

**Nos. 15-1039 & 15-1424**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS LOCAL 627**

**Intervenor for Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND  
CROSS-APPLICATION FOR ENFORCEMENT OF  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

Hawaiian Dredging Construction Company, Inc. (“the Company”) is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths,

Forgers and Helpers, Local 627 (“the Union” or “the Boilermakers”) is an intervenor before the Court, and was the charging party before the Board. The Company, the Board’s General Counsel, and the Union appeared before the Board in Case 37-CA-008316. There were no amici before the Board, and there are none in this Court.

### **B. Rulings Under Review**

This case is before the Court on the Company’s petition to review and the Board’s cross-application to enforce a Decision and Order the Board issued on February 9, 2015, reported at 362 NLRB No. 10.

### **C. Related Cases**

The ruling under review has not previously been before this Court or any other court, except to the extent that the Union initially petitioned for review in the Ninth Circuit (No. 15-70504). The Ninth Circuit dismissed that case on October 21, 2015, for lack of appellate jurisdiction. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben

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NATIONAL LABOR RELATIONS BOARD

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Dated at Washington, DC  
this 4th day of January, 2017

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## GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. §§ 151 <i>et seq.</i> )
ALJ	The administrative law judge who heard this case
Association	Association of Boilermakers Employers of Hawaii
Board	The National Labor Relations Board
Boilermakers	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627; the Intervenor in this case and Charging Party before the Board
Br.	The Company's opening brief to this Court
Company	Hawaiian Dredging Construction Company, Inc.; the Petitioner and Cross-Respondent in this case and Respondent before the Board
HECO	Hawaiian Electric Company
JDA	The Joint Deferred Appendix
NLRB	The National Labor Relations Board
Pipefitters	Local 675 of the Plumbers and Pipefitters Union
Union	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627; the Intervenor in this case and Charging Party before the Board

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**ON PETITION FOR REVIEW AND  
CROSS-APPLICATION FOR ENFORCEMENT OF  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Hawaiian Dredging Construction Company, Inc. (“the Company”) to review an order issued by the National Labor Relations Board (“the Board”) against the Company, and the

Board's cross-application to enforce that order. The Board's Decision and Order issued on February 9, 2015, and is reported at 362 NLRB No. 10.<sup>1</sup>

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) ("the Act"), which empowers the Board to remedy unfair labor practices. The Board's Decision and Order is final under Section 10(e) and (f) of the Act, which provides the basis for this Court's jurisdiction. (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on February 19, 2015; the Board filed its cross-application for enforcement on November 25, 2015. Both filings were timely because the Act places no time limit on such filings. The International Brotherhood of Boilermakers Local 627 ("the Union" or "Boilermakers") has intervened on the Board's behalf.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging 13 employees based on their membership in the Union.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act are contained in the Statutory Addendum.

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<sup>1</sup> "JDA" refers to the joint deferred appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

## STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging, laying off, or terminating 13 employees on the basis of their affiliation with the Union. (JDA 1; 202-09.) Following a hearing, an administrative law judge issued a recommended decision and order dismissing the complaint. On February 9, 2015, after the General Counsel and the Union filed exceptions, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting) issued its Decision and Order finding, contrary to the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by discharging the 13 employees because of their affiliation with the Union. (JDA 1.)

### I. THE BOARD'S FINDINGS OF FACT

#### A. **The Company's Operations and Collective-Bargaining Relationship with the Union; the 2010 Contract Negotiations**

The Company is the largest general contractor in Hawaii and employs approximately 375 craft employees. (JDA 1; 101-02.) At all relevant times, the Company was a member of Association of Boilermakers Employers of Hawaii ("the Association"), and company manager Tom Valentine was the Association's

chairman.<sup>2</sup> (JDA 1; 71-72.) For at least 20 years, the relationship between the Association and the Union (collectively, “the parties”) was governed by a prehire collective-bargaining agreement under Section 8(f) of the Act, 29 U.S.C. § 158(f).<sup>3</sup> (JDA 1; 258-93, 73-74, 82.) Pursuant to that agreement, the Union provided the Company with employees to perform welding, rigging, equipment setting, piping, and PVC work. (JDA 1; 83.) Those employees worked for the Company’s power and industrial division. (JDA 21; 68, 80.) The Company is Hawaii’s principal power and industrial contractor. (JDA 21; 101.) Employees worked on the same project to completion or they could be transferred to other jobs. (JDA 21; 85.)

The parties’ collective-bargaining agreement was due to expire on September 30, 2010. (JDA 1; 278, 74, 104.) That evening, Allen Meyers, the

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<sup>2</sup> At relevant times, the Association consisted of the Company and two smaller employers. (JDA 21 n.2; 72-73.) The Association’s roles included negotiating and administering collective-bargaining agreements with the Union; in doing so, the Association acted as the representative of its employer-members, including the Company. (JDA 21; 71-72.)

<sup>3</sup> An 8(f) agreement is a type of collective-bargaining agreement specific to the construction industry, which can be entered into without a showing that the union represents a majority of a company’s employees (contrary to regular agreements under the Act, which require such a showing). *See generally NLRB v. Local Union No. 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 344-46 (1978); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003). Because there is no presumption that a Section 8(f) union enjoys majority support, an employer is not obligated to bargain with the union after expiration of an 8(f) agreement. *Nova Plumbing*, 330 F.3d at 535.

Union's business agent, contacted Valentine, who was then the Company's senior project manager for power and industrial work as well as the Association's chairman. Meyers told Valentine that the employees had voted against the Company's most recent contract proposal, that the parties had no contract, and that they should resume bargaining that night. (JDA 3; 69-70, 135-36.) Valentine responded that that was not necessary, because work could continue under the terms of the expiring contract, but Meyers expressly disagreed. (JDA 3; 70, 136-37.) The contract, by its terms, expired that night. (JDA 3; 111-12.)

The next day, Union business representative Gary Aycock sent an e-mail to Valentine informing Valentine that the Union remained available to pursue negotiations toward a new contract. (JDA 1; 338, 79, 105, 138.) Aycock attached to his e-mail a letter the Union had received from its attorney, which advised the Union that, because the agreement had expired, its members were free to stop working without notice. (JDA 1; 339, 105, 138.) The same day, a group of union-represented employees at one worksite informed the Company's superintendent that they would not work that day because the contract had expired. (JDA 1; 340, 106, 139, 173.) The employees resumed work the following workday. (JDA 21; 113, 173.)

