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

June 17, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND EMANUEL

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit. The issue is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging all welders represented by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (Boilermakers or Local 627), when the Respondent ceased performing all welding work upon the expiration of its Section 8(f) agreement with the Boilermakers. In light of the court’s decision, with which we agree, we now answer that question in the negative.<sup>1</sup>

On February 9, 2015, the Board issued a Decision and Order in this proceeding.<sup>2</sup> Reversing the administrative law judge, the Board found the discharges unlawful. The Respondent petitioned the court for review of the Board’s Order, and the Board cross-applied for enforcement. On May 26, 2017, the court denied enforcement and remanded the case for further consideration.<sup>3</sup> The court held that the Board had not adequately addressed the credited evidence that substantiated the Respondent’s defenses—in particular, evidence that the Respondent had a longstanding practice of performing craft work (such as the welding work performed by the Boilermakers-represented employees at issue here) only under a collective-bargaining agreement.<sup>4</sup>

Having carefully considered the record and the position statements—and after examining the evidence credited by the administrative law judge in the context of Section 8(f), as directed by the court—we conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act, and we dismiss the complaint.

Facts

The Respondent is the largest general contractor in Hawaii, employing approximately 375 craft employees. Through its membership in the Association of

Boilermakers Employers of Hawaii (Association), the Respondent had been party to 8(f) prehire agreements with the Boilermakers for at least 20 years. The Respondent also has 8(f) agreements with other unions, covering all of its employees. For at least 20 years, the Respondent had performed all of its work requiring craft labor under 8(f) collective-bargaining agreements.

The most recent collective-bargaining agreement between the Association and the Boilermakers expired on September 30, 2010. On October 1, the Boilermakers notified the Respondent that they would not work under the expired agreement, and a crew of Boilermakers-represented employees refused to report to work that day. In the past, the Respondent and the unions with which it partners had treated hiatus periods between contracts as contract extensions. Between October 1 and 7, the Respondent continued to employ Boilermakers-represented employees to perform welding work. On October 8, the Association and the Boilermakers agreed to extend the expired agreement through October 29. On or about October 27, the Association and the Boilermakers reached what they believed to be a successor 8(f) agreement retroactive to October 1, which was ratified by the Boilermakers’ members. Confirming this belief from the Boilermakers’ side, on November 1, Local 627 Business Representative Gary Aycock emailed Association Chairman Tom Valentine a new wage and benefit schedule effective October 1. However, the schedule contained two benefit terms that Valentine believed had not been agreed to. That same day, November 1, Valentine replied to Aycock’s email, asking Aycock to remove those items from the wage schedule. Aycock did not respond. The Respondent’s Boilermakers-represented welders continued working.

On November 12, Valentine sent Local 627 copies of the contract he believed the parties had reached, omitting the two terms Aycock had included. Local 627 refused to sign it and insisted that the two terms be included. It also set a deadline of November 30—subsequently extended to December 6—for Valentine to sign an agreement that included those terms. Valentine did not do so. On December 6, the Boilermakers refused to honor a December 3 dispatch request from the Respondent. The Association then filed a Section 8(b)(3) charge, alleging that the Boilermakers had refused to execute the contract and had attempted to modify it by adding employee benefits without bargaining.

On February 17, 2011, the Association learned that the Region had dismissed the 8(b)(3) charge on the ground

<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> 362 NLRB 81.

<sup>3</sup> *Hawaiian Dredging Construction Co. v. NLRB*, 857 F.3d 877 (D.C. Cir. 2017).

<sup>4</sup> *Id.* at 885.

that there was no complete agreement on the terms of a successor collective-bargaining agreement.

That same day, via letter, the Association terminated its 8(f) agreement with the Boilermakers and informed them that it “d[id] not intend to utilize members of the Boilermaker’s Union for future work.” The Respondent ceased performing all welding work and discharged its 13 Boilermakers-represented employees, citing the expiration of the contract as the reason for the terminations.

