UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AGGREGATE INDUSTRIES, Respondent, vs. TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL 631, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS Charging Party.	Case No. 28-CA-23220 28-CA-23250 **RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. FACTS/CASE NO. 28-CA-23220

Prior to 2003 Southern Nevada Paving, Inc. ("SNP") owned one half of the "Sloan Quarry" and was engaged in the paving and grading business in the Las Vegas, Nevada area. **(TR p. 52).** At that time Frehner Construction Company, Inc. ("Frehner") also owned one half of the Sloan Quarry, and was involved in the construction industry performing major public works, such as heavy highway, bridge, road, and dam projects. **(TR p. 53.)** In 2003 Aggregated Industries ("AI") purchased SNP and continued to operate SNP as a wholly owned subsidiary. **(TR p. 52, Amended Answer, paragraphs 5-6).** In 2004 AI purchased Frehner and continued to operate Frehner as a wholly owned subsidiary. **(TR p. 53, Amended Answer, paragraphs 7-8).**

In 2004 AI created, as a subsidiary corporation, Regal Materials, Inc. ("Regal Materials"). AI purchased Regency Ready Mix, and Bradstone Pavers, and put both entities into Regal Materials. **(TR pp. 60-61)** AI purchased Regency Ready Mix at the request of Howard Hughes Development. Regency Ready Mix was an internal ready mix company that Howard Hughes Development used for its development projects in the Summerlin area. **(TR pp. 60-61, 388).** Regal Materials made the ready mix company a d/b/a of Regal Materials and began operating as Regal ReadyMix, exclusively for the Howard Hughes Development projects in Summerlin. **(TR pp. 60-61, 388-389).**

In 2006 there was an NLRB election, and, in 2007, a decertification election, for the ready-mix drivers and the mechanic (singular) at the Summerlin batch plant (singular). The Charging Party Teamsters won both elections and was certified by the Board. **(TR pp. 61-63)** The bargaining unit included:

> "All full time and regular part-time drivers and mechanic employed by the Employer out of <u>its concrete batch plant</u> in or about Clark County, Nevada;

> excluding all other employees, office clerical employees, guards and supervisors as defined in the Act. (Emphasis added herein).

(GC Exh. 5)

There was bargaining between Regal Materials and the Union but the parties never reached an agreement. **(TR p. 62).**

Howard Hughes Development stopped its development projects in 2007-2008 and the Summerlin batch plant was shut down in early 2008. **(TR p. 389).** Around this time AI had discussions with the Union about its future in the ready-mix/rock sand and gravel industry. AI was considering whether to simply wait for "Howard Hughes to get back online and run from Summerlin" or whether AI was going to "throw some money in the market and become a player." **(TR p. 389).** AI "decided to become a player" and, in March or April 2008, began construction on a batch plant in North Las Vegas and a batch plant at the Sloan Quarry. **(TR p. 389-390)**

AI eventually reopened the Summerlin batch plant **(TR p. 389)**. However, before the Summerlin plant re-opened, and before the other batch plants were constructed, Dewey Darr of the Union approached Sean Stewart of AI and said that AI should consider signing the Rinker or Nevada Ready Mix rock, sand, and gravel agreements because it would address AI's concerns in the marketplace. **(TR pp. 392-393).** This occurred in mid-2008 at a time when Regal Materials, as an entity, had no ready-mix drivers and no material hauling trucks or employees. The bargaining that ensued occurred in this context. **(TR p. 391).** Wayne King, for the Union, and Pat Ward, for AI, were also present for some, but not all of the bargaining sessions. **(TR pp. 254, 289).**

The bargaining involved three main components. First, bargaining took place concerning the ready-mix drivers that would eventually be utilized at the three batch plants. Second, AI

wanted to make the Sloan Quarry a rock, sand and gravel site, and the parties bargained over the terms and conditions of employment of employees on the site that were at that time employed by the entity SNP **(GC Exh. 7),** but who had originally been dispatched by the Union to Frehner. **(TR pp. 67, 70-71, 73)** The third component of the bargaining concerned the hauling of aggregate materials. **(TR p. 391).**

At the time the bargaining began all of AI's employees at the Sloan Quarry were under rock, sand and gravel agreements with various unions, except the Teamsters Union. There were nine Teamster represented employees working at the quarry who were being paid wage rates under the Construction agreement. Dewey Darr provided Sean Stewart with copies of the Rinker/Cemex agreement and the Nevada Ready Mix agreement and informed Stewart that AI could have the same contract terms that those contracts contained, nothing more and nothing less. **(TR pp. 99-100, 392-393, 397)** Darr's original proposal was to bring the ready mix drivers "on line," move the Sloan Quarry drivers from SNP to Regal Materials, and to transfer several SNP trucks to Regal Materials on the same day that the agreement was signed. **(TR p. 393).** This would have lowered the wages of the Sloan Quarry employees to those wage rates set forth in the Rinker/Cemex and Southern Nevada Paving agreements. The Union contended that the designation of trucks would require that SNP's name be taken off of the trucks and replaced with the name of Regal Materials d/b/a, Southern Nevada Ready Mix. These trucks would then not be able to be used for construction work. **(TR pp. 395-396).**

AI wanted to wait until January 1, 2009 to transfer the Sloan Quarry Teamsters from SNP to Regal Materials d/b/a Southern Nevada Ready Mix to coincide with internal accounting changes and the Union agreed. **(TR p. 69).** At that time AI had more than enough on-site construction work to keep its fleet of trucks busy. Indeed, it was even leasing trucks to

accommodate its fleet performing construction work. If AI transferred trucks to Regal Materials d/b/a Southern Nevada Ready Mix and designated their use for material hauling, it would have diminished its ability to service its construction site work. AI informed the Union that it was not ready to transfer trucks to the R S & G agreement at that time, but the parties agreed that AI could do so later and put the material hauling work under the agreement. **(TR pp. 292, 402).** On July 11, 2008, the parties executed the R S & G Agreement. Pat Ward signed the agreement for AI as the Regional President of Aggregate Industries. **(GC Exh. 3).**

