

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AGGREGATE INDUSTRIES

and

**Cases 28-CA-23220
28-CA-23250**

**TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS,
LOCAL 631, affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Table of Contents

- I. FACTS 2
 - A. Respondent’s Operations and its Various Subsidiaries..... 2
 - B. Respondent’s Subsidiaries and their Collective-Bargaining Relationship with the Union..... 4
 - 1. Construction Industry Contract with the Teamsters..... 4
 - 2. Union’s Certification at Regal Ready-mix..... 5
 - 3. Negotiations for a Ready-Mix Agreement. 6
 - 4. The Parties’ Post Negotiation Relationship. 10
 - 5. July 9, 2010 Meeting Between Respondent and the Union. 12
 - 6. Respondent’s October 1, 2010 Meeting with Drivers..... 15
- II. ARGUMENT 18
 - A. The ALJ Erred by Refusing to Find that Respondent Unlawfully Changed the Scope of the Unit [Exception No. 1]..... 18
 - B. The ALJ Erred in Finding that Respondent Bargained to Impasse Over the Change in the Assignment of Work, That the Union Waived its Right to Bargain, or that the Change was Not Presented as a Fait Accompli [Exception No. 2] 23
 - C. The ALJ Erred in Refusing to Find that Respondent Engaged in Direct Dealing with Unit Employees [Exception No. 3] 27
 - D. The ALJ Erred in Failing to Analyze the General Counsel’s Arguments Regarding Respondent’s Defenses [Exception No. 4] 29
 - 1. If Any Legal Significance is Given to Respondent’s August 2010 Amalgamation then an Accretion Occurred, and the Construction Unit is the Appropriate Unit. 29
 - 2. If There Is No Accretion, Respondent Must Preserve the Status Quo. 31
- V. CONCLUSION 31

Table of Authorities

<i>Allied-Signal, Inc.</i> , 307 NLRB 752 (1992)	27
<i>NLRB v. Bay Shipbuilding Corp.</i> , 721 F.2d 187 (7th Cir. 1983)	18, 22
<i>Bay Shipbuilding Corp.</i> , 263 NLRB 1133 (1982) enfd. 721 F.2d 187 (1983).....	19
<i>Beverly Enterprises, Inc.</i> , 341 NLRB 296 (2004).....	20
<i>Borden Inc.</i> , 308 NLRB 113 (1992) enfd. 19 F.3d 502 (10th Cir. 1994).....	31 n 29, 31
<i>Bozzuto’s, Inc.</i> , 277 NLRB 977 (1985).....	18
<i>Burrows Paper Corporation</i> , 332 NLRB 82 (2000).....	24, 25, 26
<i>Central Soya Co., Inc. v. NLRB</i> , 867 F.2d 1245 (10th Cir. 1988)	30
<i>Dayton Newspapers</i> , 339 NLRB 650 (2003)	28
<i>Facet Enterprises, Inc. v. NLRB</i> , 907 F.2d 963 (10th Cir. 1990)	22
<i>Hill-Rom Co., Inc. v. NLRB</i> , 957 F.2d 454 (7th Cir. 1992)	18, 19, 23
<i>Hilton’s Environmental, Inc.</i> , 320 NLRB 437 (1995)	27
<i>Idaho Statesman</i> , 281 NLRB 272 (1986).....	21
<i>Laro Maintenance Corp.</i> , 333 NLRB 958 (2001)	25
<i>McDonnell Douglas Corp.</i> , 312 NLRB 373 (1993).....	23
<i>Mount Hope Trucking Co.</i> , 313 NLRB 262 (1993)	28
<i>Newcor Bay City</i> , 345 NLRB 1229 (2005)	24
<i>Newport News Shipbuilding v. NLRB</i> , 602 F.2d 73 (4th Cir. 1979)	22
<i>Newport News Shipbuilding</i> , 236 NLRB 1637 (1978)	21
<i>Paramount Liquor Co.</i> , 307 NLRB 676 (1992).....	20
<i>Ryder Integrated Logistics</i> , 329 NLRB 1493 (1999).....	29
<i>SFX Target Center Arena Mgt. LLC.</i> , 342 NLRB 725 (2004).....	21
<i>Smith’s Complete Market</i> , 237 NLRB 1424 (1978).....	27
<i>NLRB v. Southwestern Bell Telephone Co.</i> , 730 F.2d 166 (5th Cir. 1984).....	28
<i>Taylor Warehouse Corp.</i> , 314 NLRB 516 (1994)	18, 19
<i>NLRB v. Texaco Inc.</i> , 659 F.2d 124 (9th Cir. 1981)	28
<i>The Idaho Statesman v. NLRB</i> , 836 F.2d 1396 (DC Cir. 1988).....	21
<i>The Wackenhut Corp.</i> , 345 NLRB 850 (2005)	20
<i>NLRB v. United Technologies Corp.</i> , 884 F.2d 1569 (2d Cir. 1989).....	18
<i>United Technologies Corp.</i> , 292 NLRB 248 (1989) enfd. 884 F.2d 1569 (2d Cir. 1989).....	19
<i>NLRB v. Wooster Div. of Borg-Warner Corp.</i> , 356 US 342 (1958)	18
<i>U.S. Utilities Corp.</i> , 254 NLRB 480 (1981)	28

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge Burton Litvack, [JD(SF)-13-11] (ALJD), issued on June 6, 2011, in the above captioned cases.¹ As set forth in the General Counsel's Exceptions, filed under separate cover, the General Counsel excepts to the following findings of the Administrative Law Judge (ALJ): (a) the ALJ's failure to find that Respondent's actions constituted a change in the scope of an established unit; (b) the ALJ's finding that Respondent bargained to impasse; (c) the ALJ's holding that the Union waived its right to bargain; (d) the ALJ's decision that Respondent's proposal to the Union was not presented as a fait accompli; (e) the ALJ's failure to find that Respondent engaged in direct dealing; and (f) the ALJ's failure to analyze the General Counsel's arguments regarding Respondent's

¹ Aggregate Industries will be referred to as "Respondent." The Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, will be referred to as "Union." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel, Respondent, and the Charging Party's Exhibits will be referred to as (GC.), (R.), and (CP.), respectively with the appropriate exhibit number. All dates are in 2010, unless otherwise stated.

defenses. In all other respects, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence. These include findings that Respondent violated the Act by: (a) bypassing the Union and dealing directly with sweeper truck drivers regarding their terms and conditions of employment; (b) unilaterally assigning the sweeper truck driving work to employees covered by a bargaining unit represented by another union; and (c) unilaterally changing the terms and conditions of employment of the sweeper truck drivers.

