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 POST-HEARING BRIEF

CERTIFICATE OF SERVICE

MARR JONES & WANG
A LIMITED LIABILITY LAW PARTNERSHIP

BARRY W. MARR
MEGUMI SAKAE
1003 Bishop Street
Pauahi Tower
Suite 1500
Honolulu, Hawaii 96813
Tel. No. (808) 536-4900
Fax No. (808) 536-6700
E-mail: bmarr@marrjones.com

Attorneys for Respondent
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.

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HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

This is a case where the National Labor Relations Board ("**NLRB**" or the "**Board**") got it right the first time when on July 29, 2011, it dismissed the underlying Charge filed by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 (the "**Boilermakers Union**" or "**Charging Party**") against Hawaiian Dredging Construction Company, Inc. ("**HDCC**"), alleging HDCC violated §§ 8(a)(1), (3) of the National Labor Relations Act ("**NLRA**"). When the Board dismissed the Charge, it determined that under *Jack Welsh Company, Inc. and United Brotherhood of Carpenters and Joiners of Amer., Local Union 690.*, 284 NLRB 378 (1987), HDCC did not lay off the members of the Boilermakers Union ("**Boilermaker welders**") because they were members of the Boilermakers Union, but that they "voluntarily chose not work under [HDCC's] lawful implementation of new terms and conditions of employment." For reasons unclear, the Board rescinded its dismissal and the Acting General Counsel filed first a Complaint, and then the Amended Complaint at issue.

During the hearing, the Acting General Counsel alleged that HDCC violated § 8(a)(3) under *Catalytic Indus. Maintenance Co. (CIMCO) and International Brotherhood of Elec. Workers, Local 527*, 301 NLRB 342 (1991), when it laid off the alleged Discriminatees *because* they were members of the "Boilermakers Union." As established throughout these proceedings and explained in detail below, the instant case is unlike *CIMCO*, where the employer admittedly terminated all of its unionized employees *because* they were members of the union.

Here, unlike *CIMCO*, the indisputable evidence shows that HDCC laid off the Boilermaker welders because there was no contract and a collective bargaining agreement covering their work. The indisputable evidence shows that historically, and at least during the past twenty years, HDCC performed and continues to perform all of its craft work pursuant to a § 8(f) pre-hire agreement under the NLRA. The conduct of the Boilermakers Union during the period leading up to the February 14, 2011 Dismissal Letter in walking off jobs and ignoring dispatch requests only reinforced that HDCC needed to have the protections and the predictability of a union contract. Thus, while there was work to be done, HDCC ceased all work that had been performed by the Boilermaker welders until it negotiated an agreement with the Plumbers & Pipefitters Union, Local 675 (the "**Pipefitters Union**") and the first Pipefitter was dispatched to it.

The evidence further shows that unlike *CIMCO*, after entering into an agreement with the Pipefitters Union, HDCC immediately informed the former Boilermaker welders that they could return to HDCC and that they need only go through the Pipefitters Union's process to do so. Because HDCC was aware that the process included a welding test, to facilitate their return, HDCC made available its shop facility where its former Boilermaker welders could practice their welding. HDCC offered the space, the equipment, the materials and coaching. Those that took advantage of the opportunity to practice their welding all passed the Pipefitters test and returned to HDCC.

What is not at issue in this this case is the lawfulness of HDCC's conduct in terminating its relationship with Charging Party on February 17, 2011 before sending the alleged Discriminatees back to the Hiring Hall. Also not at issue is the lawfulness of HDCC entering into a collective bargaining agreement with the Pipefitters Union on February 23, 2011.

Thus, the evidence shows that HDCC's conduct in no way discriminated against the alleged Discriminatees and HDCC requests that the Amended Complaint be dismissed in its entirety.

II. STATEMENT OF FACTS

A. HDCC's Collective Bargaining History

HDCC is the largest and most diversified general contractor in the State of Hawaii. Tr. 89. As a general contractor, HDCC builds hotels, houses, highways and roads. *Id.* It is also a waterfront and foundation contractor. *Id.* HDCC is also the State's principal power and industrial ("**P&I**") contractor. *Id.* As a P&I contractor, HDCC performs industrial mechanical construction, for example, by building power plants and performing industrial work in the sewage and water treatment plants on Oahu and Maui. Tr. 44, 90.

HDCC employs approximately 230 salaried employees and approximately 375 craft labor employees. Tr. 90. It is undisputed that for at least the past twenty years, all of HDCC's craft labor work has been covered by collective a bargaining agreement. HDCC is presently signatory to six collective bargaining agreements. Tr. 118; *see* Tr. 90-91 (Testimony of William Wilson, President of HDCC) ("All of the work that we perform is done under a collective bargaining agreement and has been through the 19 years I've been president and prior to that time as well."). Consistent with its long-standing practice, HDCC has never and does not intend to do field work without a collective bargaining agreement in place to cover the work. Tr. 91, 253, 256, 258.

B. September 2010: The Association And The Boilermakers Union Negotiate A New Contract

The Association of Boilermakers Employers of Hawaii (the "**Association**"), of which HDCC was a member (along with Arakaki Mechanical LLC and another employer), and

Charging Party were parties to a § 8(f) pre-hire agreement for many years, and at least since 2005. Tr. 27, 28-29, 46; GC Ex. 2 (October 1, 2005 to September 30, 2010 CBA between Charging Party and the Association). Charging Party provided HDCC with welders for its P&I Division. Tr. 44.

