Hawaiian Dredging Construction Company, Inc. ***and*** **International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627.** Case 37–CA–008316

February 9, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 4, 2013, Administrative Law Judge Eleanor Laws issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The judge recommended dismissing the complaint, which alleged that the Respondent, Hawaiian Dredging Construction Company, Inc., violated Section 8(a)(3) and (1) of the Act when it discharged, laid off, or terminated 13 members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the Boilermakers) upon repudiation of the Respondent's 8(f) bargaining relationship with that union. The judge concluded that the Respondent had met its burden to establish that the discharges were motivated by a substantial and legitimate business justification. We disagree. The evidence establishes that the discharges were motivated by the alleged discriminatees' union affiliation, and therefore were unlawful. In the alternative, even assuming an absence of specific evidence of unlawful motive, the Respondent's conduct was "inherently destructive" of the employees' rights and its asserted business justification did not outweigh the destructive impact. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1).

I. FACTUAL BACKGROUND

The Respondent is the largest general contractor in Hawaii, employing approximately 375 craft employees. At the time of the events at issue here, the Respondent was a member of the Association of Boilermakers Employers of Hawaii (the Association). The Association and the Boilermakers had been parties to an 8(f) prehire collective-bargaining agreement for at least 20 years. Pursuant to this agreement, the Boilermakers provided the Respondent with employees to perform welding and other duties.

The most recent agreement between the Association and the Boilermakers expired on September 30, 2010, at which time the parties had not reached a new agreement, despite ongoing negotiations. By email on October 1, the Boilermakers notified Tom Valentine, who was then the Respondent's senior project manager and chairman of the Association, of its availability to continue negotiating. Attached to the email was a letter from the Boilermakers' attorney, advising the Boilermakers that because its agreement with the Association had expired, its members were free to cease working without notice. Also on October 1, a crew of Boilermakers-represented employees informed the Respondent that they would not perform work that day because the agreement had expired. A week later, on October 8, the Association and the Boilermakers agreed to extend the terms of the expired agreement through October 29, to facilitate further bargaining.

The October 29 expiration date passed and negotiations continued into November, with the parties disagreeing about the inclusion of certain benefits. On November 12, Valentine sent the Boilermakers four copies of the collective-bargaining agreement that he believed the parties had successfully negotiated. On November 17, the Boilermakers sent a letter to Valentine listing various corrections and additional terms relating to the disputed benefits. On December 6, Valentine informed the Boilermakers that the Association would not accept the additional terms. That same day, the Association filed a charge with the Board, alleging that the Boilermakers violated Section 8(b)(3) of the Act by refusing to sign the purported agreement and by insisting on terms that had not been negotiated.

On February 17, 2011, the Association received notice of the Regional Office's decision to dismiss the December 6 charge, on the ground that the parties had not reached a complete agreement. That same day, the Association terminated its 8(f) relationship with the Boilermakers, and it informed the Boilermakers that the Association would no longer be using its members for future work.[2] The Respondent also temporarily shut down ongoing welding operations that day and issued termination notices to its 13 Boilermakers-represented employees (the alleged discriminatees). The notices cited "contract has expired" as the reason for the terminations.[3]

[1] The name of Kona Akuna was included in the complaint but omitted from the list of alleged discriminatees in the judge's decision. We correct this inadvertent error.

[2] It is undisputed that the termination of the 8(f) relationship was lawful.

[3] The General Counsel excepts to the judge's finding that the discriminatees were "laid off," contending instead that they were dis-

On February 23, 2011, the Respondent entered into a collective-bargaining agreement with the United Plumbers and Pipefitters Union (the Pipefitters). The Respondent resumed its welding operations on March 1, the day the Pipefitters dispatched its first employee to the Respondent. About this time, the Respondent contacted 10 of the 13 alleged discriminatees, informed them that it had reached an agreement with the Pipefitters, and stated that the alleged discriminatees would need to speak to the Pipefitters' leadership if they were interested in returning to work. Eight of the 13 alleged discriminatees registered with the Pipefitters, and the first was dispatched to the Respondent on March 22, 2011.

II. THE JUDGE'S DECISION

The judge dismissed the complaint, finding that the Respondent's discharge of its 13 Boilermakers-represented employees did not violate Section 8(a)(3) and (1) of the Act. The judge analyzed the discharges under the framework set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In a *Great Dane* analysis, the lawfulness of the employer's conduct turns on the impact of its conduct on Section 7 rights. If an employer's discriminatory conduct is "inherently destructive" of employee rights, no proof of antiunion motive is required, and the Board may find an unfair labor practice even if the employer comes forward with evidence that it was motivated by business considerations. If, on the other hand, the adverse impact on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain an 8(a)(3) charge if the employer has come forward with evidence of a legitimate and substantial business justification for the conduct.[4] Under either scenario, once it has been established that the employer engaged in discriminatory conduct that affected employee rights to *some* extent, the conduct will be found unlawful unless the employer establishes that it was motivated by legitimate objectives. Id. at 33–34.

Under this framework, the judge rejected the General Counsel's contention that the Respondent's conduct was "inherently destructive" of the employees' Section 7 rights. Because the Respondent considered the alleged discriminatees for reemployment without regard to their prior affiliation with the Boilermakers, the judge found that any adverse impact was "comparatively slight." She concluded that, in any event, there was no violation because the Respondent established a legitimate and substantial business justification for the discharges. Specifically, the judge found that the discharge of the alleged discriminatees following the expiration of the parties' contract was justified by the Respondent's longstanding practice of performing craft work only under a valid collective-bargaining agreement. Alternatively, the judge found that the discharges would also be lawful under the Board's motive-based *Wright Line* standard.[5]

On exceptions, the General Counsel and the Boilermakers contend that the Respondent's discharge of all of its employees who had been referred by the Boilermakers constituted "inherently destructive" conduct. They further assert that the Respondent's alleged practice of working only under a collective-bargaining agreement is not a sufficient justification for discriminatorily discharging employees, particularly because the Respondent had, in fact, previously performed welding work without a collective-bargaining agreement during the period between October 29, 2010 (when the Boilermakers' agreement expired), and February 17, 2011 (when the Respondent terminated its relationship with the Boilermakers). Accordingly, they assert, the Respondent cannot prevail even if the effect of the discharges is found to be "comparatively slight."

III. ANALYSIS

Contrary to the judge, we find that the discharges violated Section 8(a)(3) and (1). As explained below, the discharges were unlawful under both *Wright Line* and *Great Dane*.[6]

charged. We agree with the General Counsel. Each notice deemed the action the employee's "separation," and, as the parties stipulated, the Respondent did not inform the alleged discriminatees of any possibility of recall. Moreover, according to Valentine's credited testimony, the Respondent no longer considered them to be employees.

[4] The judge's analysis at one point erroneously suggests that the Board will determine whether an employer's conduct had a "comparatively slight" impact on employee rights only after the conduct is first found to be "inherently destructive." In fact, under *Great Dane*, the impact will be deemed to be *either* "comparatively slight" *or* "inherently destructive." 388 U.S. at 34.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] Although the General Counsel neither clearly advanced a *Wright Line* theory at the hearing nor excepted to the judge's failure to find a violation under that framework, this does not preclude the Board from doing so. The complaint is sufficient to encompass a *Wright Line* theory. It alleges that the Respondent discharged the employees "because [they] were members of the Union" and that this conduct violated Sec. 8(a)(3) and (1). The complaint need not plead a specific legal theory, as long as it contains "a clear and concise description of the acts which are claimed to constitute unfair labor practices." See NLRB Rules and Regulations, Sec. 102.15. Indeed, the Board, with court approval, has often found violations for different reasons and on different theories from those of administrative law judges or the General Counsel where the unlawful conduct was alleged in the complaint. See, e.g., *Pepsi America, Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750, 750–751 (1985), enfd. 783 F.2d 679 (6th Cir. 1986). We note further that the Respondent's posthearing brief to the judge analyzed the case under *Wright Line*, and, as stated above, the judge included an alternative *Wright Line* analysis in her decision.

A. The Respondent denies that the alleged discriminatees' association with the Boilermakers played any role in its decision to discharge them. Rather, it contends, the sole reason for the discharge was that it no longer had a collective-bargaining agreement with the Boilermakers. Inasmuch as this case turns on the Respondent's motive, *Wright Line* is the appropriate analytical framework. See *Nationsway Transport Services*, 327 NLRB 1033, 1034 (1999).

Under *Wright Line*, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision. The elements commonly required to support a finding of unlawful motivation are union activity, the employer's knowledge of that activity, and evidence of animus. The burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employees' union activity. *Wright Line*, supra, 251 NLRB at 1089. We find that the General Counsel established discriminatory motive, and the Respondent has failed to meet its rebuttal burden.

The first two elements of the *Wright Line* test are undisputed: all of the alleged discriminatees were Boilermakers members, and their union affiliation was known to the Respondent. The third element, animus, is readily established by the Respondent's summary discharge of all of its Boilermakers-represented employees, and *only* its Boilermakers-represented employees. Although an employer is free to terminate an 8(f) relationship with a union after expiration of a contract, it cannot discriminatorily discharge its employees because of their affiliation with that union.[7] Here, however, it did just that. On February 17, the Association notified the Boilermakers that it was terminating their relationship and that it did not "intend to utilize members of the Boilermaker's [sic] Union for future work." The same day, the Respondent issued termination notices to all of its employees represented by the Boilermakers. Those facts virtually compel a finding that the Respondent discharged the alleged discriminatees because of their Boilermakers' affiliation.

We further find that the Respondent has not met its rebuttal burden of demonstrating that it would have discharged the alleged discriminatees even in the absence of their affiliation with the Boilermakers. The Respondent maintains that it requires that all its craft work be performed under collective-bargaining agreements to avoid the instability and unpredictability of working without the protections of an agreement. It asserts that this business model—not the alleged discriminatees' union affiliation—was the reason for the discharges.