I. FACTS

A. Respondent's Operations and its Various Subsidiaries.

Respondent Aggregate Industries, a Delaware corporation, is a subsidiary of the Holcim Group, a Swiss based worldwide supplier and manufacturer of concrete, construction, and building materials. Respondent started operating in the Las Vegas market by purchasing several long-standing Nevada companies, in different construction-related sectors. In 2003 Respondent purchased the operations of Southern Nevada Paving, Inc., (Southern Nevada Paving) a Las Vegas area paving and grading business. After the purchase, Southern Nevada Paving continued performing the same work, and operated as a separate legal entity under its own name, until August 2010, when all of Respondent's separate Las Vegas area subsidiaries were consolidated into a single name, Aggregate Industries-SWR, Inc. (ALJD at 3-4)

In May 2004, Respondent purchased the operations of Frehner Construction Company, Inc., (Frehner) a construction company specializing in building major public projects such as dams, highways, and bridges. (ALJD at 3) Frehner was also the owner of a quarry located in Sloan, Clark County, Nevada (Sloan Quarry or Quarry) (GC. 10, 38) At the Sloan Quarry, aggregate materials are mined, and then rock is processed through various crushers and screens to create different size aggregate. (ALJD at 3)

After the purchase, Frehner continued to own a one-half interest in the Sloan Quarry, through an entity called Sloan Quarry LLC, which Frehner owned. (Tr. 53, 487-88; GC. 38) The other half of the Quarry was owned by Aggregate Industries-WCR, a Colorado corporation.² (ALJD at 3) After the acquisition, Frehner continued performing the same work, and operated as a separate legal entity under the Frehner name, until August 2010. (ALJD at 3) As a construction company, Frehner did not transport building materials, but relied upon Southern Nevada Paving, or outside contractors. Traditionally, neither Frehner nor Southern Nevada Paving performed any ready-mix work. (ALJD at 5, n. 8)

In May 2004, Respondent purchased Regency Ready-Mix, a Las Vegas area ready-mix company with a batch plant and operations in Summerlin, Nevada. (ALJD at 3) At the time of the purchase, Respondent created a separate Nevada corporation called Regal Materials, Inc., (Regal or Regal-SNR) to own Regency.³ (ALJD at 3; Tr. 60) Regal's Summerlin batch plant closed in February 2008, but was reopened later that same year. In March or April 2008, Regal also started constructing a batch plant on the grounds of the Sloan Quarry, and in December 2008 opened a batch plant in North Las Vegas, known as the Delhi batch plant.⁴ During this time, Regal decided to become a major player in the local ready-mix industry, and in mid-2008 started operating its ready-mix operations under the fictitious trade-name of Southern Nevada Ready Mix.⁵ Although they were all subsidiaries of Respondent,

² The Union believed that the Sloan Quarry was owned by Bardon Materials. (Tr. 331) In fact, Bardon Materials was a trade-name used by Respondent to operate the Sloan Quarry, and was an internal designation of Respondent's materials division. (Tr. 386-87)

³ Another company purchased by Respondent at the same time, Bradstone Pavers, was also owned by Regency. Bradstone manufactured decorative pavers and blocks for driveways, roads, and highways. (Tr. 60-61, 179)

⁴ The Summerlin, Sloan, and Delhi batch plants are all located in Clark County, Nevada. (Tr. 505)

⁵ Southern Nevada Ready Mix was a d/b/a of Regal Materials (Tr. 65, 173, 484, 507-08). In April 2009, Frehner filed a notice with the County Clerk of Clark County, Nevada, indicating that it was doing business as Southern Nevada Ready Mix. (R. 15) However, this was nothing more than a paper transaction. (GC. 175)

Frehner, Southern Nevada Paving, and Regal, all bid for jobs separately, under their own company names. (ALJD at 4)

On August 7, 2010, Southern Nevada Paving and Regal were merged into Frehner; on the same date, Frehner changed its name to Aggregate Industries-SWR. (ALJD at 4) Then, on August 30, Southern Nevada Ready Mix was registered as a d/b/a of Aggregate Industries-SWR. (Tr. 86-87) In October 2011, Respondent started transferring its vehicle titles from the various subsidiaries over to Aggregate Industries-SWR, and putting new logos on the doors of its trucks; however, up through the hearing date, some trucks were still registered to Southern Nevada Paving. (Tr. 501-503; GC. 39, 40; ALJD at 4)

Even though the firms were now operating under Aggregate Industries-SWR name, through the date of the hearing, Respondent's website continued listing Southern Nevada Paving, Frehner, and Southern Nevada Ready Mix, as separate operating divisions of Respondent. Moreover, Stewart testified that he had filed the requisite documents preserving the distinct firm names for future use, and Respondent retained the fictitious firm names (d/b/a's) for Frehner, Southern Nevada Paving, and Southern Nevada Ready Mix, all owned by Aggregate Industries-SWR. (ALJD at 4)

B. Respondent's Subsidiaries and their Collective-Bargaining Relationship with the Union.

1. Construction Industry Contract with the Teamsters.

The Union has a long history of representing employees at Frehner and Southern Nevada Paving, under the terms of a Master Labor Agreement (MLA or Construction Contract). From their inception, and since at least 1994 for both, Frehner and Southern Nevada Paving have been signatories to the Construction Contract with the Union

(Construction Unit).⁶ (Tr. 526, 545; GC. 37; ALJD at 4) For at least the past ten years, both Frehner and Southern Nevada Paving have been members of the Association of General Contractors (AGC), a multiemployer association of construction contractors; the AGC negotiates the terms of the Construction Contract with the Union, on behalf of its members. (Tr. 544) The AGC and its associated members have been signatory to a Construction Contract with the Union for at least 30 years.⁷ (Tr. 545) The terms of the most recent Construction Contract, to which both Frehner and Southern Nevada Paving were signatories through their membership in the AGC, ran from July 1, 2007 through June 30, 2010. (ALJD at 5-6; GC. 2) Negotiations for a successor MLA started in the late spring/early summer of 2010, and were ongoing as of the date of the hearing. On their own, both Frehner and Southern Nevada Paving have actively participated in negotiations for a successor Construction Contract. (Tr. 82, 361-62, 527; CP. 1)

2. Union's Certification at Regal Ready-mix.

In 2006, the Union was certified as the collective-bargaining representative of the drivers and mechanics at Regal (Ready-Mix Unit). (ALJD at 3) After about a year of bargaining, with no agreement having been reached, Regal employees filed for a decertification election, which the Union won by a vote of 9 – 7. (ALJD at 3-4; GC. 6) At the time of the decertification vote, Regal employed approximately 18 workers, one mechanic and 17 ready-mix/bubble-truck drivers. (Tr. 63; GC. 5)

⁶ Frehner was incorporated in 1970. (GC. 37; Tr. 486) The record does not indicate the year in which Southern Nevada Paving was incorporated.

⁷ In the past, sometimes Frehner would sign the MLA negotiated by the AGC, and other times it would sign its own separate agreement with similar terms. (ALJD at 4 n. 5; Tr. 58-59)

3. Negotiations for a Ready-Mix Agreement.

The December 2007 certification prompted another round of negotiations with the Union, which ultimately resulted in a collective-bargaining agreement (Ready-Mix Agreement), dated July 11, 2008.⁸ (ALJD at 9; GC. 3) At the time negotiations started, Regal owned ten ready-mix/bubble-trucks, but had closed its Summerlin batch plant in February 2008, and laid off all of its drivers. (Tr. 391-92) Notwithstanding, negotiations progressed, as Regal had started constructing a new batch plant at the Sloan Quarry, and opened the Delhi plant later that same year. (ALJD at 4-5; Tr. 389, 505) Although Regal was building a new batch plant at Sloan, Regal did not own the Sloan Quarry, and has never owned a quarry. (Tr. 329, 487-88, 507; GC. 38) Similarly, as a construction company, Southern Nevada Paving did not own any quarries or materials, but instead purchased materials from vendors. (ALJD at 7 n. 19, 8 n. 22; Tr. 416-17)