In or around September 2010, the Association and Charging Party began negotiating a new agreement. *See* Tr. 193. On September 30, 2010, the day the collective bargaining agreement expired, HDCC's offer for a new collective bargaining agreement was presented for ratification to the Boilermaker welders and was rejected. Tr. 193; GC Ex. 2 at Article XXX; Er Ex. 2. After the vote, Charging Party's Business Agent, Allen Meyers, contacted Tom Valentine, Chairman of the Association and HDCC's then Senior Project Manager, and told him that the membership had voted down the contract, they had no contract, and that he further wanted to return to negotiating that night. Tr. 169, 193-94. Valentine responded that he did not believe it was necessary because he (Valentine) believed the parties could continue working under the existing terms and conditions and any resolution would be retroactive to the end of the contract. Tr. 194. Meyers disagreed and the following day, on October 1, 2010, Valentine received a letter from Charging Party's Business Representative, Gary Aycock, forwarding a letter Charging Party received from its attorney. Tr. 195-96; Er Ex. 3; *see* Tr. 6. The letter provided in relevant part:

> Because recognition is under Section 8(f), either party is free to either take economic action or to cease bargaining. All bargaining is voluntary. ***Under these circumstances, the members of the Local can cease working without any further notice or further bargaining.***
>
> There is a provision in the National Labor Relations Act requiring that the Agreement be terminated with a 60 day written notice with appropriate notice to the meditation service. ***You have given that notice so there is no reason why your members can't cease working effective with the expiration of the contract.***

Er Ex. 3 at HDCC 000421.

Valentine understood the letter as a threat that the Boilermaker welders would be walking off these jobs. Tr. 196. That same day, five Boilermaker welders showed up to work at HDCC's Sand Island project and walked off the job. Tr. 196-97; Er Ex. 4. The five Boilermaker welders told their supervisor they were leaving because they had no contract. Tr. 197. On or about October 8, 2010, Valentine signed an agreement to extend the term of the contract until October 29, 2010, with any changes being retroactive to the expiration of the collective bargaining agreement on September 30, 2010. Tr. 198; GC Ex. 3.

Thereafter, the Association and Charging Party continued their negotiations and reached an agreement, which was ratified by Charging Party's members. Tr. 198. On November 1, 2010, Aycock sent Valentine a wage letter which included two terms that were neither discussed nor agreed upon during the negotiations. *See* Tr. 198; Er Ex. 6. Valentine responded to Aycock's that same day, alerting Aycock that the additional terms needed to be deleted. Tr. 198; Er Ex. 6.

Despite the dispute over the two items, Valentine believed the parties had an agreement. On November 12, 2010, he sent Meyers a letter attaching four copies of the new collective bargaining agreement which Valentine believed reflected the parties' agreement. Tr. 200; Er Ex. 7. On or about November 17, 2010, Meyers sent Valentine a letter demanding that the two disputed terms be added to the new agreement and gave Valentine until November 30 to sign the agreement with the additional wage items, otherwise "the Union will be forced to take appropriate action." Er Ex. 8; Tr. 201, 262. Because Valentine was out of town at that time, Charging Party extended Valentine's response date to December 6, 2010. Tr. 262. On

December 6, 2010, Valentine E-mailed Aycock and informed him that the Association would not agree to Charging Party's November 17 demands. Er Ex. 11.

C. December 6, 2010: Charging Party Directs Its Members Not To Report To Work; The Association Files A Charge To Enforce The Negotiated Contract

In December 2010, HDCC contracted with its largest client, Hawaiian Electric Company ("**HECO**") to provide approximately twenty Boilermaker welders for a power plant outage at HECO's Kahe 4 Power Plant ("**Kahe 4 project**"). Tr. 204. HDCC began submitting manpower requests to Charging Party in accordance with its client's needs for varying skill levels (*e.g.*, welders, riggers, tube welders) for different times, dates and shifts. Tr. 164 (Testimony of Gordon Caughman), 203-04 (Valentine). On December 3, HDCC submitted a request to Charging Party for the first Boilermaker welder to be dispatched to the job on December 6. Er Ex. 10; Tr. 164, 203. On December 6, the same day the Association's response to Charging Party's November 17 demand was due, Charging Party did not dispatch anyone to the Kahe 4 project and no one showed up. Er Ex. 10. Valentine soon learned that Aycock was directing the Boilermaker welders not to report to work if HDCC dispatched them to a project. Er Ex. 9, Tr. 203.

When the first Boilermaker welder did not report to work on December 6, HDCC's General Foreman, Gordon Caughman, contacted Aycock and asked why Boilermaker welder, Manuel "Kalani" Gaoiran, did not show up to work. Tr. 165. Aycock told Caughman that dispatches were being handled by Meyers in Arizona. Tr. 166. Caughman then spoke to Meyers and Meyers asked Caughman, "did we get their attention yet?" Tr. 166. Caughman responded that he believed "attention was gotten, but I don't know if it was good attention." Tr. 166. Meyers then directed Caughman to "tell them to sign a contract." Tr. 169. Caughman responded that he was "just trying to put people to work." Tr. 169.

Caughman also spoke with Gaoiran. Tr. 166. Gaoiran told Caughman that Aycock directed him not to report to work and that he did not want to get stuck in the middle. Tr. 166. Caughman told HDCC about his conversations with Aycock, Meyers and Gaoiran. Tr. 166, 169-70.