On October 8, 2010, the parties agreed to extend the terms of their expired agreement until October 29. (JDA 1; 294, 74-75, 139-40.) They were unable to

reach an agreement by that deadline, however, and negotiations continued into November. (JDA 1; 341, 140-41.) On November 1, the Union e-mailed a schedule of wages and benefits that it believed would apply in a successor contract, but Valentine replied by e-mail the same day to dispute two of the Union's stated items. (JDA 4; 341-42, 70, 140-41.) On November 12, Valentine sent the Union four copies of the collective-bargaining agreement that he believed the parties had negotiated, which did not contain the disputed items. (JDA 1; 343, 366, 141-42.) The Union responded on November 17 with several corrections and the addition of the two disputed benefits. (JDA 1; 367-68, 143.) On December 6, Valentine informed the Union that the Company did not agree to the two additional terms and would not sign the contract because it did not reflect the parties' agreement. (JDA 1; 371.) On the same day, the Association filed an unfair-labor-practice charge with the Board's regional office, alleging that the Union had violated the Act by refusing to sign the contract and insisting on terms that had not been negotiated. (JDA 1; 372.)

**B. The Association Terminates its Bargaining Relationship with the Union; the Company Discharges its Boilermakers-Affiliated Employees and Signs a Bargaining Agreement with the Pipefitters**

On February 17, 2011, the Association received notice that the Board's Regional Director had dismissed the Company's unfair-labor-practice charge against the Union, finding that the Company and the Union had not reached a

complete collective-bargaining agreement. (JDA 1; 381-82.) Later that day, Valentine sent the Union a letter terminating the Association's bargaining relationship with it. (JDA 1, 11, 22; 295-96, 107, 160-61.) The letter stated the Regional Director's finding that there was no existing agreement between the parties and advised the Union that, because the Association's prior agreement with the Union had terminated on September 30, 2010, the Association did not intend to utilize members of the Union for future work. (JDA 1; 295.) Valentine's letter added that "the Union does not appear to be genuinely interested in continuing a partnership between its members and Hawaii contractors. Consequently, we are terminating our relationship with the Union effective immediately." (JDA 295.)

That same day, the Company terminated all its employees who were represented by the Union and temporarily discontinued welding operations. (JDA 1-2; 76-78, 168, 178.) Company President William Wilson directed that separation notices be prepared for each employee, stating the reason as "contract has expired" or "Boilermaker contract has expired," and Valentine initialed each notice to indicate his approval of the terminations. (JDA 2; 297-310, 84, 161.) At the end of the workday, each employee was given his separation notice and paycheck. (JDA 1-2; 297-310, 77, 93.) The discharges were not due to a lack of work, and employees were not told that there was either a lack of work or a quality problem with their work. (JDA 22; 297-310, 66-67, 90-91, 96.) Further, the employees

were given no information at that time about any possibility of recall or rehire.

(JDA 2 n.3; 89, 93-94.)

During the following week, representatives of the Company met twice with representatives of Local 675 of the Plumbers and Pipefitters Union (“the Pipefitters”). On February 23, 2011, the Company’s power and industrial division entered into a collective-bargaining agreement with the Pipefitters. (JDA 2; 384-477, 81, 162-63.) Shortly after, the Company informed discharged employees that they should speak to the Pipefitters’ leadership if they wanted to work again for the Company. (JDA 2; 187-89.) A few weeks later, on March 1, the Company resumed its welding operations, using Pipefitters-represented employees. (JDA 2; 168, 179.) Eight of the 13 discharged employees registered with the Pipefitters; the first of them was dispatched to work for the Company on March 22, 2011.<sup>4</sup> (JDA 2; 478, 179-80.)

## II. PROCEDURAL HISTORY

On May 12, 2011, the Union filed an unfair-labor-practice charge with the Board. (JDA 20; 192.) After an investigation, the Board’s Acting General Counsel issued a complaint and amended complaint alleging that the Company

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<sup>4</sup> Prior to March 22, the Pipefitters dispatched to the Company other workers who were not its prior employees and Gordon Caughman, an admitted Company supervisor or agent who is not a named discriminatee. (JDA 2; 478, 86-87, 179-81.)

discharged 13 employees because they were members of the Union, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). (JDA 1; 195-96, 204.) On February 4, 2013, following a hearing, Administrative Law Judge Eleanor Laws issued a recommended order dismissing the complaint. (JDA 20-25.) The Acting General Counsel and the Union both filed exceptions to have the judge's recommended order reviewed by the Board.

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On February 9, 2015, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting) issued a Decision and Order reversing the judge and finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging 13 employees based on their union affiliation. (JDA 1-20.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, 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, 29 U.S.C. § 157. (JDA 7.) Affirmatively, the Board's Order requires the Company to fully reinstate the discharged employees to their former positions, purge its files of any reference to the unlawful discharges, and give notice to the affected employees once this has been done. (JDA 7.) The Order also requires the Company to make the discharged employees whole for any loss of

earnings or benefits suffered as a result of its actions. (JDA 7-8.) Finally, the Order requires the Company to post a remedial notice. (JDA 8.)

### SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act when, on February 17, 2011, it notified all its Boilermakers-affiliated employees that they were no longer employed because the Company had terminated its contract with the Union. The Board properly found that, under either of two analytical frameworks, the employees' discharges discouraged their membership in the Union in violation of Section 8(a)(3) and (1) because they were based solely on the employees' union affiliation.

First, substantial evidence supports the Board's finding that the Company's discharge of 13 Union-affiliated employees was unlawful under the motive-based framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Initially, the General Counsel had demonstrated that the employees' affiliation with the Union was a motivating factor in their discharges by showing the existence of protected conduct, Company knowledge, and antiunion animus. The employees' alignment with the Union was undisputedly both protected and known to the Company. In finding animus, the Board reasonably relied on the Company's summary discharge of all of its Boilermakers-represented employees and *only* those employees, as well as on the Company's

declaration that it would not use Boilermakers members for future work. As the Board explained, although an employer may terminate its Section 8(f) agreement with a union, it may not discriminatorily discharge its employees because of their affiliation with that union.

The Company failed to meet its rebuttal burden, because it had not consistently abided by its own asserted policy of performing work only under a contract. During two recent periods, the Company continued Boilermakers-covered work without a contract. The Company's contention that it thought it had a contract in place at those times is neither supported by the record nor reasonable. Further, the Company's belated claim that having a bargaining relationship and negotiations sufficed contradicts its own stated reasons for needing a contract: the need for certainty about labor costs and staffing.

Further, substantial evidence supports the Board's alternative finding that that the discharges were unlawful under the framework set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). First, the Board properly found that the discharges were "inherently destructive" of represented employees' Section 7 rights. "Inherently destructive" conduct directly penalizes employees for union activity or is potentially disruptive of the future opportunity to organize; because that conduct speaks for itself no independent proof of antiunion motivation is needed. In line with two factually similar cases, the Board concluded that the mass

discharge of Boilermakers-affiliated employees was “inherently destructive,” as it would discourage employees from exercising their right to join a labor organization. And the unanimous Board reasonably found that the employees had been discharged—as happened in those cases—not merely laid off. Further, the Board found that the Company failed to meet its burden of establishing a legitimate and substantial justification for the discharges, because it had not consistently followed its claimed policy of performing craft work only under a contract. The Board rejected dissent arguments that the employees would have been in a similar situation whether they were discharged or laid off, and it reasonably found that the discharges would be unlawful even under *Great Dane*’s “comparatively slight” standard, because of the Company’s failure to establish its legitimate justification.