Within days Sean Stewart and the Union agreed upon an MOU for the transfer of the Sloan Quarry Teamster drivers from SNP to Southern Nevada Ready Mix, to take place on January 1, 2009. Sean Stewart prepared a draft of the MOU and sent it by e-mail to the Union for review. His initial draft called for a phase in for the lower wages of the R S & G Agreement. His draft called for the drivers to continue getting the wage rates they were receiving as of July 1, 2008 for a period of two years. **(Resp. Exh. 7, TR pp. 437-438).** The Union rejected this approach and opted to have the lower wage rate of the R S & G agreement take effect immediately upon their transfer on January 1, 2009. **(Resp. Exh 8, 9 and 10, TR pp. 440-441).** Before the end of the day the parties agreed to the transfer of the employees effective January 1, 2009 and for the employees to be "subject to the wages and benefits" of the R S & G Agreement at that time. **(Resp. Exh. 10).**

On December 30, 2008 AI submitted dispatch requests to the Union concerning 9 Teamster employees that were employed at the Sloan Quarry. The "Requesting Contractor" was listed as "Southern Nevada Paving, Inc./Southern Nevada Ready Mix." The "Representative Placing Order" was listed as Steve Jensen, whose signature appeared on the dispatch requests. The dispatch requests noted:

"Transfer from SNP Construction contract to the Southern Nevada Readymix Contract."

(GC Exh. 7 and 8)

At the time the dispatch requests were sent, the officers of the Union were the same officers that had negotiated the R S & G Agreement. They had been voted out shortly before the end of 2008. On January 1, 2009 the new officers of the Union took over. Within a few weeks the Union filed a grievance against SNP over the transfer of the employees from the SNP Construction Agreement to the Southern Nevada Ready Mix R S & G Agreement and made a demand for a signed copy of the MOU agreed upon between Sean Stewart and the Union. **(Resp. Exh. 11 and 12).** The Union also filed an unfair labor practice charge concerning the transfer. To this end the Union also sent a written "Request to Bargain" to Dana Wiggins, of the Associated General Contractors, who was acting as AI's representative on the matter. **(Resp. Exh. 13, TR p. 447).** In said correspondence the Union stated:

> "To the extent the parties reach a supplemental agreement pursuant to Article 43 of the Labor Agreement. The Union hereby requests decisional and effects bargaining on the Company's decision to transfer employees from one Collective Bargaining Agreement to another Collective Bargaining Agreement without giving the Union advance notice to bargain on the effects and in good faith. (Emphasis added herein)

The Union withdrew the grievance and NLRB charge thereafter, noting that they lacked merit. **(Resp. Exh. 14; TR pp. 448-449).**

In April 2009, Sean Stewart moved the fictitious name of Southern Nevada Ready Mix from Regal Materials to Frehner. **(Resp. Exh. 15, TR pp. 178, 484).**

By the summer of 2010, the operations of AI had changed dramatically from July of 2008 when the R S & G Agreement was negotiated. There had been a substantial decline in its construction activities. In 2008 AI had performed approximately $350 million of work on

construction projects. In 2010, AI anticipated that it would perform approximately $120 million of work on construction projects. It was also winding down operations on two major construction projects outside of Las Vegas, at Mesquite, Nevada and at the Nevada Test Site. Those projects ended around September 2010. As a result, AI had a significant number of trucks that had been dedicated to those sites that would be returning to Las Vegas. **(TR p. 450).**

Conversely, there had been a substantial increase in the amount of ready mix and material hauling from the summer of 2008 to the summer of 2010. This was caused in part by the expansion that AI had made in 2008 in building new batch plants. Furthermore, in the summer of 2010, Cemex approached AI to have AI haul aggregate material that Cemex had been purchasing from AI at the Sloan Quarry. Prior to that Cemex had hauled the material that it purchased from the Sloan Quarry, using its trucks, to its plants. Cemex had used its trucks, including end dumps and belly dumps, to haul the material to its plants, and it did so under the terms of its rock, sand and gravel agreement. Cemex informed AI that it was going to discontinue utilizing its own trucks. **(TR pp. 450-453).** This proposal has in fact taken place. AI is hauling a substantial part of material to Cemex plants and is in negotiations for additional hauling. **(TR p. 452).**

As a result, AI was in a position to begin operating hauling under its R S & G Agreement. It decided to consolidate all three companies into one and to utilize both its R S & G Agreement and its Construction Agreement. On July 9, 2010, AI management officials, including Sean Stewart, Robert Winningham, Shag Madison, Jeff Bremmer and Mike Kuck, together with Jack Shafer from the Nevada Contractors Association, met with Wayne Dey of the Teamsters at AI's offices. The meeting was scheduled to address a grievance that the Teamsters had filed, but Sean

Stewart had also informed Dey that he was going to be discussing corporate changes at the meeting. **(TR pp. 454-55).**

Jack Shafer started the meeting by explaining that AI was going to go through a reorganization, to consolidate all of the corporate entities in Las Vegas into one entity. Sean Stewart then described the steps for the reorganization and then stated that as a single entity it would operate under different divisions, but under one name. He stated that they would operate construction and operate ready mix and rock, sand, and gravel under one corporate name. Stewart asked Dey if Dey knew that AI had a rock, sand and gravel agreement and that AI planned to move the trucks that were coming back to Las Vegas into the R S and G Agreement. Dey responded that he did know there was a rock, sand, and gravel agreement, that he anticipated AI doing something like this and that he did not think there was anything he could do to stop it. **(TR p. 457).**