During negotiations for the Ready-Mix Agreement, the Union was primarily represented by its Business Agent Dewayne “Dewey” Darr, along with Secretary–Treasurer Wayne King; because of issues with his health, King did not participate in all the negotiating sessions. (Tr. 253-55) Regal was represented by its Vice President and General Counsel Sean Stewart, its Human Resources Director Steven Jensen, and Respondent’s Regional Vice President Pat Ward. (Tr. 256, 289-90) Stewart and Jensen held the same job titles for Regal, Frehner, and Southern Nevada Paving. (Tr. 369, 389) Stewart was the Vice President and General Counsel for Frehner, and has worked for Respondent since its 2004 purchase of Frehner. (ALJD at 6; Tr. 51)

At the start of bargaining, the Union asked Respondent what name would appear “on the door” of the employer’s operations; while the Board certification was with Regal, the

⁸ The term of Ready-Mix Agreement is from July 1, 2008 through May 31, 2012. (GC. 3)

Union knew that Regal was a subsidiary of Respondent. (Tr. 256-58) Respondent informed the Union that the name of the entity would be Southern Nevada Ready Mix, and the parties preceded with their negotiations accordingly, using the Southern Nevada Ready Mix designation for Regal. (Tr. 64-65; 256-58)

During the negotiations for the Ready-Mix Agreement, the parties agreed that nine “heavy haul” drivers, working at the Sloan Quarry would be covered by the Ready-Mix Agreement, starting January 1, 2009. (Tr. 257) These nine drivers operated large off-road trucks at the Sloan Quarry, and were previously employed under the Construction Contract through Frehner. The parties memorialized this agreement with a written Memorandum of Understanding (MOU). (ALJD at 6; Tr. 67-70; GC. 7, 11)

Along with setting forth the terms of employment for the bubble-truck drivers, the Ready-Mix Agreement also contains classifications and wage rates for two categories of transportation drivers, Transport Drivers (Bulk) and Transport Drivers (S&G), neither of which Regal-SNR operated at the time.⁹ (ALJD 6-7)

Regarding the classification of Transport Drivers (S&G), according to Darr, this classification would have allowed Regal-SNR to haul “plant mix” or “plant haul” from quarries to its batch plant, or from batch plant to batch plant.¹⁰ (ALJD at 7, 16 n. 44; Tr. 257-59, 262-63, 270-272, 320) This classification also appears in ready-mix contracts the Union has negotiated with other Las Vegas area ready-mix companies, and the Union wanted the Ready-Mix Agreement to mirror these other agreements.¹¹ (ALJD at 6; Tr. 272; R. 4, p. 30;

⁹ Transport Drivers (Bulk) referred to drivers who transport Portland cement powder from cement plants to ready-mix batch plants. (Tr. 261-65, 256, 307, 432; GC. 3, p. 29) Regal-SNR never operated bulk powder trucks, and this classification is not an issue in this matter. (Tr. 262-63)

¹⁰ Plant haul/plant mix refers to material (sand and rock) that is used at batch plants to create ready-mix concrete. (Tr. 327) Ready-mix concrete consists of aggregate rock, sand, water, and cement powder. (Tr. 431-32)

¹¹ The Union has ready-mix contracts with Cemex/Rinker and Las Vegas Ready Mix. (R. 4, 5) Both ready-mix agreements contain a classification similar to “Transport Driver (S&G).” (R. 4, p. 30; R. 5, p. 25; Tr. 534-35)

R. 5, p. 25) However, unlike the other ready-mix companies, who do not perform any construction work, Respondent owned various construction subsidiaries, which were signatory to the Construction Contract. (Tr. 538) Therefore, the Union was concerned that Respondent would try to dispatch workers under the Ready-Mix Agreement, and then use them to deliver materials to construction sites; work that was to be performed under the Construction Contract. (Tr. 273-74) While Regal-SNR did not operate any material delivery trucks, the trucks owned and operated by Southern Nevada Paving were “dual use” trucks, meaning they could be used on construction sites (“on-site” work) as well as for delivering material to batch plants or for stockpiling at construction sites, (“off-site” work). (ALJD at 7 n. 17, 8 n. 29; Tr. 256, 510; R. 6)

The Union wanted Respondent to make a clear distinction between its ready-mix and construction operations. It wanted to ensure that, if Regal-SNR was going to use trucks to transport plant mix, then: (1) the trucks belonged to Regal-SNR; (2) the trucks said Regal-SNR “on the door”; (3) the employees worked for Regal-SNR; and (4) the employees were dispatched pursuant to the Ready-Mix Agreement. (Tr. 198-99, 201, 272, 290-92)

At the time the Ready-Mix Agreement was being negotiated, Southern Nevada Paving was hauling plant mix to all of Regal-SNR’s batch plants under the terms of the Construction Contract. (Tr. 309-10) Darr noticed that sometimes Southern Nevada Paving trucks would sit idle at the Sloan Quarry; therefore, during negotiations he asked Ward why Respondent didn’t transfer these trucks to Regal-SNR to transport plant mix from the Quarry to its batch plants, or from batch plant to batch plant. (ALJD at 7; Tr. 258-59, 309, 332-34)

After Darr’s suggestion, Respondent had its accountants run the numbers, but decided not to devote any of its trucks to Regal-SNR. This would have required Respondent to

dedicate assets that were being used by Southern Nevada Paving, under the Construction Contract. Had Respondent dedicated trucks to Regal-SNR for hauling plant mix, because of the restrictions in the Construction Contract, these trucks could not be used to haul material to, or work on, construction sites for Frehner or Southern Nevada Paving, and the construction industry was busy in Las Vegas at the time.¹² (ALJD at 7-8; Tr. 134-35, 197-99, 403-04)

Ward told Darr that all of the material delivery trucks were being used for construction work. (Tr. 291-92) Darr then asked if Respondent was planning to use the Transport Driver (S&G) classification in the future. (Tr. 292) Ward replied that, if Regal-SNR was going to use trucks for material delivery in the future, these trucks would come from Colorado.¹³ (ALJD at 7) Ward specifically told Darr that Regal-SNR would not use any of the Southern Nevada Paving trucks for material hauling. (Tr. 334) Jensen told the Union that Regal-SNR did not have any trucks to haul material, and that any such material delivery would be covered by the terms of the Construction Contract.¹⁴ (Tr. 258-59)

With this understanding, the negotiations continued. At no time during the negotiations did the Union ever agree to allow Regal-SNR to operate trucks to deliver material to construction job sites and the ALJ properly credited Darr's testimony that the Union would never have allowed Regal-SNR to do so. (ALJD at 16 n. 44; Tr. 257, 273) The negotiations culminated with the signing of the Ready-Mix Agreement on July 11, 2008, and the finalizing of the MOU regarding the nine heavy-haul drivers at the Sloan Quarry a week later. (GC. 3, 11; R. 7-10)

¹² Pursuant to Article 4 of the Construction Contract, signatory contractors could subcontract hauling work to a non-signatory company only if all of their trucks were being used, and no other signatory contractor had any truck available to perform the work. (Tr. 306, 313, 498; GC. 3, p. 7-10)

¹³ Respondent's subsidiary Aggregate Industries-WCR, which was 50% owner of the Sloan Quarry, was a Colorado corporation. (ALJD at 3; Tr. 487-88, 507)

¹⁴ Darr's testimony as to what he was told by Ward and Jensen regarding this issue is un rebutted.