On or about February 19, the Respondent met with representatives of the United Plumbers and Pipefitters Union (Pipefitters) to discuss a possible 8(f) agreement. They met again on February 23. At both meetings, the Pipefitters turned down requests to waive their usual requirements—principally, a welding test that all prospective registrants in the Pipefitters’ hiring hall must pass—so that the discharged welders could be promptly dispatched to the Respondent. During the February 23 meeting, the Respondent executed an 8(f) agreement with the Pipefitters, which contained an exclusive referral provision requiring the Respondent to secure all employees covered by the agreement from the Pipefitters’ hiring hall. The Respondent informed the 13 discharged employees that they could only return to the Respondent through the Pipefitters’ hiring hall. The Respondent permitted them to use its warehouse facility to practice their welding skills in preparation for the Pipefitters’ welding test. On March 1, the Pipefitters dispatched the first welder to the Respondent under their new 8(f) agreement, and the Respondent resumed performing welding work for the first time since February 17. Eight of the 13 discharged employees ultimately resumed work for the Respondent through referrals from the Pipefitters’ hiring hall.

On May 12, the Boilermakers filed the instant charge alleging that the discharges violated Section 8(a)(3). There is no allegation in this case calling into question the lawfulness of the Respondent’s long-established practice of performing work requiring craft labor only under collective-bargaining agreements.

#### Board and Court Proceedings

The administrative law judge recommended that the complaint be dismissed. Applying the analytical framework established by the Supreme Court in *NLRB v. Trailers*,<sup>5</sup> she found that the Respondent’s conduct was not “inherently destructive” of employee rights but rather had only a “comparatively slight” adverse effect, and that the Respondent had established a legitimate and substantial

business justification for the discharges: the absence of an agreement with the Boilermakers and a longstanding practice of performing craft work only under collective-bargaining agreements. She further found that the General Counsel did not prove an antiunion motive. In the alternative, under *Wright Line*,<sup>6</sup> the judge found that even assuming the General Counsel had met his initial burden, the Respondent met its defense burden by showing that it would have discharged the employees in any event based on the same longstanding practice.

Over the dissent of then-Member Miscimarra, the Board reversed, finding the discharges unlawful on two grounds. First, applying *Wright Line*, the Board found that the discharges were based on a discriminatory motive. The Board found that the Respondent’s animus was established by its mass discharge of only Boilermakers-represented employees and its statement that it would not use Boilermakers in the future.<sup>7</sup> The Board rejected the administrative law judge’s conclusion that the Respondent had met its defense burden. Rather, the Board found that the Respondent’s purported justification was undermined by the fact that it had performed craft work without a contract in effect during two periods: from October 1 through 7 and from October 30 through November 12.<sup>8</sup>

Second, applying *Great Dane*, the Board found the Respondent’s discharge of the employees was “inherently destructive of their right to membership in the union of their choosing . . . .”<sup>9</sup> The Board found it “clear from the facts” that the Respondent discharged the employees “because of their affiliation with the Boilermakers.” *Id.* The Board observed that discrimination in favor of one union over another is just as destructive of employee rights as discrimination against unionization. *Id.* The Board also found that the Respondent’s business justification did not outweigh its actions’ effect on employee rights. In that regard, the Board noted that it had already rejected the Respondent’s asserted business justification—that all of its craft work be performed under contracts—under the *Wright Line* analysis. The Board further found that, even if the Respondent *had* shown it solely performed craft work under collective-bargaining agreements, that practice did not outweigh the harm done to employees on the basis of their union affiliation.<sup>10</sup>

The court rejected both lines of analysis. Regarding the *Wright Line* analysis, the court explained that “[g]iven the evidence on the nature of the company’s twenty-year practice under its business model, the Board failed adequately to explain its conclusion that the gap periods [October 1

<sup>5</sup> 388 U.S. 26 (1967).

<sup>6</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

<sup>7</sup> 362 NLRB 81, 83.

<sup>8</sup> *Id.*, at 83–84.

<sup>9</sup> *Id.*, at 85.

<sup>10</sup> *Id.*, at 86.

through 7 and 30 through November 12] 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."<sup>11</sup> The court also stated that the Board "never confronted the evidence relied on by the ALJ that the company's Section 8(f) agreements contemplated implied agreements during gap periods . . . ." <sup>12</sup> Moreover, the court reasoned that in the construction industry, discharging all employees when a collective-bargaining agreement expires does not, on its own, show animus against employees' union activity.<sup>13</sup> Ultimately, the court concluded that the Board "never confronted the evidence . . . that . . . overwhelmingly showed that the [Respondent]'s conduct was inconsistent with discouraging union membership, much less Boilermakers membership," and gave "inappropriate emphasis to the gap periods."<sup>14</sup>

