

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

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.

and

Case 37-CA-008316

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

GENERAL COUNSEL'S STATEMENT OF POSITION TO THE BOARD ON REMAND
FROM THE D.C. CIRCUIT COURT OF APPEALS

I. Introduction

The Board accepted the remand from the Court of Appeals in *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10 (Feb. 9, 2015), *enforcement denied*, 857 F.3d 877 (D.C. Cir. 2017), and has solicited statements of position from the parties. For the reasons discussed below, Counsel for the General Counsel respectfully requests that the Board reaffirm its finding “that the Respondent’s discharge of its Boilermakers-represented employees was inherently destructive of their right to membership in the union of their choosing, unencumbered by the threat of adverse employment action,” 362 NLRB No. 10, slip op. at 5, in violation of Section 8(a)(3) and (1) of the Act.

II. Procedural History

In the underlying decision, a Board majority (Member Miscimarra dissenting) concluded that the Respondent unlawfully terminated all of its craft welding employees on February 17, 2011, the day it repudiated the 8(f) bargaining relationship with the International Brotherhood of

Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627

("Boilermakers"). 362 NLRB No. 10, slip op. at 1-2. Specifically, the parties agreed on October 8, 2010 to extend through October 29 their prior 8(f) agreement that had expired on September 30; the parties thereafter reached agreement but disputed the terms of the agreement. *Id.* Once the Respondent learned on February 17, 2011 that the Region would not issue complaint requiring the Boilermakers to sign the Respondent's version of the successor agreement, it repudiated the 8(f) relationship with the Boilermakers and temporarily shut down its welding operations. *Id.*, slip op. at 1. Within a week, the Respondent entered into an 8(f) agreement with the United Plumbers and Pipefitters Union ("Pipefitters") and began accepting referrals from the Pipefitters' exclusive hiring hall. *Id.*, slip op. at 2.

The Board majority concluded that the discharges were unlawful under both *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). The majority found a prima facie case under *Wright Line* based on the summary nature of the discharges and concluded that the Respondent's defense was unpersuasive. *Id.*, slip op. at 3. The Respondent claimed that the discharges flowed from its business practice of only performing craft work under an 8(f) agreement so as to avoid the instability and unpredictability of conducting operations without the protections afforded by such an agreement. *Id.* But the majority found that the Respondent did not so strictly adhere to that practice so as to show it would have discharged the Boilermakers on that basis alone, given that the Respondent continued to perform craft work after the most recent 8(f) agreement expired, including during two short gap periods when no agreement was in effect. *Id.*, slip op. at 3-4.

Alternatively, the Board majority concluded that the discharges were unlawful even absent proof of an unlawful motive because the discharge of all employees of a particular craft

due to their affiliation with and referral from a union has been found to be “inherently destructive” of employee rights, relying on *Catalytic Industrial Maintenance (CIMCO)*, 301 NLRB 342 (1991), *enforced*, 964 F.2d 513 (5th Cir. 1992), and *Jack Welsh Co.*, 284 NLRB 378 (1987). 362 NLRB No. 10, slip op. at 5. Having rejected the Respondent’s claim that it was merely following its practice of only operating with an 8(f) agreement in place, the majority concluded that the Respondent’s decision to discharge employees—as opposed to continuing their employment during the contract hiatus, or laying them off and recalling them once operations resumed—caused a several week delay in returning the employees to their former jobs. *Id.* The Board found that this delay harmed employees and discouraged their membership in the Boilermakers. *Id.* Assuming arguendo that the Respondent indeed requires all craft work to be performed under an 8(f) agreement, the Board found that this justification did not outweigh the harm caused by summarily discharging all employees who had been referred from the Boilermakers hiring hall. *Id.*, slip op. at 6. Finally, the Board majority noted that it would reach the same conclusion even if the impact on employee rights were only “comparatively slight” because the Respondent failed to establish a “legitimate and substantial business justification,” that is, it failed to show it was necessary to discharge rather than lay off the craft employees when it temporarily ceased operations. *Id.*, slip op. at 7 n.14.

