UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IRVING READY-MIX, INC.

And

Cases 25-CA-31485
25-CA-31490 Amended
25-CA-31548

CHAUFFEURS, TEAMSTERS & HELPERS,
LOCAL UNION NO. 414, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now Counsel for Acting General Counsel and respectfully submits to the Board this Answering Brief to Respondent's Statement of Exceptions to the Administrative Law Judge's Decision. The General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's decision in this case, issued on December 17, 2010, be affirmed with the exception of those modifications requested in Acting General Counsel's Cross Exceptions to the Board. In support of this position, the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

Pursuant to charges filed by the Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (herein called "the Union"), pursuant to the provisions of the National Labor Relations Act (herein called "the Act"), an Order Consolidating Cases, Consolidated Case and Notice of Hearing, was issued on August 26, 2010.[1] An

[1] All dates hereafter are 2010, unless otherwise noted.

Amendment to the Complaint issued on September 14. The Complaint alleged that Irving Ready-Mix, Inc. (herein called "the Respondent") violated Sections 8(a)(1) and (5) of the Act. An administrative hearing was held before Administrative Law Judge Paul A. Bogas on September 29 and 30, in Fort Wayne, Indiana.

On December 17, Judge Bogas issued his decision finding that the Respondent had violated Sections 8(a)(1) and (5) of the Act by ceasing to recognize and bargain with the union, upon the expiration of the parties' collective bargaining agreement The Judge rejected the Respondent's argument that the parties' relationship was covered by Section 8(f) of the Act. Further, as a result, the Judge found that the Respondent dealt directly with bargaining unit employees, when it announced new terms and conditions of employment and unilaterally changed those terms and conditions, including pension benefits, which further violated Section 8(a)(1) and (5) of the Act. Additionally, Judge Bogas held that the Respondent violated Section 8(a)(1) of the Act by inquiring of an employment applicant if he would be willing to cross the Union's picket line.

II. ARGUMENT

1. Judge Bogas correctly held that the relationship between the Respondent and the Union was covered by Section 9(a) of the Act.

Respondent has filed exceptions regarding the Administrative Law Judge's finding that that the parties were engaged in a Section 9(a) relationship, which survived the expiration of the collective bargaining agreement.

The Respondent argues that the parties' collective bargaining agreement was governed by Section 8(f) of the Act which privileged it to withdraw recognition from the Union upon the expiration of the collective bargaining agreement. The Respondent asserts that it is an employer engaged in the construction industry.

The Respondent does not dispute that it withdrew recognition from the Union. Instead, the Respondent maintains that it was party with the Union to a prehire agreement pursuant to Section 8(f) of the Act. Thus, the Respondent argues it was not obligated to bargain in good faith with the Union, was privileged to withdraw recognition from the Union, and was free to unilaterally set the terms and conditions of employment for its drivers after the contract expired.

In order for an employer and a union to lawfully enter into a pre-hire agreement under Section 8(f) of the Act, three requirements must be met: (1) the agreement must be with an employer engaged primarily in the building and construction industry; (2) the agreement must be with a labor organization of which building and construction employees are members; and (3) it must cover employees who are engaged in the building and construction industry.

The evidence at hearing clearly contradicted any such claims. Both Counsel for Acting General Counsel's witnesses, and those of the Respondent, testified that the Respondent's bargaining unit employees are Ready-Mix drivers. As such, their duties are to pick up ready-mix at the Respondent's batch plant and deliver it to the customer's work site. The delivery is accomplished through lowering the chutes on the ready-mix truck and discharging the mixture as directed by the customer's employees. At the completion of this process, the drivers rinse the truck and chutes and return to the Respondent's facility to reload the truck for the next delivery.[2]

In Techno Construction Corp., 333 NLRB 75 (2001) and Hudson River Aggregates, Inc., 246 NLRB 192, 199 (1979), the Board has held that ready-mix companies, such as the Respondent, do not fall within the line of businesses engaged primarily in the building and construction industry. See also J.P. Sturrus Corporation, 288 NLRB 668 (1988) (ready-mix concrete delivery companies are not engaged in the building and construction industry within the

[2] There was some testimony at the hearing that the drivers might, on occasion, assist the customer with spreading the ready-mix or might rinse the customer's tools, while they are cleaning their truck. However, the record reflected that this is done at the driver's discretion and is the exception and not the rule.

meaning of Section 8(f)). Thus, the Respondent is unable to satisfy the first or third requirements and therefore not able to lawfully enter into an 8(f) agreement with the Union.