For similar reasons, the court also rejected the Board's finding, under *Great Dane*, that the Respondent's conduct was "inherently destructive" of the Boilermakers-represented employees' right to membership in the union of their choosing.<sup>15</sup> The court acknowledged that the Respondent sent a letter to the Boilermakers with a sentence that referenced the employees' membership in that union. But it found that the sentence supported the Board's view only if "extracted from what else was stated in the letter and record evidence," including the Respondent's longstanding practice with 8(f) agreements.<sup>16</sup> The court stated that, other than referencing the two gap periods and the parties' disagreement during negotiations, the Board "offered no reason for rejecting evidence that the [Respondent]'s conduct was only plausibly 'inherently destructive' if the employees were separated *because of* their union membership, rather than—as the ALJ found—because of the expiration of their contract."<sup>17</sup>

The court concluded that "the Board's analysis failed 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)," and it

therefore granted the Respondent's petition, denied the Board's cross-application for enforcement, and remanded the case to the Board "for further consideration."<sup>18</sup>

#### Discussion

After further consideration, we conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act under either *Wright Line* or *Great Dane*.

The Board originally found the violation based largely on the existence of two periods during which the Respondent "knowingly operated without an agreement in place."<sup>19</sup> In the Board's view, those two periods undermined the Respondent's stated legitimate reason for the discharges, i.e., that it strictly adhered to the practice of only performing craft work with a collective-bargaining agreement in place. The court rejected that finding. It held that the Board gave "inappropriate emphasis" to the two "gap" periods in light of the credited evidence (i) regarding the Respondent's 20-year practice of only performing craft work under a collective-bargaining agreement, and (ii) "that the company's Section 8(f) agreements contemplated implied agreements during gap periods."<sup>20</sup> We agree. Accordingly, we find that the two brief gap periods do not undermine the Respondent's stated legitimate reason for the discharges.

In their position statements, the Boilermakers and the General Counsel contend that the Board should find the violation for reasons unrelated to the gap periods. But, as explained below, their arguments are either unpersuasive or precluded by the law of the case, or both.

The Boilermakers point to the Association's statement, made in its February 17 letter to the Boilermakers terminating the 8(f) agreement, that it "[d]id not intend to utilize members of the Boilermaker's Union for future work." The Boilermakers contend that the court "attempted to ignore" this statement, which, they argue, shows that the Respondent's decision was "plainly . . . based on Union membership." But the court did not ignore this statement. Rather, it reasoned that the statement supported the Board's view (which was the same as the Boilermakers')

<sup>11</sup> 857 F.3d at 884.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id. The court also observed that the administrative law judge credited testimony that the Respondent had—or believed it had—a 20-year practice of only performing craft work under 8(f) agreements, and it faulted the Board for failing to explain how that belief, even if mistaken, "was insufficient to rebut an inference of discriminatory motive." Id. at 885 (citing *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 435–436 (D.C. Cir. 2012)).

<sup>15</sup> Id.

<sup>16</sup> Id. The court also rejected the Board's reasoning that "[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.'" Id. (quoting 362 NLRB 81, 86) (alterations in the court's opinion). The court stated that no exception had been filed to the administrative law judge's finding that the discharges "had only a comparatively slight adverse impact." Id. In fact, the General Counsel *had* excepted to that finding and insisted that the Respondent's conduct was "inherently destructive." This error does not alter our conclusion, explained below, that the discharges were not "inherently destructive."

<sup>17</sup> Id. (emphasis in original).

<sup>18</sup> Id.

<sup>19</sup> 362 NLRB 81, 83.

<sup>20</sup> 857 F.3d at 884.

“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.”<sup>21</sup> Again, we agree with the court’s reasoning.

The Boilermakers and the General Counsel also argue that the Respondent unlawfully conditioned continued employment on immediate membership in the Pipefitters at a time when the employees were entitled to a grace period<sup>22</sup> during which they could not be lawfully compelled to join a union.<sup>23</sup> The General Counsel acknowledges that employees in the construction industry must bear some risk that their employer will contract with a different union, thereby requiring the employee to either switch union membership within the statutory grace period 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. The General Counsel contends that this grace-period “framework appropriately takes into account the ‘unique’ circumstances of 8(f) relationships,” as the court criticized the Board for failing to do.

But the Board made similar grace-period arguments in its original decision. The Board stated:

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

...