On review, the D.C. Circuit rejected both theories of violation and remanded the case to the Board for further consideration. As to the *Wright Line* theory, the court found the prima facie case, specifically evidence of animus and nexus, “problematic.” 857 F.3d at 882. Moreover, it found the Board’s reasons for rejecting the Respondent’s defense unconvincing in light of evidence that the Respondent had, or believed it had, a twenty-year practice of only performing craft work under an 8(f) agreement (noting that the short periods during which the

Respondent had operated without a contract were distinguishable because there was an expectation of reaching a new agreement). *Id.* at 884. As to the “inherently destructive” theory, the court essentially concluded that the evidence did not support finding that union membership alone caused the discharges. *Id.* at 885. The court rejected the Board’s arguendo balancing of employee and Respondent interests, noting that no exception had been filed to the Administrative Law Judge Eleanor Law’s (ALJ) finding that the discharges had only a comparatively slight adverse impact (such that there could be no violation absent an affirmative showing of improper motive, so long as the Respondent had a substantial and legitimate business justification). *Id.*; *Great Dane*, 388 U.S. at 34. Finally, the court suggested that the Respondent’s actions could only be “inherently destructive” if the employees were discharged because of their membership in the Boilermakers rather than because the 8(f) agreement had expired. 857 F.3d at 885.

III. The Respondent’s Summary Discharge of all Craft Employees upon Termination of the 8(f) Relationship with the Boilermakers was “Inherently Destructive” of Employee Rights

The General Counsel urges the Board to find once again that the Respondent’s summary discharge of all craft employees upon termination of the 8(f) relationship with the Boilermakers was “inherently destructive” of employee rights. The court incorrectly suggested that the Respondent’s actions could only be “inherently destructive” if the employees were discharged *because of* their membership in the Boilermakers, rather than because the 8(f) agreement had expired. When employers expressly discriminate along Section 7 lines—for example, based solely on union affiliation or concerted activities, such as a strike—they engage in “discrimination in its simplest form” that “surely may have a discouraging effect on either present or future concerted activity.” *Great Dane*, 388 U.S. at 32. *See also Austin & Wolfe Refrigeration*, 202 NLRB 135, 135 (1973); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331,

1334 (9th Cir. 1976) (“conduct which discriminates solely upon the basis of participation in strikes or union activity,” such as “permanent discharge for participation in union activities,” is “inherently destructive”). Here, the Respondent’s actions single out craft employees who are affiliated with, or were referred from, the Boilermakers simply because they are no longer covered by an 8(f) agreement and are, therefore, not members of a different union with which the Respondent hoped to contract. As the ALJ noted, Boilermakers membership went hand in hand with lack of an 8(f) contract. 362 NLRB No. 10, slip op. at 24; 857 F.3d at 883. Discharging all craft employees who are no longer covered by an 8(f) agreement invariably discriminates against employees affiliated with the Boilermakers. *See Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1057 (D.C. Cir. 2003) (“even a facially nondiscriminatory rule could be shown to invariably discriminate against union adherents and therefore might be termed ‘inherently destructive’”). Thus, the court wrongly presumed that Boilermakers membership could be disentangled from their lack of contract, which is inconsistent with the D.C. Circuit’s prior view on the matter.

Furthermore, as the Board already found, the discharge of all employees of a particular craft because of their affiliation with and referral from a union is inherently destructive based on *CIMCO* and *Jack Welsh*, i.e. because it “‘create[s] visible and continuing obstacles to the future exercise of employee rights.’” 362 NLRB No. 10, slip op. at 5 (quoting *D & S Leasing*, 299 NLRB 658, 661 (1990), *enforced sub nom. NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1994)).¹ In *CIMCO*, the Board adopted the ALJ’s conclusion that “[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” creates such obstacles. 301 NLRB at 347. In this regard, it will

¹ It is worth noting that neither the ALJ nor Respondent have identified any case finding discharges in these circumstances to be anything other than inherently destructive.

not be lost on craft employees that they have lost their jobs at the end of an 8(f) agreement simply because the union that dispatched them is not one with which the Respondent wishes to continue an 8(f) relationship.

The negative impact on employee rights is particularly acute when employees may perceive that their union's assertiveness in bargaining a successor 8(f) agreement cost them their jobs, as was the case here where the Boilermakers insisted on certain terms and directed employees not to report for work on the Respondent's projects. Just as a refusal to reinstate strikers discourages employees from organizing and striking, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), discharging employees simply because they belong to a union that failed to secure a new 8(f) contract after pressuring the Respondent for a favorable contract discourages employees from associating with that union. Such conduct affects employees' choice of union affiliation not only at the time of discharge, but also on an ongoing basis, since an employee, when deciding which hiring hall to join, would be forced to evaluate his future chances of job loss based on a particular union's standing with Respondents. Although the ALJ and court are correct that employees assume some risk of economic disadvantage by associating themselves with a more assertive union, that risk should not include immediate termination at the end of an 8(f) relationship, with the mere *possibility* of being referred to that same employer by a new union at some indeterminate future date. *See Hawaiian Dredging*, 857 F.3d at 883 ("That 'employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the [company]' was par for the course in bargaining disputes and not Section 8(a)(3) discrimination 'absent some unlawful intention.'" Quoting 362 NLRB No. 10, slip op. at 24). Rather, the appropriate risk employees in the construction industry must bear is the risk that their employer will contract with a different union, thereby requiring the employee to either

