UNITED STATES OF AMERICA
BEFORE THE
NATIONAL RELATIONS BOARD
REGION 9

In the Matter of	*		
I.M.I. SOUTH, LLC d/b/a IRVING MATERIALS	*		
Respondents,	*		
and	*	Case Nos.	9-CA-073769
	*		9-CA-080462
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89 AFFILIATED WITH THE BROTHERHOOD OF TEAMSTERS	*		
Charging Party.	*		

BRIEF FOR RESPONDENTS

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I. STATEMENT OF THE CASE

This matter represents the consolidation of two separate unfair labor practice charges. The first, 9-CA-073769, involved allegations that security guards hired by Respondent I.M.I. South, LLC d/b/a Irving Materials ("IMI") during a strike by General Drivers, Warehousemen and Helpers, Local Union 89, Affiliated with the Brotherhood of Teamsters ("Local 89") made unlawful threats against the striking employees in violation of Section 8(a)(1) of the Act. That matter, however, was settled by IMI and Local 89 during the Administrative Hearing on October 17, 2012. (Transcript of October 17-18, 2012 Hearing ("Tr., p. __"), pp. 150-152) ("I'm accepting the settlement agreement over the General Counsel's objection."). Therefore, this Brief does not address the allegations of 9-CA-073769.

The second charge, 9-CA-080462, is still pending. This charge was filed by Local 89 on May 7, 2012. In it, Local 89 alleged that IMI transferred or reassigned bargaining unit maintenance work to employees working in New Albany, Indiana, without prior notice to Local 89 and without engaging in bargaining with respect to the effects of this change. (Consolidated Complaint, ¶ 8). Consequently, Local 89 also alleged that IMI failed to return certain mechanics to work following their unconditional offer to return to work because some of this work had been reassigned to New Albany employees. (Consolidated Complaint, ¶ 9).

After a period of investigation, Region 9 of the National Labor Relations Board ("NLRB") issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing against IMI. The Complaint asserted that the allegations in charge 9-CA-080462 violated Sections 8(a)(1), (a)(3), and (a)(5) of the National Labor Relations Act ("the Act"). 29 U.S.C. § 158. IMI filed a timely Answer on August 27, 2012.

A hearing on the Complaint was held before the Honorable Arthur Amchan, Administrative Law Judge, on October 17 and 18, 2012, at the Louis D. Brandeis School of Law at the University of Louisville, Louisville, Kentucky. The issues presented to Judge Amchan were: (1) whether a past practice existed between the parties by which all Southern Indiana maintenance work was committed permanently to Louisville mechanics; (2) whether the parties engaged in negotiations regarding the Southern Indiana maintenance work when Local 89 proposed defining the contract area for mechanics and IMI rejected that proposal; and (3) whether Local 89 waived the enforcement of any past practice by entering into a new collective bargaining agreement that expressly renounced unwritten agreements. The pending charge should be dismissed if any one of these issues is resolved in IMI's favor, and the evidence and documents reveal that all three issues should be decided for IMI. Therefore, Charge 9-CA-080462 should be dismissed.

II. STATEMENT OF FACTS

The facts of this case are largely undisputed. Nevertheless, a detailed recount of the negotiating history between the parties and the context under which these negotiations took place is critical to an understanding of the legal issues to be resolved.

A. Company Background

IMI is one of six subsidiaries of Irving Materials, Inc. ("Irving"). Irving was established in 1946 in Greenville, Indiana, and remains headquartered there. It is in the business of mining sand and gravel aggregates and then manufacturing and delivering ready mix concrete to construction sites for the building industry. Irving conducts business in six different states,

Indiana, Kentucky, Tennessee, Southwestern Ohio, Southeastern Illinois, and Northern Alabama. (Tr., pp. 239-243).

IMI, which is the "South Region" subsidiary for Irving, spans the southern third of Indiana, the majority of Kentucky, and the northern edge of Tennessee. IMI has 50 ready mix concrete operations, 38 of which are active. It is party to 12 collective bargaining agreements with Teamster Locals. Eleven of those agreements are with Local 89, and one is with Local 215 out of Hopkinsville, Kentucky. In all, about 160 IMI employees are represented by Local 89. (Tr., pp. 239-243).

