UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AGGREGATE INDUSTRIES, Respondent v. TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL 631 affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS Charging Party	)	Cases 28-CA-23220 28-CA-23250 Charging Party's Brief in Support of Exceptions to the Decision of the Administrative Law Judge

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INTRODUCTION

This case involves an employer that boldly announced to the Union that represented two discrete bargaining units of its employees that it was moving a group of about sixty jobs from the bargaining unit with substantially higher wage and benefit rates to the bargaining unit with lower rates. It is undisputed that employees who were moved from one bargaining unit to the other continued to do the exact same jobs, in the exact same place, in the exact same way and for the same employer. The only thing that changed was their compensation and the bargaining unit to which they belonged. The employer would not have been privileged to make this change even if it had bargained to impasse (which it did not) because the transfer of these jobs changed the bargaining unit's scope and, as a result, interfered with the employees' right to bargain collectively. The question whether an employer has transferred work or changed the scope of a bargaining unit can be a difficult one. These facts make this an easy case.

But even if what the employer did could be characterized as transferring work, the employer still violated Section 8(a)(5) because the employer was not open to changing its mind about this decision. The employer's counsel testified repeatedly that he announced to the Union's representative what the employer had already decided to do. He presented the decision as a *fait accompli* because the employer believed it had the right to transfer the jobs without bargaining. Since the employer had no intention of changing its mind, bargaining to good faith impasse was impossible and the Union did not waive its right to bargain by failing to request bargaining.

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STATEMENT OF THE CASE

A. Background

1. Aggregate Industries

In 2003, Respondent Aggregate Industries ("Respondent") purchased Southern Nevada Paving, Inc., which was a paving and grading business. TR 52. In 2004, Respondent purchased Frehner Construction Company, Inc., which was a construction company that worked on major public projects and which partially owned the Sloan Quarry. TR 53-54, 487-88; GC 10, 38. Southern Nevada Paving and outside contractors hauled building materials to construction sites for Frehner Construction. TR 54. Neither Frehner Construction nor Southern Nevada Paving performed any Ready Mix work. TR 53-54.

In 2004, Respondent purchased Regency Ready Mix, a ready mix company that owned and operated a batch plant in Summerlin, Nevada. Respondent then created a corporation called Regal Materials which held Regency Ready Mix. TR 60-61, 388. In 2008, Regal Materials closed and later reopened its Summerlin batch plant, built a batch plant at the Sloan Quarry, opened the Dehli batch plant in North Las Vegas and began conducting its ready mix operations under the trade name Southern Nevada Ready Mix. TR 388-89, 505.

In August 2010, Respondent consolidated Southern Nevada Paving, Frehner Construction and Regal Materials into a single entity under the name Aggregate Industries-SWR, Inc. First, Respondent merged Southern Nevada Paving and Regal Materials into Frehner Construction, and then Frehner Construction changed its name to Aggregate Industries-SWR. Finally, Southern Nevada Ready Mix was registered as a d/b/a of Aggregate Industries. TR 25-26, 52-55, 86-87, 485-86, GC 18, 37. Respondent continues to use the names Frehner Construction, Southern Nevada Paving and Southern Nevada Ready Mix as fictitious business names and organizes its business into separate operating divisions under those names. TR 104-05, 106-08; GC 21, 22.

2. The Construction Bargaining Unit

Since at least 1994, Teamsters Local 631 ("the Union") has represented employees of Frehner Construction and Southern Nevada Paving ("the Construction Bargaining Unit") under the terms of a Master Labor Agreement ("the Construction Agreement"). TR 526, 545; GC 37. From at least 2001 until April 2010, Frehner Construction and Southern Nevada Paving were members of a multiemployer association known as the Association of General Contractors that negotiated the Construction Agreement. The most recent Construction Agreement ran from June 1, 2007 to June 30, 2010. TR 55, 544-45; GC 2. In April 2010, Frehner Construction and Southern Nevada Paving gave the Union notice that it was terminating the Construction Agreement and withdrew authority from the Association of General Contractors to negotiate on their behalves. TR 79-80; GC 12, 13. Negotiations for a successor Construction Agreement were on-going at the time of the hearing in this case. TR 82, 361-62, 527; CP 1.

The Construction Bargaining Unit includes five classifications of "drivers" who operate different types of trucks. GC 2, at 40-41. These drivers haul construction material to construction sites and on the construction sites. This case concerns the drivers that haul materials from the Sloan Quarry to the construction sites. In this brief, they are referred to as the "off-site material haul drivers."

3. The Ready Mix Bargaining Unit

In 2006, the Union was certified as the representative of drivers and mechanics at Regal Materials ("the Ready Mix Bargaining Unit"). The unit described in the certification as "All full-time and regular part-time drivers and mechanics employed by the Employer out of its concrete batch plant in or about Clark County, Nevada; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act." GC 5. In December 2007, the

Union was certified again at the same unit when it won a decertification election. TR 61-63, 256-57, GC 6.