As a result of Charging Party's failure to dispatch workers to the Kahe 4 project, Valentine wrote to Meyers and Aycock. *See* Tr. 207; Er Ex. 11. Because he could not understand why Charging Party would want to impact the ability of the local Boilermaker welders to work, even after he informed Aycock that the new CBA would be retroactive to the expiration of the 2005-2010 CBA, Valentine further wrote, "I do not understand the reason for this failure to honor the dispatch. We have a disputed contract and our position has always been that upon resolution the contract would be retroactive to October 1, 2010." Tr. 194, 207; Er Ex. 11. Valentine then informed Charging Party that the Association was filing an unfair labor practice charge with the NLRB to enforce the agreed upon CBA. *See* Er Exs. 11, 12; Tr. 207, 229. Neither Meyers nor Aycock responded to Valentine. Tr. 207. On December 7, 2010, HDCC was expecting three additional journeymen at the Kahe 4 project, but Charging Party continued to ignore HDCC's dispatch requests and did not send any workers. Er Ex. 13; Tr. 208.

Approximately two days after the first worker was expected to show up, Charging Party began sending Boilermaker welders to the Kahe 4 project. Tr. 170. However, HDCC's difficulties in staffing the job continued because Charging Party did not tell HDCC who was showing up, when they were showing up, or the skill level of the Boilermaker welders who did show up. Tr. 170-71 (Caughman), 263 (Testimony of Forrest Ramey, HDCC Superintendent). Because it was unusual that HDCC would not be told who was going to report to work on a

given day, on December 10, 2010, Valentine E-mailed Aycock asking for notice when it was sending a worker to the site. Tr. 209-10; Er Ex. 14.

On December 12, 2010, Valentine sent HDCC's management team an update on the challenges it was experiencing with Charging Party and the Kahe 4 project. Tr. 210; Er Ex. 15. Valentine wrote:

> Within the past week HDCC has submitted dispatch requests to the boilermakers for workers to support HECO for the current Kahe 4 outage. This work is expected to continue until January 31, 2011 and will be a 7 day/week two shift (12 hour/per) per day operation. ***So far HDCC has submitted dispatch requests for 13 journeymen for this work. With the exception of one worker the boilermakers have failed to dispatch any worker on the date requested. These delays have been for at least two days, some have been for 3 to 4 days and some have not been answered at all.***
>
> *****
>
> In an attempt to resolve this situation we've repeatedly emailed and telephoned the boilermakers to determine the status of the dispatches and inquire as to why they are not meeting out dispatch requests. Any union response has been "incomplete" at best. . . . On Sunday the boilermakers indicated that 3 boilermakers would report to the job – only two reported. I don't know what to expect for Monday – based on past experience I do not expect the boilermakers to provide the requested workers. ***This behavior is adversely impacting our ability to respond to customer needs and plan upcoming work.***

Er Ex. 15 (emphases added). Valentine was concerned because the Kahe 4 project was expected to last through the end of January, and despite HDCC's dispatch requests for thirteen journeymen, Charging Party had only timely honored one. *Id.*; Tr. 210-11. Valentine understood that HECO had its own schedule to keep and that he would have to notify HECO about the situation. Tr. 205, 211; Er Ex. 10. Valentine was concerned about telling HECO because it was a very valuable customer and he knew it was very important that HDCC satisfy its needs. Tr. 205. He understood that if HDCC did not provide the manpower needed by HECO at

the Kahe 4 project, HECO could terminate its contract with HDCC and find workers from other sources. Tr. 211; Er Ex. 15. In addition to affecting HDCC's client relationships, Valentine was concerned by Charging Party's failure to honor HDCC's dispatch requests because it was making it difficult to plan future work. *Id.*

As of December 12, HDCC had eight Boilermaker welders working for it on other projects. To provide manpower to the Kahe 4 project, HDCC transferred all eight Boilermaker welders from other ongoing projects to the Kahe 4 project. Tr. 263, 273-74; Er Ex. 16 at HDCC 000461. This forced HDCC to shut down all of its other projects to provide the workers to make up for the dispatches not honored by Charging Party. Tr. 263. As of December 17, a majority of the dispatch requests were either not being honored at all or dispatched two to three days late, and HDCC (and the Boilermaker welders) lost twenty-six, 12-hour shifts, or 312 hours. Tr. 213-14, 269; Er Ex. 16. The efforts by HDCC to offset the shortage of manpower at the Kahe 4 project were not enough and, as a result, HECO reassigned the work it had originally contracted HDCC to perform. Tr. 212 (Valentine) (A: When you spoke to [HECO] did they indicate why they were removing some of the work that they had previously assigned to you? A: Because we could not staff it.), 273 (Ramey) ("the client shifted their resources around to fit our inability to staff it"); *see* Er Ex. 16 at HDCC 000461.

During this same time period, several of the Boilermaker welders dispatched to the Kahe 4 project failed HECO's quality control requirements. Tr. 215-16; Er Exs. 17, 18. As a result of their sub-standard work, HECO removed the work the Boilermaker welders performed at a $115,000 loss of revenue to HDCC. Tr. 216-17. The sub-standard performance by the Boilermaker welders concerned HDCC not only because HECO is an extremely important client for HDCC, but also because HDCC prides itself on being able to perform weld at a higher

quality and at higher production rates than HECO's welders. Tr. 216; Er Ex. 18. At HECO's request, HDCC also laid off three Boilermaker welders (none of whom are alleged Discriminatees identified in the Amended Complaint) and transferred another one. Tr. 245; *see* Er Ex. 17. On December 20, 2010, HDCC explained its concerns to Charging Party in a detailed memo and requested input on how these issues could be addressed so they did not re-occur. *See* Er Ex. 18; Tr. 218. Charging Party never responded. *Id.*

D. February 14, 2011: The NLRB Finds There Was No Meeting Of Minds Between HDCC and Charging Party

On February 14, 2011, the NLRB dismissed HDCC's Charge, concluding the parties did not have an agreement, writing in relevant part:

> [I]t cannot be said that the Union acted in good faith and did not suspect the Charging Party's [HDCC] 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. . . . I therefore conclude that the parties did not reach a complete agreement on terms and conditions of employment."

