International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.) *and* Donna Marie Mata. Cases 16–CB–181716 and 16–CB–194603

February 20, 2018

DECISION AND ORDER REMANDING

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND EMANUEL

On June 13, 2017, Administrative Law Judge Robert A. Ringler issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

The complaint alleges that the Respondent violated its duty of fair representation to Charging Party Donna Mata in violation of Section 8(b)(1)(A) of the Act by: (1) refusing to refer Mata for training based on her sex; and (2) soliciting her to withdraw her unfair labor practice charge. The judge dismissed the complaint in its entirety, largely because he credited the testimony of the Respondent's training coordinator, Tim Harris, over the testimony of Mata. The judge gave several reasons for his credibility findings, and concluded, "on the basis of these several reasons, which in many cases suffice in isolation, Harris has been credited." The judge did not identify which of the several reasons would have sufficed in isolation.

In his exceptions and brief, the General Counsel argued that the judge's decision should be reversed because his credibility determinations about Mata's claims were based on sex stereotypes and demonstrated bias. The General Counsel also argued that the judge improperly relied on language in the charge to discredit Mata.

We agree that the judge erred by relying in part on improper bases in making his credibility determinations, but rather than reverse the judge, we will vacate the judge's decision and remand to the chief administrative law judge for reassignment to a different judge for a hearing de novo. Such remands are plainly within the Board's authority and the Board has ordered such remands on a number of occasions. See, e.g., *Reading Anthracite Co.,* 273 NLRB 1502, 1503 (1985); *Dayton Power & Light Co.,* 267 NLRB 202, 202–203 (1983); *New York Times Co.*, 265 NLRB 353, 353 (1982); *Center for United Labor Action,* 209 NLRB 814, 815 (1974).

In remanding the case to a new judge for rehearing, we emphasize that this is an unusual case where the judge relied on inappropriate bases to assess credibility and intertwined those bases with other legitimate considerations to such an extent that we are precluded from determining whether the judge's credibility finding may be adopted based on the legitimate considerations. We have further determined that a rehearing will not be logistically impractical. The hearing was held less than a year ago, lasted only 10-1/2 hours, and involved only a small number of witnesses, so a rehearing will not involve the expenditure of extraordinary resources by the agency or the Respondent.

ORDER

IT IS ORDERED that the administrative law judge's decision of June 13, 2017, be vacated.

IT IS FURTHER ORDERED that this case be remanded to the chief administrative law judge for reassignment to a different judge for a hearing de novo on the issues raised by the allegations of the complaint.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. February 20, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Laurie M. Duggan, Esq., for the General Counsel.
Bruce Johnson, Esq. (Berg, Plummer, Johnson & Raval, LLP) and *Eric Nelson, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Houston, Texas, from April 3 to 4, 2017. The complaint alleged, inter alia, that the International Longshoremen's Association, Local 28 (the Union or Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act (the

Act) by arbitrarily and discriminatorily failing to provide training to Donna Marie Mata because of her gender, and by soliciting her to withdraw a connected unfair labor practice (ULP) charge.

On the entire record, including my observation of the witnesses' demeanors, and after considering posthearing briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

The Union is a labor organization within the meaning of Section 2(5) of the Act. It represents employees employed by stevedoring employers at the Houston Terminal, who are subject to the Act (e.g., Ceres Gulf, Inc.), and members of the West Gulf Maritime Association (WGMA), which is also subject to the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

1. Union—generally

The Union and WGMA are parties to a collective-bargaining agreement, which authorizes the Union to operate an exclusive hiring hall at the Houston Terminal. (R. Exhs. 3–4). The Union maintains a seniority roster, which is used to determine stevedoring job referrals, training and other matters. (R. Exh. 5.) The Union is led by: Larry Sopchak, president; Jesse San Miguel, Jr., business agent and treasurer; Jesse San Miguel, Sr., executive board member; and Tim Harris, business agent, secretary–treasurer and training coordinator.

2. Union training program

As training coordinator, Harris refers interested employees to WGMA's stevedoring classes.[3] He makes periodic announcements at the union hall regarding such training, and then transmits a roster to WGMA, which then conducts various training classes.[4] He explained that he uses an informal announcement system because WGMA's schedule frequently changes, and it would be arduous to do otherwise.[5] He averred that he is not empowered to deny anyone training.

