

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES

HAWAIIAN DREDGING  
CONSTRUCTION COMPANY, INC.

and

Case 37–CA–008316

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

*Meredith A. Burns and Trent K. Kakuda,*  
for the Acting General Counsel.  
*Barry W. Marr and Megumi Sakae,*  
(Marr, Jones & Wang) for the Respondent.  
*Caren Sencer and David Rosenfeld,*  
(Weinberg, Roger & Rosenfeld)  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This case was tried in Honolulu, Hawaii on November 6–7, 2012. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the Boilermakers or the Union) filed the charge on May 12, 2011. The Acting General Counsel issued the original complaint on November 30, 2011, and issued an amended complaint on January 13, 2012. Hawaiian Dredging Construction Company, Inc., (the Respondent or Hawaiian Dredging) filed a timely answer denying all material complaint allegations. The Respondent filed a motion for summary judgment on March 31, 2012, which the National Labor Relations Board (the Board) denied on February 29, 2012.

The Acting General Counsel issued a compliance specification and order consolidating the compliance specification with the amended complaint on September 10, 2012. The Respondent filed a timely answer. At the hearing, I severed the compliance specification from the amended complaint and took evidence on the unfair labor practices complaint only.

The issue before me is whether Respondent’s layoffs of Paul Aona, Crispin Bantoy, Domingo Delos Reyes, Jeffery Esmeralda, Joseph Galzote, Manuel Gaoiran, Daniel Marzo, Jr.,

Henry Merrill, Peter Pagaduan, Joselito Peji, Rolando Tirso, and Kenneth Valdez (the alleged discriminatees) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Respondent, and the Union, I make the following

## 10 FINDINGS OF FACT

### 15 I. JURISDICTION

The Respondent, a Hawaii corporation with an office and a place of business in Honolulu, Hawaii, is a general contractor in the construction industry. During the past twelve months and at all material times, it derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the state of Hawaii. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### 20 II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

25 Hawaiian Dredging is the largest general contractor in the state of Hawaii with roughly 230 salaried employees and 375 craft labor employees. Its building projects include hotels, houses, highways and roads, and piers. The Respondent also does renovation and foundation work both for their own and other contractors' projects. In addition, the Respondent is the state's principal power and industrial contractor, and its employees perform industrial work at sewage and wastewater treatment plants. The Respondent's industrial operations consist of five divisions: heavy, waterfront, power and industrial, and two building-oriented groups. For more than 20 years, Hawaiian Dredging has performed all craft work pursuant to collective bargaining agreements (CBAs). (Tr. 90-91, 106, 253, 256).<sup>1</sup>

35 William Wilson is the Respondent's longtime President. Tom Valentine manages the Respondent's power and industrial (P&I) division. The work he oversees is industrial mechanical construction and generally involves welding. Prior to January 2012, Valentine was a senior project manager. In that capacity, he oversaw power-related projects. The Hawaiian Electric Company (HECO) has been, at all relevant times, the Respondent's primary client in this area. Gordon Caughman, general foreman over the Pipefitters since March 2011, oversees the labor and mechanical work for the P&I division. He reports to the P&I division managers. Caughman was previously the Boilermakers' general foreman.

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<sup>1</sup> Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; and "GC Exh." for Acting General Counsel's exhibit. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record.

## B. The Collective Bargaining Relationship

5 The Association of Boilermaker Employers of Hawaii (the Association) represents employer-members in negotiating and administering CBAs. From at least October 1, 2005 to February 17, 2011, the Respondent was a member of the Association.<sup>2</sup> For roughly eight years up until February 2011, Valentine was chairman of the Association.

10 For at least 20 years, up until February 17, 2011, the Boilermakers and the Association were parties to a collective bargaining relationship under Section 8(f) of the Act. Boilermakers worked in Hawaiian Dredging's P&I division. In addition to welding, they did rigging, equipment setting, PVC work, and piping. Some employees worked on the same project through its completion, while other employees were transferred among jobs.

15 The most recent CBA between the Association and the Boilermakers ran from October 1, 2005, through September 30, 2010. (GC Exh. 2). Upon expiration of the contract, having not reached a new agreement, the parties agreed to extend its terms through October 29, 2010, with any new agreement retroactive to September 30. (GC Exh. 3).

