BEFORE THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the Matter of:	)	
	)	
IRVING READY MIX, INC.,	)	
	)	
Respondents.	)	Case Nos. 25-CA-31485
	)	25-CA-31490
-and-	)	(Amended)
	)	25-CA-31548
CHAUFFEURS, TEAMSTERS &	)	
HELPERS, LOCAL UNION NO. 414,	)	
a/w INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS,	)	
	)	
Charging Party.	)	

ANSWERING BRIEF OF CHARGING PARTY
CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL UNION NO. 414
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO RESPONDENT IRVING READY MIX., INC.'s EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION

Charging Party, Chauffeurs, Teamsters & Helpers, Local Union No. 414 a/w International Brotherhood of Teamsters (the "Union" or "Local 414"), submits this answering brief to Respondent Irving Ready Mix, Inc.'s Exceptions to the Administrative Law Judge's Decision in Case Nos. 25-CA-31485, 25-CA-31490 (Amended), and 25-CA-31548.

On January 14, 2011, the Respondent, Irving Ready-Mix, Inc. ("Irving" or the "Company"), filed its Exceptions to the Administrative Law Judge's Decision in this matter. Irving's Exceptions can be categorized into three broad categories:

(1) Irving did not fail to make required pension contributions; its failure to make

the contributions did not constitute a unilateral change in pension benefits; and the charge of unilateral change in pension benefits is barred as untimely per Section 10(b) of the Act.

(2) Irving was a construction industry employer and therefore the bargaining relationship between it and Local 414 is governed by Section 8(f), not Section 9(a) of the Act. This in turn would have permitted Irving to withdraw recognition from Local 414 on June 1, 2010.

(3) Irving agent Derek Ray did not unlawfully interrogate employment applicants regarding their willingness to cross a picket line.

I. Irving's Failure to Make Contributions to the Pension Plan Constituted a Unilateral Change in Pension Benefits Which Was a Violation of Sections 8(a)(5) and (1) of the Act.

The Administrative Law Judge's Decision found that Irving violated its bargaining obligation since about January 26, 2010 when it unilaterally changed the employee pension benefits by failing to make the contractually required contributions. Sometime in 2008 Irving ceased making contributions to the pension plan required by the collective bargaining agreement. Thereafter, the Company notified the Union, on December 9, 2009, that it failed to make the contributions which were required for 2008. Then, on January10, 2010, the Company advised the Union that it had failed to make the required contributions for 2009. Further, as of the trial date (September 29 and 30, 2010), Irving had still not made the back contributions to the pension plan as required by the collective bargaining agreement. The Administrative Law Judge found that Irving did not bargain with the Union prior to ceasing

to make pension contributions and thereby unilaterally changed the pension benefits that bargaining unit employees were entitled to receive per the collective bargaining agreement. This was a violation of Section 8(a)(5) regardless of the Company's motivation and regardless of whether the Company announced it as a formal change. As the Board made clear in *Rapid Fur Dressing, Inc.*, 278 NLRB 905, 906-907 (1986), not making payments to a pension fund without prior notice or consent of the Union equals a failure and refusal to bargain and is a violation of Sections 8(a)(5) and (1). Further, as the Board held in *Republic Dye and Tool Co.*, 343 NLRB 683-686 (2004), an employer's failure to make payments to benefit funds constitutes a repudiation of the collective bargaining agreement. Irving has failed to cite any case law which holds that an employer unilaterally failing to make contributions to a pension or benefit plan does not equal a repudiation of a contract and a violation of Section 8(a)(5).

