

UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.

and

Case 37-CA-008316

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND
HELPERS, LOCAL 627

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Submitted by
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I. STATEMENT OF THE CASE¹

This case presents the issue of whether Respondent Hawaiian Dredging Construction Company (“Respondent”) violated Section 8(a)(3) and (1) of the Act when it summarily terminated all of its employees who were associated with the Charging Party International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (“Boilermakers Union”) when the Association of Boilermakers Employers of Hawaii (“Association”), in which Respondent was a member, ended its Section 8(f) relationship with that union. As argued below, it is General Counsel’s position that these terminations were inherently destructive of the employees’ Section 7 rights and thus violated Section 8(a)(3) and (1) of the Act.

On November 6 and 7, 2012, a hearing was held in Honolulu, Hawaii before Administrative Law Judge Eleanor Laws on an Amended Complaint and Notice of Hearing issued by the Regional Director for Region 20. The Acting General Counsel respectfully seeks an order finding that Respondent violated Sections 8(a)(3) and (1) of the Act as alleged. The Acting General Counsel also respectfully seeks the issuance of an appropriate Notice to Employees to be displayed at Respondent’s facility and distributed electronically to Respondent’s employees pursuant to *J. Picini Flooring*, 356 NLRB No. 9 (2010).²

II. STATEMENT OF FACTS

Respondent is the State of Hawaii’s largest general contractor. (Tr. 1: 89). Respondent has five divisions, including the Power and Industrial Division. (Tr. 1: 44, 90). At the time of

¹ All references to the transcript are noted by “Tr.” followed by the volume and page number(s). General Counsel’s exhibits are designated as “GC” followed by the exhibit number. Respondent’s exhibits are designated as “R” followed by the exhibit number.

² Also pending is a Compliance Specification. (GC 1(v)). Administrative Law Judge Laws severed the liability and compliance phases of the trial but retained jurisdiction over the compliance portion of the trial, should she find a violation of the Act in this case. (Tr. 295-6).

the hearing, Respondent had 230 salaried employees and around 375 craft labor employees. (Tr. 1: 90). On February 17, 2011, fourteen of Respondent's craft labor employees were members of the Boilermakers Union. (GC 5; Tr. 32).³

The Association and the Boilermakers Union had a collective bargaining relationship pursuant to Section 8(f) of the Act for many years. (Tr. 1: 29-30, 46). Respondent was a member of the Association. (Tr. 1: 28). The most recent agreement between the Association and Respondent expired on September 30, 2010, and was extended to October 29, 2010. (GC 2 at 21, GC 3, Tr. 1: 30-31, 92).

Until February 17, 2011, through an exclusive hiring hall, the Boilermakers Union provided Respondent with Boilermakers for Respondent's Power and Industrial Division, which does industrial mechanical construction. (Tr. 1: 26, 44). The Boilermakers performed welding work for Respondent. (Tr. 1: 26).

By letter dated February 17 to Allen Meyers, the Business Manager of the Boilermakers Union, Respondent's then Senior Project Manager and Chairman of the Association Tom Valentine ("Valentine") terminated the Association's relationship with the Boilermakers Union. (GC 4; Tr. 1: 26-27, 31). Valentine wrote in the letter:

By letter dated February 14, 2011 (a copy of which is enclosed), the Association of Boilermakers Employers of Hawaii ("Association"), through its counsel, was notified by the National Labor Relations Board ("NLRB") that the Association's unfair labor practice charge against the Union was being dismissed. NLRB's decision is based upon its Regional Director's finding that there was no meeting of the minds between the Union and the Association on the terms of a new agreement, and therefore no agreement between the parties currently exists.

Since our prior agreement with the Union terminated on September 30, 2010, you are hereby advised that the Association does not intend to utilize members of the Boilermaker's Union for future work. While previously, we had hoped to come to terms with the Union on a new agreement, the Union does not appear to be genuinely interested

³ All dates herein occurred in 2011 unless otherwise noted.

in continuing a partnership between its members and Hawaii contractors. Consequently, we are terminating our relationship with the Union effective immediately.

