

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

AGGREGATE INDUSTRIES

and

**Cases 28-CA-023220
28-CA-023250**

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

**ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO THE EXCEPTIONS FILED
BY RESPONDENT AGGREGATE INDUSTRIES**

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**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
ANSWERING BRIEF TO THE EXCEPTIONS FILED
BY RESPONDENT AGGREGATE INDUSTRIES**

Respondent Aggregate Industries' Exceptions to the Decision of Administrative Law Judge Burton Litvack, [JD(SF)-13-11] (ALJD) are without merit and not supported by the evidence.¹ The ALJ's findings that Aggregate Industries violated Section 8(a)(1) and 8(a)(5) of 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 in another bargaining unit represented by a different union; and (c) unilaterally changing the terms and conditions of employment of the sweeper truck drivers, are fully supported by the record. Accordingly, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Aggregate Industries' Exceptions.

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.

I. PROCEDURAL HISTORY

The hearing in this matter was conducted before ALJ Burton Litvack, on February 15 through February 17, 2011. (ALJD at 1) ALJ Litvack issued his decision on June 6, 2011, finding that Aggregate Industries violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with sweeper truck drivers regarding their terms and conditions of employment, unilaterally assigning work to employees covered by another bargaining unit represented by another union, and unilaterally changing employees' terms and conditions of employment. (ALJD at 22-25)

On September 6, 2011, Aggregate Industries filed twenty-nine (29) exceptions to the ALJD. Respondent's first five exceptions deal specifically with the ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act as outlined above. With respect to these findings, Respondent filed the following specific exceptions:

In Exception 1, Respondent asserts that the ALJ erred in concluding that Aggregate Industries violated the Act by bypassing the Union and dealing directly with its sweeper truck drivers.

In Exception 2, Respondent excepts to the ALJ's finding that Aggregate Industries violated the Act by assigning mechanical sweeper truck driving job duties to the Laborers Union.

In Exception 3, Respondent claims that the ALJ committed error by finding that Aggregate Industries violated the Act by unilaterally changing the terms and conditions of employment of Respondent's sweeper truck drivers.

In Exception 4, Respondent excepts to the ALJ's finding that Respondent's unfair labor practices affect commerce.

In Exception 5, Respondent excepts to the ALJ's recommended remedy.

Respondent's other twenty-four (24) exceptions involve a variety of specific factual findings and statements made by the ALJ in his decision regarding Respondent's conduct concerning

the material haul drivers and the Construction Unit, which are relevant to the Acting General Counsel Exceptions. Respondent's other exceptions fall into the following broad categories:

- A. Respondent's claim that the Ready Mix Agreement privileged Aggregate Industries' conduct.
- B. Respondent's assertion that the Union agreed to allow Respondent haul materials under the terms of the Ready-Mix Agreement.
- C. Respondent's contention that it followed the terms of the Ready-Mix Agreement.
- D. Respondent's claim that the ALJ improperly stated that Respondent did not assert an impasse defense.
- E. Respondent's assertion that this matter should be deferred to the grievance and arbitration provision of the Ready-Mix Agreement.
- F. Respondent's "Miscellaneous" exception claiming that: (a) All Union represented employees constitute one unit; (b) the "Favored Nations" clause of the Ready-Mix Agreement privileged Respondent's conduct; and (c) the ALJ's statement that Sean Stewart conceded that Union agent Wayne Day told Respondent it had a "fight" on its hands was incorrect.

Any other recommendations, findings of fact, and conclusions of law, made by the ALJ which are not specifically asserted in Respondents' exceptions, or that have not been otherwise excepted to by the Acting General Counsel should be adopted by the Board.² *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations).

² On August 2, 2011, the Acting General Counsel filed four exceptions to the ALJD, asking the Board to find, in pertinent part, that Aggregate Industries committed additional 8(a)(1) and 8(a)(5) violations, with respect to the change in the scope of the Construction Unit.

