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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 **EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

NO.	**PAGE**	**EXCEPTIONS**
1.	2:32-34	To the finding that Hawaiian Dredging (HDCC) has performed all craft work pursuant to collective bargaining agreements. The evidence establishes that no current employee knew with certainty that there weren't periods of time when contracts had expired and work was performed. Furthermore there was not contract in effect with the Boilermakers from November 1 until February 17 and HDCC performed work.
2.	3:25-39	To the suggestion that the Boilermakers did not intend to work. This was hearsay and irrelevant.

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3.	3:40-44	To the findings regarding this work since it is irrelevant to the case. Hawaiian Dredging did not assert that it terminated the employees because of any prior conduct. It asserted it was satisfied with the performance of the workers who were terminated.
4.	5:4-5	To the suggestion that the Board took action. This was the General Counsel that took action. See elsewhere where the ALJ makes the same mistake.
5.	5:9-10	The Boilermaker employees were being terminated as found by the ALJ at lines 10-11.
6.	5:14-26	Although the ALJ is correct that full membership including making out of an application and complying with membership rules was a condition of a referral, the ALJ fails to recognize that this was discriminatory and unlawful. It violates 8(a)(3).
7.	5:29-36	To the failure of the ALJ to recognize that although "they could sign up with the "Pipefitters" this meant that they had to join the Pipefitters and become full members including complying with the membership application process.
8.	5:29-36	To the failure of the ALJ to recognize that the Boilermakers could not be dispatched from the Pipefitter's hall under the Pipefitter's referral procedure because they would not qualify to be on the work list and or would be placed on the lowest classification.
9.	5:29-37	To the failure of the ALJ to recognize that Hawaiian Dredging was fully aware of the unlawful conditions of the Pipefitters contract and of the requirement that Boilermakers would have to join the Pipefitters Union which included an application and otherwise becoming full members.
10.	5:38-40	To the failure of the ALJ to find that even if somebody registered, they were not eligible for dispatch or any priority dispatch. For example an employee could only be entitled to Class A status which is the top status if the employee has worked as a Pipefitter for 10,000 hours.
11.	5:15-6:4	To the failure of the ALJ to find that the Pipefitters Union made it clear to Hawaiian Dredging that the Boilermakers could not be hired but rather had to become full members and had to be referred through the contractual referral procedure.
12.	5:15-6:4	To the failure of the ALJ to recognize that the Pipefitters referral procedure was unlawful as applied to the Boilermakers. The Boilermakers were formally employed by Hawaiian Dredging and had no priority status under the Pipefitter contract.

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13.	6:6-7	The issue was whether the Respondent unlawfully terminated discriminatees.
14.	6:9-11	The Charging Party alleges that the terminations were unlawfully motivated in addition to being inherently destructive. There is no need to infer anti-union motivation since it is plain from the conduct. The letter of February 17 from Tom Valentine expressly stated that HDCC would not be employing members of the Boilermakers.
15.	6:14-24	To the suggestion that this was a "unique factual scenario." To the contrary, unfortunately employers discriminate all the time based on Union membership.
16.	6:14-24	To the suggestion that case law has not concerned itself with similar circumstances in the past. Unfortunately once again there are too many circumstances where employers have withdrawn recognition from one union and recognized another union and discriminated against the employees who were formally employed by the employer.
17.	6:14-44	To the discussion regarding "Inherently destructive." To the suggestion that inherently destructive does not reflect a continuum of unlawful conduct.
18.	6:29-34	To the suggestion that "comparatively slight" conduct is a separate category. To the contrary, there is a continuum of conduct between "inherently destructive and "comparatively slight."
19.	7:1-4	To the finding that HDCC's actions did not hinder future bargaining. To the contrary once the employees were terminated there was no bargaining on their behalf or bargaining. Bargaining was only with the Pipefitter's Union on behalf of Pipefitter members. .
20.	7:6-24	To the failure of the ALJ to find that the employees were terminated because of their union membership. See GC Ex. 4, letter of Tom Valentine dated February 17 stating "you are hereby advised that the Association does not intend to utilize members of the Boilermakers Union for future work."
21.	7:6-24	To the failure of ALJ to find that the conduct was inherently destructive. Not only did the Employer terminate all the Boilermaker employees, but then entered into an agreement with another union that conditioned employment upon full membership in violation of the Act. Additionally, this conduct created a cleavage between the former Boilermaker members who are now severely disadvantaged in terms of referral to Hawaiian Dredging because of the referral procedures. They could not ever qualify for Class A status which provides priority referral to HDCC. Furthermore, they were forced to join another union to give up their membership in the Boilermaker Union as a condition of employment.

