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 REPLY BRIEF IN SUPPORT OF RESPONDENT'S CROSS EXCEPTIONS**

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In arguing that no jurisdictional dispute existed, General Counsel asserted that Mike Kuck "specifically testified that the Laborers' Union never demanded or claimed the sweeper driver work." (GC Ans. Brief at p. 24; emphasis added herein). That is not true. The Judge asked Kuck whether the Laborers Union, to his "knowledge," ever demanded to be recognized as the bargaining agent for the sweepers. Kuck responded: "No. Not to my knowledge." (TR p. 244, lines 21-25). The Judge followed up by asking him whether, to his "knowledge," the Laborers Union had ever claimed the work, and Kuck responded again: "Not to my knowledge." (TR p. 245, lines 7-9)

Accordingly, the Judge asked the questions with the qualification that the answer be limited to Kuck's knowledge, and Kuck responded twice, repeating the qualification that it was only to his knowledge. For someone that clearly was not the person that negotiated with the various unions recognized by Respondent, and clearly was not the point person for Respondent in dealing with the unions, to say that he had no knowledge of a claim for work of a single classification, is not the same as testifying that no such claim had ever been made to the

company. To contend that Kuck specifically testified that no such claim was made is simply a mischaracterization of the record.

General Counsel did appear to acknowledge that the credibility resolution involved in finding that no claim for the work was made by the Laborers was not based on demeanor. General Counsel cited authority for the proposition that when the "demeanor factor is diminished," that the choice between conflicting testimony is based on the weight of the evidence, established facts, inherent probabilities and reasonable inferences drawn from the record as a whole. (GC Ans. Brief at p. 24).

First, there is no "choice between conflicting testimony." The testimony of Kuck, who was not Respondent's point person in negotiating with unions, that he had no knowledge of a claim by a union, and the testimony of Sean Stewart, the person in charge of negotiating with the unions, that there were such claims made directly to him, is not conflicting testimony. In this regard, it should be noted that when the employees asked Kuck if they could switch to another union, he did not go to the unions to find out. He went to Sean Stewart so that Stewart could address that issue with the unions involved. Again, viewing the record as a whole concerning the sweeper issue, the Judge found that the testimony of Kuck, Stewart and the employee witness called by the General Counsel were "mutually corroborative" on all other points. (JD, p. 23, lines 32-35).

Also, there were three unions that had contracts covering the sweeper work, and prior to the incident in question, there was a composite crew of sweeper driver employees made up of members from two of the three unions. In addition, the Laborers Union had added the classification to its contract in recent negotiations, had grieved the subcontracting of sweeper work to a company that was not signatory to the Laborers Union, and had recently organized

sweeper truck companies. All of these uncontradicted facts support the testimony of Sean Stewart that the Laborers Union, as well as Local 12 of the Operating Engineers, made demands to Stewart for the sweeper truck work in early 2010.

General Counsel also asserts that Stewart's testimony concerning the claim for sweeper work by the Laborers and Operating Engineers in early 2010 was "vague" in that he assertedly testified that some unidentified person named "Matt" asked that the work be assigned to them. (GC Ans. Brief. P. 24). This representation by counsel is nothing more than attempt to obfuscate the record. Stewart clearly began his description of the claims by the two unions by naming the Laborers and Operating Engineers as the unions involved, and specifically naming Tommy White, the "secretary/treasurer of the Laborers", as the Laborers agent that he spoke to. (TR p. 482, lines 18-19) The transcript then has an obviously muttled transcription of the beginning of Stewart's description of what was said in these conversations: "And Matt left me on numerous occasions and asked that work be assigned to them." (TR p. 483, lines 1-2) The reference to "Matt left me" obviously makes no sense. There is, as General Counsel points out, no person named "Matt" anywhere else in the transcript. However, the transcript reveals that the Judge then sought to confirm Stewart's testimony that both the Laborers Union and the Operating Engineers Local 12 made these claims for the work, and Stewart again responded that Tommy White, the Laborers secretary treasurer, was the person he spoke to, and also identified the Local 12 agent he spoke to as Dave Gavarino. (TR p. 483, lines 11-13) The Judge followed by asking the time frame of the conversations. Stewart replied that they were in early 2010. The Judge then sought to confirm that the conversations were clearly prior to the "problem with . . . the sweeper drivers," and Stewart replied: "Yes., definitely." (TR p. 483, lines 18-24). Finally, the Judge had no trouble finding that Stewart testified that the Laborers made claims for the sweeper

driver work in early 2010. (JD p. 24, lines 23-27) There was nothing "vague" about Stewart's testimony.

