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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627, Charging Party/Union, v. HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., Respondent/Employer.	No. 37-CA-8316 **UNION'S LIABILITY PHASE HEARING BRIEF**

The facts of this case are largely undisputed. The only dispute is to the appropriate application of current Board precedent.

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627, had a long-term 8(f) relationship with Hawaiian Dredging Construction Company, Inc. They were in negotiations in late 2010 for the subsequent agreement. At the time, Hawaiian Dredging was part of an employer association. The association negotiation committee was chaired by Tom Valentine of Hawaiian Dredging.

A dispute arose as to whether or not a valid Collective Bargaining Agreement ("CBA") was agreed to between the parties and, in response to an 8(b)(3) charge filed by the Employer, the Region determined on February 14, 2011 (*See* Emp. Exh. 19), that there was no agreement

reached between the Boilermakers and Hawaiian Dredging at the end of 2010. Upon receipt of the Region's determination that no agreement was reached, the Employer summarily terminated all of the employees employed by Hawaiian Dredging who had been dispatched by the Boilermaker's Union, who were members of the Union and who were represented by the Union. It was stipulated at the hearing that the separation was not because of lack of work or the unsatisfactory work of any employee. It was further stipulated at hearing that termination was based solely on the lack of a CBA covering the work in the period after February 14, 2011.

The Union and the Counsel for the Acting General Counsel have argued that this case falls squarely within *CIMCO*, 301 NLRB 342 (1991) enforced *NLRB v. CIMCO*, 964 F.2d F.13 (5th Cir. 1992). The Employer contends that this case is governed by *Jack Welsh Co.*, 284 NLRB 378 (1987). The evidence produced at trial establishes that *Jack Welsh* is not the appropriate framework or, if *Jack Welsh* could be the appropriate framework, it does not apply to circumstances where an employer terminates the employees because it withdrew recognition from a union and no offer of continued employment is made to the now unrepresented employees.

Under the holding of *Jack Welsh*, an employer can lawfully terminate an 8(f) relationship after the expiration; however, the employees have to be offered an opportunity to continue to work under the changed conditions (i.e., non-union shop) in order for the employer to perfect the separations without discharging the employees for a discriminatory reason. If *Jack Welsh* were applied, the Employer here would be required to produce evidence that each employee was provided an opportunity to work under the changed conditions of no union contract on February 17, 2011. No such evidence was produced or even suggested by Hawaiian Dredging. At best, at some point later in time, there was a disputed offer of re-employment under the terms of a different CBA with the Pipefitters Union. However, it is a matter for compliance as to whether that offer almost a year later cuts off liability. It does not change the fact that on February 17, 2011, when each of these employees was terminated, they were told the reason for termination was that the work they were performing was no longer covered by a union contract. While the end of the 8(f) relationship would be a valid reason for the Employer not to request additional employees from the Boilermakers Union, it does not permit the termination of those employees

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who were then working for HDDC. They had already been dispatched by the Boilermakers, were members of the Union and had worked under the terms of the Boilermaker Union agreement. The employer had no legitimate business reason to terminate or suspend them.

The more appropriate rule is that found in *CIMCO.* Under *CIMCO*, even when an employer lawfully terminates a section 8(f) agreement, an employer is not justified in terminating those employees hired under the agreement simply because of their union affiliation or lack of affiliation.. To do so, would "inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employees' rights." *CIMCO* at 347 citing *Swift Independent Corp.*, 289 NLRB 51 Slip. Op. at 18. In other words, the termination of employees simply because they have been dispatched by a particular union or represented by a particular union is inherently destructive of an employee's rights under sections 8(a)(1) and (3) of the Act as established in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967). As the act of discharging the employees for being represented by a particular union is inherently destructive of Section 7 rights, no further analysis is necessary for the Board to find and sustain an unfair labor practice. 388 U.S. at 34.

