

UNITED 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
 EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

	<u>Page : Lines</u>	<u>Exception</u>	<u>Record</u>	<u>Grounds</u>
1	1: No line listed, 1 st paragraph	To the ALJ's statement that Respondent Hawaiian Dredging Construction Company, Inc. (Respondent) filed a motion for summary judgment on March 31, 2012, which the National Labor Relations Board (the Board) denied on February 29, 2012.	GC 1(k); GC 1(u)	Incorrect dates.
2	1: No line listed, 3d paragraph	To the ALJ's failure to include Kona Akuna among the alleged discriminatees.	GC 1(c); GC 1(f); GC 5	Omission of an alleged discriminatee.
3	1: No line listed, third paragraph 5: 1 6: 6, 7 7: 2, 6, 8, 34 9: footnote 11 10: 1, 35.	To the ALJ's consistent use of the term "layoffs" rather than "terminations."		Misleading characterization of facts.

4	3: 20-21	To the ALJ's statement that "the Respondent's attorney" sent, via email, a letter to Boilermakers' business agent Allen Meyers.	R. Ex. 3	Incorrect statement of facts; Charging Party's attorney sent the letter.
5	5: Footnote 3	To the ALJ's statement that February 15, 2011, was a Saturday.		Incorrect day of week; February 15, 2011 was a Tuesday.
6	5: 7-8	To the ALJ's statement that the Association terminated its relationship with the Boilermakers effective Monday, February 17, 2012.	GC 4	Incorrect date; the correct date is February 17, 2011.
7	5: 39	To the ALJ's statement that by May 12, 2011, nine of the alleged discriminatees had registered with the Pipefitters.	R. Exh. 23	Incorrect statement of the facts because only 8 had done so.
8	6: 35-44	To the ALJ's discussion concerning inherently destructive conduct.		Overly narrow statement of the law.
9	7: 6-9	To the ALJ's finding that all employees who had worked under the terminated 8(f) agreement but no longer were covered by a collective-bargaining agreement (CBA) were laid off, regardless of union or any other protected activity.		Incorrect factual and legal conclusion.
10	7: 9-11	To the ALJ's finding that the employees who had worked under the contract with the Boilermakers were afforded the same opportunity to work as any other employee, <i>i.e.</i> under a contract once one was in place.		Consideration of irrelevant fact.
11	7: 11-13	To the ALJ's finding that Respondent had no obligation to treat the employees who had worked under the former Boilermakers' contract more favorably than its other craft workers by permitting them to work without the protections of a CBA.		Incorrect legal conclusion.

12	7: 13-15	To the ALJ's finding that Respondent laid off the alleged discriminatees because they were no longer working under a contract, not because they were members of the Boilermakers or any other union.		Incorrect factual and legal conclusion.
13	7: Footnote 8	To the ALJ's consideration of the fact that management did not know whether the alleged discriminatees remained Boilermakers Union members after their termination.		Consideration of irrelevant fact.
14	7: 9-11 7:15-17 7: 29-32 8: 17-21 9: 16-20 9: 39-40	To the ALJ's reliance on facts that occurred subsequent to the termination of the alleged discriminatees in support of her analysis.		Incorrect analysis; consideration of irrelevant facts.
15	7:17-20	To the ALJ's conclusion that the Respondent's actions here are not "demonstrably so destructive . . . that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees know to be possessed of a violent antiunion animus."		Incorrect legal conclusion and analysis.
16	7: 23-24 8: 14	To the ALJ's conclusion that Respondent's conduct was not inherently destructive of employee rights.		Incorrect legal conclusion.
17	7: 27-29	To the ALJ's conclusion that continuous employment of the alleged discriminatees "assumes a right to employment on terms inconsistent with the Respondent's longstanding practice of having its craft work performed under CBAs rather than a right to be free from discrimination."		Incorrect legal conclusion.