20 On Friday October 1, 2010, the Respondent's attorney sent, via email, a letter to Boilermakers' business agent Allen Meyers informing him that because the CBA fell under Section 8(f), either party was free to cease bargaining or take economic action. He further noted that because the requisite 60-day notice had been given, the members of the Local 627 could cease working without further notice or bargaining. Boilermakers' business representative Gary Aycocock forwarded the letter to Valentine. (R. Exh. 3). That same day, the Boilermakers arrived for work at the Sand Island wastewater facility and notified superintendent Manny Fernandez that they did not intend to work because their contract had expired. (Tr. 96; R. Exh. 4). By Monday, October 4 the Boilermakers had resumed work. (Tr. 112).

30 Contract negotiations continued into November with the parties disagreeing about inclusion of maintenance of benefits provision and an increase in the mobilization optimization stabilization and training (MOST) benefit. (R. Exhs. 6, 7). On November 12, Valentine forwarded to Meyers four copies of a CBA he believed the Boilermakers had ratified. (R. Exh. 7). On November 17, Meyers sent a letter to Valentine that, in addition to pointing out minor corrections, instructed the Respondent to add a \$.50 per year maintenance of benefits provision and include an increase in the MOST contribution. Meyers requested a response no later than November 30, but this was extended to December 6. (R. Exh. 8; Tr. 262).

## C. The Kahe 4 Project, Continued Negotiations, and Board Charges

40 In December, Hawaiian Dredging contracted with HECO to provide about 20 Boilermaker welders for a power plant outage at HECO's Kahe 4 power plant (the Kahe 4 project). On December 3, Hawaiian Dredging submitted a request to the Boilermakers to dispatch a welder to the Kahe 4 plant on December 6. (R. Exh. 10; Tr. 164, 203).

45 Superintendent Forrest Ramey notified management that the Boilermakers had not dispatched a worker on December 6. Caughman contacted Aycocock to inquire, and Aycocock stated that Meyers

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<sup>2</sup> The other members were Arakaki Mechanical and Elayer Enterprises.

was handling dispatches from Arizona. According to Caughman, when he and Meyers spoke, Meyers asked “words to the effect of” whether the Union had gotten management’s attention. Caughman also called Manuel “Kalani” Gaoiran, the worker who was supposed to report to the Kahe 4 project on December 6. By Caughman’s account, Gaoiran responded that he was told not to report and did not want to get stuck in the middle. (Tr. 166). Valentine had to notify HECO about the dispatch problems, which caused him concern because HECO is his major customer. (R. Exh. 9, 10).

Later that same day, December 6, Aycock sent Valentine an email inquiring as to whether he intended to respond to the November 12 letter Meyers had sent him about the contract. Valentine responded, copying Meyers and others. He stated that Meyers’ letter did not accurately reflect the agreement from the most recent negotiations. He further wrote, “I do not understand the reason for this failure to honor the dispatch. We have a disputed contract and our position has always been that upon resolution the contract would be retroactive to October 1, 2010.” He concluded by informing Aycock and Meyers that the Association had been advised to file an unfair labor practices complaint and would be doing so that day. (R. Exh. 11).

The Association filed charges with the NLRB on December 6, alleging that the Union violated Section 8(b)(3) of the Act by attempting to add a maintenance of benefits provision and increase the MOST benefit without first negotiating. (R. Exh. 12). During the investigation of this Charge, Hawaiian Dredging requested mediation of the contract dispute through Federal Mediation and Conciliation Services (FCMS), but the Boilermakers declined. (GC Exh. 1(k) Valentine Decl.)

