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Case No. 19-03-14 (CE)

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142,

Complainant(s),

and

HAWAIIAN MACADAMIA NUT
SERVICES, LLC,

Respondent(s).

CASE NO(S). 19-03 (CE)

DECISION NO. 507

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

In the Matter of

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142,

Complainant(s),

and

HAWAIIAN MACADAMIA NUT
SERVICES, LLC,

Respondent(s).

CASE NO(S). 19-04 (CE)

<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p>Complainant(s),</p> <p>and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p>Respondent(s).</p>	<p>CASE NO(S). 19-05 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p>Complainant(s),</p> <p>and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p>Respondent(s).</p>	<p>CASE NO(S). 19-06 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p>Complainant(s),</p> <p>and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p>Respondent(s).</p>	<p>CASE NO(S). 19-07 (CE)</p>

<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-08 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-09 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-10 (CE)</p>

<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-11 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-12 (CE)</p>
<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-13 (CE)</p>

<p>In the Matter of</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,</p> <p style="text-align: center;">Complainant(s),</p> <p style="text-align: center;">and</p> <p>HAWAIIAN MACADAMIA NUT SERVICES, LLC,</p> <p style="text-align: center;">Respondent(s).</p>	<p>CASE NO(S). 19-14 (CE)</p>
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FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction

This unfair labor practice case arises from the 2019 negotiations between Complainant INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142 (Complainant, ILWU, or Union) and Respondent HAWAIIAN MACADAMIA NUT SERVICES, LLC (Respondent, Hawaiian Mac Nut, or Employer) regarding the renewal of collective bargaining agreements that would succeed the last executed collective bargaining agreements for each of Hawaiian Mac Nut’s locations. After several bargaining sessions, the ILWU believed that Hawaiian Mac Nut failed to negotiate in good faith when it 1) refused to conduct in-person negotiations; 2) failed to produce requested information; and 3) demanded that ILWU accept the Employer’s first, last, and best final offer and present the offer to the membership.

Due to other events in that same time period, the ILWU believed that Hawaiian Mac Nut unilaterally interfered with the applicable collective bargaining agreements by 1) failing to notify ILWU that Hawaiian Mac Nut utilized outside contractors; 2) failing to enroll bargaining unit members in the Health and Welfare Trust when the members became eligible; and 3) making changes to the bargaining unit members’ pension benefits without reaching a tentative agreement with ILWU.

Based on the ILWU’s beliefs, from June 19, 2019 through June 21, 2019, the ILWU filed twelve different unfair labor practice complaints with the Hawai‘i Labor Relations Board (Board), each one regarding one of the six issues mentioned above for one of Hawaiian Mac Nut’s two locations, one at Kea‘au and one at Kā‘u, and alleging violations of Hawai‘i Revised Statutes (HRS) §§ 377-6(1), (3), (4), and (6). The Board consolidated the twelve cases on July 2,

2019 and held hearings on the merits (HOMs) in the consolidated cases on July 17, 18, and 19, 2019. After the HOMs, the parties submitted post-hearing briefs on August 23, 2019.

After a full and complete review of the record and the HOMs, based on the reasons set forth below, the Board issued a minute order finding, among other things:

1. That Hawaiian Mac Nut committed unfair labor practices in violation of HRS §§ 377-6(1), (3), and (4) by refusing to conduct in-person negotiations, failing to provide requested information, and demanding that ILWU accept Hawaiian Mac Nut's first, last, and best final offer.
2. That Hawaiian Mac Nut committed unfair labor practices in violation of HRS §§ 377-6(1), (3), and (4) by failing to enroll members in the Health and Welfare Trust and by unilaterally making changes to the employees' pension benefits.
3. That Hawaiian Mac Nut did not commit an unfair labor practice by failing to notify the ILWU about the utilization of outside contractors.

The Board ordered the ILWU to submit proposed findings of fact and conclusions of law in this case, which it did. Hawaiian Mac Nut submitted its objections to ILWU's proposed findings of fact and conclusions of law, including its own proposed findings of fact and conclusions of law. After receiving and reviewing the proposed findings of fact and conclusions of law, the Board now issues its final order in the case.

