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**International Brotherhood of Teamsters, Local 251  
and Material Sand & Stone Corp.**

**International Brotherhood of Teamsters, Local 251  
and Material Concrete Corp.**<sup>2</sup>

**International Brotherhood of Teamsters, Local 251  
and J.H. Lynch & Sons, Inc.** Cases 1–CC–2678,  
1–CC–2681, 1–CE–91, and 1–CE–92

April 19, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

On April 25, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent, the General Counsel, and the Charging Parties filed exceptions and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's and Charging Parties' exceptions, as well as a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>3</sup> and has decided to affirm the judge's rulings, findings,<sup>4</sup> and conclusions<sup>5</sup>

<sup>2</sup> The complaint alleges, and the Respondent admits in its answer, that the charges in Cases 1–CC–2678 and 1–CE–91 were both filed by Material Sand & Stone Corp. The record establishes, however, that the charge in Case 1–CE–91 was actually filed by Material Sand & Stone's sister corporation, Material Concrete Corp. We have amended the caption accordingly.

<sup>3</sup> The Charging Parties have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>4</sup> The Charging Parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge correctly found that the delivery of ready-mix concrete and asphalt to a construction site is not "work to be done at the site of the construction" within the meaning of that term in the construction industry proviso to Sec. 8(e) of the Act. See, e.g., *Teamsters Local 166 (Shank/Balfour Beatty)*, 327 NLRB 449, 455 (1999), and the cases cited therein. Michael Klitzner, a ready-mix concrete truckdriver for Cardi Corp. (which is not a party to this proceeding) testified extensively and in great detail about the tasks that he performs in operating his truck and in delivering ready-mix concrete to construction sites. (Tr. 580–614; 616–619; 627–629; 634–642). Near the conclusion of Klitzner's

only to the extent consistent with this Decision and Order.

*A. The May 1999 Agreement*

1. The Respondent's 10(b) defense

The complaint alleges, inter alia, that the Respondent violated Section 8(b)(4)(i)(ii)(A) and Section 8(e) of the Act by entering into an agreement with J. H. Lynch & Sons, Inc. (J. H. Lynch) on May 28, 1999 (the May 1999 agreement), in which J. H. Lynch agreed not to use the trucking services of Northeast Transportation Corp. (Northeast) and Cullion Excavating Corp. (Cullion). As an affirmative defense to this allegation, the Respondent asserted that the allegation was time-barred under Section 10(b) of the Act.

Section 10(b) provides, in pertinent part, that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. Here, the Respondent entered into the May 1999 agreement more than 6 months before J. H. Lynch filed the relevant unfair labor practice charge on April 18, 2001. Nevertheless, the judge rejected the Respondent's 10(b) defense on two, alternative grounds: (1) the May 1999 agreement is unlawful on its face and therefore constitutes a continuing violation; and (2) the Respondent reaffirmed the May 1999 agreement within the 10(b) period on or about April 12 and 16, 2001, when, in reliance on the May 1999 agreement, the Respondent demanded that J. H. Lynch cease doing business with Northeast.

We adopt the judge's second ground for rejecting the 10(b) defense, but not the first. The Board has not applied the continuing violation theory to 8(e) allegations.<sup>6</sup>

testimony on direct examination, the Respondent introduced into evidence two videotapes (R. Exhs. 14 and 15) that are described on the record by the Respondent's attorney and Klitzner as briefly, fairly, and accurately showing Klitzner and another driver delivering ready-mix concrete to separate construction sites. The video of Klitzner was made a week before the hearing. These exhibits are missing from the record before the Board despite diligent efforts to discover the whereabouts of these exhibits and to obtain replacement copies. In light of (1) Klitzner's extensive and detailed testimony about the tasks involved in delivering ready-mix concrete to a construction site, (2) the description of the videotapes in the record, and (3) the well-established precedent holding that such work is not within the scope of the construction industry proviso to Sec. 8(e), we conclude that the absence of the videotapes from the record has not resulted in prejudice to the Respondent. See *Spector Freight Systems*, 141 NLRB 1110, 1112–1113 fn. 3 (1963).

<sup>5</sup> The judge inadvertently included Charging Party J. H. Lynch & Sons, Inc. in his Conclusion of Law 2 as having violated Sec. 8(e), and in Conclusion of Law 3 as not having violated it. J. H. Lynch & Sons, Inc., however, is not a respondent, and the judge correctly does not include it as such in his recommended Order and notice.

<sup>6</sup> The two continuing violation cases cited by the judge do not involve 8(e) allegations. Inasmuch as the Board finds that the 10(b) defense should be rejected on other grounds, Member Hayes does not

The Board has, on the other hand, consistently held that a charge that an agreement is unlawful on its face under Section 8(e) is timely if it is reaffirmed, even unilaterally, within the 10(b) period. See, e.g., *General Truck Drivers Local 467*, 265 NLRB 1679, 1681 (1982), enfd. mem.723 F.2d 915 (9th Cir. 1983) (cited by the judge and, in turn, citing other precedent in support of this proposition).

## 2. The merits

J. H. Lynch is a heavy highway construction general contractor. It employs approximately 10 truckdrivers, who are represented by the Respondent. J. H. Lynch is a member of the Construction Industries of Rhode Island (CIRI) and is a party to the May 1, 2000–April 30, 2003 Rhode Island Heavy Highway Construction collective-bargaining agreement between CIRI and the Respondent (the CIRI agreement).

J. H. Lynch's bargaining unit drivers haul sand, stone, gravel, and asphalt from its plants to highway construction jobsites. At times, when additional trucks are needed for a particular job, J. H. Lynch engages the services of independent truck owner/operators as well as other trucking companies, including Northeast and Cullion. In early 1999, Joseph Boyajian, the Respondent's vice president, threatened to call a strike among J. H. Lynch's employees if the Company continued to use either Northeast or Cullion.

As a result, J. H. Lynch and the Respondent entered into the May 1999 agreement, which provided:

The trucking services of Northeast Transportation Corp. and Cullion Excavating Corp. will not be utilized. Should a particular project come along that requires excessive trucking and we are not able to supplement our fleet adequately, we will notify you of the situation to allow us to amicably resolve the problem. The Employer acknowledges the Union's right to strike to enforce this Agreement.