IMI and Local 89 have entered into a series of collective bargaining agreements dating back many years. The most recent collective bargaining agreement between the parties was executed in 2008 and was scheduled to expire on June 30, 2011 (the "2008 Agreement"). (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement). The 2008 Agreement, as with previous agreements, defined the terms and conditions governing the employees of IMI working at certain Louisville-area plants, including mechanics, batch men, and drivers. Article 1, Section 2 of the 2008 Agreement identified the territorial reach of the agreement to cover four plants, Louisville, Middletown, Shelbyville and Shepherdsville. (Tr., p. 31); (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 5).

IMI mechanics from Louisville had been performing mechanical work on IMI trucks operating out of plants in Corydon, Salem, Scottsburg, New Albany, Clarksville, and Greenville, all in Southern Indiana. Thus, the Louisville mechanics cover maintenance on all trucks operating from Southern Indiana facilities with the exception of Madison, Indiana. Trucks

operating from Madison, Indiana, are serviced currently by IMI mechanics working out of its Carrolton, Kentucky plant. (Tr., p. 33); (GC Exhibit 1, "IMI/Teamsters Local 89 Locations").

Louisville mechanics had previously performed maintenance on the Madison, Indiana trucks as well. However, IMI moved that work to the Carrolton mechanics when the Carrolton, Kentucky plant opened due to its proximity to Madison and the presence of a bridge that crosses the Ohio River in Madison. Carrolton was not covered by the 2008 Agreement or any of the predecessor agreements between IMI and Local 89 governing the Louisville area work. This meant that the mechanical work in Madison was removed from the scope of work of Louisville mechanics without objection or incident. (Tr., pp. 63, 225-226).

B. <u>Problems with Ohio River Bridges and the Need for A New Albany Mechanical Shop</u>

In January 2011, Kevin Swaidner became the new President of IMI. In connection with assuming the duties of President, Swaidner made a point of meeting with the heads of each Department to ask them, among other things, whether they had any concerns about their Department for the future. Swaidner had this conversation with Chris Holt, IMI's Director of Fleet and Maintenance, about potential problems facing the Maintenance Department in January 2011.

At that time, Holt said his biggest concern was the plan by the local, state, and federal governments to commence work on a massive bridge project in downtown Louisville where the first of two new bridges spanning the Ohio River would be built. Holt was concerned that the construction work on this new bridge, being built adjacent to an existing bridge, would create traffic problems on the existing bridges that would hamper IMI's ability to service its trucks on the other side of the river in a timely fashion. As Local 89's Assistant to the President Jeff

Cooper conceded, it was the biggest bridge project that has ever occurred in the Louisville metropolitan area. (Tr., pp. 39-41, 158).

There are three operating bridges that connect the Louisville Metropolitan area and Southern Indiana for vehicular traffic. The first of these bridges, the Kennedy Bridge, services the I-65 interstate highway that runs from Nashville through downtown Louisville and on to Indianapolis. The second bridge, the Sherman Minton Bridge, services the I-64 interstate highway running from Lexington, Kentucky, through Louisville, to St. Louis. This bridge is located to the west of downtown Louisville near New Albany, Indiana. Both of these bridges permit commercial vehicle passage. The third bridge, the George Rogers Clark Bridge, runs from Louisville's 2nd Street across the river to Jeffersonville, Indiana. This bridge, however, is small and does not permit the passage of the commercial trucks used by IMI, which weigh seventy-eight tons when fully loaded. Thus, when there are problems with either the Sherman Minton Bridge or the Kennedy Bridges, all commercial interstate traffic is limited to a single bridge. (Tr., pp. 41-43).

Ready mix concrete is a perishable product. IMI has approximately one or one and one-half hours to deliver its ready mix concrete to its destination before it becomes unusable. In fact, depending upon the mix, the concrete could become unusable within 30 minutes. Because of the perishable nature of IMI's product, Holt was highly concerned that the increased traffic congestion caused by the bridges' project would create potentially serious problems with servicing and maintaining IMI's vehicles working from its Southern Indiana locations. In fact, Holt had discovered that, as part of the preliminary work to prepare for the bridges project, the Kennedy Bridge would be completely shut down temporarily for repairs and re-decking. This

meant that there was a certainty that for at least several months in the near future, the Louisville metropolitan area would be limited to one bridge for commercial traffic. (Tr., pp. 43-44).