4. The Parties' Post Negotiation Relationship.

After the Ready-Mix Agreement was finalized, Regal-SNR started managing its various batch-plant operations pursuant to the terms of the Ready-Mix Agreement, using the Union's read-mix dispatch procedures. (Tr. 274) Conversely, Frehner and Southern Nevada Paving continued operating under the terms of the Construction Contract, under the Union's construction dispatch process. (Tr. 274-76) Although they used the Union's dispatch procedures, Frehner, Southern Nevada Paving, and Regal-SNR had a consistent group of long-term employees, and in general had the same employees working for them each day. (Tr. 73-74)

The difference in wage rates and benefits under the two agreements was significant, about thirty-percent. Under the Construction Contract, effective July 2009, drivers were paid anywhere from \$30.29 to \$31.28 per hour, depending on the type of truck they operated. (ALJD at 7 n. 16; GC. 2 p. 40-41) In addition, Construction Contract employers paid \$5.80 per hour in benefit fund payments, and \$0.65 per hour to a training trust. Conversely, during the same time period, under the Ready-Mix Agreement, rates designated for plant-haul drivers ranged anywhere from \$23.00 to \$24.80 per hour, depending upon the type of truck, along with \$4.16 per hour in benefit fund payments. (GC. 3, p. 29)

In January 2009, there was a change in administrations at the Union, and Wayne Dey took over Darr's position as Union Business Agent. When the dispatch request was made to transfer the nine Sloan Quarry heavy-haul equipment operators from the Construction Contract to the Ready-Mix Agreement on December 30, 2008, the new administration initially took the position that this transfer was not allowed. However, after researching the

matter, the Union realized it was mistaken, and dropped its objection to the transfer. (ALJD at 6 n. 14, 9 n. 25; Tr. 75-76, 100; GC. 7-8)

Respondent's construction industry revenues started declining in 2009, going from \$350 million in 2008, to \$280 million in 2009. Conversely, revenues from its ready-mix and materials operations were increasing. (ALJD at 9; Tr. 525-26, 450)

The Construction Contract was set to expire in June 2010. Southern Nevada Paving and Frehner decided to withdraw authority from the AGC to negotiate a successor agreement on their behalf, and on April 19, the two companies sent separate letters informing the Union accordingly. (GC. 12-13) On May 3, the Union replied, via separate letters to both, reminding the companies that the Union was the Section 9(a) bargaining representative of their Construction Unit employees, and that both companies had a continuing duty to bargain with the Union for a successor agreement. The Union also requested that both companies begin negotiations for a successor contract. (GC. 14, 15)

In June 2010, Southern Nevada Paving and Frehner began negotiations with the Union for a successor Construction Contract.¹⁵ (ALJD at 5; Tr. 82; GC. 16) During these negotiations, Southern Nevada Paving and Frehner submitted a joint proposal to the Union for terms of a successor agreement. (CP. 1) This proposal included a 25% decrease in the base wage rates for all employees covered by the Construction Contract, and no wage increases over the term of the agreement. (CP. 1) The proposal for a wage decrease covered all Construction Unit employees. (GC. 2, p. 40-41; CP. 1) During this time, Respondent had two major construction projects outside the Las Vegas area scheduled for completion, and

¹⁵ That negotiations for a successor Construction Contract started in June 2010, comports with the documentary evidence. In its letter to the parties, dated June 7, the FMCS notes that it has "recently been notified of your upcoming collective bargaining negotiations" and offers the parties the agency's assistance during negotiations. (GC. 16, 17) Therefore, it appears that successor negotiations did not begin until after June 7.

was concerned about finding ways to use its material delivery trucks when these projects finished. Also, in June 2010, Respondent had been approached by Cemex, one of its ready-mix competitors, about hauling plant mix to Cemex batch plants. Cemex traditionally picked up its material using its own trucks, and was exploring outsourcing this work to a third-party. (ALJD at 9; Tr. 450-53) Cemex hauled its plant mix under pay rates similar to those in the Ready-Mix Agreement, and it would have been too expensive for Respondent to propose subcontracting this work from Cemex under Construction Contract rates. (Tr. 452-53, 515; GC. 3, p. 29; R. 4, p. 30) To haul all of Cemex's plant mix, Respondent needed about 15 to 20 trucks.¹⁶ (ALJD at 9; Tr. 453)

5. July 9, 2010 Meeting Between Respondent and the Union.

On July 9, Respondent met with Union Business Agent Wayne Dey, at Respondent's office. Dey had called Stewart, asking if he could stop by the office to discuss a potential grievance involving Respondent using a third-party to perform material delivery work, while some Southern Nevada Paving trucks were idle. (ALJD at 10; Tr. 83, 454)

When Dey arrived for the meeting, he found Stewart along with five of Respondent's officials waiting.¹⁷ At the meeting Stewart told Dey that Respondent was going to move the material haul drivers from the Construction Contract to the Ready-Mix Agreement, and asked whether Respondent could keep their same drivers. Respondent then told Dey about their planned time-frame for this move, and said that Respondent was going to try to consolidate all of its subsidiaries under one name. (ALJD at 10-11; Tr. 83-84; 454-55)

¹⁶ Respondent and Cemex ultimately reached a subcontracting agreement, and as of the date of the hearing, Respondent was hauling about 50% of Cemex's plant mix. (Tr. 452)

¹⁷ Dey was never told that there would be a large group of Respondent's managers waiting for him at this grievance meeting. (Tr. 522)

Dey initially said that he did not think there was anything he could do to stop Respondent. He also told Stewart that, under the Union's ready-mix dispatch system, an employer cannot call-out specific employees by name. Dey further said that he needed to discuss this matter with Johnny Gonzales, the Union's Business Agent who oversees ready-mix operations. (ALJD at 10; Tr. 457-58, 461) This was the first time that Respondent had told the Union it was moving Construction Unit employees from the Construction Contract to the Ready-Mix Agreement. (Tr. 84-85) In fact, at no time between July 2008 and July 2010 had Respondent ever raised this issue with the Union. (Tr. 495-96)

On August 13, Dey called Stewart and told him that the Union was going to object to Respondent's plan to move drivers from the Construction Contract to the Ready-Mix Agreement. Dey further said that Respondent could not transfer trucks and staff them pursuant to the Ready-Mix Agreement because material delivery work had always been performed under the Construction Contract. (ALJD at 11; Tr. 92, 462-64)

After this conversation, that same day, Stewart sent a letter to the Union stating that Respondent was merging Southern Nevada Paving and Regal into Frehner, which would then change its name to Aggregate Industries-SWR, Inc. Furthermore, the letter informs the Union that, "in conjunction with the name change," material deliveries would be performed under the terms of the Ready-Mix Agreement. The Union replied to Stewart, by letter dated August 20, expressing the Union's willingness to meet with the company to discuss their reorganization, but affirmed the Union's position that material delivery is Construction Unit work, and may not be performed under any agreement other than the Construction Contract. (ALJD at 11; GC. 18, 20)

On September 24, Respondent faxed a dispatch request to the Union for 64 drivers, under four different job classifications, to work under the terms of the Ready-Mix Agreement, starting on September 28. (ALJD at 11; Tr. 113; GC. 24) Until then, the drivers operating the trucks requested by Respondent had all worked in the Construction Unit, under the terms of the Construction Contract.¹⁸ (Tr. 114-16) This was the first time that Respondent had ever requested these drivers be dispatched under the terms of the Ready-Mix Agreement. (Tr. 116-17) The Union did not fill the request. (ALJD at 12; GC. 25; Tr. 166, 469) At no time after September 24, did Stewart request that the Union dispatch drivers for these positions under the terms of the Construction Contract. (Tr. 518)

