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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627.	Case 37-CA-008316 HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.'S **MOTION FOR SUMMARY JUDGMENT**; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF TOM VALENTINE, EXHIBITS "1"-"2"; DECLARATION OF BARRY W. MARR, EXHIBITS "1"-"2"; DECLARATION OF GORDON CAUGHMAN; DECLARATION OF REGINALD CASTANARES; CERTIFICATE OF SERVICE

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.'S
MOTION FOR SUMMARY JUDGMENT

Hawaiian Dredging Construction Company ("HDCC"), by and through its attorneys Marr Jones & Wang, LLLP, hereby moves for summary judgment to dismiss the

Acting General Counsel's Amended Complaint alleging HDCC violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

This Motion is filed pursuant to 29 C.F.R. § 102.24 and is based on the record herein and the accompanying memorandum, declarations and the exhibits attached thereto, and the oral argument at the hearing on this motion.

DATED: Honolulu, Hawaii, January 31, 2012.

BARRY W. MARR
MEGUMI SAKAE

Attorneys for
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.

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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 **MEMORANDUM IN SUPPORT OF MOTION**

I. INTRODUCTORY STATEMENT

This is a case where the National Labor Relations Board ("NLRB" or the "Board") got it right the first time when it dismissed the underlying Charge against Hawaiian Dredging Construction Company, Inc. ("HDCC"). But for reasons unclear, the Board rescinded its dismissal and the Acting General Counsel filed first a Complaint, and then the Amended Complaint at issue, alleging that HDCC violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") when it sent thirteen welders back to the hiring hall after the Board determined that no contract existed between HDCC and the welders' union, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the "Boilermakers Union"). It is undisputed that before HDCC sent the welders back to the hiring hall, it contacted the Boilermakers Union and lawfully terminated its relationship with it. It is further undisputed that six days later, HDCC lawfully entered into a collective bargaining agreement with another union, the Plumbers & Pipefitters Union, Local 675 (the "Pipefitters Union"). Thereafter, HDCC informed all thirteen welders that they could return to HDCC and that they need only go through the Pipefitters Union to do so. Some welders returned, and others

voluntarily chose not to return. These material facts are undisputed. Thus, HDCC's conduct in no way discriminated against the thirteen welders for their union activity and HDCC requests that the Amended Complaint be summarily dismissed in its entirety.

II. UNDISPUTED FACTS

A. History Of HDCC And The Boilermakers Union's Relationship

HDCC is primarily in the building and construction industry. Declaration of Tom Valentine at ¶ 2 ("Valentine Decl."). HDCC is a signatory to six collective bargaining agreements. Valentine Decl. ¶ 3. The Association of Boilermakers Employers of Hawaii (the "Association"), of which HDCC was a member (along with Arakaki Mechanical LLC and another employer), and the Boilermakers Union were parties to a Section 8(f) pre-hire agreement for many years, and at least since 2005. Valentine Decl. ¶ 4. The Boilermakers Union provided HDCC with welders for its Power & Industrial Division. Valentine Decl. ¶ 5.

In or around September 2010, the Association and the Boilermakers Union began negotiating a new agreement. Valentine Decl. ¶ 6. When the Union refused to honor its agreement with the Association after the parties negotiated and agreed to the terms of a new agreement, on or about December 6, 2010, the Association filed a Charge with the NLRB (NLRB Charge No. 37-CB-2043). Valentine Decl. ¶ 6. During the investigation of this Charge, HDCC requested mediation of the contract dispute through FMCS, but the Boilermakers Union refused. Valentine Decl. ¶ 7. During this time period, the quality of the workers referred by the Boilermakers Union became unacceptable and HDCC received a complaint from one of its biggest customers, HECO, from whom HDCC received 75% of its welding business. Valentine Decl. ¶ 8. HDCC attempted to address these issues with the Boilermakers Union, but received no response. Valentine Decl. ¶ 8, Exhibit 1.

By letter dated February 14, 2011, having concluded that the parties did not reach a complete agreement on the terms and conditions of a new collective bargaining agreement, the Board notified the parties that it was dismissing the Association's Charge (the "February 14 Dismissal Letter"). Declaration of Barry W. Marr ("Marr Decl.") at ¶ 2, Exhibit 1. According to the dismissal, "it cannot be said that the Union acted in perfect good faith and did not suspect the Charging Party's misunderstanding when the parties reached a tentative agreement on a proposal drafted by the Union . . . ." *Id.* HDCC received the Board's determination on February 17, 2012. Valentine Decl. ¶ 9.

The same day the Association received the February 14 Dismissal Letter, the Association employers lawfully terminated their relationship with the Boilermakers Union. Valentine Decl. ¶ 10. The Amended Complaint does not allege that HDCC's conduct in choosing to terminate its relationship with the Boilermakers Union violated the NLRA. While the Boilermakers Union contended in an unfair labor practice charge that termination of the relationship was unlawful, that charge, after investigation, was dismissed.

Also that same day, HDCC informed the welders that they were being laid off because there was no contract between HDCC and the Boilermakers Union.[1] Valentine Decl. ¶ 11. After sending the welders back to the hiring hall, HDCC did not hire any welders – union or non-union. Valentine Decl. ¶ 12. HDCC further did not layoff employees who were members of the other five unions with which it had collective bargaining agreements. Valentine Decl. ¶ 13.

The next day, on February 18, 2011, HDCC met with representatives of another union, the Plumbers & Pipefitters Union, Local 675 (the "Pipefitters Union"), to discuss and possibly negotiate a collective bargaining agreement. Valentine Decl. ¶ 14. On or around

[1] HDCC also did not have work for the welders, but this is not a material fact for purposes of this Motion. HDCC does not waive its right to claim that there was no work at or around February 17, 2011 during the hearing.

February 23, 2011, HDCC entered into an agreement with the Pipefitters Union. *See* Valentine Decl. ¶ 15, Exhibit 2 (relevant provisions of the Agreement between HDCC and the Pipefitters Union (the "Pipefitters CBA")); Declaration of Reginald Castanares ("Castanares Decl.") at ¶ 2. The Complaint does not allege that HDCC's conduct in entering into the Pipefitters CBA was unlawful, since that allegation by the Boilermakers Union, after investigation, was dismissed.

The Pipefitters CBA includes a union-security clause and an exclusive hiring hall provision. *See* Valentine Decl., Exh. 2 at Arts. III, IV, Exhibit "A"; Castanares Decl. ¶ 3. Also under the Pipefitters CBA, from and after the eighth day of their employment, employees must become and remain a member of the Pipefitters Union. *See* Valentine Decl., Exh. 2 at Art. III, § 7; Castanares Decl. ¶ 4. If the employee does not become and remain a member, the CBA provides for the termination of the employee upon written request of the Union. *See id.* Thus, under the terms of the Pipefitters CBA, HDCC could only use Pipefitters Union members to provide the welding work that had been previously been performed by welders hired through the Boilermakers Union. Valentine Decl., Exh. 1 at Art. III, § 7.

During this February time period, HDCC asked the Pipefitters Union to accept the welders formerly employed by HDCC and refer them to HDCC. Valentine Decl. ¶ 16; Castanares Decl. ¶¶ 5-7. The Pipefitters Union responded that it would refer a former HDCC welder to HDCC if the welder completed the Pipefitters process. *Id.* That application process consisted merely of a welding skills test and an interview. Valentine Decl. ¶ 16; Castanares Decl. ¶ 5. The application process is strictly enforced by the Pipefitters Union. Castanares ¶ 6. These protocols allow the Pipefitters Union to monitor and maintain the necessary skills and quality of work of its members who are dispatched to the more than 60 employers in Hawaii. *Id.* Moreover, the Pipefitters Union CBA contains a "Uniform Conditions" provision (most favored

nation clause) which would be violated if HDCC's request for a deviation of the Pipefitters Union's hiring and referral procedures were permitted. Castanares Decl. ¶ 7. Thus, the Pipefitters Union denied HDCC's request to be allowed to deviate from the Pipefitters Union hiring and referral procedures to allow them to hire former welders directly. *Id.*

Around the same time that HDCC entered into the Pipefitters CBA, the Boilermakers welders were made aware that HDCC had signed with the Pipefitters Union and that they could get on the Pipefitters Union's out of work list. *See* Declaration of Gordon Caughman at ¶ 2. In fact, by February 25, 2011, six out of the thirteen alleged discriminatees – Paul Aona, Kona Akuna, Joseph Galzote, Daniel Marzo, Henry Merrill and Joselito Peji – signed in with the Pipefitters Union. Castanares Decl. ¶ 8. By April 13, 2011, an additional two alleged discriminatees –Rolando Tirso and Ken Valdez – signed in with the Pipefitters Union. Castanares Decl. ¶ 9. The remaining five alleged discriminatees never signed up with the Pipefitters Union.