Following the December 2007 certification, the Union and Regal Materials negotiated a collective bargaining agreement which was signed on July 11, 2008 and ran from July 1, 2008 to May 31, 2012 ("the Ready Mix Agreement"). TR 20; GC 3. In early 2008, Regal Materials had closed its Summerlin batch plant but during the course of the Ready Mix Agreement negotiations, Regal Materials reopened the Summerlin batch plant, started building a batch plant at Sloan Quarry and prepared to open the Dehli batch plant in North Las Vegas. TR 389-92, 505. The name on the Ready Mix Agreement is Southern Nevada Ready Mix because that was the business name used by Regal Materials. TR 64-65, 256-58.

The Ready Mix Agreement contains classifications for Transport Drivers (Bulk) and Transport Drivers (S&G). GC 3, at 29. Transport Drivers (Bulk) transport cement powder from cement plants to batch plants. TR 432. Transport Drivers (S&G) drive "plant haul" from quarries to batch plants, and between batch plants. TR 257-65, 270-72. The Union did not agree that Transport Drivers (S&G) working under the Ready Mix Agreement could haul material to construction sites for Frehner Construction or Southern Nevada Paving. That work was part of the Construction Bargaining Unit and covered by the Construction Agreement.[1] TR 257-59, 273.

[1] In negotiations for the Ready Mix Agreement, the parties agreed to move nine "heavy haul" drivers who worked off-road within the Sloan Quarry from the Construction Bargaining Unit to the Ready Mix Bargaining Unit. This change was memorialized in a written Memorandum of Understanding. TR 67-70, 257-58, 263, GC 11. Respondent then requested that the drivers who had been performing this work under the Construction Agreement for Southern Nevada Paving be dispatched to perform the same work under the Ready Mix Agreement for Southern Nevada Ready Mix. Because there was an agreement, the Union complied. TR 67, 69-70; GC 7, 8, 9.

The difference in wage rates between the Ready Mix Agreement and the Construction Agreement is substantial. During the last year of the Construction Agreement (from July 1, 2009 to July 1, 2001), drivers were paid between $30.29 to $31.28 per hour; and $6.45 per hour was paid to benefit funds and a training trust. GC 2, at 40-43. During the same time period, Transport Drivers (S&G) under the Ready Mix Agreement were paid between $23.00 to $24.80 per hour, and $4.16 was paid to benefit funds. GC 3, at 29-30.

B. Respondent moved off-site material haul jobs out of the Construction Bargaining Unit and into the Ready Mix Bargaining Unit

The events between July 9 and October 11, 2010 are undisputed, and the Union agrees with the ALJ's recitation of those facts. As a result, they are only summarized here.

On July 9, 2010, two years after the Ready Mix Agreement was signed and just after the Construction Agreement expired, Respondent's representative Sean Stewart announced to the Union's representative for the Construction Agreement (Wayne Dey) that Respondent was "going to move" the material haul drivers and only wanted "to discuss whether we could keep our own drivers." Stewart was referring to the drivers that hauled material from the Sloan Quarry to construction sites, the off-site material haul drivers. Stewart asked whether Respondent could continue to employ the same individuals currently working under the Construction Agreement to haul the same material in the same trucks but under the Ready Mix Agreement. TR 83-84. On August 13, Dey told Stewart that the Union objected to Respondent's plan. He told Stewart that the material delivery work could not be transferred to the Ready Mix Agreement because it was covered under the Construction Agreement. TR 92, 463-64. On August 20, the Union reiterated this position in writing. GC 20.

On September 24, 2010, Respondent requested that the Union dispatch 64 drivers to work under the Ready Mix Agreement beginning four days later, doing exactly the same work that

they had previously been done under the Construction Agreement. The Union did not fill the request. TR 113-16, 166, 469, GC 24, 25. Between September 28 and 30 the Union and Respondent briefly discussed the pay rate for the drivers the Respondent had announced that it was transferring to the Ready Mix Bargaining Unit. TR 118, 476-77. No agreement was reached. TR 120-21, 518. They did not bargain over the underlying decision to transfer the jobs. This was a result of Respondent's position that it had the automatic right to transfer the jobs because the Union had agreed to this change when the parties bargained for the Ready Mix Agreement in 2008. GC 19, at 9; see also GC 23 ("In June of 2008 Teamsters Local 631 and AI [Respondent] entered into a materials agreement which covers, among other things, the delivery of materials. At the time of signing, Local 631 encouraged AI [Respondent] to transfer trucks to the materials division so that AI could compete directly with other signatory material suppliers."); GC 29 ("In 2008 we negotiated an agreement with the union that covers material deliveries. We have been attempting to work with the union to perform work under that agreement."); GC 34, at 5 ("The Teamsters are upset because AI has demanded to deliver materials under the collective bargaining agreement AI negotiated and signed with Teamsters Local 631.").

