

UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.

and

Case 37-CA-008316

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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITON TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

On January 13, 2012, the Regional Director issued an Amended Complaint and Notice of Hearing against Hawaiian Dredging Construction Company, Inc. (Respondent) alleging that it violated Section 8(a)(3) and (1) by terminating 13 members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (Boilermakers Union) because of their membership in the Boilermakers Union.¹ The Respondent filed a timely Answer on January 26, 2012.² The hearing before an administrative law judge is currently scheduled to begin on February 28, 2012. On January 31, 2012, Counsel for the Acting General Counsel received Respondent's Motion for Summary Judgment (Motion). Counsel for the Acting General Counsel opposes Respondent's Motion for the reasons set forth herein.

II. FACTUAL BACKGROUND

¹ A copy of the Amended Complaint and Notice of Hearing is attached as Exhibit 1.

² A copy of Respondent's Answer to the Amended Complaint is attached as Exhibit 2.

Respondent states in its Motion and the declaration³ of Respondent's Power and Industrial Division Manager, Tom Valentine (Valentine), that it terminated its 8(f) relationship with the Boilermakers Union on February 17, 2011. Motion at 3; Valentine Decl. ¶¶ 9-10. Respondent admits that it laid off all employees who were members of the Boilermakers Union that same day because "there was no contract" between Respondent and the Boilermakers Union. Motion at 3; Valentine Decl. ¶ 11.

According to Respondent, sometime after all the members of the Boilermakers Union were terminated on February 17, 2011, Gordon Caughman (Caughman) informed the terminated employees that they could sign up with the United Association of Journeymen and Apprentice Plumbers & Pipefitters of the U.S. & Canada, Local 675 (Pipefitters Union) and that Respondent was looking for journeymen. Caughman Decl. ¶ 2. At the time Caughman spoke with the terminated employees, Caughman was not working for Respondent because he had been terminated with the other members of the Boilermakers Union on February 17, 2011, and he did not work for Respondent again until March 28, 2011. Motion at 5, fn.2; Caughman Decl. ¶ 3.

III. ANALYSIS

A. Respondent's Motion Must Be Denied Because It Admits to the Violations Alleged in the Complaint

In *Catalytic Industrial Maintenance Company, Inc. (CIMCO)*, 301 NLRB 342 (1991), enfd. 964 F.2d 513 (5th Cir. 1992), the Board affirmed the administrative law judge's conclusion that the employer violated Section 8(a)(3) and (1) by terminating all 34 employees referred to it by a local union whose international affiliate had terminated the 8(f) relationship with the employer. *Id.* at 343, 347-48. "It is clear beyond peradventure that the discharge of all employees of a particular craft because of their affiliation with, and referral from, a union . . .

³ References to declarations in this brief are limited to those submitted by Respondent with its Motion.

‘creates continuing obstacles to the future exercise of employee rights.’” *Id.* at 347. The administrative law judge found, and was later affirmed by the Board and the U.S. Court of Appeals for the Fifth Circuit, that the employer’s conduct was inherently destructive. *CIMCO* illustrates the principle that parties to an 8(f) relationship may lawfully terminate that relationship, but that does not privilege an employer to discriminate against employees because of their membership in the union with which it has terminated that relationship. See *Jack Welsh Co.*, 284 NLRB 378, 379 (1987).

In this case, Respondent has admitted in its Motion and attached declarations that it terminated the members of the Boilermakers Union on February 17, 2011, because there was no contract between it and the Boilermakers Union. In other words, Respondent terminated the employees referred to it by the Boilermakers Union because they were members of a union with whom Respondent had ended its 8(f) relationship. This fits squarely within the parameters of *CIMCO*. All of the facts argued by Respondent occurring after the February 17th terminations are irrelevant to determining whether the terminations violated Section 8(a)(3) and (1). Accordingly, summary judgment in favor of Respondent is inappropriate because Respondent admits to the essential facts which constitute a violation of Section 8(a)(3) and (1), as alleged in the Amended Complaint.⁴

Finally, summary judgment is also inappropriate in this case because Respondent asserts, and “reserves” the right to argue, that it laid off the 13 Boilermakers on February 17, 2011, because Respondent did not have work for them. Counsel for the Acting General Counsel disagrees with this contention. Thus, there is an issue of material fact that must be resolved by an administrative law judge should Respondent choose to offer this contention.

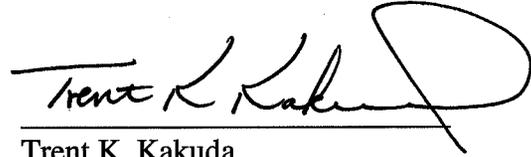
IV. CONCLUSION

⁴ The alleged Section 8(a)(1) violation is a derivative of the Section 8(a)(3) allegation.

Based on the foregoing, it is respectfully requested that the Board deny Respondent's Motion for Summary Judgment.

DATED AT Honolulu, Hawaii, this 2nd day of February, 2012.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Trent K. Kakuda". The signature is written in a cursive style with a large, prominent loop at the end.