### **STANDARD OF REVIEW**

This Court “accords a very high degree of deference to administrative adjudications by the [Board].” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted). In reviewing the Board’s decision, the Court must uphold the Board’s findings of fact, and the Board’s application of law to particular facts is “conclusive,” if supported by “substantial evidence on the record considered as a whole.” Section 10(e) of the Act (29 U.S.C. § 160(e)); accord *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Bally’s Park Place*, 646 F.3d at 935. A reviewing court should not disturb the Board’s factual

findings, even if it would reach a different result on *de novo* review. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004). The Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Bally’s Park Place*, 646 F.3d at 939 (quotation marks and citations omitted).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING 13 BOILERMAKERS-AFFILIATED EMPLOYEES BASED ON THEIR MEMBERSHIP IN THE UNION**

#### **A. General Section 8(a)(3) Principles**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6 (D.C. Cir. 2008). Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging employees because of their union affiliation. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty*

*Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001). Discrimination based on employees' affiliation with a particular union, rather than another, is just as violative of the Act as discrimination based on employees' affiliation with any union, rather than none. *See, e.g., APF Carting, Inc.*, 336 NLRB 73 (2001), *enforced*, 60 F. App'x 832 (D.C. Cir. 2003); *see also Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 140 (D.C. Cir. 1967) (adopting Board finding that employer discriminated between two unions in assignment of overtime to the employees they represented).

The finding of a violation under Section 8(a)(3) usually turns on whether an employer's action against an employee "was motivated by an antiunion purpose." *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 311-13 (1956); *accord Radio Officers' Union v. NLRB*, 347 U.S. 17, 43-44 (1954); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). In such cases the Board applies the well-established test from *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983). As the Supreme Court has recognized, however, some conduct "is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (internal quotation marks

omitted); *accord Local 702*, 215 F.3d at 16. Substantial evidence supports the Board's findings that the Company's discharge of all its Boilermakers-affiliated employees violated Section 8(a)(3) under either analytical framework.

**B. Substantial Evidence Supports the Board's Finding that the Discharges Were Unlawful Under *Wright Line***

**1. *Wright Line* Principles**

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Before the Board, and in accordance with *Wright Line*, in order to establish unlawful discharge, the General Counsel must show that the employees' union activity was a substantial or motivating factor for the employer's action. This is done by demonstrating that: the employee engaged in protected activity; the employer had knowledge of that activity; and the employer harbored animus toward protected activity.<sup>5</sup> *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). If the General

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<sup>5</sup> Although the Company argues (Br. 29) that the General Counsel must show a link or nexus between the employees' protected activity and the action against them, the Board has stated that *Wright Line* contains no such requirement. *See Praxair Distrib., Inc.*, 357 NLRB 1048, 1048 n.2 (2011) (the General Counsel's initial burden does not require "that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action" (internal citation and quotation marks omitted); *see also TM Group, Inc.*,

Counsel makes that showing, the burden then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. *Id.* If the lawful reasons advanced by the employer for its actions were a pretext—that is, if the reasons either did not exist or were not in fact relied upon—the employer's burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 653 (D.C. Cir. 2003).

Courts will enforce the Board's finding of an unlawful discharge if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *accord Manor Care of Easton PA, LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011).

Unlawful motivation under *Wright Line* can be inferred from circumstantial as well

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357 NLRB 1186, 1186 n.2 (2011); *accord Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 218 (D.C. Cir. 2016) (finding initial burden met by showing of employees' active union support, employer's knowledge of their activity, and employer's animus toward union and its supporters). And, in any event, the Company cannot plausibly argue, in the circumstances here, that the employees' discharges were unconnected to their affiliation with the Boilermakers.

as direct evidence. *Waterbury Hotel Mgmt.*, 314 F.3d at 651. Such evidence includes knowledge of union activities,<sup>6</sup> hostility toward the union,<sup>7</sup> and the employer's reliance on implausible or shifting reasons for the action.<sup>8</sup>

Here, as detailed below, substantial evidence supports the Board's finding that the General Counsel carried its initial burden by showing that: (1) the discriminatees were undisputedly affiliated with the Union; (2) the Company was undisputedly aware of their affiliation; and (3) the Company demonstrated antiunion animus by discharging all employees who were members of the Union and *only* those employees and stating that it did not intend to use Union-represented employees in the future. (JDA 3.) In response, the Company argued that it discharged the discriminatees only because it maintained a strict practice of performing craft work only under a valid contract and there was no applicable contract once it terminated the Boilermakers agreement. (JDA 3.) Yet the evidence, as detailed by the Board, reflects that the Company knowingly operated

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<sup>6</sup> *Tasty Baking Co.*, 254 F.3d at 125-26.

<sup>7</sup> *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d at 218 (quoting *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016)) (citing *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000)); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

<sup>8</sup> *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005).

without a valid contract on at least two recent occasions. (JDA 3-4). The Board thus found that the Company failed to demonstrate that it discharged the employees because of the lack of a contract, as it asserted, rather than because they were affiliated with the Union. (JDA 3.)

## **2. The Board Reasonably Found that the Employees' Discharges Were Unlawfully Motivated**

As an initial matter, substantial evidence supports the Board's finding (JDA 3) that the discharged employees engaged in union activity and the Company knew of that activity. It is undisputed that every employee discharged was a member of the Boilermakers, and the only employees discharged were members of the Boilermakers. (JDA 3.) And, of course, their Boilermakers affiliation was known to the Company. The Board reasonably relied on these straightforward and undisputed facts as components of the General Counsel's initial burden to show antiunion motivation.

The Board also properly found that the Company demonstrated animus toward the employees' union activity. It did so, first, by its summary discharge of *every* employee represented by the Boilermakers, and of *only* those employees, when the contract was terminated. As the Board explained (JDA 3), although it is undisputed that the termination of the Section 8(f) contract with the Boilermakers was lawful, that contract termination did not privilege the Company to discharge the Boilermakers-represented employees. *Automatic Sprinkler*, 319 NLRB 401,

402 n.4 (1995), *enforcement denied on other grounds*, 120 F.3d 612 (6th Cir. 1997); *Jack Welsh Co.*, 284 NLRB 378, 379, 383 (1987).