However, if further analysis is deemed necessary, the *CIMCO* holding provides for consideration of the employer's "legitimate objectives" that may have been the motivating factor for the otherwise illegal action, if the unfair act was only a slight or minor intrusion into the protected Section 7 rights of the employees.[1] Like the employer in *CIMCO,* Hawaiian Dredging has failed to meet this standard. There was no legitimate business reason to discharge these employees.

The Employer has attempted to argue three different positions to establish that there was a business necessity for it to fire these particular employees.

The first was the uncertainty that may have occurred based on a strike. The only action that gave rise to any belief that any employee would cease working for the Employer for any period of time occurs five months prior to the termination of the employees. Here the employer

[1] It is doubtful that this additional step is necessary as it is difficult to imagine a more "inherently destructive" act that unconditional termination based solely on union affiliation.

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does not claim even a lockout; just a termination of employees. An employer may not use the economic weapon of discharging employees even if it is privileged to lock them out. But here a lockout would not have been lawful because it would not have supported any lawful bargaining demands. The fact that that employer could not have locked out the workers demonstrates it could not go further and terminate them.

On October 1, 2011, the Foreman and two to three other Boilermakers who were assigned to the Sand Island Project, did not work. This was a one-day work stoppage by a portion of the crew, and was corrected on the following workday. This occurred in October 2010 and the discharges do not occur until February 17, 2011. This one-day work stoppage, by one work crew five months earlier, does not support a finding of business necessity.[2] There is no evidence for the Employer to assert a work stoppage was imminent.[3] And as noted, the employer could not legally terminate employees even if it reasonably anticipated a strike. It could only engage in an offensive lockout which it could not do once it withdrew recognition from Local 627.

The second ground upon which the Employer claims that it was necessary to fire the current employees was the failure of the Boilermakers to provide employees to a particular job in December 2010. This is the only job in which there were any dispatching difficulties during contract negotiations or the life of the contract. The only employee who was discharged by the Employer in February 2011, who was also involved in the December 2010 dispatch, was an employee who had been requested by name by the **client** the Employer was servicing in December. There is no evidence or other assertion that any other dispatch requests by the Employer to the Boilermakers were not honored at any time in this process. This dispatch issue

[2] Even if this short partial work stoppage could support the termination of the employees engaged in the strike action, it could not support the termination of other boilermakers who did not take a position one way or another in the stoppage. *Freeman Decorating Co.*, 336 NLRB No. 1, Slip Op. 10 (2001).

[3] The Company refers to a letter from Boilermakers' counsel to support its belief that a strike was coming. This letter (Er. Ex. 3) merely recites the economic options available to the Union based on the status of the negotiations and contract at the time. A mere recitation of the law is not a threat of strike. Even if it could constitute a threat, the passage of time from the date of the letter, October 1, 2010, to the discharges, five months later, would negate any idea of an imminent work stoppage. And as noted, an employer does not have the right to terminate employees; at best the employer can hire replacements if there is a strike or engage in a lockout.

was approximately two-months prior to the termination of the discriminatees. The claim that it was a business necessity on February 17, 2011 to fire all of the Boilermakers over difficulties in staffing a December job is further contradicted by the Employer's repeated statements that all work that had been covered by the Boilermaker agreement was suspended for the two-weeks immediately following the withdrawal from the 8(f) agreement. There was no immediate work need that the Employer was facing that could not be handled by the employees already engaged by the employer.[4]

The third and only other ground upon which the Employer has attempted to support its claim of business necessity is that it believed the Union was sending unqualified employees in response to a dispatch in December 2010. The only employees mentioned in the context of this claim are four employees who were welding at night. As previously stated, one of these four employees was requested by name by Hawaiian Dredging's client. The other three employees in question, Brian Ortiz, Rick Buynar and Lee Cody, were all dispatched and completed testing on-site through the client to ensure the quality of their welding prior to being placed in the positions to which they were ultimately discharged from in December 2010 before the withdrawal of recognition and termination of the employees. There is no evidence that this singular event, two months prior to the discharge of the other employees, gives rise to a business necessity, nor is there any indication that any other work was not being performed adequately. It is important to note, again, that of these four employees, the only one who was on payroll and was discharged on February 17, 2011, is an employee who had been requested by the client by name. The other three employees were travelers and had arrived at the location and passed the client's test prior to any welding work being performed. There is simply no basis to conclude that the quality of the work being performed by the Boilermaker members on-site, particularly the discriminatees, in any way played into the February 17, 2011 decision to terminate all of the employees because of the lack of a CBA. In fact, the one employee who was requested by name stayed on the Employer's payroll at different facilities throughout the period after December 2010 which