Er Ex. 19 at HDCC 000466.

After receiving the February 14 Dismissal Letter, by letter dated February 17, 2011, Valentine lawfully terminated the Association's relationship with the Boilermakers Union. Tr. 219-20; GC Ex. 4. The Amended Complaint does not allege that HDCC's conduct in choosing to terminate its relationship with Charging Party violated the NLRA. *See* GC Ex. 1(f).

Also on February 17, 2011, HDCC informed the welders that they were being laid off because there was no contract between HDCC and Charging Party. Tr. 106 (Wilson), 220 (Valentine), 229 (same); *see* GC Exs. 6-19 (transmittal sheets all indicating as the reason for the separations was "Contract has expired"); Tr. 72, 78-79 (Aona) (testifying he received his

transmittal sheet that indicated "Contract has expired" on the day he was laid off). The layoffs were consistent with HDCC's long-standing practice of having all of its craft labor work done under a union agreement. Tr. 106. Caughman, a former Boilermaker member who had worked for HDCC for fifteen years, testified that when he was told he was being laid off on February 17, 2011 because there was no contract, he understood why HDCC could no longer employ him and the other Boilermaker welders: "In my mind we are a bargaining unit. I am a member of a union, and if there is no contract, that therefore the Company can't employ people that aren't under contract." Tr. 54, 171. After sending the welders back to the hiring hall, HDCC did not perform any welding work until it executed a contract with the Pipefitters Union. Tr. 227.

E. February 23, 2011: HDCC Enters Into A Collective Bargaining Relationship With The Pipefitters Union

Around this time, HDCC met with representatives of the Pipefitters Union to discuss and possibly negotiate a collective bargaining agreement (the "**First Meeting**"). Tr. 222. At the First Meeting, among other participants, from the Pipefitters Union were Reginald Castanares (Business Manager, Financial Secretary/Treasurer), Val Ceria (officer), and Allen Hoe (counsel), and from HDCC were Valentine, Dan Guinaugh (Vice President of the P&I Division) and Gary Yokoyama (HDCC's in-house counsel). *Id.*; *see* Tr. 27, 127, 129, 206. During the First Meeting, Guinaugh asked Castanares to accept HDCC's former Boilermaker welders as Pipefitters. Tr. 223. Castanares refused HDCC's request explaining that the Boilermaker welders would need to go through the process of becoming a member of the Pipefitters Union, which consisted simply of (1) an application, (2) an interview and (3) a welding test. Tr. 129-30 (Castanares).

Castanares explained that having the Boilermaker welders go through the Pipefitter process ensured the quality of their work. Tr. 130 (Castanares) ("It's part of our

quality control of our membership and our skillset"). Castanares further explained that the Pipefitters Union had over sixty signatory employers to its collective bargaining agreement (the "**Pipefitters CBA**"), which included a strictly-enforced "Uniform Conditions" (most favored nations) clause. Tr. 133; *see* Er Ex. 22 at Article XXVIII. The most favored nation's clause requires the Pipefitters Union to offer any terms outside of the contract that it provides to one of its signatory employers to the more than sixty signatory contractors.[1] Tr. 133 (Castanares), 223 (Valentine); Er Ex. 22 at Article XXVIII.

Thus, the evidence shows that Castanares refused HDCC's request to accept the Boilermaker welders unconditionally because of the Pipefitters Union's quality control concerns and because making an exception for HDCC would have required it to do the same for all of the signature contractors, which it was not willing to do. Tr. 133, 223. Guinaugh offered to provide Castanares with a list of HDCC's former Boilermaker welders, but Castanares refused to accept the list because he did not want to appear to be soliciting members from another union. Tr. 224.

On February 23, 2011, the Pipefitters Union and HDCC met again. Tr. 221. Attending the meeting from the Pipefitters Union were Castanares, Ceria, Hoe, and its administrative assistant, and from HDCC were Bill Wilson (President of HDCC), Guinaugh, Valentine, Tamie Matsuoka (HR) and Cheryl Arii (HR). Tr. 221-22. During this meeting, Wilson also asked Castanares if the Pipefitters Union would take HDCC's former Boilermaker welders. Tr. 108 (Wilson) ("I had indicated to him that I felt that the workers that we'd had

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[1] In addition, the Pipefitters CBA includes a union-security clause and an exclusive hiring hall provision. *See* Er Ex. 22 at Arts. III, IV, Exhibit "A." 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* Er Ex. 22 at Art. III, § 7. 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. Er Ex. 22 at Art. III, § 7.

doing the work were fully qualified to do our work . . . and felt that it would be appropriate for them to be our employees again under the agreement."); 132, 225. Again, citing to the Pipefitters CBA, Castanares refused to accept the former Boilermaker welders unconditionally. Tr. 132, 225; *see* Tr. 108-09 (Wilson) ("[Castanares] indicated due to the number of other signatory contractors and their commitments to them and their Union, that they needed to follow their standard practices for people choosing to become Pipefitters. . . . [W]hen you become a member of [the Pipefitters] Union, you have the potential of being dispatched to any one of those employers [signatories]. So my view of that was they wanted to be sure that these people could meet the needs of their other signatory contractors as well."). During the February 23 meeting HDCC became a signatory to the Pipefitters CBA. Tr. 110, 131-32, 140, 221; *see* Er Ex. 22. The Amended Complaint does not allege that HDCC's conduct in entering into the Pipefitters CBA was unlawful. *See* GC Ex. 1(f).