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

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.

and

Case 37-CA-008316

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

AMENDED COMPLAINT AND NOTICE OF HEARING

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 627, herein called the Union, has charged that Hawaiian Dredging Construction Company, Inc., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this case was filed by the Union on May 12, 2011, and a copy was served by first-class mail on Respondent on the same date.
2. (a) At all material times, Respondent, a Hawaii corporation with its headquarters in Honolulu, Hawaii, has been a general contractor in the construction industry doing commercial and industrial construction in the State of Hawaii.
(b) During the 12-month period ending October 31, 2011, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received products,

EXHIBIT 1

goods and materials valued in excess of \$50,000, which originated from points outside the State of Hawaii.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Daniel Guinaugh	Vice President
Tom Valentine	Senior Project Manager
Forrest Ramey	Superintendent
Manny Fernandes	Superintendent
Gordon Caughman	General Foreman

6. (a) The Association of Boilermakers Employers of Hawaii, herein called the Association, at all material times was an organization composed of employers engaged in the construction industry and existed for the purpose, inter alia, of representing employer members in negotiating and administering collective-bargaining agreements.

(b) For many years and from at least October 1, 2005 to February 17, 2011, Respondent was a member of the Association.

(c) For many years and from at least October 1, 2005 to February 17, 2011, the Association and the Union were parties to a collective-bargaining relationship pursuant to Section 8(f) of the Act.

(d) By letter dated February 17, 2011, the Association terminated its Section 8(f) relationship with the Union, effective that same day.

7. (a) On or about February 17, 2011, Respondent discharged, laid off, and/or terminated the following employees:

Kona Akuna
Paul Aona
Crispin Bantoy
Domingo Delos Reyes
Jeffery Esmeralda
Joseph Galzote
Manuel Gairan
Daniel Marzo, Jr.
Henry Merrill
Peter Pagaduan
Joselito Peji
Rolando Tirso
Kenneth Valdez

(b) Respondent engaged in the conduct described above in subparagraph 7(a) because the named employees of Respondent were members of the Union.

8. By the conduct described above in paragraph 7, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraph 7, the Acting General Counsel seeks an Order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. The Acting General Counsel further seeks, as

part of the remedy for the above allegations, that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. The Acting General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the amended complaint. The answer must be received by this office on or before **January 27, 2012**, or postmarked on or before **January 26, 2012**. Unless filed electronically or in pdf format, Respondent should file an original and four (4) copies of its answer with this office and serve a copy of the answer on each of the other parties.

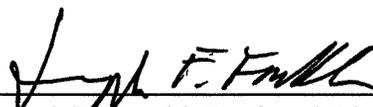
An answer may also be filed electronically through the Agency's website. *To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on **February 7, 2012**, at 9:00 a.m. in Room 7-241, 300 Ala Moana Boulevard, Honolulu, Hawaii, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Honolulu, Hawaii, this 13th day of January, 2012.



Joseph F. Frankl, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8½ by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case: 37-CA-008316

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in **detail**;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; **and**

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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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.

Cases 37-CA-008316

**RESPONDENT HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.'S
ANSWER TO AMENDED COMPLAINT DATED JANUARY 13, 2012**

MARR JONES & WANG
A Limited Liability Law Partnership

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Attorneys for Respondent
Hawaiian Dredging Construction
Company, Inc.

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

HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.,

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**RESPONDENT HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.'S
ANSWER TO AMENDED COMPLAINT DATED JANUARY 13, 2012**

COMES NOW Hawaiian Dredging Construction Company, Inc. (hereinafter "HDCC") Respondent herein and pursuant to Section 102.20 of the NLRB's Rules and Regulations as amended answers the Amended Complaint dated January 13, 2012 filed herein against it as follows.

1. HDCC admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, and 7(a) of the Amended Complaint.
2. HDCC denies the allegations of paragraphs 7(b), 8, and 9 of the Amended Complaint.
3. Each and every allegation of the Amended Complaint not specifically admitted is denied.

FIRST AFFIRMATIVE DEFENSE

HDCC's conduct was in accordance with its contractual obligations under the Labor-Management Agreement with the Plumbers & Pipefitters Union, Local 675, which required HDCC to use the Plumbers & Pipefitters Union, Local 675 as its exclusive source of labor.

WHEREFORE, Respondent Hawaiian Dredging Construction Company, Inc. prays that the Amended Complaint filed herein against it be dismissed with prejudice.

DATED: Honolulu, Hawaii, January 26, 2012.



BARRY W. MARR
MEGUMI SAKAE

Attorneys for Respondent
Hawaiian Dredging Construction
Company, Inc.

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

HAWAIIAN DREDGING
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and

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 26, 2012, by the method of service noted below, a true and correct copy of the foregoing document was duly served upon the following:

Joseph F. Frankl
Regional Director, NLRB
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

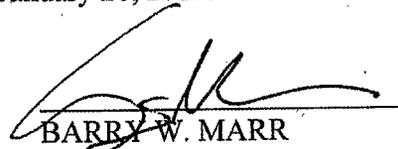
Via E-filing

David A. Rosenfeld, Esq.
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*Via E-mail & First Class
Mail*

Attorney for Union
International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers, Local 627

DATED: Honolulu, Hawaii, January 26, 2012.



BARRY W. MARR
MEGUMI SAKAE

Attorneys for Respondent
Hawaiian Dredging Construction
Company, Inc.

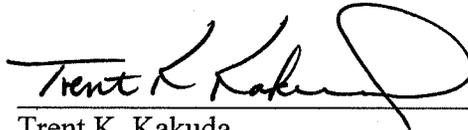
CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment in Case 37-CA-008316 has this day been electronically filed with the National Labor Relations Board's Office of the Executive Secretary, and a copy served upon the following persons by e-mail:

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Dated at Honolulu, Hawaii, this 2nd day of February, 2012.



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