[T]he Respondent was free to lay off the alleged discriminatees during this period, so long as they remained employees with an expectation of recall, thereby allowing them to return once operations resumed. Thereafter, at the end of the statutory 7-day grace period, the Respondent and the Pipefitters were free to require the alleged discriminatees, as a condition of continued employment,

to meet the Pipefitters’ criteria for referral and become dues-paying members. What the Respondent could not do, however, was sever its employment relationship with the alleged discriminatees on account of their Boilermakers’ membership.

362 NLRB 81, 86. Although the court did not directly address this aspect of the Board’s rationale, it implicitly rejected the Board’s arguments, as they are inconsistent with the court’s statement that the Board “never confronted” certain evidence relied on by the administrative law judge that “overwhelmingly showed that the company’s conduct was inconsistent with discouraging union membership, much less Boilermakers membership.”<sup>24</sup> Accordingly, we conclude that the Boilermakers’ and General Counsel’s grace-period arguments are precluded by the court’s decision. We also find them unpersuasive. We reject the finding that the welders “were discharged . . . merely because they were members of the Boilermakers”—that the Respondent “sever[ed] its employment relationship with the alleged discriminatees on account of their Boilermakers’ membership.” In agreement with the administrative law judge, we find instead that the welders were separated because of the expiration of their contract in keeping with the Respondent’s long-settled practice of only performing craft work under 8(f) agreements—not because of their membership in the Boilermakers.

Moreover, the record does not support the claim that the Respondent conditioned continued employment on immediate membership in the Pipefitters. There is no evidence the Respondent told its former employees that they had to become members of the Pipefitters before they could be re-employed by the Respondent. Rather, one of the Respondent’s managers—Superintendent Forrest Ramey—testified that he told former employees that he “didn’t know exactly what the process was or what hurdles they would have to cross, but that there was a path and that if they were interested in returning, they needed to start down it” (Tr. 275). The welders knew that this “path” entailed taking and passing the Pipefitters’ welding test before they could register for referrals from that union’s hiring hall. It is well established, however, that in operating a hiring hall, unions are prohibited from discriminating on the basis of membership.<sup>25</sup>

Respondent unless they became full members of the Pipefitters. But there is no allegation against the Pipefitters in this case. Moreover, the evidence does not support the claim that the Pipefitters conditioned referral of the discharged welders to the Respondent on the welders becoming members of the Pipefitters. Rather, the evidence shows that the Pipefitters merely declined the Respondent’s request to waive, for the discharged welders, the welding test it requires all prospective registrants in its hiring hall to pass.

<sup>24</sup> 857 F.3d at 884.

<sup>25</sup> See, e.g., *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

<sup>21</sup> 857 F.3d at 885.

<sup>22</sup> Sec. 8(f) of the Act permits an agreement between an employer in the building and construction industry and a labor organization to “require[] 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.”

<sup>23</sup> The Boilermakers also contend that the Pipefitters “were unlawfully preventing the rehiring [of] any of the Boilermaker employees” by making clear that the Boilermakers-represented employees who had been discharged would not be referred and could not be hired back by the

In addition, the General Counsel argues that the court erred by failing to recognize that the discharges were “inherently destructive” because “[d]ischarging all craft employees who are no longer covered by an 8(f) agreement invariably discriminates against employees affiliated with the Boilermakers,” and by suggesting 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” (emphasis in original). Our dissenting colleague, likewise, contends that the discharges were inherently destructive because the Respondent “linked its employment relationship with incumbent employees to its (terminated) bargaining relationship with the Boilermakers—and that linkage necessarily implicated employees’ union affiliation.” But the court’s decision implicitly rejects the notion that the discharges were discriminatory on their face, absent evidence of some unlawful intention. Moreover, the welders were discharged because there was no work for them to perform after the 8(f) contract with the Boilermakers expired, and there was no work for them to perform because the Respondent adhered to its longstanding practice of only performing work requiring craft labor under a collective-bargaining agreement. What the General Counsel effectively argues here is that the Respondent’s decades-old practice was “inherently destructive”—but there is no such allegation in this case.