switch union membership within the 7-day grace period provided for in Section 8(f) in order to retain his current job, possibly under less favorable terms, or seek referral to a new employer through his existing union's hiring hall. This framework appropriately takes into account the "unique" circumstances of 8(f) relationships. *See Hawaiian Dredging*, 857 F.3d at 883 (criticizing the Board decision's failure to take into account the unique legal framework present in the 8(f) context, in contrast with the ALJ's analysis).

Moreover, to the extent the Respondent anticipatorily discharged employees based on its belief that a new union would want a clean slate of workers dispatched by its own hiring hall, permitting such preemptive action would amount to circumvention of the ordinary rule that hiring hall clauses cannot be imposed retroactively. *See Austin & Wolfe*, 202 NLRB at 135. That is, an employer violates 8(a)(3) by acquiescing to a union's request to discharge employees hired before a lawful hiring-hall clause became effective for the simple reason that such employees had not been dispatched by that union's hiring hall. *Id.* (such action is the "plainest kind of discrimination" and falls into the "inherently destructive" category). There is no reason to treat the retroactivity of hiring-hall clauses any differently in the 8(f) context as compared to the 9(a) context.

The ALJ argued that *CIMCO* is distinguishable because the employer hired non-union employees. However, the employer there discharged the employees in order to apply pressure on the International to reinstate its participation in the 8(f) agreement. 301 NLRB at 347; 964 F.2d at 522, 524. That is, the employer in *CIMCO* wanted to continue using the union's hiring hall under terms it found favorable, but once its plan failed to achieve the desired result, the employer hired nonunion labor in an "unhurried" fashion. 301 NLRB at 348. The fact that the employer eventually hired nonunion replacements did not contribute to the finding that the discharges were

inherently destructive; this fact was only mentioned in rejecting the employers's proffered business justification, that it urgently needed reliable labor. In fact, conduct can be inherently destructive even when an employer does not seek to become nonunion. In *Rushton & Mercier Woodworking Co.*, 203 NLRB 123 (1973), *enforced*, 502 F.2d 1160 (1st Cir. 1974) (unpublished opinion), the Board found that the employer had engaged in inherently destructive conduct by hiring "a whole new work force represented by one union to the exclusion of [its] laid-off employees who are represented by a different union," when it reopened an alter ego company. *Id.* at 124.

The court, citing the Board, states that there was no exception filed to the ALJ's finding that the discharges had only a comparatively slight adverse impact. 857 F.3d at 885. However, General Counsel, in Exception 26, excepted to the ALJ's finding that the adverse effects on employee rights was comparatively slight. Accordingly, the Board was presented with this issue and properly balanced Respondent and employee interests as part of the "inherently destructive" analysis as an alternative ground for finding a violation, contrary to the court's suggestion otherwise. *See* 857 F.3d at 885.

IV. The Respondent has not Presented a Substantial and Legitimate Business Justification for the Discharges

The ALJ found that the Respondent's practice of only operating with 8(f) agreements in place provides a substantial and legitimate business justification "given the purpose of Section 8(f) and the mutual safeguards 8(f) agreements provide to both parties." 362 NLRB No. 10, slip op. at 24. Even assuming the Respondent was merely following its twenty-year practice of operating exclusively under 8(f) agreements, as the Board already noted, such a practice only justifies the Respondent's decision to temporarily cease operations while negotiating a new 8(f) agreement. It does not explain why it was necessary to discharge rather than lay off the

discriminatees. 362 NLRB No. 10, slip op. at 7 n.14. *See Hawaiian Dredging*, 857 F.3d at 885 (“The ALJ concluded therefore that the company had presented in rebuttal legitimate and substantial business justifications for its action The Board, of course, was not required to reach the same conclusion as the ALJ, but so far it has not adequately engaged the record evidence”).

V. The Respondent's Actions are Unlawful Because Employee Interests Outweigh the Respondent's Interests

Even assuming the 20-year practice constitutes a legitimate and substantial business justification, the Respondent's actions are unlawful because employee interests outweigh the Respondent's interests. The Board has already concluded that the Respondent's justification did not outweigh the harm done to employees, assuming *arguendo* that the Respondent discharged the discriminatees because there was no 8(f) contract in place. 362 NLRB No. 10, slip op. at 6.