On October 1, Respondent met with the off-site material haul drivers in the Construction Bargaining Unit at the Sloan Quarry about the change. Wayne Dey and other representatives from the Union were present but were not permitted to speak. TR 123, 350-52. Sean Stewart told the drivers that, at the Union's request, Respondent was offering to phase-in the reduction from the Construction Agreement rates to the Ready Mix Agreement rates for any driver who would move to the Ready Mix Bargaining Unit. TR 142, 146, 348-49, GC 29. A few days later, Respondent distributed the same offer to the drivers by leaving a notice in their mailboxes. The

document contained a section for the drivers to fill out and return if they wanted to continue working on October 11, but under the Ready Mix Agreement. TR 127, 349, GC 27.

From October 12 to 15, the Union picketed. On October 15, Respondent and the Union agreed that, pending resolution of the instant unfair labor practice charge, the drivers from the Construction Bargaining Unit would work under the Ready Mix Agreement with the phased-in wages offered by Respondent on October 1. TR 155-56, 479, 519. About sixty drivers are doing the exact same work, using the same trucks, and to haul the same material to and from the same locations as they did when they worked under the Construction Agreement. TR 345-46, 355-57; GC 31. The only difference is that they are not part of the Construction Bargaining Unit, and they are getting paid less.

C. The ALJ's Decision

The ALJ rejected the Respondent's theory that the Union had agreed to this change in the 2008 bargaining for the Ready Mix Agreement:

> What is in dispute is whether, during the 2008 negotiations for the Ready-Mix Agreement, the Union's main negotiator, Dewey Darr, agreed that, by entering into the said collective-bargaining agreement, SNRM [Southern Nevada Ready Mix], which employed no material haul drivers and did not own or produce its own aggregate, would have the right to pay its material haul drivers for hauling aggregate materials not only from the Sloan Quarry to its batch plants but also from the Sloan Quarry to construction job sites at the Ready-Mix Agreement wage rate. As to this, as between Dewey Darr and Sean Stewart, notwithstanding his sometimes confusing and contradictory testimony, I found the former to have been the more forthright witness regarding said bargaining. Thus, I believe that Darr, in discussing the material haul driver classification and the matter of transferring trucks from SNP [Southern Nevada Paving] to SNRM, was concerned only with hauls from the Sloan Quarry to SNRM's batch plants and that he would never have agreed to anything which would have abrogated or diminished the terms of the Construction Agreement.

ALJD 16:34-45.

Having rejected Respondent's threshold theory (that the Union agreed in 2008 to change the bargaining units by moving the off-site material haul jobs to the Ready Mix Bargaining Unit), the ALJ then reached the two issues that are the subject of these exceptions. The ALJ first decided that the movement of the off-site material haul jobs was merely a transfer of work, and not a change to the scope of the Construction Bargaining Unit, and was therefore a mandatory subject of bargaining. ALJD 17:14-37. Disregarding the Respondent's position that it had no duty to bargain over the transfer of material haul jobs, the ALJ decided that the Respondent was willing to bargain with the Union over this change and did not present the change to the Union as a *fait accompli*. ALJD 19:22-20-15. These two conclusions are discussed in more detail in the Argument section of this Brief.

STATEMENT OF THE ISSUES

1. Did the Respondent violate Section 8(a)(5) by changing the scope of the Construction Bargaining Unit when it transferred the off-site material haul jobs from the Construction Bargaining Unit to the Ready Mix Bargaining Unit? (Exception Nos. 1, 2, 3, 4, 5)

2. Did the Respondent violate Section 8(a)(5) by transferring the off-site material haul work and drivers from the Construction Bargaining Unit to the Ready Mix Bargaining Unit after it presented the Union with its decision to do so as a *fait accompli*, making it futile for the Union to request bargaining? (Exception Nos. 2, 3, 6, 7, 8, 9)

ARGUMENT

I. The Respondent violated Section 8(a)(5) by unilaterally changing the Construction Bargaining Unit's scope

A. The ALJ's Decision

The ALJ began by stating the threshold rule that a bargaining unit's scope is a permissive subject of bargaining, while a transfer of work out of the bargaining unit is a mandatory subject

of bargaining. ALJD 16:27-17:12. Observing that distinguishing between a transfer of work duties and a change to bargaining unit scope "is not an easy task,"[2] the ALJ then concluded that "the correct characterization of Respondent's actions is that of a transfer of material hauling duties from drivers covered under the Construction Agreement to drivers covered under the Ready Mix Agreement." ALJD 17:14-18. The ALJ explained this conclusion as follows:

> [T]here is no contention that Respondent eliminated the material driver position from the Construction Agreement bargaining unit or eviscerated the position by creating a non-bargaining unit position and assigning the work of bargaining unit employees to employees in the new job classification. To the contrary, in his August 13 letter to the Union, Sean Stewart wrote that Construction Agreement bargaining unit drivers would continue to perform construction site material hauling work, and it is undisputed that Respondent's drivers, who currently perform material hauling work on construction sites, are paid at the Construction Agreement wage rate. Moreover, Respondent and the Union bargained for and agreed to a Ready Mix Agreement bargaining unit job classification, transport drivers (S&G), in which material haul truck drivers perform virtually identical off site driving work as their driver counterparts covered by the Construction Agreement.

