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 BRIEF IN SUPPPORT OF EXCEPTIONS

I. INTRODUCTION

The issue in this case is whether Respondent Hawaiian Dredging Construction Company (Respondent) violated Section 8(a)(3) and (1) of the Act when it summarily and immediately 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. It is the Acting General Counsel's (General Counsel) 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. The Administrative Law Judge (ALJ or Judge), in dismissing the complaint, found and/or concluded that: (1) Respondent's conduct was not "inherently destructive" of employee rights; (2) any adverse impact on employee rights was "comparatively slight"; and (3) Respondent had legitimate and substantial business justifications for its actions. General

Counsel submits that these findings or conclusions were made in error and should be reversed, and that the Board should find that Respondent violated section 8(a)(3) and (1) as alleged.

II. STATEMENT OF FACTS[1]

Respondent is the State of Hawaii's largest general contractor. (ALJD 2: 25). Respondent has five divisions, including the Power and Industrial Division. (ALJD 2: 30-31). At the time of 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).[2]

The Association and the Boilermakers Union had a collective bargaining relationship pursuant to Section 8(f) of the Act for many years. (ALJD 3: 9-10). Respondent was a member of the Association. (ALJD 3: 5-6). The most recent collective-bargaining agreement between the Association and Respondent expired on September 30, 2010, and was extended to October 29, 2010. (ALJD 3: 15-18).

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 and other work for Respondent. (ALJD 3: 11-12).

By letter dated February 17 to the Union's Business Manager Allen Meyers, Respondent's then Senior Project Manager and Chairman of the Association Tom Valentine

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[1] References to the Administrative Law Judge's Decision are indicated as (ALJD -); references to the hearing transcript are indicated as (Tr. -); references to the exhibits offered by the Acting General Counsel are indicated as (GC -); references to exhibits offered by Respondent are indicated as (R -).

[2] All dates herein occurred in 2011 unless otherwise noted.

("Valentine") ended the Association's relationship with the Boilermakers Union. (GC 4; Tr. 1: 26-27, 31). Valentine wrote in the letter (GC 4):

> 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 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"),[3] 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 Peji, Rolando Tirso ("Tirso"), and Kenneth Valdez ("Valdez") (collectively the "Boilermakers" or "discriminatees").[4] (Tr. 1: 33, GC 5). On that date, Respondent gave the Boilermakers transmittal sheets which state the reason for separation as

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[3] The ALJ failed to include Akuna among the discriminatees in her decision. (ALJD: 1). (Exception 2).

[4] The Acting General Counsel did not allege that the discharge of Boilermakers General Foreman Gordon Caughman ("Caughman") violated the Act. Respondent has admitted that Caughman was 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)).

"contract has expired."[5] (Tr. 1: 33, 48, 88; GC 6-19). At the time of their termination, the employees did not receive notice of any plan to rehire them. (ALJD 5: 11-12).

Respondent's counsel stipulated at the hearing that the separation on February 17 of the Boilermakers 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. (ALJD 2: 31-33).

At about noon on February 17, Valentine and Respondent's Superintendent Forrest 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, including himself, 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).[6] Respondent's President Bill Wilson testified that Respondent had never had an issue

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[5] Respondent also provided as the reason for separation "Boilermaker contract has expired" to the State of Hawaii Unemployment Division. (GC 33 - 45).

[6] The ALJ incorrectly stated that no welding work was performed on February 17. (ALJD 8: 17-18). The discriminatees were working on February 17 when they were informed of their termination. (Exception 27).

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 at the Sand Island Wastewater Treatment Plant. (Tr. 1: 59). Caughman tried to call every site to speak with either the individual employee 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);[7] Bantoy at the Hawaiian Electric Kahe Power Plant job site (Tr. 1: 57); Valdez, who was working with Tirso at the Hawaiian Electric Waiau Power Plant (Tr. 1: 58); and Gaoiran at the Hawaiian Electric Honolulu Power Plant. (Tr. 1: 58-59). Caughman informed the Boilermakers that they were all "laid off" because there was no contract between Hawaiian Dredging and the Boilermakers. (Tr. 1: 56-59).