On December 7, the Boilermakers did not dispatch three journeymen requested for the Kahe 4 project. (R. Exh. 13). One worker was dispatched the evening of December 9 without notice to the Respondent or HECO. Workers continued to show up at the site unannounced. Valentine sent Aycock an email on December 10, asking him to tell Hawaiian Dredging and HECO when it was dispatching Boilermakers to the Kahe 4 project. (R. Exh., 14). On December 12, Valentine sent an e-mail to Wilson, then vice-president Dan Guinagh, and the Respondent’s in-house counsel Gary Yokoyama, detailing the problems with staffing for the HECO project, expressing his concern about the Boilermakers’ failure to dispatch workers as well as the quality of their work, and opining that Hawaiian Dredging should consider terminating its relationship with them. (R. Exh. 15). To provide manpower to the Kahe 4 project, the Respondent transferred its eight Boilermaker welders from other ongoing projects to the Kahe 4 project, forcing the other projects to shut down. (Tr. 263, 273–274). According to a spreadsheet Ramey prepared, Boilermakers had failed to show for 24 12-hour shifts as of December 16. (R. Exh. 16). HECO ultimately removed some work from Hawaiian Dredging because of its inability to staff it. (Tr. 212, 273).

On December 18, HECO directed the Respondent to terminate four welders because their welds failed radiographic testing. Valentine directed the Boilermakers to prepare a written response as to how the Union would correct the problem so that he could present it to HECO. (R. Exhs. 17–18). He did not receive a response. (Tr. 218).

#### D. Termination of the 8(f) Agreement and Layoffs

Valentine received a letter from the Board on February 17, 2011, regarding the December 6, 2010 charges.<sup>3</sup> The Board dismissed the charges, concluding that the parties did not reach complete agreement on the terms and conditions of employment. (R. Exh. 21).

Relying on the Board's dismissal, the Association terminated its relationship with the Boilermakers effective Monday, February 17, 2012, on the basis that there was no CBA in place. At around noon, Valentine and Ramey met with Caughman to inform him the Boilermaker employees were being laid off because there was no contract. The Boilermakers received termination notices at the end of the work day. (GC Exhs. 4–19). At the time, the employees did not receive notice of any plan to rehire them. The Respondent separated the employees because there was no contract in place, not due to a lack of work.<sup>4</sup>

#### E. Contract with the Pipefitters Union

On February 18, 2011, Valentine and Guinaugh met with representatives of the Plumbers and Pipefitters Union, Local 675 (Pipefitters) to discuss the possibility of entering into a contract. Guinagh asked the Pipefitters' business manager and secretary/treasurer, Reginald Castanares, if he would accept Hawaiian Dredging's former Boilermaker employees as Pipefitters. Castanares stated that membership would be conditioned on following the Pipefitters' standard practice of applying, interviewing, and passing a welding test and a drug test.<sup>5</sup> The Respondent and the Pipefitters became parties to a CBA on February 23.<sup>6</sup> (R. Exh. 22). In a meeting earlier that day, Wilson informed Castanares that Hawaiian Dredging wanted the employees who had worked under the contract with the Boilermakers to continue working and asked if they could be referred through the Pipefitters. Castanares responded with the same answer he had given to Guinaugh.

Shortly after the contract with the Pipefitters was signed, Caughman and Ramey informed the alleged discriminatees that they could sign up with the Pipefitters if they wanted to continue working for Hawaiian Dredging. Wilson did not believe the Boilermakers would have trouble passing the Pipefitters' welding test because the work they had performed over the years had almost always met the Respondent's contractual obligations. The Respondent permitted them to use its warehouse facility to practice their welding skills in preparation for the welding test. Hawaiian Dredging performed no welding work between February 17 and March 1, 2011, when the first worker was dispatched under the February 23 contract with the Pipefitters. (Tr. 228).

By February 25, 2011, six out of the thirteen alleged discriminatees had registered with the Pipefitters. By May 12, 2011, nine had registered. (R. Exh. 23). The additional four alleged discriminatees did not register.

<sup>3</sup> The letter is dated February 14 and date-stamped February 15, which was a Saturday.

<sup>4</sup> The parties entered into a stipulation on this fact. (Tr. 9–10).

<sup>5</sup> The Pipefitters' CBA contains a "Uniform Conditions" provision (most favored nation clause) which would be violated by a deviation of its hiring and referral procedures.

<sup>6</sup> The CBA between the Pipefitters' Union and the Respondent was also pursuant to Section 8(f) of the Act.

Wilson did not care which union referred the former Boilermaker-employees to work for Hawaiian Dredging, as long as the work was performed under a contract. (Tr. 109).