Patrick McKinney of Tri-Kin Enterprises provides training for WGMA. He said that most courses have a classroom and hands-on component. He related that the Union sends him a proposed roster, which is reviewed and approved. Tri-Kin, thereafter, assembles a class list, conducts the course, and maintains completion records.

3. Mata's employment history

Mata has been a union member since 2001. She generally works as a truck driver.[6]

a. Union work referrals

Mata received union work referrals between March and November 2007. (R. Exhs. 6–7.) She then had a union employment break until April 2015. During this hiatus, she worked as a truckdriver in Iraq for 3 years, and was also employed by various nonunion entities. She then began receiving union work referrals again in May 2015. Her union employment is, at best, part time, inasmuch as she only averages less than $10,000 annually in union referrals, which amounts to less than 400 of workhours per year. (R. Exh. 7.)

b. Training

Mata was referred to these WGMA classes:

MONTH	COURSES
Apr. 2007	• yard tractor (classroom and hands–on), forklift (classroom)
Jan. 2008	• lashing (classroom and hands–on)
Apr., 2010	• haz–mat (classroom)
Jun. 2015	• longshore (classroom), haz–mat (classroom), yard tractor (classroom and hands–on)
Aug. 2016	• ro–ro (classroom and hands-on),[7] heavy–lift (classroom and hands–on), forklift (classroom and hands–on)
Sep. 2016	• ro–ro hands–on
Feb. 2017	• yard tractor (classroom and hands–on), forklift (classroom)

(GC Exh. 6; R. Exh. 2.)

c. Alleged harassment by Harris regarding training

I. GENERAL COUNSEL'S STANCE

Mata averred that, from March to August 2016,[8] she asked Harris to place her in training classes about six times per month. (Tr. 49.) She recalled him denying her requests and responding that: she already had sufficient work opportunities and did not require additional training; she did not need to be trained to perform tough and grimy jobs; or her requested clas-

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

[2] WGMA represents its employer-members in labor relations matters with the Union.

[3] Certain classes are prerequisites for particular work referrals.

[4] WGMA offers classes in hazardous materials, longshore skills, forklifting, toploading, heavy lifting, yard tractor, and crane operation. It maintains a training handbook, which describes curricula and evaluation criteria.

[5] Training schedules are publically available on WGMA's website; Mata has previously accessed them. (Tr. 108.)

[6] In this capacity, she transports shipping containers at the Houston terminal.

[7] "Ro–ro" stands for "roll–on, roll–off."

[8] All dates cited hereinafter refer to 2016, unless otherwise stated.

ses were already full.[9] (Tr. 51–53.) She added that, when she periodically stopped by Harris' office to request training, he closed his door, groped her, and propositioned her. She said that she consistently rejected these advances. She estimated that this scenario repeated about 10 times between 2010 and 2015.[10] She said that her rebuffs during this period prompted him to deny her WGMA training between March and August.[11] She described these assaults in the following manner:

> [A]s soon as I was ready to leave, he'd . . . grab on me and I would tell him, ". . . never in a million years." I'd push him away and . . . walk out. And then I wouldn't come back for a while. And this is a never ending cycle

(Tr. 85.)

Mata stated that she complained to the Union in June, when she informed Business Agent San Miguel Jr., who then conveyed her concerns to president Sopchak.

Mata then filed a ULP charge against the Union on August 5, which alleged that:

> Since the last six months, the . . . [Union] through … Harris, has unlawfully refused to allow . . . Mata, to be placed on the certification list . . . . [and] refer . . . Mata, to any jobs for unfair, arbitrary, and invidious considerations.[12]

(GC Exh. 1(a).)

II. UNION'S REPLY

Harris denied groping or propositioning her, or withholding WGMA training. He noted that he sent an email that requested extensive training for her on June 5, 2015 (i.e., after the alleged harassment period), and that she then attended several classes at that time. (R. Exhs. 2, 13.) He also recalled Mata asking for additional training in passing at an October 2015 membership meeting. He recollected telling her that the schedule was full and asking her to remind him next month.[13] See (R. Exh. 12.) He also recalled her asking to take a forklift class in 2016, but, could not recall the status of this request.