Regardless, the Respondent takes the position it is within the building and construction industry as contemplated by Section 8(f) of the Act. In support of this argument, the Respondent describes its business operation as the batching, loading, mixing, delivering, and *installation* of ready-mix concrete. However, there is no installation performed by its employees (TR 13-14). The Respondent delivers concrete to its customers at specific job sites. The drivers unload the concrete in locations designated by its customers. The Respondent's customers finish the concrete after the driver pours it in the designated location. The Board has found that concrete is not delivered until it is poured. Island Dock Lumber, 145 NLRB 484, 491 (1963). The delivery of concrete by bucket or chute, according to the Board, is the final step in the delivery process because concrete cannot be dumped on the ground or stored for later use. Id. Thus, the Respondent is only engaged in the delivery of material used in the building and construction industry and not, as it contends, the installation of concrete.

The Employer's primary defense is that the Board's decisions in the Section 8(f) context finding that ready-mix concrete companies are not primarily engaged in the building and construction industry are flawed because they rely on Section 8(e) decisions that did not address that issue. Id. at 671 (citing Teamsters Joint Council 42 (Inland Concrete Enterprises, Inc.), 225 NLRB 209 (1976), and Teamsters Local 294 (Island Dock Lumber, Inc.), 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965)).

There is no merit to the Employer's defense. In J.P. Sturrus Corp., the Board explicitly held that a ready-mix concrete delivery company is not primarily engaged in the building and construction industry and the Respondent failed to cite any authority holding to the contrary. To support that finding, the ALJ in J.P. Sturrus relied on the 8(e) decisions in Island Dock and

Inland Concrete, which state that "the mixing and delivery of ready-mix concrete at construction sites is not construction work but is the delivery of a material or product."[3] A natural extension of Island Dock and Inland Concrete is that a ready-mix concrete delivery company is not primarily engaged in the building and construction industry under Section 8(f).

In its' exceptions, the Respondent relies heavily on Techno Construction Corp., 333 NLRB 75 (2001). In that case the Board affirmed the Administrative Law Judge's finding that the employer was engaged in the construction industry and, therefore, covered by Section 8(f) of the Act. However, there are several crucial differences between the work performed by Techno and that done by the Respondent in this case. Techno and Janco, which the Board found to be joint employer's, own and operate four dump trucks which are used to remove dirt and soil from trench's which are being excavated and then to backfill the trench with the same rock and soil once the trench is ready to be closed. In addition, the employer operates a boom truck which is used to deliver and remove materials from the jobsite. Finally, the employer owns and operates a semi-trailer dump truck which is filled with unneeded soil and asphalt, which is carried off to a landfill. The Board held that the employer in this case provided both labor and material and was, therefore, covered by Section 8(f) of the Act.

In reaching his decision, the Administrative Law Judge in Techno, cited: In Teamsters, Local 83, 243 NLRB 328, 331 (1979), where it was held: "However, the 8(f) exemption has been denied to employers whose business involves the manufacture of construction materials which are installed by the employees of a different employer and to employers who have only minimal involvement in the construction process." This clearly applies to Respondent, whose role on the construction site is limited to the delivery of ready-mix.

[3] Island Dock, 145 NLRB at 491. See also Inland Concrete, 225 NLRB at 216-17.

Based on the foregoing, the Respondent's relationship with the Union cannot derive from Section 8(f) of the Act. Accordingly, the Respondent's relationship with the Union derives from Section 9(a) of the Act and it was not privileged to withdraw recognition from the Union, and it's withdrawal of recognition violates Section 8(a)(5). See, J.P. Sturrus Corporation, supra; Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001).

Respondent has failed to adduce any evidence or law to justify a reversal of the Judge's finding that the relationship between the Union and the Respondent is covered by Section 9(a) of the Act. Therefore, Respondent's exceptions to such findings should be dismissed.

2. Judge Bogas correctly held that the Respondent violated Sections 8(a)(1) and (5) of the Act When It Changed Employee Pension Benefits

At the opening of the hearing, the Respondent stipulated on the record, as follows:

> Since September 2009, the Respondent has failed to make any employer contributions to Respondent's retirement plan on behalf of eligible full-time employees.

In its exceptions, the Respondent now argues that this stipulation does not amount to an admission that it violated the Act. This argument is based on three separate theories. The Respondent first argues that it could not be past due on its 2009 contributions since they would not be due until at least, September, 2010. Second, the Respondent argues that it did not make a unilateral change in pension contributions because any failure to pay was based upon lack of funds. Of which, the Respondent notified the Union and has never attempted to evade its pension responsibilities. Finally, the Respondent argues that the unilateral change allegation that it failed to make pension contributions is barred by Section 10(b) of the Act.

Respondent's first argument is based upon the testimony of General Manager Derek Ray. In testifying about Respondent's admitted delinquency Ray stated:

"This is – yes, there is a delinquency. This is monies due into the 401(k) accounts of these employees that was for the year of 2008. I believe that it was due in September of 2009. I may not be correct in my date there, but--" (TR 300).