### III. ANALYSIS

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The issue before me is whether the Respondent laid off the alleged discriminatees in violation of Section 8(a)(1) and (3) of the Act.<sup>7</sup>

10 Both the Acting General Counsel and the Charging Party argue that the layoffs were inherently destructive of employee rights, and therefore anti-union motivation may be inferred. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

15 Before jumping into analysis under *Great Dane* or any familiar legal paradigm, it is important to point out the extremely unique factual scenario this case presents. Much of the caselaw that has developed under *Great Dane* and its progeny concerns strikes, lockouts, and other actions where the parties have some sort of continuing obligation to each other. This case occurs in a very different context that derives from the unique nature of the construction industry. Here, the Association had lawfully terminated its Section 8(f) relationship with the Union, and the parties therefore had no continuing contractual obligations to each other. The majority of the caselaw also concerns replacing union workers with non-union workers and/or workers not affiliated with the union that is a party to the case. Here, consistent with its longstanding practice, the Respondent refused to go “open shop” and would only employ craft workers who were affiliated with a union and were operating under a CBA, regardless of any particular union affiliation. Against this unusual factual backdrop, I turn to the legal analysis.

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Under *Great Dane*, if the employer’s conduct is “inherently destructive” of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was based upon important business considerations. If the adverse effect of the discriminatory conduct on employee rights is “comparatively slight,” and the employer has come forward with evidence of legitimate and substantial business justifications for its actions, antiunion motivation must be proved to sustain the charge. *Ibid.* The burden is upon the employer to establish that it was motivated by legitimate objectives.

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35 The first question to answer, then, is whether the employer’s conduct was “inherently destructive” of important employee rights. “Inherently destructive” conduct involves actions “that exhibit hostility to the process of collective bargaining,” and that have “far reaching effects which could hinder future bargaining; *i.e.*, conduct that creates visible and continuing obstacles to the future exercise of employee rights.” *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989) (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976). See also *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006); *Bud Antle, Inc.*, 347 NLRB 87 (2006). In addition, “conduct which discriminates solely upon the basis of participation in strikes or union activity” may be inherently destructive. *Portland Willamette Co.*, 534 F.2d at 1334.

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<sup>7</sup> The Association’s termination of its Section 8(f) relationship with the Union is not at issue in this case. The Association is not named in the Complaint. The Union had contended that termination of the 8(f) relationship violated the Act, but this charge was investigated and dismissed.

In the instant case, there was no future bargaining to occur between at the time of the layoffs, as the Association had lawfully terminated the 8(f) agreement with the Boilermakers Union. As such, the Respondent’s actions did not hinder future bargaining.

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As to whether the layoffs distinguished among workers based on participation in protected activity, the evidence shows that all employees who had worked under the terminated 8(f) agreement but no longer were covered by a CBA were laid off, regardless of union or any other protected activity. 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 contract once one was in place. The 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. In short, the 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.<sup>8</sup> Once a new CBA was in place, the Respondent facilitated returning the employees to work, as detailed above, on a non-discriminatory basis. Accordingly, 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 known to be possessed of a violent antiunion animus.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965). *See also D&S Leasing*, 299 NLRB 658, 659 (1990) (terminating employees and refusing to rehire them to escape bargaining obligations inherently destructive). Based on the unique facts of this case, I do not find that the Respondent’s conduct was inherently destructive of employee rights.

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The Acting General Counsel and the Union assert that the Respondent was required to continuously employ the alleged discriminatees. This, however, 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. Though the transition was not seamless, 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.

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The Acting General Counsel and the Union further assert that the employees were laid off simply because they were members of the Boilermakers Union. As noted above, the distinguishing factor was not Boilermaker membership but rather lack of a CBA. Though the two did go hand in hand under the circumstances present, this does not imply discrimination given the facts of this case. As the Supreme Court stated in *Amer. Ship Bldg. Co.*, 380 U.S. at 311–313:

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[W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. *See, e.g., National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, 58 S.Ct. 904, 911, 82 L.Ed. 1381.