III. CREDIBILITY RESOLUTION

Mata's and Harris' deeply conflicting testimonies warrant a credibility resolution. Moreover, Mata testified that she sought training about 36 times between March and August, Harris groped and propositioned her 10 times between 2010 and 2015, and that her rejection of Harris' advances prompted him to deny her training. Harris, on the other hand, denied touching or propositioning her, and contended that he reasonably responded to her training requests.

For several reasons, I credit Harris. *First*, and foremost, Mata was a highly uncooperative witness, who effortlessly answered virtually all of the General Counsel's direct examination queries, but then responded to equally simple cross-examination questions with delays, pauses, additional questions, recollection issues, and reported confusion.[14] These repeated stonewalling activities rendered her unreliable. *Second*, the glaringly false statement in her ULP charge regarding Union work referrals further detracted from her credibility (i.e. the August 5 ULP charge falsely stated that, "Tim Harris, has unlawfully refused to . . . refer . . .] for unfair, arbitrary, and invidious considerations," even though she was repeatedly referred to union jobs during this period).[15] *Third*, the implausibility of several key parts of her story further undercuts her creditability. It is simply implausible that Mata, who appeared to be a tough woman who performs stevedoring work on the docks and previously drove a truck in Iraq, would have meekly allowed Harris' to harass and assault her a whopping 10 times, without an utterance. It is even less plausible that she would have tolerated such egregious misconduct to preserve a job that only paid her less than $10,000 annually. (R. Exh. 7.) It is still less plausible that a woman, who was empowered by having two relatives holding influential union positions (e.g., San Miguel Jr. and San Miguel Sr.),[16] would have allowed Harris to repeatedly violate her. It is also implausible that, if Harris withheld training because she rejected his advances from 2010 to 2015, as she alleges, he would have then enrolled her for training in June 2015 after her rejection. (R. Exh. 2.) It is also implausible that Mata, who claims that she was too embarrassed to complain about sexual harassment, would have not opted to address her training problems by solely complaining about Harris' other reportedly less embarrassing comments (e.g., his alleged comment that, as a driver, she did not require training, or that he did not want to train her to perform grimy jobs).[17] *Fourth*, Mata's completely unsubstantiated claim that Pat McKinney, a nonunion employee, was a co-conspirator further undercuts her claims. (Tr. 104.) *Finally*, Harris was a

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[9] She stated that, on one occasion, she witnessed him solicit a male to take the same class that she had just asked to take. She offered a poor explanation, however, of why she did not immediately confront him about this anomaly.

[10] In early 2017, she pressed criminal charges against him.

[11] Michael Atwood, another Union member, related that between March and August, he observed Mata and Harris at union hall. He said that he observed Harris grant training to men during this period, which was believable given that the Union's seniority list is almost entirely male. He then added, without substantiation, that he believed that Mata did not receive training because she was female. This statement was conclusory, based solely upon assumption, and has not been credited. He then, somewhat contradictorily, stated that he, as a male, also had a difficult time being referred to WGMA training by the Union. (Tr. 25–26.) He also acknowledged that Harris awards jobs to women, if they hold sufficient seniority and experience. (Tr. 29.) On the basis of these inconsistencies, his testimony has not been afforded any weight.

[12] Although Mata signed the charge and certified that it was "true to the best of [her] . . . knowledge and belief," her employment records contrarily established that she was referred to several jobs during the challenged period. (R. Exh. 7.)

[13] It is noteworthy that, at the time of Mata's October 2015 training request, she had already completed a sizeable portion of then available WGMA training. (R. Exh. 18.)

[14] See, e.g., (Tr. 80–81, 83, 87, 93–94, 96, 104, 108, 116, 119, 121, 127–28, 130–31, 133–38.)

[15] See supra fn. 12 and accompanying text.

[16] Jesse San Miguel Sr. is married to her aunt; Jesse San Miguel Jr. is her cousin through marriage. They could have clearly insulated Mata against any possible retribution, if she had immediately complained.

[17] Mata could have complained about these nonembarrassing matters, and received her desired training. Her unwillingness to take this obvious course at the expense of enduring further sexual harassment is highly dubious.

solid, cooperative, and believable witness.