ALJD 17:25-35. The ALJ incorrectly resolved the question whether Respondent changed the Construction Bargaining Unit's scope when it moved the off-site material haul drivers to the Ready Mix Bargaining Unit.

B. An employer cannot change the scope of a bargaining unit without the union's consent

An employer's proposal to transfer work out of the bargaining unit is often a mandatory subject of bargaining. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-11 (1964). But when positions are transferred (as opposed to some duties), the transfer affects the

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[2] Judge Litvack is not the first to acknowledge this challenge. See, e.g., Hill-Rom Co., Inc. v. NLRB, 957 F.2d 454, 458 (7th Cir. 1992) ("Distinguishing between a transfer of work and an alteration in the scope of the unit, however, is not an easy task."); Taylor Warehouse Corp., 314 NLRB 516, 527 (1994) (stating that "tension exists between permissive and mandatory subjects of bargaining when the unit is defined in terms of job assignments").

bargaining unit's scope and bargaining is permissive only. There is no obligation to bargain over the scope of an established bargaining unit. "It is clear that the scope of the bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed on by the parties." Hampton House, 317 NLRB 1005, 1005 (1995). "Accordingly, once a specific job has been included within the scope of the bargaining unit by either Board action or the consent of the parties, the employer cannot remove or modify the position without first securing the consent of the union or the Board." Id.; see also Wackenhut Corp., 345 NLRB 850, 852 (2005) (same). The employer cannot change a bargaining unit, even after bargaining to impasse. "The issue of impasse is not relevant where an employer has made a unilateral change of the bargaining unit, because such changes are not mandatory subjects of bargaining." Wackenhut Corp., 345 NLRB at 853 n.8.

The reasons why bargaining over unit scope if permissive are rooted in the Act's most basic purposes. "Adherence to a bargaining unit, once it is fixed, is central to Congress' purpose of stabilizing labor-management relations in interstate commerce." NLRB v. United Technologies Corp., 884 F.2d 1569, 1572 (2d Cir. 1989) (enforcing 292 NLRB 248 (1989)). The rule is also central to enabling employees to bargain collectively:

> The reason why the law disfavors unilateral changes in the unit description is as simple as it is fundamental: if an employer could vary unit descriptions at will, it would have the power to sever the link between a recognizable group of employees and its union as the collective bargaining representative of these employees. This in turn would have the effect both of undermining a basic tenet of union recognition in the collective bargaining context and of greatly complicating coherence in the negotiation process.

Hill-Rom Co., Inc., 957 F.2d at 457 (internal citations omitted). "If [the scope of the bargaining unit] were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees' guaranteed right to

representatives of their own choosing." The Idaho Statesman v. NLRB, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988).

C. The Employer moved the drivers to the Ready Mix Bargaining Unit in order to reduce their wages and benefits and prevent them from bargaining with other employees in the Construction Bargaining Unit

The central facts are not in dispute. Until October 2010, off-site material haul work (i.e. hauling construction material from the Sloan Quarry to construction sites) was performed by drivers in the Construction Bargaining Unit. In October, Respondent moved those jobs to the Ready Mix Bargaining Unit. Nothing else changed. The same drivers continued to do the work, and they continued to be employed by Respondent (not a subcontractor). The drivers performed the work in the same location, with the same trucks, and using the same procedures. The only thing that changed was the bargaining unit to which they belonged and the collective bargaining agreement that covered their work. Respondent's motive for transferring these positions to the Ready Mix Bargaining Unit is also undisputed. Combined wages and benefit fund contributions are between $ 8.77 and $9.58 per hour lower under the Ready Mix Agreement than under the Construction Agreement, and Respondent wanted to pay the drivers lower wages and benefits. Respondent sought to accomplish this by severing their relation to the Construction Bargaining Unit. These facts make the question whether the Respondent transferred work or changed the scope of the bargaining unit an easy case.

1. The drivers who performed off-site material haul jobs are no longer in the Construction Bargaining Unit

"[T]he scope of the bargaining unit is determinative of what employees the unit represents." Boise-Cascade Corp. v. NLRB, 860 F.2d 471, 474-75 (D.C. Cir. 1988) (enforcing 283 NLRB 462 (1987)). The scope of a bargaining unit is changed when the employer removes a position from the bargaining unit so that the employees filling that position are no longer in the

same bargaining unit. Wackenhut Corp., 345 NLRB at 852-53 n.7 (stating that employer altered bargaining unit by eliminating positions in the bargaining unit); Hampton House, 317 NLRB at 1005 ("[O]nce a specific job has been included within the scope of the bargaining unit by either Board action or the consent of the parties, the employer cannot remove or modify the position without first securing the consent of the union or the Board."); Paramount Liquor Co., 307 NLRB 676, 682, 686-87 (1992) (holding that the transfer of spotter/loader position from one bargaining unit to another changed the bargaining unit's scope, and rejecting the employer's argument that this transfer constituted a permissible work assignment change); United Technologies Corp., 292 NLRB 248, 249 & n.9 (1989), enf'd 894 F.2d 1569 (2d Cir. 1989) (holding that employers violate the act when they "replace bargaining unit jobs with nonunit positions or transfer substantial groups of employees out of the unit").

