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

14 UNITED STATES OF AMERICA

15 NATIONAL LABOR RELATIONS BOARD

16 INTERNATIONAL BROTHERHOOD OF
17 BOILERMAKERS, IRON SHIP BUILDERS,
18 BLACKSMITHS, FORGERS AND
19 HELPERS, LOCAL 627,

20 Charging Party/Union,

21 v.

22 HAWAIIAN DREDGING CONSTRUCTION
23 COMPANY, INC.,

24 Respondent/Employer.

No. 37-CA-8316

**BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

25 **I. INTRODUCTION**

26 On the same day that Hawaiian Dredging (“HDCC”) received a letter from SubRegion 37
27 dismissing a charge against the Boilermakers Union, Employer Exhibit (“EX”) 18, HDCC
28 terminated all its Boilermakers employees. On the same day, Tom Valentine, who is the
Employer’s superintendent, stated in a letter to the Boilermakers Union that the Union was
“hereby advised that the Association does not intend to utilize members of the Boilermakers
Union for future work.” Mr. Valentine similarly withdrew recognition from the Boilermakers
Union pursuant to Section 8(f).

Notwithstanding the Employer’s expressed and unequivocal statement that it was
terminating the employees and would not be “utiliz[ing] the members of the Boilermakers Union

1 for future work,” the Administrative Law Judge (“ALJ”) found the union activity was not a factor
2 in the decision to terminate the employees. Here, the termination was completed when HDCC
3 signed an agreement with the Pipefitters Union which unlawfully required the Boilermakers who
4 might come back to work for HDCC to become full members of the Pipefitters Union and to
5 comply with a referral procedure which guaranteed that they would not return to work for a
6 substantial period of time.

7 The conduct of HDCC was motivated by union membership and thus was in violation of
8 Section 8(a)(3). It was a *per se* violation since its agreement with the Pipefitters unlawfully
9 required full union membership and otherwise discriminated in violation of Section 8(a)(3).
10 Applying the “inherently destructive” test or the “comparatively slight” test, the conduct violates
11 the Act for reasons discussed below. HDCC’s claim of business justification does not stand up;
12 there is no business reason to terminate its employees. Finally, the conduct of Respondent
13 violates Section 8(a)(1) because the terminations interfere with the rights guaranteed by Section 7
14 of the Act. The conduct interferes with the right to refrain from concerted activity, that is to be
15 unrepresented until the 8(f) contract was signed. They cannot be terminated because they are
16 unrepresented.

17 **II. STATEMENT OF THE FACTS**

18 All parties agree that the relationship between the Boilermakers Union and HDCC
19 (through the Association of Boilermaker Employers) was governed by Section 8(f). 29 U.S.C. §
20 158(f). Thus, there is no contention here that HDCC’s decision to withdraw recognition from the
21 Boilermakers, effective February 17, 2011, was unlawful.

22 Furthermore, as found by the ALJ, the Employer does not contend that there was any
23 reason to terminate the employees on February 17 except, according to the Employer, its defense
24 that there was no collective bargaining agreement. See fn. 11 of ALJ Decision. Thus, there is no
25 reason to discuss the prior alleged issues concerning the Boilermaker employees or any disputes
26 between the Boilermakers and HDCC. HDCC had no reason related to the performance of work
27 to terminate the HDCC employees except its asserted reason that there was no agreement in effect
28

1 with a union. As noted below, HDCC sought to have the Pipefitters allow HDCC to hire the
2 Boilermakers, demonstrating no reason to terminate them related to their work for HDCC.

3 This case then rests in part upon the claimed justification by HDCC that it could lawfully
4 terminate the Boilermaker employees because it did not have a collective bargaining agreement in
5 place with any union.

6 On February 17, 2011, when Tom Valentine announced that the Association, and thus
7 HDCC, would not employ any more Boilermakers, the Boilermakers working for the HDCC were
8 terminated. The amended complaint at paragraph 7(a) alleges that on or about February 17, 2011,
9 “Respondent discharged, laid off and/or terminated the following employees” HDCC, in its
10 answer to the amended complaint, admitted that allegation. See ¶ 2 of the answer filed by HDCC.

11 It is undisputed that, on that same day, the employees were told that they were being
12 terminated. None was told that the termination was temporary and that they would be called back
13 at some later time.

14 HDCC stipulated that the termination was not due to lack of work. Tr. 9-10 and 62. The
15 only reason, and thus justification, to terminate these employees was because there was no
16 collective bargaining agreement in effect at that time. The Boilermakers were working at five
17 separate sites where there was ongoing work. Tr. 57-59. Four locations were ongoing work for
18 HDCC’s major customer, Hawaiian Electric. Tr. 59.

19 The employees who were terminated had worked for HDCC for a number of years. Their
20 most recent hire dates ranged from 2005 to 2011. G.C. Ex 6-19.

21 HDCC immediately met with the Pipefitters Union to negotiate an agreement. We believe
22 HDCC does not claim it met with the Pipefitters before the Boilermakers were terminated. Thus
23 the decision to terminate was made without contemplating any replacement contract. If HDCC
24 had some expectation on February 17 that it would recall the boilermakers, that anticipation was
25 squarely rejected by the Pipefitters Union in discussion with the Pipefitters. This is an important
26 aspect of this case which was ignored by the ALJ.