It is clear that HDCC wanted the former Boilermaker welders to return to HDCC. Accordingly, immediately after HDCC entered into the Pipefitters CBA, HDCC told the former Boilermaker welders that HDCC had signed with the Pipefitters Union and advised them they could return to HDCC *via* the Pipefitters Union. Tr. 275-76 (Ramey); *see* Tr. 173 (Caughman),[2] 225-26 (Valentine) ("we had a series of contacts with some of the former employees, and we outlined . . . the procedures as we understood them from the Pipefitters. And at least in my conversation I clearly indicated that . . . this was a decision you need to make, . . . what you believe is best for you, but these are the options available, and we understood that the process

[2] While Acting General Counsel takes issue with Caughman's employment status with HDCC after February 17, 2011, nonetheless, in the Amended Complaint, he admits that Caughman was "***at all material times***," a supervisor of HDCC within the meaning of § 2(11) of the NLRA and/or an agent of HDCC within the meaning of § 2(13) of the NLRA. Acting General Counsel should not be allowed to claim Caughman was a supervisor and/or agent of HDCC depending on whether Caughman's testimony is helpful or hurtful to his case.

has an application process, an interview process and also a skills test, typically a welding test."), 231 (Valentine), 260-61 (Valentine) ("We understood the process at the Pipefitters and let the guys know if they chose to continue working with Hawaiian Dredging, this is the route they would have to follow. It was purely their choice to make."), 274-76 (Ramey) (listing alleged Discriminatees he contacted including Henry Merrill, Paul Aona, Joe Galzote, Ken Valdez, Rolando Tirso, Manuel Gaoiran, Daniel Marzo, Joselito Peji, Domingo Delos Reyes, and Kona Akuna); *see also* Tr. 173 (Caughman) ("It is a small island and everybody talks."). Ramey testified during the hearing that he communicated the Pipefitter opportunity to its former Boilermaker welders at the directive of Valentine and because he wanted individuals he knew he could trust working for him. Tr. 275. When Ramey contacted the Boilermaker welders, he explained to them the process for becoming a Pipefitter Union member, and knowing that there was a welding test, made available an HDCC facility so they could practice their welding before the test. Tr. 277. HDCC provided the tools, equipment, raw materials, consumables such as welding rods, and coaching. Tr. 277. In addition to Caughman, alleged Discriminatees who initially took advantage of the opportunity to practice their welding included Merrill, Marzo, Gaoiran, Galzote, and Tirso. Tr. 175-76, 232-33, 277-78. HDCC did not deny anyone the opportunity to use its facilities to practice their welding for the Pipefitter welding test. Tr. 278.

Within two days of signing the Pipefitters CBA, by February 25, 2011, six out of the thirteen alleged discriminatees – Paul Aona,[3] Kona Akuna, Joseph Galzote, Daniel Marzo, Henry Merrill and Joselito Peji[4] – signed in with the Pipefitters Union. *See* Er Ex. 23. By

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[3] Aona, who initially did not take advantage of HDCC's offer to practice his welding, did not pass the Pipefitters welding test. Tr. 82-83. Aona later practiced at HDCC's facility, passed the Pipefitters' welding test and is currently a foreman with HDCC. Tr. 73, 85.

[4] Although Peji registered at the Pipefitters Union Hiring Hall, he did not pay the permit fee and his name was removed from the out of work list. Tr. 153 (Castanares); Er Ex. 23; *see* Tr. 176 (Caughman) (Q: Do

April 13, 2011, an additional two alleged discriminatees –Rolando Tirso and Ken Valdez – signed in with the Pipefitters Union. Er Ex. 23. The remaining five alleged discriminatees never signed up with the Pipefitters Union. *See id.*; *see also* GC Ex. 1(v) (Compliance Specification) at ¶ 12(j) (admitting alleged Discriminatee Peter Padaguan was not available to work and withdrew from the labor market).

The evidence shows that HDCC has never rejected and would not reject a former Boilermaker welder dispatched to it from the Pipefitters Union hiring hall because of his status as a member or former member of the Boilermakers Union. *See* Tr. 73, 177; Er Ex. 23.

F. May 12, 2011: Charging Party Files A Charge

On or about May 12, 2011, Charging Party 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." GC Ex. 1(a). 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).

GC Ex. 1(k) at Exhibit 2 attached to the Declaration of Barry W. Marr dated January 31, 2011 (emphases added).

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you know why Joselito Peji did not take advantage of the Pipefitter opportunity? . . . A: He felt threatened. Q: Did he tell you why he felt threatened? A: He felt threatened that Gary Aycock had told him that people that were pursuing jobs with the Pipefitters would have their pension benefits taken away and words to the effect that they would go after you.").

The Board rescinded the dismissal and filed a Complaint against HDCC on November 30, 2011. GC Ex. 1(c). The Amended Complaint was filed on January 13, 2012. GC Ex. 1(f).

III. DISCUSSION

A. Congress Enacted Section 8(f) To Help Employers In The Construction Industry Meet Their Business Needs And To Maintain Industrial Peace

Enacted in 1959, § 8(f) of the NLRA is an exception to § 9 of the NLRA, which makes it unlawful for an employer to sign a collective bargaining agreement recognizing a minority union as an exclusive bargaining representative. *See* 29 U.S.C. §§ 158(f), 159(a); *see NLRB v. Pacific Erectors*, 718 F.2d 1459, 1462 (9th Cir. 1983); *see also Bldg. & Constr. Trades Council v. Assoc. Builders & Constrs.*, 507 U.S. 218, 230 (1993) ("Section 8(f) explicitly permits employers in the construction industry – but no other employers – to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees."). Section 8(f) recognizes the fluidity of the construction industry and the "construction industry employer's need to 'know his labor costs before making the estimate upon which his bid will be based' and that 'the employer must be able to have available a supply of skilled craftsman for quick referral." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983); *see also Bldg. & Constr. Trades Council*, 507 U.S. at 221, 231 (upholding prehire agreement entered into to maintain worksite harmony, labor-management peace, and overall stability throughout duration of a project).