II. FACTS

A. Respondent's Operations and its Various Subsidiaries

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 several 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. Southern Nevada Paving continued performing the same work, and operated as a separate legal entity under its own name, until August of 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) (Tr. 25-26, 52-55, 86-87) (GC. 37)

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.³ (ALJD at 3) (Tr. 487-88; 507) 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) (Tr. 53) 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) (Tr. 53-54)

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) (Tr. 388) At the time of the purchase, Respondent created a separate Nevada corporation called Regal Materials, Inc., (Regal or Regal-SNR) to own Regency.⁴ (ALJD at 3; Tr. 60) Regal's Summerlin batch plant closed in February 2008, but was reopened later that same year. (Tr. 389, 391 505) 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.⁵ (Tr. 389, 505) 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.⁶ (Tr. 65, 507-08) Although they were all subsidiaries of Respondent, Frehner, Southern Nevada Paving, and Regal-SNR, all bid for jobs separately, under their own company names. (ALJD at 4) (Tr. 489-90)

³ 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)

⁴ 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)

⁵ The Summerlin, Sloan, and Delhi batch plants are all located in Clark County, Nevada. (Tr. 505)

⁶ 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)

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) (Tr. 485, 486) 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 the 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. (GC. 21, 22; Tr. 106-08) Moreover, Respondent 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) (Tr. 104-05)

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).⁷ (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

⁷ Frehner was incorporated in 1970. (GC. 37; Tr. 486) The record does not indicate the year in which Southern Nevada Paving was incorporated.

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 member have been signatory to a Construction Contract with the Union for at least 30 years.⁸ (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)

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, 2008.⁹ (ALJD at 9) (Tr. 255; GC. 3) At the time negotiations started, Regal owned ten ready-mix/bubble-trucks, but had closed its Summerlin batch plant

⁸ 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)

⁹ The term of Ready-Mix Agreement is from July 1, 2008 through May 31, 2012. (GC. 3)

in February 2008, and had laid off all of its drivers. (Tr. 391-92) Notwithstanding, negotiations progressed, as Regal was 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 has worked for Respondent since it purchased Frehner in 2004. (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 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 employed at the time.¹⁰ (ALJD 6-7) (Tr. 262-63, 256, 307; GC. 3, p. 29)

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.¹¹ (ALJD at 7, 16 n. 44) (Tr. 257-59, 262-63, 270-272, 320) This classification appears in ready-mix contracts the Union has with other Las Vegas area ready-mix companies, and the Union wanted the Ready-Mix Agreement to mirror these other agreements.¹² (ALJD at 6) (Tr. 272; R. 4, p. 30; R. 5, p. 25) However, unlike the other ready-mix companies, which do not perform 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; this work was supposed to be performed under the Construction Contract. (Tr. 273-74) While Regal-SNR did not operate any material delivery

¹⁰ 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)

¹¹ 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)

¹² 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)

trucks, the trucks owned and operated by Southern Nevada Paving were “dual use” trucks, meaning they and could be used on construction sites (“on-site” work) as well as for delivering material to batch plants (“off-site” work). (ALJD at 7 n. 17) (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 were sitting idle at the Sloan Quarry; therefore, during negotiations he asked Ward why Respondent did not transfer these idle 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, to Regal-SNR. 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 construction sites for Frehner or Southern Nevada Paving, and the

construction industry was busy in Las Vegas at the time.¹³ (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.¹⁴ (ALJD at 7) (Tr. 258, 267, 292, 320, 334) 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.¹⁵ (Tr. 258-59)

With this understanding, 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)

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

¹³ 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)

¹⁴ 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)

¹⁵ Darr's testimony as to what he was told by Ward and Jensen regarding this issue is un rebutted.

Union's read-mix dispatch procedures. (Tr. 274) 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 paid to 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 (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, 2009, the new administration initially took the position that this transfer was not allowed under the contract. 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 of their withdrawal. (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.¹⁶ (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 was concerned about finding ways to use its material delivery trucks when these projects finished. (Tr. 450-51) Also, in June 2010, Respondent had been approached by Cemex, one

¹⁶ 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, 2010, 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, 2010.

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.¹⁷ (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's use of a third-party to perform material delivery work, while some Southern Nevada Paving trucks were sitting idle. (ALJD at 10) (Tr. 83, 454)

When Dey arrived for the meeting, he found Stewart along with five of Respondent's officials waiting.¹⁸ 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 its 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)

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

¹⁷ 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)

¹⁸ Dey was never told that there would be a large group of Respondent's managers waiting for him at this grievance meeting. (Tr. 522)

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 ever 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.¹⁹ (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.²⁰ 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 advertisements in newspapers for drivers, and put "word on the street" that it was hiring. Although no new drivers were hired, a group was on hold ready to start. (Tr. 165-66, 474-75)

