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

ACTING GENERAL COUNSEL'S REPLY BRIEF

Counsel for the Acting General Counsel submits the following Reply Brief to the Answering Brief filed by Respondent Aggregate Industries.[1] For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the Acting General Counsel's Exceptions.

I. The ALJ Erred by Refusing to Find that Respondent Unlawfully Changes the Scope of the Unit.

The Acting General Counsel asserts that the ALJ erred by refusing to find that Respondent unlawfully changed the scope of the Unit by removing the drivers performing "off-site" material hauling work from the Construction Unit, and for the first-time, requiring that these employees work under the terms of the Ready-Mix Agreement, covering the Ready-Mix Unit. Respondent's claim that the "scope of the bargaining unit . . . has not changed to this date" is unsupported by the record evidence. *Resp't Ans. Br.* at 25. The evidence shows

[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." Regal Materials, Inc., and Southern Nevada Ready Mix will be referred to interchangeably as "Regal-SNR." 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.

that, by requiring all "off-site" material haul work be performed under the terms of the Construction Contract, Respondent has virtually eviscerated the entire Construction Unit. Respondent admitted that, in September 2010, when for the first time it requested the Union dispatch 60 material haul drivers under the terms of the Ready-Mix Agreement, had the Union fulfilled the dispatch, Respondent would have laid off all of its Construction Contract drivers (Tr. 517); this would have de-facto eliminated the Construction Unit. Although the Union refused to fulfill the dispatch, Respondent accomplished the same outcome by requiring all drivers performing material haul deliveries to work under the Ready-Mix Agreement. *Beverly Enterprises, Inc.*, 341 NLRB 296, 296 (2004) (employer changed the scope of the unit by taking work performed by represented employees, transferring the operations to another part of its business, and having the same employees perform the work, as non unit employees).

Similarly without merit is Respondent's claim that there was no change in the scope of the Construction Unit because the Construction Contract allows for "Supplemental Agreements." *Resp't Ans. Br.* at 19. While Article 43 of the Construction Contract, to which Frehner and Southern Nevada Paving were signatories, contains a clause allowing signatory contractors to negotiate Supplemental Agreements covering sand and gravel operations, neither Frehner nor Southern Nevada Paving had negotiated, or were signatories to, any Supplemental Agreement. Instead, the Ready-Mix Agreement was negotiated and signed by Regal-SNR, pursuant to the Union's certification. (ALJD at 5-9; GC. 3) There is simply no support for Respondent's claim that Frehner and/or Southern Nevada Paving negotiated the Ready-Mix Agreement, or that the bargaining for the Ready-Mix Agreement was not a result of the Union's certification. *Resp't Ans. Br.* at 22. Instead, the credible testimony from Union Business Agent Dewey Darr is that the Union's election victory prompted negotiations

for the Ready-Mix Agreement, as the law requires an employer to negotiate with a certified union. (Tr. 255)

Finally, Respondent's claim that Article 43 of the Construction Contract privileged its actions, because it provides for the ability of a signatory contractor to negotiate a separate agreement, and the Union never requested bargaining, conflates the issues. *Resp't Ans. Br*. at 23. Where an employer removes a substantial group of employees from the bargaining unit, without agreement from the union, and the employer cannot show that the removed group of employees were sufficiently dissimilar from the remainder of the unit to warrant their removal, an illegal change in the scope of the unit has occurred. *United Technologies Corp.*, 292 NLRB 248, 248 (1989). Such is the case here. Because unit scope is a permissive bargaining subject, there was no obligation for the Union to have engaged in any bargaining with Respondent. *Hill-Rom Co., Inc.*, 957 F.2d 454, 457 (7th Cir. 1992); *Bozzuto's Inc.*, 277 NLRB 977, 977 (1985).

II. Respondent Unlawfully Presented its Change as a Fait Accompli.

The ALJ erred in failing to find that Respondent presented its proposed change to the Union as a fait-accompli, and Respondent's assertion that the Union had an obligation to request bargaining is without merit. *Resp't. Ans. Br.* at 13. Here, the morning after Respondent presented the Union with its transition wage proposal, transferring material haul work to the Ready-Mix Agreement, Respondent presented the proposal directly to employees. (ALJD at 13-14) The proposal was presented as a done-deal, a fait-accompli, and under these circumstances there was no obligation upon the Union to request bargaining. *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000) (union not afforded an opportunity to bargain where wage

increase was announced to employees one day after it was presented to the union, and any attempt by the union to object would have been futile).