Thus, it is axiomatic that a construction industry employer has the right to have work done pursuant to a collective bargaining agreement to meet its business needs and maintain industrial peace. Section 8(f) facilitates this right by permitting a construction industry employer

to enter into a collective bargaining relationship with a union without any indication of majority support. HDCC performs all its craft work pursuant to a collective bargaining agreement for the very reason § 8(f) exists: to maintain workplace harmony and to have a predictable and known workforce on which it can plan future projects.

B. The Acting General Counsel Failed To Meet His Burden

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 Acting General Counsel alleges that HDCC violated §§ 8(a)(1), (3) when it laid off the alleged Discriminatees *because* they were members of Charging Party.[5] *See* GC Ex. 1(f) at ¶¶ 7, 8. However, the evidence presented during the hearing shows that the alleged Discriminatees were laid off, not because they were members of Charging Party, but for legitimate business reasons – *i.e.*, because there was no collective bargaining agreement covering their work. All craft work performed at HDCC is done pursuant to a union contract and HDCC did not want the work performed without the security and predictability of a collective bargaining agreement.

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

[5] While the Acting General Counsel cites to § 8(a)(1) and § 8(a)(3), the § 8(a)(1) claim "is derivative of the 8(a)(3) allegation." *See* GC Ex. 1(l) (Opposition to Motion for Summary Judgment) at 3 n. 4.

"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.

1. <u>There Was No Animus</u>

The Counsel for the Acting General Counsel has failed to meet his burden to establish his *prima face* case.

First, there is no evidence (or even an allegation) that the Boilermaker welders engaged in protected concerted activity before they were sent back to the hiring hall.

Second, there is no evidence that HDCC harbored union animus. In fact, the evidence presented during the hearing shows that despite the disagreement between HDCC and Charging Party over the terms of the new agreement, HDCC continued with business as usual while *Charging Party* began its campaign of disruptive behavior:

- Valentine testified that on September 30, 2010, the day the contract expired and the Boilermaker Union members rejected HDCC's offer, he informed Meyers that the parties could continue to negotiate while working under the existing contract. Tr. 194. Meyers disagreed and the next day, Charging Party sent Valentine a letter from its attorney, stating, in relevant part:

> Because recognition is under Section 8(f), either party is free to either take economic action or to cease bargaining. All bargaining is voluntary. ***Under these***

> ***circumstances, the members of the Local can cease working without any further notice or further bargaining.***
>
> There is a provision in the National Labor Relations Act requiring that the Agreement be terminated with a 60 day written notice with appropriate notice to the meditation service. ***You have given that notice so there is no reason why your members can't cease working effective with the expiration of the contract.***

Tr. 194-95; Er Ex. 3 (emphasis added). Valentine interpreted the letter as a threat that the Boilermaker welders would walk of the job. Tr. 196; *see* Er Ex. 3. True to its threat, that same day, five Boilermaker welders showed up to work, but then walked off the job after telling their supervisor they were leaving because there was no contract. Tr. 196-97; Er Ex. 4.

- Caughman, Valentine and Ramey testified that in December 2010, as Charging Party and HDCC's disagreement over the terms of the new contract continued, Charging Party failed to dispatch employees to the Kahe 4 project costing the Boilermaker welders twenty-six, 12-hours shifts, or 312 hours of wages. Tr. 164, 213-14, 269; Er Ex. 16. Caughman further testified that when the first Boilermaker welder did not show up to the Kahe 4 project, he called the Boilermaker and was told by him that Charging Party told him not to report to work. Tr. 165-66. Caughman further testified that when he called Charging Party about its failure to dispatched workers, the Business Agent's response was, "did we get their attention yet?" and "tell them to sign a contract." Tr. 166, 169. Despite Charging Party's conduct, HDCC filed a Charge with the NLRB in the hopes of enforcing the parties' new CBA and continuing the parties' § 8(f) relationship. Tr. 207.

Notably, despite testimony from HDCC and Caughman about Charging Party's disruptive behavior leading up to the February 14 Dismissal Letter, Charging Party failed to call a single witness to rebut their testimony, even as Aycock, Charging Party's agent alleged to have first-hand knowledge of much of the events, sat silently next to its counsel during the two days of hearing. Aycock could have, but did not, provide testimony rebutting HDCC's concerns about working without a collective bargaining agreement were unfounded. Aycock could have denied that the Boilermakers Union directed its employees to walk off jobs and to ignore dispatch requests, but he did not. He could have provided testimony denying that the Boilermakers Union threatened its members so they would not either respond to HDCC's referrals in December or pursue employment with HDCC through the Pipefitters in February.

Third, the undisputed evidence shows that after February 17, 2011, HDCC did not replace the Boilermaker welders with other union or non-union employees, or perform any welding work. Tr. 227. Rather, less than a week after it lawfully terminated its relationship with Charging Party, it entered into a lawful § 8(f) 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. *See* Er Exs. 22, 23. HDCC twice 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. *See supra* Section II.E. HDCC then notified the Boilermaker welders about the Pipefitter opportunity and the process for joining the Pipefitters Union. Tr. 173, 225-26, 231, 260-61, 274-76. It even made available a shop facility, complete with coaching, tools, equipment, and materials, to all of the Boilermaker welders so they could practice welding and prepare them for the Pipefitter welding test. Tr. 277. It is

undisputed that all of the Boilermakers welders who successfully completed the Pipefitters Union's process were dispatched to HDCC and hired. *See* Er Ex. 23; Tr. 73, 177.