¹⁹ 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)

²⁰ Darr testified that he specifically disagreed with Stewart's claims. (Tr. 311-13)

On September 30, Stewart called Dey and asked 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.²¹ (Tr. 121)

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

On October 1, Respondent met with 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. 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. The Union never asked Respondent to draft a phase-in proposal, or present it directly to the drivers. (ALJD at 14 n. 39) (Tr. 143-44) 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. (Tr. 350, 352) Stewart then told the drivers that the company was also seeking

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

workers from other sources. (Tr. 124, 142; GC. 29) He explained what terms Respondent was offering the drivers, and handed out a document to them 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, 2010.²² (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 offer 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 six-month period. (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 them 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 wanted to continue working for Respondent. (Tr. 349; GC. 27) In turn, Respondent would

²² 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, 2010.

contact the drivers who returned the document with their assignments for the next Monday.²³
(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 fill out and return the form by Friday, October 8. (GC. 28) On Monday, October 11, it was raining and there were limited crews working. Respondent still refused to request dispatch of material drivers under the Construction Contract, and on October 12, the Union started picketing.²⁴ (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)

7. Transfer of the Sweeper Drivers

Andrew Barnum and Mike Crane were employees of Southern Nevada Paving, being paid under the terms of the Construction Contract, and were members of the Union. (Tr. 32,

²³ 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)

²⁴ At first the picket signs said "on strike." Later, the Union changed the signs to say "Locked Out." (Tr. 155-56)

168-69, 212-13, 242) Both were long-term employees of Southern Nevada Paving, Barnum having worked for the company for over seven years, and Crane for four. (Tr. 211, 213) During this time, both operated truck-mounted mechanical sweeper trucks and would fill-in at times as material haul drivers. (Tr. 213, 228-29, 241, 519) Barnum and Crane became dissatisfied with the Union and, in early October, Barnum asked Transportation Manager Mike Kuck whether he and Crane could withdraw from the Union but still keep their jobs with the company. Kuck told Barnum that he was unsure, but would get back to him. (Tr. 218-20, 242-43) At some point, Barnum told Dey that Southern Nevada Paving was looking into switching him to another union, and Dey replied that the Union would not let this happen. (Tr. 221)

Kuck spoke with Stewart, who said that it would be easy enough to switch Barnum and Crane over to another union. (Tr. 243) Around the third week of October, Kuck called Barnum and told him that there were two options available, he and Crane could switch to either the Laborers' Union or the Operating Engineers' Union. (Tr. 222, 244) Barnum and Crane discussed their options, and decided that they wanted to join the Laborers' Union. (Tr. 223-24) Barnum informed Kuck, who said that he would take care of it and call when their dispatch was available. (Tr. 223, 245) On October 29, Stewart faxed a letter to the Laborers' Union, asking what Barnum and Crane needed to do to join the union. The letter also assigned the sweeper work (for Barnum, Crane, and all future hires) to the Laborers' Union.²⁵ (Tr. 166-67; GC. 35) That same day, Stewart called the Laborers' Union and faxed them another letter requesting that Barnum and Crane be dispatched; the letter also noted that both

²⁵ At the time, Respondent operated three sweeper trucks, with three sweeper drivers, Barnum, Crane, and another employee who was a member of the Operating Engineers. (Tr. 168; GC. 35)

had been instructed to report to the Laborers' union hall that day to pay their fees. (Tr. 481; GC. 36)

Kuck then called Barnum, telling him that the dispatches were available, and that both he and Crane needed to go to the Laborers' hall. (Tr. 223-24, 170) Barnum and Crane complied, and they both joined the Laborers' Union. (Tr. 224, 246) They then withdrew from the Teamsters. (Tr. 225) After withdrawing from the Union, Barnum and Crane went back to work for Respondent, driving the same mechanical sweeper trucks, except they were now being dispatched from the Laborers' Union, and were covered by a separate collective-bargaining agreement between Respondent and the Laborers' Union. (Tr. 170-71, 225-26, 246; GC. 4) It is undisputed that Respondent never bargained with the Union over this change. (Tr. 246-47, 481)

III. ARGUMENT

A. The ALJ Properly Found that Respondent's Conduct Involving the Sweeper Truck Drivers Violated 8(a)(1) and (5) of the Act.