Respondent's reliance on the Board's decisions in *Jim Walter Resources, Inc.*, 289 NLRB 1441 (1988) and *Citizens National Bank of Willmar*, 245 NLRB 389 (1979) are unavailing. *Resp't Ans. Br.* at 17-18. In *Jim Walter Resources*, the employer provided the union with notice that it would cease paying insurance premiums for disabled employees 10 days before the premiums were due. 289 NLRB at 1442. The Board found that the announcement was not presented as a fait-accompli, as the union had 10 days to request bargaining. Id. In *Citizens National Bank of Willmar*, the employer announced a change in work schedules to the union five-days before the implementation date, but the union never requested bargaining. 245 NLRB at 390. The Board dismissed the allegation that the change was made unilaterally, finding that the union failed to exercise its right to demand bargaining. Id.

Unlike the employer in *Jim Walter Resources*, who provided the Union with 10-days notice, or the employer in *Citizens National Bank of Willmar*, who provided the union with five days notice, Respondent announced its proposal to employees the morning after it was presented to the Union. Under these circumstances Respondent's proposal was presented as a fait-accompli, and any further attempts by the Union to object would have been futile. *Burrows Paper Corp*. supra.

III. Respondent's Merger Resulted in Either an Accretion or an Obligation to Retain the Status Quo in Both Units.

In its Answering Brief, Respondent notes that, by the "summer of 2010, the operations of [Aggregate Industries] had changed dramatically from July of 2008." *Resp't Ans. Br.* at 5. By this time, the trade name Southern Nevada Ready Mix had already been moved from

Regal Materials to Frehner. Thereafter, on August 7, 2010, Regal Materials and Southern Nevada Paving were merged into Frehner, and Frehner's name was changed to Aggregate Industries, SWR, Inc (Aggregate Industries-SWR). Id. at 8.

Therefore, as of August 7, 2010, over a month before Respondent required that all "off-site" material delivery work be performed under the terms of the Ready Mix Agreement, Respondent had consolidated its operations, and both units, under the Aggregate Industries-SWR umbrella. While Respondent's consolidation appears to only be a paper transaction, if any legal significance is given to Respondent's amalgamation of entities and bargaining units, then either: (1) an accretion occurred, and the Ready-Mix Unit was accreted into the Construction Unit; or (2) the Respondent was required to maintain the status quo, until it bargained to impasse or agreement over the status of both units. Under either scenario, Respondent violated Section 8(a)(1) and (5) by requiring that its material haul delivery work be performed under the terms of the Ready-Mix Agreement.

1. <u>The Ready-Mix Unit was Accreted into the Construction Unit.</u>

At the time of the August 2010 amalgamation, Regal-SNR employed about 29 Ready-Mix Unit employees, while Southern Nevada Paving employed between 50-55 Construction Unit employees. (Tr. 87-88) By October 2010, Aggregate Industries-SWR employed between 29 and 35 Ready-Mix Unit employees, while there were about 59 Construction Unit employees, who were, for the first time, being forced to work under the terms of the Ready-Mix Agreement. (GC. 31; Tr. 157-160) The Construction Unit drivers were a clear majority of the amalgamated workforce for Aggregate Industries-SWR. Accordingly, if any legal significance is placed upon Respondent's consolidation, the employees from the Ready-Mix

Unit were accreted into the Construction Unit, and all of the Aggregate Industries-SWR employees should be covered by the Construction Contract, not the Ready-Mix Agreement.

2. Respondent was Required to Maintain the Status Quo

Absent an accretion, upon the consolidation of its various entities, Respondent was required to preserve the status quo until it bargained to impasse or agreement over both units. *Borden Inc.*, 308 NLRB 113, 115 (1992) enfd. 19 F.3d 502, 508 (10th Cir. 1994) (where separate groups of workers, represented by the same union but under separate contracts, are consolidated, the employer is obligated to maintain the status quo until it bargains to agreement or impasse over each group). Here, instead of preserving the status quo, Respondent forced its Construction Unit employees to work under the terms of the Ready-Mix Agreement, in violation of Section 8(a)(1) and (5).