Here, there were approximately sixty drivers in the Construction Bargaining Unit who hauled material to construction sites. Those sixty positions have been removed from the Construction Bargaining Unit. This cannot be characterized merely as a transfer of some duties because the change required the transfer of sixty employees who performed this work. The scope of the Construction Bargaining Unit has been changed because the off-site material haul drivers no longer bargain collectively with other employees in the Construction Bargaining Unit.

The ALJ concluded that the material haul driver position was not eviscerated because some material haul drivers continue to work in the Construction Bargaining Unit. It is true that the Respondent did not transfer the drivers who haul materials on construction sites (as opposed to the off-site material haul drivers), but an employer changes the scope of a bargaining unit when it transfers even one position out of the bargaining unit. Facet Enterprises, Inc., 290 NLRB 152 (1988).

2. The off-site material haul drivers do the same work that they did when they were in the Construction Bargaining Unit

"Where the duties of the newly-designated out of unit employees are substantially similar to those of the unit employees, the transfer may be a sham and consequently subject the employer to liability under Section 8(a)(5)." Facet Enterprises, Inc. v. NLRB, 907 F.2d 963, 976 (4th Cir. 1990) (enforcing 290 NLRB 152 (1988)). In Facet Enterprises, an employer improperly changed the scope of a bargaining unit when it moved a bargaining unit employee's duties to a new non-unit supervisory classification and transferred the bargaining unit employee to that classification. The Board rejected the employer's attempt to characterize this change as a mere transfer of work. 290 NLRB at 152.

Here, the off-site material haul drivers continue to do the same work in the same location and in the same way. Nothing has changed other than the wage and benefit rates, and the bargaining unit to which they belong.

3. The same employees continue to do the off-site material haul work

When the same employees continue to do the work, the Board rejects attempts by employers to characterize the change merely as a transfer of work. Beverly Enterprises, Inc., 341 NLRB 296, 296 (2004) ("[T]he Respondent did not transfer work to nonunit employees. The same employees continued to do the work. The Respondent attempted to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit."); Facet Enterprises, Inc., 290 NLRB 152 (1988), enf'd 907 F.2d 963 (4th Cir. 1990) (holding that bargaining unit scope changed when employer transferred work to newly-created supervisory position, and then transferred bargaining unit employee who did work to supervisory position); Bay Shipbuilding Corp., 263 NLRB 1133, 1140-41 (1982), enf'd 721 F.2d 187 (7th Cir. 1983) (holding that employer violated Section

8(a)(5) when it established a new department outside of the unit and transferred bargaining unit employees and their work to that unit).

Here, the same individuals continue to work as drivers to do the off-site material haul work. Respondent requested that the Union dispatch these employees to it under the Ready Mix Contract and then offered the work directly to the employees.

4. Respondent continues to perform the work with its own employees

The Respondent might rely on cases in which the employer transferred work to another employer through subcontracting. That case law does not resolve the question whether the transfer constituted a change in the scope of the bargaining unit because, when work is transferred to a different employer, the Board does not have to grapple with the distinction between transferring work and changing the bargaining unit's scope. There are two reasons for this.

First, when an employer transfers jobs to another employer, the scope of the bargaining unit that previously performed that work remains the same. Even after work is subcontracted, the positions previously filled by employees who performed the subcontracted work remain in the bargaining unit. The positions are simply unfilled. If the employer later ceases subcontracting the work and resumes doing the work in-house, bargaining unit employees once again will perform the work. F&A Food Sales, 325 NLRB 513, 513 (1998), enf'd 202 F.3d 1258. 1262 (10th Cir. 2000) (holding that work remains in the bargaining unit even after employer subcontracts work, and when employer ceases subcontracting, it must continue to recognize union as the representative of employees who perform that work); Lockheed Martin Tactical Aircraft Systems, 331 NLRB 1407, 1407-08 (2000) (holding that work remains part of bargaining unit even after employer transfers work to nonunit employees). This cannot be true

when an employer, like Respondent here, simply transfers the positions out of the bargaining unit, but continues to fill the positions with its own employees in a different bargaining unit. The same positions cannot be in two different bargaining units of the same employer. Boise Cascade Corp. v. NLRB, 860 F.2d 471, 476 (D.C. Cir. 1988) (stating that it is "improper under the Act" to treat multiple unions as "joint representatives of the mass of employees, with none of them having status as the exclusive representatives of any particular group"). "Exclusive representation" is a fundamental tenet of the Act.