The Respondent's interest in only operating under a contract is not that strong with respect to ongoing projects, where it already has a workforce of skilled employees assigned to a given project. As the Board already noted, the Respondent has “not indicated that it needed additional labor beyond the number of Boilermakers members who had already been dispatched and were working” in order to continue working on existing projects. 362 NLRB No. 10, slip op. at 4.

Although the Respondent has an interest in stability and predictability that supports its decision to halt operations absent an 8(f) contract, this interest does not justify the Respondent's failure to recall discriminatees once it resumed operations. If the Respondent had any doubts about whether the Boilermakers would work during the statutory 7-day grace period the employees should have under Section 8(f), it could have allayed those fears by speaking with employees or the Boilermakers about whether employees would be permitted to work during this

short period. *See* 362 NLRB No. 10, slip op. at 5 n.11. Although the Boilermakers directed employees not to perform work for the Respondent, this occurred in the midst of negotiations over the successor 8(f) contract. Once the Respondent withdrew from the 8(f) relationship, the Boilermakers had no need to apply economic pressure on the Respondent. Thus, the Respondent could not assume that the discriminatees would refuse to work after February 17, 2011.

In addition, there was no real risk that recalling laid-off Boilermakers would breach the referral procedure in the Pipefitters' agreement, given that contractual dispatch provisions cannot be applied retroactively. *See Austin & Wolfe*, 202 NLRB at 135.

VI. The Respondent's Efforts to Aid Employees in Securing their Jobs through the Pipefitters Hiring Hall does not Demonstrate an Innocent Motive

The ALJ found that the summary discharges were not "inherently destructive," in part, because the Respondent took actions after the discharges to return some discriminatees to work, suggesting a benign motive. 362 NLRB No. 10, slip op. at 23 ("[Respondent] facilitated returning the employees to work . . . on a nondiscriminatory basis. Accordingly, the [Respondent's] actions here are not 'demonstrably so destructive . . . that the Board need not inquire into Respondent motivation . . .'). The ALJ is correct that motive is still relevant in the *Great Dane* context, since a benign motive would preclude finding a Section 8(a)(3) violation. *See Contractors' Labor Pool*, 323 F.3d at 1057-59 (policy against hiring applicants whose recent earnings were 30 percent above or below Respondent's starting wage could not constitute "inherently destructive" conduct where Board explicitly found motivation to be benign). However, "inherently destructive" conduct is unlawful without *proof* of an unlawful motive because it "bears its own indicia of intent," i.e. impermissible motive. *Great Dane*, 388 U.S. at 33.

The Respondent's efforts to facilitate some discriminatees' reemployment do not retroactively demonstrate a blameless motive here. The summary discharge of all Boilermakers craft employees, regardless of subsequent reemployment efforts, warrants an inference of improper motive—that is, animus toward those affiliated with the Boilermakers. Having discharged the discriminatees, the Respondent knew that they could only be dispatched to its projects if they became members of the Pipefitters. In these circumstances, the fact that the Respondent harbored no lingering ill will toward the individuals themselves, as long as they were not affiliated with the Boilermakers, does nothing to undermine the inference of unlawful motive with respect to the earlier discharges.

VII. Conclusion

For the reasons set forth above, it is respectfully requested that the Board reaffirm its original decision that the Respondent violated Sections 8(a)(3) and (1) of the Act when it discharged its Boilermakers-represented employees.

DATED AT Honolulu, Hawaii, this 24th day of October 2017.

Respectfully Submitted,

/s/ Meredith A. Burns
Meredith A. Burns
Counsel for the General Counsel
National Labor Relations Board,
Subregion 37

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of General Counsel's Statement of Position to the Board on Remand from the D.C. Circuit Court of Appeals has this day been served as described below upon the following persons at their last known address:

1 copy Barry W. Marr, Esq. Via E-Mail
 Megumi Sakae, Esq.
 Pauahi Tower
 1003 Bishop Street, Ste. 1500
 Honolulu, HI 96813

1 copy David A. Rosenfeld, Esq. Via E-Mail
 Caren P. Sencer, Esq.
 Weinberg, Roger & Rosenfeld
 1001 Marina Village Parkway, Suite 200
 Alameda, CA 94501-1091

DATED AT Honolulu, Hawaii, this 24th day of October 2017.

/s/ Meredith A. Burns
Meredith A. Burns
Counsel for the General Counsel
National Labor Relations Board
Subregion 37
300 Ala Moana Blvd. Rm. 7-245
P.O. Box 50208
Honolulu, HI 96850