Also on February 17, Respondent terminated all members of the Boilermakers Union in its employ because it no longer had an agreement with the Boilermakers. (Tr. 1: 32-34, 106). These employees were Kona Akuna (“Akuna”), Paul Aona (“Aona”), Crispin Bantoy (“Bantoy”), Domingo Delos Reyes, Jeffery Esmeralda (“Esmeralda”), Joseph Galzote (“Galzote”), Manuel Gaoiran (“Gaoiran”), Daniel Marzo, Jr., Henry “Hank” Merrill, Peter Pagaduan (“Pagaduan”), Joselito Peiji, Rolando Tirso (“Tirso”), and Kenneth Valdez (“Valdez”) (collectively the “Boilermakers” or “alleged discriminatees”).⁴ (Tr. 1: 33, GC 5). On that date Respondent gave the alleged discriminatees transmittal sheets which state the reason for separation as “contract has expired.”⁵ (Tr. 1: 33, 48, 88; GC 6-19). Valentine initialed the transmittal sheets, meaning he approved the terminations. (Tr. 1: 34-35, 48; GC 6-19). Valentine also called Boilermakers Union Assistant Business Manager Gary Aycock on February 17 and informed him that the alleged discriminatees would all be terminated. (Tr. 1: 42-43).

Respondent’s counsel stipulated at the hearing that the separation on February 17 of the alleged discriminatees was not due to lack of work, but rather because there was no collective-bargaining agreement in effect at the time covering the work at issue. (Tr. 1: 9-10).

Respondent’s witnesses testified that all craft labor work performed by Respondent is done under a collective-bargaining agreement. (Tr. 1: 90-91, 106; Tr. 2: 253, 256).

⁴ The Acting General Counsel has not alleged that the discharge of Boilermakers General Foreman Gordon Caughman (“Caughman”) violated the Act. Respondent has admitted that Caughman is a supervisor within the meaning of Section 2(11) of the Act and/or an agent of Respondent within the meaning of Section 2(13) of the Act. (GC 1(j)).

⁵ Respondent also provided as the reason for separation “Boilermaker contract has expired” on State of Hawaii Unemployment Division forms. (GC 33 - 45).

At about noon on February 17, Valentine and Respondent's Superintendent Forest Ramey ("Ramey") called Boilermakers General Foreman Caughman into a meeting at a field office in Campbell Industrial Park. (Tr. 1: 54-56). Valentine and Ramey informed Caughman that all of the Boilermakers needed to be laid off by the end of the work day because the NLRB had decided that there was no contract with the Boilermakers Union. (Tr. 1: 56, 60-61, 64, 171). Caughman had been laid off in the past, but only due to lack of work. (Tr. 1: 61). However, this time Caughman was not told that he was being laid off due to lack of work. (Tr. 1: 62). Valentine and Ramey did not tell Caughman that there was a way that he could be recalled. (Tr. 1: 61, 63).

After the meeting with Valentine and Ramey, Caughman called the Boilermakers working at Respondent's various job sites and told them that all of the Boilermakers were being laid off because there was no contract between Respondent and the Boilermakers Union. (Tr. 1: 56-59). Respondent's President Bill Wilson testified that Respondent had never had an issue with the quality of the work of the individual Boilermakers whom it terminated on February 17. (Tr. 1: 116, 121).

The Boilermakers were working at five separate sites on February 17: four Hawaiian Electric Co. sites and one on Sand Island. (Tr. 1: 59). Caughman tried to call every site to speak with either the individual or the foreman. (Tr. 1: 59). Caughman testified that he spoke with the following Boilermakers: Aona at the Sand Island job site, where five or six Boilermakers were employed (Tr. 1: 56-57);⁶ Bantoy at the Hawaiian Electric Kahe Power Plant job site (Tr. 1: 57); Valdez, who was working with Tirso at the Hawaiian Electric Waiiau Power Plant (Tr. 1: 58); and Gairan at the Hawaiian Electric Honolulu Power Plant. (Tr. 1: 58-59).

⁶ Galzote, Akuna and Esmeralda were also working at the Sand Island job site on February 17. (Tr. 1: 69).

The Boilermakers terminated by Respondent on February 17 had worked for Respondent on and off for a number of years (GC 20-32). Their February 17 Employee Transmittal Forms list their most recent dates of hire as follows (Tr. 1: 42):

Kona Akuna – January 15, 2008 (GC 6)

Paul Aona – January 14, 2008 (GC 7)

Crispin Bantoy – September 14, 2010 (GC 8)

Domingo Delos Reyes – December 15, 2010 (GC 10)

Jeffery Esmeralda – October 20, 2008 (GC 11)

Joseph Galzote – July 12, 2010 (GC 12)

Manuel Gaoiran – February 9, 2011 (GC 13)

Daniel Marzo, Jr. – December 13, 2010 (GC 14)

Henry “Hank” Merrill – July 16, 2009 (GC 15)

Peter Pagaduan – January 14, 2008 (GC 16)