On the basis of these several reasons, which in many cases suffice in isolation, Harris has been credited. I find, as a result, that he did not grope, sexually harass or proposition Mata at any time, prohibit her from being added to training certification lists between March and August, bar her from receiving certification training during this period, or otherwise discriminate against her on the basis of her gender. I further find that, at all relevant times, Harris reasonably granted Mata's training requests.

d. San Miguel Jr.'s alleged solicitation to withdraw the charge

I. GENERAL COUNSEL'S STANCE

Mata indicated that, on December 15, Union Business Agent San Miguel Jr. solicited her to withdraw her pending ULP charge, when he sent her this text, "[h]ey, have you gone down to withdraw the charges at the labor board." (GC Exh. 5.) She added that he also inquired about her dropping the ULP charge in February 2017, and claimed that, at that time, he withdrew a union work referral, in order to coerce her withdrawal of her ULP charge. (Tr. 73–74.)

II. UNION'S REPLY

Union President Larry Sopchak denied directing anyone to solicit Mata to withdraw her ULP charge. Business Agent San Miguel Jr. testified that he periodically sees Mata at family gatherings. He adamantly denied soliciting her to withdraw her ULP charges, promising her anything in exchange for such withdrawal, or denying her benefits in order to coerce her withdrawal. He stated that, once she reported Harris' alleged harassment to him, he offered to let her request training from someone other than Harris. He recalled discussing her ULP charge with her in December. He stated that his text was not a solicitation seeking her withdrawal, and was only a follow-up inquiry regarding a matter that she raised with him.

III. CREDIBILITY RESOLUTION

For the reasons previously stated, I credit San Miguel Jr. As noted, Mata was less than credible. In contrast, San Miguel Jr. had a strong demeanor and was consistent. He was also corroborated to some extent by Sopchak, who was a credible and cooperative witness.

III. ANALYSIS

1. Training allegations[18]

The Union did not breach its duty of fair representation by unlawfully withholding Mata's training. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union violates its duty of fair representation, when it acts in a manner that is "arbitrary, discriminatory, or in bad faith." Id. at 207. In *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991), the Supreme Court added that ". . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Id. at 67. Regarding exclusive hiring halls, as is the case herein, the Board has held as follows:

> When it operates an exclusive hiring hall, a union has a duty of fair representation to all applicants using the hall, whether members or nonmembers. . . . As part of this duty, the union must operate its exclusive hiring hall "in a fair and impartial manner. This code of acceptable conduct necessarily extends to the institution of any referral rules which . . . cannot be discriminatory or arbitrary."

IATSE Local 838 (Freeman Decorating Co.), 364 NLRB No. 81, slip op. at 4 (2016).

In the instant case, the General Counsel contended that Harris repeatedly sexually harassed Mata, and withheld training opportunities from her between March and August because she failed to accept his advances. As noted, I found that these facts were not established, and that Harris: never groped, sexually harassed or propositioned her at any time; never prohibited her from being added to training certification lists between March and August; never barred her from receiving certification training during this period; and did not otherwise discriminate against her on the basis of her gender during this period. It also appears that she generally received training, in accordance with her requests, and, in fact, repeatedly received training in a wide subset of stevedoring specialties. Additionally, once she lodged her complaint against Harris, the Union rationally responded by offering her a host of training opportunities, remained impartial in its investigation of this matter, and erred on the side of caution by directing her to request training from someone other than Harris, irrespective of the complete absence of any corroborating evidence of harassment. I find, as a result, that the Union's actions were nondiscriminatory, nonarbitrary, conducted in good faith, and reasonable. In sum, the General Counsel has failed to show that the Union breached its duty of fair representation regarding Mata's training requests.

2. Solicitation allegations[19]

As stated, I do not credit Mata's claim that San Miguel, Jr. solicited her to withdraw her ULP charges, or rescinded a work referral in order to coerce such withdrawal. I credited San Miguel Jr.'s general denial and testimony that his text was solely a follow-up inquiry, which was eminently reasonable given that Mata first approached him about Harris' alleged misconduct. The solicitation allegation, accordingly, also lacks merit.

CONCLUSIONS OF LAW

1. WGMA and its constituent members are employers engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[20]

[18] These allegations are listed under pars. 9–10, and 12–14 of the complaint.

[19] These allegations are listed under pars. 11 and 14 of the complaint.

[20] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The complaint is dismissed in its entirety.
Dated Washington, D.C. June 13, 2017

Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.