Stewart anticipated that AI would have to lay off drivers to accomplish this change because AI would have to request drivers utilizing the dispatch procedure set forth in the R S & G Agreement to drive the trucks that AI would end up moving to the R S and G Agreement. **(TR p. 460)** At that time AI could not call out by name drivers under the R S and G Agreement dispatch procedures. **(TR p. 436).** Accordingly, it would get new drivers pursuant to the dispatch procedures of the R S and G Agreement. Stewart told Dey that AI would rather keep its drivers and asked Dey if there was any way to accomplish this. Dey responded that he did not handle the ready mix dispatch and that he would have to talk to Johnny Gonzales, who was the business agent in charge of the rock, sand, and gravel dispatch. However, Dey said that he did not think there was any way that Gonzales would "let construction guys jump over his ReadyMix guys on the out of work list." **(TR p. 458)**

AI also noted that it intended to keep some of the trucks designated as construction trucks. Shag Madsen said that he realized that AI would need to have some construction trucks and he suggested transferring about 20 to 30 trucks to the R S and G Agreement and keep the remainder dedicated to construction. He then said that he assumed that if they needed more trucks for construction work that AI could "call out" construction drivers. **(TR p. 459)** At that time the Union allowed employers to call specific employees from the Construction Agreement out of work list by name. **(TR p. 436)** However, Dey said that the Union would not want employees to "jump from list to list" **(TR p. 459)** and he suggested that AI follow the procedure that Cemex follows, by having all of its employees dispatched under its rock, sand, and gravel agreement, and if they performed jobsite work on a construction project they would receive the higher prevailing wage rate, which equaled the rate under the Construction Agreement. **(TR pp. 458-461).** Dey left the meeting agreeing to talk to Johnny Gonzales to see if there was a way that AI could keep its present drivers. **(TR p. 458).** At no time during this meeting did Dey request to bargain over the intended changes advanced by AI. **(TR p. 461).**

On August 7, 2010, Regal Materials and SNP were merged into Frehner and Frehner's name was changed to Aggregate Industries, SWR, Inc. **(TR p. 86)**

On August 13, 2010, Dey called Stewart and said that he had talked to his attorneys and the Union was going to object to AI's action. Stewart responded: "[S]o we're not going to be able to keep our own drivers, we're going to have to lay them off?" Dey responded: "[N]o, you're not going to be able to transfer trucks because that work has always customarily been done under the construction agreement." **(TR p. 463)**

Stewart immediately responded by sending a letter to Dey on August 13 noting Respondent's discussions at prior meetings, that AI would be reorganizing and that material

deliveries would be performed under the rock, sand, and gravel collective bargaining agreement. Stewart noted that on-site work would continue to be performed under the Construction Agreement, and stated that the company's trucking manager would be in contact with Dey "to sort the dispatch of Teamster truck drivers" for their material delivery trucks. **(GC Exh. 18).** The Union responded in writing on August 20, 2010. The Union agreed to meet to talk about the reorganization of the Company but refused to discuss the delivery of materials. The Union stated that the delivery of materials "must continue to be done under the construction agreement." The Union then volunteered that Article 43 does not permit the intended changes of AI, that said article is "confined to agreements that are supplemental to the construction agreement. It does not permit work to be transferred to a different bargaining unit." In closing, Dey stated that "[s]hort of changing the coverage under the construction agreement," the Union would be happy to meet with the company "to discuss reorganization."

Stewart and Dey traded various correspondence thereafter setting forth their positions. **(TR p. 468).** Then, on September 24, 2010, Respondent AI, SWR, sent dispatch requests to the Union's Rock, Sand & Gravel dispatch, requesting transfer drivers, double belly drivers, double side dump drivers, and end dump drivers for the following Tuesday, September 28, 2010. **(TR pp 111-112, GC Exh. 24).** Respondent utilized a form dispatch call sheet that the Union had provided to Respondent. **(TR p. 467)** The form was entitled: "Local 631 – Rock, Sand & Gravel Job Call Worksheet." **(GC Exh. 24).**

Approximately two days later Stewart called Dey and asked if the Union was going to supply drivers pursuant to the dispatch requests. Dey said they were not going to dispatch drivers. Dey again said that he did not agree that Respondent could "transfer the trucks" and do the work under the Rock, Sand & Gravel Agreement. **(TR p. 469).**

On September 27, 2010, Stewart sent another letter to Dey setting forth Respondent's position. He noted that Dey's position would render meaningless AI's extensive negotiations for the materials agreement. He then stated:

> "In June of 2008 Teamsters Local 631 and AI entered into a materials agreement which covers, among other things, the delivery of materials. At the time of signing, Local 631 encouraged AI to transfer trucks to the materials division so that AI could compete directly with other signatory material suppliers. At that time AI's construction divisions were so busy that the trucks were needed for construction work on site more than they were needed for materials deliveries from the commercial plant. As a result, AI chose not to immediately make changes but to wait for a more appropriate time.
>
> . . .
>
> As a result of the economy, the majority of AI's trucking work is now in the delivery of materials. As mentioned before, instead of downsizing and selling the idle equipment once used for on-site construction work, AI has transferred assets to the materials divisions and will use these assets and manpower for the delivery of materials.

(TR pp. 109-110, GC Exh. 23)

At the end of the correspondence Stewart noted that they had a meeting the next day, September 28, "to discuss any issues outstanding." **(GC Exh. 23).** The next day, before Stewart met with the Union, he faxed to the Union a notice that the Union had not filled the dispatch request. He quoted Article 3.2 of the Agreement which states:

> "In the event that forty-eight (48) hours after such notice, the Union or its agents shall not furnish such workers, then the Employer may procure workers from any source or sources. Regardless of union affiliation, provided however, that such workers or mechanics shall obtain clearance from the Union before commencing work."