The Board also properly considered Valentine's communication to the Boilermakers that the Association did not "intend to utilize members of the Boilermaker's [sic] Union for future work," and the Company's communications to the employees that they were being discharged because the "Boilermakers contract ha[d] ended."<sup>9</sup> (JDA 3; 295, 297-310.) Thus, the Company made it clear that it fired the employees because it was at odds with their union. This was unlawful because, although it could lawfully terminate its 8(f) relationship with the Union, it could not terminate its relationship with the employees simply because they were members of the Union. Moreover, Valentine telegraphed animus towards the Boilermakers and its members by foreclosing the possibility of working with them even in the future, not just because that contract had ended.

The Company does not dispute the employees' union membership or its knowledge, challenging only the legal significance of those facts. But, in contending that union membership alone is not sufficient protected activity to support a finding of antiunion motivation (Br. 30-31), the Company cites only

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<sup>9</sup> Valentine's letter expressly stated as the immediate reason for the termination of the bargaining relationship that "the Union does not appear to be genuinely interested in continuing a *partnership between its members and Hawaii contractors.*" (JDA 295 (emphasis added).) The letter thereby indicated that the Union was an obstacle to its members' continued employment.

*Midwest Television, Inc. d/b/a KFMB Stations*, 343 NLRB 748 (2004), a case that is readily distinguishable from this one. There, the discriminatee was the only employee subjected to adverse action although he was clearly not the only union member; there was evidence that he tried to decertify the union; and the adverse action (a pay cut) was unconnected to his union membership. *Id.* at 751. In contrast, this case requires no further proof of the discriminatees' union activities because it is undisputed that the Company discharged them because it had decided it would not employ any Boilermakers-represented employees. Thus, the Company's stated reason for the discharges – the termination of the Boilermakers contract – is undeniably connected to the employees' affiliation with the Boilermakers.<sup>10</sup> Further, in contrast to *Midwest Television*, this case involves the discharge of each and every Boilermakers member but no other employees. Such an obvious correlation can indeed suggest that membership itself is the conduct that the employer opposes and thus support an inference of causation. *Cf. Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1328 (D.C. Cir. 2012) (Board forbids “selective sanction” directed “only [at] those employees who engage in protected

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<sup>10</sup> The Company contends that it “made clear the welders were not laid off because they were members of the Boilermakers” (Br. 33), but rather because there was no contract; however, the Company cites only Valentine's after-the-fact testimony (JDA 110, 161, 169), which does not indicate that any clarity on the matter was provided to the employees themselves.

conduct”) (enforcing and quoting *Pittsburg & Midway Coal Mining Co.*, 355 NLRB 1210, 1214 (2010)).

Contrary to the Company’s contention that the evidence shows it bore no animus towards the Union or its members (Br. 31-34), the record contains ample evidence demonstrating the Company’s hostility. In particular, the Company displayed extreme frustration about problems, beginning in early December 2010, with getting Boilermakers-represented employees timely dispatched for work on a major project of the Company’s most important customer, the Hawaiian Electric Company (“HECO”). (JDA 22; 145-46.) The Company quickly understood that the Union’s delayed and partial responses to the Company’s dispatch requests for the project at HECO’s Kahe 4 plant were tactics related to the contract dispute.<sup>11</sup>

In an email to the Union two weeks into the project, Valentine described the Company and HECO as “hav[ing] been plagued by problems” associated with Kahe 4 dispatch requests. (JDA 379.) The Company also expressed “great concern” (JDA 157) about an incident of low-quality work performed on the Kahe 4 project by a few Union-referred employees, and by the Union’s failure to

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<sup>11</sup> The Company’s prompt understanding of the reason for the dispatch problems, as well as its displeasure, are clear from general foreman Caughman’s December 6 discussion with the Union. When Caughman inquired about the Union’s failure to dispatch an employee to the Kahe 4 project that day, Meyers asked him whether the Boilermakers had gotten the Company’s attention yet. (JDA 22; 127.) Caughman responded that “there was attention gotten,” but he “d[id]n’t know if it was good attention.” (JDA 127.)

respond to the Company's concerns. (JDA 22; 378, 379, 156-59.) Indeed, it recounts its exasperation at length in its brief (Br. 10-16) even though its reaction appears irrelevant to its stated reason for terminating its relationship with the employees. At best, those frustrations reflect on the reason for terminating the Association's relationship with the Union, an action that the Board agreed was lawful. In conflating its antagonism toward the Union with its reasons for discharging the Union-represented employees, the Company highlights, rather than refutes, the role animus played in its decision to terminate the employees. The Company's attempt to portray itself as a neutral employer simply implementing a policy of working under craft agreements is thus at odds with the larger landscape of the case, even as seen through the Company's eyes.

Similarly, the Company's invocation (Br. 18-20, 22-24, 33-34) of its willingness to rehire the employees after they cut ties with the Boilermakers does not demonstrate a lack of animus; indeed, it can reasonably be viewed as pointing in the opposite direction. Although the Company attempted to facilitate the acceptance of the Boilermakers-represented employees into the Pipefitters union and then their rehire by the Company, those efforts tellingly came only after the employees had been forcibly divested of their Boilermakers affiliation. Therefore, those efforts only buttress the Board's finding that the Company's problem was

with that union affiliation.<sup>12</sup> The Company errs in framing the question as whether it harbored animus toward the welders themselves (Br. 34), rather than toward their Boilermakers affiliation. Thus, with regard to assessing the initial showing that the discharges were unlawfully motivated, the Board reasonably found that the facts here “virtually compel a finding that the [Company] discharged the alleged discriminatees because of their Boilermakers affiliation.” (JDA 3.)

### **3. The Board Reasonably Found that the Company Failed to Meet Its Rebuttal Burden**

The Company sought to demonstrate that it would have discharged the employees, regardless of their affiliation with the Boilermakers, based on its claimed practice of performing craft work only under collective-bargaining agreements; however, the Board reasonably found that the Company failed to meet its burden of proof because the Company’s asserted practice was not hard and fast as it claimed.<sup>13</sup> (JDA 3.) Substantial evidence supports the Board’s finding that

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<sup>12</sup> Although the Company contends (Br. 24) that “[t]he substantial evidence shows that [the Company] has never rejected and would not reject a welder dispatched to it from the Pipefitters Union hiring hall because of his status as a member or former member of the Boilermakers Union,” its cited evidence (JDA 132) demonstrates, at most, that employees who had withdrawn from the Boilermakers at the Pipefitters’ demand were able to return as Pipefitters.

<sup>13</sup> The Company erroneously describes the Board as having found the Company’s stated reason pretextual (Br. 35). Rather, the Board considered the Company’s asserted policy and found that, because the policy was not applied consistently, the Company had not shown that it would have discharged the

the Company performed work throughout the months leading up to the February 17, 2011 discharges, even though it lacked a contract during two periods: October 1 to 7, 2010 and October 30 to November 12, 2010.<sup>14</sup> (JDA 3.)