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)

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

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

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

Peter Pagaduan – January 14, 2008 (GC 16)

Joselito 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 told him 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 lost employment with Respondent prior to February 2011 for any reason apart from 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).[8] On February 23, Respondent entered into a contract with Pipefitters Union pursuant to Section 8(f) of the Act. (ALJD 5: 22-23). Respondent's Superintendent Forrest Ramey testified that he contacted 10 of the 13 Boilermakers on February 23 and February 24 to inform them that there was an agreement with the Pipefitters Union in place and that if they were interested in returning to work for Respondent they needed to speak with the leadership of the Pipefitters Union. (Tr. 2: 274-277).[9]

III. ARGUMENT

In reaching her conclusion that Respondent did not violate the Act by precipitately terminating its entire Boilermakers-represented workforce immediately upon the cessation of the bargaining relationship, the ALJ applied incorrect or conflicting legal standards and thereby committed clear legal error.

A. The Legal Standard[10]

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)). In such situations, the 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.'" *Id.* Respondent must prove

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[8] Later in the testimony, Valentine placed this meeting sometime between February 17 and 23, a few days after the termination letter (GC 4) was sent to the Boilermakers Union. (Tr. 2: 222, 246-7).

[9] The three discriminatees that Ramey did not contact were Bantoy, Esmeralda, and Pagaduan.

[10] Exception 8.

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). Generally, "inherently destructive" conduct is that "with far reaching effects which would hinder future 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 contrast, if the harm to employee rights is found not to be "inherently destructive," but is instead deemed "comparatively slight," *and* a substantial and legitimate business end is served, then the employer's conduct is *prima facie* lawful and an affirmative showing of improper motivation must be made. *Great Dane* at 34 (quoting *NLRB v. Brown*, 380 U.S. 278, 289 (1965)).

The Board has consistently held the termination of employees upon the ending of an 8(f) relationship to be "inherently destructive" of employee rights. For example, 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 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 342, 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.* at 347.

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 the employer's lawful termination of its Section 8(f) relationship with the union. The Board found it significant that these employees were "'never given an opportunity to quit'" based upon their new terms and conditions of employment, *Id.* at 379, but rather were summarily and unilaterally terminated based on the employer's assumption that they would not work under the new open shop conditions. *Id.* at 383. 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. In reaching this finding, the judge accepted the employer's contention that "there was no evidence of antiunion motivation," but nonetheless concluded that "'specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership [and] is but an application of the common law rule that a man is held to intend foreseeable consequences of his conduct.'" (*Id.* at 383 n.10, quoting *Radio Officers v. NLRB,* 347 U.S. 17, 44-45 (1954)). This conclusion was left undisturbed by the Board.[11]

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

1. Respondent Terminated the Boilermakers Solely Due to their Association with the Boilermakers Union[12]

In this case, on the same day that the Association terminated its Section 8(f) relationship with the Boilermakers Union, Respondent terminated all employees who had been represented by the Boilermakers—not due to lack of work or any other arguably legitimate basis, but on the solitary ground that its contract with the Boilermakers Union had expired. In addition, in its February 17 letter ending its Section 8(f) relationship with the Union, the Association, in which

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[11] Significantly, the Board disagreed with the ALJ solely with respect to one employee who, in the Board's view, "voluntarily quit" his employment, in contrast to his coworkers, who "were 'never given an opportunity to quit.'" *Id.* at 379.

[12] Exceptions 9, 15, 16, 22, 34, 35, 36, and 37.

Respondent was a member, states "[s]ince 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 Boilermakers Union for future work." (GC 4). The termination of the Boilermaker employees was thus directly linked to the ending of the relationship with the Union. As in *Jack Welsh*, the Boilermakers were not given the choice of continuing to work under new employment conditions or provided with "an opportunity to quit." Neither were they informed of any right of recall or provided with notice of any plan to rehire them. Instead, Respondent severed the employment of the Boilermakers – the most extreme action available to an employer– based purely and simply on their prior association with the Boilermakers Union—that is, their "participation in ... union activity." *Portland Williamette Co. v. NLRB*, 534 F.2d at 1334. As in *Jack Welsh* and other cited cases, Respondent's conduct was "inherently destructive" of the Boilermakers' Section 7 rights "and thus [bore] 'its own indicia of intent.'" *Great Dane* at 33.[13]

Instead of recognizing that Respondent's termination of the Boilermakers was due to their association with the Boilermakers Union, the ALJ instead determined that they were terminated "regardless of union or any other protected activity" and that "the Respondent laid off the alleged discriminatees because they were no longer working under a contract . . . ." (ALJD 7: 8-9, 13-14). In this regard, the ALJ erred because she failed to recognize that under the correct legal standard, see cases cited above, such conduct is "inherently destructive." It is unlawful discrimination in its purest form.