Second, an employer can move jobs to a subcontractor in order to reduce labor costs but it cannot move jobs out of the bargaining unit without subcontracting in order to reduce labor costs. In Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) the Supreme Court held that a decision to subcontract bargaining unit work is a mandatory subject of bargaining if the decision turns on labor costs. Id. at 213. In his often-quoted concurring opinion, Justice Stewart explained that "[n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control." Id. at 409. Thus, an employer may subcontract work even though the union matches the subcontractor's labor costs if the employer's decision to subcontract is motivated by some other entrepreneurial considerations. For example, the employer may subcontract work simply because it does not want to be the employer. The same is not true when an employer moves positions out of a bargaining unit but continues to employ individuals to do the same work in the same way in nonunit positions (either as part of another bargaining unit or in no bargaining unit).

The decision whether employees are in one bargaining unit, or another bargaining unit, or no unit at all, is not a "managerial decision[] which lie[s] at the core of entrepreneurial control."[3]

5. Transferring jobs out of the bargaining unit in order to reduce labor costs is an evasion of the duty to bargain

If the employer seeks to reduce labor costs as Respondent did here, the employer can bargain about the wages and benefits paid to employees in the existing bargaining unit. Transferring of the jobs out of the bargaining unit is an evasion of the duty to bargain. Respondent claims that its sole objective in transferring the off-site material haul drivers from the Construction Bargaining Unit to the Ready Mix Unit was reducing wage and benefit rates. Respondent was entitled to pursue that objective in bargaining for a new Construction Agreement.[4] What the Respondent did instead -- transfer the off-site material haul driver positions to the Ready Mix Bargaining Unit -- was an evasion of the duty to bargain. Fibreboard Paper Prods., 379 U.S. at 224-25 (concurring opinion of Justice Stewart) (stating that "if the employer had merely discharged all of its employees and replaced them with others willing to work on the same job in the same plant without the various fringe benefits so costly to the company" then "it would be equally possible to regard the employer's actions as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of its duty to bargain on these questions").

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[3] This is not the only circumstance in which Board law treats transfers of work to a different employer differently from transfers of work to nonunit employees of the same employer. SFX Target Center Arena Management, 342 NLRB 725, 725 n.3 (2004) (observing that while a successor employer can transfer work to subcontractors, an employer cannot unilaterally decide that the incumbent union can no longer bargain on behalf of categories of its own employees).

[4] In fact, in bargaining for a successor Construction Agreement, Respondent proposed to cut wages by 25 percent. TR 361-62; CP 1.

If Respondent's conduct were lawful, then every employer could eviscerate every bargaining unit without making any changes in how it does business simply by moving work to nonunit positions after bargaining to impasse over its proposal to move the jobs out the bargaining unit.

II. The Respondent unilaterally transferred work from the Construction Bargaining Unit to the Ready Mix Bargaining Unit in violation of Section 8(a)(5)

A. The ALJ's Decision

The ALJ concluded that Respondent did not violate its bargaining duty when it transferred the material haul work, and gave three related reasons for this conclusion. First, he decided "as of October 11, the parties were at impasse over Respondent's stated desire to have its offsite material hauling performed by drivers working under the terms and conditions of employment established by the Ready-Mix Agreement." ALJD 18:23-26. Next, the ALJ concluded that the Union waived its right to bargain over implementation of the planned transferred to the Ready Mix Bargaining Unit:

> [A]ssuming the parties had failed to meaningfully bargain to impasse, I also think the Union waived its right to bargain regarding implementation of Respondent's plan to transfer its off-site material hauling work from drivers in the Construction Agreement bargaining unit to drivers in the Ready-Mix Agreement bargaining unit. In this regard, on September 30, Dey rebuffed Respondent's offer to bargain regarding the latter's continuation of employment offers for the former SNP material haul drivers – an offer to bargain which, I think Dey understood, would have opened the entire transfer of work issue for discussion. Then, on October 5, four days after Stewart had informed the former SNP material haul drivers regarding Respondent's terms for them to remain employed by Respondent, he formally provided notice to the Union that the drivers' new terms and conditions of employment, which included working pursuant to the Ready-Mix Agreement, would be implemented on October 11. Notwithstanding having, at least, six days notice prior to implementation by Respondent, presumably bent upon maintaining its legal position regarding the transfer of the driving work, the Union failed to request bargaining, and Respondent implemented its announced change on October 11.

ALJD 19:4-20. Finally, the ALJ decided that the *fait accompli* doctrine was inapplicable. He stated that there was sufficient time between July 9 and October 11 for bargaining, and the Union waived bargaining by not requesting that the Respondent bargain:

> [T]he Union had in excess of 90 days in which to bargain over Respondent's stated desire to have its material hauling work performed by its drivers working under the terms of the Ready-Mix Agreement and, at most, ten and, at least, six days in which to demand bargaining prior to Respondent's implementation of its continuation of employment offers to its material haul drivers, by which Respondent effectuated the transfer of its material hauling work, and, other than protesting, and failed to do so.

ALJD 19:39-20:1. Based on this analysis, the ALJ recommended dismissal of paragraphs 7(a), 7(b) and 7(d) of the Complaint. ALJD 20:13-15, 20:17-21:3, 21:48-22:4.