First, after the collective-bargaining agreement expired by its terms on September 30, 2010, but before the parties agreed on October 7 to extend the contract, the Company continued to perform work using employees represented by the Boilermakers. (JDA 3.) The Board reasonably rejected the argument that the Company believed there was a tacit extension of the expired contract from October 1 through October 7, finding that the Union's communications to Valentine made clear that that was not the case. (JDA 3.) Specifically, when Meyers and Valentine spoke on the evening of September 30 about the Union members' rejection of the Company's offer and the possible resumption of negotiations, Meyers expressly stated that there was no contract and disagreed with Valentine's view that the parties could continue working under the expiring contract's terms. (JDA 3; 136-37.) The Union made its position even clearer the next day, when Aycock forwarded a letter from the Union's counsel advising that the Union's

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employees even in the absence of their affiliation with the Boilermakers. (JDA 3, 4.)

<sup>14</sup> The Board essentially accepted the Company's argument that, from November 12, 2010 through February 17, 2011, it believed it had a contract with the Union. Thus, the Board focused only on periods before November 12, 2010. (JDA 3.)

members were free to cease working in light of the contract's expiration. (JDA 3-4; 338-39.) Valentine identified the letter as a threat of a work stoppage even before some Boilermakers-represented employees announced a work stoppage later that day. (JDA 4.) And the contract extension agreement that the Company and the Union entered into on October 8 (JDA 294) expressly referenced the contract's expiration on September 30. Indeed, had the contract automatically or tacitly extended, as the Company suggests, there would have been no need for the parties to formally extend it. In light of this evidence, the Company's contention that it believed there was an agreement in place from October 1 to 7 – and, even more, its contention (Br. 37-38) that there actually was an agreement in effect – borders on the frivolous.

Second, after the October 8 agreement to extend the contract lapsed on October 29, the Company continued to perform work using Boilermakers-represented employees from October 30 until November 12, when the parties believed they had reached a new agreement. (JDA 4.) Although the Company argues (Br. 38-40) that a new agreement was reached by November 1, the Board reasonably rejected that claim, finding the Company's argument unsupported by the record. (JDA 4.) The Company's own evidence, particularly the parties' correspondence on November 1, establishes that they expressly disagreed about what terms had purportedly been agreed to. (JDA 341-42, 140-41.) The

Company's contention (JDA 371) that the parties had "a disputed contract" establishes that, as the Regional Director found in dismissing the Company's unfair-labor-practice charge against the Union, they had *not* reached a complete agreement. (JDA 1; 381-83; 159-60.) Logically, if there is a dispute about the terms of an agreement, then there is no agreement.

Further supporting the Board's finding that no contract had been reached by November 1 is the judge's then-undisputed finding that contract negotiations continued into November. Although the Company asserted to the Board that agreement had been reached by November 1, it did not expressly challenge the judge's finding that negotiations continued into November. (JDA 1 (noting that only General Counsel and Charging Party filed exceptions); 32, 26-63.) Section 10(e) jurisdictionally bars the argument that the judge was "mistaken" (Br. 39) where that argument was not first raised to the Board. *See* Section 10(e) (29 U.S.C. § 160(e)) (providing that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015). And, in any event, the facts, as described above, simply do not support the existence of an agreement by November 1. Finding, as the judge had, that the Company first indicated its belief that a new contract had been reached on November 12, the

Board reasonably rejected its claims that it believed throughout the October 30 to November 12 period that it had a contract in place.

Given the two recent exceptions to the Company's asserted practice of not doing craft work without a valid contract, the evidence fully supports the Board's finding that the Company does not so strictly adhere to the practice that it would have discharged the employees on that basis alone. (JDA 3.) Accordingly, the Board reasonably found that the Company did not carry its burden to show that it would have discharged the discriminatees even if they were not affiliated with the Union. (JDA 3.)

Although the Company argues (Br. 35-37) that the Board was arbitrary in demanding strict compliance with its asserted policy of performing work only under a contract, there is nothing improper, let alone arbitrary, in the Board's determination. The Board simply took the Company at its word that its practice was to *never* work without an applicable craft agreement and found that the evidence undermined the Company's stated rationale for its actions. The Company's burden at this stage of *Wright Line* is to show that it *would* have discharged the employees for its stated reason, not merely that it could have.<sup>15</sup>

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<sup>15</sup> *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993) (employer must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity"), *enforced mem.*, 99 F.3d 1139 (6th

Where that evidence fails to show that the Company would have taken the same action, it is entirely consistent with the Board's duty to find that the unlawful motivation has not been rebutted.

The Company further argues that the two periods when the Board found that it performed craft work without a contract should not weigh against its defense, because during those periods, its bargaining relationship with the Union continued and it still expected to reach a contract.<sup>16</sup> This distinction is inconsistent with both the Company's previously asserted rationale and the credible reasons underlying that rationale. That is, the Company stated it prefers to perform work under a contract for at least two main reasons: cost certainty and labor supply. (Br. 40-42.) Neither goal, however, is achieved by negotiations and a bargaining relationship in the absence of a contract. Thus, until a contract is reached, labor costs are unknown, especially where, as here, the prospective contract was expected to be retroactive. (JDA 294, 341-42, 364.) And, as became apparent to the Company on October 1, 2010 – when the Boilermakers sent the Company a

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Cir. 1996); *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995); *Power Inc. v. NLRB*, 40 F.3d 409, 417 (D.C. Cir. 1994).

<sup>16</sup> The Company's argument (Br. 9, 11) that an eventual contract would have been retroactive merely highlights that the prior agreement had lapsed and that no new contract was in effect. Retroactivity neither erases the existence of a gap in coverage nor cures it, in light of the Company's stated reasons for needing to have a contract in effect.

letter stating that its members could cease working without further bargaining or notice (JDA 338-39), and several employees later refused to work (JDA 340) – the prospect of an eventual contract does nothing to prevent work stoppages.

Essentially, the Company seeks to argue that “there is a contract” is equivalent to “there will have been a contract.” For the reasons stated, this argument that is as implausible pragmatically as it is grammatically. Moreover, the Company’s effort to conflate its new rationale with its previously asserted rationale undermines its credibility.

The Company now seizes on two arguments first raised by the dissenting Board Member, neither of which is properly before the Court. The Company cannot rely on the dissenting opinion’s invocation of an argument to create the Court’s jurisdiction for it. Section 10(e) requires that the parties themselves actually raise an issue before the Board, such as by filing a motion for reconsideration, and that requirement is not excused simply because the Board members discussed the issue. *See HealthBridge Mgmt.*, 798 F.3d at 1069; *Contractors’ Labor Pool v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003).