It is respectfully requested that the Board carefully review this issue, even though it is a minor issue compared to the issues presented in Case No. 28-CA-23220. All three unions had the classification of sweeper truck in their collective bargaining agreements. Respondent made the change in this case by submitting a "Letter of Assignment." Such assignments of work are commonplace in the construction industry, and they are routinely done without first notifying and "bargaining" with any of the affected unions. All three collective bargaining agreements in this case have provisions regarding the resolution of jurisdictional disputes: The Construction Agreement in Article 13 (GC Exh. 2, p. 17); the Rock, Sand and Gravel Agreement ("R, S & G Agreement") in Article 14 (GC Exh. 3, p. 17); and the Laborers Agreement in Article III C. (GC Exh. 4, p. 9). A construction employer with multiple agreements covering the same work has a genuine jurisdictional dispute based on the existence of the contracts alone, and established Board law provides that such an employer is free to make and to change work assignments over such work without violating Sections 8(a)(3) or (5) of the Act. The Board has consistently let the work jurisdictional resolutions of collective bargaining agreements, and/or the mechanisms of Section 10(k) of the Act, resolve any disputes that arise based on such work assignments. The Board should not issue a decision in this case which would wreck havoc with these established practices.

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General Counsel asserts that Stewart told Dey in the July 9, 2010 meeting that "Respondent was going to move the material haul drivers from the Construction Contract to the Ready-Mix Agreement." (GC Ans. Brief p. 14) That is a mischaracterization of the record and

is inconsistent with the findings of the Judge. (JD p. 10) Stewart told Dey at this meeting about the out of town construction projects that were being completed and that the trucks that were used for the construction projects were coming back to Las Vegas, and that they expected a bad year in construction but a better year in materials. (TR p. 454-455). As noted by the Judge, Stewart told Dey that Aggregate planned on moving the trucks to the R, S & G Agreement, but Aggregate still had some work on construction projects and would keep a group of trucks for that work. Stewart then asked Dey if there was any way that they could keep their same drivers. (JD p. 10). This suggested action was consistent with Darr's testimony that Darr noticed idle SNP trucks and suggested they be designated for work under the R, S & G agreement. Stewart never stated that Respondent intended to "transfer" any employees.

In the same vein, General Counsel stated that "Respondent has forced all of the Sothern Nevada Paving Construction Unit drivers into the Ready-Mix Unit, not just those who deliver aggregate material." (GC Ans. Brief, p. 32). First, there is no record evidence that Respondent forced any SNP drivers into any "unit," and there is no evidence that Respondent forced anyone to operate under the R, S & G Agreement. Respondent did not "transfer" any employee. Prior to the filing of the charge the only conduct Respondent engaged in was to request drivers from the R, S & G hiring hall. The Union then called a strike and then the Union requested to bring back the striking drivers and pay them rates under the R, S & G Agreement, pending resolution of the Union's charge. If the Union would have provided employees to Respondent from the R, S & G hiring hall, and if Respondent then would have had one or two drivers perform work that the Union considered not to be covered by the R, S & G Agreement, then it could have filed a grievance over the issue. But speculating what Respondent would have done in such a circumstance is inappropriate for this forum.

Furthermore, even if some drivers did some hauling that was not "aggregate" material, that does not mean that the hauling was not covered by the R, S & G Agreement. The record evidence establishes that there is quarry material that is hauled under rock, sand and gravel agreements that has no relation to ready mix operations and is not even aggregate material. The testimony of Larry Miller, of Respondent's competitor, Nevada Ready Mix Corporation, corroborates Stewart's testimony on this issue. Nevada Ready Mix operates a quarry where it mines "concrete aggregate and other building materials." (TR p. 531) Miller then described the various types of material it sells, which clearly extend beyond ready mix material and/or aggregate material. (TR p. 532, lines 1-7) The critical facts to this case are that Nevada Ready Mix hauls various materials, including but not limited to aggregate material, to construction sites, and it pays the wage rates in its rock, sand and gravel contract for all such hauls. (TR p. 534).

General Counsel also noted that Respondent terminated its Construction Agreement and began negotiations for a new Construction Agreement. (GC Ans. Brief p.13) It is not clear why Counsel for the General Counsel put these facts in his brief. There is nothing inconsistent between such bargaining and Respondent's other actions in this case. There is no dispute that Respondent pays rates under the Construction Agreement when current drivers perform work on a construction project, and bargaining to determine what those rates are is consistent with its actions in this case and, indeed, is required by law. The Judge made the finding that Respondent pays the rates under the Construction Agreement for work by its employees conducted on job sites. (JD p. 15, n. 42). No one filed exceptions to this finding.

Counsel for General Counsel also stated that on September 28, Respondent and the Union "held negotiations" in an attempt to resolve the dispute. (GC Ans. Brief p. 16). Neither Stewart or the Union has contended that this meeting constituted negotiations, and neither the Union nor

the General Counsel offered any witness to express such a position. Indeed, the Union counsel at the hearing took the position that the Union did not have to bargain over the issue. (TR pp 37-38). In the Union's exceptions Union counsel stated that the "parties did not bargain over this issue. . ." (Charging Party Exceptions No. 6). In Charging Party's brief in support of its exceptions the Union's counsel stated: "There is no obligation to bargain over the scope of an established bargaining unit." (Charging Party Brief p. 10).

General Counsel also stated that Stewart called Dey on September 30 and asked if the parties were going "to continue bargaining." (GC Ans. Brief p. 17). There is nothing in the record to support the assertion that Stewart made any such statement. All the Union did from the minute it first protested Respondent's request to move trucks to the R, S & G Agreement, was to stonewall and say that Respondent had no right to take such action. The case law clearly establishes that such expressions of protest do not constitute bargaining.

In our brief in support of Respondent's exceptions, we gave Counsel for the General Counsel the benefit of the doubt when we noted that his mistake concerning Respondent's position paper was an innocent mistake. Unfortunately, General Counsel now tries to mislead the Board with one half of the story concerning General Counsel's cross examination of Stewart, using Respondent's position paper submitted during the investigation of the charge. In the position statement a conversation between Stewart and Dey on August 13 is set forth where Dey said he was going to "fight" Respondent on its plan of action. However, the position statement also describes a September 30 conversation between Dey and Stewart where Dey tells Stewart that he has "a fight on his hands." Getting the two mixed up, General Counsel, during his cross examination, asserted that Dey made the "fight on his hands" statement in the August 13 conversation. Stewart correctly responded that it did not occur on said date, that it occurred on

September 30. Without checking the position statement further, General Counsel showed the portion of the position statement dealing with the August 13 statement and asked Stewart if Dey said he was going to "fight" Aggregate Industries on its plan of action, and, of course, Stewart replied that Dey did make such a statement. Apparently without reviewing the actual position statement, the Judge noted that Stewart "conceded" that Dey said he would "fight" Respondent during the August 13 conversation.

Although the notation by the Judge may seem minor, it may have been an attempt to bolster his finding that one of Dey's many conflicting stories was more accurate than Stewart's testimony concerning the negotiations for the R, S & G Agreement. It should be noted that almost all of the facts set forth in the Judge's decision were based on the testimony of Stewart. Indeed, concerning the events of 2010, the Judge noted that Dey did not testify and he specifically credited Stewart, noting that his testimony was not disingenuous. (JD p. 16) Nevertheless, he dropped the somewhat silly footnote concerning the "concession" that Dey used the word fight in an August 13 conversation with Stewart. Also, he noted Stewart's testimony concerning the sweeper issue was harmonious with all other witnesses on the issue, except for one statement which the Judge discredited as being inconsistent with the testimony of Respondent's agent Kruk, even though there was no inconsistency at all.