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[13] Although the ALJ uses the term "layoff" throughout her decision, the discriminatees were in fact terminated. As explained by the Seventh Circuit: "A layoff, by definition, is not a termination of the employment relationship. The employee retains his or her status as an employee, but is placed in an 'inactive' status for the period of the layoff." *Giddings & Lewis, Inc. v. NLRB,* 675 F.2d 926, 931 (1982). In this case, the record evidence establishes that the discriminatees retained no right of recall and were not informed of any plan to rehire. Accordingly the ALJ's implicit finding and conclusion that Respondent did anything other than "terminate" the discriminatees was factually and legally incorrect. (ALJD 5: 11-12). (Exception 3).

2. Respondent Failed to Demonstrate a "Substantial Business Justification"[14]

Respondent has failed to prove that it had a "substantial business justification" for its conduct, as required under the *Great Dane* framework. Respondent's sole defense is that it terminated the discriminatees because the contract with the Boilermakers Union had expired and it only performs craft labor work pursuant to a contract. This defense must fail for two reasons. First, the contract with the Boilermakers Union was only extended from September 30, 2010, to October 29, 2010, after which time it expired. (ALJD 3: 15-18) Subsequent to October 29, 2010, the discriminatees *continued to perform* craft labor work for three months without a conclusive contract in place. It was not until February 17, when the Association ended its Section 8(f) relationship with the Boilermakers Union, that Respondent discharged the former Boilermakers-represented employees, for the ostensible reason that there was no contract in place. (Tr. 1: 32-34, 106; GC 6-19).

More importantly, Respondent's defense that all of its craft labor work must be performed pursuant to a union contract has never been held to be a "substantial business justification" under any authority of which we are aware. To the contrary, it would appear to fly in the face of the Board's rules articulated in *CIMCO* and *Jack Welsh, supra.* Contrary to the ALJ's finding (ALJD 7: 6-24), any claim by Respondent that it "did not intend to encourage or discourage [union activity] must be unavailing where a natural consequence of [its] action was such encouragement or discouragement." *Radio Officers v. NLRB*, 347 U.S. at 45.

The ALJ also erred by supporting her analysis with Respondent's conduct that took place after the discriminatees had already been terminated and its violation of the Act had been perfected.[15] Thus, the ALJ states that "the employees who had worked under the contract with the Boilermakers were afforded the same opportunity to work as any other employee, *i.e.* under a

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[14] Exceptions 10, 11, 12, 17, 18, 19, 20, 21, 23, 24, and 28.

[15] Exceptions 13, 14, 19.

contract once one was in place" and notes that "the Respondent facilitated returning the employees to work...." (ALJD 7: 9-11, 15-17). According to the ALJ, "[t]hough the transition was not seamless, the Respondent acted quickly and its managers clearly prioritized the continued employment of the alleged discriminatees. . . ." (ALJD 7: 29-31). This was erroneous, first, because the ALJ relied on this *post facto* conduct to rebut an assertion of discriminatory intent, which, as shown, has no relevance whatever in a case of "inherently destructive" conduct such as this one. It was incorrect for the further reason that it disregarded the plain fact that the employees were never "given an opportunity to quit" (see *Jack Welsh,* 284 NLRB at 379) but rather were simply severed from employment. Finally, the ALJ ignores the critical point that the "transition was not seamless" precisely because, on February 17, Respondent terminated the discriminatees without any expectation that they would be recalled, unless they had the good fortune to be referred by the Pipefitters, as to which there was no guarantee. Respondent could not have prioritized their "continued employment" for the obvious reason that they were no longer employed. Again, assuming such conduct demonstrated Respondent's "pure heart," it remained irrelevant to the "inherently destructive" impact of the conduct of February 17.[16]