Even if the Court found it appropriate to reach the Company’s belatedly raised arguments despite the Section 10(e) bar, neither argument is persuasive. The first such argument suggests that it is arbitrary to find that brief gaps in coverage by an agreement defeat the Company’s *Wright Line* defense, and it

speculates that an employer would have no option but to shut down the moment the contract expired.<sup>17</sup> (Br. 36-37.) But, again, it is the Company that asserts the importance of its performing work only under a contract, and it is the Board's role to assess whether the evidence supports that claimed reason. The Company's second newly raised argument (Br. 42-43) takes issue with the Board's finding (JDA 4, 6) that the Company had no basis for doubting the Boilermakers-represented employees' willingness to continue working, even without a contract. Relying on the difficulties with Kahe 4 dispatch requests in December 2010, the Company argues that it did have reason for doubt. But the Company, in focusing on the dispatch difficulties, fails to recognize that the Board was referring to the reliability of continued work by already-referred employees. As the Board explained (JDA 6), the Company's lawful repudiation of the Section 8(f) agreement freed it from the obligation to seek new referrals from the Boilermakers, so the only employees at issue – that is, the only ones discharged – were those who were already at work on particular projects.

Thus, having found that the discharges were motivated by the employees' affiliation with the Boilermakers and that the Company failed to demonstrate that it would have discharged them based only on the lack of a collective-bargaining

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<sup>17</sup> Rather than immediately ceasing work, however, the Company could immediately seek an extension of the contract, as it did on October 8, 2010.

agreement, the Board properly found a violation under *Wright Line*'s motive-based analysis.

**C. Substantial Evidence Supports the Board's Alternative Finding that the Boilermakers-Affiliated Employees' Discharges Were Inherently Destructive to Employee Rights Under the *Great Dane* Analysis**

After finding that the employees' discharges were unlawful when analyzed as motive-based adverse actions under *Wright Line*, the Board found, in the alternative, that the discharges were also unlawful when analyzed pursuant to *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). (JDA 5-6.) As detailed below, under *Great Dane*, if an employer engages in discriminatory conduct that is "inherently destructive" of employee rights under the Act, no proof of antiunion motive is required to find that an unfair labor practice occurred, even if the employer offers a legitimate business justification for its action. 388 U.S. at 33-34.

**1. *Great Dane* Principles and Definition of "Inherently Destructive" Conduct**

In *Great Dane Trailers, Inc.*, the Supreme Court recognized that some conduct "is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (internal quotation marks omitted). The Court described two types of employer conduct, "inherently destructive" and "comparatively slight." *Great Dane*, 388 U.S. at 33-34.

Regarding “inherently destructive” conduct, the Supreme Court explained: “[I]f it can reasonably be concluded that the employer’s discriminatory conduct was ‘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 motivated by business considerations. . . .” *Great Dane*, 388 U.S. at 34. And, in “comparatively slight” cases, antiunion motivation is relevant only if the employer “has come forward with legitimate business justifications for its conduct.” *See Local 155, Int’l Molders & Allied Workers Union v. NLRB*, 442 F.2d 742, 746 n.3 (D.C. Cir. 1971). Where employer conduct is inherently destructive of Section 7 rights, “specific evidence of intent to encourage or discourage [protected activity] is not an indispensable element of proof of violation of Section 8(a)(3).” *See Radio Officers’ Union*, 347 U.S. at 44; *see also NLRB v. Brown*, 380 U.S. 278, 288 (1965). Moreover, as the Tenth Circuit recognized, in finding conduct inherently destructive, “there need not be proof of an actual . . . discouraging *effect* on the employee.” *NLRB v. The Am. Can Co.*, 658 F.2d 746, 754 (10th Cir. 1981) (emphasis added); *accord Local 155, Int’l Molders & Allied Workers Union*, 442 F.2d at 747 & n.4.

The Board and courts of appeals have identified conduct as “inherently destructive” because of its potential for discouraging concerted activity and

employees' choice of union representation. Therefore, conduct that "directly or unambiguously penalizes or deters protected activity," *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 359 (5th Cir. 1981), or that is "potentially disruptive of the opportunity for future employee organization and concerted activity," *Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 763 (D.C. Cir. 1988) (citation omitted), is inherently destructive because it creates "visible and continuing obstacles to the future exercise of employee rights." *Id.* (quoting *Inter-Collegiate Press, Graphic Arts Div. v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973) (internal quotation marks omitted)).

If the Board has determined that an employer engaged in conduct inherently destructive of employees' Section 7 rights, the burden shifts to the employer to establish that it was motivated by legitimate objectives. *Great Dane*, 388 U.S. at 34. But "even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy." *Great Dane*, 388 U.S. at 33-34. Thus, the employer must show not only that it was motivated by legitimate business objectives but that those objectives outweigh the harm caused to employees' rights. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963).

**2. Substantial Evidence Supports the Board's Unanimous Determination that the Company Unlawfully Discharged the 13 Boilermakers Employees, Rather Than Laying Them Off**

This Court has noted “what the Supreme Court explained in *Great Dane*: Some conduct speaks for itself.” *Teamsters Local Union Nos. 822 and 592 v. NLRB*, 956 F.2d 317, 319 (D.C. Cir. 1992). An employer’s termination of its employees because of their union affiliation is that type of conduct. *See NLRB v. Catalytic Indus. Maint. Co.*, 964 F.2d 513, 523 (5th Cir. 1992). Thus, the Board found that it was the Company’s decision to discharge the Boilermakers-affiliated employees, rather than to lay them off subject to recall, after the lawful termination of the parties’ bargaining relationship that violated Section 8(a)(3) and (1). (JDA 6.)

Despite the Company’s claim to the contrary (Br. 47-48), there is ample record evidence to support the Board’s unanimous finding (JDA at 2 n.3, 11 n.10) that the Boilermakers-affiliated employees were discharged, and not merely laid off, on February 17, 2011. Specifically, company manager Valentine testified that he and other managers decided that the 13 employees would be terminated when the contract expired (JDA 175-76, 178), and he repeatedly referred to them as “former employees.” (JDA 164-67, 171.) Further, when directly asked about the employment status of general foreman Caughman between February 17 and mid-to late March 2011, Valentine testified that Caughman was not an employee of the

Company. (JDA 182.) The Board properly relied on the Company's own characterization, in its testimony, of the employees' status. The Board also properly relied on the Company's documents, which described each of the February 17 employment actions as a "separation." (JDA 297-310.) The Company's failure to provide any information about a possibility of recall at the time of the "separations," as the Board reasonably found (JDA 2 n.3), also demonstrates that the employees were being discharged, not laid off.<sup>18</sup>

The Company's transcript citations (Br. 17, 47-48, JDA 87, 88, 95) to the occasional use of the term "laid off" by counsel for the General Counsel and the Union when questioning foremen does not overcome the substantial evidence that the employees were terminated. Valentine's credited testimony (JDA 84, 178) that the employees were terminated – in answer to direct questions about the decision-making and separation, in which he participated, and the status of the employees afterward – is the record evidence; the phrasing of counsel's questions is not. Nor