President Swaidner agreed that the potential traffic issues created by the bridge project was a serious concern for IMI, and he approved Holt making plans to create a maintenance shop somewhere in Southern Indiana. IMI's original plan for opening the Southern Indiana mechanical shop was to have it available sometime between January and March 2012 when groundbreaking was tentatively scheduled to begin on the downtown bridge. (Tr., pp. 36, 117).

IMI initially did not specify a location identified for its Southern Indiana maintenance operations. However, in June 2011, Holt determined that New Albany was the best location, primarily because there had been a previous maintenance shop located at the New Albany plant. IMI made a decision in June 2011 to focus its attention on New Albany as the site for the Southern Indiana maintenance shop, and began preparations to make this transition. This decision was made shortly before contract negotiations began on June 13, 2011. (Tr., pp. 46, 51, 71).

However, IMI's plans for preparing the New Albany maintenance shop for opening in January 2012 changed drastically when the state of Indiana unexpectedly closed the Sherman Minton Bridge on September 9, 2011. During a routine inspection of the bridge, a crack four or five inches wide and four or five feet long in a significant piece of structural steel was discovered. The bridge was closed immediately, and without prior notice to the public. Jason Janes, the Human Resources Director for IMI, was, in fact, one of the last drivers permitted to cross the Sherman Minton Bridge before its closure. The bridge remained closed for a full six months. (Tr., pp. 48-50, 258-262).

As a result of Indiana closing the Sherman Minton Bridge, all interstate and commercial traffic between the Louisville Metropolitan area and Southern Indiana was forced to reroute from I-64 to I-65 and to converge on the Kennedy Bridge for river crossing. This closure caused massive traffic issues during all hours of the day and night. As Holt testified, without contradiction, "We had some people stuck in traffic up to three hours." Janes, who lives in Southern Indiana and commutes to Louisville for work, testified that his regular 30-minute commute became a commute of between 90 minutes and three hours. (Tr., pp. 49, 258-262).

Within one week of the closing of the Sherman Minton Bridge, IMI assigned one mechanic to the New Albany facility to cover any emergency situations. This occurred in mid-September 2011, shortly after Local 89 commenced a strike against IMI as a result of stalled negotiations, which will be described in more detail in the following section. Following the bridge closing, IMI also intensified its efforts to prepare the New Albany maintenance shop for full operation. The New Albany shop commenced operations in October 2011. At that time, two mechanics were assigned regularly to work from New Albany. Holt and Janes both testified that this opening had nothing to do with either the contract negotiations or the strike. They could not have predicted the closing of the Sherman Minton Bridge, but the need for a Southern Indiana base for maintenance became an absolute necessity after the bridge closing occurred. (Tr., pp. 51, 84-85, 89).

The six-month closing of the Sherman Minton Bridge also postponed the re-decking of the Kennedy Bridge, as well as several other road construction projects in the Louisville and Southern Indiana area. Thus, shortly after reopening the Sherman Minton Bridge, the Kennedy Bridge was shut down for badly needed resurfacing work. Again, the community was forced to

access a single bridge for commercial traffic, and the horrendous traffic problems continued. This work was not completed until September 2012, one year after the Sherman Minton Bridge was first closed. In turn, the start of the bridges project was delayed even further. (Tr., pp. 258-262, 279-280).

IMI recently discovered that the re-decking work on the Kennedy Bridge was not done properly. As a result, that bridge will need to be completely closed again to repeat the work previously attempted. (Tr., pp. 279-280).

Once it is finally begun, the construction of the new bridge is scheduled to last at least five to six years, well beyond the life of the existing collective bargaining agreement. (Tr., p. 281-282).

C. Relevant Provisions of the 2008 Agreement.

The negotiation of a new collective bargaining agreement to replace the 2008 Agreement overlapped with the bridge problems and the opening of the New Albany maintenance shop. The negotiations were protracted and difficult, and were complicated by an eight-month strike. Nevertheless, the new collective bargaining agreement ultimately executed by the parties in 2012 was identical to the 2008 Agreement with respect to every relevant contract provision. Therefore, it is useful to review those relevant provisions of the Agreement before considering Local 89's efforts to negotiate several changes to them.