The ALJ also erred by relying on *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), in support of her decision. In *American Ship Building*, the Supreme Court declined to apply the "inherently destructive" standard in a lockout case. As explained by the Court, "[t]he purpose and effect of the lockout were only to bring pressure upon the union to modify its demands." *Id.* at 312. Significantly, in that case there was "no claim that the employer locked out only union members, or locked out any employee simply because he was a union member;

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[16] Nevertheless, during the course of the hearing the ALJ admitted irrelevant evidence including exhibits and testimony regarding events that occurred prior to the Association's ending of its 8(f) relationship with the Boilermakers Union and regarding events that occurred subsequent to the termination of the discriminatees. General Counsel objected to the admission of such evidence throughout the hearing and now excepts to the ALJ's admission of such irrelevant evidence. (Exception 38).

nor it is alleged that the employer conditioned rehiring upon resignation from the union." *Id.* In those particular circumstances, the Court did not apply the "inherently destructive" standard, but rather required a showing of unlawful intention. *Id.* at 313. In contrast, in the instant case, Respondent terminated the discriminatees based on their association with the Boilermakers. This conduct was "inherently destructive" for the reasons set forth in *CIMCO* and *Jack Welsh*, and thus the ALJ's reliance on *American Ship Building* is wide of the mark.

3. The Harm to Employee Rights Was Not "Comparatively Slight"[17]

The ALJ also erred by considering *Great Dane's* "comparatively slight" standard as a step in the "inherently destructive" analysis. The ALJ stated that "[a]ssuming, without finding, that the conduct was inherently destructive, the next step is to consider the degree to which the Respondent's conduct affects important employee rights. . ." which the ALJ determined to be "comparatively slight."[18] (ALJD 8: 14-15). As shown above, "inherently destructive" and "comparatively slight" are distinct and mutually exclusive categories of conduct. See *Great Dane* at 34; *Austin & Wolfe Refrigeration, Air Conditioning and Heating, Inc.,* 202 NLRB 135 (1973). If conduct is found to be "inherently destructive," the next step is to inquire as to "substantial business justification" and only then to balance the two as a matter of law. Conduct the impact of which is "comparatively slight" must be proven to be the product of antiunion motivation.

But even granting for the sake of argument that the ALJ correctly concluded that the adverse impact on employee rights in this case was "comparatively slight," the ALJ also erred in finding that Respondent had demonstrated legitimate and substantial business justifications for its actions. (ALJD 8: 34-36). As previously explained, the discriminatees performed craft labor work for Respondent during a three-month period prior to their terminations when there was no

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[17] Exceptions 25 and 26.

[18] It is worth noting that the Supreme Court did not use the term "important" employee rights in *Great Dane*. See *Great Dane* at 34.

final contract in place. Thus it cannot be said that Respondent in all cases requires its craft employees to perform work under collective-bargaining agreements. The ALJ also cites to the legislative history of Section 8(f) to support her finding. In particular, the ALJ explained that Section 8(f) was added to the Act to enable employers in the construction industry to know their labor costs prior to submitting a bid on a project and to ensure an available supply of craft workers for quick referral. (ALJD 8: 25-31). These considerations were not factors in this case, however. Respondent offered no evidence that in the six-day time frame between Respondent's termination of the Boilermakers and its entering into the 8(f) agreement with the Pipefitters Union that it had to submit any project bids. Respondent also offered no evidence that it was in need of additional craft labor during the February 17 to February 23 time frame. In fact, as the ALJ points out, Respondent performed no welding work between February 17 and March 1, 2011.[19] (ALJD 5: 34-36). While the legislative history of Section 8(f) may offer a reason as to why Respondent chose to enter into an agreement with the Pipefitters Union, which is not an issue here, it does not legitimize Respondent's termination of all of its employees who were associated with the Boilermakers Union upon ending its 8(f) relationship with that union.[20] Moreover, this analysis simply flies in the face of the Board's decisions, discussed above, condemning employers' discharge of all unit employees upon their lawful terminations of 8(f) agreements.

4. The ALJ Erred in Rejecting Applicable Case Law[21]

The ALJ erred in finding that the rationale in *CIMCO* does not fit the facts of this case. The judge in *CIMCO*, whose decision was adopted by the Board, clearly explained: "The key to

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[19] As explained in footnote 6, above, the Boilermakers did perform welding work on February 17.