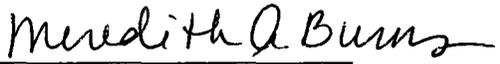
18	7: 29-30	To the ALJ's statement that "the transition was not seamless."		Misleading and incorrect statement of fact and consideration of irrelevant fact.
19	7: 30-32	To the ALJ's statement that the Respondent acted quickly and its managers clearly prioritized the continued employment of the alleged discriminatees without regard to whether they were still members of the Boilermakers Union.		Misleading and incorrect statement of the facts and consideration of irrelevant facts.
20	7: 31 9: 40	To the ALJ's use of the term "continued employment."		Misleading and incorrect statement of the facts.
21	7: 35-36.	To the ALJ's conclusion that the distinguishing factor was not Boilermaker membership but rather lack of a CBA.		Incorrect legal analysis and conclusion.
22	7: 36-38	To the ALJ's statement that although Boilermaker membership and lack of a CBA did go hand in hand, "this does not imply discrimination given the facts of this case."		Incorrect legal analysis and conclusion.
23	7: 6-32	To the ALJ's failure to draw an inference of improper motive from the alleged improper conduct itself and strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.		Incorrect legal analysis.
24	7: 38-45 and 8: 1-12	To the ALJ's reliance on <i>American Ship Building Company</i> , 380 U.S. 300 (1965), as persuasive regarding the absence of unlawful intention under the circumstances present.		Incorrect legal analysis and conclusion.

25	8: 14-15	To the ALJ's statement that "Assuming, without finding, that the conduct was inherently destructive, the next step is to consider the degree to which the Respondent's conduct affected important employee rights."		Incorrect statement of the law.
26	8: 15-16	To the ALJ's finding that the adverse effects on employee rights was "comparatively slight."		Incorrect legal conclusion.
27	8: 17-18	To the ALJ's statement that no welding work was performed between February 17 and March 1, 2011.	Tr. 68-71	Incorrect statement of fact; consideration of irrelevant facts.
28	7: 27-29 8: 23-36 9: 25-27 9: 30-31	To the ALJ's conclusion that Respondent established a substantial and legitimate business justification because it requires its craft employees to perform work under CBAs.		Incorrect legal conclusion.
29	8: Footnote 10	To the ALJ's statement that the problems Respondent faced after the CBA with the Boilermakers expired underscore its rationale for requiring work to be performed under a valid enforceable contract.		Consideration of irrelevant fact.
30	8: 40 through 9: 1 9: 14-24	To the ALJ's conclusion that there are material distinctions between <i>CIMCO</i> , 301 NLRB 342 (1991), and the instant case and that the rationale in <i>CIMCO</i> does not fit the facts of this case.		Incorrect legal analysis and conclusion; erroneous rejection of applicable precedent.
31	9: 10-12	To the ALJ's statement that the key to the judge's finding in <i>CIMCO</i> was that the employees were terminated because they had been referred by the union, and the company took this action because the union would not agree to reinstate its participation in the Section 8(f) agreement.		Incorrect legal analysis and statement of the law.

32	9: 33-41	To the ALJ's conclusion that the Board's analysis in <i>Jack Welsh Co.</i> , 284 NLRB 378 (1987), does not apply, and to her analysis of <i>Jack Welsh</i> .		Incorrect legal analysis and statement of the law.
33	10: 7-10 10: 12-27	To the ALJ's rejection of applicable legal precedent.		Incorrect legal analysis and conclusion.
34	9: 40-41	To the ALJ's statement that there is no evidence to support a finding that the Respondent attempted to subvert unionization or the Act.		Incorrect legal analysis.
35	10: 29-31	To the ALJ's finding that the Acting General Counsel has failed to prove that the Respondent violated the Act.		Incorrect legal conclusion.
36	10: 35-36	To the ALJ's conclusion that Respondent's actions of laying off the alleged discriminatees did not violate Section 8(a)(1) and (3) of the Act.		Incorrect legal conclusion.
37	11:5	To the ALJ's dismissal of the complaint and failure to order appropriate remedies.		Incorrect legal conclusion.
38		To the ALJ's admission of irrelevant evidence.	Tr. 80-85; 93-94; 98-99; 103; 107-109; 123 – 126;161-162; 163-166 -171; 174-77; 194; 271 R. Exs. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23	

DATED AT Honolulu, Hawaii, this 4th day of April 2013.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision 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 4th day of April 2013.



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