27 The Pipefitters made it plain repeatedly that in order to be referred by the Pipefitters’ hall
28 or to go to work for HDCC under the new Pipefitters agreement, the Boilermaker employees had

1 to become *full members* of the Pipefitters Union. That is, they had to make out and complete an
2 application to be processed in order to be eligible for referral. Reginald Castanares, who is the
3 Business Manager of the Pipefitters, repeatedly testified that application for membership was a
4 condition of referral. See Tr. 129-130, 136, 145, 146 and 152.

5 Q. When you say "application," what is it that you mean by
6 application as part of the process?

7 A. Well, when someone comes to our office wanting to apply
8 to our Union in whatever specific trade, he has to fill out an
9 application.

10 Q. What is the application?

11 A. It's where he gives his personal information and whatever
12 qualifications he might have to show that he can validate his
13 skill set, résumé, et cetera.

14 Q. Does the application include the membership process?

15 A. Yes.

16 Tr. 152:4-14.

17 Thus, the Pipefitters made it plain that more than simply maintaining the financial
18 obligation of the Union was a prerequisite to referral and dispatching by the Pipefitters Union.

19 This is confirmed by Mr. Gordon Caughman who is a General Foreman for HDCC. He
20 had been previously a General Foreman of the Boilermakers and remained General Foreman of
21 the Pipefitters. Mr. Caughman, who had previous experience working under Pipefitters, testified
22 in response to question from counsel for HDCC:

23 Q. BY MS. SAKAE: Did you do anything else before you were
24 dispatched?

25 A. Yes. Previously, back in the '90s, to get on the out of-work list you
26 would give them \$50 and sign a piece or two of papers and then
27 they would dispatch you. This time things were different. One of
28 the forms you sign, at the bottom of the form it asks you if you're a
member of another Union, and then it said words to the effect that
you had to get a withdrawal from the other Union. Now, back in
the '90s none of that was enforced. I was surprised to find out that
now it is enforced. So I had to go through several steps in order to -
- my initial intention was not to join, it was to get a job as a permit
hand, hoping things would work out with the Boilermakers Union.
As it turns out, I had to join the Pipefitters Union, but they had
large projects that they were working on and coming up and had a
lot of work. So I -- what I did was I had an interview with the hall,

1 I contacted the Boilermakers Union and got a withdrawal slip. I
2 presented a résumé, and I took a welding test.

3 Tr. 175:2-22

4 Mr. Caughman thus made it plain that, in order to be referred, he had to both give up his
5 membership in the Boilermakers Union and obtain full membership in the Pipefitters Union.¹
6 Tom Valentine testified that he knew that membership, including application to join the
7 Pipefitters, was a condition of referral:

8 Q. Was there any discussion about the employees who had been laid
9 off, the former Boilermaker employees?

10 A. Yes, there were.

11 Q. Could you tell us about that discussion.

12 A. In the course of that meeting with the Pipefitters, I specifically
13 addressed to the head of the Pipefitter our desire to have employees,
14 former employees of Hawaiian Dredging who -- to be potentially
15 our workers in the future and asked them the process for those
16 people to become members of the Pipefitters Union in that process.
17 I had indicated to him that I felt that the workers that we'd had
18 doing the work were fully qualified to do our work, they've been
19 our employees historically, and until very recently, and felt that it
20 would be appropriate for them to be our employees again under the
21 agreement. He made clear to me that they have three requirements
22 for people choosing to be a pipefitter. One is that they needed to
23 make an application; two, they needed to have an interview; and
24 three, they needed to pass a welding test. He indicated due to the
25 number of other signatory contractors and their commitments to
26 them and their Union, that they needed to follow their standard
27 practices for people choosing to become Pipefitters. In evaluating
28 those criteria, it was my opinion that our former employees, our
former Boilermaker members who would choose to become
Pipefitters would qualify under those requirements and could
become employees of Hawaiian Dredging.

Q. And you mentioned other employers. What was the discussion
about other employers covered under the Pipefitters.

A. Well, the Pipefitters have an agreement, standard agreement that we
were planning on signing or discussing signing that over 100 other
signatory contractors are signatory to. So when you become a
member of that Union, you have the potential of being dispatched
to any one of those employers. So my view of that was is they
wanted to be sure that these people could meet the needs of their
other signatory contractors as well.

¹ Mr. Caughman is alleged to be a supervisor and agent of the Respondent. See amended
complaint ¶ 5. HDCC admitted that allegation.

1 Tr. 108:4-109:17.

2 Mr. Valentine was thus aware that union membership, and that is *full membership*
3 including filling out an application, was a condition of referral. The Pipefitters were unlawfully
4 preventing the rehiring any of the Boilermaker employees.

5 Although Mr. Valentine professes that he doesn't care what Union his employees are
6 members of (Tr. 109-121, 125), he was well aware that the Union he was signing an agreement
7 with would not refer the Boilermakers members because of their lack of full membership in the
8 Pipefitters. He also knew the terms of the Referral Procedure attached to the contract and that it
9 effectively excluded the Boilermakers from any priority referral. Mr. Valentine confirmed this
10 understanding in an affidavit provided in support of the Employer's motion for summary
11 judgment:

12 During this February time period, HDCC ask that Pipefitters Union to
13 accept the welders formerly employed by HDCC and refer them to HDCC.
14 The Pipefitters Union denied HDCC's request and stated that it would refer
15 a welder to HDCC if the employee completes the Pipefitters process. I
16 understand this process required an application, welding test and an
17 interview.