He then informed the Union that Respondent would exercise its "option to procure workers from any source or sources, regardless of union affiliation." He informed the Union that once workers had been procured that Respondent would provide a list to the Union so that the workers could be cleared to commence work. **(TR p. 476, lines 13-19, GC Exh. 25)**

He then met with the Union. Mike Kuck of Respondent was present and, in addition to Wayne Dey, the Union had "their attorneys" present. **(TR pp. 117-119, 471-272).** The meeting was very short. Mr. Dey and the Union attorney took the position that Respondent could not do any hauling delivery under the Rock, Sand & Gravel Agreement, even "internally between plants." **(TR p. 472 lines 2-13).** At the end of the meeting, as the parties were leaving, the Union attorney, Richard McCracken asked if anyone had considered a transition rate if the drivers were brought over. Stewart said that no one had discussed it but that he would consider it. Stewart did not recall Dey even responding to the suggestion. **(TR pp, 476, 129)** Stewart did not consider the Union attorney's question as "bargaining." He believed that the Union attorney saw that the parties were "really frustrated" and that the Union attorney was just "talking out loud." **(TR pp. 135-136.)**

Stewart then prepared a proposal for transition rates for existing drivers, with the initial transition rate to take effect the following Monday, October 4, 2010. **(TR p. 477; GC Exh. 26).** Stewart called Dey to ask if they could get together to discuss transition rates. Dey responded that he had nothing for him, and that the Union would not be proposing transition rates. Stewart asked him to swing by so that he could give Dey what he had prepared. Dey agreed and informed Stewart that there was going to be a craft meeting that night to discuss the issue. Stewart asked Dey if he would present it to the employees and Dey said he would. **(TR pp. 477-478).** That evening Dey called Stewart after his craft meeting and informed Stewart that they "had a fight on their hands." **(TR p. 478)**.

The next morning, October 1, 2010, Stewart met with approximately 50 material haul drivers at Respondent's truck yard at the Sloan Quarry. Pat Ward was also present for Respondent. Stewart had invited the Union to this meeting and Dey and several other Union

officials showed up. Stewart told the drivers that Respondent had requested the Union to dispatch drivers pursuant to the R S & G Agreement, but the Union had not dispatched any drivers. He told them that Respondent was seeking drivers from other sources and that if any of them wanted to work for Respondent under the R S & G Agreement to let Respondent's dispatch know. Stewart had documents similar to the transition rate proposal he had given Dey **(GC Exh. 26).** It had the same language, but deleted the date of October 4 for the first transition rate. He inserted words that noted that the implementation would be imminent. He informed the employees that Respondent had proposed the transition rates and that Respondent would honor them. **(TR pp. 121-127, 144-145).** After the meeting the employees met with their Union representatives. **(TR p. 145).**

The following week Respondent determined that it would begin material hauls under the R S & G Agreement on Monday, October 11. Respondent prepared a notice to its current Teamster employees informing them that new hire Teamster haulers would be paid under the rates set forth in the R S & G Agreement. Respondent informed the current Teamster drivers that if they wanted to work under the R S & G Agreement with the transition rates that they should do so by filling out the form on the notice and returning it to Respondent's dispatch by 3 p.m. on Friday, October 8, 2010. The notice was placed in the individual drivers' "cubbyholes" that week. **(TR p. 127, GC Exh. 27).** Sean Stewart also sent the notice to the Union in correspondence on October 5 which informed the Union of its offer to the current employees and the timelines set forth in the notice. **(GC Exh. 28, TR p. 131).**

On Monday, October 11, 2010, Stewart met with the Union in the morning. The Union met with the Trades Council and Stewart received notice in the afternoon that the Trades Council had sanctioned a Teamsters strike. On Tuesday, October 12, Teamster pickets arrived at

Respondent's main office and at the Sloan Quarry. At the beginning of the day the picket signs read "On Strike." Later that afternoon the words "On Strike" were taped over and the words "Locked Out." were inserted. **(TR p. 155).**

On Thursday, October 14, Stewart received a telephone call from the Union and on Friday, October 15 the Union agreed to end the strike and have the drivers come back to work under the R S & G Agreement with wages at the transition rates, pending resolution of the NLRB charges under consideration in this matter. **(TR p. 156).**

II. ARGUMENT/CASE NO. 28-CA-23220

A. The Union Failed to Make a Timely Request to Bargain

If it is determined by the Board that the 2008 R S & G Agreement did not, by itself, permit Respondent to take the action it has taken, the Union nevertheless waived any obligation of Respondent to bargain over the issue when the Union failed to request to bargain over the issue when informed of Respondent's intended action. General Counsel alleged in paragraph 7(i) of the Consolidated Complaint that Respondent engaged in its conduct without prior notice to the Union and without affording the Union an opportunity to bargain. Nothing could be further from the truth.

In reviewing this issue, it should be noted that Wayne Dey was present throughout the entire proceedings to assist both the Counsel for the General Counsel and Respondent's counsel. Dey heard the entire testimony of Respondent's three witnesses in its case in chief; Stewart, Larry Miller of Nevada Ready Mix, and Dana Wiggins, the retired former Labor Relations Director of the Associated General Contractors in Las Vegas. Both General Counsel and Respondent chose not to call Dey to rebut any of the testimony of these witnesses. Accordingly, the entire testimony of Stewart concerning his conversations with Dey are uncontradicted.

Prior to July 9, 2010, Respondent had suffered a substantial decline in its construction work in the time period following the 2008 negotiations. In addition, it was completing two large construction projects out of the Las Vegas vicinity and would be bringing back to its Las Vegas operations those trucks that had been dedicated to those out of town projects. **(TR p. 450).** Also during this time there had been an increase in its ready mix operations and material hauling in the time period following the 2008 negotiations. Part of this was due to its expansion in that market by building new plants in 2008. Also, in early 2010, Respondent negotiated with Cemex to take over hauling material that Cemex purchased from the Sloan Quarry and had previously utilized its own trucks to haul from the Sloan Quarry. **(TR pp. 450-451)**

On July 9, 2010, Dey met with representatives of Respondent. He was informed of the intent by AI to consolidate the three subsidiaries into one corporate entity and was given a rough timeline of that process. **(TR pp. 454-454).** He was also told that Respondent would operate construction and rock, sand and gravel divisions, but would operate under one name. Stewart asked Dey if Dey was aware that Respondent had a rock, sand, and gravel agreement. Stewart then stated:

> I . . . told him that we were planning to move <u>those trucks that we were bringing back to town</u> under the rock, sand and gravel agreement. (Emphasis added herein).