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<sup>8</sup> Management did not know whether the alleged discriminatees remained Boilermakers Union members. (GC Exh. 1(m), Valentine Declaration).

...  
 It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict, and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of § 8(a) (3) absent some unlawful intention.

10 Though there is no bargaining conflict before me in the instant case, the Court's reasoning regarding the absence of unlawful intention, under the circumstances present, is nonetheless persuasive.

15 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. For the reasons that follow, I find the adverse effect on employee rights was "comparatively slight." No welding work was performed between February 17 and March 1, 2011, when the first employee under the new contract with the Pipefitters was sent to work. As set forth above, the employees working under the former contract with the Boilermakers were considered for work under the new contract without regard to their Boilermaker status, and in fact the Respondent facilitated their re-employment.

25 The Respondent's burden at this juncture is to prove it had legitimate and substantial business justifications for its actions. The Respondent's asserted justification, simply put, is that it requires its craft employees to perform work under CBAs.<sup>9</sup> More specifically, the Respondent points to the reasons Section 8(f) was enacted. As the Respondent notes, the legislative history of Section 8(f) shows it was added to the Act because of the construction industry employer's need to "know his labor costs before making the estimate upon which his bid will be based" and "to ensure the employers in the construction industry would have a readily available supply of skilled craft workers for quick referral." S. REP. No. 86-187 (1959). See also *NLRB v. Local 103, International Association of Bridge Workers*, 434 U.S. 335, 348–349 (1978). Neither the Acting General Counsel nor the Union has refuted the Respondent's evidence that, for at least the past 20 years, it has exclusively relied on the Union hiring halls to provide labor to it under CBAs governed by Section 8(f). I find that such reliance, given the purpose of Section 8(f) and the mutual safeguards Section 8(f) agreements provide to both parties, constitutes a legitimate business justification.<sup>10</sup>

40 The Acting General Counsel and the Union assert that the Board's decision in *CIMCO*, 301 NLRB 342 (1991), enforced 963 F.2d 513 (5th Cir. 1992), controls and requires me to find the Respondent violated Section 8(a)(1) and (3). There are material distinctions, however,

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<sup>9</sup> Neither the Acting General Counsel nor the Union argued that this case should be decided under the Board's familiar analysis in *Wright Line*, 251 NLRB 1083 (1980). Assuming such analysis governs and that the Acting General Counsel has met its initial burden, I find that the Respondent's requirement to have its craft work performed pursuant to CBAs is a legitimate non-discriminatory reason for its actions, and the Acting General Counsel has not presented evidence to show this was pretext.

<sup>10</sup> The problems the Respondent faced after the CBA with the Boilermakers expired, detailed above, underscore its rationale for requiring work to be performed under a valid enforceable contract.

between *CIMCO* and the instant case. In *CIMCO*, the union terminated its Section 8(f) agreement with the company at a particular worksite that employed electricians, and the company disputed the legitimacy of this action. Thereafter, in response to unsubstantiated rumors that the union was not going to permit its members to work at the site, the company terminated them but stated it considered them to have voluntarily quit. The company then placed ads in the paper and, although all the electricians who had been referred by the union applied, it hired a “core group” of employees who exclusively were not from the union. Thereafter, it hired some of the electricians who had previously been referred by the union. The Board agreed with the administrative law judge that this course of conduct was inherently destructive of employee rights. The key to the judge’s finding 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.

In the instant case, unlike in *CIMCO*, the Respondent did not advertise for outside nonunion employees. The company in *CIMCO* discriminated in its hiring when it initially only considered the electricians who had not previously been referred by the union. By stark contrast, the Respondent here did not consider or hire any nonunion employees to resume work without a CBA in place, and did not at any point favor workers who were unaffiliated with the Boilermakers. The evidence shows that the Respondent facilitated the Boilermakers’ referral under the new CBA and considered them for hire from the outset on a non-discriminatory basis. Finally, unlike in *CIMCO*, the Respondent was not attempting to coerce the Boilermakers, as the Association had already lawfully terminated the 8(f) relationship. Accordingly, I find that the rationale in *CIMCO* does not fit the facts of this case.