18 See ¶ 16 of Valentine Affidavit attached to General Counsel's ("GX") 1(k). Mr. Valentine
19 confirmed this testimony at the hearing. At the first meeting, Mr. Valentine was expressly told
20 that the Pipefitters could not take the boilermakers and therefore that HDCC could not rehire
21 them on condition:

22 Q. And who said it as best you can recall.

23 A. Dan Guinaugh posed a question to Reggie about would they take
24 our former Boilermaker employees as Pipefitters.

25 Q. Is that what the Company wanted?

26 A. Yes.

27 Q. And what did Reggie say?

28 A. Well, Reggie said that they could not take them unconditionally.
They had a process that they had to follow, and, you know -- and
also they had the most favored nation clause in their contract where
if they did something outside of what their procedures were, they
had to offer it to their other signatory contractors as well, and that
would be -- he did not believe that would be prudent in this
situation and refused to do that.

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Q. Okay. Did Dan offer -- well, what else was said at that meeting about the former employees?

A. Well, we appreciated his candor with it and understood and we, you know, we told -- or Dan, I believe, told Reggie that we would have to inform our former employees as to - you know -- you know, what this -- you know, what the process they were describing.

Tr. 223:5-25.

Mr. Valentine furthermore confirmed that the Pipefitters would not refer the Boilermakers if they remain members of the Boilermakers:

Q. BY MR. MARR: Do you recall if Dan made any offers to the Boilermakers about the former Boilermakers -- I'm sorry, let me take that back. Do you recall if Dan made any offers to the Pipefitters about the former Boilermakers?

A. Yes, he had offered that he could provide a listing of former members, or our former employees.

Q. And what did Reggie say?

A. He said they could not accept that.

Q. Did Reggie say anything else as to why he couldn't?

A. Well, he said that, you know, they would be willing to take them, but they did not want to be in the position or could not be in the position of openly soliciting them to become members of the Union if they were members of another Union.

Tr. 224:11-25.

Mr. Valentine further confirmed that HDCC had specifically requested that the Boilermaker employees be moved so that they could continue to work for the company but under a different collective bargaining agreement:

Q. That Dan had asked the question of the Pipefitters about the movement of the employees who had been working under the Boilermaker contract, correct?

A. What do you mean by movement?

Q. Having them continue to work for the Company but under a different collective bargaining agreement.

A. Yes.

Q. And you were told by the Union that they couldn't just do that, correct?

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- A. Correct.
- Q. All right. Were you ever told at any point after that that they could?
- A. No.
- Q. And the question was raised by Dan Guinaugh because you were interested in maintaining those employment relationships, correct?
- A. Yes.

Tr. 251:1-17.

In summary, then, HDCC terminated the Boilermaker members on February 17. HDCC knew that it could not recall any of the former Boilermakers members because the Pipefitters would not allow it to do so. First, it is plain that the Pipefitters imposed an unlawful condition that Boilermakers would have to drop their membership in the Boilermakers Union. Second, the Pipefitters also stated that the Boilermakers would have to complete an application process, pass a welding test, and undergo an interview process. None of this is limited to the direct process of paying only the appropriate financial obligation.² Third, as discussed more fully below, the referral procedure contained in the Pipefitters’ agreement would have prevented any of the Boilermaker employees from any immediate dispatch. Some of them would not have been qualified for dispatch even if they had joined the Pipefitters Union for a substantial period of time. In fact, none of the Boilermakers went to work immediately for HDCC.

In summary, then, the facts demonstrate that the Boilermakers employees were summarily terminated on February 17. Their status was not made clear to them; HDCC terminated them without suggesting they might ever be rehired. Even assuming that its business justification was HDCC wanted a collective bargaining agreement covering its employees, it was plain from the next day, when it met with the Pipefitters, that it could not rehire the Boilermaker members because the Pipefitters had placed unlawful restrictions on such rehiring. Thus, HDCC knew immediately that any effort to rehire the Boilermakers was now being thwarted by its negotiations

² As described below, the application process itself is unlawful.

1 with the Pipefitters, effectively turning the termination to a permanent termination on account of
2 union membership and union support.

3 **III. THE TERMINATION OF THE BOILERMAKER EMPLOYEES VIOLATED**
4 **THE ACT**

5 **A. THERE IS NO NEED TO DO AN ANALYSIS UNDER *GREAT DANE* BECAUSE**
6 **ANTI UNION DISCRIMINATION IS ESTABLISHED**

7 There is no need to do an analysis under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26
8 (1967), and subsequent cases because the union discrimination is apparent on the face of the
9 actions by the HDCC. As noted above, Boilermaker employees were terminated because, as it
10 was expressed by Mr. Valentine, “the Association [including HDCC] does not intend to utilize
11 members of the Boilermakers Union for future work.” GX 4. Mr. Valentine, as Chairman of the
12 Employer Association, and as a senior management official for HDCC, certainly discouraged the
13 union membership aspect of HDCC’s decision. The timing of the termination is conclusive. The
14 nature of the action – permanent termination – is conclusive. The ALJ has cited no case where
15 the Board has found that an employer can terminate employees unless the conduct of the
16 employee is unprotected.

17 The union discrimination motivation is further confirmed by HDCC’s position that it
18 terminated the Boilermaker members because there were no contracts in existence covering these
19 craft employees (to use HDCC’s phrase). HDCC met the next day with the Pipefitters and
20 learned that the Boilermakers would have to give up their membership in the Boilermakers Union
21 and become full members of the Pipefitters. HDCC had now effectively discriminated against
22 them because of union membership or support.