(TR p. 457)

Dey responded that he anticipated Respondent would do this, that he knew there was a rock, sand, and gravel agreement, and that he did not think there was anyway he could stop Respondent from doing such. **(TR p. 457).**

At that time the Union no longer allowed companies to call for specific individuals when seeking a dispatch under a rock, sand and gravel agreement. Stewart asked if there was any way

that Respondent could keep its same drivers after it moved trucks to the R S & G Agreement. Dey responded that he did not think the business agent in charge of dispatching from the rock, sand, and gravel dispatch, Johnny Gonzales, would permit those drivers to "jump over" others on the out of work list, and so he did not think there was anyway to keep those drivers. However, he agreed to consult with Gonzales on the issue. **(TR p. 458).**

Shag Madison stated that Respondent realized that Respondent would need trucks designated for construction. He suggested that Respondent might move 20 to 30 trucks to the R S & G Agreement and keep the remainder as construction trucks. Madison then told Dey that he assumed that if Respondent needed more trucks on construction, that Respondent could "call out the guys to go back to construction." **(TR pp. 458-459).** At that time Respondent could still request specific employees to be called from the Construction Agreement dispatch. **(TR p. 436).** Dey responded that he did not want people to "jump from list to list," and he suggested that Respondent "look at how Cemex does it, where Cemex has everyone under rock, sand and gravel and if they do construction work, they have to pay a higher rate." **(TR p. 459).** To this Shag Madison responded that they had not "thought about that as a company," and that they "would look at it as well." **(TR p. 459, lines 17-18).**

Dey never requested to bargain over this issue at the July 9 meeting. The Union had notice of Respondent's intended actions one month before the consolidation of the subsidiaries and name change to Aggregate Industries, SWR, Inc., and almost three months before Respondent requested drivers pursuant to the R S & G Agreement on September 24, 2010. The Union never requested to bargain over the issue. It simply stated that Respondent could not undertake its course of action. On August 13, Dey called Stewart and informed him the Union was going to fight Respondent on its course of action. Stewart asked if that meant that

Respondent would not be able to keep its drivers and Dey responded that the Union would not even allow Respondent to move its trucks to its materials operation. **(TR p. 463).** Stewart responded in writing that same day outlining Respondent's intended action and noting that Mike Kuck would be in contact with Dey to "sort the Teamster truck drivers for our material delivery trucks." **(GC Exh. 18).** Dey's response noted that he would be "happy" to talk to the company about its reorganization, but evidenced his refusal to discuss the issue of delivery of materials to job sites, which he contended must continue to be done under the Construction Agreement. He said he would "be interested in hearing" about "changes in management structure and/or uses of facilities." He said he would work with the company to achieve its business objectives "[s]hort of changing the coverage under the construction agreement." **(GC Exh. 20).** Accordingly, not only did the Union not request to bargain over the delivery of materials under the R S & G Agreement, it made it clear that such was not open for consideration.

On September 28, 2010, Stewart and Kuck met with Union officials including Dey and the Union attorneys. The meeting was very heated and very short. Stewart said Respondent had the right to take the action that it was taking and Dey said they could not. **(TR p. 130).** In fact, Dey said Respondent could not do any material hauls under the R S & G Agreement, including hauls to its own ready mix plants or to stockpiles at jobsites. **(TR p. 472, lines 2-13).** As the meeting was breaking up, the Union attorney asked if anyone considered a transition rate. Stewart said that they had not but that Respondent would think about it. Stewart did not consider this inquiry to be a request to bargain. Indeed, he did not even recall Dey responding to the inquiry. **(TR pp. 129, 135-136).**

Dey quickly made it clear that he not only was not requesting to bargain over the issue of a transition rate, that he would not take part in such. He informed Stewart on September 30, that

the Union would not present any proposal on such issue. Stewart, nevertheless, gave a copy of suggested transition rates to Dey. **(TR p. 477).** Thereafter, Stewart notified drivers on October 1 that it would be offering the transition rates for anyone that would work under the R S & G Agreement. After Respondent determined that it would begin operating material hauls under the R S & G Agreement on October 11, 2010, with the transition rates for those present drivers that would agree to be cleared for work under the R S & G Agreement, it gave advance notice of such in writing to the Union on October 5. **(GC Exh. 28).** Accordingly, the Union had 11 days to request to bargain over the transition rates, and it not only chose not to request such bargaining, it made it clear that it would not engage in any such bargaining.

Board law concerning a Union's duty to request bargaining has long been established. The Board cases of *Jim Walter Resources, Inc.,* 289 NLRB 1441 (1988), *Kansas National Education Association,* 275 NLRB 638, and *Citizens National Bank of Wilmar*, 245 NLRB 389 (1979) set forth the Board's long standing law concerning the Union's duty to request bargaining in situations such as present in this case. All three cases involved announced changes in terms and conditions of employment of employees and the failure of the union to request bargaining over the issue. The *Jim Walter* case involved announced changes after the expiration of a collective bargaining contract, which is similar to this case where the Construction Agreement has expired. The other two cases involved announced changes that occurred while a contract was in existence.

In all three cases there were meetings where the unions and the employers discussed the intended changes and even argued over them, which also happened in this case. In all three cases the unions contended that the company did not have the right to take the action they intended to take, which also happened in this case. However, in all there cases, the unions failed

to request to bargain over the intended changes. In *Citizens National Bank,* at pages 389-390, the Board noted that it is well established that when a union has notice of an employer's proposed change in terms and conditions of employment it must timely request to bargain in order to preserve its right to bargain over the subject. The Board noted, at page 390:

> The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the issue.