Aggregate Industries' first five exceptions involve the ALJ's finding that Respondent's conduct involving the sweeper-truck drivers violated Section 8(a)(1) and (5) of the Act.²⁶ *Resp't Exceptions*, # 1-5; *Resp't Br. Supp.*, at 2-6. Specifically, the ALJ found that Respondent bypassed the Union and dealt directly with sweeper truck drivers regarding their terms and conditions of employment, unilaterally assigned sweeper truck driving work to employees covered by another bargaining unit represented by another union, and unilaterally changed the terms and conditions of employment of the sweeper truck drivers. (ALJD at 22-

²⁶ While Respondent also excepts to the ALJ's order and remedy, such exceptions only relate to the fact that the ALJ found a violation.

25) These findings are fully supported by the record evidence; Respondent's exceptions are without merit and should be rejected by the Board.

1. Legal Framework

A union must be given notice and afforded a meaningful opportunity to bargain before any changes are made to unit employees' wages, hours, and working conditions. *Mission Foods*, 350 NLRB 336, 344 (2007). This obligation extends to the elimination of bargaining-unit positions. *Id.*, citing *Kansas AFL-CIO*, 341 NLRB 1015, 1027 (2007). It also applies to transferring unit employees. *Id.* citing *Wellman Industries*, 222 NLRB 204, 206 (1976). 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). *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993); Cf. *Hanson SJH Construction*, 342 NLRB 967, 969 (2004) (no violation where the transferred employees performed different work, and the transfer did not remove work from the unit).

2. Analysis

Here, Respondent assigned the mechanical sweeper driver work performed by Barnum and Crane to the Laborers' Union, moved Barnum and Crane from the Construction Unit to the Laborers' Unit, and at no time provided the Union with notice or an opportunity to bargain over the move. Moreover, the record shows that since the transfer, both Barnum and Crane perform the exact same work, driving the exact same type of mechanical sweeper trucks, as they performed when they were covered by the Construction Contract.²⁷ (Tr. 226; 246) As such, Respondent no longer has any sweeper drivers who are members of the Union covered by the Construction Contract. (Tr. 168; GC. 35) Under these circumstance, where

²⁷ Since the transfer, Barnum has also been trained to perform additional laborer duties, but spends about 70% of his time performing the same work he previously performed under the Construction Contract. (Tr. 226)

Respondent failed to give notice to, or bargain with, the Union, and the transferred employees perform the exact same work which was removed from the Construction Unit, the ALJ properly found that Respondent's unilateral conduct violated Section 8(a)(1) and (5).

The record evidence also supports the ALJ's conclusion that Respondent engaged in direct dealing with respect to its transferring Barnum and Crane to the Laborers' Union. *Kansas Education Assn.*, 275 NLRB 638, 640 (1985) (employer negotiating directly with employee regarding a transfer is engaged in unlawful direct dealing). Here, Respondent negotiated directly with Barnum and Craig as to whether they desired to join the Laborers' Union or the Operating Engineers' Union, both of which offered different wages and terms of employment. Respondent facilitated the transfer, and at no time did Respondent ever discuss this matter with the Union. *Otis Elevator Co.*, 283 NLRB 223, 225 (1987) (by offering transfer relocation package directly to employees employer engaged in direct dealing). Clearly, the ALJ's findings with respect to the direct dealing violation are supported by the record and extant Board law.

3. The ALJ Properly Found No Jurisdictional Dispute Existed

In its brief, Respondent asserts that it was privileged to engage in unilateral actions, because the matters involved a jurisdictional dispute between the Union and the Laborers' Union, and that the ALJ erred in discrediting the testimony of Stewart as to whether the Laborers' ever made a demand for representation. *Resp't Br. Supp.* at 6. However, in his decision the ALJ properly reviewed, and dismissed, these claims; the ALJ's findings are fully supported by the record. (ALJD at 24)

The evidence shows that the Laborers' Union never performed any of the work in question before the transfer, and has never made a demand or otherwise sought assignment of

the work. (Tr. 244-45; GC. 35) *Plasterers Local 526*, 149 NLRB 78, 81 (1964) (no jurisdictional dispute exists when unions never demanded or sought assignment of work to their members). Kuck specifically testified that the Laborers' Union never demanded or claimed the sweeper driver work. (Tr. 244-45) The ALJ properly credited Kuck's testimony that no demand was ever made, and the preponderance of all the relevant evidence, including the inherent probabilities and inferences drawn from the record, does not support an alternate finding. *Vic Koenig Chevrolet*, 263 NLRB 646 n. 1 (1982) (when the demeanor factor is diminished, the choice between conflicting testimony rests not only on demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole). It is inherently improbable that Kuck, Respondent's transportation manager would be unaware of a demand for representation, had such a demand been ever made.