On March 1, 2011, HDCC hired it first welder through the Pipefitters Union hiring hall. Valentine Decl. ¶ 17. HDCC did not hire any welders – union or non-union – between February 17, 2011 and March 1, 2011. Valentine Decl. ¶ 18. Eventually, HDCC hired seventeen welders from the Pipefitters Union, six of whom were Boilermakers welders who had been sent back to the hiring hall on February 17, 2011.[2] Valentine Decl. ¶ 19. These welders all complied with the Pipefitters Union requirements of members. Castanares Decl. ¶ 10. HDCC has never rejected and would not reject a former Boilermakers welder dispatched to it from the

[2] One was Gordon Caughman who is not listed as a discriminatee in the Amended Complaint. The three Boilermakers welders who were not dispatched to HDCC failed to complete the Pipefitters Union's process to be dispatched. Castanares Decl. ¶ 11.

Pipefitters Union hiring hall because of his status as a member or former member of the Boilermakers Union. Valentine Decl. ¶ 20.

B. The Boilermakers Union Files A Charge

On or about May 12, 2011, the Boilermakers Union filed a Charge (37-CA-8316) 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." The Board dismissed the Charge in a letter dated July 29, 2011, finding:

> The investigation revealed that the Employer Association did not lay off the employees because of their membership in the Union, but rather because the employees voluntarily chose not to work under the Employer Association's lawful implementation of new terms and conditions of employment. The Employer offered its employees jobs under the new collective bargaining agree[ment] with the Pipefitters and some of the employees voluntarily chose not to join that Union. Accordingly, there was no violation of Section 8(a)(3).

Marr Decl. ¶ 3, Exhibit 2 ("July 29 Dismissal Letter"). On or about August 25, 2011, the Board rescinded its dismissal of the Boilermakers Union's May 12, 2011 Charge. This rescission was not based on new facts or evidence or even new law; rather it was based on the Region's reliance on two cases decided more than twenty years earlier, *Catalytic Indus. Maintenance Co. (CIMCO) and International Brotherhood of Elec. Workers, Local 527*, 301 NLRB 342 (1991) and *Jack Welsh Company, Inc. and United Brotherhood of Carpenters and Joiners of Amer., Local Union 690.*, 284 NLRB 378 (1987).[3]

[3] Although the Board based its August 25 rescission on *Jack Welsh*, the July 29 Dismissal Letter cites to *Jack Welsh* in its determination that there was no violation by the Association. *See* Marr Decl., ¶ 3, Exh. 2.

The Acting General Counsel filed a Complaint against HDCC on November 30, 2011.[4] An Amended Complaint was filed on January 13, 2012.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).[5] The moving party satisfies its initial burden of production by producing evidence that either negates an essential element of the non-moving party's case or demonstrates that the non-moving party does not have enough evidence of an essential element of its claim to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1106 (9th Cir. 2000). Once the moving party makes its initial showing, the burden shifts to the non-moving party to go beyond the pleadings and to "designate *specific facts* showing that there is a genuine issue for trial." *Celotex v. Catrett*, 477 U.S. 317, 324 (1986) (emphasis added). If the non-moving party fails to so respond, summary judgment must be entered against him. Fed. R. Civ. P. 56(e).

As the Regional Director initially dismissed the unfair labor practice Charge, and then reversed its position and filed a complaint based on two NLRB decisions (as opposed to discovery of previously unavailable evidence), review by summary judgment is particularly appropriate.

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[4] The Board withdrew Charge 37-CA-8316 as to the other Association employer, Arakaki, even though it was alleged to have engaged in the same or similar acts, including entering into a collective bargaining agreement with another union (Ironworkers Union) and then offering the Boilermakers Union welders jobs through the Ironworkers Union.

[5] Under 29 U.S.C. § 160(b), these proceedings are being conducted in accordance with the Federal Rules of Civil Procedure.

IV. ARGUMENT

A. There Is No Evidence That HDCC Violated Section 8(a)(1)

The Board's Amended Complaint alleges that HDCC's conduct violated 8(a)(1) of the NLRA. Under Section 8(a)(1), it is unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the NLRA. *See* 29 U.S.C. § 158(a)(1). The rights guaranteed under Section 7 are the employees' right to (1) self-organization, (2) form, join or assist labor organizations, (3) bargain collectively through representatives of their own choosing, and (4) engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. *See* 29 U.S.C. § 157. The Amended Complaint's 8(a)(1) claim should be dismissed because there is no evidence that HDCC interfered with, restrained or coerced any of the Boilermakers welders with respect to any right guaranteed under Section 7. In fact, even after the Board's nearly seven-month investigation into the matter, the Acting General Counsel's Amended Complaint is devoid of any *factual* allegations that the employees were exercising rights under Section 7. For example, there is no allegation that at the time HDCC sent the employees back to the Boilermakers Union's hiring hall on February 17, 2011, HDCC and the Boilermakers Union were in the midst of an election campaign or even negotiating a contract; nor can there be because by then the Board had already determined that there was no contract. *See, e.g., Queen Mary Restaurants Corp. and Marine Cooks and Stewards Union*, 219 NLRB 776 (1975) (employer violated 8(a)(1) when it threatened to permanently replace strikers). Likewise, there is no allegation that the welders were engaged in concerted activities for their mutual aid or protection. *See, e.g., NLRB v. Searle Auto Glass*, 762 F.2d 769 (9th Cir. 1985) (employer violated 8(a)(1) when it discharged employee for filing wage claim).

To the contrary, the indisputable evidence shows that HDCC sent the welders back to the hiring hall because it no longer had a contract with the Boilermakers Union. The undisputed evidence shows that within a week, HDCC signed a contract with the Pipefitters Union and then sought to have the former Boilermakers welders referred to it through the Pipefitters Union. *See* July 29 Dismissal Letter ("The analysis turns on whether the employees are given the opportunity to work under the new terms and conditions of employment; here becoming members of the Pipefitters and working under the terms of the new contract.").

Thus, the Acting General Counsel cannot establish an independent violation of 8(a)(1) and the claim should be dismissed.

B. Likewise, Sending The Boilermakers Welders Back To The Hiring Hall Did Not Violate 8(a)(3)

Section 8(a)(3) "prohibits discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

The Board evaluates cases in which employees allege they were subject to adverse employment action as a result of their union conduct under the two-prong *Wright Line* test. *Wright Line*, 251 NLRB 1083, 1089 (1980). Under the *Wright Line* test, the Acting 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 Acting General Counsel is able to establish that the employee's 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.

To establish a *prima facie* case, the Acting General Counsel must show: (a) the employee engaged in protected concerted union activity; (b) the employer had knowledge of the protected activity; (c) evidence of union animus; *and* (d) a link or nexus between the protected activity and the adverse employment action exists. *See Earthgrains Co.*, 338 NLRB 845, 849 (2003); *see also Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001); *see also* General Counsel Memo 06-09, "The General Counsel's Burden Under *Wright Line*," Oct. 12, 2006. If the employer's alleged conduct is "inherently destructive of employee interests," then anti-union animus is inferred. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). On the other hand, "when the resulting harm . . . is comparatively slight, and a substantial or legitimate business end is served, the employers' conduct is prima facie lawful." *Id.* at 34.

1. <u>The Acting General Counsel Cannot Meet Its Burden</u>

The Acting General Counsel cannot establish a *prima face* case.

First, as explained above in Section IV.A., there is no evidence (or even an allegation) that the Boilermakers welders engaged in protected concerted activity before they were sent back to the hiring hall.