In *Kansas National,* at page 639, the Board stated:

> Once an employer notifies a union of a proposed change in conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining. Further, the failure of a union, on receipt of this notice, to request bargaining may result in a waiver of its rights.

In *Jim Walter,* at page 1442, the Board rejected an argument that the employer's announcement to employees of a proposed change amounted to a fait accompli, excusing the union from its obligation to timely request to bargain. The Board noted that in prior cases where an employer made a decision and announced it to employees that the union must do more than merely protest the change, it must meet its obligation to request bargaining. In this case, it can hardly be said that Respondent's announcements amounted to a fait accompli. Respondent demonstrated an openness in dealing with the Union throughout the bargaining in 2008 and in the discussions that took place in 2010. Indeed, Respondent responded to the possibility of having a transition rate by offering a suggestion for such transition rates. The Union refused to address the issue.

In *Jim Walter* the Board also addressed the amount of time needed to give a union an opportunity to timely request bargaining. In *Jim Walter*, the union had ten days notice of a proposed change. The Board stated, at page 1442:

> The Board has on occasion found as little as 2 day's notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient. Therefore, we cannot

agree with the judge that 10 days did not provide a meaningful opportunity to bargain.

It should also be noted, that in view of Respondent's willingness to address issues advanced by the Union, such as transition rates, that if the Union had made a request to bargain at any time, that Respondent may very well have pushed back implementation of changes to accommodate bargaining.

B. Change In Scope Of Bargaining Unit Argument Has No Merit

1) 2008 Agreement Was A Supplemental Agreement

As noted, even if the 2008 negotiations did not establish that Respondent had the right to take the actions that it did, and even if the R S & G Agreement on its face does not afford Respondent those rights, the Complaint must be dismissed because the Union did not timely request to bargain. To counter this, the Union contended in its opening statement that it could have refused to bargain over such an issue because it allegedly would involve permissive bargaining over a change in the scope of the collective bargaining unit. It is clear that the Union refused to request bargaining based on such a theory. It was wrong on several counts.

First, the R S & G Agreement was itself a supplement to the Construction Agreement that it had in 2008. Article 43 of the Construction Agreement, entitled "SUPPLEMENTAL AGREEMENTS," provides:

> Supplemental Agreements may be negotiated covering Signatory Employers engaged in commercial sand and gravel operations to allow for competitive wage/fringe amounts prevailing in that industry, special conditions for-hire transports, demolition work, landscaping, tankers, and truck repairman trainee.

(GC Exh. 2, page 48)

Aggregate Industries, through its subsidiaries, Frehner and SNP, were "Signatory Employers" in 2008 when the R S & G Agreement was negotiated. Furthermore, Aggregate

Industries, through its subsidiary SNP was "engaged in commercial sand and gravel operations" in 2008 through its employees working in the Sloan Quarry and through its drivers hauling aggregate from the Sloan Quarry. The negotiations for an agreement that would at first be operated under the Aggregate Industries subsidiary Regal Materials, actually involved negotiations over the terms and conditions of employment of the SNP employees working at the quarry, who had originally been dispatched to Frehner. Even Darr admitted that he was bargaining over the terms and conditions of the SNP employees. Also, the negotiations involved the trucks of SNP, which would impact the terms and conditions of SNP drivers. Indeed the R S & G Agreement was executed by Pat Ward as Regional President of Aggregate Industries.

The Construction Agreement and the R S & G Agreement were with one "single employer" even before the formal consolidation of the three subsidiaries in August of 2010. The Board and the courts have developed factors for consideration in determining whether separate entities constitute a single employer for labor law purposes. They are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Carpenters Local Union No. 1478 v. Neal Stevens,* 743 F.2d 1271, at 1276 (1984). All four of those elements have existed since 2008. Aggregate Industries owned all three entities. Sean Stewart, as an employee of Aggregate Industries Management, Inc. was the general counsel and vice president of all three subsidiaries and all three had the same human resource manager. They had common management supervising employees of all three entities.

Even though three entities may constitute a single employer, their separate collective bargaining agreements may not apply to all of the employees covered by the agreements unless there is a single bargaining unit. *South Prairie Construction Co. v. Operating Engineers Local 62*, 425 US 800 (1976). Upon remand from the *South Prairie* decision, the Board, in *Peter*

Kiewit Sons' Co., 231 NLRB 76 (1977), found that even though two companies constituted a single employer, that they had two separate bargaining units and therefore the contract of one did not cover the other bargaining unit. In doing so it relied on such factors as an absence of functional integration of operations, differences in the types of work, the decentralization of labor relations and the relatively insignificant extent of interchange between the groups. Those factors are not present here. There is centralized control of labor relations. The bargaining for the 2008 agreement directly involved terms and conditions of employment of SNP employees, who had been initially dispatched to Frehner, and directly involved the equipment being utilized by SNP.

Even the evidence produced by the Charging Party and General Counsel establish interchange among employees among the various entities. Charging Party produced an October 20, 2009 letter from Dana Wiggins on behalf of Frehner and SNP requesting "dual dispatches" to both Frehner and SNP because the entities had "created an equipment division to more effectively utilize the resources of both companies," and, as a result, "SNP trucks are being used on both SNP and Frehner projects." Wiggins noted that on occasions an employee would work a half a day on an SNP project and the other half of the day on a Frehner project. **(CP Exh. 2).** This exhibit establishes that one individual, Dana Wiggins, was acting on behalf of both companies, and noted employees bouncing back and forth from one company to the next, and that equipment of one company was being used by both. It is difficult to imaging better evidence of a single bargaining unit. Furthermore, the General Counsel's own witness, Andrew Barnum stated:

> My check has changed from saying Southern Nevada Paving to Frehner Construction to AI to Southern Nevada Paving so may times, I couldn't tell you - -

(TR pp. 216-217)

Furthermore, Counsel for General Counsel went to great lengths to establish that the types of trucks listed in the R S & G Agreement were also covered by the Construction Agreement. In fact, even ready mix trucks are listed in the classifications set forth in the Construction Agreement. **(GC Exh. 2, pages 40-41, Groups 2, 3 and 4).**

Accordingly, the 2008 Agreement was a Supplemental Agreement to the Construction Agreement covering the same types of work of a single bargaining unit, and simply provided for different rates for the employees covered by both agreements.