The dissent acknowledges that the Respondent was free to terminate its 8(f) relationship with the Boilermakers when it did and to suspend welding operations but contends that “there was no justification for the Respondent terminating their employment altogether.” But with no work to perform, the Respondent had to choose between discharging its welders and laying them off with an expectation of recall, and nothing in the Act required the Respondent to choose one option over the other. What the Respondent could not do, as the court’s decision makes clear, was discharge its welders *because of* their union membership.<sup>26</sup> That was not the case here, however, as the Respondent discharged the welders because of the expiration of their contract—regardless of their affiliation

<sup>26</sup> The dissent maintains that “the Board has held that an employer may not discharge its employees upon termination of an 8(f) agreement.” But the cases she cites are easily distinguishable. In *Automatic Sprinkler Corp.*, 319 NLRB 401, 402 fn. 4 (1995), enf. denied 120 F.3d 612 (6th Cir. 1997), cert. denied 523 U.S. 1106 (1998), the Board stated that “[t]he expiration of an 8(f) contract simply privileges a withdrawal of recognition, not a *discriminatory* discharge of employees” (emphasis added). The Board found direct evidence of antiunion motive, and in any event the employer had terminated the employees during the term of the 8(f) agreement, not after its expiration. Likewise, in *Jack Welsh Co.*, 284 NLRB 378, 379, 383 (1987), the Board held that the employer, which had decided to “go open shop,” violated Sec. 8(a)(3) by discharging “its

with any particular union—in accordance with its practice of performing craft work only under a collective-bargaining agreement.

Further, the dissent’s position hinges on a distinction she draws between *discharging* the Boilermakers-represented welders when the 8(f) contract with the Boilermakers expired and all welding work ceased and *laying them off* and recalling them when welding operations resumed. According to the dissent, discharging the welders “impaired their ability to return to work once the Respondent reached a new agreement with the Pipefitters,” whereas “[h]ad [they] merely been laid off, they all would have been entitled to immediately return to work once the Respondent resumed operations under the Pipefitters’ agreement.” This was simply not the case. The Pipefitters’ agreement required the Respondent to secure all employees covered by the agreement—i.e., welders—by referral from the Pipefitters’ hiring hall, and to qualify for referral, welders had to meet the Pipefitters’ referral requirements, including satisfactory performance on a welding test. Thus, regardless of whether the welders had been laid off or discharged, their path to re-employment with the Respondent would have been the same: take and pass the welding test, satisfy any other referral requirements, and register at the Pipefitters’ hiring hall.<sup>27</sup> Consequently, from the welders’ standpoint, there was no practical difference between a layoff and a discharge.

As the dissent observes, the court instructed the Board “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).” We have followed the court’s instructions, and, for the reasons explained above, we reach the same result on remand as the judge reached. The dissent, in contrast, has not explained why the evidence credited by the judge supports a different result. Instead, the dissent repackages the same arguments made by the Board in its original decision, including the contention that discharging employees upon the expiration of an 8(f) agreement is inherently destructive because it demonstrates to employees that their

carpenter employees *because they were members of the [union]*” (emphasis added). *Automatic Sprinkler* and *Jack Welsh*, therefore, do not support the broad proposition that an employer can never discharge employees upon termination of an 8(f) agreement. Rather, they support the narrower proposition that an employer cannot *discriminatorily* discharge employees in such circumstances. For the reasons stated in this decision, we find that that did not occur here.

<sup>27</sup> The Respondent tried to persuade the Pipefitters to waive the referral requirements for its discharged welders, but the Pipefitters were unwilling to do so because of the industry-wide implications of such a concession.

employment status is dependent on their union affiliation.<sup>28</sup> But the court found this reasoning inadequate, and so do we.

For the above reasons, we find that the Respondent's discharge of all Boilermakers-represented employees after the expiration of the parties' 8(f) agreement was consistent with its longstanding practice of only performing craft work under a collective-bargaining agreement. We therefore find that the Respondent has shown a legitimate and substantial business justification for the discharges under *Great Dane*, and the General Counsel has failed to demonstrate antiunion motive.<sup>29</sup> Alternatively, under *Wright Line*, even assuming the General Counsel met his initial burden, we find that the Respondent proved it would have discharged the employees anyway based on its longstanding practice.

Accordingly, we shall vacate the Board's Decision and Order in Case 37-CA-008316 and dismiss the complaint.

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 17, 2019

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John F. Ring, Chairman

\_\_\_\_\_  
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Unlike my colleagues, I would adhere to the Board's prior finding that the Respondent's discharge of its

<sup>28</sup> In support, the dissent cites *Catalytic Industrial Maintenance*, 301 NLRB 342, 347-348 (1991), *enfd.* 964 F.2d 513 (5th Cir. 1992), which the original Board majority had cited for the same proposition. 362 NLRB 81, 85. In that case, the Board stated that "the discharge of all employees of a particular craft *because of* their affiliation with, and referral from, a union . . . creates 'continuing obstacles to the future exercise of employment rights.'" 301 NLRB at 347 (emphasis added). But that principle is inapposite where, as here, the employees were discharged because of the expiration of their contract, not because of their union affiliation.

