

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.,

Case 37-CA-008316

and

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

**HAWAIIAN DREDGING CONSTRUCTION
COMPANY, INC.'S STATEMENT OF POSITION**

CERTIFICATE OF SERVICE

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I. INTRODUCTION

Hawaiian Dredging Construction Company, Inc. (“**HDCC**” or the “**Respondent**”) submits this position statement with respect to issues raised upon the Board’s acceptance of remand from the D.C. Circuit Court of Appeals, No. 15-1039. *See Hawaiian Dredging Constr. Co., Inc. v. NLRB* (“**HDCC**”), 857 F.3d 877 (D.C. Cir. May 26, 2017).

Specifically, the D.C. Circuit remanded this case based on the Board’s failure “*to engage with evidence credited by the ALJ in the context of Section 8(f) for purposes of determining whether the company violated Sections 8(a)(3) and (1) . . .*” in its February 9, 2015 Decision and Order. *HDCC*, 857 F.3d at 885 (emphasis added). Had the Board properly considered the credited evidence, it would have found, consistent with the Administrative Law Judge (“**ALJ**”) and the D.C. Circuit decisions, that HDCC’s conduct was neither discriminatory nor inherently destructive under §§ 8(a)(3) and (1). Thus, HDCC requests the Board reverse the February 9, 2015 Decision and Order, 362 NLRB No. 10 (“**D&O**”) in its entirety.

II. BACKGROUND

A. Statement of Facts

The facts of this case are the evidence credited by the ALJ in the February 4, 2013 Decision. To assist with the Board’s decision on remand, below is a summary of the credited evidence:

- For at least 20 years, HDCC has relied on union hiring halls to provide all of its craft labor under collective bargaining agreements governed by § 8(f), including, through the Association of Boilermakers Employers of Hawaii (the “**Association**”), with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 627 (“**Boilermakers**”). *See D&O* at 21, 24.
- In 2005, the Association and Boilermakers entered into an agreement set to expire on September 30, 2010. *D&O* at 21.

- On September 30, 2010, the Boilermakers presented a new agreement for ratification, which its members (the “**welders**”) rejected. D&O at 21; Tr.¹ 193; GC Ex.² 2 at Article XXX; Er Ex.³ 2.
- On October 1, 2010, the Boilermakers sent the Chair of the Association, Tom Valentine, a letter regarding its availability to continue negotiations, and also attached a letter from its counsel, stating that because the parties’ 8(f) agreement had expired, its members were free to cease working without notice. That same day, some welders did not show up for work. D&O at 21.
- On October 4, 2010, the welders returned to work. D&O at 21.
- On October 8, 2010, the parties reached an agreement to extend the terms of their agreement until October 29, 2010, with any changes being retroactive to September 30, 2010. D&O at 21; Tr. 198; GC Ex. 3.
- On November 1, 2010,⁴ the Boilermakers circulated new wage/benefits rates to its members, and informed them that new wage rates/benefits would be retroactive to **October 1, 2010**. The Boilermakers’ wage/benefits letter included two terms that were neither discussed nor agreed upon during negotiations. *See* D&O at 21; Tr. 198; Er Ex. 6.
- On November 12, 2010, Valentine sent the Boilermakers what he understood to be the parties’ final agreement, but the Boilermakers refused to sign it. D&O at 21.
- Throughout December 2010, consistent with the exclusive hiring provision in the CBA between the parties, HDCC submitted manpower requests to the Boilermakers. D&O at 22; Tr. 164, 203-04.
- On December 6, 2010, the Association filed a Charge with the NLRB. That same day, the Boilermakers began refusing to honor dispatch requests for welders to work on HDCC projects. Valentine wrote an email to the Boilermakers business representative, writing, “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.***” D&O at 22 (emphasis added).

¹ References to the transcript of testimony from the hearing before the ALJ are referred to as “Tr.”

² References to the General Counsel’s exhibits during the hearing are referred to as “GC Ex.”

³ References to the Employer’s exhibits during the hearing are referred to as “Er Ex.”