First, Article 1, Section 2 of the 2008 Agreement addressed the territorial reach of the contract. It provided:

> **Article I**
> **Declaration of Intent**
>
> …
>
> Section 2 – Coverage

> The territory covered by this Agreement shall be the Kentucky territory defined as Louisville and Middletown, in addition to driving personnel at the Shelbyville and Shepherdsville locations. The operations covered thereby are the hauling by truck of any building materials, such as, but not limited to, Ready-Mix concrete, and related building supplies, reinforcing steel, building specialties, and any other materials, customarily classed and known as building materials.

(GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 5) (emphasis added). Thus, the territory of the 2008 Agreement was limited to locations in Kentucky within the Louisville metropolitan area.

Besides the language in Article I, Section 2, the 2008 Agreement did not have an express description or definition of the relevant contract area for mechanics. It did, however, include a definition of the "contract area" that applied to a benefit directed to drivers. This was located in Article IX, Section 24, of the 2008 Agreement, titled, "Out of Town Pay," which provided:

Article IX
Extent and Nature of Agreement

> …
>
> Section 24 – Out of Town Pay
> Drivers from the Louisville, Middletown and Shepherdsville Plants delivering outside the contract area, defined as Louisville, Middletown, Shepherdsville, Mt. Washington, Shelbyville, Clarksville IN (loading only) and Taylorsville shall receive one dollar ($1.00) per hour above the current contract rate for all hours worked.
>
> The Shelbyville Plant contract area shall be defined as Louisville, Middletown, Shepherdsville, Mt. Washington, Clarksville IN (loading only), Taylorsville, Frankfort and Lawrenceburg locations. Shelbyville plant drivers delivering outside this area shall receive one dollar ($1.00) per hour above the current contract rate for all hours worked that day.

(GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 23) (emphasis added). This defined "contract area" was limited to Kentucky locations, with the sole exception of loading (but not delivering) done in Clarksville, Indiana.

Finally, the 2008 Agreement contained a clause expressly refuting the existence of any past practices or other non-written agreements or understandings between the parties. Moreover, it expressly disclaimed and annulled any previous agreements by operation of the signatures of the parties. It provided:

Article XV
Extent and Nature of Agreement

Section 1
This Agreement expresses the complete understanding of the parties on the subjects of wages, hours of employment, and working conditions. During the terms of this Agreement neither party hereto will make any demands upon the other with respect to any and all matters not covered herein.

Section 2
This Agreement embraces in their [sic] entirety all the terms and conditions imposed on and the benefits granted to the parties and shall be strictly construed. The rights, duties, and privileges of the parties are strictly limited to the terms herein stated.

Section 3
Any misprints, amendments, or changes in this contract, must be agreed upon in writing, by the parties, prior to the said changes going into effect, otherwise said changes become null and void.

Section 4
By the execution of this Agreement, the parties hereto have annulled any prior Agreement or understanding, whether written, verbal or implied, which may have existed between Irving Materials, Inc. and Truck Drivers Local Union No. 89, or any member of either organization.

(GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 29) (emphasis added). Again, the above-quoted language was included in the new collective bargaining agreement executed by the parties in May 2012, after the conclusion of the strike.

D. Negotiations on a New Collective Bargaining Agreement

As with much of the nation, the construction industry in Louisville experienced a sharp decline beginning in the Fall of 2007 and continuing through the start of the contract negotiations relevant to this matter, which began in June 2011. The business downturn had a direct effect on IMI in Louisville and its production. In turn, IMI experienced a steady decline in trucks. In 2007, IMI owned and operated approximate 305 trucks, providing its mechanics with significant work. However, as business declined, IMI began selling a significant portion of those trucks. By June 2011, it owned fewer than 250 trucks, and those numbers were continuing to fall. In fact, in June 2011, there were between 35 and 45 trucks out of operation sitting for sale on IMI's lot in Louisville. While the process of preparing trucks for sale provided the mechanics with some temporary work, it also was clear that the significant reduction in the IMI fleet was going to result in less work for the mechanics over time. These are the circumstances that faced the parties when negotiations commenced in June 2011. (Tr., pp. 246-248); (GC. Exhibits 2, 6).

Again, the 2008 Agreement expired by its own terms on June 31, 2011. Before its expiration, the parties agreed to an indefinite extension that would last until a new contract was executed or until one side rescinded the extension. (Tr., pp. 94-95).

Jason Janes is the Human Resources Director for IMI and was a member of IMI's negotiating committee. In fact, Janes was the only IMI representative who was able to attend each of the negotiating meetings with Local 89 regarding the new collective bargaining

agreement. Janes has been employed by IMI for five years. Other members of IMI's negotiating committee included Maintenance Director Chris Holt, Jim Spalding and Eddie Webster, both Vice Presidents of IMI, and Michael Vasquez, Human Resources Director for Irving Materials. In the later meetings between the parties, Kevin Swaidner, the new President of IMI, and Shad Daubard, also participated in the negotiations. (Tr., pp. 65-66, 92-94, 115).

For Local 89, Jeff Cooper was the chief negotiator. Cooper is the Assistant to the President for Local 89 and a trustee and member of that union. He has worked for Local 89 since 2000, and has had responsibility for maintenance of the IMI contract since 2009. Other members of the Union's negotiating team included Jim Kincaid, Dave Smith, Mike Hathling, Brian Raisor, Al Hodge, and Kyle Cochran. (Tr., pp. 53, 126-129).

During this first meeting on June 13, 2011, the Union made two proposals addressing the rights and scope of Louisville mechanics with respect to maintenance work in Southern Indiana. (R.'s Exhibit 1, 2011 Union Contract Proposals, ## 8 and 10).

The first of these proposals, Number 8, provided, "Out of town pay to include all employees for any work performed outside of the contract area." (Id.) (emphasis added). Cooper indicated that the purpose of this proposal was to provide Louisville *mechanics* with out-of-town pay when they went outside of the "contract area," a benefit that existed for Louisville drivers under Article IX, Section 24 of the 2008 Agreement. Again, that Section specifically defined the "contract area" as "Louisville, Middletown, Shepherdsville, Mt. Washington, Shelbyville, Clarksville IN (loading only) and Taylorsville." (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 23). The reference to "outside the contract area" in Proposal Number 8 appeared to track the language of Article IX, Section 24, "Out of Town Pay."

Thus, although Proposal Number 8 generically referred to "employees," Local 89 admitted that it was intended solely to benefit mechanics. (Tr., pp. 57, 201).

The second proposal, Number 10, provided, "Define area for the shop and Drivers." (Id.). As Janes testified, Cooper explained that the purpose of this proposal was to "define the area for the shop and drivers but in particular the shop. He wanted to define that work as the work that is already enumerated in the contract in addition to the Southern Indiana facilities." (Tr., p. 248). According to Holt, Cooper explained during the June 13, 2011 negotiations that he "wanted Louisville mechanics to have the right to the Southern Indiana work." (Tr., p. 58).

Again, the Southern Indiana territory was not addressed in the 2008 Agreement. (Tr., pp. 60, 64); (GC Exhibit 2, 2008 Agreement). Instead, separate collective bargaining agreements covered the various IMI facilities and locations in Southern Indiana. (Tr., p. 61). Local 89 mechanic Simon Hodge, a member of the negotiating committee, testified that his fellow mechanics had included this proposal because they wanted "those areas in the – defined specifically in the contract." (Tr., p. 227) (emphasis added).

According to Cooper, his goal in Proposal Number 10 was to define the contract area for mechanics so that it covered all of the Southern Indiana maintenance work with the exception of work arising in Madison, Indiana. In other words, in Cooper's mind, his proposal was aimed at defining the "contract area" to include only the work already performed by Louisville mechanics. Thus, his proposal would have only "clarified" the past practice that he claims already existed between the parties. (Tr., pp. 177-178).

When asked to explain why he made a proposal that only clarified a term he believed was included in the Agreement, Cooper could not do so: "I can't answer that." (Tr., p. 179).

After hearing these proposals from Local 89, IMI's negotiating committee met privately and then communicated its responses to Local 89. Specifically, IMI rejected both Proposal Numbers 8 and 10. IMI rejected Proposal Number 8 because it did not believe that a mechanic driving across the Ohio River to fix a vehicle warranted an extra dollar per hour. IMI rejected Proposal Number 10 because it wanted to maintain flexibility in determining how best to maintain its trucks, especially considering the traffic and bridge issues that might be on the horizon. (Tr., pp. 66-67, 251-252).