B. The Respondent presented its decision to transfer material haul work to the Ready Mix Bargaining Unit as a fait accompli[5]

1. The fait accompli doctrine

There is no duty to bargain when an employer presents the union with a decision that it has already made. "The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter." Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 1017 (1982). But "if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli.*" Id. (emphasis added). Two consequences follow from an employer's presentation of a *fait accompli* to the union. First, if the union fails to request bargaining upon being presented with a *fait accompli*, the union does not waive its right to bargain. This is

[5] In Section II, we assume, solely for the sake of argument, that the change constituted a transfer of work and not a change to the bargaining unit's scope.

logical. The union is not required to demand bargaining when the employer has resolved to act without bargaining or regardless of bargaining. St. Anthony Hospital Systems, 319 NLRB 46, 46 (1995). Cf. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (holding that the waiver of a right under the Act will not be found in the absence of clear and unambiguous evidence to such effect). Second, "no impasse is possible where an employer presents the union with a '*fait accompli*' as to a matter over which bargaining to impasse is required." Castle Hill Health Care Center, 355 NLRB No. 196, at slip op. 34 (2010) (citing Dorsey Trailers, Inc., 327 NLRB 835, 858 (1999)).[6]

Here, the ALJ considered only one of the ways in which the *fait accompli* doctrine comes into play. As the Board has repeatedly stated, the *fait accompli* doctrine applies either "when the notice is too short a time before implementation or because the employer has no intention of changing its mind." Ciba-Geigy Pharmaceuticals, 264 NLRB at 1017. The ALJ concluded that there was sufficient time between the July 9 announcement and the October 11 implementation for bargaining to have occurred, but did not consider whether the Respondent had any intention of changing its mind.

2. There is no objective evidence that Respondent had any intention of changing its mind about the planned transfer of work to the Ready Mix Bargaining Unit

At the July 9 meeting Respondent's Vice President and Regional Counsel Sean Stewart informed Union representative Wayne Dey of Respondent's decision "to move the drivers from

[6] As a factual matter, the Union and Respondent did not bargain to impasse about Respondent's decision to transfer the work because they did not bargain about the decision at all. The Union and the Respondent did communicate, albeit briefly, about Respondent's desire to keep the same drivers who had been working under the Construction Agreement and about a transition wage rate for the transferred drivers, but they did not bargain about the threshold decision to transfer the work.

the Construction Agreement to the Ready-Mix Agreement" and characterized this decision as definite and unalterable. There is no dispute about this fact. Stewart was the only witness to testify about what he said in the July 9 meeting, and Counsel for the General Counsel asked Stewart directly how he presented the decision to the Union:

> Q: Okay. And during this July 9th meeting, you told Wayne Dey that the Company was considering moving the material haulers from the Construction Agreement over to the ReadyMix Agreement?
>
> A: I informed Wayne that we were going to move them and the main purpose of our meeting was to discuss whether we could keep our own drivers. When I say our own, we wanted to keep the drivers we had.
>
> Q: But that wasn't my question. You told him at that meeting – did you tell him you were moving them or you were considering moving them?
>
> A: We were going to move them.

TR 83:16-84:1. Stewart emphasized this fact repeatedly throughout his testimony:

> WITNESS: I explained to Wayne that we were moving to Aggregate Industries as a name and we would have separate divisions that would operate construction and operate ReadyMix and rock, sand and gravel, but it would be under one name. I told him I'd get him some definite dates on when that would happen, but it was kind of up to the entity system. We had to go through the secretary of state and the contractor's board and other entities that license us.
>
> I then asked Wayne if he was aware we had a rock, sand and gravel and ReadyMix agreement and told him we were planning to move these trucks that we were bringing back to town under the rock, sand and gravel agreement.

TR 457:5-17.

> WITNESS: No, there --- the only proposal that had been on the – we hadn't even proposed. We had just talked to Wayne about the fact that we were going to transfer trucks to rock, sand and gravel and we wanted to man them with our existing drivers, if possible.

TR 464:7-11.

> WITNESS: No, we wanted to know – we were going to transfer the trucks. We wanted to know if we could keep our same drivers and if there was a way to keep our same drivers, which we anticipated we'd have to lay them off and we were hoping we could call them by name and bring them across that way.

TR 465:16-21. Stewart also reiterated this position in writing to the Union on August 13, 2010:

> In conjunction with the name changes, Aggregate Industries SWR., Inc. will be adjusting the size an application of its trucking fleet to meet market demand. Material deliveries for the company will be performed by Teamster employees under the rules of the rock, sand and gravel collective bargaining agreement. . . . Mike Kuck, the company's trucking manager, will be in contact with you within the next few days to sort the dispatch of Teamster truck drivers for our material delivery trucks.

GC 18.