Peji – July 19, 2010 (GC 17)

Rolando Tirso – May 28, 2007 (GC 18)

Kenneth Valdez – May 11, 2006 (GC 19)

Aona testified that he had worked for Respondent on and off since the 1990s. (Tr. 1: 66-67). He was a member of the Boilermakers Union for the entire time that he worked for Respondent. (Tr. 1: 67). Sometime after lunch on February 17, Aona’s supervisor, Mechanical Superintendent Manny Fernandes (“Fernandes”) approached him and said that he was laid off. (Tr. 1: 71). When Fernandes spoke with Aona, Aona was putting a cover on the gravity thickener using a crane. (Tr. 1: 70-71). Aona testified that by February 17, he had put the cover on three of four gravity thickeners and he was also supposed to work on a fourth gravity thickener. (Tr. 1: 71). Fernandes gave Aona his paycheck and a transmittal sheet which listed

the reason for separation as “Boilermaker contract has expired.” (Tr. 1: 72, 78; GC 7). On February 17, neither Fernandes nor any other supervisor or manager from Respondent offered Aona the opportunity to continue working for Respondent. (Tr. 1: 72-73). Aona had never been laid off from Respondent prior to February 2011 for anything other than lack of work. (Tr. 1: 74).

Several days after February 17, Respondent’s representatives met with officials of the United Plumbers & Pipefitters Union, Local 675 (“Pipefitters Union”), to discuss the possibility of entering into a contract. (Tr. 1: 45, 221-222).⁷ On February 23, Respondent entered into a contract with Pipefitters Union pursuant to Section 8(f) of the Act. (Tr. 1: 45-46, R 22).

III. ARGUMENT

A. Respondent’s Termination of the Boilermakers Violated Section 8(a)(3) and (1) of the Act

Under Board law, “[i]f an action is deemed ‘inherently destructive’ of employee rights, antiunion motivation is inferred and the conduct may be found unlawful, even if such conduct was based on legitimate and substantial business considerations.” *Bud Antle, Inc.*, 347 NLRB 87, 89 (2006), review denied 539 F.3d 1089 (9th Cir. 2008). As explained by the Supreme Court “[s]ome conduct . . . is so ‘inherently destructive of employee interests’ that it may be deemed proscribed without need for proof of an underlying improper motive.” *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (quoting *NLRB v. Brown*, 380 U.S. 278, 287 (1965)). Conduct is “inherently destructive” if it “carries with it ‘unavoidable consequences which the employer not only foresaw but which he must have intended’ and thus bears ‘its own indicia of intent.’” *Id.* (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963)). Generally, “inherently destructive” conduct is that “with far reaching effects which would hinder future

⁷ Later in the testimony, Valentine placed this meeting sometime between February 17 and 23, a few days after the termination letter was sent to the Boilermakers. (Tr. 2: 222, 246-7).

bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity.” *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976).

In *CIMCO*, 301 NLRB 342 (1991), enforced 963 F.2d 513 (5th Cir. 1992), the Board held that an employer violated Section 8(a)(3) and (1) when it terminated all of its onsite electricians because they had been referred to the employer by a union that had lawfully ended its Section 8(f) prehire agreement with the employer. The Board, adopting the decision of the administrative law judge, found this conduct to be inherently destructive of employees’ rights within the meaning of *Great Dane*. *Id.* at 347. As stated in *CIMCO*, “[i]t is clear beyond peradventure that the discharge of all employees of a particular craft because of their affiliation with, and referral from, a union, as was the case here, creates ‘continuing obstacles to the future exercise of employee rights.’” *Id.*

Similarly, in *Jack Welsh*, 284 NLRB 378, 379, n.6 (1987), the Board found that an employer violated Section 8(a)(3) and (1) when it discharged three of its four carpenter employees solely because of their membership in a union upon lawfully ending its Section 8(f) relationship with the union. The Board found it significant that these employees were “‘never given an opportunity to quit.’” *Id.* at 379. Instead, the employer summarily and unilaterally terminated the employees based on the employer’s assumption that they would not work under the new open shop conditions. *Id.* at 383.⁸ The Board agreed with the judge’s conclusion that the “‘terminations were effectuated in order to discourage membership in the Union, in violation of Section 8(a)(3) of the Act.’” *Id.* at 379, 383. The judge’s findings were made under an inherently destructive theory and absent evidence of antiunion motivation on the part of the employer. *Id.* at 383 n.10.⁹

⁸ The Board determined that a fourth carpenter employee was not discharged but rather voluntarily quit upon learning that the employer was going open shop. *Id.* at 379.