⁴ It is undisputed that the parties reached an agreement that was ratified by the Boilermaker’s members by November 1, 2010. Tr. 198.

- As of December 17, 2010, HDCC determined that the Boilermakers failed to dispatch 26, twelve-hour shifts. D&O at 22; Tr. 213-14, 269; Er Ex. 16.
- On February 14, 2011, the Board’s Regional Director dismissed the Charge against the Boilermakers, finding “the parties did not reach a complete agreement on terms and conditions of employment.” D&O at 22.
- On February 17, 2011, the Association lawfully terminated its relationship with the Boilermakers. D&O at 23 n. 7. Valentine sent a letter to the Boilermakers writing: “based upon [the] Regional Director’s finding that . . . no agreement between the parties currently exists . . . the Association does not intend to utilize members of the Boilermaker’s Union for future work.” Valentine further wrote, “While previously, we had hoped to come to terms with the Union on a new agreement, the Union does not appear to be genuinely interested in continuing a partnership between its members and Hawaii contractors.” Bd. Ex. 4. The same day, HDCC ceased performing all welding work and laid off all the welders because there was no contract. D&O at 22, 23.
- The layoffs were consistent with HDCC’s long-standing practice of having all of its craft labor work done under a union agreement. D&O at 22, 24; Tr. 106, 109, 229.
- On February 18 and 23, 2011, HDCC’s executives met with the United Association of Journeymen and Apprentice Plumbers & Pipefitters of the U.S. & Canada, Local 675 (the “**Pipefitters**”). During the meetings, HDCC asked the Pipefitters if they would accept the welders as Pipefitters. The Pipefitters responded that “membership would be conditioned on following the Pipefitters’ standard practice of applying, interviewing, and passing a welding test and a drug test.” D&O at 22.
- On February 23, 2011, HDCC lawfully entered into a § 8(f) agreement with the Pipefitters. After entering into the Pipefitters contract, HDCC informed the welders they could continue to work for HDCC if they became members of the Pipefitters. To help the welders pass the Pipefitters’ welding test, HDCC offered assistance to them by providing tools, equipment and coaching. All of the welders who registered through the Pipefitters Union were employed. D&O at 12, 22-23; Er Ex. 23; Tr. 73, 85.

B. Procedural History

On May 12, 2011, the Boilermakers filed a Charge against the Association, alleging that it “locked out the employees and terminated them all. The employer hired other employees and otherwise discriminated against the employees on account of union and/or

protected activity.” GC Ex. 1(a). On November 30, 2011, the Board issued a Complaint. GC Ex. 1(c). On January 13, 2012, the Board issued an Amended Complaint. D&O at 20. GC Ex. 1(f).

On February 4, 2013, the ALJ dismissed the Amended Complaint after an evidentiary hearing concluding, “The Respondent’s actions of laying off the alleged discriminates did not violate Section 8(a)(1) and (3) of the Act.” D&O at 20-25, 25. On exceptions filed by the General Counsel and the Boilermakers, the majority of the Board, with one member dissenting, reversed the ALJ’s decision. *See* D&O at 1-20.

HDCC petitioned for review of the decision with the D.C. Circuit Court of Appeals and on May 26, 2017, the D.C. Circuit granted HDCC’s petition for review, denied the Board’s cross-application for enforcement, and remanded the case to the Board. *See HDCC*, 857 F.3d 877.

C. **The D.C. Circuit Determined the Board Improperly Rejected the Evidence Credited by the ALJ**

The D.C. Circuit remanded the D&O based on the Board’s failure “to engage with evidence credited by the ALJ in the context of *Section 8(f)* for purposes of determining whether the company violated *Sections 8(a)(3) and (1)*.” *HDCC*, 857 F.3d at 885 (emphasis in original).