When questioned about the delinquency for the 2009 contributions, Ray testified:

"No, I understand. The 2009 contribution isn't due until I believe it is September of 2010" (TR 301).

Ray's testimony is hardly that of unqualified certainty. Indeed, in his testimony about the 2008 pension contribution he admits that the information to which he is testifying may not be correct. As a matter of fact, he is hardly more confident, regarding the 2009 contributions. Further, the Respondent failed to establish any basis for Ray's supposed knowledge on this issue. Additionally, the exhibits introduced through Ray regarding the pension delinquencies, provide no evidence of their actual due dates. Finally, the Respondent neither cited, nor produced any authority in support of its position that it was not delinquent.

As to Respondent's second argument that because of a lack of funds and an inability to pay, it cannot be guilty of making a unilateral change, is wholly without merit. Respondent fails to provide any authority that an inability to pay, absolves it of a finding that it unilaterally changed the employees terms and conditions of employment. Its sole argument is based upon Gulf Coast Automotive Warehouse, 256 NLRB 486, 489 (1981). In this case the Administrative Law Judge stated: "Whether or not the Act was violated by Respondent's unilateral change of working conditions is a matter for factual determination, regardless of any motive that may be involved." In fact, this is exactly what the Respondent is contending. It wants the Administrative Law Judge and the Board to consider its motive and absolve it of wrongdoing. This is a clearly specious argument, considering that Respondent never raised the defense of an inability to pay during its contract negotiations with the Union.

Respondent's final argument is that the unilateral change allegation is barred by Section 10(b) of the Act. As noted in the Administrative Law Judge's Decision, the Respondent failed to raise this argument either at the hearing, or in its post-hearing brief. However, from the exceptions that the Respondent filed, it is clear that it fails to comprehend what is being alleged by the Counsel for Acting General Counsel. The Complaint (General Counsel's Exhibit 1(i)), alleges at 7(a) that: "Since on or about January 26, 2010, Respondent has changed employee pension benefits." This date, is based upon the charge filed by the Union on June 26, 2010 in Case 25-CA-31548 (General Counsel's Exhibit 1(g). This is within the 10(b) period and, as such, is not barred.

Respondent has failed to adduce any evidence or law to justify a reversal of the Judge's finding that it violated Section 8(a)(5) of the Act when it changed the employees' pension benefits. Therefore, Respondent's exceptions to such findings should be dismissed.

3. Judge Bogas correctly held that the Respondent violated Sections 8(a)(1) of the Act When Derek Ray Unlawfully Interrogated Employment Applicants Regarding Their Willingness to Cross a Picket Line

Respondent's argument in regard to Ray's admission is that it lacked a "full and fair opportunity to defend the claim and is not supported by the record evidence." Initially, it must be noted that the Respondent failed to provide any authority for its argument that it was not given an opportunity to defend against its witnesses own admission. However, in Meisner Electric, 316 NLRB 597, (1995), the Board held:

> It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admission of the Respondent's own witnesses.

In the instant case, Ray's admission came while testifying about his telephone conversation with employment applicant Greg Walker. The Complaint alleges in Paragraph 5(a) that the Ray violated the Act when he told Walker that the Respondent intended to remove the union and replace the bargaining unit employees (General Counsel's Exhibit 1(i)). While the Administrative Law Judge, denied this allegation and credited Ray's denial, he also credited Ray as to what he testified he actually said to Walker. Therefore, since the closely connected to the complaint allegation, Respondent's exception is without merit.

Respondent next argues that the Administrative Law Judge's reliance on Planned Building Services, 341 NLRB 670 (2006), is misplaced and claims that it does not support a finding that Ray violated the Act, when he inquired about Walker's willingness to cross a picket line. In that case the Board held that asking applicants about their willingness to cross a picket line was coercive and therefore a violation of Section 8(a)(1) of the Act. Respondent argues that this was not Ray's intention. However, even if relevant, no such questions were asked or answered at the hearing and therefore, his intention remains unknown.

Respondent has failed to adduce any evidence or law to justify a reversal of the Judge's finding that it violated Section 8(a)(1) of the Act when Ray interrogated employment applicants about their willingness to cross a picket line. Therefore, Respondent's exceptions to such findings should be dismissed.

III. CONCLUSION

For the foregoing reasons, Counsel for General Counsel respectfully requests that Respondent's Exceptions to the Decision and Order of the Administrative Law Judge be denied in its entirety.

Dated at Indianapolis, Indiana this 28th day of January, 2011.

/s/ Belinda J. Brown

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, General Counsel's Exceptions to the Administrative Law Judge's Decision and General Counsel's Brief in Support of Exceptions has been electronically filed with the Board and further certifies that she caused a copy to be served via electronic mail on January 28, 2011 and by Regular Mail upon the following persons, addressed to them at the following addresses:

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