⁹ See also *Wayron, LLC*, JD(SF)-12-12 (March 29, 2012), where Administrative Law Judge Wacknov found a violation of Section 8(a)(3) when employees were informed via letter that they were discharged due to the termination of the collective-bargaining agreement. Judge Wacknov concluded that “such a message to employees announcing adverse consequences, including termination, resulting from the refusal by their collective bargaining representative to

In this case, on the same day that the Association terminated its Section 8(f) relationship with the Boilermakers Union, Respondent terminated all Boilermakers in its employ because its contract with the Boilermakers Union had expired. As in *Jack Welsh*, the Boilermakers were not given the choice of continuing to work under new employment conditions. Instead, Respondent immediately and summarily terminated the Boilermakers, the most extreme action available to an employer, without so much as affording them the opportunity to quit. Respondent's conduct was inherently destructive of the Boilermakers Section 7 rights and as such violated Section 8(a)(3) and (1) of the Act.

B. Respondent has not Established That it Terminated the Boilermakers Based on Legitimate Objectives

Under *Great Dane*, Respondent “has the burden of explaining away, justifying or characterizing ‘his actions as something different than they appear on their face,’ and if he fails, ‘an unfair labor practice charge is made out.’” *Great Dane*, 388 U.S. at 33 (quoting *Erie Resistor Corp.*, 373 U.S. at 228). Respondent must prove that it was motivated by “legitimate objectives.” *Id.* at 34. However, “even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *Id.* at 33-34 (quoting *Erie Resistor Corp.*, 373 U.S. at 229).

The only reason Respondent gave the Boilermakers for their termination was the expiration of the contract. Respondent may attempt to split hairs by arguing that it did not terminate the alleged discriminatees because they were Boilermakers, but rather because the contract with the Boilermakers had ended. This is a distinction without a difference. The essential factor that led Respondent to terminate the alleged discriminatees was their status as

accept the Respondent's demands, is inherently destructive of employees' Section 7 rights, and on its face constitutes unlawful retaliation against them for their union activity in violation of Section 8(a)(3) and (1) of the Act.” Slip op. at 18. It appears from the NLRB website that the respondent in *Wayron* did not file exceptions with the Board.

Boilermakers. Simply stated, the contract with the Boilermakers had expired, the employees were Boilermakers who were working under the terms of the expired contract, and on that basis Respondent terminated their employment. Respondent thus tied the alleged discriminatees' membership in the Boilermakers Union—which was a party to the expired contract and therefore responsible for negotiating a successor contract—directly to the reason for the terminations.

Nevertheless, the mere expiration of the contract did not mandate Respondent's termination of the alleged discriminatees. In fact, the contract expired on October 29, 2010, yet Respondent continued to employ the alleged discriminatees until February 17. There was no requirement, either by contract or law, that compelled Respondent to terminate the Boilermakers on February 17.

To the extent Respondent claims it was concerned that the alleged discriminatees would engage in some type of work action if they continued in Respondent's employ, not only is this speculative, but there is no evidence that this was the reason Respondent terminated the alleged discriminatees. For example, Valentine's February 17 letter to the Boilermakers Union does not mention this as a reason and Respondent's consistent position during the hearing, which is reflected in all documents regarding the terminations, was that the Boilermakers were terminated due to the contract's expiration. Such an argument is appropriately disregarded as an after-the-fact justification for Respondent's unlawful action. In *CIMCO*, the Board agreed with the administrative law judge's finding that such a speculative argument does not constitute an adequate business justification. *CIMCO*, 301 NLRB at 342 n.2, 348. In addition, the Board has found that criterion for layoff that disfavor employees who are likely to engage in protected activities "is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity." *National Fabricators, Inc.*, 295 NLRB 1095 (1989) (quoting *Gatliff Business Products*, 276 NLRB 543, 558 (1985)).

Also without merit is any argument by Respondent that it had no choice but to terminate the Boilermakers because the Pipefitters would only permit the employment of employees dispatched through the Pipefitters Union. Significantly, the initial meeting with the Pipefitters

occurred after Respondent had already terminated the Boilermakers and the contract between Respondent and the Pipefitters was not entered into until February 23, six days after Respondent terminated the Boilermakers. This argument suffers from a temporal disconnect.