Second, there is no evidence (or even an allegation) that HDCC harbored union animus. It is undisputed that after February 17, 2011, HDCC did not replace the welders with union or non-union employees. Likewise, it did not take an adverse action against any employees who belonged to the five other unions with which it has collective bargaining agreements. Rather, less than a week after it terminated its relationship with the Boilermakers Union, it entered into an agreement with the Pipefitters Union and, in accordance with the Pipefitters CBA, began hiring workers from the Pipefitters Union, including many of the alleged discriminatees. HDCC had asked the Pipefitters Union to accept the welders formerly employed by HDCC and refer them to HDCC, but the Pipefitters Union denied HDCC's request and stated

that it would only refer a welder to HDCC if the welder completed the Pipefitters Union's process. It is undisputed that all of the Boilermakers welders who successfully completed the Pipefitters Union's process were dispatched to HDCC.

Furthering the argument that HDCC did not harbor union aminus is HDCC's lack of motivation; because no contract existed between HDCC and the Boilermakers Union, HDCC had no reason to take actions to discourage union activity or union membership. *See Fresh Fruit and Vegetable Workers Local 1096 v. NLRB*, 539 F.3d 1089, 1097 (9th Cir. 2008) ("Indeed, since the workers had just voted against union representation by a substantial margin, it is not clear that the company had much to gain at the time by taking further action to discourage union activity.").

2. HDCC's Conduct Was Not Inherently Destructive

To the extent the Acting General Counsel argues that it need not establish union animus on the basis that HDCC's conduct was "inherently destructive," such argument should be disregarded. 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). It is undisputed that after the February 14 Dismissal Letter was issued, HDCC was free to find another source of referrals for welders and it chose to enter into a collective bargaining agreement with the Pipefitters Union. Within one week, the Boilermakers welders were offered the opportunity for jobs through the Pipefitters Union. Some voluntarily chose to accept the offer, and others voluntarily chose not to. Thus, the alleged resulting harm was relatively slight and could not have been inherently destructive. *See Great Dane Trailers*, 388 U.S. at 34.

Moreover, the cases relied upon by the Regional Director in rescinding the July 29 Dismissal Letter are distinguishable.

a. *CIMCO* is factually distinguishable

CIMCO, in which an employer terminated all of its union members and replaced them with non-union employees after the union terminated the parties' contract, is factually distinguishable and, therefore, is inapposite.

First, in *CIMCO*, the NLRB determined that the employer discriminated against the union workers after it terminated thirty-four employees "in an attempt to bring pressure on the International Union to reinstate its participation in the [Agreement] at the [work] site." 301 NLRB at 348. Unlike *CIMCO*, here, the HDCC did not terminate its employees in an attempt to pressure the Boilermakers Union to enter into an Agreement with it. Although HDCC had attempted to negotiate an agreement with the Boilermakers Union, when no agreement could be reached, HDCC filed an unfair labor charge. At the time the welders were sent back to the hiring hall, the NLRB had already determined that a contract did not exist between the parties and HDCC had notified the Boilermakers Union that it was terminating their relationship.

Second, in *CIMCO*, the employees believed that they would not be reconsidered for future employment. 301 NLRB at 346. Here, the employees were informed that they would be considered for future employment if they joined the Pipefitters Union. In fact, six former Boilermakers Union members have been employed by HDCC.

Finally, unlike in *CIMCO*, the terminated Boilermakers Union members were *not* replaced by non-union employees, but rather other union employees and/or they were rehired. *See* 301 NLRB at 348.

Thus, the holding in *CIMCO* is based on facts that are vastly different from the facts here and, therefore, by contrast, established anti-union animus.

b. ***Jack Welsh* is also factually distinguishable**

This case is also unlike *Jack Welsh*, in which the employer decided he was "going open shop," and terminated all of his union employees.[6] 284 NLRB at 378. After terminating its employees, the employer then hired new employees. *Id.* at 383. After the employees filed a charge with the NLRB, the employer offered its former employees reinstatement. *Id.* at 381, n. 2. The Board held that the employer's failure to give the employees "an opportunity to quit" violated the NLRA. *Id.* at 379, 383.

Unlike *Jack Welsh*, HDCC was not "going open shop" and there is no allegation that such a statement was made to the welders when they were returned to the Boilermakers Union hiring hall. After efforts to negotiate a new contract with the Boilermakers Union failed and after it received the February 14 Dismissal Letter, HDCC almost immediately entered into a collective bargaining agreement with the Pipefitters Union. The employees were then notified of the opportunity to be dispatched to HDCC if they went through the Pipefitters Union. The Pipefitters Union would not dispatch the HDCC welders unless they went through its application process. As explained above, eight former HDCC welders registered with the Pipefitters Union by the time the Boilermakers Union filed its unfair labor practice charge on May 12, 2011.

Analyzing the facts under *Jack Welsh,* the Board explained it best in the July 29 Dismissal Letter:

> [T]he Employer Association did not lay off the employees because of their membership in the Union . . . .***The Employer offered its employees jobs under the new collective bargaining agree[ment] with the Pipefitters and some of the employees voluntarily chose not to join that Union. Accordingly, there was no violation of Section 8(a)(3).***

Marr Decl., Exh. 1 (emphasis added).

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[6] One employee was found to have voluntarily quit. *Id.* at 379.

Thus, the Acting General Counsel cannot establish a *prima facie* case to support its 8(a)(3) claim and it should be dismissed.

V. CONCLUSION

Based on the above, Hawaii Dredging Construction Company, Inc. respectfully requests that the Amended Complaint be dismissed in its entirety.

Dated: Honolulu, Hawaii, January 31, 2012.

BARRY W. MARR
MEGUMI SAKAE

Attorneys for
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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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 DECLARATION OF TOM VALENTINE

TOM VALENTINE, declares the following:

1. I have been employed by Hawaiian Dredging Construction Company, Inc. ("HDCC") for over 20 years. I am currently the Power and Industrial Division Manager of HDCC. All statements made in this Declaration are based on my personal knowledge and to the best of my recollection.

2. HDCC is primarily in the building and construction industry.

3. HDCC is a signatory to six collective bargaining agreements.

4. The Association of Boilermakers Employers of Hawaii (the "Association"), of which HDCC was a member (along with Arakaki Mechanical LLC and another employer), and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the "Boilermakers Union") were parties to a Section 8(f) pre-hire agreement for many years, and at least since 2005.

5. The Boilermakers Union provided HDCC with welders for its Power & Industrial Division.

6. In or around September 2010, the Association and the Boilermakers Union began negotiating a new agreement. When the Union refused to honor its agreement with the Association after the parties negotiated and agreed to the terms of a new agreement, on or about December 6, 2010, the Association filed a Charge with the NLRB (NLRB Charge No. 37-CB-2043).

7. During the investigation of this Charge, HDCC requested mediation of the contract dispute through FMCS, but the Boilermakers Union refused.

8. During this time period, the quality of the work referred by the Boilermakers Union became unacceptable and HDCC received complaints from its primary customer, HECO. The welding business we receive from HECO represents approximately 75% of our welding work. HDCC attempted to address these issues with the Boilermakers Union, but received no response. Attached as **Exhibit 1** is a true and correct copy of an e-mail I sent to the Boilermakers Union (Gary Aycock) on December 20, 2011 regarding HDCC's client's concerns. Neither Mr. Aycock nor anyone else from the Boilermakers Union responded to my e-mail or addressed my concerns.

9. On February 17, 2011, HDCC received the NLRB's determination which stated that the parties did not reach a complete agreement on the terms and conditions of employment and that it was dismissing the Association's Charge (the "February 14 Dismissal Letter").

10. The same day the Association received the February 14 Dismissal Letter, the Association employers terminated their relationship with the Boilermakers Union.

11. That same day, HDCC informed the Boilermakers welders that they were being laid off because there was no contract between HDCC and the Boilermakers Union.

12. After sending the Boilermakers welders back to the hiring hall, HDCC did not hire any welders – union or non-union.

13. HDCC further did not layoff employees who were members of the other five unions with which it had collective bargaining agreements.