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<sup>18</sup> Some of the employees had been laid off from the Company on other occasions, but never for any reason but lack of work. (JDA 89, 95.) The parties stipulated that the February 17, 2011 separations were *not* due to a lack of work (JDA 22 n.4; 66-67), and that stipulation is consistent with the Company's separation notices, in which it did not select "lack of work" as the reason for separation. (JDA 297-310.) The February 17 separations were thus unlike any layoffs the employees had experienced at the Company. And, unlike a layoff due to a lack of work, the Company's stated reason for the separations, "contract has terminated," was not reasonably likely to be temporary, especially given that the bargaining relationship had formally been terminated.

do the Company's records (JDA 311-36, 378, 379-80) clarify the matter. If anything, they add further confusion by demonstrating that the Company used the terms "lay off" and "terminate" essentially interchangeably, in contrast to its attempt to differentiate those actions now. In any event, the evidence supporting the Board's finding need not be unequivocal, merely substantial. *See S.E.C. v. Fed. Labor Relations Auth.*, 568 F.3d 990, 995 (D.C. Cir. 2009) (substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966))). That standard is clearly met here.

**3. The Company's Discharge of All Its Boilermakers-Affiliated Employees Was Inherently Destructive of Their Section 7 Rights, and the Company Did Not Support Its Asserted Business Justification**

An employer's termination of its employees because of their union affiliation "create[s] visible and continuing obstacles to the future exercise of employee rights," making it "inherently destructive" under *Great Dane. Catalytic Indus. Maint. Co.*, 964 F.2d at 523 (citing *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989), and *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir.1976)). Thus, having properly found that the employees were terminated, not merely laid off, the Board correctly concluded that the Company's termination

of Boilermakers-affiliated employees after the expiration of its collective-bargaining agreement with the Union was “inherently destructive” of their statutory right to be members of the union of their choosing. (JDA 5.) As the Board explained (JDA 6), although the Company’s termination of its bargaining relationship with the Boilermakers freed it of any *contractual* obligation regarding the treatment of its employees, it did not extinguish the Company’s *statutory* obligation to refrain from discriminating in its treatment of its employees.

Even in the context of an employer’s change from a Section 8(f) bargaining relationship with one union to a Section 8(f) relationship with a different union, its employees may not be discharged without certain procedural protections, as the Board observed. (JDA 6.) In particular, they are entitled to a 7-day grace period to consider whether to join the new union to retain their jobs. *See George C. Foss Co.*, 270 NLRB 232, 232 (1984) (interpreting and applying Section 8(f)(2), 29 U.S.C. § 158(f)(2)), *enforced*, 752 F.2d 1407 (9th Cir. 1985). Until that grace period has ended, the new union cannot require the employees to be terminated and to be referred to jobs through its own referral process. *See Austin & Wolfe Refrigeration*, 202 NLRB 135, 135 (1973). Thus, employers with expiring Section 8(f) agreements are constrained in discharging their union-represented employees, even when a newly recognized union would require that action. It follows that the Company’s discharge of its Boilermakers-represented employees immediately

upon the termination of that Section 8(f) relationship, when no other union had been recognized or imposed such requirements, is necessarily the sort of inherently destructive “conduct [that] speaks for itself.” *Teamsters Local Union Nos. 822 and 592*, 956 F.2d at 319.

The Board reasonably rejected the Company’s contention that its asserted policy of performing work only under a contract constituted a legitimate business justification. First, the Board reiterated its conclusion, discussed in Section B.3., above, that the record did not support the Company’s claim that it required all its craft work to be performed under collective-bargaining agreements. (JDA 6.) But, in any event, the Board found (JDA 6), that asserted justification, even if supported by the evidence, would not outweigh the harm done to the employees on account of their union affiliation. The Board’s conclusions were reasonable, and the Court should enforce the Board’s Order.

In concluding that the Company’s conduct was inherently destructive, the Board properly relied on two very similar cases, *Catalytic Industrial Maintenance (CIMCO)*, 301 NLRB 342 (1991), *enforced*, 964 F.2d 513 (5th Cir. 1992), and *Jack Welsh Co.*, 284 NLRB 378 (1987). Both cases involved employers’ unlawful discharges of all employees working in a particular craft because of their affiliation with and referral by a particular union. In *CIMCO*, the employer discharged all of its electricians after the union that had referred them terminated its Section 8(f)

relationship with the employer. The Board found the mass discharge was “‘inherently destructive’ of employees’ rights within the meaning of [*Great Dane*] . . . and thus violated Section 8(a)(3) and (1) of the Act.” *CIMCO*, 301 NLRB at 347. As the Board stated, “[i]t is clear beyond peradventure that the discharge of all employees of a particular craft because of their affiliation with, and referral from, a union, as was the case here, creates continuing obstacles to the future exercise of employee rights.” *Id.* (quotation marks omitted). Accordingly, there was no need to address whether the employer’s action was motivated by antiunion animus. *Id.* at 347 n.17. Nor did the employer support its asserted business justification: its stated belief that it needed to replace the union-referred employees because they would not staff its worksite after the union’s withdrawal from the contract was not supported by the record evidence. *Id.* at 347-48. The Fifth Circuit had “little difficulty” agreeing, in light of the facts, and enforcing the Board’s order. *CIMCO*, 964 F.2d at 523.

In *Jack Welsh Co.*, the employer discharged its carpenters upon the expiration of its Section 8(f) agreement and replaced them with nonunion employees. The Board “emphasize[d] that the employees were discharged solely because of their membership in the [u]nion.” 284 NLRB at 379 n.6. Accordingly, the Board adopted the judge’s finding that the discharges were inherently destructive and no evidence of an antiunion motivation was necessary. *Id.* at 379,

383 n.10. Further, the Board rejected the employer's defense that it needed to discharge the union-referred carpenters because they would not have worked in an open shop; as the Board explained, the employer needed to inform the employees of the changes to their employment conditions and give them an opportunity to decide what to do. *Id.* at 383.

As in those cases, the Company discharged all its Boilermakers-affiliated employees after their Section 8(f) agreement expired. (JDA 1-2.) Therefore, the Board's conclusion that the discharges were inherently destructive is consistent with Board precedent.