Any finding of fact or conclusion of law submitted by the ILWU or Hawaiian Mac Nut but not adopted in this decision is deemed rejected. Any conclusion of law improperly designated as a finding of fact is deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law is deemed or construed as a finding of fact.

1. Findings of Fact

1.1. Parties

The ILWU is the sole and exclusive representative¹ of all production, maintenance, and agricultural (field) employees of Hawaiian Mac Nut employed on the island of Hawai'i, and in that capacity represents approximately 170 Hawaiian Mac Nut employees.

Elmer Gorospe (Gorospe) and Roselyn Molina (Molina) were two of the ILWU's agents. Gorospe was the Hawaii Division Director of the ILWU and represented the ILWU as its chief negotiator and spokesperson during collective bargaining negotiations with Hawaiian Mac Nut. Molina was a business agent for the ILWU, who attended and took notes at each session of collective bargaining negotiations between the ILWU and Hawaiian Mac Nut.

Hawaiian Mac Nut is an employerⁱⁱ, agricultural business, and corporation engaged in the planting, harvesting, and production of macadamia nuts. Hawaiian Mac Nut has two orchards for macadamia nut production, one in Kea‘au and one in Ka‘ū. Several years ago, Hawaiian Mac Nut added a husking plant to the Ka‘ū orchard.

Bradford Nelson (Nelson), Brian Ahakuelo (Ahakuelo), Brandon Ahakuelo, and Stephanie McNamara (McNamara) were Hawaiian Mac Nut’s agents. Nelson was the President and General Manager, of Hawaiian Mac Nut, the Managing Partner of Hawaiian Mac Nut Orchards, and the sole member of Hawaiian Mac Nut. McNamara was Hawaiian Mac Nut’s Human Resources Director.

Hawaiian Mac Nut hired Ahakuelo and Brandon Ahakuelo to negotiate on its behalf as co-spokespersons and co-negotiators during collective bargaining negotiations with the ILWU.

1.2. Collective Bargaining Agreements

ILWU and Hawaiian Mac Nut are parties to two collective bargaining agreements (CBAs), one for the Kea‘au Orchard Division and one for the Ka‘ū Orchard Division. The two CBAs were in effect from June 1, 2016 through May 31, 2019.

1.3. Negotiations

In March of 2019, the parties began to negotiate, as the CBAs were set to expire on May 31, 2019. The ILWU submitted approximately 15-20 proposals to amend and modify the CBAs, focusing on three major areas.

Hawaiian Mac Nut submitted approximately one hundred proposals, a large increase from prior negotiations. Not all the proposals contained enough detail to be considered complete, and Ahakuelo subsequently made verbal proposals that were not contained in the initial batch of proposals.

Among other things, Hawaiian Mac Nuts proposals included eliminating the recognition section from the CBAs, including proposing to eliminate:

- Section 001.04.0: “The company and its representatives will not undermine the Union or promote or finance any competing labor organization.”
- Section 001.05.0: “The Company and its representatives will not interfere with the right of any employee to join the Union, and will make known to all employees that they will secure no advantage, more favorable consideration, or any form of special privilege because of non-membership in the Union.”

- Section 001.07.0: “Any claim that the Company has shown favoritism or granted special privileges to a non-Union employee in violation of the Agreement shall take priority over other pending grievances.”

Hawaiian Mac Nut proposed eliminating these provisions because, among other things, the National Labor Relations Act (NLRA) contains similar protections, so they did not need to be in the CBAsⁱⁱⁱ.

Hawaiian Mac Nut further proposed eliminating vacation, sick leave, and severance benefits entirely.

1.3.1. Pension Plan

Another of Hawaiian Mac Nut’s proposals would terminate Section 26 of the CBAs, regarding Pension Plan. To effectuate this, prior to the start of negotiation meetings, Hawaiian Mac Nut dealt directly with union membership without giving the ILWU prior notice. McNamara distributed notices to employees that Hawaiian Mac Nut was going to terminate the Defined Benefit Plan (DBP) and offer a 401(k) to all employees.

The ILWU filed grievances for direct dealing and requested that Hawaiian Mac Nut provide more information to allow the ILWU to determine if a switch in plans would be beneficial or harmful to members. Hawaiian Mac Nut did provide some but failed to provide all the requested information to the ILWU. Hawaiian Mac Nut stated that the pension plan would be discussed during collective bargaining negotiations.