14. The next day, on February 18, 2011, I, along with others from HDCC met with representatives of the Plumbers & Pipefitters Union, Local 675 (the "Pipefitters Union"), to discuss and possibly negotiate a collective bargaining agreement.

15. On or around February 23, 2011, HDCC entered into an agreement with the Pipefitters Union. Attached hereto as **Exhibit 2** is a true and correct copy of portions of the Agreement between HDCC and the Pipefitters Union (the "Pipefitters CBA").

16. During this February time period, HDCC asked the Pipefitters Union to accept the welders formerly employed by HDCC and refer them to HDCC. The Pipefitters Union denied HDCC's request and stated that it would refer a welder to HDCC if the employee completes the Pipefitters process. I understand that this process required an application, a welding test, and an interview.

17. On March 1, 2011, we hired the first welders through the Pipefitters Union hiring hall.

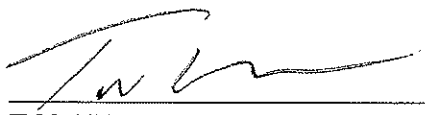
18. HDCC did not hire any welders – union or non-union – between February 17, 2011 and March 1, 2011.

19. Eventually, HDCC hired seventeen welders from the Pipefitters Union, six of whom were Boilermakers Union employees who had been sent back to the hiring hall on February 17, 2011.

20. HDCC has never rejected and would not reject a former Boilermakers Union member dispatched to it from the Pipefitters Union hiring hall because of his status as a member or former member of the Boilermakers Union.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2011, Honolulu, Hawaii.



TOM VALENTINE

From: Tom Valentine [tvalentine@hdcc.com]
Sent: Monday, December 20, 2010 10:11 AM
To: local627@boilermakershawaii.com
Cc: Dan Guinaugh
Subject: FW: Kahe 4 Outage Support

Gary:

Yesterday (12/19/10) our client (HECO) directed HDCC to terminate the four boilermaker tube welders that had been recently dispatched to the Kahe 4 Outage Support Project. The reason for this termination is the welder's failure to meet the ASME weld quality standards of the project. To be more precise the overwhelming majority of the welds completed by these welders failed radiographic testing (RT). Initially RT inspection was utilized to spot check the welder's performance against the ASME quality standards but due to the overwhelming failure rate of the spot checks all welds completed by these welders must be evaluated and repaired (if necessary) at an additional cost to HDCC. Clearly this performance is unacceptable by any standard and our client is asking HDCC how it will address this welder performance problem.

HECO is an extremely important client for HDCC and has provided numerous contracting opportunities for construction and maintenance services over the past several years. The primary reasons for this long term relationship with HECO has been HDCC's perceived ability, utilizing predominantly boilermaker labor, to provide highly skilled workers at a competitive price. This perception was driven by HECO's belief that HDCC and its boilermaker work force met or exceeded the capabilities of HECO in-house maintenance work force. Recent events are causing HECO to reevaluate it's perception and relationship with HDCC and the boilermakers. We (HDCC and the boilermakers) must correct this situation and demonstrate to HECO that we are making improvements.

From the outset of the Kahe 4 project HDCC and HECO have been plagued by problems associated with the timeliness of the union dispatching personnel to the project. Regardless of the reasons for these staffing delays it has only reinforced the customer's concern for continuing its ongoing relationship with HDCC and the boilermakers. The poor performance by the boilermaker tube welders has further compounded this problem. HDCC depends on the boilermakers to provide skilled workers to perform the boiler maintenance work specified by the client. The work for this particular project is clearly within the skill sets that a journeyman boilermaker is suppose to possess.

Our client has provided numerous contracting opportunities for HDCC over the past several years, During this time period this work has provided the overwhelming majority of boilermaker work in Hawaii. Based on this reality our client deserves and expects to be provided with skilled workers that provide a high quality product. Clearly we (HDCC and the boilermakers) are not meeting this obligation particularly as it relates to tube welding and the situation must be corrected. In the past we've discussed this issue and expressed our concerns with the local scarcity of boilermakers possessing these skills. Based on recent events it seems that this problem is worse than previously thought. In order to preserve these relationships with our (HDCC and boilermakers) clients corrective actions must be taken immediately. What actions are the boilermakers taking to improve welder training and performance with the locally-based membership? How many qualified tube welders reside on Oahu? Are the tube welders dispatched to this project the best available candidates?

EXHIBIT 1

Please provide a written response on how the union will correct these immediate problems. This response will be necessary for our upcoming discussions with HECO. It is imperative that we understand how the union will respond to allow us to map out a strategy to move forward.

Tom

PO Box 4088
Honolulu, HI 96812-4088
Phone: (808) 735-3211
www.hdcc.com

HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.

February 23, 2011

Mr. Reginald V. Castanares
Business Manager & Financial
Secretary-Treasurer
LOCAL UNION 675 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICE PLUMBERS & PIPEFITTERS OF THE U.S. & CANADA ("Union")
1109 Bethel Street, Suite 403
Honolulu, Hawaii 96813-2288

Letter of Understanding Regarding
Agreement, dated February 23, 2011

Dear Reggie:

This will set forth our understanding relative to the Agreement, dated February 23, 2011, attached hereto ("Agreement") between the Power & Industrial Division of Hawaiian Dredging Construction Company, Inc. ("HDCC" or "Hawaiian Dredging"), as Employer, and Local Union 675 Of The United Association Of Journeymen And Apprentice Plumbers & Pipefitters Of The U.S. & Canada, as the Union, whereby HDCC agrees to abide by all wage, hour and other terms and conditions of employment set forth in the collective bargaining agreement between the Plumbing & Mechanical Contractors Association of Hawaii, dated January 6, 2008 ("CBA").

As you are aware, the circumstances are such that HDCC has recently ended its relationship with a mainland-based labor union which previously furnished journeymen and welders to our Power & Industrial Division. We are pleased that the Union is now committed to train and furnish skilled workers to fill the void left by the other union's departure and to meet the high quality standards of our customers. At the same time, Hawaiian Dredging looks forward providing greater employment opportunities to Hawaii's union workers through this new partnership with the Union.

Notwithstanding any provision in the Agreement or the CBA to the contrary, it is agreed between Hawaiian Dredging and the Union as follows:

EXHIBIT 2

1. The terms and conditions of the CBA shall only apply to the steamfitter work performed by, or on behalf of, the Power & Industrial Division of Hawaiian Dredging;

2. Hawaiian Dredging does not intend to perform any plumbing work with its own forces and all such work shall be subcontracted to others;

3. All work which has been, and is currently being, performed by other trades on Hawaiian Dredging projects shall not be claimed by the Union, or otherwise affected by the Agreement;

4. The Agreement and the CBA may be voided by Hawaiian Dredging in the event the NLRB or a court of competent jurisdiction determines that Hawaiian Dredging is bound to the CBA with the Boilermakers; and

5. This Agreement and the CBA are entered into pursuant to section 8(f) of the NLRA and the bargaining relationship between Hawaiian Dredging and the Union may be terminated upon the expiration of the CBA or any successor CBA.

Please confirm that the Union agrees to the foregoing by signing below where indicated and return a signed copy to me.

Very truly yours,

Dan Guinaugh
Vice President
Power & Industrial Division

ACKNOWLEDGED AND AGREED TO
THIS 23RD DAY OF FEBRUARY, 2011 BY

LOCAL UNION 675 OF THE UNITED
ASSOCIATION OF JOURNEYMEN AND
APPRENTICE PLUMBERS & PIPEFITTERS
OF THE U.S. & CANADA

By:_____
Reginald V. Castanares
Business Manager & Financial
Secretary-Treasurer

AGREEMENT

This Agreement, made this 23rd day of February, 2011, with the effective date of February 23, 2011, in Honolulu, Hawaii, by and between the undersigned CONTRACTOR of Honolulu, Hawaii, hereinafter referred to as "Employer," and LOCAL UNION 675 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICE PLUMBERS & PIPEFITTERS OF THE U.S. & CANADA, hereinafter referred to as "Union."