We do not doubt that the Respondent's practice is to rely on hiring halls for labor pursuant to prehire collective-bargaining agreements. Upon examination of the full record, however, we are not persuaded that the Respondent so strictly adheres to that practice that it would have discharged the discriminatees on that basis alone. In fact, the evidence reveals the contrary. As the General Counsel observes, the Boilermakers-represented employees performed craft work in the months leading up to the February 17, 2011 discharges. Even setting aside the period from November 12 until February 17—when the Respondent believed the parties had an enforceable agreement—there were two periods during which the Respondent knowingly operated without an agreement in place. The first period occurred from October 1 through 7. Although its agreement with the Boilermakers had expired on September 30, it was not until October 8 that the parties agreed to extend the terms of that agreement through October 29. Yet the Respondent continued to perform craft work during that week-long period. The dissent overlooks the probative value of this evidence, contending that the hiatus periods between contracts were treated as contract extensions by the parties pursuant to "tacit agreement." It relies on the testimony of Valentine and the Respondent's president, William Wilson, that, when the Boilermakers' membership rejected the Respondent's latest offer on September 30, they believed that the expired agreement would continue to be enforced. Although that may have initially been the case, the Union promptly and affirmatively dispelled this belief. On September 30, Union Business Manager Meyers called Valentine to inform him that because the contract was expiring and the membership had rejected the Respondent's most recent proposal, they should resume negotiations that day. Valentine countered that immediate negotiations were unnecessary because the parties could continue working under the terms of the expired agreement. According to Valentine's own testimony, Meyers expressly disagreed. (Tr. 195–196.)

The Boilermakers' subsequent actions confirm that it viewed the expired contract as inoperative. On October 1, the Boilermakers sent Valentine an email stating, "As you know Allen [Meyers] was available to continue negotiations last night and will be available all day. Attached is a letter for your information." The attached letter, from the Boilermakers' attorney, advised the Boilermakers that because its agreement with the Respondent

[7] Cf. *Automatic Sprinkler Corp.*, 319 NLRB 401, 402 fn. 4 (1995) ("The expiration of an 8(f) contract simply privileges a withdrawal of recognition, not a discriminatory discharge of employees."), enf. denied 120 F.3d 612 (6th Cir. 1997), cert. denied 523 U.S. 1106 (1998); *Jack Welsh Co.*, 284 NLRB 378, 379, 383 (1987) (finding 8(a)(3) violation where employees were discharged after employer decided to "go open shop" rather than renew its 8(f) agreement; employees were "never given an opportunity to quit").

had expired, its members were free to cease working at any time. Valentine admitted that he perceived this as a threat that the Boilermakers would engage in a work stoppage, notwithstanding the no-strike clause contained in the parties' expired agreement. And, in fact, Valentine's concerns were substantiated later that day when the Boilermakers members announced a work stoppage. These actions hardly reflect a "tacit agreement" to extend the terms of the expired contract.

The second period occurred from October 30 through November 12. The parties failed to reach a new agreement by the new October 29 expiration date and the Respondent again continued to perform welding work using Boilermakers members. Once again our dissenting colleague attempts to diminish the significance of this period by asserting that Valentine believed that a new agreement had been reached before November 1. As evidence, he points to an exchange of emails between the Boilermakers and Valentine on November 1, in which the Boilermakers sent Valentine a document outlining the "new Hawaii Wage/Benefits Rates" and Valentine responded that certain benefits included in the document had not been discussed or agreed to. From these limited communications, the dissent infers an acknowledgment between the parties that they had reached a complete agreement. We are not prepared to make that leap. He also relies on Valentine's uncorroborated testimony that he was informed that the agreement had been ratified by the Boilermakers' membership sometime prior to the November 1 exchange. In addition to the lack of any evidence that ratification occurred, the dissent's position is directly contradicted by the judge, who found that "[c]ontract negotiations continued into November[.]" As noted by the judge, the earliest indication of Valentine's belief that the parties had reached a successor agreement is contained in a November 12 letter.

In short, from October 1 through 7, and then again from October 30 until November 12, the Respondent continued its operations using Boilermakers-represented employees, despite not having a collective-bargaining agreement in place.

We recognize that, during these periods, the Respondent had not yet repudiated its 8(f) relationship with the Boilermakers and, we presume, expected to negotiate a successor agreement with that union. This, however, is of little significance because the Respondent contends that it was the lack of an *agreement* with the Boilermakers—not the lack of a bargaining relationship—that led to its decision to discharge the alleged discriminatees.

The Respondent has not come forward with any explanation for its inconsistent adherence to its asserted business model. Nor does it offer any basis for the proposition that the discharges furthered its interest in maintaining operational stability. The Respondent cites the legislative history of Section 8(f), but makes no showing that the policy considerations there discussed—including predictability of labor costs and labor supply—were factors in its decision to discharge the discriminatees. It is undisputed that there was welding work to be performed and, although we understand that the repudiation of the 8(f) relationship prevented the Respondent from seeking new referrals from the Boilermakers, it has not indicated that it needed additional labor beyond the number of Boilermakers members who had already been dispatched and were working for the Respondent. As to those employees, the Respondent does not contend, let alone show, that it doubted their willingness to continue to perform work after February 17. Simply put, the evidence offered by the Respondent does not overcome the inference of discriminatory intent. Accordingly, we find that the Respondent has not carried its burden of establishing that it would have discharged the discriminatees even in the absence of their union affiliation. The discharges therefore violated Section 8(a)(3) and (1).[8]

[8] We do not dispute that the three "black-letter principles" cited by the dissent are "clear and well accepted." But, as we have discussed, the first two principles—an employer's right to repudiate an 8(f) relationship with one union after the agreement expires and to enter into a new 8(f) agreement with a different union—do not answer or even address the question presented here: whether the employer may then discharge its employees who were members of the first union.

The third principle—an employer's right to permanently shut down its business—was enunciated by the Supreme Court in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). That case stands for the proposition that an employer's decision to go out of business is a matter of management prerogative and does not violate the Act, even if motivated by antiunion considerations. But this case involves a temporary shutdown, not a permanent closure, and *Darlington* is therefore irrelevant.

In *Darlington*, where the employer closed its plant following the union's election, the Court held that an employer has an absolute right to completely terminate its entire business for any reason, even antiunion animus, and that such action will not constitute an unfair labor practice. The Court observed that the Act prohibits the discriminatory use of economic weapons for the purposes of obtaining future benefits. Thus, because an employer who undertakes a "bona fide" complete liquidation of a business in response to collective activity does not stand to gain any benefit from the resulting discouragement of such activity, that action is not the type of discrimination prohibited by the Act. Id. at 272. The Court was careful to distinguish other employer actions aimed at obtaining some future benefit— for example, "runaway shop" and "temporary closing" cases. Id. at 272–273, 275. The Court observed that a permanent *partial* closing would be unlawful if intended to discourage union activity among employees in the employer's remaining operations. Id. at 274–275.

The Board and courts have consistently recognized that the Court's logic is limited to permanent closings and has no applicability to suspensions of operations that are merely temporary. See, e.g., *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 987 (2003); *Bruce Duncan Co. v. NLRB*, 590 F.2d 1304, 1307 (4th Cir. 1979); *NLRB v. South-*

B. Alternatively, as argued by the General Counsel, the Respondent's discharge of all of its Boilermakers-represented employees was unlawful under *NLRB v. Great Dane Trailers*, supra, 388 U.S. 26. As previously stated, if an employer's conduct is "inherently destructive" of important employee rights, no proof of discriminatory motive is needed and the Board can find a violation even if the employer introduces evidence of a business justification.[9] Id. at 34. Conduct is deemed to be "inherently destructive" if it "would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." *D & S Leasing*, 299 NLRB 658, 661 (1990), enfd. sub nom. *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1994), cert. denied 513 U.S. 983 (1994) (internal quotations omitted).

The Board has applied the "inherently destructive" standard to similar situations where an employer discharges all employees of a particular craft because of their affiliation with and referral from a union. For example, in *Catalytic Industrial Maintenance Co. (CIMCO)*, 301 NLRB 342 (1991), enfd. 964 F.2d 513 (5th Cir. 1992), the Board found that the employer violated Section 8(a)(3) by discharging all of its electricians after the union that had referred them ended its 8(f) relationship with the employer. Similarly, in *Jack Welsh Co.*, 284 NLRB 378 (1987), the Board found a violation where the employer discharged employees after the expiration of its 8(f) contract and replaced them with unrepresented employees. Both decisions found that specific evidence of antiunion motivation was unnecessary because the discharges were inherently destructive of employee rights. *CIMCO*, 301 NLRB at 347 fn. 17; *Jack Welsh*, 284 NLRB at 383 fn. 10.

Applying those principles, we find that the Respondent's discharge of its Boilermakers-represented employees was inherently destructive of their right to membership in the union of their choosing, unencumbered by the threat of adverse employment action. As discussed above, it is clear from the facts that the Respondent, as in *CIMCO* and *Jack Welsh*, discharged the alleged discriminatees because of their affiliation with the Boilermakers.

In declining to find the Respondent's conduct inherently destructive, the judge distinguished *CIMCO* and *Jack Welsh* as involving employers that sought to replace their employees with a nonunion work force. Here, the judge reasoned, the Respondent never intended to become a nonunion shop and, in fact, ultimately informed the alleged discriminatees that they could return to work through a referral from the Pipefitters. The judge's reasoning is flawed in two respects. First, discrimination on the basis of affiliation with one union instead of another is no less violative of Section 8(a)(3), than discrimination on the basis of union membership in general. The cases are legion that both forms of discrimination have the tendency to discourage or encourage union membership, and are therefore unlawful.[10]

Second, the judge's reliance on the Respondent's subsequent offer to allow the alleged discriminatees to return to work if they obtained a referral from the Pipefitters is misplaced. As in *CIMCO*, where the employer offered reemployment to its former union-represented employees after it hired a "core complement" of nonunion employees, the Respondent's offer does not undo the impact of the discriminatory discharges. *CIMCO*, supra, 301 NLRB at 346. Although the judge found that the Respondent "acted quickly" and "prioritized the continued employment" of the alleged discriminatees once it resumed operations on March 1, when the Pipefitters made its first dispatch under the new agreement, not one of the alleged discriminatees was among the employees initially dispatched by the Pipefitters. In fact, although six of the alleged discriminatees had registered with the Pipefitters as soon as February 25, it was not until March 22 that the first was actually dispatched to the Respondent—3 weeks after operations resumed and the first Pipefitters members were dispatched. Accordingly, the Respondent's conduct harmed the alleged discriminatees by delaying their ability to promptly return to work once the Respondent resumed its operations.[11]

We also reject the dissent's assertion that the discriminatees would have been in a similar position even if they had been continuously employed or laid off during the temporary shutdown rather than terminated. It reasons that after the Respondent reached a new agreement with

ern Plasma Corp., 626 F.2d 1287, 1292 (5th Cir. 1980); see also *Flat Dog Productions*, 347 NLRB 1180, 1196 (2006). We are aware of no decision applying *Darlington* to facts like those presented here.