On September 27, Stewart sent a letter to the Union claiming that the Ready-Mix Agreement gave Respondent the right to deliver materials under the terms of that agreement.¹⁹ The letter further states that, because the majority of Respondent's work now involved the delivery of materials, Respondent had transferred assets from the construction side "to the materials division and will use these assets and manpower for the delivery of materials." (ALJD at 12; Tr. 109-10; GC. 23) On September 28, Respondent and the Union held negotiations in an attempt to resolve the dispute, however no agreement was reached. At the end of the meeting, the Union's attorney asked whether the parties had discussed paying a transition pay-rate to the Construction Contract drivers. This issue had never before been raised, and the parties agreed to "go home and think about it." (ALJD at 12; Tr. 118, 476-77) That same day, Respondent sent a letter to the Union stating that, because the Union did not dispatch any workers under the Ready-Mix Agreement as requested, Respondent was procuring workers from other sources. (Tr. 476; GC. 25) Thereafter, Respondent placed

¹⁸ Respondent asked for 22 Transfer Drivers, 20 Double Belly Drivers, 12 Double Side Drivers, and 10 End Dump Drivers. (ALJD at 11-12; GC. 24; Tr. 114-16)

¹⁹ Darr testified that he specifically disagreed with Stewart's claims. (Tr. 311-13)

advertisements in newspapers for drivers, and put “word on the street” that it was hiring drivers. Although no new drivers were hired, a group was on hold ready to start. (Tr. 165-66, 474-75)

On September 30, Stewart called Dey and asked him whether the parties were going to meet to continue bargaining over the issue of potential transition rates for the material delivery drivers. Dey told Stewart that the Union did not have any proposals for the company. Stewart asked Dey to stop by Respondent’s office and pick up a proposal on transition rates that Respondent had drafted. Dey met with Stewart, who gave him Respondent’s proposal to pay drivers a transition rate, effective October 4, to transition from the Construction Contract to the Ready-Mix Agreement. (ALJD at 13; Tr. 120-21, 477-78; GC. 26) Dey asked Stewart to give this proposal to the drivers, and Dey agreed.²⁰ (Tr. 121)

6. Respondent’s October 1, 2010 Meeting with Drivers.

On October 1, Respondent scheduled a meeting for all the Southern Nevada Paving Construction Unit drivers, at the Sloan Quarry truck yard. The entire day shift was present, about 50 of the Construction Unit drivers, along with Dey and other Union representatives. (Tr. 120-123, 347-350) Stewart, Pat Ward, and Transportation Manager Mike Kuck were present for Respondent. (ALJD at 13-14; Tr. 123, 347-350)

At the meeting, Stewart told the assembled drivers that Respondent was attempting to work with the Union to have the drivers work under the terms of the Ready-Mix Agreement. Stewart further told the drivers that, at the Union’s request, Respondent put together a wage phase-in agreement designed to minimize the impact on the drivers. (ALJD at 13-14; Tr. 142; GC. 29) This was untrue, as the Union never requested that Respondent draft a phase-in proposal, or that Respondent present it directly to the drivers. (ALJD at 14 n. 39; Tr. 143-44)

²⁰ No agreement was ever reached with the Union over the proposed transitional rate. (Tr. 120-21, 518)

Dey tried to speak up on behalf of the Union, but Pat Ward interrupted him, saying that Respondent was paying for the meeting, and Dey could speak with his members after the meeting was finished. (ALJD at 13 n. 38; Tr. 350, 352) Stewart then told the drivers that the company was also seeking workers from other sources. (Tr. 124, 142; GC. 29) He explained what terms Respondent was offering the drivers, and handed out a document to the drivers setting forth the hourly wages and benefits Respondent was willing to offer any driver who desired to continue working for the company, effective October 4.²¹ (ALJD at 13-14; Tr. 348-49; GC. 26) Under Respondent's proposal, which Stewart had given Dey the previous day, employees agreeing to work under the terms of the proposal would transition from Construction Contract wage rates of approximately \$30 per hour, to the Ready-Mix Agreement wage rates of about \$24 per hour, over a period of six months. (GC. 26)

After the meeting, Dey met with the drivers outside of the truck yard, in the parking lot. (ALJD at 13 n. 38; Tr. 146, 349) Dey told the drivers that Respondent was now claiming it was no longer a construction company, but a ready-mix company. (Tr. 353) The fact that Respondent had stopped scheduling any work for the Southern Nevada Paving Construction Unit drivers, and was now claiming it was a ready-mix company, was of great concern to the drivers. (Tr. 353-54)

Two or three days after the October 1 meeting, Respondent put a document in the mailboxes of all the Southern Nevada Paving drivers, similar to the one disseminated at the October 1 meeting, but effective as of October 11. (ALJD at 14; Tr. 127, 349) It also contained a section for the drivers to fill-in their contact information and required the drivers to return the completed form to the dispatch office no later than Friday, October 8, if they

²¹ Dean Mulvaney, a current employee of Respondent, credibly testified that Stewart handed out GC. 26 at the meeting with drivers on October 1, which states that Respondent's proposal for transitional wage rates would be effective as of October 4.

wanted to continue working for Respondent. (Tr. 349; GC. 27) In turn, Respondent would contact the drivers who returned the form with their assignments for the next Monday.²² (ALJD at 14; GC. 27)

On October 5, Respondent sent a letter to the Union, stating that it would start making all material deliveries pursuant to the Ready-Mix Agreement starting October 11, with the graduated pay scale it had previously provided to the drivers. (ALJD at 14; GC. 28) Respondent included in the letter a copy of the form it had put in the drivers' mailboxes, and noted that, to qualify for continued employment, current employees must complete and return the form to Respondent by October 8. (GC. 28) On Monday, October 11, it was raining and there were limited crews working. Respondent still refused to dispatch drivers under the Construction Contract, and on October 12, the Union started picketing.²³ (ALJD at 15; Tr. 155-57, 166) On October 13, the Union filed its initial charge in this matter. (GC. 1(a)) The situation with the Union picketing continued until October 15, when the parties reached an agreement whereby the drivers returned to work under the terms of the Ready-Mix Agreement, with the wage phase-in as proposed by Respondent, pending the resolution of the Union's unfair labor practice charges. (ALJD at 15; Tr. 156, 479; 519) The Construction Unit drivers who are now working under the terms of the Ready-Mix Agreement are performing the exact same work, with the same trucks, at the same location, as they did when they were under the Construction Contract. (Tr. 345-46, 355-57)

²² Some drivers returned the completed documents, expressing a willing to return to work under the terms offered by Respondent. (ALJD at 14; Tr. 127-28)

²³ At first the picket signs said "on strike," later they were changed to read "Locked Out." (Tr. 155-56)

II. ARGUMENT

A. The ALJ Erred by Refusing to Find that Respondent Unlawfully Changed the Scope of the Unit [Exception No. 1]

In his decision, the ALJ dismissed the General Counsel's allegation that Respondent's actions constituted an illegal change in the scope of the bargaining unit, instead finding that Respondent's actions constituted a change in the assignment of work, a mandatory subject of bargaining, and that the parties had bargained to impasse. (ALJD at 17-18) The ALJ's findings are contrary to established Board law, and must be overturned.