In *Merrill & Ring, Inc.*, 262 NLRB 392, 394-95 (1982), the Board found that the employer had violated Section 8(a)(5) of the Act by unilaterally changing the jury duty provisions of the collective bargaining agreement without bargaining. The Board held: ". . . we find that it was Respondent's refusal to cease its unlawful unilateral conduct and restore the *status quo ante* that indicated bargaining would be futile, not the Union's insistence that Respondents cease its unlawful conduct." The Board further held: "We further find that Respondent's refusal to cease its unlawful conduct provided evidence that its unilateral change in working conditions was irrevocable." The Board also noted: "Respondent's statement that it preferred to treat the dispute as a grievance rather than as an unfair labor practice hardly qualifies as an unequivocable statement that it would cease its unfair labor

practices or that its unlawful change in working conditions was not irrevocable." *Merrill & Ring, Inc.*, 262 NLRB at 395, fn 11. The foregoing nullifies Irving's contention that there was "any evidence to show that Irving ever intended to not make required contributions to its employees' 401(k) accounts for calendar years 2008 and 2009." (Respondents Exceptions, p. 7).

As to Irving's contention that the allegation that it unilaterally ceased making contributions to the pension plan was outside the Section 10(b) six-month statute of limitations period, the Board held in *Castle Hill Health Center*, 355 NLRB No. 196, slip op. at 37-38, "Here, Respondent has a continuing obligation to make Fund contributions notwithstanding any apparent failure on the part of the Fund to act with some measure of diligence in this matter." The same analysis applies to the facts of the instant case insofar as Irving had a continuing obligation to make contributions to the pension plan as required by the collective bargaining agreement. Therefore, its continued failure to make the contributions meant that the date of January 26, 2010, brought it's unilateral action within the six-month statute of limitations, as required by Section 10(b) of the Act.

Further, relevant case law is clear that a Section 10(b) defense is a statute of limitation and is not jurisdictional in nature and therefore must be pled and is waived if not timely raised. The Administrative Law Judge notes in footnote 11 of his Decision, page 16, that Irving did not specifically plead the 10(b) defense, either in its Answer, its post-trial brief, or at the trial regarding the allegation regarding pension plan contributions or any specific complaint allegations. The case law overwhelmingly supports the Administrative Law

Judge's finding. See, *Federal Management Co.*, 264 NLRB 107 (1982); *K&E Bus Lines*, 255 NLRB 1022, 1029 (1981); *Laborers' Local 252*, 233 NLRB 1358, fn. 2 (1977); and *DTR Industries, Inc.*, 311 NLRB 833, fn. 1 (1993). Irving has failed to cite any case law which contradicts the foregoing cases to establish that its boilerplate defense in its Answer to the Consolidated Complaint: "The Consolidated Complaint and any recovery thereon should be barred in whole or in part as being untimely pursuant to Section 10(b) of the Act", satisfies the requirement to specifically plead the Section 10(b) affirmative defense. Therefore, not only is the Administrative Law Judge's finding that the allegation regarding the failure to make pension plan contributions was a repudiation of the contract a violation of Section 8(a)(5) correct, but Irving did not specifically or timely plead that Section 10(b) affirmative defense.

II. Irving Was Not an Employer in the Construction Industry; therefore, the Bargaining Relationship Between Irving and the Union Was Subject to Section 9(a) Not Section 8(f) of the Act.

Irving urges in its exceptions that the Administrative Law Judge's finding that Irving was not a construction industry employer was based on an improper decision by the NLRB in *JP Sturrus Corp.*, 288 NLRB 668 (1988). Irving filed a variety of exceptions all making the argument that Irving, a ready-mix company, is an employer in the construction industry and therefore, its bargaining relationship with Local 414 was governed by Section 8(f) of the Act rather than Section 9(a). As the Administrative Law Judge correctly noted, Irving failed to show facts that would justify treating it differently for purposes of Section 8(f) than ready-mix companies in general, or the ready-mix companies involved in *JP Sturrus* and *Mastronardi*

Mason Materials Co., 336 NLRB 1296 (2001). As noted by the Administrative Law Judge, Irving did not attempt to distinguish the facts of the instant case from those of *Sturrus* and failed to mention *Mastronardi.* Instead, Irving relies on the argument that the Board decided *Sturrus* incorrectly and should not follow that precedent in the instant case. That argument is frivolous, as so noted by the Administrative Law Judge at page 14 of his Decision.