[9] For the reasons already discussed regarding the inapplicability of *Darlington* to the Respondent's temporary partial shutdown, we reject the dissent's argument that the "inherently destructive" theory is foreclosed by *Darlington*.

[10] See, e.g., *Matros Automated Electrical Construction Corp.*, 353 NLRB 569, 572–573 (2008) (discrimination against employees because of their support of one union over another violated Sec. 8(a)(3) and (1)), enfd. 366 Fed. Appx. 184 (2d Cir. 2010); *APF Carting, Inc.*, 336 NLRB 73 (2001) (same), enfd. 60 Fed. Appx. 832 (D.C. Cir. 2003).

[11] Similarly, we are not persuaded by the dissent's attempt to distinguish *CIMCO* on the basis that the Boilermakers never informed the Respondent that it would permit its members to continue working without a collective-bargaining agreement. In *CIMCO*, the fact that the union told the employer that it would permit its members to continue working after termination of the bargaining relationship was significant because it undercut the employer's defense that it believed hiring nonunion employees was necessary to ensure a continuous work force. Here, by contrast, the Respondent asserted no basis for doubting the discriminatees' willingness to continue working.

the Pipefitters, the discriminatees would have had to withdraw from the Boilermakers and seek referral from the Pipefitters in order to "return" to work. To the contrary, under Section 8(f)(2), when an employer terminates its 8(f) relationship with one union and enters into an 8(f) relationship with another union, the employees who were referred by the first union are entitled to a 7-day grace period to decide whether to join the new union in order to retain their jobs. See *George C. Foss Co.*, 270 NLRB 232, 232 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985). Meanwhile, the new union cannot require that the employees be terminated and be put through its own referral process. *Austin & Wolfe Refrigeration*, 202 NLRB 135, 135 (1973). In other words, if, instead of discharging them, the Respondent had continuously employed the discriminatees when it temporarily ceased operations, they would have been able to promptly return to work once operations resumed rather than seek referral anew and await dispatch through the Pipefitters.[12]

Further, the fact that the discriminatees would have had to choose between membership in either the Boilermakers or the Pipefitters at the end of the statutory grace period regardless of whether they were discharged does not undercut our finding that the discharges were inherently destructive. The dissent's view that the Respondent's actions were "inherently neutral" with regard to the discriminatees' right to membership in a union of their choosing ignores the signal fact that they were discharged and lost several weeks of employment merely because they were members of the Boilermakers.

Having concluded that the Respondent engaged in conduct that was "inherently destructive" of the alleged discriminatees' Section 7 rights, we turn to the next step in the *Great Dane* analysis and examine whether the Respondent's asserted business justification is sufficient to outweigh the destructive impact of the discharges.[13] We find that it is not. As we have already noted, the record does not support the Respondent's contention that it requires that all of its craft work be performed under collective-bargaining agreements. Even assuming, however, that the Respondent discharged the alleged discriminatees because there was no collective-bargaining agreement in place, we would still find that this justification did not outweigh the harm done to the employees on account of their union affiliation.

As the dissent correctly notes, the Respondent's termination of its relationship with the Boilermakers freed it of any "*contractual* obligation regarding the appropriate treatment of [its] employees" (emphasis supplied). It did not, however, extinguish the Respondent's statutory obligation to refrain from engaging in discriminatory treatment of its employees. To be clear, we do not dispute the importance of an employer's interest in operational stability and predictability, and the Respondent's lawful repudiation of its 8(f) relationship with the Boilermakers freed the Respondent of its commitment to continue to seek referrals from that union. We also recognize the Respondent's right to exercise its managerial prerogative to cease operations temporarily. We disagree, however, that these interests justified the summary discharge of the employees who had already been referred from the Boilermakers and who were working for the Respondent when the 8(f) relationship ended. Put otherwise, after the Respondent ended its relationship with the Boilermakers on February 17, it was free to temporarily halt its operations while it negotiated a new 8(f) agreement with another union. And, the Respondent was free to lay off the alleged discriminatees during this period, so long as they remained employees with an expectation of recall, thereby allowing them to return once operations resumed. Thereafter, at the end of the statutory 7-day grace period, the Respondent and the Pipefitters were free to require the alleged discriminatees, as a condition of continued employment, to meet the Pipefitters' criteria for referral and become dues-paying members. What the Respondent could not do, however, was sever its employment relationship with the alleged discriminatees on account of their Boilermakers' membership.

For the reasons discussed, we conclude that the Respondent's discharge of its 13 Boilermakers-represented employees upon the repudiation of its 8(f) relationship with that union violated Section 8(a)(3) and (1).[14]

[12] The dissent quotes the Pipefitters agreement, which requires the Respondent to "secure all employees covered by this agreement through the employment office of the union." It contends that *if* "secure all employees" includes recalling them from layoff, then even if the Respondent had laid off the welders rather than terminating them, it could not have recalled any Boilermakers-represented welders—even within the 7-day grace period—without breaching the Pipefitters agreement. This argument is at odds with the Respondent's own interpretation of the agreement; the Respondent denies that the Pipefitters required the discharged employees to cease being Boilermakers members or to join the Pipefitters before expiration of the 7-day grace period. (See R. Ans. Br. at 33–34.)

[13] "[E]ven 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." *NLRB v. Great Dane Trailers*, supra, 388 U.S. at 33.

[14] Although we conclude that the Respondent's conduct was "inherently destructive," we note that there are no exceptions to the judge's finding that the discharges had at least a "comparatively slight" adverse impact. Indeed, it is clear that the discharge of all employees associated with a particular union is discriminatory on its face and that this discrimination has the potential to discourage union membership within the meaning of Sec. 8(a)(3). We would also find a violation applying this standard of *Great Dane*, under which the burden still rests with the

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Employer has violated Section 8(a)(3) and (1) by discharging the following employees: Kona Akuna, 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.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily discharging 13 employees, we shall order that each of the affected employees be offered immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate the employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The Respondent additionally shall be ordered to remove from its files any references to the unlawful discharges of these employees and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

Respondent to establish a "legitimate and substantial business justification" for the discharges. *Great Dane Trailers*, supra, 388 U.S. at 34. For the reasons discussed above, we find that the Respondent did not sustain this burden because it has not shown that it was necessary to discharge, rather than simply lay off, the alleged discriminatees when it temporarily ceased its welding operations.

ORDER

The Respondent, Hawaiian Dredging Construction Company, Inc., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their membership in, activities on behalf of, or referral from, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Kona Akuna, 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 immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the affected employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing this has been done and that these actions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order

(f) Within 14 days after service by the Subregion, post at its Honolulu, Hawaii facility copies of the attached

notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Subregion 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time during the period beginning on February 17, 2011.

(g) Within 21 days after service by the Subregion, file with the Regional Director a sworn certification of a responsible official on a form provided by the Subregion attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, dissenting.

I believe this case turns on three black-letter principles that are clear and well accepted.

- When a "prehire" agreement exists between a construction industry employer and a union, the employer has the right, on or after the agreement's expiration, to repudiate the agreement and abandon any relationship with the union.[1]
- The same employer, absent a conflicting agreement, has the right to enter into a different "pre-hire" agreement with a different union.[2]
- The Act does not require *any* employer to remain in business or to continue any particular type of work. Every employer has the right, regardless of motivation towards the affected employees, to cease operations and to discharge employees, provided the same work is not performed by other employees and there is no purpose to "chill" union activity elsewhere.[3]

These three principles relate to what the employer did here. The Respondent, Hawaiian Dredging Construction Company, had a prehire agreement governing welding work. After the agreement expired, the Company entered into a new prehire agreement with a different union. During the hiatus between the agreements, the employer discontinued *all* welding operations, which meant (no surprise) there was no work for welders. Therefore, the existing welders were discharged. At the time, no union agreement was in effect and, accordingly, there were no applicable contract provisions that imposed any requirements on the Company concerning permanent or temporary closings, employment terminations, layoffs, or recalls. However, there is good news: the welding work resumed, and the Company contacted its former welders about obtaining potential employment pursuant to the new union agreement.[4] As to the welding work—the

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377–1378 (1987) ("[U]pon the expiration of [prehire] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship."), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). Prehire agreements are expressly permitted under Sec. 8(f) of the Act, and they are governed by special rules—including those established in part by *Deklewa*—based on considerations that uniquely pertain to the construction industry.

[2] Sec. 8(f) expressly permits construction industry employers "to make an agreement" with a construction union regardless of whether the union has "majority" support among the employees and regardless of whether the new agreement requires employees to become members of the new union (subject to certain requirements and qualifications that have no relevance here). Congress enacted 8(f) in recognition of the fact that construction industry employers have a unique need to enter into labor agreements—even before they have employees and regardless of whether employees support the union—because (i) construction industry unions, through their hiring halls, are often the source of labor for those employers, and (ii) prehire agreements enable employers to have enough information regarding labor costs to formulate bids for construction work. See *Deklewa*, 282 NLRB at 1380 (citation omitted).

[3] *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268–276 (1965) (employer has the "absolute right" to terminate its business or to implement a "partial closing," even if motivated by antiunion animus, provided there is no "purpose to chill unionism" among other employees). Unlike a complete or partial discontinuation of operations, a relocation or subcontracting based on antiunion considerations violates Sec. 8(a)(3), id. at 272–273 and fn. 16, and Federal law also prohibits employers from circumventing obligations under the Act by transferring work to an alter ego or "disguised continuance" of the employer, id. at 270 (citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). None of the latter types of changes are at issue here.

[4] Respondent employed 13 welders under its initial prehire agreement who were discharged. It contacted 10 of the welders about potential reemployment under the Pipefitters' agreement, 8 of whom regis-

only work relevant here—no former employees were discriminated against in favor of other employees.

On these facts, the judge found the Respondent engaged in no violation, and she dismissed the complaint. My colleagues disagree, however, and find that the Respondent violated Section 8(a)(3) by terminating the former welders during the hiatus between contracts.

I respectfully dissent because the judge's disposition, in my view, was correct, and I disagree with my colleagues' finding of a violation, which is irreconcilable with the three black-letter principles stated above. As explained below, I believe my colleagues are incorrect in the following respects.

First, under the Supreme Court decision in *Darlington*, the Respondent's cessation of welding work was lawful without regard to its motivation, and it had no legal obligation—in the absence of work being performed—to refrain from employment terminations or layoffs, or to do one versus the other.