The judge found that the May 1999 agreement violated Section 8(e) with regard to Cullion. But the judge found that the agreement did not violate Section 8(e) as to Northeast because the evidence showed that Northeast drivers were performing work that was traditionally performed by J. H. Lynch's bargaining unit drivers. Accordingly, the judge found that J. H. Lynch's agreement not to use the trucking services of Northeast was, under

the circumstances, a lawful attempt by the Respondent to preserve bargaining unit work.<sup>7</sup>

For the reasons explained below, we find that the May 1999 agreement violated Section 8(e) on its face without regard to whether the work covered by the agreement was work traditionally performed by employees in the unit. Accordingly, the May 1999 agreement violates Section 8(e) with regard to both Northeast and Cullion.

The May 1999 agreement by its terms prohibits J. H. Lynch from utilizing the trucking services of Northeast and Cullion. It thus has an express "cease doing business" objective. Section 8(e) forbids agreements between an employer and a labor organization whereby the employer agrees to "cease doing business with any other person." Nevertheless, the Board and the Federal courts have held that an agreement that an employer will not subcontract work performed by bargaining unit employees to any person serves a lawful primary purpose—preserving work for employees in the unit. Similarly, the Board and courts have held that an agreement that permits an employer to subcontract bargaining unit work only to subcontractors that honor the economic terms of the collective-bargaining agreement serves a lawful primary purpose—eliminating any economic incentive to take work away from employees in the unit. In other words, a clause is lawful despite the fact that it bars the employer from doing business with some category of persons if it has a primary objective, i.e., preserving or protecting work performed by the employees of the employer bound by the contractual provision. *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936 (1999). Whether an agreement has a lawful work preservation objective or a proscribed secondary objective depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *NLRB v. Longshoremens ILA*, 447 U.S. 490, 504 (1980), quoting *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644–645 (1967).

Whether a particular clause is lawful or unlawful under Section 8(e) depends both on the scope of the work it covers and the nature of the prohibition it imposes. Even if the clause covers only work traditionally performed by bargaining unit employees, it may violate Section 8(e) if the prohibition it imposes on the employer is not rea-

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pass on whether a continuing violation theory should apply to 8(e) allegations.

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<sup>7</sup> See *Meat & Highway Drivers Local 710 (Wilson & Co.) NLRB*, 335 F.2d 709, 711–714 (D.C. Cir. 1964), cited by the judge.

sonably related to preserving or protecting that work for unit employees. Thus, a union and an employer cannot enter into an agreement that bars the employer from subcontracting with any person not party to an agreement with the union even if the prohibition applies only to the subcontracting of bargaining unit work. The fact that such clauses permit subcontracting of unit work only to union signatories belies any asserted work preservation purpose. See *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936–937 (1999); *Chemical Workers Local 6-18 (Wisconsin Gas Co.)*, 290 NLRB 1155, 1155–1156 (1988).

Similarly, the May 1999 agreement did not wholly prohibit J. H. Lynch from subcontracting work performed by its own employees. Nor did it limit subcontracting to companies that paid their employees wages and benefits commensurate with those required by J. H. Lynch's collective-bargaining agreement with the Respondent. Rather, it permitted subcontracting generally, but prohibited it only to two specific companies, Northeast and Cullion, both of which were not parties to an agreement with the Respondent. That the May 1999 agreement does not bar all subcontracting or name any other companies—despite the fact that the Respondent was aware J. H. Lynch used other subcontractors—belies the Respondent's contention that its primary dispute was with J. H. Lynch and not with Northeast or Cullion. The terms of the May 1999 agreement make clear that its purpose was not to preserve work for bargaining-unit members at J. H. Lynch, but was “tactically calculated to satisfy union objectives elsewhere.” *National Woodwork*, 386 U.S. at 644.<sup>8</sup> For these reasons, the May 1999 agreement had an unlawful secondary purpose, and the Respondent violated Section 8(e) by entering into it.

*C. The Respondent's April 2001 Strike Against J. H. Lynch*

In early April 2001, Boyajian learned that J. H. Lynch was using Northeast to provide trucking services. On April 12, Boyajian threatened to strike J. H. Lynch for failing to comply with its May 1999 agreement not to use Northeast. When J. H. Lynch refused to cease using Northeast, the Respondent struck J. H. Lynch on April 16.

The judge found that the Respondent's strike did not violate Section 8(b)(4) because the strike was premised on the May 1999 agreement, which, the judge found, had a valid work preservation objective as to Northeast.

<sup>8</sup> There may be situations where a clause taking a form similar to that at issue here would be lawful, for example, if the named subcontractors were the only subcontractors able to perform bargaining unit work and, thus, the clause effectively barred all subcontracting. But no such facts are present here.

As explained above, we find, contrary to the judge, that the Respondent violated Section 8(e) by entering into the May 1999 agreement. Consequently, we also find that the Respondent violated Section 8(b)(4)(i)(ii)(A) and (B) by Boyajian's April 12 threat to strike J. H. Lynch to enforce the May 1999 agreement with regard to Northeast<sup>9</sup> and the Respondent's April 16 strike to that end.<sup>10</sup>

*D. Article XIV(a) of the CIRI Collective-bargaining Agreement*

The judge found that article XIV(a) of the CIRI agreement (set out in full in the final section of the judge's decision) violated 8(e). In so finding, he did not address the Respondent's affirmative defense that this allegation was time-barred under Section 10(b) of the Act. The Respondent has excepted to the judge's failure to address its Section 10(b) defense.<sup>11</sup> For the following reasons, we find merit in the Respondent's argument.

As discussed supra, Section 10(b) provides, in pertinent part, that no complaint shall issue based upon any unfair labor practice occurring more than 6 months before the filing of the charge with the Board. Here, the Respondent entered into the CIRI agreement, including

<sup>9</sup> Although the General Counsel's complaint did not separately allege that Boyajian's *threat* to strike violated the Act, we nevertheless find that the allegation is properly before us. It is undisputed that on April 12, 2001, Boyajian threatened J. H. Lynch that the Respondent would strike the Company to enforce the May 1999 agreement. Having conceded that the threat was made, the Respondent's only defense would be the same as its defense to the strike itself, i.e., that its conduct was privileged as an attempt to enforce an agreement with a lawful primary objective—an argument we reject. For these reasons, we find that the threat allegation is “closely connected to the subject matter in the complaint and has been fully litigated.” *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

We find it unnecessary to pass on the judge's findings that the Respondent also violated Sec. 8(b)(4)(B) by Boyajian's threats to representatives of Dimeo Construction Company (on the Ferri Middle School project), J. H. Lynch (on the Kiewit jobsite), and R. P. Iannucillo & Sons (on the Rhode Island College project) that the Respondent would engage in “informational picketing” if Material Concrete performed work on their projects. We also find it unnecessary to pass on the allegation that the Respondent violated Sec. 8(b)(4)(B) by Boyajian's threat to C. Pezza Co. President Leonard Pezza that the Respondent would strike the Ferri Middle School project and shut it down if Material Concrete continued to deliver concrete to the jobsite. Even if those alleged violations were found, they would be cumulative to the other 8(b)(4)(B) threat by Boyajian (described above), which we find.