23 **B. THE TERMINATION OF THE EMPLOYEES BECAUSE OF UNLAWFUL**
24 **RESTRICTIONS REQUIRING FULL MEMBERSHIP IS A PER SE VIOLATION**
25 **OF SECTION 8(a)(3)**

26 Section 8(a)(3), 29 U.S.C. § 158(a)(3), was amended in 1947 to deal expressly with this
27 issue. Although union security arrangements are permissible, it is unlawful to condition
28 “membership” upon giving up one’s membership in another union. Second, it is unlawful to
condition referral, and thus employment, upon anything other than meeting the financial
obligation normally required of other employees, whether employment is under a construction

1 industry agreement governed by Section 8(f), 29 U.S.C. § 158(a) or Section 9(a) agreement
2 governed by 29 U.S.C. § 159(a). Thus, for example, it is unlawful to require that employees fill
3 out an application process for membership. See *Union Starch & Refining Co.*, 87 NLRB 779
4 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951) *cert. denied*, 342 U.S. 815 (1951) and
5 *Boilermakers Local 749 v. NLRB*, 466 F.2d 343 (D.C. Cir. 1972).

6 It is apparent that HDCC's plan, after firing the Boilermakers and withdrawing
7 recognition from the Boilermakers, was to force the Boilermakers who were members of the
8 Boilermakers Union to go to work under the Pipefitters' agreement. However, Tom Valentine
9 accurately expressed HDCC's intent that it would no longer be using members of the
10 Boilermakers Union because its employees would now have to become members of the
11 Pipefitters Union. The unlawful motivation is plainly established. The unlawful motivation is
12 furthermore confirmed because HDCC knew that unlawful conditions of membership, and thus
13 discrimination within the meaning of Section 8(a)(3), were being imposed by the Pipefitters as a
14 condition of allowing the Boilermakers to continue working for HDCC. HDCC agreed to those
15 unlawful conditions.

16 Thus, the termination of the employees was unlawful because it was a per se violation of
17 section 8(a)(3) and (1). The unlawful motivation is plainly established given the statements of
18 HDCC and its conduct and there is no need to do a *Great Dane* analysis.

19 **C. APPLYING A GREAT DANE ANALYSIS TO THE CONDUCT OF HDCC IS**
20 **INHERENTLY DESTRUCTIVE OF THE RIGHTS OF THE BOILERMAKER**
21 **EMPLOYEES**

22 We only need to do an analysis for *Great Dane Trailers, supra*, if there is no other
23 evidence of anti-union motivation. Here the evidence is not "anti-union" as described above.
24 Rather, it is union discrimination. First, the employees are terminated because of their union
25 membership and affiliation. Then, as part of the termination, the Boilermaker members were
26 being forced to give up their membership in the union they had chosen and to become full
27 members of another union.

28 The ALJ misunderstood and seriously misstated what occurred:

1 The employees who had worked under the contract with the Boilermakers
2 were afforded the same opportunity to work as any other employee, *i.e.*,
3 under a contract once one was in place... once they knew CBA was in
4 place, the Respondent facilitated returning employees to work, as detailed
5 above, on a non-discriminatory basis.

6 ALJ Decision p. 7.

7 As described above, that statement is not accurate and is contrary to the facts which
8 demonstrate that union membership was a primary consideration.³

9 Terminating all employees because they were members of the Boilermakers Union is
10 inherently destructive on its face. As a result, the employees were left without union
11 representation and no bargaining. The ALJ asserted that there was no future bargaining because
12 the “Association had lawfully terminated the 8(f) agreement with the Boilermakers Union.” She
13 thus concluded that the actions of HDCC “did not hinder future bargaining.” That conclusion
14 was wholly inaccurate. It was inaccurate because the membership in the Boilermakers Union of
15 the employees who were terminated prevented their reinstatement.⁴ In fact, it was foreclosed by
16 the position taken by the Pipefitters. The ALJ thus attempts to excuse the fact that the
17 Boilermakers were terminated on the following rationale:

18 Though the transition was not seamless, Respondent acted quickly as
19 managers clearly prioritized the continued employment of the alleged
20 discriminatees without regard to whether they were still members of the
21 Boilermakers Union.

22 ALJ Decision at p. 7.

23 Once again, as described above, this statement is contrary to the facts. Giving up
24 membership in the Boilermakers and obtaining membership in the Pipefitters became the critical
25 test. The terminated employees had to give up their membership in the Boilermakers and obtain
26 full membership in the Pipefitters.

27 Furthermore, for the reasons described below, even to the extent the Boilermaker
28 members became members of the Pipefitters, the members were severely and permanently

³ There is more about this later where we describe the hiring hall rules which also have a discriminatory impact.

⁴ Some were reinstated only after they became members of the Pipefitters and gave up their membership in the Boilermakers.

1 disadvantaged in terms of referral and seniority. One of the touchstones of finding that conduct is
2 inherently destructive is that it affects, on an ongoing basis, job entitlement and seniority rights of
3 employees. This cleavage, as described by the Supreme Court, creates continued discrimination
4 as well as interferes with bargaining. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the
5 Court held that it was inherently destructive to give super seniority to striker replacements. See
6 also *Trans World Airline v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1990).