Second, even if motivation is relevant, I believe the record does not reasonably support any finding of unlawful motivation. To the extent this case involves dual motives—which I believe is not established by the record evidence—the Respondent has satisfied its *Wright Line* burden to prove it would have taken the same actions without regard to any unlawful motivation.[5]

Third, I believe there is no reasonable justification for finding a violation on the basis that the Respondent's actions were "inherently destructive." This phrase, most often associated with the Supreme Court's *Great Dane* decision,[6] refers to conduct that—by its nature—carries with it a necessary inference of unlawful motivation. I believe any "inherently destructive" finding is foreclosed by *Darlington*. Moreover, as one can gather from the facts described above, Respondent here did not do anything unlawful, and nothing in the record reasonably proves that Respondent's actions were "inherently destructive" of protected employee rights.

Facts

Hawaiian Dredging Construction Company, Inc. (the Respondent or HDCC) is the largest general contractor in the State of Hawaii and the principal power and industrial (P&I) contractor in the State. P&I work includes, for example, building and maintaining electric power plants and performing industrial mechanical work in water treatment plants. The Respondent performs P&I work through its P&I division.

The Respondent is not a likely candidate to be enmeshed in unfair labor practice proceedings before the Board. For at least 20 years, the Respondent has performed all work requiring craft labor under collective-bargaining agreements. Consistent with that decades-long practice, for many years the Respondent's P&I division performed welding work using welders supplied by the Charging Party, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the Union, the Boilermakers, or Local 627), under 8(f) collective-bargaining agreements between the Union and the Association of Boilermakers Employers of Hawaii (the Association), of which the Respondent was a member. The most recent of these agreements was effective October 1, 2005, to September 30, 2010 (the 2005–2010 CBA). The Company's decades-old practice of performing craft work *only* under collective-bargaining agreements with trade unions is certainly consistent with the Act, which was enacted in part to "encourag[e] the practice and procedure of collective bargaining."[7]

The Association and the Union began meeting on September 20, 2010, to negotiate a successor agreement. On September 30, the Union's members rejected the Association's offer for a new agreement. In the past, when the Respondent and one of the unions with which it partners were unable to conclude a successor agreement by the expiration date of their current agreement, the Respondent and the union treated the just-expired agreement as extended until a new agreement was reached. Based on that practice, the Respondent believed that the 2005–2010 CBA would be extended by mutual, tacit agreement while bargaining continued.[8] On October 1, the Union gave the Association notice that "[b]ecause recognition is under Section 8(f), either party is free to . . . take economic action or to cease bargaining," and that its members were free to "cease working without any further

tered with the Pipefitters. There is no allegation that the Respondent engaged in unlawful discrimination with respect to these arrangements.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

[7] Sec. 1 of the Act.

[8] William Wilson, the Respondent's president, relevantly testified as follows: "I expected, as on several other occasions in recent years and the time I'm familiar with it where agreement was not reached between the [e]mployer and the [u]nion, that the conditions of the current agreement continued to be enforced, workers continued to show up to work and management continued to do that while the bargaining continued" (Tr. 95–96.) Tom Valentine, at the time the Respondent's senior project manager and chairman of the Association, operated under the same expectation. When the Union's membership rejected the Respondent's contract offer on September 30, Valentine spoke by telephone with Local 627 Business Manager B. Allen Meyers. Meyers told Valentine that he wanted to return to bargaining immediately, but Valentine saw no need, since (in his view) the terms and conditions of the 2005–2010 CBA continued to apply. As Wilson testified, the Respondent's relationship with the trade unions "[has] been very much a partnership, a very cooperative arrangement" (Tr. 92).

notice." The same day, five Boilermakers-represented employees showed up at one of the Respondent's P&I projects and walked off the job.

On October 8, the Association and the Union formally agreed to extend the 2005–2010 CBA until October 29, with any new agreement retroactive to October 1. The parties continued bargaining and reached an agreement on or about October 27. The Union's members ratified the new contract, and Association Chairman Tom Valentine was informed of that fact.

On November 1, Union Business Representative Gary Aycock sent an email to Valentine. Aycock attached to the email "the new Hawaii Wage/Benefit Rates that are effective October 1, 2010." The attached document included two terms that Valentine believed had not been discussed or agreed to during the just-concluded negotiations: a "maintenance of benefits" provision adding 50 cents an hour to the Respondent's Health & Welfare contribution "in the event additional contributions are necessary to maintain the existing level of benefits," and 29 cents an hour for "MOST" (mobilization optimization stabilization and training) instead of the 24 cents an hour Valentine believed had been agreed to. The same day—November 1—Valentine replied to Aycock's email, stating that the parties "did not negotiate these [two] items" and asking Aycock to "[p]lease remove these items from the wage schedule." Aycock did not respond.

Subsequently, Valentine sent Local 627 Business Manager Meyers a letter dated November 12, enclosing four copies of a document that Valentine believed accurately reflected the parties' new collective-bargaining agreement, which in his view did not include maintenance of benefits and the additional 5-cent contribution for MOST. Valentine's letter stated that these items were "not included in the recently concluded negotiations." At the hearing, Valentine testified that notwithstanding the back-and-forth over maintenance of benefits and MOST, he believed the parties had an agreement.

Meyers replied to Valentine by letter dated November 17, insisting that the two disputed terms be included, and setting a deadline of November 30 for Valentine to sign an agreement that included the disputed terms. The Union subsequently extended this deadline to December 6.

Meanwhile, the Respondent contracted with Hawaiian Electric Company (HECO) to perform welding work at HECO's Kahe 4 Power Plant during a planned maintenance outage. At its peak, the Kahe 4 project would require the Respondent to employ approximately 20 welders assigned to that project. Under the recently concluded agreement (as under the 2005–2010 CBA), the Respondent was required to obtain welders by referral from the Union (unless the Union was unable to fulfill a request within 48 hours, in which case the Respondent was entitled to "employ applicants from any other available source"). On Friday, December 3, the Respondent asked the Union to dispatch a welder to the Kahe 4 project on Monday, December 6. No welder showed up on December 6, and Valentine learned that Aycock was directing Boilermakers welders not to report to the Respondent's projects.

That same day (December 6), Valentine emailed Aycock. "I do not understand the reason for this failure to honor the dispatch," Valentine wrote. "We have a disputed contract and our position has always been that upon resolution the contract would be retroactive to October 1, 2010." Valentine also reiterated that the Union's version of the contract "does not reflect the agreement from recently concluded contract negotiations." Valentine informed Aycock that the Respondent intended to file an unfair labor practice charge. That charge, also dated December 6, alleged that the Union, on or about November 17 (the date of Business Manager Meyers' letter to Valentine), violated Section 8(b)(3) by "refusing to sign a negotiated agreement and attempting to include terms in the . . . agreement that were neither discussed nor negotiated."

On December 7, the Union failed to honor a dispatch request for three welders for the Kahe 4 project. On December 9, the Union dispatched one welder to the Kahe 4 project, but without giving the Respondent advance notice who was coming or when he would arrive, contrary to the Union's usual practice.

On December 12, Valentine emailed a status update to the Respondent's management team. Valentine informed the team that the Respondent had submitted 13 dispatch requests for journeymen welders for the Kahe 4 project, and that with one exception the Union had failed to honor the dispatch on the date requested. "These delays," Valentine wrote, "have been for at least two days, some have been for 3 to 4 days and some have not been answered at all." Valentine stated that the Respondent had contacted some Boilermakers welders "directly (as permitted by contract if the [U]nion fails to respond to our dispatch within 48 hours)," and had learned that the Union had told those individuals "not to report to any HDCC job or suffer the sanctions from the [U]nion."[9]

[9] I take administrative notice that art. 17.1.20 of the constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers provides that "[n]o member shall accept employment with a nonunion contractor without prior written approval by the Business Manager or where there is no Business Manager, by the President of the Local Lodge having the jurisdiction over the territory." Under art. 17.5.1, the penalties for violating art. 17.1.20 include reprimand, fine, suspension, and expulsion. I infer that these are the "sanctions" Valentine referred to in his December 12 email.See

Valentine expressed concern that HECO "could terminate [the Respondent's] contract" for the Kahe 4 project "[i]f the [U]nion continues this practice."

Meanwhile, welds performed by welders the Union had dispatched failed HECO's quality-control testing, and HECO directed the Respondent to terminate four Boilermakers welders. In an effort to retain the Kahe 4 project work, the Respondent transferred eight welders from other projects to the Kahe 4 project and shut down those other projects. The transfers were insufficient to offset the manpower shortages caused by the Union's sporadic and untimely referrals, and HECO reassigned the Kahe 4 project work to another contractor. On December 20, Valentine reported these developments to Aycock, reminding Aycock that for the past several years HECO had provided "the overwhelming majority of [B]oilermaker work in Hawaii," and expressing concern that the Union's untimely dispatches and the poor performance of the welders it referred "are causing HECO to reevaluate its . . . relationship with HDCC and the [B]oilermakers." Valentine asked the Union to explain "how [it] will correct these immediate problems." The Union did not respond.

On February 14, 2011, the Region dismissed the Respondent's 8(b)(3) charge, finding that the parties "did not reach a complete agreement on terms and conditions of employment." By letter dated February 17, Valentine notified the Union that the Respondent was terminating their relationship. The same day, the Respondent discharged its 13 remaining welders and ceased performing all welding work.[10]

On or about February 19,[11] Valentine, Respondent's vice president, Dan Guinaugh, and its In-House Counsel Gary Yokoyama met with representatives of the Plumbers and Pipefitters Union, Local 675 (the Pipefitters) to discuss a possible agreement. Guinaugh asked the Pipefitters if they "would take our former Boilermaker employees as Pipefitters" (Tr. 223)—i.e., if the Pipefitters would dispense with their usual requirements and refer the former employees back to the Respondent. The Pipefitters refused to do so for two reasons. First, the parties were contemplating that HDCC would become signatory to the Pipefitters multiemployer agreement covering approximately 60 contractors, and that contract contained a "most favored nations" clause. Under that clause, the Pipefitters would have to extend to all signatory employers any special consideration in referrals given to the Respondent, and it was unwilling to do so. Second, the Pipefitters wanted to ensure that HDCC's former employees possessed the necessary skills to work for any of their signatory employers, and therefore they were unwilling to waive the welding test required of all prospective registrants in its hiring hall. Guinaugh offered to give the Pipefitters a list of names of the former employees. The Pipefitters declined, saying that they could not solicit membership of another union's members.