<sup>29</sup> The dissent appears to suggest that the Respondent's business justification was not legitimate and substantial because the Respondent could have laid off the welders instead of discharging them. Nothing in *Great Dane*, however, requires an employer to use the least-restrictive course of action in order to establish a legitimate and substantial business justification.

In any event, as explained above, we disagree with the dissent's assertion that there was any practical difference, from the welders'

incumbent employees, upon the expiration of the Section 8(f) agreement with the Boilermakers, was "inherently destructive" of the employees' statutory rights and thus unlawful.<sup>1</sup> There is no impediment in the court's opinion to reaffirming this correct finding. Under Section 7 of the National Labor Relations Act, employees have the right to join or assist unions of their own choosing—here, the Boilermakers.<sup>2</sup> Even if the Respondent had a longstanding practice of performing craft work only under an 8(f) agreement, and even if it executed a new 8(f) agreement with another union (the Pipefitters), there simply was no legitimate reason for the Respondent to discharge incumbent employees. A mass discharge was not required to abide by the Respondent's 8(f)-agreement practice (employees could have been laid off temporarily) or to enter into a new 8(f) bargaining relationship (which did not depend on which union incumbent employees were affiliated with). Treating discharge as the inevitable consequence of the Respondent's lawful business decisions necessarily means treating employment status as dependent on union affiliation, but the Act simply does not permit such a linkage.

#### I.

The material facts are set forth fully in the Board's original decision. Briefly, the Respondent and the Boilermakers had been parties to an 8(f) prehire collective-bargaining agreement for at least 20 years. Pursuant to this agreement, the Boilermakers provided the Respondent with employees to perform welding and other duties.

The parties' most recent agreement expired at the end of September 2010, at which time the parties had not reached a new agreement, despite ongoing negotiations. Following a series of communications and exchanges of proposals, the Respondent filed an unfair labor practice charge alleging that the Boilermakers had unlawfully refused to sign what the Respondent believed was an agreed-

standpoint, between a layoff and a discharge. The dissent speculates that had the welders been laid off, they might have retained seniority and preferential recall rights. Once the Respondent's 8(f) agreement with the Pipefitters took effect, however, that agreement became the exclusive source of the welders' employment terms and conditions, and the dissent makes no showing that the welders would have retained any such rights from the expired Boilermakers' 8(f) agreement.

<sup>1</sup> *Hawaiian Dredging Construction Co.*, 362 NLRB 81, 85-86 (2015). See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) ("Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. . ."). As the majority explains, this case is on remand from the District of Columbia Circuit following its decision in *Hawaiian Dredging Construction Co. v. NLRB*, 857 F.3d 877 (D.C. Cir. 2017).

<sup>2</sup> 29 U.S.C. §157 ("Employees shall have the right . . . to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing . . .").

upon contract. The Region dismissed this charge, however, finding that the parties had not reached a complete agreement.

Upon receiving notice of that dismissal, the Respondent terminated its 8(f) relationship with the Boilermakers, and it informed the Boilermakers that the Respondent would no longer be using Boilermakers-represented employees for future work. The Respondent also temporarily suspended ongoing welding work and issued termination notices to its 13 Boilermakers-represented employees. The notices cited “contract has expired” as the reason for the terminations. In fact, the Respondent did have an historical, albeit not entirely uniform, practice of performing craft work only under an applicable Section 8(f) agreement.

The Respondent then entered into a Section 8(f) collective-bargaining agreement with the Pipefitters, and shortly thereafter resumed its welding operations. About this time, the Respondent contacted 10 of the discharged Boilermakers-represented employees, informed them that it had reached an agreement with the Pipefitters, and stated that they would need to speak to the Pipefitters’ leadership if they were interested in returning to work. Eight of those employees registered with the Pipefitters, and the first was dispatched to the Respondent several weeks later.