In finding one of Darr's inconsistent statements to be authoritative, it should be noted that the testimony of Darr and Stewart on almost all of the facts in the negotiations was harmonious. From the discussion of the initial bargaining at the Summerlin batch plant, to the finding that Respondent wanted to become a player in the aggregate industry, to the assertion by Darr that the Union wanted the R, S & G Agreement to be the same as the Nevada Ready Mix and Cemex agreements, the testimony of Darr and Stewart was consistent. Darr even acknowledged that he

initiated the discussion concerning the transfer of trucks from SNP to Regal Materials. Darr also acknowledged that the parties were bargaining over the terms and conditions of some SPN employees during the bargaining that resulted in the R, S & G Agreement. (TR pp. 294-295)

It is hard to really pin point the portion of the testimony that Darr gave which would support a finding that the Union did not agree to allow Respondent to engage in material hauling under the R, S & G Agreement. Counsel for the General Counsel did not really dispute in his brief the numerous times that Darr testified that Respondent would be permitted under the R, S and G Agreement to haul material not only to its own batch plants, but to construction projects as well.

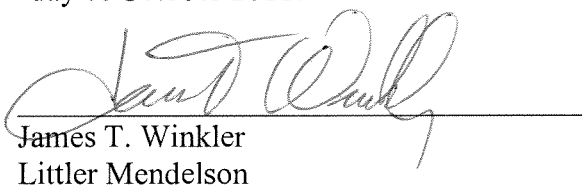
In this regard, it should also be remembered that the Union, in 2010, would not even allow Respondent to transfer trucks for use of hauling from the Sloan Quarry to its batch plants, an activity clearly anticipated by Darr as being appropriate under the R, S & G. Agreement. (TR p. 470 at lines 4-6, p. 472 at lines 5-10). When asked by the Judge if such hauling would be a problem, Counsel for the Charging Party said it would have been a "smaller problem" and would only have been permitted if the parties did additional bargaining and came to an additional memorandum of understanding to permit such hauling under the R, S & G Agreement. (TR p. 524 at line 20 through p. 525 line 10) In view of the Union's steadfast refusal to bargain over this issue it is clear that the Union's position renders the bargaining that took place during 2008 concerning material hauling to be a nullity. The Union's position also renders Article 43 of the Construction Agreement a nullity.

One final note should be made concerning an apparent assertion that ownership of the Sloan Quarry is somehow relevant. First, Respondent owns the Quarry, despite what General

Counsel may be attempting to assert. (TR p. 498) Furthermore, there is nothing in any of the three rock, sand and gravel agreements that require that the signatory must own any quarry from which it hauls. It should also be remembered that although Cemex owns its own quarry, it also hauled from Respondent's Sloan Quarry and operated under its rock, sand and gravel agreement when it did so.

Based on the above, and the record as a whole, the entire consolidated complaint should be dismissed.

Dated in Las Vegas, Nevada, this 17th day of October 2011.



James T. Winkler
Littler Mendelson
3960 Howard Hughes Parkway, #300
Las Vegas, Nevada 89169
Attorney for Respondent
T: 702-862-8800

CERTIFICATE 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 October 17, 2011, I served the following document(s) via email to the addresses as set forth below:

1.) RESPONDENT'S REPLY BRIEF IN SUPPORT OF RESPONDENT'S CROSS EXCEPTIONS

Richard G. McCracken
Kristin L. Martin
McCracken, Stemerman & Holsberry
1630 S. Commerce St., Ste. A-1
Las Vegas, NV 89102
rmccracken@dcbsf.com

Patrick Domholdt
International Brotherhood of Teamsters
Local No. 631
700 N. Lamb Blvd.
Las Vegas, NV 89110
patrickd@teamsters631.com

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Ave., Ste. 1800
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

John T. Giannopoulos
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Ave., Ste. 1800
Phoenix, AZ 85004-3099
john.giannopoulos@nlrb.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 17, 2011 at Las Vegas, Nevada.

Kimberly Gregos