

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
REPLY TO RESPONDENT'S OPPOSITION TO EXCEPTIONS
AND BRIEF IN SUPPORT OF EXCEPTIONS**

I. Introduction

On February 17, 2011, Respondent, through the Association, ended its 8(f) relationship with the Boilermakers Union and immediately and summarily discharged all Boilermakers in its employ based on their prior association with the Boilermakers Union. This act in and of itself bore its own indicia of intent and constitutes conduct inherently destructive of the Boilermakers Section 7 rights under established law. As explained herein, Respondent has offered no valid defense to this inherently destructive conduct. For the reasons discussed in Acting General Counsel's Brief in Support of Exceptions (Brief in Support) and below, the Administrative Law Judge's (ALJ or judge) findings or conclusions in this case were made in error and should be reversed, and the Board should find that Respondent violated Section 8(a)(3) and (1) of the Act as alleged.

II. Discussion

A. Respondent Did Not Terminate the Boilermakers Based on Legitimate Objectives

As fully discussed in the Brief in Support, the ALJ erred in finding that Respondent's termination of the Boilermakers did not violate Section 8(a)(3) and (1) of the Act. In fact, Respondent terminated the Boilermakers on February 17, 2011, based on their prior association with the Boilermakers Union. (Brief in Support at 10).¹ This conduct is inherently destructive of the Boilermakers' Section 7 rights. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); *CIMCO*, 301 NLRB 342 (1991), enforced 963 F.2d 513 (5th Cir. 1992); *Jack Welsh*, 284 NLRB 378, 379 (1987).

Respondent argues in its Opposition to Exceptions and Brief in Support of Exceptions (Opposition) that it was justified in taking this action based on its "long-standing practice of performing craft labor work only under a collective bargaining agreement" for the ostensible purpose of having "the protections provided by a labor agreement." (Respondent's Opposition at 19, 21, 25, 26). Respondent has offered no case law to support its assertion that this legitimized its inherently destructive conduct. Respondent instead points to the Administrative Law Judge's citation to the legislative history of Section 8(f) of the Act. As explained in the Brief in Support, although there are reasons why Respondent may elect to perform work pursuant to an 8(f) agreement, this does not privilege Respondent's termination of its employees connected with a union immediately upon ending its 8(f) relationship with that union. In addition, Respondent's defense cannot be legitimate because it necessarily results in discrimination based solely on

¹ One of these employees was Boilermakers General Foreman Gordon Caughman, who was terminated by Respondent on February 17, 2011, and who did not recommence employment with Respondent until March 28, 2011, when he was referred by the Pipefitters Union. (Tr. 1: 60-61). Respondent suggests in footnote 5 on page 16 of its Opposition that Caughman remained continuously employed by Respondent after February 17 and that the Acting General Counsel has somehow conceded this point. This is an astonishing mischaracterization of the clear facts and as such it is appropriately disregarded.

Union activity and association, which is contrary to Board decisions such as *CIMCO*, 301 NLRB at 347, and *Jack Welsh*, 284 NLRB at 379, 383. Such decisions condemn the discharge by an employer of all unit employees upon the lawful termination of an 8(f) agreement.

Even under Respondent's own recitation of the facts, the parties operated without a contract in place from October 1, 2010, to October 7, 2010. (Respondent's Opposition at 5-6).² In addition, after that time, the parties were engaged in a contract dispute and work was not being performed under the terms and conditions of that disputed contract, but apparently pursuant to the terms and conditions of the expired contract. (See, e.g., R 11 ["We have a disputed contract and our position has always been that upon resolution the contract would be retroactive to October 1, 2010."]). It is significant that by February 17, 2011, Respondent's collective-bargaining agreement with the Boilermakers Union had long since expired. (See GC 4 ["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."]).³ Although Respondent may have "believed" there was a contract between the parties, this does not change the fact that there was no conclusive contract in place.

Respondent also asserts that "it is axiomatic an employer has a right to legitimately manage its operation even if it results in discouraging union membership." (Respondent's Opposition at 19). Respondent draws this incorrect and overbroad conclusion based on several cases that are readily distinguished. First, Respondent quotes *American Ship Building*, 380 U.S.

² The collective-bargaining agreement expired on September 30, 2010, and the parties did not enter into an extension agreement until October 8, 2010. (See GC 2 and GC 3). Thus, there was no agreement in effect between those dates covering the Boilermakers' work.

³ Given these facts, it is difficult to understand how Respondent could claim that "HDCC never operated without a collective bargaining agreement . . ." (Respondent's Opposition at 21). At most, between October 2010 to February 17, 2011 Respondent was operating pursuant to an expired agreement while it engaged in a contract dispute regarding a successor agreement.