7 Here, the cleavage was created because, as we describe below, members of the Pipefitters
8 were given substantial preference in hiring at HDCC. This preference was created because the
9 hiring procedure gave preference to those who had been employed under the terms of the
10 Pipefitters agreement for 10,000 hours or more. Class A referrals. The HDCC employees started
11 without any hours so they would never reach Class A for a minimum of 5 years assuming
12 working for 2000 hours each year. The hiring procedure also gave preferences for employees who
13 had worked in the United Association jurisdiction. Class B. Since the HDCC Boilermakers had
14 never been employed under the terms of the Pipefitters agreement, they were at the bottom of the
15 referral process. At best they were Class C. See Exhibit A to employer Exhibit 25. HDCC
16 000517. They were permanently at the bottom of the referral process because there were many
17 Pipefitter members who had greater hours and thus were entitled to hiring under Class A. This is
18 a permanent cleavage, and this is worse than super seniority, which the Court found unlawful in
19 *Erie Resistor*.

20 Furthermore, the referral procedure required a license that never had been required by
21 HDCC. This license requirement was at least a bar to hiring any HDCC workers. The exception
22 in (f) is even more discriminatory because it applies only to those workers who have been
23 dispatched by the Pipefitters and who have worked for an employer “who has a collective
24 bargaining agreement with the union.” This is unlawful. Furthermore, the hiring procedure
25 requires that, for someone to be eligible for referral, their “union dues or maintenance fee [be]
26 current.” This suggests that the dues or maintenance fee be “current”, thus depriving workers of
27 the eight day grace period provided for in Section 8(f).

1 Finally, it was inherently destructive because the employees were forced to give up their
2 union and forced to choose a new union under unlawful circumstances. Not only were they
3 forced to join a new union, they were forced to complete an application to become full members,
4 contrary to the law.

5 In summary, for the Boilermaker employees, leaving them without the collective
6 bargaining representative for a period of time, rehiring them with substantial and permanent loss
7 of seniority and referral rights, and then forcing them to become full members of another union is
8 inherently destructive.

9 The appropriate analysis is that found in *NLRB v. CIMCO*, 964 F.2d F.13 (5th Cir. 1992).
10 Under *CIMCO*, even when an employer lawfully terminates a section 8(f) agreement, an
11 employer is not justified in terminating those employees hired under the agreement simply
12 because of their union affiliation or lack of affiliation. To do so would “inevitably hinder future
13 bargaining or create visible and continuing obstacles to the future exercise of employees’ rights.”
14 *CIMCO* at 347 citing *Swift Indep. Corp.*, 289 NLRB 51 Slip. Op. at 18. In other words, the
15 termination of employees simply because they have been dispatched by a particular union or
16 represented by a particular union is inherently destructive of an employee’s rights under sections
17 8(a)(1) and (3) of the Act as established in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34
18 (1967). As the act of discharging the employees for being represented by a particular union is
19 inherently destructive of Section 7 rights, no further analysis is necessary for the Board to find
20 and sustain an unfair labor practice. 388 U.S. at 34. The Judge’s attempt to distinguish *CIMCO*
21 fails. For example, the Judge once again makes the serious mistake of believing that HDCC
22 “considered them [Boilermakers] for hire from the outset on a non-discriminatory basis.” ALJ
23 Decision, p. 9. As shown above, that is simply incorrect. In addition, the ALJ assumed that
24 Respondent was not favoring employees represented by another union. To the contrary, the
25 referral procedure put in place with the Pipefitters forced out the Boilermakers who were former
26 employees of HDCC, and, to the extent they were later able to obtain referral, it was through a
27 considerably lower referral preference and status.

1 The ALJ also attempted to distinguish *Jack Welsh Co.*, 284 NLRB 378 (1987). Under the
2 holding of *Jack Welsh*, an employer can lawfully terminate an 8(f) relationship after the
3 expiration; however, the employees have to be offered an opportunity to continue to work under
4 the changed conditions (i.e., non-union shop) in order for the employer to perfect the separations
5 without discharging the employees for a discriminatory reason. If *Jack Welsh* were applied, the
6 Employer here would be required to produce evidence that each employee was provided an
7 opportunity to work under the changed conditions of no union contract on February 17, 2011. No
8 such evidence was produced or even suggested by HDCC. On February 17, 2011, when each of
9 these employees was terminated, they were told the reason for termination was that the work they
10 were performing was no longer covered by a union contract. While the end of the 8(f)
11 relationship would be a valid reason for the Employer not to request additional employees from
12 the Boilermakers Union, it does not permit the termination of those employees who were then
13 working for HDCC. They had already been dispatched by the Boilermakers, they were members
14 of the Union, and they had worked under the terms of the Boilermaker Union agreement. The
15 employer had no legitimate business reason to terminate or suspend them.

16 In summary, then, the conduct of HDCC was inherently destructive.

17 Finally, the Judge attempts to construct a rationale that there was no “adverse effect on
18 employee rights” because “[n]o welding work was performed between February 17 and March 1,
19 2011 when the first employee under the new contract with the Pipefitters were sent to work.”
20 ALJ Decision, p. 8. That rationale is faulty. First, HDCC had plenty of work to do. It simply
21 chose not to do some of the welding work. Second, the Boilermakers were not limited to welding
22 work. They did substantially other forms of work which continued nonetheless.⁵ As noted, they
23 were required to give up their status as members of the Boilermakers in order to be referred.
24 This of course considerably affected their right to seek work as boilermakers with other
25 employers. They were forced to choose between working as Pipefitters or Boilermakers. Third,
26 they were not terminated for lack of work, so this rationale is wholly of HDCC’s determination.