Suffice it to say, Irving offered no case law, or any additional analysis, which would cause the Board to reject its earlier decision in *Sturrus* and *Mastronardi.* Therefore, the Administrative Law Judge's finding that Irving was not a construction industry employer and its bargaining relationship with Local 414 was governed by Section 9(a) of the Act instead of Section 8(f) is legally correct and must stand.

III. Irving Agent Derek Ray Unlawfully Interrogated Employment Applicants Regarding Their Willingness to Cross a Picket Line.

The Administrative Law Judge concluded that Ray's admission of what he said to employment applicants constituted a violation of Section 8(a)(1) when he told them that the Union might engage in a strike and asked the applicants whether they would drive for Irving in the event of a strike. As the Board found in *Plan Building Services*, 347 NLRB 670, 677 (2006), the employees' willingness to cross a picket line is a "impermissible consideration for hiring, since it penalizes employees for their intention to engage in protected activities" and asking employees about their willingness to do so is coercive. *Id.* at 707-08. As the Administrative Law Judge noted, such questioning of an applicant has been found to violate the Act even when an employer is interviewing the applicant during negotiations with the Union for the purpose of securing replacement workers who will be working in the event of

a strike. See, *Smith's Complete Market*, 237 NLRB 1424, 1431 (1978).

Irving further contends that because the unlawful interrogation was raised in the Consolidated Complaint, and not the subject of a motion to amend, Irving was prevented from being aware of the issue and mounting the defense by being allowed to more fully develop Ray's testimony on this issue. Irving urges that there may have been a wide range between what Ray wanted to know about the intentions of applicants and what he actually asked for or determined. However, there is no dispute about what Ray said. The findings by the Administrative Law Judge are based on Ray's testimony at the trial. On ths point there can be no dispute. As the Administrative Law Judge noted in footnote 13 of his Decision, at pages 18 and 19, "The Board may find and remedy a violation even in the absence of a specific allegation in the Complaint if the issue is closely connected to the subject matter of the Complaint and has been fully litigated. This is particularly true when the unlawful conduct is established by the testimonial admissions of the Respondent's own witness." (citations omitted). The Administrative Law Judge further found in said footnote that "The statements which give rise to the violation, are established by the testimonial admission of Ray, the Respondent's own witness and general manager. I conclude that this matter has been fully litigated and that the Respondent violated Section 8(a)(1) when Ray interrogated Walker about his willingness to work even if the Union went on strike."[1]

Irving does not attempt to distinguish any of the case law relied on by the Administrative Law Judge and has cited no contrary law. Further, Irving does not contest

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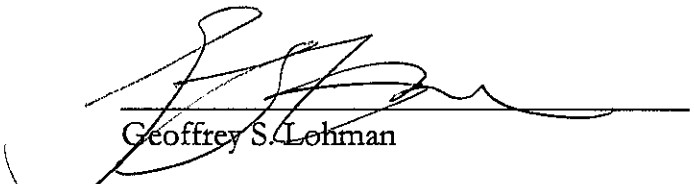
[1] Decision of Administrative Law Judge, page 19, fn. 13.

the facts based on Ray's admission. Therefore, its exception to the finding is wholly without merit and the finding of the Administrative Law Judge should be sustained.

IV. Conclusion

The Charging Party respectfully requests that Irving's exceptions to the Administrative Law Judge's Decision be dismissed in their entirety and that the Decision of the Administrative Law Judge be fully adopted and enforced by the Board.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2011, a copy of the foregoing Answering Brief was filed electronically with the following parties:

Executive Secretary
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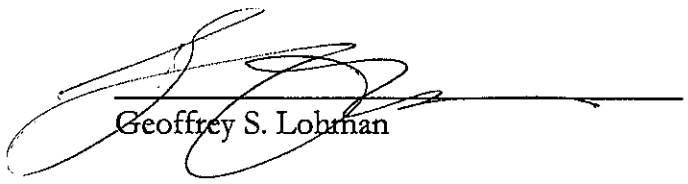

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