1.3.2. Meetings and Negotiations

When the parties began negotiations, they discussed their respective availabilities and set ground rules. Among other things, Ahakuelo refused to put tentative agreements into writing and proposed that tentative agreements could be amended after they were agreed upon. Ahakuelo also stated that he did not have the authority to negotiate past May 31, 2019.

During the course of negotiations, the only dates that ILWU proposed that were acceptable to Hawaiian Mac Nut for negotiating sessions were April 29, 2019 and April 30, 2019; however, Brandon Ahakuelo later cancelled those dates.

Ahakuelo further refused to meet in person in August and would not agree to meet in person in June or July even though ILWU was available to meet on all days those months, except for some specific dates. Ahakuelo suggested a phone conference in July instead.

1.3.3. Last, Best, Final Offer

On May 29, 2019, Hawaiian Mac Nut submitted a last, best, final offer. ILWU asked to continue negotiations, but Hawaiian Mac Nut declined and stated that ILWU could take the proposal back to its membership for a vote. Ahakuelo refused a written offer to extend negotiations but said he would continue to negotiate. Ahakuelo never stated that Hawaiian Mac Nut had given him the authority to continue negotiations beyond May 29, 2019.

It would take approximately two months to retype the proposals into a single agreement, and even if the last, best, final offer were accepted, the negotiating committee would still need to “review the entire, all the language and then go over each item and then make a determination of where [the parties] could agree upon it.” Accordingly, the contract could not have been finalized by May 31, 2019, which Ahakuelo knew.

The ILWU proposed a counteroffer to Hawaiian Mac Nut’s last, best, final offer, which would, among other things, reduce the employer medical premiums. After receiving the counteroffer, Hawaiian Mac Nut re-proposed the last, best, final offer. When the ILWU asked if there were any differences between Hawaiian Mac Nut’s original proposal and the last, best, final offer, Ahakuelo stated that the proposal had already been explained in detail, that he assumed that the parties were deadlocked, that the ILWU should take the last, best, and final offer to its membership for a vote, and that Hawaiian Mac Nut required a signed agreement before the proposal could be taken to the membership.

1.4. Health and Welfare Trust

The CBAs require Hawaiian Mac Nut to contribute to the ILWU Local 142 (General Health and Welfare Trust) (Trust) for health benefits. In an August 1, 2018 letter of understanding regarding the Trust, the parties agreed that those contributions would be made by the 5th day of that month.

Hawaiian Mac Nut failed to enroll eligible employees in the Health and Welfare Trust when the employees became eligible.

1.5. Retaining Outside Contractors

In June or July of 2019, Hawaiian Mac Nut retained the services of an outside arborist and his company Apical Bud for tree and orchard maintenance. The arborist has a variety of skills qualifying him to perform work that requires, among other things, specialized tools. The type of work that Apical Bud performs is outside of the scope of work of bargaining unit employees.

2. Analysis and Conclusions of Law

2.1. Jurisdiction and Burden of Proof

The Board has jurisdiction over cases involving allegations of unfair labor practices, as laid out in HRS § 377-9, and so has jurisdiction over this case.

Under HRS § 91-10(5)^{iv}, ILWU bears the burden of proof. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be met by a preponderance of the evidence. HRS § 91-10(5). ILWU must present both evidence and argument that show that it is more probable than not that Hawaiian Mac Nut violated HRS Chapter 377. See Minnich v. Admin. Dir. of the Courts, 109 Hawai‘i 220, 229, 124 P.3d 965, 974 (2005) (Minnich) (*citing* Masaki v Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)).

2.2. ILWU Failed to Exhaust All Contractual Remedies Prior to Filing These Complaints with the Board

Preliminarily, the Board will dispense with all of ILWU’s allegations that Hawaiian Mac Nut violated HRS § 377-6(6)^v by violating the CBAs. The Board has consistently held that, to maintain an action against an employer for an alleged violation of a CBA, a complainant must first exhaust contractual remedies, unless attempting to exhaust would be futile. See, Ahmed v. AFSCME, et al., Case Nos. 94-6(CU); 95-1(CE), Order No. 1345, *11 (June 28, 1996) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1345.pdf>).