[4] This cessation of work also undercuts the Employer's attempt to shoehorn this case into a *Jack Welsh* analysis.

contradicts the claim that his work was inadequate. Finally, on February 17, 2011 the Employer discharged all Boilermaker employees simply for being Boilermakers.

The quality of these employees' work is highlighted by the Employer's later actions. As part of its negotiations with the Pipefitters, the Employer repeatedly requested that the former Boilermakers be re-hired. In fact, the President of the Company testified that he had no doubt that the Boilermakers who had been working for Hawaiian Dredging would pass the welding test and any other tests that were required as qualifications. He confirms there was no issue in the quality of the work performed by the discriminatees over the years. The quality of the work had never been an issue. As such, the Employer is unable to show a business necessity for terminating these particular employees. And any attempt to the contrary is simply pretext.

Moreover the terminations violate section 8(a)(3). The motivation was plainly the lack of representation. Here the Employer's decision to fire them because they lacked union representation and a union contact violates the act to the same degree it would violate the Act because they were represented. This is the application of the "refrain from any and all such activities." In any case, HDCC anticipated signing an agreement with another union and terminated the employees anticipating signing an agreement with the Pipefitters. The termination of employees in the anticipation of signing an agreement is itself unlawful.

The two week suspension of work shows that none of the discriminatees who were discharged on February 17, 2011 were given an option at the time of discharge of continuing their employment without a Union contract or would otherwise have left employment. In fact, many of these employees, according to the personnel records provided (*see* GC Exhs. 20-32) were long-term employees of the Employer at the time the discharge occurred. Consistently, the Employer states the reason for separation (GC Exhs. 6-19 and GC Exhs. 33-45) is explicitly and exclusively the lack of a CBA covering their work.

Neither *Jack Welsh* nor *CIMCO* provide the Employer with the right to discharge employees simply because their work is no longer covered by a CBA. This, in fact, would be a separate 8(a)(3) and (a)(2) violation of the Act if the Employer is requiring all work to be performed under a union contract regardless of an employee's choice whether or not it chooses to

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be affiliated with a labor organization.[5]

It has already been established that the Employer was privileged to terminate the 8(f) agreement. The termination of the 8(f) agreement, however, does not permit the termination of the employees who had been working under that agreement. On February 17, 2011, none of the discriminatees were given the option of maintaining their employment in the absence of the union contract or in anticipation of another union contract.

CONCLUSION

On February 17, 2011, all HDCC Boilermaker employees were terminated simply because of their membership in and dispatch from Boilermakers Local 627. This case falls squarely inside the *CIMCO* doctrine and under *Great Dane Trailers*, the Employer's claimed business considerations cannot negate the unfair practice. Even if the business concerns were considered, these three pre-textual claims, separated in time from the act of discharge, do not outweigh the inherently destructive nature of the Employer's termination of employees simply based on their Union affiliation. This matter should be set for the compliance stage to determine the appropriate remedy including back pay.

Dated: December 12, 2012

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/s/ Caren P. Sencer
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[5] We recognize that if and when a valid agreement is executed the employees may then be subject to a union security obligation. But each employee would be entitled to at least the 8 day grace period before being required to meet his or her financial obligation. 28 U.S. C. § 158(f). This demonstrates that an employer cannot terminate employees before the lawful application of such a clause contained in an agreement and where the grace period is allowed.

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 12, 2012, I served the following documents in the manner described below:

UNION'S LIABILITY PHASE HEARING BRIEF

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

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☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jwatkinson@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 12, 2012, at Alameda, California.

/s/ Jennifer Watkinson
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