27 _____
28 ⁵Once again the ALJ makes the comment that “Boilermakers were considered for work under the
new contract without regard to their Boilermaker status....” ALJ Decision, p. 8.

1 There appears to be no business reason advanced why HDCC would not do any available welding
2 for any period of time. It serves no explained or articulated business purpose to do no work
3 particularly when HDCC stipulated there was work available. Tr. 9-10 and 62 Each
4 Boilermaker was in the middle of assigned work when terminated. Tr. 57-59.

5 Finally, to the extent that HDCC attempted to prove that it had a legitimate substantial
6 business justification, it failed in this regard. First, the evidence is generally that HDCC performs
7 work under the terms of the craft agreements. There is no evidence of any long term history as to
8 what occurred during hiatus between contracts or during negotiations for agreements. There is
9 simply no evidence of a similar circumstance where the employer unilaterally withdrew
10 recognition from a union. Second, there is no legitimate business justification of terminating its
11 long term employees while HDCC negotiated with another union to obtain a Section 8(f) contract.
12 The Employer was free to set conditions and establish them unilaterally. It was at no
13 disadvantage to continue employing those employees. The transition would have been utterly
14 seamless had it retained those employees. Furthermore, the Employer concedes that it had no
15 dispute with their skills and abilities and that they were performing satisfactorily for HDCC and
16 the customer.

17 Although there is a business justification for wanting to have a collective bargaining
18 agreement, no HDCC witness explained why that benefits HDCC's business. There is nothing in
19 the record establishing the business reason. The record demonstrates that at the time the
20 terminations occurred the Boilermakers were engaged in five ongoing projects, four of which
21 were for Hawaiian Electric, HDCC's largest client. Tr. 57-59. HDCC offered no explanation
22 how it helped its business by stopping work suddenly for its largest client. But the desire to have
23 an agreement doesn't provide a reason to permanently terminate the employees. There is no
24 reason expressed on the record why HDCC needed to terminate its long-term Boilermaker
25 members. It offered no explanation for why it did not tell the Boilermakers they were on layoff
26 temporarily.

27 Finally, this contention is specious because HDCC had been performing work for months,
28 all the while contending that it had a different agreement with the Boilermakers than the Union

1 asserted. After the Boilermakers had terminated the prior agreement, effective September 30,
2 2010 (with a one month extension), there were several weeks during which the parties were
3 negotiating without an agreement. Even at best it was not until November 12, 2010, two weeks
4 after the contract expired, that Mr. Valentine sent to Allen Myers the agreement which the
5 employers thought had been reached. Em Ex. 7. Mr. Meyers responded immediately, pointing
6 out the differences. Em Ex 8. So there was a long period of time between contract expiration on
7 October 31, 2010, and February 17, 2011, when HDCC continued to work Boilermakers without
8 a contract. This rationale is wholly without foundation.

9 HDCC has offered no reason to terminate the employees while it was negotiating an
10 agreement with another union. The argument that it wants to perform work under the terms of a
11 contract doesn't explain a business justification to terminate long term employees pending such
12 negotiation. If HDCC was concerned that the employees would not like the new agreement, its
13 decision to terminate them violates section 8(a)(3). The problem here is simply that there is no
14 reason to terminate the employees. This wasn't even a lockout. HDCC did not take this action to
15 pressure the Boilermakers since it had withdrawn recognition. HDCC's actions were a permanent
16 termination.

17 What is apparent, however, is that there was an unlawful motivation to terminate the
18 employees. Because HDCC fully knew that the Pipefitters would insist that its own members
19 should be referred to HDCC, it was easy enough to terminate the Boilermakers so that HDCC
20 could facilitate its negotiations for a new agreement with the Pipefitters with their referral
21 procedures which would favor the Pipefitter members. This is why Mr. Valentine wrote on
22 February 17 that HDCC would not be utilizing members of the Boilermakers any more.

23 There is simply no business justification to terminate the employees. There may be
24 substantial business justification for wanting to work under the terms of a collective bargaining
25 agreement, but that is independent from any need to terminate its employees, some of whom have
26 worked for the company for a long period of time.

27 Lack of existence of a contract with a Union offers no business justification for
28 terminating the long term employees. In fact, they were terminated solely on the account of

1 union activity, that is, the membership in the Boilermaker Union and former representation by the
2 Boilermaker Unions. The termination was meant to facilitate negotiation of an agreement with
3 another union.

4 **D. APPLYING A *WRIGHT LINE* ANALYSIS, THE EMPLOYER IS UNABLE TO**
5 **RAISE A DEFENSE**

6 The Judge dismisses a *Wright Line* analysis in footnote 9. In *Wright Line*, 251 NLRB
7 1083 (1980) the Board adopted an analysis of burdens of proof in Section 8(a)(3) cases. That
8 analysis is an independent method by which to analyze HDCC's conduct. As noted above,
9 however, it is not necessary since the Employer's conduct is inherently destructive and was
10 plainly motivated by union considerations. The Employer's conduct is a per say violation of
11 Section 8(a)(3) because it knew that the boilermakers who had worked for the company would be
12 unlawfully required to become full members of the Pipefitters and abandon their membership in
13 the Boilermakers Union. Either of these conditions is per say unlawful, and there is no business
14 justification which can excuse that discrimination under the terms of the Section 8(a)(3).