On February 23, the Respondent and the Pipefitters met again. Bill Wilson, HDCC's president, attended this meeting, and he repeated Guinaugh's request from the first meeting, asking the Pipefitters to take HDCC's former employees unconditionally. The Pipefitters again declined to do so. During this meeting, the Respondent became signatory to the Pipefitters multiemployer agreement. That agreement contained an exclusive referral provision, which required the Respondent to "secure all employees covered by this agreement" by referral from the Pipefitters' hiring hall (unless the Pipefitters could not supply the Respondent's needs within three working days of the request).[12] The Pipefitters agreement also contained a union-security provision.[13] The Respondent promptly notified its former employees that they could return to the Respondent through the Pipefitters if they chose to[14] and if they met the Pipefitters' re-

https://www.boilermakers.org/files/leadership/2011_IBB_Constitution.pdf (last visited June 30, 2014).

[10] The judge characterized these as layoffs. I agree with my colleagues that the employees were discharged.

[11] The precise date of the first meeting between the Respondent and the Pipefitters is uncertain. Valentine testified as follows:

> Q. And how much before this February 23rd meeting was the previous meeting?
>
> A. Just a few days. It was after we had sent the termination letter to the Boilermakers and it was in that time frame. I know it was a couple days after that and a few days before this. I don't remember precisely the date.
>
> Q. So it was sometime between February 17th and February 23rd?
>
> A. Yes. (Tr. 222.)

[12] Pipefitters Agreement, Exh. "A": Referral Procedure, sec. 3 (R. Exh. 22 at Bates No. HDCC 000517): "The individual employer must secure all employees covered by this agreement through the employment office of the union except as provided in Section 11 herein below." Sec. 11 (R. Exh. 22 at Bates No. HDCC 000518) provides that "[i]n the event that the Union does not dispatch any applicants within three (3) working days following the day of the request of the individual employer . . . , the individual employer may employ any person . . . ."

[13] Pipefitters Agreement, art. III, sec. 7 (R. Exh. 22 at Bates No. HDCC 000492): "The employer shall require each employee covered by this agreement to become and remain a member of the union as a condition of employment from and after the 8th day following the date of his/her employment or the effective date of this agreement, whichever is later."

[14] Valentine testified that he told former employees that "this was a decision you need to make, you know, what you believe is best for you, but these are the options available" (Tr. 226). Most of the former employees were contacted by Valentine's subordinate, Superintendent Forrest Ramey (Tr. 274–276). Ramey told them that he "didn't know exactly what the process was or what hurdles they would have to

ferral requirements. The Respondent provided its former employees a warehouse where they could practice in preparation for the Pipefitters' welding test. The Respondent furnished the necessary tools, equipment, raw materials, and welding rods, and also provided coaching. Several former employees took advantage of the Respondent's offer. At the time, the Pipefitters' "bench" was empty: anyone who met the Pipefitters' qualifications and signed the out-of-work list would have been dispatched. By February 25, 6 of the Respondent's 13 former employees had registered with the Pipefitters; by May 12, 8 had registered.

On March 1, the Pipefitters dispatched the first welder to the Respondent under the parties' newly concluded agreement, and the Respondent resumed performing welding work. Between February 17, when it terminated its 8(f) bargaining relationship with the Boilermakers, and March 1, when it obtained its first welder referred under the Pipefitters agreement, the Respondent performed no welding work.

Discussion

The General Counsel alleged that the Respondent violated Section 8(a)(3) when it discharged its Boilermakers-represented welders. The judge dismissed the complaint. Analyzing the allegation under *Great Dane Trailers*,[15] the judge found that (i) the discharges were not "inherently destructive" of employee rights; and (ii) the discharges had a "comparatively slight" adverse effect on employee rights, the Respondent established a legitimate and substantial business justification for the discharges—the absence of an agreement with the Boilermakers and HDCC's decades-long practice of performing all craft work solely under collective-bargaining agreements—and the General Counsel did not prove an antiunion motive.[16] Alternatively, under *Wright Line*, the judge assumed the General Counsel met his initial burden and found that the Respondent would have discharged the Boilermakers-represented welders regardless of any antiunion motive based on that same longstanding practice.

My colleagues reverse the judge's decision. They find that the Respondent violated Section 8(a)(3) under both *Wright Line* and *Great Dane Trailers*. I would find *Wright Line* inapplicable for two reasons. First, this case involves a cessation of work that was lawful under *Darlington* and similar cases without regard to the Respondent's motivation towards the alleged discriminatees, and Respondent's employees were not discriminated against in favor of any other individuals. Second, *Wright Line* articulates a burden-shifting approach that applies in dual-motive (sometimes called "mixed motive") situations, and the record here reasonably supports no motive other than what the Respondent articulated: it wanted to have an applicable prehire agreement before proceeding with welding work, and the cessation of welding work—absent such an agreement—resulted in the disputed employment terminations.

Even assuming *Wright Line* applies, and further assuming (as did the judge) that the General Counsel met his initial burden under *Wright Line*, I would find that the record establishes that Respondent satisfied its burden under *Wright Line*—i.e., to prove it would have taken the same actions in the absence of any antiunion motivation. Finally, I would find no violation notwithstanding my colleagues "inherently destructive" characterization in reliance on *Great Dane*. My reasons follow.

A. Respondent's Actions were Lawful Under the Supreme Court's Darlington Decision

In *Darlington*, the Supreme Court considered two types of employer actions. First, the Court held that "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."[17] Second, the Court held that a "partial closing"—where other parts of the business continue operating—was also lawful, even if caused by antiunion considerations, unless the record shows (a) the partial closing was "motivated by a purpose to chill unionism" among *other* employees, and (b) "the employer may reasonably have foreseen that such closing would likely have that effect."[18]

The *Darlington* decision was applied by the Board in *A. C. Rochat Co.*,[19] where the employer shut down its sheet metal installation operations for antiunion reasons, resulting in the layoff of 17 employees, but continued the sale of air-conditioning and refrigeration equipment.[20] The Board indicated that the discontinued installation services "were unquestionably important to its sales activities, and vice versa," and the evidence also showed

cross, but that there was a path and that if they were interested in returning, they needed to start down it" (Tr. 275).

[15] 388 U.S. at 26.

[16] As my colleagues note, the judge misstated the *Great Dane* framework. I agree with their correction.

[17] 380 U.S. at 273–274.

[18] Id. at 275.

[19] 163 NLRB 421 (1967).

[20] Although the displaced employees in *A. C. Rochat* were described as being "laid off," the Board did not differentiate between layoffs and employment terminations. However, the Board's decision makes clear that the employees were not regarded as having any expectation of recall because the discontinuation of sheet metal operations was described as "permanent," and the employer went so far as to restrict its remaining operations so they would not require sheet metal installation. Id. at 422.

that, following the antiunion curtailment of sheet metal installation, the employer "restricted its sales to transactions that would not require [sheet metal] installation."[21] The Board held that *Darlington* compelled a finding that these actions by the Respondent were lawful. The Board found the record did not support a conclusion that the employer had a purpose of discouraging union activity among remaining employees.

The Board also applied *Darlington* in *Purolator Armored, Inc.*,[22] where the employer was engaged in armored car and related services, including a "coin room operation" where change bags were prepared in response to customer orders.[23] After the coin room employees voted to be union-represented (by a near-unanimous vote), the employer shut down the coin room for antiunion reasons while continuing its other operations.[24] Significantly, the judge analyzed the cessation of "coin room" operations under *Wright Line* (the judge reasoned that the case presented "dual-motive considerations")[25] and under *Darlington.*[26] The judge found that the cessation of "coin room" operations violated Section 8(a)(3) under both types of analysis.

Significantly, the judge in *Purolator* concluded that each analysis was "valid and independent of the other," and he stated: "The *Wright Line* theory is, in my view, an alternative theory of violation to *Darlington*."[27] This position was squarely rejected by the Board, which held that the cessation of "coin room" operations—while the remainder of the business remained ongoing—could be held unlawful *only* pursuant to *Darlington*. Thus, the Board stated:

> The judge determined that the two analyses of the case [under *Wright Line* and *Darlington*] stood independent of each other, and either view of the case was valid. *We do not agree.* Thus, to be a violation under *Darlington*, a partial closing must *not only* be discriminatory, *but must be motivated by a desire to chill unionism of an employer's other employees, and it must be reasonably foreseeable that the closing will have that chilling effect.*[28]

It is undisputed here that the Respondent entirely ceased its welding operations at a time when there was no applicable prehire agreement: the Boilermakers' agreement had expired, and Respondent had not yet entered into its new Pipefitters' agreement. The welding work was not relocated, contracted out, or performed by someone employed by a different entity. There is no evidence that Respondent benefited from the temporary nature of its cessation of welding operations.[29] Nor is there any doubt that the terminated Boilermakers were displaced *because of* the cessation of welding operations. During the posttermination period (until Respondent resumed welding operations under the Pipefitters' agreement), there was no work for welders to do.

In these circumstances, the Supreme Court's decision in *Darlington* requires a conclusion that Respondent had the right to cease welding operations, regardless of motivation, while the remainder of its business remained ongoing, absent evidence that Respondent had the "purpose" of chilling union activity among *other* employees. Because the record provides no support for such a purpose, I believe this precludes a finding that Respondent's actions violated the Act.

B. Respondent's Conduct does not Involve Dual Motives Subject to Scrutiny Under Wright Line

Even if *Wright Line* were otherwise applicable here, it applies only in dual-motive cases, and this is not a dual-motive case.[30] The record establishes that Respondent discharged the Boilermakers-represented welders for one reason and one reason only: it performs craft work, such as welding, solely under collective-bargaining agreements. Thus, when the Region determined that the Respondent and the Boilermakers had failed to reach agreement on a successor 8(f) contract, the Respondent repudiated its bargaining relationship with the Boilermakers (as it was entitled to do under *Deklewa*[31]), ceased

[21] Id.

[22] 268 NLRB 1268 (1984), enfd. 764 F.2d 1423 (11th Cir. 1985).

[23] Id. at 1271.

[24] Id. at 1273–1275.

[25] Id. at 1280.

[26] The judge rendered an initial decision based exclusively on a *Wright Line* "dual motive" analysis, and the Board remanded the case for further consideration as to the applicability of *Darlington*. The Board's remand in *Purolator* was unpublished, but it is referenced in the Board's subsequent opinion, 268 NLRB at 1268 fn. 3, and in the judge's "supplemental decision on remand," id. at 1287–1291, which appears following his initial opinion, id. at 1270–1287.