The General Counsel may contend that 2008 agreement was not intended to be a supplement to the Construction Agreement, contending that the 2008 agreement resulted from bargaining pursuant to a separate Board certification. Yet the 2008 bargaining had nothing to do with the certification of the unit that resulted from a vote at Respondent's Summerlin batch plant. The bargaining that took place after that certification never resulted in an agreement and the plant was shut down when its one customer ceased work. The bargaining that took place in 2008 resulted from Respondent's decision to "throw money" in the aggregate market and to become a "player" in the market. Three plants were envisioned and eventually opened. The certification referred to only a single batch plant. (all drivers and mechanic at "its concrete batch plant."). Indeed, the certification only referred to a single "mechanic" in the bargaining unit of drivers at the one, and only one, batch plant. In fact, the 2008 bargaining took place at a time when AI had no ready mix drivers at all. The Summerlin batch plant was still closed. The 2008 bargaining involved, in addition to future ready mix drivers, the Sloan Quarry drivers employed by SNP. It also involved material hauling at a time when material haulers were working under the Construction Agreement. The description of material hauling trucks was specifically set forth in

the R S & G Agreement. There would have been no need for such designations if the parties were bargaining over the ready mix drivers and the one mechanic at the Summerlin batch plant.

2) Union Had Obligation to Request Bargaining Under Article 43

Even if the R S & G Agreement was not itself negotiated pursuant to Article 43 in 2008, Article 43 gives the right to a contractor signatory to the Construction Agreement to address rock, sand and gravel wage issues if its operations include work in that industry. As Dana Wiggins testified, the Teamsters often deal with heavy highway contractors, who often buy rock, sand and gravel pits. The purpose of Article 43 is to allow such contractor the right to negotiate a rock, sand and gravel agreement for its trucking so that the contractor does not have to compete against companies that have lower rates. **(TR p. 543).**

When Aggregate Industries informed the Union of its intentions on July 9, 2010, the Union, if it did not believe that the 2008 R S & G Agreement already allowed Respondent to take such intended action, had an obligation to request bargaining if it wanted to address the announced intended action. If it did not request such bargaining, it would waive any right to bargain over the issue. Respondent had the right to address wage issues concerning its rock, sand and gravel operations. It had bargained for the right when it executed the Construction Agreement which contained Article 43. Furthermore, with Article 43, any bargaining that occurs pursuant to said provision does not constitute bargaining over a change in the scope of the bargaining unit. The Construction Agreement, by its terms, covers the exact type of work that is covered by the rock, sand and gravel agreements in evidence. As noted, even ready-mix trucks are covered by the Construction Agreement. Furthermore, Article 43's own terminology establishes that sand and gravel operations of a "Signatory Contractor" are covered by the Construction Agreement. It simply provides the right of a contractor that is signatory to the

Construction Agreement, and which has rock, sand and gravel employees, to seek lower wages for those employees, in order to be competitive with those wages "prevailing in that industry."

This is, in fact, the interpretation of Article 43 that the Union's "new regime" advanced when it originally contested the transfer of SNP employees at the Sloan Quarry to Southern Nevada Ready Mix in early 2009. On February 9, 2009, the Union wrote to Dana Wiggins, as the representative of AI, requesting to bargain over the issue. The Union official stated:

> To the extent the parties reach a supplement agreement pursuant to Article 43 of the Labor Agreement. The Union hereby requests decisional and effects bargaining on the Company's decision to transfer employees from one Collective Bargaining Agreement to another Collective Bargaining Agreement without giving the Union advance notice to bargain on the effects and in good faith.

(Resp. Exh. 13)

The interpretation given to Article 43 by Dana Wiggins in his testimony, by the Union in February 2009, and by the Respondent herein, is a reasonable interpretation. Furthermore, even if another interpretation is possible, when a contractual provision is susceptible to more than one interpretation, an employer who acts in accordance with its interpretation of that provision cannot be found to have committed a violation of Section 8(a)(5) of the Act. *Crest Litho, Inc.,* 308 NLRB 108 (1992); *Yellow Freight Systems, Inc.,* 313 NLRB 309, 331 (1993); *NCR Corp.,* 271 NLRB 1212, 1213 (1984); *Vickers, Inc.,* 153 NLRB 561, 569-570 (1965).

Also, it should not be forgotten that the General Counsel has the burden of proof. If General Counsel has a different version of Article 43, it must show that its version is not just a plausible interpretation, but also the correct interpretation, one that is so clear as to preclude all others. *Hempstead Park Nursing Home,* 341 NLRB 321 (2004); *Sterling Lebanon Packaging Corp.,* 332 NLRB 11, fn. 1 (2000).

3) The Scope of Bargaining Unit Remains Same

Any bargaining that would have taken place if the Union had made a request to bargain after being notified of Respondent's intended actions at the July 9 meeting would not have constituted bargaining over a change in the scope of the Construction Agreement. The bargaining would have involved the hauling of material in various types of trucks that are specifically covered by the Construction Agreement. The scope of the bargaining unit never would have changed, and has not changed to this date. Bargaining for lower wage rates for those covered in the bargaining unit does not change the scope of the bargaining unit. This is especially true where any agreement that would be reached pursuant to such bargaining would be categorized as a supplement to the Construction Agreement itself.