As noted by the ALJ, collective-bargaining topics fall into three broad categories -- mandatory subjects, permissive subjects, and illegal subjects. *Hill-Rom Co., Inc.*, 957 F.2d 454, 457 (7th Cir. 1992) citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 US 342 (1958). Mandatory subjects are wages, hours, and working conditions, over which both the employer and the union are obligated to bargain in good faith. *Id.* citing Section 8(d) of the Act. An employer may unilaterally implement a proposal regarding a mandatory subject only after bargaining with the union in good faith until impasse. *Id.* Permissive subjects fall outside the scope of Section 8(d), and cannot be implemented without the union's approval. *Id.* Illegal subjects are those proscribed by federal, or where appropriate, state law. *Id.*

The scope of the employee bargaining unit is a permissive subject of bargaining, regardless of whether the unit was created through a voluntary recognition or Board certification. *Id.*; *Bozzuto's, Inc.*, 277 NLRB 977, 977 (1985); *Taylor Warehouse Corp.*, 314 NLRB 516, 528 (1994). Therefore, once a specific job is included within the scope of a bargaining unit, an employer cannot unilaterally change or remove that position without the consent of the union or action by the Board. *Hill-Rom Co., Inc.*, 957 F.2d at 457; citing *NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 191 (7th Cir. 1983); *NLRB v. United Technologies*

Corp., 884 F.2d 1569, 1573 (2d Cir. 1989). This means that either party may engage in, or resist, bargaining about the unit definition, without losing the right to refuse to agree on any changes. *Taylor Warehouse Corp.*, 314 NLRB at 528.

The law disfavors unilateral changes in unit descriptions because giving an employer the right to make such changes allows the employer to sever the link between employees and their union. *Hill-Rom Co., Inc.*, *supra*. This, in turn, would have the effect of undermining a basic tenet of union recognition in the collective-bargaining context and of greatly complicating coherence in the negotiation process. *Id.*

Contrary to the ALJ's conclusion, the facts support a finding that Respondent illegally changed the scope of the unit. An employer who removes a substantial group of employees from the bargaining unit, without the agreement of the union, improperly changes the scope of the unit in violation of Section 8(a)(5), unless the employer can show that the group of employees were sufficiently dissimilar from the remainder of the unit to warrant their removal. *United Technologies Corp.*, 292 NLRB 248, 248 (1989) *enfd.* 884 F.2d 1569, 1572 (2d Cir. 1989), citing *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1139-41 (1982) *enfd.* 721 F.2d 187 (1983) (employer violated 8(a)(5) by failing to apply the terms of the collective-bargaining agreement to employees in a newly-created work group, where the employees in the new work group performed the same functions as unit employees, and had the same job skills). The burden is upon an employer to show such a dissimilarity. *United Technologies Corp.*, 884 F.2d at 1572.

The facts here clearly support a finding that Respondent violated Section 8(a)(5) of the Act by removing all drivers performing "off-site" material hauling work from the Construction Unit, and for the first-time requiring such employees work under the Ready-Mix

Unit. Respondent has not, and cannot show that the material haul work being performed by the Southern Nevada Paving drivers, now under the Ready-Mix Agreement, is so dissimilar from the remainder of the Construction Unit to warrant their removal and absolve Respondent from the finding of a violation.

Respondent cannot do so because the work is exactly the same, with the same trucks, at virtually the same locations, as work still covered by the Construction Contract. Moreover, this is the identical work these same drivers previously performed under the Construction Contract.²⁴ The only difference is that these same workers are now being paid 30% less under the Ready Mix-Agreement to perform “off-site” material hauls, delivering material to batch plants or for stockpiling at construction sites. That being said, whenever these same drivers perform “on site” work, hauling or applying materials on the actual construction sites themselves, they are covered by the wage and benefit rates in the Construction Contract. (ALJD at 15 n. 42; Tr. 39-40, 207, 275, 277, 300, 306, 316-17, 322, 408-09, 461, 518-19) Because Respondent cannot show that the group of employees removed from the Construction Unit were so dissimilar from the remainder of the Construction Unit to warrant their removal, the Board must reverse the ALJ and find an 8(a)(5) violation. *Beverly Enterprises, Inc.*, 341 NLRB 296, 296, (2004) (employer changed the scope of the unit by taking work performed by represented unit employees, transferring these operations to another part of its business, and having the same employees perform the work, as non-unit employees). *The Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (employer’s elimination of the sergeant position, and removing the sergeants’ duties from the bargaining unit, without first securing the union’s consent, was an illegal change in the scope of the unit). *Paramount*

²⁴ As properly noted by the ALJ, Construction Unit material haul drivers and Ready-Mix Unit material haul drivers each use identical equipment to transport aggregate and other materials on construction sites. ALJD at 17, n. 46.

Liquor Co., 307 NLRB 676, 686-87 (1992) (employer illegally changed the scope of the unit by implementing proposal eliminating certain job classifications from the bargaining unit); *Idaho Statesman*, 281 NLRB 272, 277 (1986) (employer violated Section 8(a)(5) by bargaining to impasse over changes in the scope of the unit, a permissive subject, as opposed to jurisdictional clause, a mandatory subject, in part, where employer's intent was to reduce the size of the unit); *SFX Target Center Arena Mgt. LLC.*, 342 NLRB 725, 735 (2004) (successor employer violated the Act by unilaterally changing the historical bargaining unit).

Moreover, as noted by the DC Circuit, "the close correspondence between the composition of the bargaining unit and the specific jobs it performs makes it likely that a change in the unit's functions will have a concomitant effect on the scope of the unit." *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1402 (DC Cir. 1988). Therefore, "when the bargaining unit is defined with reference to specific jobs" any attempt by an employer to change the "union's jurisdictional work will be regarded as an attempt to alter the bargaining unit." *Id.*

Here, the Construction Unit is defined with reference to specific jobs (GC. 2, Article 2, 3), and the driving of dump trucks is specifically defined as work to be performed by the Construction Unit. (GC. 2, Article 3 Section 1; GC. 2, Article 34) Accordingly, by requiring that all "off-site" dump truck drivers work under the terms of the Ready-Mix Agreement, Respondent removed those specific jobs from the Construction Unit, unlawfully altered the scope of the unit.²⁵ *Id.*; *Newport News Shipbuilding*, 236 NLRB 1637, 1637, 1643 (1978) (employer motivated by the economic purposes illegally demanded a change in the scope of

²⁵ It is undisputed that the material haul drivers now required to work under the terms of the Ready Mix Agreement all drive various types of dump trucks. (ALJD at 11-12; Tr. 114-116, 200; R. 17 b-f; Tr. 532-33)

the unit by eliminating some classifications and job functions in that unit and having them performed outside the unit).

Finally, with respect to the transfer of work outside the bargaining unit, an employer may not, under the guise of transferring unit work, alter the composition of the bargaining unit. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975-76 (10th Cir. 1990); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77-78 (4th Cir. 1979). To do so not only modifies the job functions of various unit members but also affects their right to representation. *Id.* “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 § 8(a)(5).” *Id.* citing *NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 190-91 (7th Cir. 1983). Here, the duties of the Southern Nevada Paving dump-truck drivers performing “off-site” material haul work under the Ready-Mix Agreement, are identical to those of the “on-site” material haul dump-truck drivers in the Construction Unit. In fact, it is the same drivers with the same trucks that can perform this work, being paid under the terms of the Construction Contract for “on-site” work and under the terms of the Ready-Mix Agreement for “off-site” work. Under these circumstances, any claim that Respondent simply transferred work is unsupported by the facts and the law. Instead, the General Counsel asks that the Board find that Respondent’s actions violated Section 8(a)(1) and (5) of the Act, as alleged.