In rejecting the Board’s analysis in the D&O, the D.C. Circuit criticized the Board for ignoring the evidence credited by the ALJ, writing:

The Board does not appear to have rejected the ALJ’s view that the construction industry presents unique circumstances for purposes of determining *Section 8(a)(3)* and *(1)* violations. ***Yet the Board never confronted the evidence relied on by the ALJ as to nexus and animus, namely that the company’s Section 8(f) agreements contemplated implied agreements during gap periods and overwhelmingly showed that the company’s conduct was inconsistent with discouraging union membership, much less Boilermakers membership.*** Given the evidence on the nature of the company’s twenty-year practice under its business model, as found by the ALJ and discussed by the dissenting member, and ***the evidence credited by the ALJ relevant to the company’s motive,***

the Board failed adequately to explain its conclusion that the gap periods defeated the company's defense and the company would not discharge craft employees where no current *Section 8(f)* agreement existed and the company had no expectation of a new agreement with the Boilermakers.

The Board did not ignore entirely the company's arguments or the dissenting member's views. *See, e.g.*, Dec. 4, 6. But ***it never confronted the critical point that, in view of the evidence regarding the company's twenty-year practice, and the company's credited evidence, the Board was giving inappropriate emphasis to the gap periods.*** For instance, Member Miscimarra, echoing the company's arguments, concluded as to animus and nexus that ***the Board had "fail[ed] to appreciate the nature of the [company's] collective-bargaining relationships, which historically had been 'very cooperative,'" and the fact that "[t]he evidence shows that in practice, the [company] and the unions with which it partners have treated hiatus periods between 8(f) contracts as contract extensions.***" Dis. Op. 14. He explained,

even assuming there was a brief gap of less than a week in [the company's] *decades-long* practice of performing all craft work under collective bargaining agreements . . . this cannot reasonably be regarded as defeating [the company's] *Wright Line* defense. Under the majority's view, the only way the [company] could establish a valid *Wright Line* defense would have been to immediately cease all welding work the very moment the 2005-2010 [Section 8(f) collective bargaining agreement] expired, but ***this would have been contrary to [the company's] long history of bridging such hiatus periods cooperatively.***

Id. at 15 n.33. ***The Board has no response to this contradiction in its analysis.*** Its response was limited to the gap periods. Dec. 3-4.

HDCC, 857 F.3d at 884-85 (emphases added).

III. ANALYSIS

A. An Analysis Under *Wright Line* or *Great Dane* Is Unnecessary

As a threshold matter, it is not necessary for the Board to analyze this case under *Wright Line* or *Great Dane*. Cases alleging a violation of §§ 8(a)(3) and (1) are analyzed under

Wright Line or *Great Dane* when the employer's motivation is at issue. See *Wright Line*, 251 NLRB 1083, 1083-84 (1980); *NLRB v. Great Dane Trailers, Inc.*, 388 US 26, 33 (1967). Here, the credited evidence is that the reason the welders were laid off was there was no contract. Therefore, HDCC's motivation is not an issue and such analyses are unnecessary.

Even if the Board analyzed this case under *Wright Line* or *Great Dane*, based on the credited evidence, the D&O should be reversed.

B. The Board's Flawed *Wright Line* Analysis

Under the *Wright Line* analysis, the Board's General Counsel must first "prove, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the employer's adverse action." *Alan Ritchey, Inc.*, 346 NLRB 241, 242 (2006); *Wright Line*, 251 NLRB at 1089.

If the General Counsel is able to establish that the employee's protected conduct was a "motivating factor," the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. "Under *Wright Line*, evidence of a good faith belief suffices to establish a defense, even if the belief is erroneous." *HDCC*, 857 F.3d at 885.

Even assuming the General Counsel established its *prima facie* case, which HDCC disputes he did, the Board erroneously determined that HDCC's defense – that it laid off the employees only after it determined that there was no collectively-bargained agreement – failed to rebut the inference of discriminatory intent. Specifically, the Board stated:

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.