Although the Company seeks to distinguish *CIMCO* and *Jack Welsh* (Br. 51-54), it relies on immaterial differences, including that it did not seek to be "union free." That those employers discharged employees to become nonunion employers, rather than to sign with a different union, is irrelevant to the discrimination finding. As the Board explained (JDA 5 & n.10), discrimination based on *which* union an employee is in is just as unlawful as discrimination between a union and nonunion employee. The Company does not challenge this principle or the Board's invocation (JDA 5) of it in this case. Accordingly, it has waived any such challenge. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (petitioners waive arguments that they fail to raise in their opening briefs); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (same). The

Company's refrain (Br. 53) about its supposed benevolence in assisting the employees it had just fired to join a different union and be rehired supports, not negates, the unlawfulness of the discharge in the first place, as explained above (pp. 22-23). Moreover, its claims (Br. 53-54) that, unlike the employer in *CIMCO*, it was not trying to pressure the union rings hollow; there could hardly be more pressure on the Boilermakers and discouragement of its members' continued affiliation than this mass discharge.

Further, the Board reasonably rejected, as both unsupported by the record and insufficiently weighty, the Company's claimed business justification regarding its asserted policy of performing work only under a contract. As the Board explained (JDA 6), even recognizing the Company's interests in labor stability and cost predictability, as well as its lawful repudiation of the Section 8(f) bargaining relationship and its managerial prerogative to temporarily cease welding operations, those Company interests did not justify discharging the Boilermakers-referred employees who were already working when the Section 8(f) relationship ended. Thus, the Company had options that did not require discharging the employees: had it lawfully laid them off with recall prospects while it paused operations to negotiate a Section 8(f) agreement with another union, the employees would have been able to return to work promptly after operations resumed, with

the required 7-day grace period before choosing whether to join the new union to remain employed. (JDA 6.)

Lastly, the Board stated (JDA 7 n.14) that it would also have found a violation under *Great Dane*'s "comparatively slight" standard, because the judge's finding of such an adverse impact was unchallenged and, for the reasons previously explained, the Company did not meet its burden of establishing a legitimate and substantial business justification for the discharges. *See Allied Indus. Workers Local 289 v. NLRB*, 476 F.2d 868, 878 (D.C. Cir. 1973) (finding employer's failure to prove substantial business justification for its conduct fatal to its defense regardless of whether employer's conduct was "inherently destructive" or "comparatively slight"). The Company simply repeats its rejected assertion (Br. 55) that it did meet that burden by relying on its supposed policy of performing work only under a contract. Again, the Company did not show it was necessary to discharge all of the Boilermakers-represented employees instead of laying them off with recall rights. (JDA 7 n.14.) Accordingly, the Board correctly concluded that the Company unlawfully discharged the Boilermakers-affiliated employees under either standard of *Great Dane*. (JDA 5, 6, 7 n.14.)

The Company raises several counterarguments, but none warrants reversal. First, the Company repeats an argument articulated by the dissenting Board member, which suggests (Br. 45-46) that the Board's analysis is precluded by the

Supreme Court's decision in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). In *Darlington*, the Court held that an employer may fully and permanently close its business as a management prerogative, even if it acts with antiunion animus, because it does not stand to gain any future benefit from the discouragement of protected activity that would result. *Id.* at 271-72. In contrast, the Court held, an employer's *partial* closure of its business would be *unlawful* if it was intended to discourage protected activity among employees in the remaining operations. *Id.* at 274-75. As the Board observed, *Darlington* has been understood to apply only to permanent closures. (JDA 4-5 n.8.) Thus, it simply does not apply to the Company's temporary cessation of welding operations.

The Company takes another page from the dissent's book in contending (Br. 49-51) that, even assuming that the employees were discharged, rather than laid off, they would have ended up in a similar position; thus, the Company's claim goes, the discharges could not be inherently destructive if they left the employees no worse off than layoffs. The Board responded to the dissent's view, observing (JDA 6) that if the employees had not been discharged, they would have been able to return to work promptly after the Company's welding operations resumed, rather than seek referral anew and wait to be dispatched by the Pipefitters. The terminations imposed on the employees material consequences that layoffs would

not have imposed. For instance, the first discriminatee was dispatched back to the Company on March 22, 2011, a full 3 weeks after the Company had resumed welding work under the Pipefitters agreement, and it was 2 weeks more before any other discriminatee was dispatched. (JDA 2, 5; 478.) In the meantime, the Pipefitters dispatched other welders to the Company. (JDA 2, 5; 478, 179-81.)<sup>19</sup> In addition, the Board pointed out that the dissent's view that the employees were in essentially the same situation ignored their terminations and loss of several weeks of employment just because they were Boilermakers members. The Company contends (Br. 51) that the similarity of the employees' situation after layoff or discharge makes its conduct not inherently destructive but comparatively slight. But the Board (JDA 7 n.14) found that the Company's conduct would be

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<sup>19</sup> The record reflects other harms the employees suffered as a result of being discharged, rather than laid off. One former Boilermakers-represented employee did not complete the Pipefitters' welding test and was not dispatched back to the Company until March 2012, when he took the test again. (JDA 94, 95, 97-100.) Only eight of the 13 discriminatees registered with the Pipefitters (JDA 2; 478), and the record does not reflect whether the others would have done so if the Company had merely laid them off, rather than discharging them. And, as the Board noted (JDA 6), the employees, if laid off rather than discharged, would have been entitled to a 7-day grace period to decide whether to join the Pipefitters in order to keep their jobs, rather than having already been terminated. *See George C. Foss Co.*, 270 NLRB at 232 (under Section 8(f)(2), 29 U.S.C. § 158(f)(2), employees are entitled to 7-day grace period if their employer terminates its Section 8(f) bargaining relationship with their union and enters into a bargaining relationship with a different union).

unlawful even under the comparatively slight standard, because it did not establish a legitimate business justification.

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In short, the Board properly found that the Company violated the Act when, on February 17, 2011, it terminated the employment of its 13 Boilermakers-affiliated employees because of that union affiliation. Whether analyzed under *Wright Line*, based on the Company's motivation (see section B., above), or under *Great Dane*, based on the inherently destructive effects of the Company's conduct on the employees' Section 7 rights (see section C., above), it is manifest that the Boilermakers-affiliated employees were discouraged from membership in their chosen labor organization by discrimination in regard to their employment tenure. Indeed, it is difficult to imagine a more direct and effective means of discouraging employees' labor organization membership than their mass discharge as a result of their employer's dispute with their chosen union.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

January 4, 2017

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

HAWAIIAN DREDGING CONSTRUCTION	)	
COMPANY, INC.,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 15-1039 & 15-1424
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	37-CA-008316
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	
BOILERMAKERS LOCAL 627	)	
	)	
Intervenor for Respondent/	)	
Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,740 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 4th day of January, 2017

## STATUTORY ADDENDUM

### **Section 7 of the Act (29 U.S.C. § 157) provides:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

### **Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:**

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .;

### **Section 8(f) of the Act (29 U.S.C. § 158(f)) provides:**

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the

beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

**Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

...

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS  
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Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF	)	
BOILERMAKERS LOCAL 627	)	
	)	
Intervenor for Respondent/	)	
Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if

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Dated at Washington, DC  
this 4th day of January, 2017