300, 308 (1965), distinguished on pages 12 to 13 of the Brief in Support, which concerned the limited issue of “the use of a *temporary layoff* of employees solely as a means to bring economic pressure to bear in support of the employer’s bargaining position, after an impasse has been reached.” (Emphasis added). The Supreme Court found it significant that there was no showing of discrimination based on union affiliation in that case, rather the only purpose and effect of the lockout was to bring pressure on the union to modify its demands. *Id.* at 312. Under those particular circumstances, the Supreme Court did not apply the inherently destructive standard, but rather required a showing of unlawful intent and found no violation of the Act. *Id.* at 313. Respondent has offered no response to the points made in the Brief in Support regarding *American Ship Building* but rather persists in citing it throughout its Opposition without explanation.

Respondent also cites *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 365 U.S. 667 (1961), which concerns the legality of an exclusive hiring hall, a subject not at issue here. *Teamsters Local 357* cites *Radio Officers v. NLRB*, 347 U.S. 42-45 (1954), in which the Court recognized “that specific intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3).” In addition, Respondent quotes *Great Dane* for the comparatively slight standard, which is distinct and mutually exclusive from the inherently destructive standard, and not applicable in this case.

Meanwhile in discussing *CIMCO* and *Jack Welsh*, Respondent merely summarizes the judge’s decision and does not address the issues raised by the Acting General Counsel in the Brief in Support as to why the judge erred in rejecting this case law. (Brief in Support at 14-16).

B. The Harm to Employee Rights Was Not Comparatively Slight

Respondent claims that the resulting harm from the terminations to employee rights was comparatively slight. (Respondent’s Opposition at 2, 29). In so doing, Respondent refers to the

judge's decision, which focused on post-termination and thus irrelevant facts, without addressing the issues with the judge's decision raised by the Acting General Counsel in the Brief in Support. (See Brief in Support at 13-14). Respondent also argues that the resulting harm of its conduct to employee rights was comparatively slight because even if it had continued its welding work after February 17, 2011, the discriminatees "would have had to go through the Pipefitters Union to return to HDCC." (Respondent's Opposition at 30). This is incorrect and contrary to the law. See *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), and *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973). All that the law requires upon an employer's commencement of an 8(f) relationship with a new union is that its employees may be required to join the union pursuant to a valid union-security clause after the expiration of 8(f)'s seven-day grace period. This contemplates continued employment throughout, rather than the termination of employment. See *Acme Tile*, 318 NLRB at 428.⁴

C. The Inherently Destructive Standard Requires No Proof of Anti-Union Motivation

Respondent suggests this is a case where motive matters,⁵ but proof of an underlying improper motive is not an issue in an inherently destructive case because the conduct bears its own indicia of intent. *Great Dane*, 388 U.S. at 33. Respondent incorrectly asserts that *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), applies here. The Board's *Wright Line* allocation of burdens applies

⁴ From the discussion on pages 2 to 3 and 34 of its Opposition, it appears that Respondent misunderstands the import of these cases, which as explained on page 16 of the Brief in Support, define the parameters of the violation in this case. It is the Acting General Counsel's position that the violation of the Act occurred when, on February 17, Respondent severed the employment of the Boilermakers based on their prior association with the Boilermakers Union.

⁵ See Respondent's Opposition at 18, 30-31.

to “all cases alleging violations of Section 8(a)(3) and (1) turning upon employer motivation.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). The fact that the Boilermakers were terminated due to their association with the Boilermakers Union takes this out of the realm of *Wright Line* and places it squarely within the realm of *Great Dane* where the conduct itself “may be deemed proscribed without need for proof of an underlying improper motive.” *Great Dane*, 388 U.S. at 33.⁶ In addition, the Acting General Counsel has consistently argued that Respondent’s defense that it only performs craft labor work pursuant to a contract is not a legitimate defense. *See, e.g.*, Brief in Support at 11 and Exception 28.

III. Conclusion

For the reasons set forth above, Respondent’s arguments in its Opposition are unpersuasive. The Board should reverse the ALJ and find that 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 2nd day of May 2013.

Respectfully Submitted,

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⁶ The pre and post-termination facts referred to throughout the ALJ’s decision and Respondent’s Opposition apparently concern Respondent’s motive in ending its 8(f) relationship with the Boilermakers Union, its motive in commencing its 8(f) relationship with the Pipefitters Union, and its alleged good intentions regarding the terminated Boilermakers. Despite Respondent’s assertions to the contrary, these facts are irrelevant in this inherently destructive case.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Reply to Respondent's Opposition to Exceptions and 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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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 2nd day of May 2013.

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