D&O at 3. In support of its determination, the Board focused on two gap periods: October 1-October 7, 2010 and October 30-November 12, 2010. *Id.*

With respect to the first gap period between October 1 and October 7, 2010, the credited evidence is that HDCC and the Boilermakers expected the parties to continue negotiating and work under their “current” collective bargaining agreement. D&O at 21. In fact, on October 8, 2010, the parties entered into an agreement to extend their collective bargaining agreement. *Id.*

With respect to second period between October 30 and November 12, 2010, the credited evidence is that on November 1 (after the Boilermaker members ratified the agreement), the Boilermakers circulated new wage/benefits rates to its members, and informed them that new wage rates/benefits would be retroactive to **October 1, 2010**. See D&O at 21; Tr. 198; Er Ex. 6. On November 12, 2010, Valentine sent the Boilermakers what he understood to be the parties’ final agreement, but the Boilermakers refused to sign it. D&O at 21.

The Board’s finding was erroneous because it failed to consider the credited evidence of HDCC’s decades-long history of only performing craft work under a collectively-bargained agreement and of cooperatively bridging any gap periods during negotiations. D&O at 22. Dissenting member Miscimarra best explained the illogic of the Board’s finding:

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 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 Respondent could have acted lawfully only by (i) immediately discontinue all welding work based on a CBA hiatus of less than one week, and (ii) disregarding Respondent’s long

history of informal cooperation in dealings with the Boilermakers and multiple other trade unions.

D&O at 15 n. 33 (emphasis added).

Thus, had the Board properly considered the evidence credited by the ALJ, it would have concluded that HDCC's decision to lay off the welders was not based on hostility towards the welders, but because there was no prehire contract, *i.e.*, there was no bargaining relationship covering the work. The Board's finding should therefore be reversed.

C. The Board's Flawed Analysis Under *Great Dane*

In *NLRB v. Great Dane Trailers, Inc.*, the United States Supreme Court set forth the two controlling principles in analyzing a claim of inherently destructive conduct. 388 U.S. 26 (1967).

First, if 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. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34.

An employer's conduct is "inherently destructive" if it "carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Amer. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311-12 (1965).

1. **The Credited Evidence Shows HDCC's Conduct Was Not Inherently Destructive**

As explained above, the credited evidence shows that once HDCC learned that no contract existed and it no longer had a relationship with the Boilermakers, consistent with its long-standing policy of performing all craft work under a collectively bargained agreement, HDCC ceased all welding work and laid off the welders. D&O at 23.

Ignoring the credited evidence, the Board relied on the February 17 letter that referenced the Boilermaker members and determined that HDCC laid off the welders “because of their affiliation with the Boilermakers.” D&O at 5. The Board further stated, “[e]ven assuming . . . that the [company] discharged the alleged discriminatees because there was no collective-bargaining agreement in place,’ that it ‘would still find that this justification did not outweigh the harm done to the employees on account of their union affiliation.’ ” *HDCC*, 857 F.3d at 885; D&O at 4.

The D.C. Circuit rejected the Board’s analysis under *Great Dane*. 857 F.3d at 887 (“The Board’s alternate analysis under *Great Dane* also provides no basis for denying the company’s petition.”). Again, the Court criticized the Board for failing to consider HDCC’s long history performing craft work under a CBA, writing:

The company's February 17 letter terminating its relationship with the Boilermakers does include a sentence referencing Boilermakers membership but that supports the Board's view *only if it is extracted from what else was stated in the letter and record evidence, including the company's twenty-year practice with Section 8(f) agreements.*

857 F/3d at 877 (emphasis added).

It further wrote:

Neither the company’s business model was designed to, nor in fact operated to, single out particular unions for discriminatory treatment without regard to the absence of a current collective

bargaining agreement. Other than referencing two gaps and the parties' disagreement during their negotiations, the Board appears to have offered no reason for rejecting evidence that the company's conduct was only plausibly 'inherently destructive' if the welders were separated *because* of their union membership, rather than – as the ALJ found – because of the expiration of their contract.

HDCC, 857 F.3d at 885 (emphasis in original).

Thus, had the Board properly considered the credited evidence, it would have determined that HDCC's reason for laying off the employees was not the welders union affiliation, but the lack of a contract, and therefore, not "inherently destructive."