The record shows that ILWU did not exhaust its contractual remedies for any of the alleged violations of HRS § 377-6(6); accordingly, the Board will dismiss all such allegations.

2.3. Hawaiian Mac Nut Committed Unfair Labor Practices by Failing to Negotiate in Good Faith

Turning next to the question of the duty to bargain in good faith, the Board has stated:

The duty to bargain in good faith is an “obligation to...participate actively in the deliberations so as to indicate a present *intention* to find a basis for agreement....” This implies both “an open mind and a sincere desire to reach agreement, as well as “a sincere effort...to reach common ground.[”] The presence or absence of intent “must be discerned from the record.” Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright refusal to bargain, relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good faith or bad faith. The “totality of conduct” is the standard by which the “quality” of negotiations is tested.

Thus, even though some specific actions, viewed alone, might not support a charge of bad-faith bargaining, a party's overall course of conduct in negotiations may reveal a violation of the Act.

ILWU, Local 142 v. Del Monte Fresh Produce (Hawaii), Inc.; et al., Case No. 03-3(CE), Decision No. 447, at *10-11 (March 24, 2004)
(<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-447.pdf>) (Del Monte) (citations omitted).

Further:

Bad faith bargaining typically must be inferred from a party's conduct at or away from the bargaining table, since an intent to frustrate agreement is rarely articulated. The distinction between lawful "hard" bargaining and unlawful "bad faith" or "surface" bargaining is a difficult one to draw and depends on the facts of each case. Section 8(d) of the Act does not "compel either party to agree to a proposal or require the making of a concession...."

But the Board does consider the justification for proposals and a willingness to make concessions in evaluating whether "the totality of circumstances" shows good-faith bargaining.

John E. Higgins, Jr., et al., The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act (2018).

Both employer and union are under a duty to negotiate "with sincere purpose to find a basis of agreement," but neither party can be forced to make a concession on any specific issue or to adopt any particular position. *Id.* at 1603. Surface bargaining occurs when a party's overall conduct reflects an intention to avoid reaching an agreement. Altorfer Machinery Co., 332 NLRB 130, 148 (2000).

The National Labor Relations Board (NLRB) has followed the so-called Atlanta Hilton factors to determine such intention. The seven factors signaling bad faith bargaining are enumerated in Atlanta Hilton & Tower, 271 NLRB 1600 (1984) as follows: 1) delaying tactics; 2) unreasonable bargaining demands; 3) unilateral changes in mandatory subjects of bargaining; 4) efforts to bypass the union; 5) failure to designate an agent with sufficient bargaining authority; 6) withdrawal of already agreed-upon provisions; and 7) arbitrary scheduling of meetings. Although the Board has not officially adopted the Atlanta Hilton factors, the Board does find them helpful in providing guidelines for considering whether the parties are bargaining in good faith.

Here, the Board finds that several of the Atlanta Hilton factors show that Hawaiian Mac Nut acted in bad faith. Further, the Board finds that “the totality of circumstances” does not show that Hawaiian Mac Nut acted in good faith in its negotiations with ILWU.

The Board finds that, among other things, Hawaiian Mac Nut did not cooperate with a prompt scheduling of meetings and cancelled meetings that had been scheduled, which delayed the progress of negotiations, including declining to attend in-person negotiations and stating that it would be available only for a telephone conference in June of 2019^{vi}; explicitly refusing to meet in the month of August; and refusing to meet in person in June and July, despite the Union making itself available.

Hawaiian Mac Nut also attempted to make unilateral changes to mandatory subjects of bargaining and bypassed the Union in making such attempts when it dealt directly with the employees to make changes to the employees’ pension benefits without reaching a tentative agreement with ILWU^{vii}. Additionally, Hawaiian Mac Nut failed to provide ILWU with requested information that was necessary for ILWU to meaningfully compare the existing and proposed medical plans^{viii}.