## II.

On those facts, the Board found in its earlier decision that the Respondent’s mass discharge of all of its Boilermakers-represented employees was “inherently destructive” of their statutory rights under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). We should reaffirm that finding.<sup>3</sup>

To begin, the majority is mistaken in thinking that the court’s decision implicitly rejected the Board’s “inherently destructive” finding or otherwise precludes the Board from reaffirming it now. The law-of-the-case doctrine requires the Board to abide by the court’s decision, but that doctrine is limited to matters that the court

actually decided.<sup>4</sup> That the court may have questioned the Board’s finding is not a bar, so long as the court’s expressed concerns are addressed on remand—as they can be in this case.<sup>5</sup>

Here, the court gave two reasons for rejecting the Board’s original conclusion that the Respondent’s actions were “inherently destructive” of the employees’ Section 7 rights: (1) that “no exception was filed to the ALJ’s finding that the discharges had only a comparatively slight adverse impact”; and (2) that “the Board *appear[ed]* 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.”<sup>6</sup> As my colleagues acknowledge, the court’s first rationale is simply incorrect. And by phrasing the latter conclusion tentatively and remanding for the Board “to engage with evidence credited by the ALJ in the context of Section 8(f),” the court invited the Board to clarify its finding that the Respondent’s action was “inherently destructive” even if based on the absence of a collective-bargaining agreement.

With respect to the latter, the Board has held as a general matter that discharging employees upon the expiration of an 8(f) agreement is “inherently destructive” of employees’ Section 7 rights because it demonstrates to employees that their employment status is dependent on their union affiliation, which employees must be free to choose without fear of adverse consequences imposed by their employer.<sup>7</sup> That principle applies here, as the Respondent’s discharge notices to the Boilermakers-represented employees cited “contract has expired” as the reason. Thus, the Respondent linked its employment relationship with incumbent employees to its (terminated) bargaining relationship with the Boilermakers—and that linkage necessarily implicated employees’ union affiliation, i.e., their prior representation by the Boilermakers. Thus, as the Board found in its original decision, “the Respondent’s

<sup>3</sup> I find it unnecessary to reach the Board’s additional finding that the Respondent’s action was unlawful under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

<sup>4</sup> The law-of-the-case doctrine “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–816 (1988) (internal quotation marks and citation omitted). Thus, *if* a question has been considered and decided by an appellate court, the issue may not be reconsidered at any subsequent stage of the litigation, save on a petition for rehearing or on a further appeal.

<sup>5</sup> *Tussey v. ABB, Inc.*, 850 F.3d 951, 959 (8th Cir. 2017), *cert. denied* 138 S.Ct. 281 (2017) (“We suggested two points in the district court’s explanation that ‘seem[ed]’ or ‘appear[ed]’ to be mistaken, but we did so in tentative, qualifying terms, rather than the firm, definite

language we used for our holdings . . . . Properly read, the passage at issue proposed an alternative we thought warranted consideration . . . , it did not require that the district court adopt our proffered approach.”).

<sup>6</sup> *Hawaiian Dredging Construction Co. v. NLRB*, 857 F.3d at 885 (first emphasis added).

<sup>7</sup> *Catalytic Industrial Maintenance*, 301 NLRB 342, 347–348 (1991), *enfd.* 964 F.2d 513 (5th Cir. 1992). As the Board explained in *Catalytic Industrial*, “mass discharges . . . of union adherents are particularly destructive of rights of employees guaranteed to them in Section 7 of the Act,” and “[i]t is clear . . . that the discharge of all employees of a particular craft because of their affiliation with, and referral from, a union . . . creates ‘continuing obstacles to the future exercise of employment rights,’” namely, the right to choose which union to be affiliated with. 301 NLRB at 348 (emphasis omitted), quoting *D & S Leasing*, 299 NLRB 658 (1990).

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.”<sup>8</sup>

As the Board previously recognized, the question then becomes whether the Respondent’s asserted justification—a practice of not performing craft work without a collective-bargaining agreement in place—was legitimate and, if so, whether it outweighed the substantial impact on its employees’ rights.<sup>9</sup> The answer here is “no.” Of course, the Respondent was free to terminate its 8(f) relationship with the Boilermakers when it did and to thereafter suspend welding operations, in accordance with its asserted practice. And, as the Board emphasized, the Respondent was free to lay off its welders due to the lack of work resulting from the suspension of welding operations.<sup>10</sup> But there was no justification for the Respondent terminating their employment altogether.<sup>11</sup> That step necessarily made the employment relationship dependent on union affiliation, when such a connection is impermissible—in the 8(f) context, as elsewhere. For example, after lawfully withdrawing recognition from an incumbent union, an employer obviously would *not* be free to discharge its incumbent employees, on the grounds that its bargaining relationship with the union had ended. Nothing about the employees’ prior representation by the union would be incompatible with continued employment; for purposes of the National Labor Relations Act, discharging employees because the prior bargaining relationship had ended would be the equivalent of discharging them for having been represented the union.