<sup>10</sup> We affirm, for the reasons described in his decision, the judge's rejection of the Respondent's additional defenses: (1) that the April 18, 2001 proposed strike settlement agreement (which J. H. Lynch ultimately declined to enter into) precluded litigation of the allegation that the picketing and strike violated the Act; (2) that the Board should defer the unfair labor practice issues involving CIRI member J. H. Lynch to the grievance-arbitration provisions of the CIRI agreement; and (3) that J. H. Lynch and Northeast were a single employer or allies.

<sup>11</sup> Neither the General Counsel nor the Charging Parties responded to the Respondent's 10(b) argument in their briefs to the Board.

article XIV(a) thereof, on May 1, 2000. This is more than 6 months before Material Concrete Corp. filed the charge in Case 1–CE–91 on March 20, 2001, and more than 6 months before J. H. Lynch filed the charge in Case 1–CE–92 on April 18, 2001.

Thus, contrary to the requirements of Section 10(b), the complaint allegation that article XIV(a) of the CIRI agreement violates Section 8(e) of the Act is based upon an alleged unfair labor practice—i.e., the Respondent’s May 1, 2000 entry into the CIRI—that occurred more than 6 months before the March 20 and April 18, 2001 filings of the underlying 8(e) charges in Cases 1–CE–91 and 92, respectively. Furthermore, there is no evidence establishing that any party reaffirmed, reasserted, or otherwise attempted to give effect to article XIV(a) within the 10(b) period. Cf. *General Truck Drivers Local 467*, 265 NLRB at 1681, and cases cited therein. Consequently, we find merit in the Respondent’s 10(b) defense to the allegation that article XIV(a) violates Section 8(e) of the Act. Accordingly, we reverse the judge’s conclusion that article XIV(a) violates Section 8(e), and we instead dismiss this complaint allegation as barred by Section 10(b).<sup>12</sup>

*E. Article XIV(b) of the CIRI Collective-  
bargaining Agreement*

The General Counsel alleged that Article XIV(b) of the CIRI agreement<sup>13</sup> violates Section 8(e) because it

<sup>12</sup> For the reasons stated in the judge’s decision, we affirm his rejection of the Respondent’s defense that the Board should defer the unfair labor practice issues involving art. XIV(a) and (b) of the CIRI agreement to the grievance-arbitration provisions of that agreement.

We find it unnecessary to pass on the Respondent’s procedural argument, not referred to by the judge, that litigation of the March and April 2001 unfair labor practice charges relating to art. XIV(a) and (b) of the CIRI agreement was precluded by the terms of a June 16, 2000 memorandum of agreement between the Respondent and CIRI. Charging Parties Material Sand & Stone and Material Concrete were not members of CIRI and (unlike Charging Party J. H. Lynch, a CIRI member) were therefore not even arguably bound by the memorandum of agreement between CIRI and the Respondent. Thus, resolution of the Respondent’s procedural argument would not affect the right of Material Sand & Stone and Material Concrete to file their 8(e) charges regarding art. XIV(a) and (b).

<sup>13</sup> Art. XIV(b) states: “The Employer agrees that the wages, hours, and working conditions provided for by this Agreement shall encompass the entire work covered by this agreement, thereby applying equally to any subcontracting let by the Employer on work covered by this Agreement. If any Employer shall subcontract work as herein defined, all employees of said contractor shall be paid directly by the Prime Contractor, except when such subcontractor is signatory to an agreement with the Local Union or when it is mutually agreed between the Employer and the Local Union or any locals thereof, that the subcontractor may establish his own payroll. Employees of a subcontractor whether or not paid directly by a prime contractor shall not acquire seniority with the prime contractor.” The General Counsel relies exclusively on the first sentence of subsection (b) in arguing that the subsection violates Sec. 8(e) and we have, accordingly, limited our analysis to

subjects nonsignatory subcontractors to all terms of the agreement, including the union recognition clause. The judge dismissed the allegation, finding that article XIV(b) does not clearly require all subcontractors to recognize the Respondent.

Although we agree with the judge that article XIV(b) is not unlawful on its face for the reasons stated in his decision, we dismiss the complaint allegation on the ground that it is time-barred under Section 10(b). As with the allegation regarding article XIV(a) described above, the allegation that article XIV(b) violates Section 8(e) is based upon an alleged unfair labor practice—i.e., the Respondent’s May 1, 2000 entry into the CIRI agreement—that occurred more than 6 months before the relevant Section 8(e) charges.

Moreover, there is no merit in the General Counsel’s argument that the Respondent’s calling the April 2001 strike of J. H. Lynch employees to enforce its allegedly unlawful interpretation of article XIV(b) “reaffirmed” that clause during the 10(b) period. Given that article XIV(b) is not unlawful on its face, any such reaffirmation must be bilateral. See *Sheet Metal Workers Local 27*, 321 NLRB 540, 540 fn. 3 (1996) (and cases cited therein) (“solely unilateral conduct by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Sec. 8(e) because such conduct does not constitute an “agreement”) (emphasis in original). The Respondent’s April 2001 strike to enforce its allegedly unlawful interpretation of article XIV(b) was solely unilateral conduct and, accordingly, did not constitute an “agreement.” Accordingly, as there is no other evidence of a bilateral agreement to apply article XIV(b) unlawfully during the 6 months before the underlying 8(e) charges, we dismiss the charges as time-barred under Section 10(b).<sup>14</sup>

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(e) and 8(b)(4)(i)(ii)(A) and (B) of the Act, we shall order it to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

that sentence (citing the second sentence only as evidence of the meaning of the first).

<sup>14</sup> In light of our finding, discussed supra, that the April 2001 strike was unlawful because its object was the enforcement of the May 1999 agreement, we need not reach the General Counsel’s additional allegation that the strike was also unlawful because its object was to enforce art. XIV(b) of the CIRI agreement.

ORDER<sup>15</sup>

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters, Local 251, East Providence, Rhode Island, its officers, agents, and representatives, shall

## 1. Cease and desist from

(a) Entering into, giving effect to, or enforcing its May 1999 agreement with J. H. Lynch & Sons, Inc., found unlawful under Section 8(e) of the Act.

(b) Threatening, coercing, or restraining any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in East Providence, Rhode Island, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 1 for posting by each of the affected companies named in this decision at all places where notices to their employees are customarily posted, if the affected companies are willing to do so.

<sup>15</sup> Consistent with our recently issued decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), we have ordered the Respondent to distribute the notice electronically if it is customarily communicating with employees by such means. For the reasons stated in his dissenting opinion, Member Hayes would not require electronic distribution of the notice.

<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not found.

Dated, Washington, D.C. April 19, 2011

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Wilma B. Liebman, Chairman

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Craig Becker, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT enter into, give effect to, or enforce our May 1999 agreement with J.H. Lynch & Sons, Inc., found unlawful under Section 8(e) of the Act.

WE WILL NOT threaten, coerce, or restrain any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom we do not have a primary dispute ceases or

refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 251

*Lucy E. Reyes, Esq.*, for the General Counsel.  
*Marc B. Gursky, Esq. (Gursky Law Associates)*, of Providence, Rhode Island, for the Respondent Local 251.  
*Thomas J. McAndrew, Esq.*, of Providence, Rhode Island, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Boston, Massachusetts on August 28–30, October 9–11 and December 12 and 13, 2001. The charges were filed between September 6, 2000 and April 18, 2001. A complaint was issued on November 28, 2000 and an amended consolidated complaint was issued on June 8, 2001.

The General Counsel alleges that Respondent, Local 251 of the International Brotherhood of Teamsters (the Union), violated Sections 8(b)(4)(i) and (ii)(A), (ii)(B) and Section 8(e) of the Act. Generally, these allegations include claims that the Union threatened to picket several jobsites unless certain union employers agreed to cease doing business with Material Sand and Stone Corporation and its sister company, Material Concrete Corporation.<sup>1</sup> They also include allegations that the Union employed illegal secondary tactics to force J. H. Lynch & Sons from doing business with two nonunion companies, Northeast Transportation Corporation and Cullion Excavating Corporation. Finally, the General Counsel alleges that Respondent violated Section 8(e) by entering into agreements whereby union employers agreed to cease doing business with other persons who were not affiliated with the Union.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Local 251 of the International Brotherhood of Teamsters (the Union), is the Teamsters Union Local with jurisdiction over Rhode Island and portions of Massachusetts near the Rhode Island border. It is a labor organization within the meaning of Section 2(5) of the Act. The charging parties, Material Sand & Stone Corporation, Material Concrete Corporation and J. H. Lynch & Sons, Inc. conduct business operations in the State of Rhode Island and purchase and receive

<sup>1</sup> The facts surrounding the unfair labor practice allegations herein involve Material Concrete, not Material Sand and Stone.

<sup>2</sup> There are 9 General Counsel exhibits, labeled GC exhibits and 50 other exhibits, some of which are labeled Ex. R- and others that are labeled Ex. U-.

goods at their Rhode Island facilities valued in excess of \$50,000 from points outside the State of Rhode Island. The same is true of C. Pezza Sons, Inc., R. P. Iannuccillo & Sons Construction Company and Dimeo Construction Company. I find that all these companies are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*Allegations concerning Respondent's activities regarding Material Concrete*

The Ferri Middle School Project  
 (complaint pars. 13 & 17)

Paragraphs 13 and 17 of the complaint allege that the Union violated Section 8(b)(4) (i) and (ii)(A), 8(b)(4)(ii)(B) and Section 8(e) in May 2000, with regard to a construction site at the Ferri Middle School in Johnston, Rhode Island. Dimeo Construction Company, the general contractor on this project, awarded the subcontract for the delivery of ready-mix concrete to Material Concrete, a nonunion company. Dimeo did not have any collective-bargaining agreement with the Union, but did have contracts with the laborers' and carpenters' unions in Rhode Island. This project was subject to the Rhode Island prevailing wage law, which essentially requires all employers to pay union scale.

Joseph Boyajian, vice president and business agent of the Union, tried unsuccessfully to organize Material Concrete in 1996. On about May 18, 2000, he visited the Ferri jobsite and saw a Material Concrete truckdriver pouring concrete. Boyajian told a Dimeo foreman that Material Concrete did not pay the prevailing wage rate. He told this foreman that if Material Concrete stayed on the job, the Union would put up an informational picket line (Tr. 980). It is unclear whether this foreman conveyed this to anyone in higher authority at Dimeo, but I infer that Boyajian expected that he would do so.<sup>3</sup>

Robert Pezza, the president of Material Concrete, is the son of Leonard Pezza, the president of C. Pezza & Sons, a construction company which is a signatory to the Construction Industry of Rhode Island's (CIRI) collective-bargaining agreement with the Union. Boyajian called Leonard Pezza concerning the presence of Material Concrete on the Ferri Middle School project. Boyajian tried to persuade Leonard Pezza to use his influence to have Material Concrete sign a collective-bargaining agreement with the Union. Leonard Pezza testified that Boyajian told him he would strike the Ferri project and shut it down if Material Concrete continued to deliver to the site; Boyajian denied this.

Leonard Pezza proposed that one of C. Pezza's drivers, a member of the Union, deliver the concrete to the Ferri site for Material. He then called his son, Robert, president of Material Concrete, and suggested that Robert use one of C. Pezza's drivers on the Ferri jobsite. He also indicated that it might be a good idea if Material cease delivering to the Ferri jobsite.

On May 18, 2000, Dimeo informed Material Concrete that it

<sup>3</sup> I find that insofar as Boyajian was concerned, the foreman was an agent of Dimeo.

must provide Dimeo with certified payrolls each week to comply with the Rhode Island prevailing wage law and regulations. Material Concrete never provided Dimeo with a certified payroll. There was no picketing at the Ferri jobsite. After making a few deliveries to the Ferri jobsite, Material was replaced by Baccala Concrete, a concrete supplier which is a signatory to a collective bargaining agreement (the Ready-Mix agreement) with the Union.

#### *Analysis*

Paragraph 13 of the complaint alleges that the Union, through Boyajian, violated the Act in calling Leonard Pezza and telling him that if Material Concrete continued to deliver to the Ferri jobsite, the Union would strike and picket. Paragraph 19 alleges that this conduct violated the Act in that its objective was to force C. Pezza & Sons and Dimeo to cease doing business with Material Concrete. I deem Boyajian's conversation with Leonard Pezza to be irrelevant to this matter. C. Pezza & Sons did not have any employees on the Ferri project and had no other connection with it. There is no evidence that Boyajian asked Leonard Pezza to communicate with Dimeo, or that he did so.