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22.	7:26-32	Although Hawaiian Dredging asked the Pipefitters whether the Boilermakers could be employed, the Pipefitters made it plain that they could not be employed because they were not members and Hawaiian Dredging had to use the hiring procedure. Hawaiian Dredging therefore did not take action to protect the alleged discriminatees but rather recognize that they would be discriminated against. HDCC entered into an agreement which violated 8(a)(3). This was a per se violation of section 8(a)(3).
23.	7:34-8:12	To the failure of ALJ to find that the Boilermakers were terminated because they were not members and terminated because of their union or protected activity.
24.	7:34-8:12	To the failure of ALJ to find that the Boilermakers were terminated because of their protected concerted activity of working under the terms of the Boilermakers agreement. This conduct violates Section 8(a)(1).
25.	8:14-21	To the failure of ALJ to find that the work was performed and the work was available. In any case, Hawaiian Dredging terminated the employees.
26.	8:24-37	To the failure of ALJ to recognize that Hawaiian Dredging had neither a legitimate nor a substantial business justification for terminating the Boilermakers. Even if Hawaiian Dredging preferred to have a collective bargaining agreement in place, it was free to set conditions and to employ Boilermakers under any condition pending reaching of an agreement with the Union. Section 8(f) does not act as a shield for discrimination pending reaching 8(f) agreement. HDCC has offered no business justification for terminating its long-term employees even if it has a business justification for signing an agreement with the Pipefitters.
27.	8, fn. 9	To the suggestion that Respondent's alleged requirement to have its craft personnel work under the terms of the contract is a legitimate non-discriminatory reason to terminate the Boilermakers.
28.	8:39-9:41	To the ALJ's efforts to distinguish *CIMCO*, *Jack Welsh* and other cases.
29.	10:3-10	To the failure of ALJ to recognize that the issue of terminating the alleged discriminatees at the insistence of Pipefitters was litigated. Tom Valentine, Reginald Castanares and other witnesses repeatedly testified that full membership in the Pipefitters was required. Respondent offered into evidence the Pipefitters' contract which on its face discriminates. The unlawful conduct is the subject of the Motion for Summary Judgment filed by HDCC. Furthermore, the complaint clearly alleges that Boilermakers were terminated on the account of union activity.

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30.	10:12-27	Tom Valentine, Reginald Castanares and other witnesses called by the General Counsel and by the Respondent all testified that as a condition of being dispatched employees had to become full members of the Pipefitters union. They were required to sign applications. The testimony clearly establishes that as a condition of being referred they had to join the Pipefitters. Additionally, the Pipefitters testified that the employees would have to pay a permit fee which was not described in the collective bargaining agreement. It is unlawful to enclose such a fee unless it is contractually negotiated. The record shows that the Boilermakers would also have to give up their membership in the Boilermakers
31.	10:35-40	To the conclusions of law in its entirety.
32.	11:5	To the order dismissing the complaint.
33.		To the failure of ALJ to set this for further hearing to determine the appropriate remedy.

Dated: April 4, 2013

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/s/ *David A. Rosenfeld*
By: DAVID A. ROSENFELD
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INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627

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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 April 4, 2013, I served the following documents in the manner described below:

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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☑ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

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

On the following part(ies) in this action:

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Via U.S. Mail and Facsimile

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 4, 2013, at Alameda, California.

/s/ *Marveline Carrell*
Marveline Carrell

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