Hawaiian Mac Nut demanded that ILWU put Hawaiian Mac Nut’s last, best, and final proposal to a vote from ILWU’s membership, even though there were no tentative agreements signed on any items and that the proposed changes would require additional negotiation to determine “where [the parties] could agree upon it.”^{ix}

Further, Hawaiian Mac Nut presented unreasonable bargaining demands, including but not limited to persistent attempts to delete clauses from the collective bargaining agreement that follow the requirements of HRS Chapter 377, such as union recognition clauses, clauses prohibiting favoritism to non-union employees, preventing undermining of the Union or promoting competing labor organizations, and barring interference with the right of employees to join the Union; and failed to provide Ahakuhelo, the Chief Negotiator for Hawaiian Mac Nut, with sufficient bargaining authority.^x

The totality of the Employer’s conduct described above is incompatible with good faith bargaining. Hawaiian Mac Nut’s barrage of hostile initial proposals; targeted, petty, personal attacks upon Union leadership; inconsistent commitment to basic meetings, while insisting upon unrealistic and unachievable time limits; proposals to thwart union recognition and undermine union solidarity; attempts to bypass the Union with direct appeals to bargaining unit members; and the failure to empower its Chief Negotiator with meaningful authority and knowledge of the Employer’s overall financial objectives created circumstances that objectively made the attainment of a normal collective bargaining agreement impossible.

Accordingly, the Board finds that Hawaiian Mac Nut failed to bargain in good faith with ILWU, in violation of HRS § 377-6(4).

2.3.1. Interference with Employees' Rights

When considering Hawaiian Mac Nut's conduct, the Board further finds that it was intimidating in effect and inherently destructive of the right of employees to exercise their rights under HRS § 377-4 and HRS § 377-6(1). HRS § 377-4 provides in relevant part:

Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall also have the right to refrain from any and all such activities...

Further, HRS Section 377-6 states in relevant part:

§377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:

(1) To interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed under section 377-4;

(3) To encourage or discourage membership in any labor organization in regard to hiring, tenure, or other terms or conditions of employment...;

The Board has adopted the following standard to consider alleged violations of HRS § 377-6(1):

Section 377-6(1), HRS, makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the free exercise of their Section 377-4, HRS, rights. Section 377-4, HRS, guarantees employees the right "to form, join, or assist labor organizations and to engage in lawful, concerted activities for the purpose of collective bargaining..." In examining an employer's conduct under Subsection 377-6(1), HRS, then, "the test is not whether the language or acts were coercive in fact, but whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate."

United Food and Commercial Workers Union v. Hawaiian Milling Corporation, Board Case Nos. 87-5(CE), 87-6(CE), Decision No. 278, at *10 (July 18, 1988), (citing Corrie Corp. v. NLRB, 375 F. 2d 149, 153, 64 LRRM 2731 (4th Cir. 1967)); *see also*, ILWU, at. *15.

Hawaiian Mac Nut’s conduct constituted a violation of HRS § 377-6(1) because it reasonably tended to interfere with, restrain or coerce employees in the free exercise of their HRS § 377-4 rights to join and to assist the Union and to engage in concerted activities for the purpose of collective bargaining. By engaging in bad faith bargaining, Employer undermined the free exercise of employee rights under HRS § 377-4 through unilateral action to undermine the existing collective bargaining agreement, frustrate recognition of the union and bypassing it while interfering with the Union’s proper representational function as the representative of its employees and discouraging membership in the Union. The same actions were “inherently destructive” of the rights of employees and thus no explicit proof of anti-union animus is necessary to establish a violation of HRS § 377-6(3).

Based on the foregoing, in the same cases where the Board has ruled that Hawaiian Mac Nut committed violations of HRS § 377-6(4), the Board finds that Hawaiian Mac Nut further committed violations of HRS § 377-6(1) and (3).

2.4. Hawaiian Mac Nut Committed Unfair Labor Practices by Failing to Enroll Members in the Health and Welfare Trust

Hawaiian Mac Nut failed to enroll union members in the existing Health and Welfare Trust when employees became eligible for enrollment in accordance with the CBAs and the August 1, 2018 letter of understanding.

This failure to enroll eligible members in the Health and Welfare Trust interferes with employees’ rights and constitutes a violation of HRS § 377-6(1), (3), and (4).

2.5. Hawaiian Mac Nut Did Not Commit an Unfair Labor Practice by Failing to Communicate with ILWU on the Use of Outside Contractors

Hawaiian Mac Nut hired Apical Bud for tree and orchard maintenance in June or July of 2019, and Hawaiian Mac Nut did not notify ILWU about hiring Apical Bud.