15 Nonetheless, the Employer utterly fails to meet its burden of showing that there was a
16 non-discriminatory reason to terminate these employees. That reason is more fairly analyzed
17 above, but it rests on the fact that there is no business justification at all, compelling or otherwise,
18 to terminate these employees pending the subsequent negotiation of a collective bargaining
19 agreement.

20 Finally, this contention is pretextual. HDCC had been aware that the parties had been
21 disputing whether there was an agreement for months.

22 **E. THE REFERRAL LANGUAGE OF THE PIPEFITTERS' AGREEMENT**
23 **CANNOT LAWFULLY BE APPLIED TO THE MEMBERS OF THE**
24 **BOILERMAKERS UNION**

25 As described above, the Pipefitters conditioned referral on two unlawful conditions: (1)
26 Filling out an application and taking other actions inconsistent with simply a financial obligation
27 to the Pipefitters; and (2) insistence that the Boilermakers give up their status as members of the
28

1 Boilermakers.⁶ Analysis of the referral language will illustrate how it would be unlawfully
2 applied.

3 The evidence in this record demonstrates that HDCC would have to comply with referral
4 procedures of the Pipefitter Union in rehiring the former employees whom it had terminated on
5 February 17. The Brief of Hawaiian Dredging in Support for its Motion for summary Judgment
6 lays out the precise problem here in complying with this request:

7 Rather, less than a week after it terminated its relationship with the
8 Boilermakers Union, it entered into an agreement with the Pipefitters
9 Union and, in accordance with the Pipefitters CBA, began hiring workers
10 from the Pipefitters Union, including many of the alleged discriminatees.
11 HDCC had asked the Pipefitters Union to accept the welder formerly
12 employed by HDCC and refer them to HDCC, but the Pipefitters Union
13 denied HDCC's request and stated that it would only refer a welder to
14 HDCC if the welder completed the Pipefitters Union's process. It is
15 undisputed that all of the Boilermakers welders who successfully
16 completed the Pipefitters Union's process were dispatched to HDCC.
17 Employers Brief, pp. 10-11

18 GX 1(k).

19 The Declaration of Mr. Valentine in support of the motion for summary judgment
20 expressly states the same thing:

21 During the February time period, HDCC asked the Pipefitters
22 Union to accept the welders formerly employed by HDCC and refer
23 them to HDCC. The Pipefitters Union denied HDCC's request and
24 stated that it would refer a welder to HDCC if the employee
25 completes the Pipefitters Process. I understand that this process
26 required an application, a welding test, and an interview.
27 Valentine Decl. ¶ 16

28 See GX 1(k).

Indeed, we see that this is exactly the problem because Declarant, Gordon Caughman got
on the Pipefitters out of work list on February 24 but was not dispatched to HDCC until March
28, 2011, more than a month later. See Declaration of Gordon Caughman, GX 1.

⁶ As noted earlier, by forcing these members to give up their membership in the Boilermakers, these members were also giving up referral rights in the Boilermakers' agreement. This of course has a considerable adverse impact upon the boilermakers. They cannot be forced to choose between two unions, although obviously they can't work for two employers at the same time.

1 The referral procedure of Pipefitters Local 675 is unlawful under these circumstances. In
2 analyzing this, we have to remember that HDCC is not a member of any multi-employer
3 association but is a single employer.

4 The referral procedure which is EX 22, Exhibit A (HDCC0005107) is not lawful. In order
5 to register for Class A, B, or C, an employee must either have union dues or maintenance fee
6 current. The same is true for Class D Apprentices and Class E. Class E does not apply. None of
7 the discriminatees were indentured apprentices to a Pipefitter Program and thus could not register
8 under Class D.

9 Mr. Esmeralda and any other apprentice were therefore effectively blocked from
10 registering because they were not indentured to a pipefitter program. They could not be classified
11 as a journey person to be registered as Class A, B, or C. Thus, as to Mr. Esmeralda alone, the
12 offer was a sham.

13 Class A, B, and C, as noted above, require that dues and maintenance fees be current. To
14 the extent that employees may be referred into the multi-employer unit, it may be permissible to
15 insist on currency of dues. That is, however, not permissible with respect to a single employer.
16 The reason is, of course, that employees are entitled to their eight days of employment before
17 they must satisfy the union security obligation. The Board has ruled that employees are entitled
18 to separate grace periods for individual non-multi-employer units even though employers may be
19 signatory to identical labor agreements. See *Carpenters Local 740*, 238 NLRB 159 (1978) and
20 *Iron Workers Local 433*, 266 NLRB 154 (1983). Thus, the requirement that HDCC
21 discriminatees be current is unlawful because they were entitled to at least the eight day grace
22 period.

23 The hiring procedure is also unlawful because it requires that applicants for employment
24 agree to “comply with the terms and conditions of the agreement....” See Section 6, page 27.
25 This requires employees who are applicants to agree to waive the eight day grace period
26 contained in the hiring procedures. It is also not a lawful requirement to require employees to
27 agree to comply with any agreement as a condition of being dispatched.