However, I conclude that the Union violated Section 8(b)(4)(ii)(B) by threatening and coercing Dimeo Construction Company to cease doing business with Material Concrete Corporation. Although paragraph 13 of the complaint does not mention Dimeo, the deficiencies in the complaint have been cured by the fact that Union's threat to Dimeo has been fully litigated through Boyajian's testimony, *Letter Carriers Local 3825*, 333 NLRB 343 (2001); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990); *Meisner Electric, Inc.*, 316 NLRB 597 (1995); *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); *Williams Pipeline Co.*, 315 NLRB 630 (1994).

The Union argues at page 58 of its brief that Boyajian's comments about informational picketing are protected by the proviso to Section 8(b)(7) of the Act. Section 8(b)(7), which concerns picketing for recognition, has nothing to do with this case. Picketing or threats to picket, as opposed to handbilling, violates Section 8(b)(4)(ii)(B) if the Union's objective is to force or require a neutral employer, such as Dimeo, to cease doing business with Material Concrete.<sup>4</sup> Boyajian told Dimeo's foreman that he would put up an informational picket line *if Material Concrete did not leave the Ferri jobsite*; he did not say he would picket unless he was satisfied that Material paid the prevailing rate.

There remains an issue of whether the delivery of ready-mix concrete falls within the proviso to Section 8(e) of the Act, which allows unions to require employers to cease doing business with nonunion employers for on-site construction work. The Union contends if the delivery of ready-mix concrete falls within this proviso, it did not violate Section 8(b)(4)(ii)(B) by threatening, restraining or coercing Dimeo to cease doing busi-

<sup>4</sup> The Supreme Court in *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 108A S.Ct. 1392 (1988) held that *handbilling* at a neutral site was protected by the First Amendment. The decision was in large part predicated on the distinctions between handbilling and picketing.

ness with Material Concrete on the Ferri Middle School job. For reasons fully discussed with regard to the Section 8(e) allegations, I conclude that the delivery of ready-mix concrete to the Ferri site falls outside the construction industry proviso. Therefore, this exception, which sanctions secondary pressure on employers in some instances, provides no defense to the Union's violation of Section 8(b)(4)(ii)(B) herein.<sup>5</sup>

#### The Rhode Island College Project (complaint paragraphs 14 and 16)

R. P. Iannuccillo & Sons is a construction contractor which is party to a collective-bargaining agreement with the Union. Beginning in June 2000, Iannuccillo was a subcontractor on a construction project at the Rhode Island College, another prevailing wage rate job. Several Teamster members worked for Iannuccillo on this project. Iannuccillo contracted with Material Concrete for the delivery of ready-mix concrete to the jobsite.

Sometime during the summer of 2000, Teamsters Business Agent Boyajian learned of Material Concrete's presence on the site. He called Bruce Iannuccillo, the company president, and told him that he did not approve of Iannuccillo's use of Material. He said he would put out informational pickets if Iannuccillo continued to use Material. Boyajian also told Iannuccillo that Material Concrete did not pay the prevailing rate. In fact, Material's drivers were not paid the difference between their regular wage rate and the prevailing rate for this project until October 7, 2000. The drivers delivered to the college jobsite on a number of occasions between July 19, and September 14, 2000 (Union Exhibit 26). The Teamsters did not picket the Rhode Island project and Material completed its performance of its contract with Iannuccillo.

For the same reasons that I found that Respondent violated Section 8(b)(4)(ii)(B) on the Ferri Middle School project, I find it violated this section of the Act at Rhode Island College. The Union was coercing Iannuccillo to cease doing business with Material Concrete, not merely trying to prod Iannuccillo to insure that Material paid the prevailing wage. Accepting Boyajian's testimony, that he merely threatened informational picketing, his threat violated the Act due to its objective.

#### The Kiewit Jobsite (complaint paragraph 15)

In the summer of 2000, Peter Kiewit Company was the general contractor on a construction project which involved laying fiber optic cable along approximately 30 miles of roadway in Rhode Island. J. H. Lynch & Sons, Incorporated, was retained as a subcontractor to dig trenches, install PVC conduit, backfill the trenches and pave over them. Lynch is a large construction contractor, which is a signatory to a collective-bargaining agreement with the Union (the Heavy Highway Agreement). Lynch contracted with Pawtucket Ready-Mix Company (PRM), which also is a signatory to a contract with the Union (the Ready-Mix Agreement), to deliver ready-mix concrete to the

<sup>5</sup> This analysis also applies to the Union's threats of picketing to Iannuccillo and J. H. Lynch regarding doing business with Material Concrete. While the General Counsel has established an 8(b)(4)(ii)(B) violation, he has not established 8(b)(4)(i) and (ii)(A) and/or 8(e) violations as well, which were also alleged.

Kiewit jobsite.

In June 2000, Lynch determined that it needed more concrete than PRM could supply. It ordered deliveries from Material Concrete. When Business Agent Boyajian found out that Material was delivering concrete to Lynch, he called David Lynch, the company's president. Boyajian told David Lynch he could not use Material Concrete on the Kiewit job. Material borrowed a union driver from C. Pezza & Sons, and made deliveries to Kiewit for a short period of time. Material then reverted to using its own drivers. Boyajian then called David Lynch again and threatened to put out informational pickets if Lynch did not stop using Material Concrete. To avoid a picket line or strike, Lynch ceased doing business with Material on the Kiewit project.<sup>6</sup> The Union thus violated Section 8(b)(4)(ii)(B) in threatening, coercing and restraining J. H. Lynch & Sons from doing business with Material Concrete.<sup>7</sup>

The May 28, 1999 agreement between J. H. Lynch & Sons and the Union (complaint paragraphs 19, 20, 21, 25 and 26)

In early 1999, J. H. Lynch & Sons employed Northeast Transportation Corporation and Cullion Excavating Corporation to haul asphalt and sand and stone to one of its jobsites. Boyajian threatened to strike Lynch if he continued to use either of these nonunion companies.

As a result, on May 28, 1999, David Lynch, president of J.H. Lynch & Sons, sent a letter to the Union, which stated:

The trucking services of Northeast Transportation Corp. and Cullion Excavating Corp. will not be utilized. Should a particular project come along that requires excessive trucking and we are not able to supplement our fleet adequately, we will notify you of the situation to allow us to amicably resolve the problem. The Employer acknowledges the Union's right to strike to enforce this Agreement.

GC Exh. 4.

The General Counsel alleges that this agreement violates a number of sections of the Act, but I deem only Section 8(e) to be relevant. That provision makes it unlawful "for any labor organization and any employer to enter into any contract or agreement . . . whereby the employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person . . ."

The section essentially means that a Union and employer cannot agree to do many of things that Section 8(b)(4) prevents a Union from pressuring neutral employers to do, such as cease doing business with a nonneutral employer. There are exceptions to the general rule, such as one relied upon the Union in this case:

*Provided*, That nothing in this subsection . . . shall apply to an agreement between a labor organization and an employer in

<sup>6</sup> David Lynch testified that Boyajian threatened him with a strike at Kiewit if he continued to use Material Concrete. Boyajian denies this. In view of the fact that Boyajian's threat of an informational picket line violated Sec. 8(b)(4)(ii)(B), it is unnecessary to resolve this issue of credibility.

<sup>7</sup> Lynch is clearly "neutral" vis-a-vis the Union's dispute with Material Concrete, with whom it has no relationship.

the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction...

In its answer, the Union alleged that the entire complaint was time barred pursuant to Section 10(b) of the Act. The only allegations, which could conceivably be time-barred are those relating to this agreement. The Union also alleges that this agreement falls within the above-quoted "construction industry exemption." I reject these contentions and find that the General Counsel has established a violation of Section 8(e) as alleged in Complaint paragraphs 19 and 26 with regard to Cullion. I find that the May 1999 agreement is secondary activity with regards to Cullion because the Union has not established that Cullion was performing work traditionally performed by Lynch's bargaining unit employees. A conclusion regarding Northeast Trucking will require a detailed analysis of the Union's contention that its conduct aimed at preventing Lynch from doing business with Northeast is not secondary activity.

In *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538 At 539 (1993), and *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB 374 (1985), the Board held that a contractual provision that is invalid on its face is not barred by Section 10(b) and is a continuing violation of the Act. Moreover, from Boyajian's testimony at Tr. 1060-1062, I conclude that he was relying on the May 1999 letter in April 2001, when he demanded that Lynch cease doing business with Northeast. Therefore, I find that by reaffirming the May 1999 agreement within the 6-month period, he also brought the illegal provision itself with the 6-month period set forth in Section 10(b), *General Truck Drivers Local 467*, 265 NLRB 1679, 1681 (1982).<sup>8</sup>

The Board has long held that deliveries to a construction site do not fall within the construction industry proviso to Section 8(e). The rationale for these rulings is that truck drivers delivering materials to a jobsite generally have only brief contact with the construction workers on the site and therefore, the relationship and interaction between nonunion delivery personnel and unionized construction workers does not pose the risk of labor unrest that might exist if, for example, unionized carpenters were working with non-union laborers, *Joint Council of Teamsters No. 42*, 248 NLRB 808, 815-817 (1980), *enfd.* 671 F.2d 305 (9th Cir. 1981); *Operating Engineers Local 12 (Stief Co.)*, 314 NLRB 874 (1994). The Board has also held that the mixing and pouring of ready-mix concrete at a construction site is merely the final act of delivery and does not come within the construction industry exemption to Section 8(e), *Teamsters Local 194 (Island Dock Lumber, Inc.)* 145 NLRB 484, 491 (1963).

Respondent has established through the testimony of Michael Klitzner that the drivers of a ready-mix concrete truck often, if not typically, spends hours at a construction site when delivering material. During that time, such driver, often, if not

<sup>8</sup> It is not apparent from the record that Boyajian specifically mentioned the May 1999 letter in his conversations with David Lynch. He did testify that he considered Lynch's use of Northeast trucks to be a violation of the agreement set forth in that letter. Further, there is no evidence that the Union has done anything to interfere, restrain or coerce Lynch from doing business with Cullion since May 1999. Cullion appears to be relevant to this case only as a result of being mentioned with Northeast in the May 1999 letter.

typically, has extensive interaction with employees of the contractors on site, particularly laborers. It has also been established that a driver delivering asphalt to a construction site will also often, if not typically, spend a significant amount of time on a construction site. An asphalt truckdriver will typically drive parallel to a paving machine, operated by construction site personnel, discharging asphalt into the hopper of the paving machine, while the asphalt is being spread on a roadway.

The Board in *Operating Engineers Local 12*, supra, made it clear that when the transport of materials to a jobsite is incidental to the operation of a truck (in that case a boom truck) on the construction jobsite, the on-site work is covered by the proviso. In that case, the Board drew a line between activities that cannot be separated from the final delivery of cargo and activities which could be just as easily performed by the construction workers on site. From this I infer that the Board law is a hard and fast rule that the delivery of ready-mix concrete and asphalt falls outside the construction industry proviso. Therefore, I find that the Union, in seeking by contract to forbid the use of nonunion trucks to deliver ready-mix concrete and asphalt, violated Section 8(e).<sup>9</sup>

The April 2001 strike against J. H. Lynch (complaint pars. 22, 25 and 26)

In early April 2001, Boyajian learned that J. H. Lynch was using the trucking services of Northeast Transportation Company. On April 12, he threatened to strike Lynch for its failure to comply with its May 1999 agreement not to use Northeast. Lynch, Boyajian and their attorneys met on April 13. Lynch refused to cease using Northeast or to pay Northeast drivers union scale wages. On Monday, April 16, 2001, the Union struck Lynch at its Cumberland and East Providence, Rhode Island facilities.

On April 18, Boyajian and Lynch met at the offices of Edward Sullivan, business agent of the Operating Engineers. They reached a tentative settlement of their dispute whereby Lynch agreed to maintain ten of its own trucks at its Cumberland, Rhode Island facility until the expiration of the CIRI Heavy Highway Agreement on April 30, 2003. They also agreed that Northeast drivers used by Lynch would be paid directly by Lynch and would be subject to all the terms of the Heavy Highway Agreement while working for Lynch—except that they would not acquire seniority with Lynch. After further reflection and consultation with counsel, David Lynch declined to sign a memorialization of the tentative agreement. The strike lasted until April 23, 2001.

There is no question that the purpose of this strike was to pressure Lynch to cease doing business with Northeast Transportation. However, the Union argues that despite this fact, the strike and its agreement with Lynch do not violate the Act.

The principal question is whether the agreement and the Union's conduct was primary or secondary activity. However, before addressing that issue, I reject other defenses made by the Union to these allegations. The Union argues first that the Board should defer to the agreement it says was reached by the

parties on April 18, 2001 and defer these issues to arbitration. Generally, the Board does not defer to arbitration an issue which involves the application of statutory construction, as distinguished from contract interpretation, *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321 (1998). I find that the issues regarding any agreements reached by the parties and the Union's efforts to enforce those agreements raise questions of statutory interpretation with regard to which the Board should not defer either to the parties or an arbitrator.

Secondly, the Union argues that it did not violate Section 8(e) or 8(b)(4)(i)(ii)(A) and (B) because Northeast and Lynch are either "allies" or a single employer. In *Mine Workers (Boich Mining Co.)*, 301 NLRB 872 (1991), the Board explained that the single employer doctrine is actually one of two branches of the "ally doctrine." The other branch of the ally doctrine involves employers whose neutrality is compromised by the performance of "struck work," an issue not relevant to the instant case.

In determining whether two entities constitute a single employer, the Board considers four factors: (1) common ownership, (2) common management, (3) interrelations of operations, and (4) common or centralized control of labor relations. I conclude that, applying these factors to the facts set forth below, Northeast and Lynch are not a single employer, or "allies."

The owners and only officers of Northeast Transportation are Martha Lynch, president, and Elizabeth Lynch, vice-president.<sup>10</sup> These two women are the sisters of David Lynch, president of J. H. Lynch & Sons.

Elizabeth Lynch manages Northeast, with some help from her sister Martha, Bill Santoro, one of her drivers, and advice from other members of her family. Elizabeth worked for J. H. Lynch & Sons as a bookkeeper from 1997 to 1999. Martha Lynch continues to perform administrative duties for J. H. Lynch & Sons and is its assistant corporate secretary. Neither Martha nor Elizabeth own any of J. H. Lynch & Sons' stock. Northeast has its own garage and mechanic for its trucks. Northeast maintains separate bank accounts, insurance policies and accountants from those of any other of the Lynch family companies. Both Northeast and J. H. Lynch have retained attorney John Walsh to provide legal services. Walsh is a corporate director of J. H. Lynch & Sons, Inc.

In 1997, the sisters started Northeast with one truck. As of late 2001, Northeast employed 5 drivers, none of whom have ever worked for any of the Lynch companies. Northeast's sole business is the provision of trucking services. Both J. H. Lynch & Sons and Granger/Lynch (another Lynch family company) are major customers of Northeast. However, they are not Northeast's only customers. Prior to June 2001, Northeast biggest customer was the Rhode Island Resource Recovery Corporation. Northeast had a contract to transport material to the Resource Recovery Corporation's landfill.<sup>11</sup> Since losing the landfill contract in June, 50 percent of Northeast's business has been providing trucking service to J. H. Lynch & Sons. J.

<sup>10</sup> Elizabeth and Martha Lynch each own 50 percent of Northeast's stock.

<sup>11</sup> Northeast obtained 40 percent of its fill for this contract from Lynch.

<sup>9</sup> This analysis also applies to the allegations that the Union violated Sec. 8(b)(4)(B) in pressuring Dimeo, Iannuccillo and Lynch to cease doing business with Material Concrete Corporation.

H. Lynch regularly subcontracts work to Northeast.

J. H. Lynch & Sons is a heavy highway construction contractor. Its stock is owned by David Lynch, his brothers and his parents. Lynch has collective-bargaining agreements with several unions, including Teamsters Local 251. Lynch is a signatory to the Construction Industry of Rhode Island's (CIRI) contract with Local 251 (the Heavy Highway Agreement). Since 1997, the number of Local 251 members employed by Lynch has decreased from about 16 to 10, through attrition. These employees drive over-the-road trucks. As Teamster drivers have retired, Lynch has not replaced them with other Teamster drivers.

The Union's pressure on Lynch not to use the services of Northeast and the agreement between the parties that Lynch not do so is primary activity and not prohibited by the Act.

Section 8(e) of the Act generally forbids parties from entering into an agreement in which an employer agrees to refrain from dealing in the product of another person or to cease doing business with any other person. However, the Supreme Court has held that in enacting Section 8(e), "Congress intended to reach only agreements with secondary objectives." *NLRB v. Longshoreman ILA*, 447 U.S. 490, at 504, 100 S.Ct. 2305 (1980) (ILA I); *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 620, 635, 87 S.Ct. 1250 (1967). Similarly, Section 8(b)(4) was designed to protect only employers who are neutrals in a labor dispute, which is not their own, *National Woodwork*, 386 U.S. at 625–626 (1967). The Court has refused to read Section 8(b)(4) as prohibiting primary activity which may impact on a neutral employer, stating that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective", *Id.* at 627.

Parties may enter into agreements which on their face appear to violate Section 8(e) if the Union's objective is the preservation of work for bargaining unit employees, or is the recapture of work "fairly claimable" by the union, *Meat and Highway Drivers, Dockmen, Etc. v. NLRB*, 335 F.2d 711 (D.C. Cir. 1964). Similarly, a Union may engage in what initially appears to be secondary activity to force a primary employer to enter into such an agreement. In the Longshoreman's case (*ILA I*), the Supreme Court stated that a lawful work preservation agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees. The agreement: 1) "must have as its objective the preservation of work traditionally performed by the union", and 2) "the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test."

The parties' May 1999 agreement by which J. H. Lynch & Sons agreed not to use Northeast Transportation and the Union's picketing and strike to enforce that agreement meet both of these tests. The essential dispute is the decision by Lynch to reduce the number of its Teamster bargaining unit drivers and employ drivers and trucks owned by Northeast to do much of the work formerly done by its Teamster drivers. While much of the testimony regarding conversations between Teamster Business Agent Boyajian and David Lynch is confusing, the essence of the Union's demand was that Lynch use Teamster

drivers to do its trucking work rather than Northeast drivers. In the alternative, Boyajian proposed that the Northeast drivers become members of the bargaining unit when working for Lynch—with the proviso that they would not acquire seniority with Lynch (Tr. 1069–1077). Thus, the parties' May 1999 agreement and the Union's efforts to enforce it with regard to Northeast in April 2001, were valid efforts at "work preservation" and valid efforts to recapture fairly claimable work, *Meat and Highway Drivers*, supra at 714.

I deem the Union's dispute with Lynch over the use of Northeast trucks to be a primary dispute and therefore I find that the parties' May 1999 agreement with regard to Northeast did not violate Section 8(e), *Painters District Council 51 (Manganaro Corp.)*, 321 NLRB 158 (1996). Similarly, I find that the Union's efforts to enforce this agreement in April 2001 did not violate Section 8(b)(4).