Moreover, Stewart's testimony regarding the Laborers' "demand" was vague at best. Stewart testified that an unidentified person named "Matt" "asked that the work be assigned to them."²⁸ (Tr. 483) However, other than this brief statement, there is no other evidence concerning an individual named Matt, or what, if any, labor organization he might have represented. Stewart also testified that he "spoke" to the Laborers' Union secretary/treasurer sometime in 2010. (Tr. 482-83) However, Stewart was not specific about the matters he "spoke" to the Laborer's Union about, or the actual words used during these alleged conversations. Under these circumstances, there is insufficient evidence to show that the Laborers' Union ever demanded the work in question, or that the ALJ's credibility findings should be overturned. Compare *Plasterers Local 526*, 149 NLRB 78, 80 n. 2 (1964)

²⁸ This evidence was allowed over the General Counsel's objection. (Tr. 482-83) Other than this brief statement, there is no other evidence concerning an individual named Matt, or what, if any, labor organization he might have represented. Nowhere else in his testimony does Stewart mention an individual named "Matt."

(jurisdictional dispute did not exist where unions never made a demand or sought the work in question, even though the business agents of two unions told the employer “they would like to have some of their members on the job”); *Sheet Metal Workers, Local 9*, 183 NLRB 443, 445 (1970) (union did not make a demand where union employees “would have liked to have done” the work in question).

Moreover, the issue here is whether Respondent can unilaterally transfer Barnum and Crane out of the unit, and assign the work to another union, not which group of union referred employees should be assigned the sweeping work. In these circumstances, there is no jurisdictional dispute. Cf. *Teamsters Local 639 (United Rigging & Hauling)*, 296 NLRB 803, 805 n. 5 (1989) (jurisdictional dispute exists where the central issue is which group of unionized employees should be assigned the work in question, as opposed to which union should represent certain workers). Accordingly, the evidence supports the ALJ’s finding that Respondent unilaterally transferred Barnum and Crane out of the Construction Unit, and assigned the work to another union, without providing the Union with notice or an opportunity to bargain; the Board should affirm the ALJ’s findings and conclusions.

B. Respondent’s Claim that the Ready-Mix Agreement Privileged its Conduct is Without Merit

It its brief, Respondent asserts that its conduct, by removing drivers performing “off-site” material hauling work from the Construction Unit, and for the first-time requiring the work be performed under the terms of Ready-Mix Agreement, was privileged by the terms of the Ready-Mix Agreement, and claims the ALJ erred by refusing to make such a finding. *Resp’t Br. Supp.*, at 8-11. However, only Regal-SNR, which never performed material hauling work and did not employ any material haul drivers, was signatory to the Ready-Mix Agreement. Respondent’s “after-the-fact” claim that all of its subsidiaries were somehow

subject to the Ready-Mix Agreement, because Regal-SNR was signatory to the Agreement, is unsupported by the facts and the law.

After Regal's certification, Stewart specifically testified that he told the Union it was now dealing with an entity named Southern Nevada Ready Mix. (Tr. 64-65) It was under this understanding that the parties commenced their negotiations, and reached agreement on a Ready-Mix Agreement, which was signed by Regal-SNR. (Tr. 256-58) There is simply no evidence that either Respondent or the Union proceeded with the understanding that any entity, other than Regal-SNR, would be covered by the Ready-Mix Agreement.²⁹

Respondent's other subsidiaries, Frehner and Southern Nevada Paving, were already signatory to the Construction Agreement, and the fact these subsidiaries may have shared some of the same executive employees is irrelevant; many employers have distinct operating subsidiaries with separate bargaining units. See, *Sonat Marine, Inc.*, 281 NLRB 87, 88 (1986) (employer's operating subsidiaries constituted separate bargaining units for collective-bargaining, with separately negotiated contracts). Accordingly, Respondent's exceptions have no basis, and should be dismissed.

C. Respondent's Assertion that the Union Agreed that Respondent Could Haul Materials Under the Ready-Mix Agreement is Unsupported by the Record

In its brief, Respondent claims that the Union agreed to allow it to haul material under the terms of the Ready-Mix Agreement. *Resp't Br. Supp.*, at 11. However, the ALJ properly credited the testimony of the Union's witness, Dewayne Darr, who testified that the Union never made such an agreement. (ALJD at 16 n. 44) And Respondent has not, and cannot, show that the clear preponderance of all the relevant evidence shows otherwise. *Standard*

²⁹ The significance, if any, of Respondent's August 2010 amalgamation is addressed in the General Counsel's exceptions, filed on August 2, 2011. See *GC's Br. Supp. Exceptions*, p. 29-31.

Dry Wall Products, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951) (Board will not overrule an ALJ's demeanor based credibility resolutions unless the clear preponderance of all the relevant evidence shows they are incorrect).

Along with the ALJ's credibility determination, supporting Darr's testimony that no such agreement was ever reached is the fact that no documents exist sustaining Respondent's contention. *Hood v. District of Columbia*, 211 F.Supp.2d 176, 181 (D.D.C. 2002) (lack of a written agreement underscores that the parties never reached a "meeting of the minds").

During negotiations for the Ready-Mix Agreement, the parties went to great lengths to memorialize their agreement regarding the transfer of nine Sloan Quarry heavy-haul drivers from the Construction Contract to the Ready-Mix Agreement, resulting in the finalized MOU. (GC. 11) The parties exchanged numerous emails and draft MOU's over these nine drivers, before finalizing their agreement. (R. 7-10) Surely, had the parties reached some sort of similar agreement to transfer the 59 material-delivery drivers to the Ready-Mix Agreement, there would have been some sort of documentation. Instead, there is nothing: no draft agreements, no memos, not even one email.

Moreover, the actions of the parties in the years following the signing of the Ready-Mix Agreement show that no such agreement was ever reached. *Institutional Management Corp. v. Translation Systems, Inc.*, 456 F.Supp. 661, 669 (DC Md 1978) (it is hornbook law that, without mutual assent, whether demonstrated by words or acts, there is no common intention to complete an agreement); *Teamsters Local 471 (Superior Coffee)*, 308 NLRB 1, 2 (1982) (Board is free to use general contract principles, adopted to the context of bargaining, to determine whether an agreement has been reached). Here, from July 2008 through July 2010, all material deliveries were performed under the terms of the Construction Contract,

using Construction Unit drivers. Respondent's actions clearly do not support a finding that the Union had bargained away the coverage of the material-delivery drivers in 2008, and Respondent cannot show that the Union bargained about, or consented to, a change in the scope of the bargaining unit.

Finally, the ALJ properly discredited Stewart, who was contradictory in his testimony. When asked by Respondent's counsel whether there was much discussion during the Ready-Mix Agreement negotiations about the specifics of material deliveries, Stewart answered "no." (Tr. 427) Stewart definitively testified that, during negotiations for the Ready-Mix Agreement "it was never anticipated that Southern Nevada Paving drivers would be covered by the Southern Nevada Ready-Mix Agreement." (Tr. 202) Accordingly, the ALJ's findings are fully supported by the credible record evidence, and Respondent's exceptions should be dismissed.

D. Respondent's Contention that it Followed the Terms of the Ready-Mix Agreement is Without Merit

In its brief, Respondent claims that it properly followed the dispatch procedure of the Ready-Mix Agreement, when it requested that the Union dispatch Construction Unit employees pursuant to the terms of the Ready-Mix Agreement. *Resp't Br. Supp.*, at 24. However, pursuant to Article 8 of the Construction Contract, Respondent was contractually obligated to use the Union's construction dispatch procedures for hiring material delivery drivers.³⁰ (GC. 2, p. 8) All of the job positions which Stewart requested in his September 24

³⁰ Hiring hall provisions survive the expiration of a collective-bargaining agreement, are mandatory subjects of bargaining, and cannot be changed unilaterally. *The Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 535-37 (2006), citing *American Commercial Lines*, 291 NLRB 1066, 1075 (1988), and *Southwest Security Equipment Co.*, 736 F.2d 1332 (9th Cir. 1984) cert. denied 407 U.S. 1087 (1985). An employer's decision to unilaterally stop using a union's hiring hall violates Section 8(a)(5). *Id*; *Wise Allowys, LLC.*, 343 NLRB 463, 468 (2004) (employer violated Section 8(a)(5) by unilaterally discontinuing its exclusive use of the union hiring hall); *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (DC Cir. 1988) (employer violated Section 8(a)(5) by unilaterally changing its driver dispatch procedure).

dispatch had previously been dispatched under the Construction Contract. Instead of using this process, Stewart requested delivery drivers trying to use the Ready-Mix Agreement's dispatch process. Accordingly, the record evidence shows that Respondent's assertion is without merit. Respondent was contractually obligated to use the dispatch procedures in the Construction Contract, not the Ready-Mix Agreement, to dispatch material haul drivers.