[27] Id. at 1290 fn. 1.

[28] Id. at 1268 fn. 3 (emphasis added).

[29] Thus, there is no evidence that Respondent temporarily ceased operations so that "employees, by renouncing the union, could cause the plant to reopen." *Darlington*, 380 U.S. at 273. Indeed, as noted in the introduction, the Respondent as a construction employer had the absolute right, under *Deklewa*, to abandon its Boilermakers' relationship and to enter into a new prehire agreement with the Pipefitters, without regard to employee sentiments regarding either union. Respondent's prior employees were not employed when Respondent resumed welding operations, but these arrangements are not alleged to be unlawful.

[30] That explains why, as the judge noted, "[n]either the Acting General Counsel nor the Union argued that this case should be decided under . . . *Wright Line*."

[31] 282 NLRB at 1377–1378 (holding that upon the expiration of an 8(f) agreement, "the signatory union will enjoy no presumption of

performing all work requiring craft labor supplied by the Boilermakers (in keeping with its longstanding practice), and terminated the employment of its Boilermakers-represented employees (who had no work to do). The Respondent's decades-old practice of performing craft work with employees referred by its trade-union partners under collective-bargaining agreements was the one and only reason for the discharges, and a dual-motive analysis does not apply.

C. Respondent's Conduct was not Unlawful Even if Wright Line Applies

But even assuming *Wright Line* applies, and further assuming that the General Counsel met his initial burden,[32] the Respondent established its affirmative defense—again, by showing that it discharged its Boilermakers-represented employees based on its longstanding practice of performing craft work under collective-bargaining agreements. My colleagues find that the Respondent failed to establish this defense because they believe it did not adhere to this practice with perfect consistency. They cite two instances of nonadherence. They are incorrect on both counts.

First, my colleagues contend that the Respondent failed to adhere to its policy between October 30 and November 12. To the contrary, Tom Valentine, Respondent's senior project manager and Association chairman, reasonably believed that a new collective-bargaining agreement had been concluded prior to November 1. On a date the record fails to pin down with exactitude, but sometime before November 1, Valentine was informed that the parties had reached an agreement and that the Union's membership had ratified it. Moreover, the record shows that as of November 1, the Union also believed that a new agreement had been reached. On November 1, Boilermakers Business Representative Gary Aycock sent Valentine an email attaching what Aycock called "the new Hawaii Wage/Benefit Rates that are effective October 1, 2010." Since the parties' October 8 agreement formally extending the 2005–2010 CBA until October 29 provided that any successor agreement "[would] be paid retroactive to the expiration (September 30, 2010) of the current Hawaii Articles of Agreement" (GC Exh. 3), the only basis for Aycock to assert that new wage and benefit rates were in effect retroactive to October 1 was his belief that a successor agreement had been reached and ratified. Valentine's reply to Aycock's email, also dated November 1, reaffirms his reciprocal belief that the parties had reached an agreement. In that reply, Valentine disputed two items Aycock included in the "Wage/Benefit Rates" on the ground that they "were not discussed and are not included in the agreement." Although the parties continued to disagree whether those two terms were or were not part of the agreement, Valentine testified that he believed the parties had an agreement. As shown, that belief was formed prior to November 1.

Second, my colleagues point to the period from October 1 to October 7—i.e., from the day after the 2005–2010 CBA expired to the day before the parties formally agreed to extend the 2005–2010 CBA through October 29—as another period during which the Respondent failed to adhere to its practice of performing craft work only with a collective-bargaining agreement in place. Here, I believe my colleagues fail to appreciate the nature of the Respondent's collective-bargaining relationships, which historically had been "very cooperative," in the words of HDCC President Wilson. The evidence shows that in practice, the Respondent and the unions with which it partners have treated hiatus periods between 8(f) contracts as contract extensions. Thus, Wilson testified that when September 30, 2010, arrived and a successor agreement had not yet been reached,

> I expected, *as on several other occasions in recent years* and the time I'm familiar with it where agreement was not reached between the [e]mployer and the [u]nion, that the conditions of *the current agreement* continued to be enforced, workers continued to show up to work and management continued to do that while the bargaining continued. And so my expectation was that bargaining would continue, but the idea that they would not work or potentially not work as subsequently occurred, I did not expect.

(Tr. 95–96 (emphasis added).) Wilson refers to just-expired agreements as "current" agreements, with which both parties continued to comply while bargaining progressed. Valentine's response to Local 627 Business Manager Meyers on September 30 reflects the same expectation. That evening, Meyers telephoned Valentine to inform him that the membership had rejected the Respondent's latest offer.

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majority status, and either party may repudiate the 8(f) bargaining relationship").

[32] In assuming for argument's sake that the General Counsel met his initial burden under *Wright Line*, I note that the Respondent's actions clearly show that it did not harbor animus towards its welders because of their affiliation with the Boilermakers. The Respondent twice requested that the Pipefitters accept those individuals without requiring them to meet the Pipefitters' referral requirements. When the Pipefitters refused to do so, the Respondent contacted the former employees, told them what they would have to do to register with the Pipefitters, and provided a facility and materials so that they could practice for the Pipefitters' welding test. In short, the Respondent made every effort to enable its former employees to be referred back to its employ if they so chose. At the same time, by discharging them, it left them free to choose to remain Boilermakers, which they could not have done had they remained employed by the Respondent. See infra.

Meyers wanted to resume bargaining immediately, but Valentine told him that he did not think that was necessary since (in his view) the terms and conditions of the 2005–2010 CBA continued to apply (Tr. 193–194). Thus, from the Respondent's perspective, during hiatus periods (such as the period from October 1 to 7), it *was* adhering to its practice of performing craft work only under collective-bargaining agreements because it deemed those agreements extended during such periods by tacit agreement.[33]

In sum, the Respondent's practice, to which it consistently adhered, was to perform all craft work under collective-bargaining agreements. Between October 1, 2010 and February 14, 2011, the Respondent continued to perform welding work using Boilermakers-represented welders (when it could get them), believing that (a) the 2005–2010 CBA continued to apply in keeping with past practice during hiatus periods (October 1–7), or (b) the 2005–2010 CBA continued to apply under the parties' October 8 extension agreement (October 8–29), or (c) a successor agreement was in place, notwithstanding differences of opinion concerning two items (on or about October 30 forward). On February 14, 2011, the Region found that the parties had not reached a successor agreement. On February 17, in keeping with its consistent practice of performing craft work solely under collective-bargaining agreements, the Respondent ceased performing all Boilermakers-craft work and discharged its remaining Boilermakers-represented employees, who had no work to do. Even assuming, as my colleagues find, that the General Counsel met his initial burden under *Wright Line* with respect to the discharges, the Respondent has established its affirmative defense under *Wright Line* by showing that those employees would have been discharged in any event based on the Respondent's decades-long practice of performing all craft work under collective-bargaining agreements.

D. Respondent's Conduct was not "Inherently Destructive" Under Great Dane

I also disagree with my colleagues' alternative finding that the discharge of the Boilermakers-represented welders was "inherently destructive" of employee rights. Specifically, they find that the discharge was "inherently destructive of their right to membership in the union of their choosing." They acknowledge, however, that the Respondent would have acted lawfully had it laid off those employees instead. But the truth is, a layoff would have impacted their union-membership choice just the same as the discharge did.

Section 8(a)(3) does not prohibit all types of "discrimination." Rather, it only prohibits "discrimination . . . *to encourage or discourage membership in any labor organization*." See also *NLRB v. Radio Officers (A. H. Bull S.S. Co.)*, 347 U.S. 17, 43 (1954) (Sec. 8(a)(3) does not "outlaw discrimination in employment as such; only such discrimination as *encourages or discourages membership in a labor organization* is proscribed" (emphasis added).) Although a motive to discourage membership in a labor organization must be proven in every case—usually based on evidence of subjective intent—the Supreme Court has held that "[s]ome conduct may *by its very nature contain the implications of the required intent*; the natural foreseeable consequences of certain action warrant the inference." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963) (quoting *NLRB v. Radio Officers*, 347 U.S. at 44) (emphasis added; internal quotation marks omitted). "That is, some conduct 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.'" *NLRB v. Great Dane Trailers*, 388 U.S. at 33 (quoting *NLRB v. Erie Resistor*, 373 U.S. at 231) (emphasis added).[34]

My colleagues acknowledge that the Respondent was free to suspend welding work on February 17 until it had

[33] Even assuming there was a brief gap of less than a week in Respondent's *decades-long* practice of performing all craft work under collective-bargaining agreements, I believe this cannot reasonably be regarded as defeating Respondent's *Wright Line* defense. Under the majority's view, the only way the Respondent could establish a valid *Wright Line* defense would have been to immediately cease all welding work the very moment the 2005–2010 CBA expired, but this would have been contrary to Respondent's long history of bridging such hiatus periods cooperatively. In this respect, not only does my colleagues' position sacrifice common sense on the altar of the law, it would clearly undermine labor relations stability—one of the core principles the Board is charged with preserving under the Act—to suggest that the Respondent here could have acted lawfully only by (i) immediately discontinuing all welding work based on a CBA hiatus of less than 1 week, and (ii) disregarding Respondent's long history of informal cooperation in dealings with the Boilermakers and multiple other trade unions. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act"); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (a "basic policy of the Act [is] to achieve stability of labor relations").

[34] The facts of *Great Dane Trailers* illustrate what the Court meant by conduct that bears its own indicia of an intent to discourage membership in a labor organization. There, the employer "refused to pay striking employees vacation benefits accrued under a terminated collective bargaining agreement while it announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike." 388 U.S. at 27. As the Court observed, "[t]he act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." Id. at 32.

reached a new 8(f) agreement with another union, and to lay off its remaining welders with an expectation of recall. The sole remaining question, therefore, is whether discharging the Boilermakers-represented employees carried "unavoidable consequences" to the exercise of the welders' right to membership in the union of their choosing that a layoff would have avoided. Only if that question is answered in the affirmative would it be reasonable to find that the discharge "bears its own indicia of [an] intent" to discourage union membership.

Against this backdrop, I believe there are two problems with my colleagues' finding that Respondent's conduct was "inherently destructive" within the meaning of *Great Dane* and the other cases, referenced above, where the employer's conduct "by its very nature" violated Section 8(a)(3) by encouraging or discouraging membership in a labor organization.