IV. Respondent cannot rely upon a "favored-nations" defense.

Respondent's claim that the Ready-Mix Agreement's "favored nations" clause privileges its conduct is unsupported by the evidence. *Resp't Ans. Br.* at 27. While the Ready-Mix Agreement contains a favored nations clause, Southern Nevada Paving was never a signatory to the Ready-Mix Agreement, but instead was signatory to the Construction Contract.

While the Construction Contract allows ready-mix companies owning their own quarries to "stockpile" material at construction jobsites, Regal-SNR was never a signatory to the Construction Contract. Moreover, Regal-SNR has never owned a quarry. (Tr. 329) The only quarry owned by Respondent was the Sloan Quarry, one-half owned by Frehner, a Construction Contract signatory, and one-half owned by Aggregate Industries-WCR, a separate corporation. (Tr. 487-88, 507; GC. 38) Respondent's attempt to claim that Regal-

SNR is now part owner of the Sloan Quarry, and therefore Respondent is privileged to change the scope of the Construction Unit because of its "paper" name-change and a most-favored nations clause in the Ready-Mix Agreement, makes a mockery of an employer's bargaining obligations under the Act. As set forth in Section III above, if Respondent's amalgamation and name-change had any legal significance then either: (1) the Ready-Mix Unit was accreted into the Construction Unit; or (2) Respondent was obligated to maintain the status quo with respect to both units.

The issue here is not whether Frehner could have "stockpiled" material at construction sites. Instead, the issue is whether Respondent could unilaterally change the scope of the Construction Unit, without the consent of the Union, by moving all of the "off-site" material haul work from Southern Nevada Paving Construction Unit employees and forcing them to work under the terms of the Ready-Mix Agreement. Here, Respondent has forced all of the Southern Nevada Paving Construction Unit drivers into the Ready-Mix Unit, not just those who deliver aggregate material. Construction Unit employee Phillip Willars was forced into the Ready-Mix Unit, even though he primarily hauls asphalt. (Tr. 356) There is no evidence that Respondent owns its own asphalt plant, that Appendix A of the Ready-Mix Agreement covers asphalt drivers, or that Regal-SNR's ready-mix competitors deliver asphalt. Notwithstanding, Willars was moved from the Construction Unit to the Ready-Mix Unit. Similarly, Construction Unit employee Dean Mulvaney primarily hauls construction debris to the dump, but was forced into the Ready-Mix Unit despite his job duties. (Tr. 343-44; 348-49) Respondent's favored-nations argument is merely an attempt to obfuscate the issues, and is unsupported by the record evidence.

V. CONCLUSION

Based on the foregoing, the Board should reverse the ALJ's erroneous rulings and find that Respondent committed the additional violations as set forth in the Acting General Counsel's Exceptions.

Dated at Phoenix, Arizona, this 20th day of September, 2011.

Respectfully submitted,

/s/ John T. Giannopoulos
John T. Giannopoulos
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2123
Facsimile: (602) 640-2178

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF 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 20th day of September 2011, on the following:

Via E-Gov, E-Filing:
Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:
James T. Winkler, Attorney at Law
Littler Mendelson
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89101
E-Mail: jwinkler@littler.com

Patrick Domholdt, Attorney at Law
Teamsters Local Union No. 631
700 North Lamb Boulevard
Las Vegas, NV 89110
E-Mail: patrickd@teamsters631.com

Richard G. McCracken, Attorney at Law
McCraken, Stemerman & Holsberry
1630 South Commerce Street, Suite A-1
Las Vegas, NV 89102
E-Mail: rmccracken@dcbsf.com

Via Overnight Delivery:
Aggregate Industries
3101 East Craig Road
North Las Vegas, NV 89030

International Brotherhood of Teamsters, Local No. 631
700 North Lamb Boulevard
Las Vegas, NV 89110
E-Mail: johnp@teamsters631.com
wayned@teamsters631.com

/s/ Katherine A. Stanley
Katherine A. Stanley
Secretary to the Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone (602) 640-2163