Further, as the Board previously explained, by discharging its Boilermakers-represented employees the

Respondent not only unjustifiably severed their then-current employment, but actually further disadvantaged them vis-à-vis the Respondent’s new 8(f) agreement with the Pipefitters. Had the employees merely been laid off, they all would have been entitled to immediately return to work once the Respondent resumed operations under the Pipefitters’ agreement.<sup>12</sup> Instead, several of the employees never returned to work, and those who did lost several weeks of wages. None of that was necessary—or justifiable.

### III.

The Respondent’s decision to terminate its 8(f) bargaining relationship with the Boilermakers simply did not mean that it was either required—or permitted—to terminate its employment relationship with its incumbent employees. The Respondent could have adhered to its asserted practice of performing welding work only under a collective-bargaining agreement by laying off the employees—and so not impairing their ability to return to work once the Respondent reached a new agreement with the Pipefitters. As the Board previously found, the Respondent’s decision not to pursue that path, but instead to treat the end of its bargaining relationship with the Boilermakers as somehow compelling it to end its employment relationship with incumbent employees, was “inherently destructive” of their statutory rights and unjustified by any legitimate business purpose.

<sup>8</sup> *Hawaiian Dredging*, 362 NLRB at 86

<sup>9</sup> *Hawaiian Dredging*, 362 NLRB at 86. See *Great Dane*, 388 U.S. at 34.

<sup>10</sup> *Id.*

<sup>11</sup> Although my colleagues assert that “nothing in the Act required the Respondent to” layoff the employees, rather than discharge them, the Board has held that an employer may not discharge its employees upon termination of an 8(f) agreement. *Automatic Sprinkler Corp.*, 319 NLRB 401, 402 fn. 4 (1995) (“The expiration of an 8(f) contract simply privileges a withdrawal of recognition, not a discriminatory discharge of employees.”), enf. denied 120 F.3d 612 (6th Cir. 1997), cert. denied 523 U.S. 1106 (1998); *Jack Welsh Co.*, 284 NLRB 378, 379, 383 (1987) (finding an 8(a)(3) violation where employees were discharged after employer decided to “go open shop” rather than renew its 8(f) agreement; employees were “never given an opportunity to quit”). That precedent means nothing if employers can temporarily cease production upon the expiration of an 8(f) agreement, terminate their work forces, and then reopen with new employees.

Moreover, the majority’s assertion overlooks the Respondent’s burden under the *Great Dane* framework. The judge found that the discharge of the welders had a “comparatively slight” adverse effect on their Sec. 7 rights, and in the absence of exceptions to that finding, the Board

agreed that “the discharges had at least a ‘comparatively slight’ adverse impact.” *Hawaiian Dredging*, 362 NLRB at 86-87 fn. 14. Thus, under *Great Dane*, the Respondent was obligated to “establish a ‘legitimate and substantial business justification’ for the discharges.” *Id.* (quoting *Great Dane*, 388 U.S. at 34). If the Respondent’s practice of performing work under Sec. 8(f) agreements did not require it to discharge the welders—and as I have explained, it did not—then the Respondent fails to satisfy its burden under *Great Dane*.

<sup>12</sup> *Hawaiian Dredging*, 362 NLRB at 86 (citing *Austin & Wolfe Refrigeration*, 202 NLRB 135, 135 (1973)). Although my colleagues assert that this “[i]s simply not the case,” the Court of Appeals did not disturb the Board’s legal conclusion that the referral provisions of the Pipefitters agreement could not lawfully apply to employees recalled from layoff. More to the point, even assuming that the employees, had they been laid-off, would have been required to satisfy the Pipefitters’ referral requirements before returning to work, the employees at least still would have enjoyed a continuing employment relationship with the Respondent and whatever benefits might have flowed from maintenance of that relationship, such as seniority and preferential recall rights. Regarding the latter, it is noteworthy that at least several of the former Boilermakers-represented employees apparently satisfied the Pipefitters’ requirements in short order.



Because the Board's original decision in this case reached the correct result, I dissent here.

Dated, Washington, D.C. June 17, 2019

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD