there was no such investigation conducted by PMA or Local 13 demonstrating that the conduct that was the subject of the complaints was activity protected by Section 7. Under the 13.2 Policy individual longshore workers take their complaints directly to arbitration without any investigation by the union or PMA. The investigation of 13.2 Complaints is performed during the hearing by the arbitrator.

It is well established that employers have a legitimate business interests in investigating and adjudicating complaints of discrimination and harassment. Labor organizations, like employers, can be held liable under the Fair Employment and Housing Act and Title VII for discrimination and harassment. Cal. Gov't Code § 12900 et seq.; 42 U.S.C. § 2000d-h. Thus the International Union, and by extension Local 13, has an interest in the investigation and adjudication of issues of discrimination and harassment. Here, the International Union and the PMA negotiated a policy in which they delegated the responsibility of such an investigation directly to an arbitrator. In cases where harassment and discrimination complaints are filed for conduct that may constitute Section 7 activity, the fact that those complaints go directly to an arbitrator for simultaneous investigation and adjudication may have some tendency to restrain employees in their exercise of those rights, but not so much that it outweighs the legitimate interest of providing an impartial and speedy tool for investigating and adjudicating complaints of discrimination and harassment.

As to the 13.2 Complaints filed by Droege and Bebich for which Aldape was disciplined, the conduct which was the subject of the complaints was not activity protected by Section 7 of the Act thus there is no infringement on Section 7 rights to balance against the legitimate interest of the union and the employer in the 13.2 Policy. As to the 13.2 Complaint filed by Realini, even if it were to involve some activity protected by Section 7, the arbitrator investigated the complaint and found that it had no merit. The records of that complaint cannot be used against Aldape in future disciplinary matters. While having to attend an arbitration hearing before the 13.2 Complaint filed by Realini could be investigated and dismissed may have imposed some restraint on Aldape,

it is no more than the restraint that would be involved in having to cooperate in traditional investigation of the complaint. Thus the limited infringement on any Section 7 conduct involved in the Realini complaint is outweighed by the legitimate need for an investigation to take place.¹²

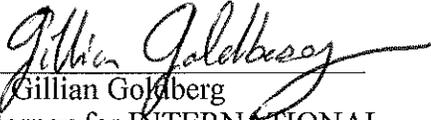
IV. Conclusion

For the foregoing reasons, Respondent Local 13 respectfully request the National Labor Relations Board affirm the rulings, findings, and conclusions of the Administrative Law Judge and adopt his recommended Order.

DATED: November 28, 2011

Respectfully submitted,

HOLGUIN, GARFIELD, MARTINEZ
& QUIÑONEZ, APLC

By: 
Gillian Goldberg
Attorney for INTERNATIONAL
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¹² Via email on August 9, 2011, Counsel for the General Counsel indicated that contrary to his position at the hearing, he would be seeking a make-whole order for Aldape with respect to the Realini 13.2 Complaint based on the fact that when Aldape turned in a doctor's note on the morning the Realini hearing was scheduled to commence, to excuse him from attendance, the Arbitrator ordered that Aldape provide him with a copy of a medical release before returning to work. Since a medical release is required after all medical-related leaves of absence it is unclear how Aldape was harmed by being required to provide a copy of such a medical release to the Arbitrator. Regardless, the Regional Director's Complaint makes no reference to this set of facts as constituting an unfair labor practice and Counsel for the General Counsel did not amend the Complaint at the hearing to include such allegations which places this issue firmly outside of consideration in this case. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 800 West Sixth Street, Suite 950, Los Angeles, California 90017.

On November 28, 2011, I served the foregoing document(s) described as: **RESPONDENT ILWU, LOCAL 13'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope as follows:

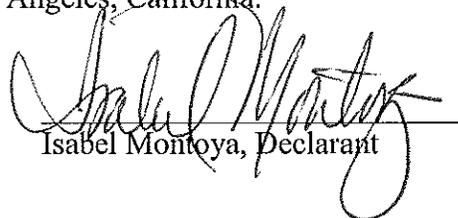
PLEASE SEE ATTACHED SERVICE LIST.

- **BY US MAIL:** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing affidavit. I will deposit such envelope(s) with postage thereon fully prepared to be placed in United States Mail at Los Angeles, California today.

- **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

- 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 this November 28, 2011, at Los Angeles, California.


Isabel Montoya, Declarant

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