1 The hiring procedure is also unlawful as applies to the HDCC discriminatees for the
2 following reason. None of them could qualify as Class A because none of them had 10,000
3 working hours with a signatory employer, in this case, HDCC. That requirement may be met
4 with a multi-employer group but not for the work which these discriminatees had done for
5 HDCC. None of them could qualify as Class B because they had not “worked within the
6 jurisdiction of the United Association....” Although some could qualify in Class C, this would
7 put them substantially at the bottom of the out-of-work list, and thus they could never have been
8 dispatched for a long time. In any case, Class C still required “maintenance fees current” and this
9 would be unlawful as to the HDCC discriminatees.⁷

10 The fact, moreover, that the Business Manager made plain that the employees had to
11 complete “the Local 675 membership application process” to the Union imposed an unlawful
12 condition because the Union cannot condition dispatching upon filling out a full application.
13 They can only condition dispatching on paying the requisite fees and dues after expiration of the
14 eight day grace period, or, in those cases where a multi-employer association may be involved,
15 maintain their dues and fees current for dispatch and for that multi-employer association. *See*
16 *Union Starch*, 87 NLRB 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951) *cert denied*, 342
17 U.S. 815 (1951). Completing a membership process goes beyond the financial core
18 responsibilities of a lawful union security clause.

19 The Board law is clear that where an employer is well aware that the application of the
20 union security clause is unlawful to the employee, the employer also violates Section 8(a)(3).

21 HDCC was well aware of the illegal provisions in the dispatching procedure since HDCC
22 signed on to them. HDCC was fully aware, moreover, that employees would not be hired by it
23 because they would be placed on the Pipefitters referral list at best. The letter was a sham and
24 dishonest.

25 Because at the same time HDCC knew that the union security clause would be applied
26 illegally, HDCC violated Section 8(a)(3) by agreeing to its implementation. An employer has an

27 _____
28 ⁷ Exception “F” is also unlawful on its face because it applies only to union members and
therefore it renders Class A unlawful.

1 obligation to investigate the circumstances surrounding any request for discharge, and in this case
2 a refusal to refer. Here, the employer was well aware that the Pipefitters were applying the union
3 security clause and the referral procedures unlawfully. It had a copy and had agreed to them.

4 Moreover, it was the employer who made it plain to the employees that they would have
5 to comply with the union security clause. The employer was also well aware that employees were
6 not provided their General Motors/Beck notice. An employer who takes action against an
7 employee, knowing that there was a potential problem with the application of the union security
8 clause, is also liable. See *Hospital Del Maestro*, 323 NLRB 93 (1997).⁸

9 In summary, entering into an agreement with the Pipefitters, which imposed these hiring
10 hall rules, the former employees were effectively deprived of their seniority and union status.
11 They were forced to be placed on a referral system which put them substantially at a disadvantage
12 to the current Pipefitter members. Because they would never catch up with the Pipefitter
13 members, they would forever be at a lower position for referral to HDCC as well as any other
14 contractors signatory to the Pipefitters. This is a permanent disadvantage.

15 IV. CONCLUSION

16 The counsel for HDCC conceded that HDCC “asked the Pipefitters to refer the welders to
17 them that they just laid off.” Tr. 21. Mr. Marr conceded “the Pipefitter said that they would be
18 eligible but they had to go through their process, and the process consisted of an application, an
19 interview and welding test. Hawaiian Dredging asked the Pipefitters to dispense with the process
20 and just refer the employees who had been laid off by them back to Hawaiian Dredging, but the
21 Pipefitters refused.” Tr. 22. Once again, this confirms the unlawful conduct. HDCC had no
22 legitimate business reason to terminate the Boilermaker members. It could have continued its
23 work and eventually negotiated an 8(f) agreement with the Pipefitters. HDCC was well aware
24 that that would create a conflict, and, as a result, terminated and laid off the Boilermaker
25 members so as to ultimately to give preference to the Pipefitter members.

26 _____
27 ⁸ The record is totally speculative as to whether the Pipefitters complied with other union security
28 requirements. As noted, HDCC made it plain that the employees would have to join Pipefitters
and never suggested that there would be a grace period as required by Section 8(f) or otherwise.
Indeed, the hiring hall rules as reflected indicate to the contrary.

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The decision of the ALJ should be reversed. The matter should be remanded for further hearings with respect to the back pay and compliance proceedings.

Dated: April 4, 2013

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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

128061/710457

1 **PROOF OF SERVICE**
2 **(CCP §1013)**

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

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

8 **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE**
9 **ADMINISTRATIVE LAW JUDGE**

- 10 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
11 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
12 mailing with the United States Parcel Service, and I caused such envelope(s) with
13 postage thereon fully prepaid to be placed in the United States Postal Service at
14 Alameda, California.
- 15 (BY FACSIMILE) I am personally and readily familiar with the business practice of
16 Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be
17 transmitted by facsimile and I caused such document(s) on this date to be transmitted by
18 facsimile to the offices of addressee(s) at the numbers listed below.
- 19 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
20 through Weinberg, Roger & Rosenfeld's electronic mail system from
21 mcarrell@unioncounsel.net to the email addresses set forth below.

22 On the following part(ies) in this action:

23 Mr. Barry W. Marr
24 Marr Jones & Wang
25 A Limited Liability Law Partnership
26 Pauahi Tower
27 1003 Bishop Street, Suite 1500
28 Honolulu, HI 96813

Mr. Trent Kakuda
National Labor Relations Board, Subregion 37
300 Ala Moana Blvd., Room 7-245
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(808) 541-2818 (fax)

Via U.S. Mail and Facsimile

bmarr@marrjones.com

Via U.S. Mail and Electronic Service

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