C. Union's Stonewalling

The evidence reflects Respondent's willingness to address issues with the Union and its openness in informing the Union of its plans in the industry and how such plans could affect the Union. The Union responded by stonewalling Respondent and thwarting any attempt of Respondent to utilize the material hauling portion of the R S & G Agreement. The Union's conduct and positions render the material hauling portion of the R S & G Agreement a nullity, and render Article 43 of the Construction Agreement a worthless and meaningless provision.

Dey informed Stewart that the Union would not only not let Respondent keep its own drivers to do work under the R S & G Agreement, it would not recognize any attempt by Respondent to move its trucks to its rock, sand, and gravel division. When the Judge asked Charging Party's counsel how the Union could stop Respondent from moving its trucks to the R S & G Agreement, or to its rock, sand, and gravel division, counsel stated that the Union would not have any objection to the transfer of trucks, only the performance of work by employees

under the R S & G Agreement. However, neither Charging Party or the General Counsel put Dey on the witness stand to explain his stonewalling tactics. Accordingly, Stewart's testimony stands uncontradicted.

Stewart also testified that the Union would not even permit Respondent to utilize the R S & G Agreement to haul "plant hauls" from the Sloan Quarry to its own batch plants, something that even the narrowest interpretation of Darr's testimony permitted. When the Judge quizzed Charging Party's counsel whether Respondent would have violated the Act if it had only sought to haul "plant hauls" under the R S & G Agreement, counsel said it would not have been a violation if the parties bargained for an MOU to permit such, noting the MOU that had been agreed upon for the Sloan Quarry employee transfer in January of 2009.

Charging Party also contended in its opening statement that it could have refused to bargain over the attempt to operate under the R S & G Agreement based on its change of scope of bargaining unit theory. It is clear the Respondent intended to deny Respondent any attempt to utilize the material delivery portion of the R S & G Agreement.

It should not be forgotten that Respondent, in the July 9, 2010 meeting with Dey originally discussed only transferring to the R S & G Agreement the trucks that had been dedicated for the construction projects in Mesquite and the test site, rather than have them sitting idle upon their return to Las Vegas. Respondent proposed to have only a certain number of trucks designated for material hauls under the R S & G Agreement, and have the remainder dedicated to construction projects. This was almost exactly, if not exactly, the fact scenario suggested by Darr during the 2008 negotiations. It was Dey that suggested that instead of keeping trucks dedicated to construction, that Respondent should consider doing what Cemex did and dedicate all of the trucks to the R S & G Agreement, and to simply pay prevailing wages

when the drivers worked on construction projects. Again, General Counsel did not call Dey to contest this testimony or to address it in any way.

D. Most Favored Nations Clause

The "Favored Nations" clause of the R S & G Agreement specifically provides that if the Union enters into any agreement with any other ready mix employer located within the jurisdiction of the Union which competes with Respondent and has more favorable terms than Respondent's agreement, that Respondent could "adopt the more favorable terms and conditions in their entirety by implementing the other collective bargaining agreement." **(GC Exh. 3, Article 26, page 27)** The Cemex and Nevada Ready Mix agreements have the identical language in their agreements.

If, for some reason, Respondent's operations are not found to have been bargained for in the 2008 negotiations, the Respondent would, nevertheless, not have violated the Act by operating under the more favorable terms set forth in the Cemex and Nevada Ready Mix Agreements. The Favored Nations clause was bargained for, and Respondent can not be found to have violated Section 8(a)(5) of the Act by operating under terms of the Cemex or Nevada Ready Mix agreements.

E. Direct Dealing Allegation

Respondent's communications with its employees did not constitute unlawful direct dealing in violation of Section 8(a)(5). As noted above, the communications were based on the bargained for right to solicit employees for work under the R S & G Agreement regardless of their union affiliation, after the Union failed to fulfill its obligation to dispatch employees pursuant to dispatch requests from Respondent. Also, the Union was notified of all of the

communications prior to their occurrence and voiced no objections to such. Union agents were present during direct communications with employees on October 1 at the Sloan Quarry.

In *Kansas National Education Association,* 275 NLRB 638 (1985), the Board stated, at page 640:

> An element of direct dealing with employees is the lack of consent by the designated bargaining representative to these employee contacts. As the record shows that the Respondent negotiated with Lopes and that the Union had no knowledge of the Respondent's contacts with Lopes until after they were made, we find that the Respondent violated Section 8(a)(5) and (1) by these direct negotiations.

None of these elements were present in this case.

F. <u>Rock, Sand & Gravel Designation</u>

Darr made some reference to the Union having ready –mix agreements and not rock, sand and gravel agreements. However, the terms are interchanged in the Cemex and the Nevada Ready Mix agreements. In addition, Darr himself used the term "rock, sand and gravel," when referring to Respondent's operations on several occasions. **(TR pp. 264, 290 and 320).** Also, the dispatch forms provided by the Union to Respondent referred to the rock, sand and gravel dispatch. General Counsel may try to extrapolate some meaning to the omission in Respondent's R S & G Agreement of the provision in the Cemex and Nevada Ready Mix agreements that "the parties hereto have had in existence since 1950 a rock, sand and gravel agreement which has been periodically amended." The only inference that can be drawn from such omission is that Respondent's agreement has not been in existence since 1950. General Counsel did not elicit any other meaning from Darr, and chose not to call Dey to address the issue.

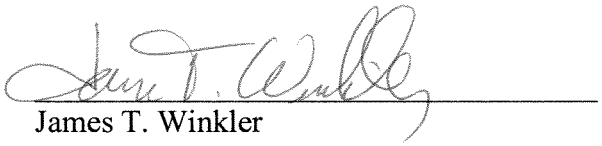
. . .

. . .

CONCLUSION

Based on the above, and the record as a whole, the Consolidated Complaint should be dismissed in its entirety.

Dated in Las Vegas, Nevada, this 6th day of September, 2011.



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 6, 2011, I served the within document(s):

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

X By **United States Mail** – a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 6, 2011 at Las Vegas, Nevada.

Kimberly Gregos

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