B. The ALJ Erred in Finding that Respondent Bargained to Impasse Over the Change in the Assignment of Work, That the Union Waived its Right to Bargain, or that the Change was Not Presented as a Fait Accompli [Exception No. 2]

In the event the Board finds that Respondent's conduct did, in fact, constitute a change in the assignment of work, as opposed to a change in the scope of the unit as alleged by the General Counsel, the ALJ erred in finding that the parties bargained to impasse over this change. The ALJ further erred in finding that the Union waived its right to bargain over the matter, and that transfer of work wage rate proposal was not presented to the Union as a fait accompli.

Here, in the context of a change in the assignment of work, the ALJ properly found that Respondent had an obligation to bargain with the Union over any such change in good faith to impasse or agreement.²⁶ *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992) (the transfer or assignment of work outside the bargaining unit is a mandatory subject of bargaining); *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993) (Where an employer unilaterally assigns bargaining-unit employees to another division, outside the unit, and their job duties and functions remain essentially the same, such conduct violates Section 8(a)(1) and (5)).

However, the facts show that the parties were not at an impasse over the matter, particularly at the time Respondent implemented the change. Moreover, because the parties initially bargained over the specific terms of any such transfer of work, and Respondent presented its proposal as a fait-accomplis, the Union did not waive its right to bargain. Accordingly, by transferring work outside the bargaining unit without bargaining to impasse with the Union, Respondent's actions violated Section 8(a)(5) of the Act.

²⁶ Construction Contract Articles 3 and 4 prohibit transferring work outside the bargaining unit. (GC. 2, p. 6-10)

The Board defines impasse as a situation where good faith negotiations have exhausted the prospects of concluding an agreement, and both parties believe they are at the “end of their rope.” *Newcor Bay City*, 345 NLRB 1229, 1237-38 (2005). Relevant factors include the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issues at hand, and the contemporaneous understanding of the parties. *Id.* at 1238. Impasse cannot exist where the employer is determined to unilaterally implement its proposal regardless of the state of negotiations. *Id.* Finally, it is the employer’s burden to prove that a valid impasse exists. *Id.*

Here, Respondent cannot prove that a valid impasse existed over the transfer of the off-site material haul work to the Ready-Mix Agreement.²⁷ It is undisputed that this issue was of paramount importance to the parties, and is the primary issue in this case. Furthermore, Respondent announced the implementation of the terms of the transfer only one day after presenting its proposal to the Union. Under these circumstances it is clear that Respondent was determined to unilaterally implement its proposal, regardless of the state of negotiations.

The Board’s holding in *Burrows Paper Corporation*, 332 NLRB 82, 83 (2000) is instructive as to whether an impasse existed here. In *Burrows Paper*, on November 12, 1997, during bargaining, the employer presented the union with a “First Proposed Agreement,” which included a proposal to increase wages of certain employees. The next day, before receiving a response from the union, the employer issued a notice to its employees that the wage increases would be implemented on January 5, 1998. The Board upheld the ALJ’s findings that the Respondent’s unilateral implementation violated the Act because no impasse existed, and that the union did not waive its right to bargain over the wage increases. *Id.*

²⁷ Indeed, as noted by the ALJ, Respondent did not even assert this defense at hearing. ALJD at 18. Instead, the ALJ analyzed the matter sua sponte.

Notably, the Board found that, by announcing the implementation of the wage increase proposal to employees on November 13, the day after it was proposed to the union, the union “was not properly afforded an opportunity to bargain concerning these proposals prior to the announcement.” *Id.* See also *Laro Maintenance Corp.*, 333 NLRB 958 (2001) (Board has long held that a reasonable time between notifying the union of a proposed change and its implementation is required under an employer’s obligation to bargain in good faith). Furthermore, the Board found that the union did not clearly and unmistakably waive its right to bargain over the wage increase, because after the employer announced the implementation to employees on November 13, “the union could reasonably conclude that the matter at that point was a *fait accompli*, i.e., that Respondent had made up its mind and that it would be futile to object to the pay raises.” *Burrows Paper*, 332 NLRB at 83.

The facts here are strikingly similar to those *Burrows Paper*. The day after Stewart presented the Union with Respondent’s transition wage proposal to transfer the off-site material haul work to the Ready-Mix Agreement, titled “Proposal for Existing Drivers Interested in Transferring to Active Agreement” (GC. 26), Respondent presented the proposal directly to employees, at a meeting where Union representatives were not allowed to speak. Respondent told the assembled employees that, if they were interested in continuing to work for Respondent under the terms of the proposal, to contact Respondent who would make the appropriate arrangements. Under these circumstances, where Respondent’s transitional wage proposal was presented to employees as a “done deal,” only one day after it was presented to the Union, the ALJ clearly erred in finding that the parties were at impasse. *Burrows Paper supra.* (union not afforded an opportunity to bargain where wage increase was announced to employees one day after the proposal was given to the union).

Moreover, in analyzing the issue of impasse, the ALJ erred in viewing this issue through the prism of the parties' discussions from July through mid-September. ALJD at 18. While the parties had generally been discussing Respondent's desire to have off-site material haul work performed by drivers working under the terms of the Ready-Mix Agreement, it was not until September 28, that the parties discussed the possibility of paying drivers a transitional pay-rate. The Union raised the issue, and the parties agreed to "go home and think about it." Respondent's proposal on transitional wage rates was not presented to the Union until September 30, proposing that drivers transition from making about \$30 per hour under the Construction Contract, to making about \$24 per hour under the Ready Mix Agreement, over a period of about 6 months. Significantly, before September 30, no party had presented a specific proposal on transitional wages. Therefore, by announcing the proposal's implementation the next day, before receiving a response from the Union, Respondent's actions violated Section 8(a)(5). *Burrows Paper*, supra.

The ALJ further erred in finding that the Union waived its right to bargain over the implementation of Respondent's plan. As in *Burrows Paper*, after Respondent's October 1 announcement to employees that its transitional wage rate proposal would be implemented on October 4, "the Union could reasonably conclude that the matter at that point was a fait accompli, i.e., that the Respondent had made up its mind and that it would be futile to object." 332 NLRB at 83. Moreover, the facts here are more compelling than those in *Burrows Paper* regarding the issue of waiver. In *Burrows Paper*, when the employer presented its proposal to employees, the implementation date was three-months away. *Id.* Here, Respondent implemented the proposal within a few days after presenting it to employees. Accordingly, under these circumstances, where Respondent presented its proposal to employees and

announced an implementation date that was only days away, one day after providing the proposal to the Union, it would have been futile for the Union to have requested bargaining, and the ALJ erred by finding that the Union waived its right to bargain. Therefore, even if the Board finds that Respondent's actions constituted a transfer of work outside the Unit, the Board must find that Respondent violated Section 8(a)(5) by failing to bargain with the Union over the transfer. *Hilton's Environmental, Inc.*, 320 NLRB 437, 439 n. 12, 453 (1995) (employer violated Section 8(a)(5) by transferring bargaining unit work without bargaining to impasse).