E. The ALJ Properly Stated that Respondent Never Asserted the Parties Were at Impasse

Respondent excepts to the ALJ's statement that "Respondent does not assert such a defense," notwithstanding the fact the ALJ found that an impasse existed. (ALJD at 18) Respondent did not assert impasse as a defense in its original Answer, but did include impasse as one of its new affirmative defenses in its Amended Answer, dated just one day before the hearing opened. (GC. 1(i); 1(j)) The General Counsel has never asserted otherwise. Notwithstanding, the ALJ properly noted that Respondent did not assert that impasse existed during the hearing, nor did it raise the issue in its post-hearing brief.

F. The Board Should Dismiss Respondent's Claim that this Matter is Subject to Deferral

In its brief, Respondent asserts that this matter should be deferred to the grievance and arbitration provisions of the Ready-Mix Agreement. *Resp't Br. Supp.*, at 28. However, the Board will not defer disputes raising issues as to unit scope, or the composition and representation of employees. *Mt. Sinai Hospital*, 331 NLRB 895, 899 (2000); *Hill-Rom Co.*, 297 NLRB 351, 360 (1989) enf. denied on other grounds 957 D.2d 454 (7th Cir. 1992) (issues regarding which unit a certain group of workers belong to are not deferrable). This is true even when the unit placement issue is coupled with a question of whether employees are covered by a certain collective-bargaining agreement. *Hill-Rom Co.*, supra. (issues involving

unit placement are non-deferrable, and when coupled with the issue of whether a certain group of employees are covered by a contract, it makes the entire matter inappropriate for deferral). Because the core issue in this case is whether or not Respondent changed the scope of the Construction Unit, deferral is not warranted and would be inappropriate.

G. Respondent’s “Miscellaneous” Exceptions Are Without Merit

In its brief, Respondent includes three “Miscellaneous” exceptions, arguing: (1) that all Teamster represented employees, whether those under the Ready-Mix Agreement or the Construction Contract, constitute one bargaining unit; (2) that the Ready-Mix Agreement’s “Favored Nations” clause privileged Respondent’s Actions; and (3) debating whether Stewart “conceded” that the Union told him it would “fight” Respondent over changing the material haul drivers to the Ready-Mix Agreement. All three exceptions are unfounded, and should be dismissed by the Board.

1. Respondent’s Employees Do Not Constitute One Bargaining Unit

Respondent argues that the Ready-Mix Unit is part of the Construction Unit because the Ready Mix Agreement is a “supplemental agreement” under Article 43 of the Construction Contract.³¹ Respondent’s claim is unfounded.

At the time the Ready-Mix Agreement was negotiated, Regal-SNR was separate and distinct from Respondent’s construction operations, which included Southern Nevada Paving and Frehner. Respondent specifically told the Union it was dealing with Regal-SNR, and Respondent never presented any proposals under the name of either Frehner or Southern Nevada Paving during negotiations. (TR 548)

³¹ Article 43 states, “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 heavy haul transports, demolition work, landscaping, tankers, and truck repairman trainee.” (GC. 2)

The evidence shows that Regal-SNR, Frehner, and Southern Nevada Paving were not consolidated into a single entity (Aggregate Industries-SWR) until August 2010. (TR 25-26,52-55,86-7,485-86; GC. 18,37). Moreover, notwithstanding the August 2010 consolidation, through the date of the hearing, Respondent's website continued listing all three entities as separate operating divisions of Respondent. (GC. 21, 22; Tr. 106-08)

Also, nothing in the Ready-Mix Agreement supports Respondent's claim that it is an Article 43 Supplement Agreement. The document is not designated as a "Rock, Sand and Gravel Agreement", as Respondent now insists on calling it, and the Ready-Mix Agreement has completely different terms from the Construction Contract. For example, the Construction Contract ran from July 1, 2007 to July 30, 2010 (GC. 2 , Art. 44); while the Ready Mix Agreement runs from July 1, 2008 to May 31, 2012. (GC. 3) The clauses related to recognition and geographic jurisdiction also differ. (Compare GC. 2, Arts. 1, 2 with GC. 3, Art. 1) If the Ready-Mix Agreement was truly a supplement to the Construction Contract, one would expect these terms to be the same.