Assuming a finding that the Respondent’s conduct was inherently destructive, I find that, unlike in *CIMCO*, the Respondent has met its burden to prove it had legitimate and substantial business justifications for its actions, as set forth above. The rationale set forth in *CIMCO* rested on unwarranted speculation that the electricians the union had referred would not show up for work if hired as nonunion workers. The rationale here is grounded in the fact that there was no longer a contract governing the work at issue, and the Respondent’s legitimate business model requires all craft work to be performed under a CBA.<sup>11</sup>

The Board’s analysis in *Jack Welsh Co.*, 284 NLRB 378 (1987), does not apply, and merely obfuscates the legal issue presented in the case at hand. In *Jack Welsh*, upon expiration of a Section 8(f) agreement between the employer and the union, the company went “open shop” and Welsh, the owner, terminated three union-member employees. The Board found this violated the Act because the employees were not given the option to continue working in the new nonunion environment. Here, the Respondent never intended to become a nonunion shop. Rather, the Respondent took steps to get a new contract into place promptly and facilitated the alleged discriminatees’ continued employment, as detailed above. There is no evidence to support a finding that the Respondent attempted to subvert unionization or the Act.

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<sup>11</sup> The Union avers that the Respondent argued other business justifications, including work disruptions and quality issues. The Respondent, however, has consistently argued that it laid off the alleged discriminatees because of the Board’s determination that no contract existed. While the Respondent has asserted that some of the problems that arose after the CBA expired illustrate why it maintains a practice of only having craft work performed under contracts, the problems themselves were not alleged as business justifications.

The Charging Party further asserts that the Respondent’s decision to lay off the alleged discriminatees because they lacked union representation and a union contract violates the Act to the same degree it would to take the same action because they were represented. The Complaint  
 5 contains no such allegation on its face or by amendment, it was not litigated or defended, and I therefore do not consider it. Likewise, the Acting General Counsel hypothesizes that had the Respondent terminated the alleged discriminatees at the insistence of the Pipefitters, both Respondent and the Pipefitters Union would have violated the Act under the Board’s reasoning in *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973). As this was neither asserted in the  
 10 Complaint nor litigated, and is argued from a speculative stance only, I do not consider it.

The Acting General Counsel notes that the Respondent could have required the alleged discriminatees to join the Pipefitters pursuant to a valid security clause after the seven-day grace period Section 8(f) provides. Citing to *Acme Tile and Terazzo Co.*, 306 NLRB 479, 480–481  
 15 (1992), reaffirmed after remand by 318 NLRB 425, enfd. 87 F.3d 558 (1st Cir. 1996), the Acting General counsel asserts that this is only permissible when there is continuous employment. *Acme Tile* concerned pressure to join the Bricklayers Union immediately, without the requisite grace period, in the context of the Bricklayers’ ongoing campaign to force the workers to join their union. There is no evidence the Respondent attempted to subvert any required waiting  
 20 period, nor is there evidence that the Respondent was assisting the Pipefitters in some sort of campaign to force the alleged discriminatees to join its union. Finally, the Acting General Counsel cites to *National Fabricators, Inc.*, 295 NLRB 1095 (1989) (quoting *Gatliff Business Products*, 276 NLRB 543, 558 (1985)), for the proposition that laying off employees who are likely to engage in protected activities “is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity.” This is unpersuasive given that there is  
 25 no hint that the Respondent was discouraging union activity or any rights protected under the Act.<sup>12</sup>

Based on the foregoing, considering the unique factual circumstances present in this case,  
 30 I find the Acting General Counsel has failed to prove that the Respondent violated the Act as alleged.

#### CONCLUSIONS OF LAW

35 The Respondent’s actions of laying off the alleged discriminatees did not violate Section 8(a)(1) and (3) of the Act.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire stipulated record, I issue the following recommended.<sup>13</sup>  
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<sup>12</sup> The Acting General Counsel also references *Steel Fabricators, Inc.*, 271 NLRB 524, 532 (1984). That case, however, involved layoffs following an unlawful refusal to bargain, whereas there was no further duty to bargain in the instant case.

<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**ORDER**

5           The complaint is dismissed.

          Date, February 4, 2013.



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Eleanor Laws  
Administrative Law Judge