C. The ALJ Erred in Refusing to Find that Respondent Engaged in Direct Dealing with Unit Employees [Exception No. 3]

The ALJ erred by failing to find that Respondent engaged in direct dealing by presenting its proposal to transition "off-site" material wage rates directly to unit employees. With respect to direct dealing, it need not take the form of actual bargaining. *Allied-Signal, Inc.*, 307 NLRB 752, 753-54 (1992). Instead, the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive bargaining representative. *Id.*

Here, Respondent presented its wage transition proposal to the assembled drivers on October 1, the day after it was presented to the Union, and then placed a copy of the proposal in the drivers' mailboxes, with a form to be completed by the drivers and returned to Respondent if they wanted to continue working. All of this, done without the consent of the Union, eroded the Union's position as exclusive bargaining representative, and therefore constituted illegal direct dealing. *Smith's Complete Market*, 237 NLRB 1424, 1428, 1435 (1978) (employer's detailed discussion in "all-employee meeting" of a pension proposal it had presented to the union earlier that day as a "concept" constituted direct dealing). Particularly

egregious is the fact that Respondent never discussed with the Union a requirement that employees complete a form, and return it to Respondent, if they wanted to continue working. *Dayton Newspapers*, 339 NLRB 650, 653 (2003) (employer's attempt to obtain from directly from drivers a waiver in exchange for returning to work constituted direct dealing).

The fact that the Union representatives attended the October 1 meeting does not preclude a finding of direct dealing, as Respondent did not allow any of them to speak at the meeting. Instead, the Union representatives were relegated to the status of passive observers, which further undermined Union's position as the unit employees' collective-bargaining representative. Cf., *NLRB v. Texaco Inc.*, 659 F.2d 124 (9th Cir. 1981) (Weingarten is violated by an employer who allows a union steward to attend an investigatory interview but requires the steward to remain silent). *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 172 n. 5 (5th Cir. 1984) (A union representative must be afforded some opportunity to participate in an investigatory interview) Compare, *Mount Hope Trucking Co.*, 313 NLRB 262 (1993) (record too vague to show direct dealing). Similarly, the fact some employees agreed to work under the proposal does not shield Respondent from a violation. *U.S. Utilities Corp.*, 254 NLRB 480, 486 – 87 (1981) (employer engaged in direct dealing and the fact employees may have agreed to new terms does not excuse employer's actions.) Accordingly, by presenting its wage transition proposal directly to the assembled drivers on October 1, and then a few days later disseminating to them another copy of the proposal and asking them to return a signed form if they sought continued employment, Respondent engaged in direct dealing, in violation of Section 8(a)(5). The ALJ erred in refusing to find a violation, and the General Counsel asks the Board to find a violation accordingly.

D. The ALJ Erred in Failing to Analyze the General Counsel's Arguments Regarding Respondent's Defenses [Exception No. 4]

In its Answer, Respondent asserted as an affirmative defense that “[t]here is one bargaining unit covering the two Teamsters’ agreements alleged in the Consolidated Complaint.” See Resp’t Ans. p. 5 (GC. 1(j) Fifth Affirmative Defense). In his testimony, Stewart made a similar claim, that no violation exists because there was now one-unit comprised of all Aggregate Industries-SWR employees. (Tr. 182-83) Accordingly, in his brief to the ALJ, the General Counsel argued that, in the event Respondent’s August amalgamation of its various subsidiaries under the Aggregate Industries-SWR umbrella had any legal significance, then either an accretion occurred, or Respondent was obligated to preserve the status quo with respect to both the Ready-Mix Unit and the Construction Unit until it reached either a new agreement or impasse for both units. The ALJ erred by failing to address the General Counsel’s argument regarding Respondent’s claims.

1. If Any Legal Significance is Given to Respondent’s August 2010 Amalgamation then an Accretion Occurred, and the Construction Unit is the Appropriate Unit.

The Board has defined an accretion as the addition of a small group of a employees to an existing unit where the additional employees have no separate identity and share a sufficient community of interest with the unit employees. *Ryder Integrated Logistics*, 329 NLRB 1493 (1999). In deciding whether an accretion occurs, the Board considers the functional integration of the business, centralized management structure, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, and geographical distance. Also, the Board determines the majority

status of the accreted unit. *Central Soya Co., Inc. v. NLRB*. 867 F.2d 1245, 1248-1249 (10th Cir. 1988).

Here, all of Respondent's consolidated entities had the same Human Resources Director, General Counsel, President, Vice President, and General Manager. (Tr. 369-70) After the name-change, all of the employees performed the same work as before, and the former Southern Nevada Paving Construction Unit employees constituted a majority of the consolidated group.

Specifically, the record shows that, in July, Regal-SNR employed about 29 Ready-Mix Unit employees, including 20 bubble-truck drivers, and 9 heavy-haul drivers working at the Sloan Quarry. (Tr. 87-88) In July, Southern Nevada Paving employed between 50 to 55 drivers Construction Unit drivers.²⁸ (Tr. 88)

In October, at the time of the picketing, there were between 29 and 35 Ready-Mix Unit employees. (Tr. 157-158) Conversely, there were 59 Construction Unit employees working for Southern Nevada Paving who were being forced to work under the Ready-Mix Agreement. (GC. 31; Tr. 158-160) These Southern Nevada Paving Construction Unit drivers are a clear majority of the total drivers working for the newly-named Aggregate Industries-SWR.

Accordingly, to the extent that Respondent's consolidation had any legal significance, then an accretion occurred, and the facts show that employees from the Ready-Mix Unit were accreted into the Construction Unit, and all of Respondent's drivers should be covered by the Construction Contract. Therefore, by requiring its off-site material haul employees to work under the terms of the Ready-Mix Agreement, Respondent violated Section 8(a)(5) of the Act.

²⁸ In July Frehner did not employ any workers covered by the terms of the Construction Contract. (Tr. 88)

2. If There Is No Accretion, Respondent Must Preserve the Status Quo.

If the Board finds that no accretion occurred, then Respondent was required to preserve the status quo with respect to both the Construction Unit and the Ready-Mix Unit, until it bargained with the Union to impasse or agreement over both units. *Borden Inc.*, 308 NLRB 113, 115 (1992) enfd. 19 F.3d 502, 508 (10th Cir. 1994). In *Borden*, the employer consolidated operations of two plants, moving workers from one plant to the other.²⁹ Workers at both plants were represented by the same union, under separate contracts, with separate wage rates. After the transfer of operations, the employer applied the contract with lower wage rates to the entire group. When the consolidation was completed, there were 35 employees from the plant with the higher wage contract, 31 employees from the plant with the lower wage contract, and 13 new hires. The Board found that, when there is no accretion, and two separate units of the same employer, represented by the same union, contribute substantial proportions of employees to a new unit, “an employer is obligated to preserve the status quo with respect to each group until it reaches either a new agreement or a bargaining impasse.” *Borden, Inc.*, 308 NLRB at 115. Accordingly, in the event the Board disregards the General Counsel’s other legal arguments, and Respondent’s August name-change has any legal significance, Respondent still violated Section 8(a)(1) and (5) of the Act by failing to preserve the status quo with respect to both units until it reaches either a new agreement or bargains to impasse.

V. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board reverse the ALJ’s erroneous rulings as set forth above, and find that

²⁹ Facts taken from *Borden Inc.*, 308 NLRB 113-115.

Respondent committed additional violations of Section 8(a)(1) and (5) of the Act as delineated herein.

Dated at Phoenix, Arizona, this 2nd day of August 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in AGGREGATE INDUSTRIES, Cases 28-CA-23220 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 2nd day of August 2011, on the following:

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