WITNESSETH:

WHEREAS, the parties hereto desire to enter into a collective bargaining relationship, whereby the wages, hours and other terms and conditions of employment of the employees of the Employer that are covered by this Agreement conform to the wages, hours and other terms and conditions of employment of employees covered by presently negotiated and subsequently negotiated collective bargaining agreements between the Plumbing & Mechanical Contractors Association of Hawaii, (hereinafter referred to as "PAMCAH") and the Union (hereinafter collectively referred to as the "collective bargaining agreements").

NOW THEREFORE, in consideration of the mutual covenants herein, the Employer and the Union agree as follows:

1) The Employer shall abide by all wage, hour and other terms and conditions of employment set forth in the collective bargaining agreement between PAMCAH and the Union effective **January 6, 2008**, and in all documents related thereto and all modifications, amendments and agreements, are hereby adopted by the Employer and the Union, and the Employer and the Union shall be bound by said collective bargaining agreement, as amended from time to time, except that the date upon which said wages, hours and other terms and conditions of employment shall take full force and effect shall be the date first above written.

2) The Employer and the Union shall be bound by the wages, hours and other terms and conditions of employment that are set forth in any and all successive collective bargaining agreement as amended and/or modified from time to time, and in all documents related thereto, that are entered into between PAMCAH and the Union negotiated subsequent to the collective bargaining agreement referred to above in paragraph 1.

3) The Employer hereby confirms that the Employer has received the a true copy of the collective bargaining agreement, and all agreements amending or modifying the same, in effect as of the date referenced above and together with all related documents thereto, that are referred to above.

4) Notwithstanding the legal effectiveness of the collective bargaining agreements, all employee benefit trust fund contributions and dues reported and/or received by the Trust Funds or Union shall be deemed to have been owed to or received by the Trust Funds or Union in accordance with the terms of the respective declaration of trust agreement establishing each employee benefit trust funds and the terms of the last existing collective bargaining agreement

(inclusive of all amendments and modifications thereto) negotiated by and between PAMCAH and the Union.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written with the specific proviso that the effective date of this Agreement shall be February 23, 2011.

EMPLOYER

(Print Company Name):
Power & Industrial Division of Hawaiian Dredging Construction Company, Inc.

By: _____
(signature)
(Print Person's Name):_____

Its:_____

201 Merchant Street, 11th Floor
Honolulu, Hawaii 96813
Address

735-3211 Fax: 735-7416
Telephone & Facsimile Number

LOCAL UNION 675 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICE PLUMBERS & PIPEFITTERS OF THE U.S. & CANADA (UNION)

By: _____
REGINALD V. CASTANARES
Its Business Manager & Financial Secretary-Treasurer

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

PLUMBING & MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

and

LOCAL 675 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICE PLUMBERS & PIPEFITTERS OF THE U.S. & CANADA

AFL-CIO

Labor-Management Agreement

and

Related Documents

Of January 6, 2008

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LABOR-MANAGEMENT AGREEMENT

This Agreement amends the Labor-Management Agreement between the Plumbing and Mechanical Contractors Association of Hawaii and Local 675 of the United Association of Journeymen and Apprentice Plumbers and Pipefitters of the U.S. and Canada, AFL-CIO dated as of January 5, 2003 as amended by Amendment No. 1 to Labor-Management Agreement dated June 30, 2004, Amendment No. 2 to Labor-Management Agreement dated August 31, 2004, Amendment No. 3 to the Labor-Management Agreement dated May 26, 2005, Amendment No. 4 to the Labor-Management Agreement dated December 1, 2005, and Addendum to Labor-Management Agreement Covering Special Residential Work dated December 27, 2004.

WITNESSETH:

WHEREAS, the parties desire to establish, maintain, and regulate fair and uniform wages, hours, and conditions of employment under which employees work for the employers; and

WHEREAS, the parties desire to establish and maintain harmonious cooperation between the employers and the union so as to avoid industrial conflict; and

WHEREAS, the parties desire to improve, protect, and maintain the plumbing, welding, pipefitting, fire sprinkler fitting, refrigeration fitting, heating, and air conditioning industry for the benefit of the employers, the employees, the union, and the community;

NOW THEREFORE, the employers and the union hereby agree to amend their existing labor agreement to read as follows:

ARTICLE I
COVERAGE OF AGREEMENT

SECTION 1. *Employees.* This agreement shall apply to and cover all construction, service, maintenance, and production employees classified as general foremen, foremen, working foremen, journeymen, apprentices, and maintenance workers of the plumbing, welding, pipefitting, fire sprinkler fitting, refrigeration fitting, heating, and air conditioning industry, but does not cover superintendents, assistant superintendents, office or professional employees, and other classifications the employer may hire.

SECTION 2. *Employers.* This agreement shall bind the association, its members and those employers who hereafter become members and other employers that become signatory to this agreement.

SECTION 3. *Work.* This agreement shall cover all work coming within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as established and recognized by the Building and Construction Trades Department of the AFL-CIO and the union's constitution.

SECTION 4. *Union.* This agreement shall bind the union and where applicable its members.

ARTICLE II
EMPLOYER AND UNION RECOGNITION

SECTION 5. *Employer Recognition.* The employers recognize the union as the exclusive collective bargaining representative of all employees of the employers covered by this agreement.

SECTION 6. *Union Recognition.* The union recognizes the Plumbing and Mechanical Contractors Association of Hawaii as the exclusive collective bargaining representative of the employers who are now or may hereafter become members of the association.

ARTICLE III
UNION SHOP

SECTION 7. *Union Shop.* The employer shall require each employee covered by this agreement to become and remain a member of the union as a condition of employment from and after the 8th day following the date of his/her employment or the effective date of this agreement, whichever is later. If an employee does not become and remain a member of the union as provided herein, he/she shall be terminated upon written request of the union. As used herein membership in the union is defined as the tendering of periodic dues and initiation fees uniformly required as a condition of membership.

SECTION 8. *Authorized Deductions.* If an employee signs the authorization forms attached hereto as "Exhibit G", "Exhibit G-1" and "Exhibit J", his/her employer shall deduct from his/her wages all dues, initiation fees, and political, contributions due from such employee to the union. Such deductions shall be made only once a month, except when the employee does not have enough wages to satisfy the deductions due to the union.

If an employee does not have enough wages on any payroll from which such deductions may be satisfied, the deductions shall be made from the next succeeding payroll until such deductions are satisfied. Deductions for government taxes, paying debts to his/her employer and deductions required by law to be made by the employer shall have priority over deductions payable pursuant to the authorizations.

The total amount of such deductions shall be immediately transmitted by the employer to the union by checks drawn (1) to the order of the union for the dues and initiation fees and (2) to the order of the PPAC Political Fund for the political contributions. The employer shall separate the two deductions into two separate checks.

The union shall indemnify the employer against all claims arising out of the operation of this section, provided that the basis for such claims was not caused by the employer.

ARTICLE IV
HIRING AND REFERRAL PROCEDURE

SECTION 9. *Hiring and Referral Procedure.* The hiring and referral procedure attached hereto as "Exhibit A" and made a part of this agreement shall be followed exclusively by the employers and the union. In the selection of employees and applicants for employment under this hiring and referral procedure there shall be no discrimination based upon age, race, color, religion, sex, national origin, physical handicap, or being a disabled veteran or a veteran of the Vietnam Era or in any way influenced by union membership except as is permitted by law under the provisions of Section 7 of this Agreement.

ARTICLE V
ACCESS TO JOB

SECTION 10. *Access to Job.* The union's business manager or his/her assistant shall have access to the employer's premises and job projects to investigate grievances and to ascertain whether this agreement is being observed. Such access shall be exercised reasonably and shall not interfere with the conduct of the employer's operation or cause employees to neglect their work.

ARTICLE VI
SHOP STEWARDS

SECTION 11. *Shop Steward.* A shop or a job steward shall be a working employee appointed by the business manager. In addition to his/her work as a journeyperson, he/she shall be given reasonable time during regular working hours to perform his/her union duties, as cannot be performed at other times. The union shall notify the employer of the appointment of the steward in writing prior to his/her appointment.

It is also agreed by both parties that, in the event a steward is transferred from shop to job or job to shop, the employer will cooperate with the steward in notifying the local union business manager's office.

In the event that overtime work is required, the steward shall be given preference to perform such overtime work provided that he/she is employed on the project requiring such overtime work, unless the work performed is a specialty type of work which the steward is not qualified to do.