Finally, Respondent's own conduct does not support its contention. On August 20, by letter, the Union asked Respondent whether it contended that Article 43 applies. (GC. 20) Respondent replied to the Union in September, and never mentioned Article 43. (GC. 23) Respondent's contention is simply a post-hoc defense in response to the unfair labor practice charge, and its exceptions regarding this issue are without merit.

2. Favored Nations Clause

Respondent's claim that it had a right to perform all former Construction Unit work, including deliveries to construction sites, under the terms of the Ready-Mix Agreement, because its competitors (Cemex and Nevada Ready-Mix) are allowed to perform material

deliveries, and the Ready-Mix Agreement contains a most-favored nations clause, is a subterfuge. It is simply an attempt by Respondent to confuse the issues, and ignore its bargaining obligations with the Union regarding the Construction Unit.

The evidence shows that both Cemex and Nevada Ready-Mix own their own quarries, both are ready-mix only companies, and neither are signatories to the Construction Contract. (Tr. 271, 276, 298, 307, 531, 537-38) While the Construction Contract allows ready-mix companies who own quarries to “stockpile” their material at construction jobsites (Tr. 305-06), Regal-SNR did not own a quarry when the Ready-Mix Agreement was negotiated, and 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. 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. Section 8(a)(5) of the Act precludes Respondent’s unilateral actions.

Moreover, 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

Respondent'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. (Tr. 343-44) Again, there is no evidence that any ready-mix competitor hauls construction debris, or that this job classification is covered by the Ready-Mix Agreement. Mulvaney, who was present at the October 1 drivers meeting, and had a copy of Respondent's transition-wage proposal and reply form put in his work mailbox, was also forced into the Ready-Mix Unit, despite his job duties. (Tr. 344-45, 348-49; GC. 27) There is simply no defense to Respondent's change in scope of the Construction Unit, and Respondent's "most favored-nations" contention is merely an attempt to obfuscate the issues.

3. The Union said it Would "fight" Respondent's Actions

Respondent's exception as to whether Stewart conceded that the Union used the word "fight" is immaterial. Nonetheless, the ALJ's finding is supported by the record. The ALJ found that Stewart conceded that, on August 13, Union agent Wayne Dey may have told him that the Union would "fight" Respondent over changing the material haul drivers to the Ready-Mix Agreement. (ALJD at 13 n. 35).

During his testimony, Stewart was presented with a position statement Respondent submitted during the investigation of the underlying charges. (Tr. 93-94; GC. 19) The position statement reads, in part, as follows: "However, in early August Dey called Sean Stewart and told him that he had talked to his attorney and that the Union was going to have to fight AI [Respondent] on paying wages under the RS&G [Ready-Mix] agreement because the Union was concerned that the employees would sue the Union." (GC. 19 p. 6) Thereafter, Stewart testified as follows:

Q [by the General Counsel]: And at least around the 13th [of August], he [Dey] told you that the Union was going to fight Aggregate Industries on changing the employees over to the Ready Mix Agreement, right?

A [Stewart] Yes. (Tr. 94)

As shown above, the ALJ's statement is fully supported by the record.

IV. CONCLUSION

Based on the foregoing, and the record evidence considered as a whole, the ALJ properly found that Aggregate Industries violated Section 8(a)(1) and 8(a)(5) of 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. The ALJ's findings are fully supported by the record, and should be adopted by the Board. Respondent's other exceptions are without merit, unsupported by the record evidence, and should be dismissed. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order insofar as they are consistent with the exceptions to the ALJD filed by the Acting General Counsel on August 2, 2011.

Dated at Phoenix, Arizona, this 4th day of October 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE EXCEPTIONS FILED BY RESPONDENT AGGREGATE INDUSTRIES in AGGREGATE INDUSTRIES, Cases 28-CA-023220 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 4th day of October 2011, on the following:

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