Finally, furthering the argument that HDCC did not harbor union aminus is HDCC's lack of motivation; because no contract existed between HDCC and Charging Party, 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. <u>HDCC's Conduct Was Not Inherently Destructive</u>

To the extent the Acting General Counsel argues that he need not establish union animus on the basis that HDCC's conduct in laying off the alleged Discriminatees *because* they were members of Charging Party was "inherently destructive of employee interests," such argument fails. *See NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). 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). Under *CIMCO*, "conduct [that] may be characterized as 'inherently destructive' " is "the type 'which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights.' " 301 NLRB at 347 (citations omitted). If the Acting General Counsel is able to show inherently destructive conduct, then the burden shifts to the employer "to establish it was motivated by 'legitimate objectives.' " *See CIMCO*, 301 NLRB at 347; *see Great Dane Trailers*, 388 U.S. at 34 ("when the resulting harm . . . is comparatively slight, and a substantial or legitimate business end is served, the employers' conduct is prima facie lawful."). Here, the

undisputed facts show that HDCC's conduct was not "inherently destructive," and that HDCC's actions were for legitimate business reasons.

First, it is undisputed that at least during the past twenty years, HDCC has performed all its craft labor pursuant to collective bargaining agreements under § 8(f). Tr. 90-91. As discussed above, HDCC's reasons for performing craft labor pursuant to a prehire agreement is inviolate and sanctioned under § 8(f) of the NLRA. *See supra* Section III.A. Charging Party's disruptive behavior during the parties' contract dispute only served to confirm HDCC's concerns about working without a union contract, which were the very concerns Congress intended to address in enacting § 8(f). *See* Er Ex. 15 (Valentine's December 12, 2010 E-mail to management regarding Charging Party's disruptive behavior) ("This behavior is adversely impacting our ability to respond to customer needs and plan upcoming work."); *see also supra* Section III.A (discussing legislative policy of § 8(f))

Second, the overwhelming evidence is that HDCC did not lay off the alleged Discriminatees because they were members of Charging Party, but because there was no contract covering the work. *See* Tr. 106, 220, 229, GC Exs. 6-19. Thus, this case is unlike *Jack Welsh*, relied upon by the Acting General Counsel, in which the employer decided he was "going open shop," and terminated all of his union employees.[6] 284 NLRB at 378. In *Jack Welsh*, after terminating its employees, the employer then hired *new*, nonunion employees. *Id.* at 383. Only after the employees filed a charge with the NLRB, did the employer offer 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. With respect to the one employee

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

was offered continued work (as the former Boilermaker welders were here), there was found to be no violation.

Unlike *Jack Welsh*, the evidence here shows HDCC was not "going open shop," but laid off the Boilermaker welders on February 17 when it lawfully ended its collective bargaining relationship with Charging Party. *See supra* Section II.B. HDCC then entered into a collective bargaining agreement with the Pipefitters Union on February 23. *See* Er Ex. 22. The undisputed evidence shows that HDCC wanted to employ the alleged Discriminatees and they asked the Pipefitters Union to accept them unconditionally, without going through the Pipefitters process of (1) an application, (2) an interview and (3) a welding test. *See supra* Section II.E. The Pipefitters Union denied the request because of quality control concerns and the most favored nation's clause in its CBA. Tr. 133, 223.

On February 23 and 24, HDCC notified the Boilermaker welders of the opportunity to be dispatched to HDCC if they went through the Pipefitters Union. Tr. 173, 225-26, 274-76. The evidence shows that nine former HDCC welders registered with the Pipefitters Union by the time Charging Party filed its unfair labor practice charge on May 12, 2011. Er Ex. 23. The evidence further shows that Charging Party threatened at least one of the Boilermaker welders and, as a result, he did not complete the Pipefitters process. Tr. 176.

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)***.

GC Ex. 1(k) at Ex. 2 attached to the Decl. of Barry W. Marr (emphases added). The Acting General Counsel did not present any facts during the hearing that would require a different finding by the ALJ.

This case is unlike *CIMCO*, a case heavily relied upon by the Acting General Counsel. In *CIMCO*, the NLRB determined that the employer discriminated against the union workers after it admittedly terminated thirty-four employees *because* they were referred to the employer by the union "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. The Board in *CIMCO* held that the discharge "of all employees of a particular craft *because of* their affiliation with, and referral from, a union . . . creates 'continuing obstacles to the future exercise of employee rights.' " *Id.* at 347.

As explained above, unlike *CIMCO*, here, HDCC did not lay off the employees *because* they were referred to it by Charging Party. Rather, the reason for the layoffs was there was no union contract covering the work. HDCC wanted to have this work, like all of its craft work, performed under a union contract so that it would be protected from the type misconduct it faced from Charging Party preceding February 2011 when Charging Party threatened to strike if there was no contract; engaged in a one day walk-out because there was no contract; delayed and disregarded dispatches, threatened employees if they accepted an HDCC dispatch, and referred substandard welders. This objective, sanctioned by § 8(f) of the NLRA, clearly would not "inevitably hinder future bargaining or create visible continuing obstacles to the future exercise of employee rights." *CIMCO*, 301 NLRB at 347 (citations and quotations omitted). In fact, within one week, HDCC entered into a CBA with the Pipefitters and immediately notified the alleged discriminatees that they could return to HDCC through the Pipefitters Union.