First, the Supreme Court in *Darlington* foreclosed reliance on the "inherently destructive" theory in a case such as this one, where the employer exercised its lawful right to cease operations. In *Darlington*, regarding a partial cessation of operations (where the employer's actions would be unlawful only if motivated by discrimination aimed at "chilling" union activity among remaining employees), the Supreme Court stated that even the "closing [of] a plant following the election of a union is not, absent an inquiry into the employer's motive, *inherently discriminatory*. We are thus *not* confronted with a situation where the employer 'must be held to intend the very consequences which foreseeably and inescapably flow from his actions,' . . . in which the Board could find a violation of § 8(a)(3) without an examination into motive."[35] The Supreme Court in *Darlington* elaborated:

> It does *not* suffice to establish the unfair labor practice charged here to argue that the Darlington closing *necessarily had an adverse impact upon unionization in such other plants*. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally *does not amount to a violation of § 8(a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect*. . . . In an area which trenches so closely upon otherwise legitimate employer prerogatives, *we consider the absence of Board findings on this score a fatal defect in its decision.*[36]

Second, even if such an inquiry were not precluded under *Darlington*, the hallmark characteristic of "inherently destructive" actions—that their "*very nature* contain the implications of the required intent" because of their "natural foreseeable consequences"[37]—cannot be reasonably associated with Respondent's conduct. Here, the potential union sentiments and union affiliation of Respondent's welders predictably would have been *the same* regardless of whether the Respondent *laid off* the employees when it ceased welding work subject to recall (the action my colleagues find the Act required) or *terminated* those employees (the action that Respondent actually took).

If employees had been *laid off* after the Respondent ceased welding work without a union contract, and after Respondent abandoned its relationship with the Boilermakers, the employees would have had the option of remaining Boilermakers and accepting referrals from the Boilermakers' hiring hall to other employers. Had those employees been *recalled* by the Respondent when it resumed doing welding work under its new Pipefitters' agreement, the recalled employees would have had to withdraw from the Boilermakers Union and become members of the Pipefitters (no later than their eighth day of work). Under article 17.1.20 of the Boilermakers' constitution, members are prohibited from working for a nonunion contractor.[38]

[35] 380 U.S. at 269 fn. 10 (quoting *Erie Resistor*, 373 U.S. at 228) (other citations omitted).

[36] Id. at 276.

[37] *Erie Resistor*, 373 U.S. at 227 (emphasis added; internal quotation omitted).

[38] The business manager of the member's local has authority to make exceptions, but there is *no* evidence that Business Manager Meyers would have exercised that authority here, and there *is* evidence that he would not have. Union members had already been threatened with sanctions if they worked for HDCC. As Senior Project Manager Valentine reported to the Respondent's management team on December 12, Boilermakers contacted directly by the Respondent—once the contractual 48-hour waiting period had elapsed—reported that the Union had ordered them "not to report to any HDCC job or suffer the sanctions from the [U]nion." Art. 17.5.1 of the Boilermakers' constitution spells out those sanctions, which include fines, suspension, and expulsion.

Moreover, the subsequent Pipefitters agreement, and the resulting requirement that the welders join the Pipefitters (no later than their eighth day of work), would have created yet another obstacle to their continued membership in the Boilermakers. Art. 17.1.4 of the Boilermakers' constitution prohibits members from "[m]aintaining membership in another labor organization that adversely affects the interest of this International Brotherhood"—and unlike art. 17.1.20, art. 17.1.4 does not authorize the business manager to make exceptions. Given the overlapping work jurisdictions of the Boilermakers and the Pipefitters—both supply welders to contractors—it is unlikely that membership in the Pipefitters would not be found to adversely affect the interest of the Boilermakers. Moreover, to sign the Pipefitters' out-of-work list, the Pipefitters required HDCC's former employees to withdraw from the Boilermakers. Tom Caughman, one of the employees HDCC discharged on February 17, testified that "[p]reviously, back in the '90s, to get on the [Pipefitters'] out-of-work list you would give them $50 and sign a piece or two of papers and then they would dispatch you. This time things were different. One of the forms you sign, at the bottom of the form it asks you if you're a member of another [u]nion,

Conversely, under the scenario that actually occurred—i.e., after the February 17 discharges of Respondent's welders—the welders were in precisely the same position regarding their choice of union affiliation. Before Respondent resumed doing welding work, the discharged employees were free to remain members of the Boilermakers and to accept referrals to other employers from the Boilermakers' hiring hall. After Respondent resumed welding work under its new prehire agreement with the Pipefitters, the former welders could seek work from Respondent under the Pipefitters' agreement. Similar to the options available had they been laid off, accepting Respondent's work under the Pipefitters' agreement would have required the employees to withdraw from the Boilermakers (to avoid the risk of being fined, suspended, or expelled under the Boilermakers' constitution, described above), register with the Pipefitters so they could be referred to the Respondent or another signatory Pipefitters' contractor from the Pipefitters' hiring hall (the record reveals the Pipefitters' hiring hall "bench" was empty), and join the Pipefitters no later than the eighth day of work on their new job.

Either way—whether the employees were laid off or terminated—they had the same basic choice, which was either (i) accept a referral to Respondent (under its new agreement with the Pipefitters) or another signatory Pipefitters' contractor and join the Pipefitters (no later than their eighth day of work), or (ii) remain a member of the Boilermakers and decline such work in favor of potential referrals to other employers using the Boilermakers' hiring hall (since Respondent was no longer party to a Boilermakers' agreement). The "natural foreseeable consequences" that resulted from discharging the welders, in comparison to the "natural foreseeable consequences" that would have resulted from laying them off, are identical.

In my view, only one reasonable conclusion can be drawn from the foregoing analysis. The discharge of the welders was not "inherently destructive of their right to membership in the union of their choosing," as my colleagues would have it. If it was inherently anything, it was inherently *neutral* in that regard because under either option—discharge or layoff—the employees would have faced the same choice.

It is true that, had the Respondent merely "laid off" the employees when it ceased performing welding work, it might have attempted to recall them from layoff without the need for a referral from the Pipefitters' hiring hall. Yet, I believe it is clear that nothing in the Act imposed such a legal obligation on the Respondent. These actions undisputedly commenced during the Respondent's hiatus between contracts. During that period, the Respondent had no contractual obligation regarding the appropriate treatment of employees for whom there was no work (i.e., whether to implement discharges or layoffs), nor was there any contractual obligation to recall anyone if and when welding operations resumed. Certainly, the Act did not require one course rather than the other. This is because (i) the Respondent had exercised the lawful right to abandon its Boilermakers' relationship; and (ii) Section 8(d) of the Act prohibits the Board from imposing substantive contract terms on an employer.[39] Moreover, had the Respondent attempted to "recall" welders represented by the Boilermakers—when the Respondent was party to its new agreement with the Pipefitters–this would clearly have breached the Pipefitters agreement.[40] In short, the path pursued by the Respondent was the only one in which its former employees could be reemployed by the Respondent without making the Respondent liable for breaching the Pipefitters' agreement (which it lawfully entered into) and without exposing the Respondent's former employees to the risk of being fined by the Boilermakers (whose constitution prohibits working for nonsignatory contractors).

If one examines the situation from a wider perspective, it is equally apparent that the Respondent's discharge of

and then it said words to the effect that you had to get a withdrawal from the other [u]nion" (Tr. 175).

[39] Sec. 8(d) states that the duty to bargain collectively does not require a party "to agree to a proposal or require the making of a concession." See also *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), where the Supreme Court stated: "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. *One of these fundamental policies is freedom of contract.* While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree *would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract*." Id. at 107–108 (footnotes omitted) (emphasis added). The constraint associated with Sec. 8(d) prevents the Board from imposing contract terms regardless of whether, as was the case here, no agreement is presently in effect.

[40] The Pipefitters' agreement requires the Respondent to "secure all employees covered by this agreement through the employment office of the union." R. Exh. 22 at Bates No. HDCC 000517. As an exception to this requirement, the Respondent may employ any person "[i]n the event that the Union does not dispatch any applicants within three (3) working days following the day of the request of the individual employer." Id. at Bates No. HDCC 000518. That is the sole exception. As my colleagues observe, under Sec. 8(f)(2) the Pipefitters would not have been able to enforce the union-security clause of the Pipefitters' agreement against employees recalled from layoff until the eighth day following their recall. But Sec. 8(f)(2) would not prevent those recalls from constituting a contract.

its Boilermakers-represented welders was not inherently destructive of their rights under the Act. First, the Respondent did not discharge the employees and continue performing welding work. It ceased performing all such work, in keeping with its longstanding business practice of performing craft work only under collective-bargaining agreements. With no work to perform, the Respondent had to choose between discharging its welders and laying them off with an expectation of recall, as my colleagues acknowledge. Nothing in the Act required the Respondent to choose one option over the other. Second, as explained above, the effect on employees' exercise of their right to membership in the union of their choice would have been the same under either option, layoff or discharge. Thus, it cannot be said that discharging them carried "unavoidable consequences" to the exercise of the welders' right to membership in the union of their choosing that a lay off would have avoided, such that the discharge bore "its own indicia of [an] intent" to discourage union membership. Third, having lost the Boilermakers as a labor source, the Respondent needed to secure a new source, and it had already identified the Pipefitters as an alternative well before February 17, 2011, the discharge date.[41] Fourth, the Respondent, long accustomed to dealing with trade unions, would naturally assume—as proved true—that the Pipefitters would insist on an exclusive referral system and union security, precluding the possibility that the former employees could have remained in HDCC's employ as members of the Boilermakers. Fifth, at its initial meeting with the Pipefitters on February 18 or 19 and again on February 23 when it signed an agreement, the Respondent tried to persuade the Pipefitters to accept its former employees without their having to meet the Pipefitters' registration requirements. Sixth, when the Pipefitters refused this request, the Respondent did everything it reasonably could to help its former employees return to its employ if they so chose—informing them what they had to do to register with the Pipefitters, and furnishing a shop, tools, equipment, and materials necessary for those workers to prepare for the Pipefitters' welding test. In my opinion, one cannot reasonably infer from this course of conduct an intent to discourage membership in any labor organization.

[41] In a December 12, 2010 email to the Respondent's management team, Valentine wrote: "With the current situation and the ongoing contract problems with the boilermakers I believe it's time for HDCC to seriously consider evaluate [sic] if our relationship with the boilermakers is the best option moving forward. For the past few years we've noticed that the skill level and professionalism of the boilermakers has been eroding at an alarming rate. With the new contract their compensation will be on par with pipefitters . . . ." (R. Exh. 15.)