Nevertheless, had Respondent terminated the alleged discriminatees at the insistence of the Pipefitters Union then *both* Respondent and the Pipefitters Union would have violated the Act. In *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973), the Board found that both the employer and the union violated the Act when, as a condition to contracting with an employer, the union insisted on the discharge of all sheetmetal workers working for the employer – to be replaced by those referred from the union’s hiring hall – and the employer complied by terminating its sheetmetal employee. As explained by the Board: “the discharge of an employee at the insistence of a union because he has not been referred by the union’s hiring hall, or because he was not receiving union scale, is the plainest kind of discrimination.” *Id.* at 135.¹⁰ The administrative law judge, with Board approval, found that this conduct would “naturally tend to encourage membership in the Union,” and therefore was so inherently destructive of employee interests that it violated Section 8(a)(3) and 8(b)(2). *Id.* at 135, 142. As explained by the Board, “such a lawful hiring-hall clause cannot be applied retroactively, that is, to justify the discharge of an employee who was hired before the hiring-hall clause became operative.” *Id.* (citing *Teamsters, Local 676 (Tellepsen Petro-Chemical Company)*, 172 NLRB 948 (1958)). The Board found this violation despite the fact that the employer in *Austin & Wolfe* wanted to retain the sheetmetal employee whom they terminated at the insistence of the union. *Id.* at 140.¹¹

¹⁰ See also *Carolina Atlantic Transportation*, 307 NLRB 948 (1992), where the Board found the union violated 8(b)(2) by insisting that the employer terminate an employee based on the retroactive application of a hiring hall clause. The employer in that case settled the charge against it by taking the employee back in the same position he had before he was terminated. *Id.* at 966.

¹¹ See also *Stockton Steel Fabricators, Inc.*, 271 NLRB 524, 532 (1984). In that case, which involved a withdrawal of recognition situation, the Board found a violation of 8(a)(3) and (1) when an employer terminated its contract with one union and required its employees to join another union in order to retain their jobs.

Respondent likely will argue that it had to terminate the Boilermakers on February 17 because all of its craft labor work is performed, and apparently in Respondent's view, must be performed, pursuant to a union contract. This defense is not legitimate because it has the effect of discriminating against an employee for union-related purposes and both encourages and discourages membership in a union in direct violation of Section 8(a)(3). In this particular instance Respondent applied its practice to discourage membership in the Boilermakers Union, as in *CIMCO* and *Jack Welsh*, by immediately terminating all employees referred to it by that union upon the ending of the 8(f) relationship. Had Respondent waited and terminated the alleged discriminatees once it entered into a contract with the Pipefitters Union because they were not referred to it by the Pipefitters, then it would have violated Section 8(a)(3) by encouraging membership in the Pipefitters Union as in *Austin & Wolfe*. Any claim by Respondent that it "did not intend to encourage or discourage must be unavailing where a natural consequence of [its] action was such encouragement or discouragement." *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954).¹²

Even if Respondent's asserted business justifications are deemed to constitute legitimate or substantial justification for the termination of the alleged discriminatees on February 17, it is still appropriate to conclude that the evidence weighs in favor of protecting the alleged discriminatees from an invasion of their rights under the Act. The alleged discriminatees in this case were terminated through no fault or action of their own but solely because Respondent had ended its relationship with the Boilermakers Union and they were associated with the Boilermakers.

¹² It is worth noting that after Respondent terminated its relationship with the Boilermakers Union and entered into a collective-bargaining agreement with the Pipefitters Union, then the alleged discriminatees could have been required to join the Pipefitters Union pursuant to a valid union-security clause after the expiration of the seven-day grace period provided by Section 8(f). See, e.g., *Acme Tile and Terazzo Co.*, 306 NLRB 479, 480-81 (1992), reaffirmed after remand by 318 NLRB 425, enforced 87 F.3d 558. However, even this scenario contemplates "continued employment" throughout rather than the termination of employment. See 318 NLRB at 428.

IV. CONCLUSION

In conclusion, for the reasons discussed above, Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge find Respondent violated Sections 8(a)(3) and (1) of the Act as alleged in the Amended Complaint when it terminated the alleged discriminatees on February 17 because they were members of the Boilermakers Union.

DATED AT Honolulu, Hawaii, this 12th day of December 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Brief to the Administrative Law Judge has this day been served as described below upon the following persons at their last known address:

1 copy	Barry W. Marr, Esq. Megumi Sakae, Esq. Pauahi Tower 1003 Bishop Street, Ste. 1500 Honolulu, HI 96813	Via E-Mail
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1 copy	David A. Rosenfeld, Esq. Caren P. Sencer, Esq. Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091	Via E-Mail
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DATED AT Honolulu, Hawaii, this 12th day of December 2012.

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