The existing group of employees known as “chippers” within the bargaining unit do not have the skills required by the arborist, such as pruning trees, climbing trees, and using climbing tools, use chainsaws, and they do not work on non-macadamia nut trees, which is part of the work Apical Bud was retained to perform. Chippers were not qualified to do pruning which requires specialized tools and selection of branches. Although there was a past practice of frequent consultation with the Union about a range of subjects, the specialized knowledge of the

arborist and his company exceeded the range of skills and scope of work of bargaining unit employees.

The Board finds the work of the arborist was non-bargaining unit work which did not require giving notice to the Union before it was contracted out. The Employer's actions therefore did not violate HRS Section 377-6(1)(3)(4) or (6).

3. Order

For the reasons set forth above, the Board finds and holds that Hawaiian Mac Nut committed ten violations of HRS § 377-6(1), ten violations of HRS § 377-6(3), and ten violations of HRS § 377-6(4).

The Board, therefore, orders that Hawaiian Mac Nut:

1. Cease and desist from the above identified unfair labor practices;
2. Enroll union members in the Health and Welfare Trust Fund promptly upon those members becoming eligible for such enrollment;
3. Provide information necessary for the ILWU to meaningfully compare existing and proposed medical plans and otherwise evaluate proposals from Hawaiian Mac Nut;
4. Immediately post copies of this decision in conspicuous places at work sites where employees of the bargaining unit assemble and congregate, and on the Respondents' website for a period of 60 days from the date of initial date of posting.
5. Consult with ILWU about whether ILWU, in its sole discretion, believes an interpreter is necessary to explain the decision to non- English and non-English reading employees, and if deemed necessary by the ILWU, the Employer shall furnish such interpreter services at its expense;
6. Pay \$30,000.00 to the State of Hawai'i general fund as a civil penalty; and
7. Notify the Board of the steps taken to comply with this Order within 45 days of receipt of this Decision and Order.

ILWU must submit any request for recovery of attorney's fees and costs by motion filed no later than ten days after the date of this Decision and Order. The motion must include sufficient details to enable the Board to determine the reasonableness of the items requested. Any opposition to such motion must be filed no later than five days after the filing of the motion.

DATED: Honolulu, Hawai'i, _____ June 29, 2021 _____.

HAWAI'I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

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ⁱ HRS § 377-1 Definitions defines “Representative” as:

“Representative” includes any person chosen by any employee to represent the employee.

ⁱⁱ HRS § 377-1 Definitions defines “Employer” as:

“Employer” means a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

ⁱⁱⁱ The NLRA does not cover agricultural workers.

^{iv} HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

^v HRS § 377-6(6) states in relevant part:

§377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:

(6) To violate the terms of a collective bargaining agreement;

^{vi} Hawaiian Mac Nut's refusal to meet in person and to conduct only telephone conferences for negotiation in June of 2019 constitutes violations of HRS § 377-6(4) in Case Nos. 19-03(CE) and 19-06(CE).

^{vii} Hawaiian Mac Nut's attempt to make unilateral changes to the employees' pension benefits without reaching a tentative agreement with ILWU and direct dealing with those employees constitutes violations of HRS § 377-6(4) in Case Nos. 19-13(CE) and 19-14(CE).

^{viii} The Board has previously held that an employer's failure to provide the union with relevant and necessary information constitutes a refusal to bargain. *See, e.g., ILWU, Local 142 v. Coffees of Hawaii, Inc.*, Case No. 00-5(CE), Decision No. 426, *14, n.5 (August 28, 2001) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-426.pdf>). Accordingly, Hawaiian Mac Nut's failure to provide this information constitutes violations of HRS § 377-6(4) in Case Nos. 19-04(CE) and 19-05(CE).

^{ix} Hawaiian Mac Nut's demand that ILWU accept Hawaiian Mac Nut's last and final offer constitutes violations of HRS § 377-6(4) in Case Nos. 19-07(CE) and 19-08(CE).

^x Although ILWU did not file a ULP specifically on this issue, the Board finds that such unreasonable demands add to the totality of Hawaiian Mac Nut's failure to bargain in good faith, in violation of HRS § 377-6(4).