In no event shall an individual employer discriminate against a steward, or lay him/her off, or discharge on account of any action taken by him/her in the performance of his/her union duties which are not in violation of the terms of this agreement.

The employer shall notify the union in writing of his/her intentions of lay-off or termination for cause.

This notice must be in the union office three (3) full working days prior to anticipated lay-off or termination. The union retains the right to investigate the cause for lay-off or termination.

ARTICLE VII
EMPLOYER REQUIREMENTS

SECTION 12. *Employer Requirements.* Every employer shall maintain a legitimate place of business which is kept open for business during the regular working day, shall meet payroll requirements every week, possess the necessary State Contractor's License for the classifications in which he/she is engaged, and shall comply with all Hawaii State, City, and County, and Federal laws enacted to protect and benefit employees. The union may terminate this agreement with respect to any employer who fails to comply with this Section in any respect.

Whenever the U.S. Department of Labor (DOL) or the Hawaii State Department of Labor and Industrial Relations (DLIR) conducts a wage survey for determination of Davis-Bacon or HRS Chapter 104 (mini Davis-Bacon) prevailing wage rates, all employers shall be required to participate fully in such surveys, including submissions of any forms as requested by the U.S. DOL and DLIR.

SECTION 13. *Eligible Employers.* No employer shall be a party to this agreement with the union unless he/she employs regularly at least one journeyman other than himself/herself on a full-time basis. Exception: Service and Maintenance contractors may be a party to this agreement with the union as a one-man shop.

ARTICLE VIII
STRIKES, LOCKOUTS, AND PICKETING

SECTION 14. *Strikes, Lockouts and Picketing.*

A. While this agreement is in effect, an employer will not lockout his/her employees, and the union will not authorize any strike, boycott, picketing, slowdown or conduct organized interference of an employer's business.

B. If the foregoing paragraph A is violated without authority from the union, neither the United Association nor the union nor any of its officers or agents shall be liable if the union declares publicly that such action is unauthorized and promptly orders its members to return to work notwithstanding the existence of any wildcat picket line.

C. An employer may discipline or discharge any employee who engages in, participates in or encourages acts described in the foregoing paragraph A. Such action by an employer shall be final and binding upon the union and its members and shall not be a violation of this agreement by an employer. However, an issue of fact as to whether or not any employee engaged in, participated in or encouraged any such violation may be subject to the grievance procedure.

D. Any other provision to the contrary notwithstanding, nothing in this agreement shall be construed as giving an employer the right to require its employees to cross a lawful picket line. A lawful picket line is one authorized or recognized by the Hawaii Building and Construction Trades Council and in compliance

EXHIBIT "A"
REFERRAL PROCEDURE

WHEREAS, the employers and the union desire to maintain at all times a permanent pool of journeymen mechanics, apprentices, and maintenance workers skilled in their trade and available to serve the requirements of the normal construction labor market without discrimination in employment because of membership or non-membership in the union; now therefore,

The employers and the union agree to the following system of referral of applicants for employment:

SECTION 1. Definitions as used herein:

A. "Normal construction labor market" means the geographical area of the State of Hawaii and the South Pacific.

B. "Apprentice" means a person working within the jurisdiction of this Labor-Management Agreement who is registered and indentured with the Honolulu Joint Apprenticeship Committee and the State Workforce Development Division.

C. "County" means the counties of Hawaii, Maui, Kauai, or the City and County of Honolulu.

SECTION 2. The union shall establish nondiscriminatory work registration and hiring facilities, which shall be the exclusive source of referrals for employment at the request of any employer, party to this agreement.

SECTION 3. The individual employer must secure all employees covered by this agreement through the employment office of the union except as provided in Section 11 herein below.

SECTION 4. In order to be eligible to register for employment a person must:

a) have successfully served an apprenticeship at the trade under an apprenticeship program approved by the U.S. Bureau of Apprenticeship Training; or
b) have been previously employed as a journeyman plumber, welder, pipefitter, fire sprinkler fitter, or refrigeration/air conditioning mechanic with an employer signatory to this agreement; or
c) have been properly indentured in the State of Hawaii as an apprentice.
d) have been previously employed as a maintenance worker with an employer signatory to this agreement.

SECTION 5. There shall be five (5) classes of employees:

(a) Class A - Shall consist of journeyperson: (1) plumbers who possess a current State of Hawaii plumber's license, (2) pipefitters, (3) certified pipe welders, (4) refrigeration mechanics, (5) air conditioning mechanics, (6) fire sprinkler mechanics, or (7) steamfitter-welders, who have:
1. More than 10,000 work hours with signatory employers, and
2. Current First Aid and CPR Certification, and
3. Union dues or maintenance fee current.

(b) Class B - Shall consist of journeyperson: (1) plumbers who possess a current State of Hawaii plumber's license, (2) pipefitters, (3) welders, (4) refrigeration mechanics, (5) air conditioning mechanics, (6) fire sprinkler mechanics, or (7) steamfitter-welders, who have:
1. Not met requirements to be in Class A but who have worked within the jurisdiction of the United Association and
2. Current First Aid and CPR Certification
3. Union dues or maintenance fee current.

(c) Class C - Shall consist of: (1) plumbers who possess a current State of Hawaii plumber's license, (2) pipefitters, (3) welders,, (4) refrigeration mechanics, (5) air conditioning mechanics, (6) fire sprinkler mechanics, or (7) steamfitter-welders, who have:
1. Solicit work within the jurisdiction of the union, or
2. Claim to possess the skills of the trade, or
3. Claim to possess the skills of closely related crafts, and
4. Maintenance fees current.

(d) Class D - Shall consist of indentured apprentices classified as: (1) plumber apprentice, (2) pipefitter apprentice, (3) welder apprentice, (4) refrigeration apprentice, (5) air conditioning apprentice, (6) fire sprinkler apprentice, or (7) steamfi ter-welder apprentice, who have:
1. Union dues or maintenance fees current.

(e) Class E - Shall consist of maintenance workers classified as: (1) plumbing maintenance worker, (2) refrigeration maintenance worker, (3) air conditioning maintenance worker, (4) fire sprinkler maintenance worker, (5) pipefitting maintenance worker, or (6) steamfitter-welder maintenance worker, who have:
1. Union dues or maintenance fee current.
2. Passed the drug test.

(f) EXCEPTIONS. Any person classified as a journeyperson and who also has been a member of the union for less than 5 years shall be excluded from the requirements of:

Class A 1: provided that for the term of his/her membership in the union, he/she has worked an average of at least 750 hours in each 12 consecutive month period beginning from the date the person was dispatched for the first time by the union to work for an employer who has a collective bargaining agreement with the union.

(g) Upgrade Certificate:

One journeyperson upgrade certificate shall be awarded to a journeyperson who successfully completes in a calendar year at least 40 hours of journeyperson upgrade classes which are offered by the PAMCAH-UA Local 675 Training Fund. The certificate shall be valid for 12 months from the date it is award ed. Upon expiration of the certificate, the employee shall no longer be eligible for upgrade.

SECTION 6. The union shall maintain adequate registration facilities at the union office for applicants for employment to register for work. All employees and applicants for employment shall be registered in their appropriate classes and in the order in which they apply for work; provided however, that if the applicant was previously employed in the normal construction labor market, the union shall promptly notify the previous employer of the applicant's registration if no termination form has theretofore been filed with the union employment office as provided in Section 10 below.

Applicants for employment shall complete and sign an application form containing all data relevant for referral including an indication of any special skills that they possess, and an agreement to comply with the terms and conditions of this agreement and shall sign the out-of-work registration list. The registration list shall be open to inspection by all parties to this agreement.

Any member of Local Union No. 675 who is issued a travel card to seek employment out of the jurisdiction of Local Union No. 675, shall be removed from the out-of-work registration list for as long as he/she is out of the jurisdiction of Local Union No. 675. When such a member returns to the jurisdiction of Local Union No. 675, he/she shall sign the out-of-work registration list if he/she desires employment.

All employees who are no longer employed as a result of the union removing employees under SECTION 59 Delinquent Contributions, shall be automatically registered in their appropriate classes and, in the union's discretion, may be placed on the top of the out-of-work registration list for their respective classes.