Article XIV(a) of the Rhode Island Heavy Highway Construction Agreement for 2000–2003 violates Section 8(e) as alleged in paragraphs 18 and 26 of the complaint. Article XIV(b) does not violate Section 8(e).

The Union's collective-bargaining agreement with CIRI (the Heavy Highway Agreement) provides in Article IV as follows:

(a) The Employer agrees that he will hire equipment to supplement his own equipment only when he does not have the number or type of equipment required for his purpose; if it becomes necessary for the Employer to hire said additional equipment under circumstances above, *preference must be given in hiring such equipment from employers who have a contract with Local Union 251 or an owner operator who is a dues paying member in good standing of Teamsters Local Union No. 251* (emphasis added).

(b) The Employer agrees that the wages, hours, and working conditions provided for by this Agreement shall encompass the entire work covered by this agreement, thereby applying equally to any subcontracting let by the Employer on work covered by this Agreement. If any Employer shall subcontract work as herein defined, all employees of said contractor shall be paid directly by the Prime Contractor, except when such subcontractor is signatory to an agreement with the Local Union or when it is mutually agreed between the Employer and the Local Union or any locals thereof, that the subcontractor may establish his own payroll. Employees of a subcontractor whether or not paid directly by a prime contractor shall not acquire seniority with the prime contractor.

In *Teamsters Local 610 (Kutis Funeral Home)*, 309 NLRB 1204 (1992), the Board found 8(e), 8(b)(4)(i) and (ii)(A) violations with respect to an arbitration award made pursuant to a collective-bargaining agreement which contained a similar provision to article XIV(a). That provision required a signatory employer, such as Kutis Funeral Home, to give preference to employees of other signatory employers when supplementing its regular work force. The Board held that this clause constituted an agreement to "cease doing business" with nonsignatory, nonunion firms. Further, the Board held that effect of the provision was secondary because it benefited the employees of other signatory funeral homes, rather than Kutis' employees. Similarly, article XIV(a) violates Section 8(e) because it re-

quires signatories to cease doing business with nonunion firms and owner-operators and because it does not have a valid work preservation rationale. Similarly, the record does not establish that in article XIV(a), the Union is seeking to recapture fairly claimable work.

The General Counsel argues, citing *Electrical Workers Local 437 (Dimeo Construction Co.)*, 180 NLRB 420 (1969), that article XIV(b) violates Section 8(e) because it not only subjects non-signatory subcontractors to the same wage, hours and working conditions as signatory employers, but to all terms of the agreement, including the union recognition clause. On the contrary, I find that article XIV(b) does not clearly require all subcontractors to recognize the Union. Assuming that the clause is ambiguous, there is no extrinsic evidence that indicates it was intended to be administered so as to require all subcontractors to recognize the Union. I therefore conclude that the General Counsel has not established that article 14(b) violates Section 8(e), *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970). On this record, article XIV(b) appears to be a valid area standards provision.

#### CONCLUSIONS OF LAW

1. Respondent, Teamsters Local 251, violated Section 8(b)(4)(ii)(B) by threatening and coercing Dimeo Construction Company, R. P. Iannuccillo & Sons and J. H. Lynch & Sons, Inc. from doing business with Material Concrete Corporation;

2. Respondent, Teamsters Local 251 and J. H. Lynch & Sons, Inc. violated Section 8(e) in agreeing that J. H. Lynch & Sons, Inc. would cease doing business with Cullion Excavating Corporation.

3. Respondent and J. H. Lynch and Sons did not violate Section 8(e) in agreeing that Lynch would cease doing business with Northeast Transportation Company.

4. Respondent did not violate Section 8(b)(4) by picketing and striking to force J. H. Lynch to cease doing business with Northeast Transportation Company.

5. Article XIV(a) of the Rhode Island Heavy Highway Collective-Bargaining Agreement violates Section 8(e).

6. Article XIV(b) of the Rhode Island Heavy Highway Collective-Bargaining Agreement does not violate Section 8(e).

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, International Brotherhood of Teamsters, Local Union No. 251, East Providence, Rhode Island, its offi-

<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening, coercing or restraining any person engaged in commerce or in an industry affecting commerce, through secondary activity, where an object thereof is forcing or requiring any person to cease doing business with any other person;

(b) Threatening, coercing or restraining any person engaged in commerce or in an industry affecting commerce, with whom Respondent does not have a primary dispute, where an object thereof is forcing or requiring any person to cease doing business with Material Concrete Corporation or Material Sand and Stone Corporation.

(c) Entering into any contract or agreement, express or implied, whereby any employer, with whom Respondent does not have a primary dispute, ceases or refrains or agrees to cease doing business with any other person, including persons with whom Respondent has a primary dispute.

(d) Giving effect to, or enforcing article XIV(a) of the Rhode Island Heavy Highway Construction Agreement insofar as it requires signatories to give preference when subcontracting to union members or union employers.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in East Providence, Rhode Island copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all persons who were employed by the Union or were members of the Union since May 18, 2000.

(b) Notify in writing Dimeo Construction Company, R. P. Iannuccillo & Sons, J. H. Lynch & Sons., Inc. Material Concrete Company and Material Sand & Stone Corporation that Respondent will not threaten, coerce or restrain any person with whom it does not have a primary dispute where the object is forcing or requiring any such person to cease doing business with Material Concrete Corporation or Material Sand and Stone Corporation.

(c) Notify all signatories to the Rhode Island Heavy Highway Construction Agreement that it will no longer give effect to, or seek to enforce article XIV(a) of that Agreement which requires signatories, when subcontracting work, to give preference to employers or persons who are members of the Union.

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 25, 2002.

## APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, through secondary activity, where an object thereof is forcing or requiring any person to cease doing business with any other person.

WE WILL NOT threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, with whom this Union does not have a primary dispute, where an object thereof is forcing or requiring any person to cease doing business with Material Concrete Corporation or Material Sand and Stone Corporation.

WE WILL NOT enter into any contract or agreement, express or implied, whereby any employer, with whom Respondent does not have a primary dispute, ceases or refrains or agrees to cease doing business with any other person, including persons with whom this Union has a primary dispute.

WE WILL NOT give effect to, or enforce article XIV(a) of the Rhode Island Heavy Highway Construction Agreement insofar as it requires signatories to give preference when subcontracting to union members or union employers.

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 251, AFL-CIO