[20] The ALJ also erred by referring in footnote 10 to "[t]he problems the Respondent faced after the CBA with the Boilermakers expired ...." (ALJD 8: fn. 10). As explained by the ALJ in footnote 11, these issues were not alleged as business justifications and it was not appropriate for the ALJ to consider them as such. (ALJD 9: fn. 11). (Exception 29).

[21] Exceptions 30, 31, 32, and 33.

my finding with respect to the 34 onsite electricians is found in Labor Relations Manager Uffelman's admission that they were terminated on December 29, because they had been referred to the Company by Local Union 527." *CIMCO*, 301 NLRB at 347. The judge went on to say that the discharge of employees of a certain craft due to their affiliation with and referral from a union constitutes inherently destructive conduct. *Id.* Thus, it was the very act itself – the discharge of the union employees due to their connection with the union – that resulted in the violation in *CIMCO*. Nevertheless, the ALJ here distinguished *CIMCO* based on facts irrelevant to the analysis in that case. These include CIMCO's initially only hiring electricians who had not previously been referred by the union in that case, an event which occurred *after* the unlawful terminations. (ALJD 9: 15-17). The ALJ also distinguished *CIMCO* based on facts irrelevant to the instant case, such as post-termination events including Respondent's considering the Boilermakers for rehire under the new CBA with the Pipefitters Union. (ALJ 9: 19-20). These irrelevant facts all relate to discriminatory intent which is not a factor in an inherently destructive analysis, and which was not the basis for the decision in *CIMCO*.

The ALJ also erred in concluding that the Board's decision in *Jack Welsh* does not apply to this case because "[t]here is no evidence to support a finding that the Respondent attempted to subvert unionization under the Act." (ALJD 9: 40-41). In *Jack Welsh*, as in *CIMCO*, the violation resulted from the employer's discharge of union employees due to their connection with the union. *Jack Welsh*, 284 NLRB at 379. The employer's discriminatory intent was not relevant to the Board's analysis and the ALJ erred in relying on it in distinguishing this case. In addition, the ALJ distinguished *Jack Welsh* based on irrelevant post-termination facts involving Respondent's new contract with the Pipefitters Union and incorrectly states that "Respondent facilitated the alleged discriminatees' continued employment." (ALJD 9: 39-40). The

discriminatees were terminated on February 17 and thus their employment with Respondent ended, not continued.[22]

The ALJ also incorrectly rejected applicable case law that defines the parameters of the violation in this case. As already discussed, *CIMCO* and *Jack Welsh* stand for the proposition that an employer, upon the ending of its 8(f) relationship with a union, violates the Act when it terminates all employees of a particular craft because of their affiliation with, and referral from, the union. The Board's decision in *Acme Tile and Terazzo Co.,* 306 NLRB 479, 480-81 (1992), reaffirmed after remand by 318 NLRB 425, enforced 87 F.3d 558 (1st Cir. 1996), a case distinguished by the ALJ, stands for an important proposition: an employer that ends its 8(f) relationship with one union and immediately commences an 8(f) relationship with another union must allow its employees who were referred by the prior union the 7-day grace period provided by 8(f) in which to become members of the new union. Similarly, 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. The common theme in each of these cases is that an employer may not immediately terminate its craft employees associated with a particular union either upon the commencement or the ending of an 8(f) relationship with that union. Upon the employer's commencement of an 8(f) relationship with a new union, the employees may be required to join the union pursuant to a valid union-security clause after the expiration of the seven-day grace period provided by Section 8(f).

What the ALJ has done in this case is create an exception to the general rule. By the ALJ's reasoning, an employer may skirt the law if it creates a gap between ending its 8(f)

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[22] To the extent that Respondent later told some of the terminated Boilermakers that they could seek employment through the Pipefitters Union, such action did not "facilitate continued employment" because at that point the Pipefitters controlled who would and who would not be dispatched to Respondent.

relationship with one union and entering into an 8(f) relationship with another and claims that it only performs work pursuant to a contract. In such a scenario, according to the ALJ, the employer may lawfully terminate all of its employees referred by the initial union. This is not consistent with the law.

C. CONCLUSION

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

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

Respectfully Submitted,

Meredith A. Burns

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National Labor Relations Board,
Subregion 37
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Brief in Support of Exceptions 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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DATED AT Honolulu, Hawaii, this 4th day of April 2013.

Meredith A. Burns

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