SECTION 7. Whenever the individual employer requires additional employees covered by this agreement, he/she shall file one copy of the employer's request for employees (Form No. 1, a sample of which is attached hereto) with the union and one copy with the association. Upon receipt of the employer's request for employees, the union shall refer, competent and qualified employees as indicated by the applicant's basic registration. The union shall dispatch applicants in the following order: First from those in Class A; if none is available in Class A, then from those in Class B; if none is available in Class B, then from those in Class C; if none is available in Class C,. then from those in Class D; as to each class, first registered, first dispatched; provided, however, that if the employer has requested a person with special skills, the union shall dispatch the person with such skills who registered first and from the highest class in which such a person is available. Requests for employees shall expire 30 days after the date filed unless updated. The union shall verify that the employee has a valid drivers license and will so inform the employer upon dispatch.

No employee shall be dispatched to an employer who is delinquent under Article XXVI in paying contributions required thereunder.

At the request of the employer as noted on Form No. 1, the prospective employees shall be required to undergo a drug test in accordance with Exhibit "N" within 48 hours of being contacted by the Union prior to being dispatched to the employer. Applicants who fail the drug test shall not be dispatched to the employer. Only applicants who pass the drug test shall be dispatched to the employer. Applicants who register altered negative or diluted negative results from the drug testing facility shall be deemed to have failed the drug test. In the event that the applicant passes the drug test, he/she shall be reimbursed by the employer within 5 working days from the date the applicant submits his/her receipt for reimbursement. Applicants who fail the drug test shall be placed on the bottom of his/her class list.

SECTION 8. The individual employer shall have the right to reject any applicant referred by the union for employment, but in the exercise of such right shall not discriminate against such applicant by reason of age, race, color, religion, sex, national origin, or by reason or membership of nonmembership in any labor organization.

SECTION 9. The individual employer, to fill a position as working foreman, foreman, or general foreman, may request an applicant by name, but only if such applicant is within Class A as defined in Section 5 of this Exhibit. Upon receipt of a proper request, the union shall dispatch the named employee if his/her name is on the registration list of applicants for employment. The employer shall employ the employee in the working foreman, foreman, or general foreman position for a minimum of 30 calendar days.

SECTION 10. On the date of termination or severance of any journeyman or apprentice or maintenance worker from the employ of an employer, the employer shall execute termination form (Form No. 2, a sample of which is attached hereto) which shall state the reason therefore (e.g. reduction in force, voluntary quit, discharge for cause, etc.). The original shall be given to the employee and copies filed with the union and the association.

SECTION 11. In the event that the Union does not dispatch any applicants within three (3) working days following the day of the request of the individual employer is filed with the union, the individual employer may employ any person, but shall arrange for a dispatch to be issued for such persons from the employment office of the union within twenty-four (24) hours of the commencement of such employment and such dispatch shall upon request be issued by the union to the employee.

SECTION 12. Out of Work Register. The union shall maintain a register of applicants for employment which the employer will draw from in accordance with the skill and qualification necessary to perform the required work. It is understood that when making requests to the union for referrals, the employer may request by name, persons who were formerly employed by him/her within 3 years before the date of the request, and if such persons are available for employment, the union shall dispatch the named employees to the employer.

SECTION 13. A copy of this referral procedure shall be posted in the union employment office and in each individual employer's place of business (shop).

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.	DECLARATION OF BARRY W. MARR

DECLARATION OF BARRY W. MARR

BARRY W. MARR declares the following:

1. I am a partner at Marr Jones & Wang, a Limited Liability Law Partnership and am licensed to practice law in the State of Hawaii. I am one of the attorneys representing Hawaiian Dredging Construction Company, Inc. ("HDCC") in the above-referenced matter. The statements herein are based on my personal knowledge in that capacity.

2. Attached as **Exhibit 1** is a true and correct copy of the February 14, 2011 letter issued by the National Labor Relations Board ("NLRB"), dismissing Charge No. 37-CB-2043.

3. Attached as **Exhibit 2** is a true and correct copy of the July 29, 2011 letter issued by the NLRB, dismissing Charge No. 37-CA-8316.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2011, Honolulu, Hawaii.

BARRY W. MARR

United States Government
NATIONAL LABOR RELATIONS BOARD
SubRegion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu, HI 96850-0001

Telephone Number: (808) 541-2814
Fax Number: (808) 541-2818

February 14, 2011

Barry W. Marr, Esq.
Megumi Sakae, Esq.
Marr Jones & Wang
Pauahi Tower
1003 Bishop Street, Suite 1500
Honolulu, Hawaii 96813

Re: International Brotherhood of Boilermakers - Iron Shipbuilders - Blacksmiths - Forgers & Helpers
(Association of Boilermakers Employers of Hawaii)
Case No. 37-CB-2043

Dear Gentlepersons:

The Region has carefully investigated and considered your charge against the International Brotherhood of Boilermakers - Iron Shipbuilders - Blacksmiths - Forgers & Helpers (Union), alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

The charge alleges that the Union failed to bargain in good faith by refusing to sign a negotiated agreement and by attempting to include terms in the agreement that were neither discussed nor negotiated. Section 8(d) of the Act requires parties to bargain in good faith, which includes "the execution of a written contract incorporating any agreement reached if requested by either party." *Health Care Workers Union, Local 250,* 341 NLRB 1034, 1037 (2004). A party violates the Act if it refuses to sign a collective bargaining agreement incorporating terms agreed to by the parties during negotiations. *Id.* (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Hospital Employees Local 1199 (Lenox Hill Hospital),* 296 NLRB 322 (1989). It is well-established that subjective misunderstandings or misunderstandings as to the meaning of terms which have been agreed to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard. *Health Care Workers Union* at 1037; *Windward Teachers Association,* 346 NLRB 1148, 1150 (2006). If one of the parties to the alleged contract errs in expressing its intention, and that error is unknown to and unsuspected by the other party, then the contract may be enforced. *Health Care Workers Union* at 1037. Accordingly, ". . . a party to a contract cannot avoid it on the ground that it made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such a mistake, and acts in perfect good faith." *Health Care Workers Union* at 1037 (citing Am.Jur.2d § 146 at 492-93).

FEB 15 2011
By Mail

EXHIBIT 1

In this case, although terms that the parties agreed to appear to be clear on their face, the facts indicate that there was a unilateral mistake involving the "total package amount." In its first three proposals, the Charging Party clearly stated that the "current total package is $55.59." The Charging Party consistently used that current total package amount as the base number for all of its wage proposals. In contrast, the Union at times used the $55.59 current total package amount as the base for its proposals, and at other times and without explanation used an amount five cents greater than the current total package amount as the base. Under these facts, the Union had to have known the Charging Party intended that the negotiated wage increase would be added to the current total package amount of $55.59. Therefore, it cannot be said that the Union acted in perfect good faith and did not suspect the Charging Party's misunderstanding when the parties reached a tentative agreement on a proposal drafted by the Union that reflected a total package amount five cents higher than the current total package amount. Under these facts I have concluded that there was a unilateral mistake on the part of the Charging Party regarding the terms of the parties' agreement.

The Maintenance of Benefits provision was not discussed or negotiated by the parties and the tentative agreement did not refer to that provision. The Union believed that the provision remained in effect under the duration provision of the expired collective bargaining agreement. However, Charging Party understood that the Maintenance of Benefits provision expired by its terms. In addition, the Charging Party did not agree to language set forth by the Union that "[e]ffective October 1, 2010 – September 30, 2010, fifty cents ($0.50) shall be allocated for the Health & Welfare in the event additional contributions are necessary to maintain the existing level of benefits." It cannot be said that the parties reached agreement on this provision.

I therefore conclude that the parties did not reach a complete agreement on terms and conditions of employment. Accordingly, the Union did not violate Section 8(b)(3) of the Act when it failed and refused to execute the contract sent to it by the Charging Party.