2. The Credited Evidence Shows The Impact Was Comparatively Slight⁵

Because HDCC's conduct was not inherently destructive, and therefore comparatively slight, the burden shifts to HDCC to set forth a legitimate business end. *See Great Dane Trailers*, 388 U.S. at 34. The test for a legitimate business end is "less stringent for actions with 'comparative slight' effect" and means "anything more than nonfrivolous." *Int'l Paper Co. v. NLRB*, 115 F.3d 1045, 1052 (D.C. Cir. 1997) (citations and quotations omitted); *Harter Equip., Inc.*, 280 NLRB at 600 n. 9. If HDCC sets forth a legitimate business end under the less demanding standard, its conduct is *prima facie* lawful and the General Counsel must make an "affirmative showing of improper motivation" *See Great Dane Trailers*, 388 U.S. a 34.

The credited evidence is that the impact on the welders was comparatively slight, because, as the dissent correctly determined, they would have ended up in a similar position whether they were laid off with an expectation of recall (as the majority claims should have happened) or terminated (what the majority claims actually happened). *See D&O* at 6, 17, 24. In determining that HDCC could have lawfully laid off the welders so long as they remained

⁵ The D.C. Circuit found the Board failed to file exceptions to the ALJ's findings that the impact was comparatively slight. However, for the sake of thoroughness, HDCC addresses the issue in this position statement.

employees with an expectation of recall, the Board’s majority glossed over the fact that the welders would have had to join the Pipefitters after seven days by going through the Pipefitters’ process. D&O at 6, 17-19. As explained by the dissent:

[T]he hallmark characteristic of “inherently destructive” actions – that their “*very nature* contain the implications of the required intent” because of their “natural foreseeable consequences”—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 where Respondent *laid off* the employee when it ceased welding work subject to recall (the action my colleagues find the Act required) or *terminated* those employees (the action the 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 Respondent when it resumed doing welding work under its new Pipefitters’ agreement, the recalled employees would have had to withdraw from the Boilermakers Union⁶ 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.

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 pre-hire agreement with the Pipefitters, the former welders could seek work from Respondent under the Pipefitters’ agreement. Similar to the options available had they

⁶ The Board claimed the dissent’s statement that the welders would need to withdraw from the Union “is at odds” with Respondent’s position. *See* D&O at 6 n. 12. Although the record is unclear whether the welders would have had to cease being a Boilermaker member to become a Pipefitters member, it is clear that they would have had to join the Pipefitters after the seven-day period, a requirement that is lawful under 29 U.S.C. § 158(f)(2).

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.

D&O at 16-17 (emphases in original). In fact, the credited evidence shows that by February 25, 2011 – eight days after they were laid off – the welders could have registered with the Pipefitters, given that by that date, six welders had actually registered. D&O at 23.

Under these circumstances – where the credited evidence shows the welders would have been in a similar situation of having to join the Pipefitters to continue working for HDCC whether they were laid off or terminated – HDCC's conduct was not inherently destructive, but comparatively slight.

Because the credited evidence shows that the impact was comparatively slight, HDCC has the low burden of showing its actions were for a nonfrivolous substantial and legitimate business end, which in this case was its decades-long practice of having all of its craft work performed under a collective bargaining agreement. Because HDCC established that its

conduct was *prima facie* lawful, the burden shifts to the General Counsel to make an affirmative showing of improper motivation, which, based on the credited evidence, it cannot do.

Thus, the Board's finding of unlawful conduct under *Great Dane* should be reversed.

IV. CONCLUSION

Based on the above, the credited evidence is that Hawaiian Dredging Construction Co., Inc.'s conduct did not violate Sections 8(a)(1) or (3) of the Act and the Board's February 9, 2015 Decision and Order should be reversed in its entirety.

DATED: Honolulu, Hawaii, October 24, 2017.



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Case 37-CA-008316

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on October 24, 2017, by the method of service noted below, a true and correct copy of the foregoing document was duly served upon the following:

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