Stewart's testimony and August 13 letter are objective and undisputed evidence that the Respondent had no intention of changing its mind about its plan to transfer material haul work was a *fait accompli.*

3. The change to material haul work was necessarily a fait accompli because Respondent took the position that it had no duty to bargain over the change

The Respondent does not argue that it was open to changing its mind. This is not surprising because the Respondent's primary argument was that it had secured the Union's agreement to transfer this work when it bargained for the Ready Mix Agreement in 2008 and was merely implementing the 2008 decision in 2010. As a result, Respondent contended that it had no duty to bargain again over the issue in 2010.[7]

When an employer denies that it has a duty to bargain over a change, its notice to the Union of the change is necessarily a *fait accompli.* The decision in Westinghouse Elec. Corp., 313 NLRB 452 (1993) demonstrates this point well. There, the employer decided to consolidate work being performed in two different buildings and layoff employees. The employer did not believe that it had a duty to bargain with the union about its decision to consolidate work and as a result did not do so. The Board rejected the employer's position and held that there was a duty to bargain. The employer then argued in the alternative that "the Union waived its right to

[7] The ALJ rejected this argument. ALJD 16:34-52 (n.44).

bargain by failing to request bargaining in the nearly two-month period between disclosure of the Respondent's plans and the implementation of those plans." Id. at 453. The Board rejected that defense because the employer presented the decision as a *fait accompli*:

> [T]he Respondent's labor officials clearly indicated their view that the decisions involved here were matters solely within management's discretion and not subject to collective bargaining. In these circumstances, it would have been futile for the Union to make a formal request for bargaining about a decision which was effectively presented as a *fait accompli*. We therefore find that the Respondent violated Section 8(a)(5) by failing to bargain with the Union about the decision to transfer work from the West Building Calibration lab to the East Building lab and to lay off four employees who had been performing the work in the West Building.

Id. The decision in McDonnell Douglas Aerospace Services, 326 NLRB 1391 (1998) follows this same principle. There, a *fait accompli* was found because "Respondent and the Union agreed their dispute involved a legal question and they disagreed on the answer, which effectively foreclosed bargaining on Respondent's decision to make the unilateral change in terms and conditions of employment." Id. at 1391 n.2, 1395.

The decisions in Westinghouse Electric and McDonnell Douglas Aerospace are all fours with this case. Just as the Board rejected the employer's waiver defense in Westinghouse Electric as inconsistent with the employer's position that it had no duty to bargain, the Board should reject Respondent's identical argument here and find that the *fait accompli* doctrine precludes any waiver.

4. The Union did not waive bargaining about the transfer of material haul work by failing to bargain about Respondent's desire to transfer the individual material haul drivers

The ALJ found that "on September 30, [Union representative Wayne] Dey rebuffed Respondent's offer to bargain regarding the latter's continuation of employment offers for the former SNP [Southern Nevada Paving] material haul drivers – an offer to bargain which, I think

Dey understood, would have opened the entire transfer of work issue for discussion." ALJD 19:10-13. There is no support in the record for either finding encompassed in this sentence.

There is nothing to suggest that taking up the Respondent's September 30 offer to bargain "would have opened the entire transfer of work issue for discussion." This is also not a logical inference given Respondent's position that it had no duty to bargain about the decision to transfer the work (as opposed to Respondent's desire to continue to employ the same drivers to do the work). Nor is there any evidence to support the ALJ's conclusion that Union representative Wayne Dey "understood" that this might transpire. Dey did not testify and no one else testified about anything Dey said about his subjective understanding. As a result, there is no basis for the ALJ's finding about what Dey "understood."

CONCLUSION

For all of the foregoing reasons, the Board should find merit to the Charging Party's exceptions and reverse the Judge's dismissal of paragraphs 7(a), (b) and (d) of the Complaint. The Board should order Respondent to restore the material haul work to the Construction Bargaining Unit and make the drivers whole for lost wages and benefits.

DATED: August 1, 2011

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PROOF OF SERVICE

Aggregate Industries and Teamsters, Chauffeurs, et al.
Case Nos. 28-CA-23220 and 28-CA-23250 (consolidated)

I, Jamie Cantwell, declare that I am employed with the law firm of Davis, Cowell & Bowe, LLP, the address of which is 595 Market Street, Suite 1400, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On August 1, 2011, I served the attached the following documents:

1.) **Charging Party's Exceptions to the Decision of the Administrative Law Judge; and**

2.) **Charging Party's Brief in Support of Exceptions to the Decision of the Administrative Law Judge**

in this action as follows:

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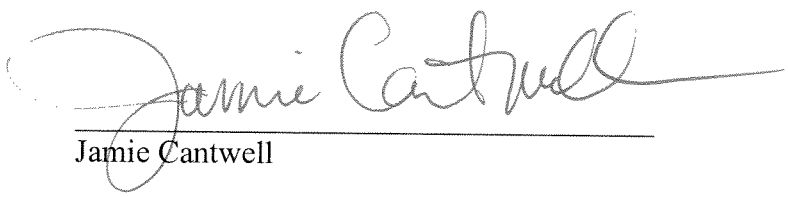
[X] **BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, jcantwell@dcbsf.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 1, 2011, at San Francisco, California.



Jamie Cantwell