Your Right to Appeal: You have the right to appeal this decision. See attached copy of Form NLRB-4938, Procedures for Filing an Appeal, for instructions applicable for filing an appeal by close of business on **February 28, 2011.**

Very truly yours,

Olivia Garcia
Acting Regional Director

OG:mab:kt

Enclosures

cc: General Counsel
Attention: Office of Appeals
National Labor Relations Board
Room 8820, 1099 14th Street, NW
Washington, DC 20570

Association of Boilermakers Employers of Hawaii
201 Merchant Street, 11th Floor
Honolulu, Hawaii 96813

B. Allen Meyers
Business Manager
Secretary Treasurer
International Brotherhood of Boilermakers Iron Shipbuilders
Blacksmiths Forgers & Helpers
P. O. Box 13268
Phoenix, AZ 85002

David A. Rosenfeld, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, California 94501

UNITED STATES GOVERNMENT
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Website: www.nlrb.gov

July 29, 2011

David A. Rosendfeld, Esq.
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: *Association of Boilermakers Employers of Hawaii, Hawaiian Dredging Construction Company, Arakaki Mechanical, LLC,*
Case 37-CA-8316

Dear Gentlepersons:

The Region has carefully investigated and considered the charge filed against ***Association of Boilermakers Employers of Hawaii, Hawaiian Dredging Construction Company, Arakaki Mechanical, LLC,*** alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing the above - mentioned charge for the following reasons:

The charge alleges "within the last six months the above named employer locked out the employees and terminated them all. The employer has hired other employees and otherwise discriminated against the employees on account of union and/or protected concerted activity."
More specifically, the Charging Party alleges that at the conclusion of the 8(f) contract, the Employers through Charged Party 1, the Employer Association, terminated the employment of the Boilermakers because of their membership with the Boilermakers, in violation of Section 8(a)(1) and (3).

The investigation revealed that the Employer Association did not lay off the employees because of their membership in the Union, but rather because the employees voluntarily chose not to work under the Employer Association's lawful implementation of new terms and conditions of employment. The Employer offered its employees jobs under the new collective bargaining agree with the Pipefitters and some of the employees voluntarily chose not to join that Union. Accordingly, there was no violation of Section 8(a)(3).

Although an employer can lawfully terminate a Section 8(f) relationship after the expiration of a contract, it does not follow that it can lay off its employees simply because they are "union" employees. Rather, normal Section 8(a)(3) concepts would apply and the discriminatory layoffs would be unlawful. See *Jack Welsh, Inc.*, et al., 284 NLRB 378, 379 (1987). The analysis turns on whether the employees are given the opportunity to work under the new terms and conditions of employment; here becoming members of the Pipefitters and working under the terms of that contract. *Id.* The Board held that where the employer lawfully offered employee opportunity to work at the changed conditions and employee voluntarily refused, there was no violation.

EXHIBIT 2

Accordingly, for the foregoing reasons, further proceedings are not warranted and I am refusing to issue complaint herein.

Your Right to Appeal: You have the right to appeal this decision. See attached copy of Form NLRB-4938, Procedures for Filing an Appeal, for instructions applicable for filing an appeal by close of business on ***Friday August 12, 2011***.

Very truly yours,

Joseph F. Frankl
Regional Director

JFF:kw:dk

Enclosures

cc: Association of Boilermakers Employers of Hawaii
202 Merchant Street, 11th Floor
Honolulu, HI 96813

Boilermakers Union Local No. 627
P.O. Box 13268
Phoenix, AZ 85002

Mr. Derrick Arakaki
President
Arakaki Mechanical, LLC
16-225 Wiliama Place
Keaau, HI 96749-8011

Mr. Dan Guinagh
Vice President
Hawaiian Dredging Construction Company
P.O. Box 4088
Honolulu, HI 96812-4088

General Counsel
Attention: Office of Appeals
National Labor Relations Board
Room 8820, 1099 14th Street, NW
Washington, DC 20570

Mr. Barry W. Marr, Esq.
Marr Jones & Wang
Pauahi Tower
1003 Bishop Street, Suite 1500
Honolulu, HI 96813

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627.	Case 37-CA-008316 DECLARATION OF GORDON CAUGHMAN

GORDON CAUGHMAN, declares the following:

1. I have worked for Hawaiian Dredging Construction Company, Inc. ("HDCC") for over 15 years. I currently work as a General Foreman for HDCC as a member of the Plumbers & Pipefitters Union, Local 675 (the "Pipefitters Union"). All statements made in this Declaration are based on my personal knowledge and to the best of my recollection.

2. On or around February 23, 2011, I confirmed with Tom Valentine that HDCC had signed with the Pipefitters Union. I made the members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627, who I had worked with at HDCC, aware that they could get on the Pipefitters Union's out of work list because HDCC and American Pipe and Boiler were looking for journeymen.

3. I got on the Pipefitters Union Out of Work List on February 24, 2011 and went to work for HDCC on March 28, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2011, Honolulu, Hawaii.

GORDON CAUGHMAN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627.	Case 37-CA-008316 DECLARATION OF REGINALD CASTANARES

REGINALD CASTANARES, declares the following:

1. I am the Business Manager-Financial Secretary of Local 675 of the United States Association of Journeymen and Apprentice Plumbers & Pipefitters of the U.S. & Canada, AFL-CIO. (the "Pipefitters Union"). This Declaration is based on my personal knowledge and is to the best of my recollection.

2. On or about February 23, 2011 Hawaiian Dredging Construction Company, Inc. ("HDCC"), executed a collective bargaining agreement with the Pipefitters Union (the "Pipefitters CBA").

3. The Pipefitters CBA contains specific "Union Shop and Hiring and Referral Procedure" requirements.

4. The Pipefitters CBA, requires among other things that its employers require each employee "to become and remain a member of the union as a condition of employment from and after the 8th day following the date of his/her employment or the effective date of this agreement, which ever is later." If the employee does not become and remain a

member by the eighth day, the CBA provides for the termination of the employee upon written request of the Union.

5. When HDCC negotiated the CBA with the Pipefitters Union it inquired whether its former employees could be unilaterally dispatched to HDCC. The Pipefitters Union responded that it would refer all qualified individuals who completed the Local 675 membership application process, which included an interview and a welding skills level performance test.

6. The application process as described above is strictly enforced by the Pipefitters Union. These protocols allow the Union to monitor and maintain the necessary skills and quality of work of its members who are dispatched. The Pipefitters Union refers its members to more than 60 employers in Hawaii.

7. HDCC's request to be allowed to deviate from the Pipefitters Union hiring and referral procedures to allow them to hire former employees directly was denied. The Pipefitters Union CBA contains a "Uniform Conditions" provision (most favored nation clause) which would be violated if HDCC's request for a deviation of our hiring and referral procedures were permitted.

8. By February 25, 2011, six welders, not including Gordon Caughman, from HDCC signed in with the Pipefitters Union. These welders were Paul Aona, Kona Akuna, Joseph Galzote, Daniel Marzo, Henry Merrill and Joselito Peji.

9. By April 13, 2011, two more welders from HDCC signed in with the Pipefitters Union. These welders were Rolando Tirso and Ken Valdez.

10. The following individuals who were former HDCC employees have complied with the Pipefitters Union requirements of membership and have been dispatched: Gordon Caughman was dispatched on 3/21/11, Henry Merrill was dispatched on 3/22/11, Daniel

Marzo was dispatched on 4/6/11, Joseph Galzote was dispatched on 4/7/11, Rolando Tirso and Ken Valdez were dispatched on 5/17/11.

11. To date former HDCC employees: Paul Aona, Kona Akuna and Joselito Peji have not completed the Pipefitters Union member application process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2011, Honolulu, Hawaii.

Reginald Castanares

REGINALD CASTANARES

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC., and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 627.	Case 37-CA-008316 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2012, a true and correct copy of the foregoing document e-filed and was duly served upon the following by the method of service indicated:

David A. Rosenfeld, Esq. Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, California 94501 Attorney for Union International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627	*Via E-mail & First Class Mail*
Trent K. Kakuda, Esq. Counsel for the Acting General Counsel National Labor Relations Board SubRegion 37 300 Ala Moana Boulevard, Room 7-425 Honolulu, Hawaii 96813	*Via E-mail*

DATED: Honolulu, Hawaii, January 31, 2012.

BARRY W. MARR
MEGUMI SAKAE

Attorneys for
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.