The instant case is also distinguishable from *CIMCO* because HDCC did not lay off the employees in an attempt to pressure Charging Party to enter into an Agreement with it. Although HDCC negotiated an agreement with Charging Party, HDCC filed an unfair labor charge when the Boilermakers refused to sign it. *See supra* Section II.B. 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 Charging Party that it was terminating their relationship. *See* Er Exs. 19; GC Ex. 4. Thus, unlike the employer in *CIMCO*, HDCC did not lay off the employees to force Charging Party's hand, but simply to exercise its § 8(f) rights and to continue its long-standing practice to have all craft work performed pursuant to a CBA.

Also distinguishing *CIMCO* from the instant case is the fact that the employees in *CIMCO* were replaced by non-union employees and believed they would not be reconsidered for future employment. 301 NLRB at 346. Here, as explained above, the undisputed evidence shows that HDCC did not replace the Boilermaker welders with non-union employees. Rather, it ceased all welding work pending negotiations of a CBA to cover that work. HDCC offered the former Boilermaker welders employment opportunity through the Pipefitters Union. The evidence shows that at least eight former Boilermakers Union members have been reemployed by HDCC. Er Ex. 23; Tr. 73. All former Boilermakers referred by the Pipefitters have been employed by HDCC.

Thus, HDCC's conduct was prima facie lawful could not have been inherently destructive. *See Great Dane Trailers*, 388 U.S. at 34.

Finally, assuming *arguendo*, that the Acting General Counsel established that HDCC's conduct was inherently destructive, which he did not, the evidence presented shows that the resulting harm was comparatively slight. 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. Caughman, Valentine and Ramey provided unrefuted testimony that within a week, the Boilermakers welders were offered the opportunity for jobs through the Pipefitters Union. To help the Boilermaker welders pass the Pipefitters welding test (and return to HDCC), HDCC set up a training facility so the Boilermaker welders could practice their welding. Tr. 277. It is also undisputed that by February 25, 2011, seven Boilermaker employees (including Caughman) signed up with the Pipefitters Union. Er Ex. 23. Thus, the alleged resulting harm was comparatively slight in relation to HDCC's substantial and legitimate business purpose to perform craft work pursuant to a collective bargaining agreement in accordance with the purposes of § 8(f) of the NLRA.

IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS

1. HDCC lawfully terminated its relationship with Boilermakers on February 17, 2011.
2. HDCC ceased performing work covered under the Boilermakers' CBA on February 17, 2011.
3. HDCC laid off the Boilermakers welders on February 17, 2011 because it did not have a CBA covering the work performed by them.
4. At both negotiations meetings with the Pipefitters Union, HDCC senior management specifically asked the Pipefitters to unconditionally accept the laid off employees. The Pipefitters declined, for 2 reasons:
    a. The Pipefitters Master Agreement, which covers 60 employers, has a Most Favored Nation clause and an exclusive hiring hall provision. If the laid off employees were accepted without going through the Pipefitters

process, it would undercut the Pipefitter's enforcement of the Most Favored Nation clause.

b. The Pipefitters wanted to insure the capabilities of the laid off employees because they would be eligible for referral to any of the 60 employers covered under the Pipefitters Master Agreement.

5. HDCC lawfully entered into a CBA with the Pipefitters on February 23, 2011.

6. By February 24, 2011, Superintendent Forrest Ramey had contacted substantially all of the laid off employees to advise them of the opportunity with Pipefitters that HDCC had entered into a CBA with the Pipefitters Unions and that they could return to HDCC through the Pipefitters if they chose to do so.

7. The evidence establishes that there was no animus towards the Boilermakers welders, as demonstrated by the following:

a. The reason for the layoffs was there was not a union CBA covering the work and HDCC performs all craft work pursuant to a CBA.

b. HDCC immediately notified the Boilermakers welders that it had signed a CBA with the Pipefitters Union and advised them they could return to HDCC through the Pipefitters Union.

c. HDCC facilitated the Boilermaker welders return by making available its shop, its materials, its equipment, and supervision to enable the Boilermakers to pass the Pipefitters welding test.

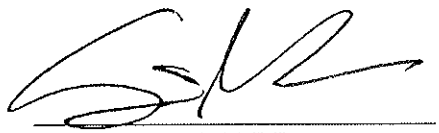
8. HDCC's actions were not inherently destructive of employee rights because such actions will not "inevitably hinder future bargaining and create visible construing obstacles to the future exercise of employee rights." *CIMCO*, 301 NLRB at 347.

9. Even if HDCC's actions were inherently destructive, HDCC was motivated by "legitimate objectives." *Great Dane Trailers*, 388 U.S. 26 at 34. Given the Boilermakers actions preceding February 2011 (threatening to strike if there was no contract; engaging in a one day walk-out because there was no contract; delaying and disregarding dispatches, threatening employees if they accepted an HDCC dispatch, and referring substandard welders), HDCC was justified in making the business decision that it would not perform welding work until it had a CBA in place which covered that work. This business decision was further justified by HDCC's longstanding practice to have all craft work performed under a CBA, a practice which is sanctioned by NLRA § 8(f).

V. CONCLUSION

For the foregoing reasons, the Amended Complaint should be denied in its entirety.

Dated: Honolulu, Hawaii, December 12, 2012.



BARRY W. MARR
MEGUMI SAKAE

Attorneys for
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.

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 December 12, 2012, by the method of service noted below, a true and correct copy of the foregoing document was duly served upon the following:

Judge Eleanor Laws Division of Judges NLRB Region 20 901 Market Street, Suite 300 San Francisco, CA 94103	*Via E-filing*
David A. Rosenfeld, Esq. Caren Sencer, 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*

Meredith A. Burns, Esq.
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, December 12, 2012.

BARRY W. MARR
MEGUMI SAKAE

Attorneys for
HAWAIIAN DREDGING
CONSTRUCTION COMPANY, INC.