To support their finding of a violation under *Great Dane*, my colleagues principally rely on two cases: *CIMCO*, 301 NLRB 342 (1991), enfd. 964 F.2d 513 (5th Cir. 1992), and *Jack Welsh*, 284 NLRB 378 (1987). Both are clearly distinguishable from the circumstances presented here.

In *CIMCO*, the union *told* the employer that the union would not object if its members continued to work for CIMCO after the IBEW withdrew from the GPA agreement, and CIMCO discharged them anyway.[42] Here, there is no evidence the Respondent was ever informed that Business Manager Meyers would permit Boilermakers to be employed by the Respondent absent a collective-bargaining agreement. I also believe the record contradicts my colleagues' contention that the Respondent had no basis for doubting the discriminatees' willingness to work in the absence of a CBA. Valentine was expressly told by Boilermakers welders he contacted in December 2010—when the Boilermakers were failing to honor the Respondent's dispatch requests—that the Union had ordered them "not to report to any HDCC job or suffer the sanctions from the [U]nion." Additionally,

[42] In *CIMCO*, the respondent employer, which performed maintenance work at chemical facilities nationwide, was party to a General Presidents' Project Maintenance Agreement (the "GPA agreement") involving a number of international unions, including the IBEW. The GPA agreement covered all CIMCO's maintenance work. Although the union parties to the GPA agreement were internationals, employees were referred to CIMCO under the GPA agreement by local unions. One of CIMCO's projects involved maintenance work at a Sterling Chemical plant in Texas. IBEW Local 527 referred electricians to CIMCO at the Sterling site.

Midway through the Sterling project, the president of the IBEW—the International—announced that it was withdrawing from the GPA agreement effective December 31, 1989. Bruce Uffelman, CIMCO's labor relations manager, was concerned that as a result, Local 527 would stop referring workers to the Sterling site. The International assured Uffelman that it was leaving that decision entirely up to the Local, but Uffelman never asked Local 527 what it intended to do. Meanwhile, one of CIMCO's site superintendents asked Local 527's business manager whether Local 527 would object to its members working at the Sterling site after December 31. The business manager replied that he would not object. The site superintendent reported that response to CIMCO's site manager, and the site manager reported it to Uffelman. Notwithstanding the business manager's assurances, of which Uffelman was aware, on the last workday of 1989 CIMCO's site manager (at Uffelman's instructions) assembled the electricians and told them that because the IBEW was withdrawing from the GPA agreement, CIMCO would consider them all to have voluntarily quit effective December 31 (eliciting vocal protests to the contrary). Uffelman testified that the electricians were deemed to have voluntarily quit because they had been referred by Local 527. CIMCO advertised for electricians in local newspapers, and many of the discharged electricians applied. However, CIMCO instructed its site manager to hire a "core complement" of nonunion applicants before hiring any applicants who had "voluntarily quit." CIMCO hired a "core complement" of roughly 20 nonunion electricians before considering and hiring any electricians formerly referred by Local 527.

even if Meyers would have permitted Boilermakers-represented employees to work after HDCC contracted with the Pipefitters, the Pipefitters would have required those individuals to withdraw from the Boilermakers before permitting them to sign its out-of-work list. See supra fn. 37. Furthermore, in *CIMCO*, the employer refused to hire or consider its former employees until it had hired a "core complement" of nonunion employees. Here, the Respondent went to considerable lengths to help its former employees return to its employ. It asked the Pipefitters, twice, to accept the former employees for referral without having to meet the Pipefitters' usual requirements, including a welding test—and when the Pipefitters declined to do so, the Respondent immediately notified its former employees of the Pipefitters' requirements, provided a facility for them to practice for the test, furnished the necessary tools, equipment, and materials, and even provided coaching. *CIMCO* does not support my colleagues' 8(a)(3) finding.

The other case cited by my colleagues—*Jack Welsh Co.*, 284 NLRB 378 (1987)—is no more convincing. In *Jack Welsh*, the employer decided not to renew its 8(f) contract with Carpenters Local 690 and repudiated the bargaining relationship. The owner told his nephew, who was an employee, that he was "going open shop." The nephew replied that he would have to quit because he belonged to a union. The owner then discharged the rest of the union carpenters, based on the assumption that they would also have to quit. The Board found that those discharges violated Section 8(a)(3) under *Great Dane*, reasoning that it was incumbent on the employer to give those employees an opportunity to decide for themselves whether to quit and remain union members, or continue working for the respondent after it went "open shop" and withdraw from the union.

The key difference between *Jack Welsh* and the instant case is that here, employees were not denied the right to decide for themselves whether to quit and remain members of the Union or continue working and withdraw from the Union, for the simple reason that there was no "continue working" option. When the Region decided that HDCC and the Boilermakers did not have an agreement, HDCC stopped performing welding work altogether, in keeping with its practice of performing such work only under collective-bargaining agreements. With welding work at a standstill, there was no work for the employees to do, and no choice for employees to make between quitting or working. The only choice was for the Respondent to make between discharging its employees or laying them off and recalling them once it had a contract with the Pipefitters. And, as explained above, that choice was neutral with respect to employees' exercise of their right to membership in the union of their choice, since either way (layoff/recall or discharge), the employees would have to choose between the Boilermakers and the Pipefitters. As also explained above, the Respondent's choice was *not* neutral with respect to risking a contract breach with the Pipefitters. Recalling its employees from layoff would have exposed the Respondent to a claim of having breached the exclusive referral article of the Pipefitters agreement. Discharging them and facilitating their transition to the Pipefitters for dispatch under that article was the risk-free alternative in that regard.

CONCLUSION

In sum, I believe the Respondent's actions here were permissible under *Deklewa*, which governs prehire agreements, and under *Darlington*, which establishes that employers can cease operations regardless of their motivation (subject to limited exceptions that have no application in the instant case). Moreover, if this case is analyzed under *Wright Line* or *Great Dane*, the record establishes that the Respondent did not violate the Act. As a final matter, my colleagues find that the Respondent had available only a single lawful course of action, which was to place employees on "layoff" subject to "recall" when it lawfully ceased its welding operations. However, this conclusion improperly disregards the fact that the Respondent was in a hiatus between contracts and therefore had no contractual obligations regarding employees displaced by a lack of work; the Respondent had no obligation to engage in bargaining regarding this issue because it had lawfully abandoned its relationship with the Boilermakers following expiration of the Boilermakers' agreement; and the Board is prohibited from imposing these types of substantive contractual terms on employers or unions.

For these reasons, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because of your membership in, activities on behalf of, or referral from, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Kona Akuna, 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 full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kona Akuna, 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 whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharges of the above named employees, and WE WILL, within 3 days thereafter, notify each of them that this has been done and that the discharges will not be used against them in any way.

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/37-CA-008316 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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 28, 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 Kona Akuna, 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)(3) and (1) of the National Labor Relations Act (the Act).

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

FINDINGS OF FACT

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 12 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

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.)[1]

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.

B. The Collective-Bargaining Relationship

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.[2] For roughly 8 years up until February 2011, Valentine was chairman of the Association.

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.

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.)

On Friday October 1, 2010, the Boilermakers' 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 Aycock, 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.)

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-cent-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

In December, Hawaiian Dredging contracted with HECO to provide about 20 Boilermaker welders for a powerplant 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.) Superintendent Forrest Ramey notified management that the Boilermakers had not dispatched a worker on December 6. Caughman contacted Aycock to inquire, and Aycock stated that Meyers 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

[1] 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.

[2] The other members were Arakaki Mechinical and Elayer Enterprises.

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.[3] 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 workday. (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.[4]

E. Contract with the Pipefitters Union

On February 18, 2011, Valentine and Guinaugh met with representatives of the Plumbers and Pipefitters Union, Local 675 (the 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 the 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.[5] The Respondent and the Pipefitters became parties to a CBA on February 23.[6] (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 Piperfitters 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, 6 out of the 13 alleged discriminates had registered with the Pipefitters. By May 12, 2011, eight had registered. (R. Exh. 23.) The additional five alleged discriminates did not register.

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

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

[3] The letter is dated February 14 and date-stamped February 15, which was a Tuesday.

[4] The parties entered into a stipulation on this fact. (Tr. 9–10.)

[5] 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.

[6] The CBA between the Pipefitters' Union and the Respondent was also pursuant to Sec. 8(f) of the Act.

[7] The Association's termination of its 8(f) relationship with the Union is not at issue in this case. The Association is not named in the

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

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 case law 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 8(f) relationship with the Union, and the parties therefore had no continuing contractual obligations to each other. The majority of the case law also concerns replacing union workers with nonunion 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.

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.

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.

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.

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.[8] Once a new CBA was in place, the Respondent facilitated returning the employees to work, as detailed above, on a nondiscriminatory 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 Building 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.

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.

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 *American Ship Building. Co*., 380 U.S. at 311–313:

> [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.

complaint. The Union had contended that termination of the 8(f) relationship violated the Act, but this charge was investigated and dismissed.

[8] 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 Section 8(a)(3) absent some unlawful intention.

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.

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 reemployment.

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.[9] 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. Bridge Workers Local 103*, 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 8(f) agreements provide to both parties, constitutes a legitimate business justification.[10]

The Acting General Counsel and the Union assert that the Board's decision in *CIMCO*, 301 NLRB 342 (1991), enfd. 963 F.2d 513 (5th Cir. 1992), controls and requires me to find the Respondent violated Section 8(a)(3) and (1). There are material distinctions, however, between *CIMCO* and the instant case. In *CIMCO*, the union terminated its 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 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 nondiscriminatory 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.[11]

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 an 8(f) agreement between the employer and the union, the company went "open shop" and Welsh, the owner, terminated

[9] 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 nondiscriminatory reason for its actions, and the Acting General Counsel has not presented evidence to show this was pretext.

[10] 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.

[11] 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.

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 discrimnatees' continued employment, as detailed above. There is no evidence to support a finding that the Respondent attempted to subvert unionization or the Act.

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 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 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 Piperfitters pursuant to a valid security clause after the 7-day grace period Section 8(f) provides. Citing to *Acme Tile & Terazzo Co*., 306 NLRB 479, 480–481 (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 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 no hint that the Respondent was discouraging union activity or any rights protected under the Act.[12]

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

CONCLUSION OF LAW

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

[Recommended Order for dismissal omitted from publication.]

[12] 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.