Janes testified, "We did inform the Union that we maintained our rights to … to service that in the most flexible way that we needed to." (Tr., p. 117). He also explained, "The discussion that we had was that we were going to maintain our rights to maintain flexibility in the way we serviced our fleet going forward. Because, in the first negotiation, they attempted to define their area for mechanic work as the Southern Indiana plants, as well as what was agreed to in the contract here." (Tr., p. 124). Proposal Number 10 was rejected outright by IMI during the first round of negotiations. Proposal Number 8 was rejected by IMI during the first meeting and withdrawn by Local 89 during the second meeting. (Tr., pp. 254-255); (R. Exhibit 3).

Local 89 noted these rejections, and then moved forward with negotiations. Local 89 never argued or objected to IMI's rejections. Thus, contrary to the mechanics' goal, expressed by Hodge, to have the Southern Indiana "areas in the – defined specifically in the contract," no changes were made to the 2008 Agreement in this vein. (Tr., p. 227) (emphasis added). In short, Local 89 failed to accomplish its one negotiating goal with respect to Proposal Numbers 8 and 10 on behalf of the mechanics. (Tr., p. 228).

Even after the June 13, 2011 meeting, Local 89 never again raised the issues of Proposal Numbers 8 or 10 during negotiations. Cooper admitted that he made no effort to raise the issues again. (Tr., pp. 68-70, 137). His best explanation for why IMI rejected Proposal Number 10 was, "I guess they misunderstood my proposal. Because the purpose was to clarify that that work was supposed to be done by the Louisville garage." (Tr., p. 180). Still, despite hearing IMI reject the inclusion of a term that he claimed to believe already was a part of the 2008 Agreement, Cooper never mentioned the topic again.

Negotiations continued in earnest after the June 13, 2011 meeting, but little progress was made towards a new contract. In early September 2011, Local 89 notified IMI that it was terminating the agreed-upon extension of the 2008 Agreement. Local 89 then commenced a strike against IMI at the Louisville facilities on September 7, 2011. There were additional strikes by Local 89 against IMI at other facilities, but they were largely unrelated to the strike in Louisville and the issues raised by this charge. (Tr., pp. 31-32, 95).

After the strike commenced, negotiations continued. There were many successive negotiation meetings and cross-proposals submitted by the parties during the following months. According to the witnesses, there were between fifteen and twenty negotiation meetings in total, and several written proposals exchanged outside of meetings. These negotiations lasted from June 2011 until April 2012. Still, Local 89 never again raised the issue of Proposal Numbers 8 and 10 or any related topics. (Tr., p. 115).

Local 89 made an unconditional offer to return to work on or about May 1, 2012, and the parties agreed upon a new collective bargaining agreement commenserate with that event. Still, the final agreement executed by the parties did not make any changes to the relevant language of

Articles I, IX, and XV, nor did it add a definition or description of the "contract area" for mechanics. (Tr., pp. 81-82, 120, 265-266); (GC Exhibit 3).

Janes summarized the situation with respect to the contract and Proposals Number 8 and 10: "they made proposals in negotiations. We rejected them. Ultimately, they made additional counterproposals that didn't include defining those rights. And ultimately we had a contract that was agreed upon." (Tr., p. 119).

As a result of this process, IMI's negotiating committee understood that they had negotiated with Local 89 and reached an agreement regarding the subject of the jurisdiction or territory of its Louisville mechanics. IMI understood that the parties had consented not to expand the definition of "contract area" or the general jurisdiction of the new collective bargaining agreement beyond the Louisville facilities to include Southern Indiana. This understanding was based upon Local 89's initial effort to include such provisions in the new agreement, IMI's express rejection of those proposed changes, and Local 89's acceptance of that rejection. (Tr., pp. 81).

E. <u>Cooper's Testimony is Incredible.</u>

Cooper testified that his goal in making these proposals was to have IMI's commitment to preserve the Southern Indiana maintenance work for the Louisville mechanics. (Tr., pp. 185-186, 204). From the perspective of Al Hodge, a Local 89 mechanic, "The only goal we had was definition of the areas we took care of." (Tr., p. 220). That goal went unaccomplished as the new agreement included no new language addressing the scope of maintenance work for the Louisville mechanics, and IMI expressly objected to including or considering such language.

Nevertheless, Cooper claimed this goal had been achieved because, as he testified, Eddie Webster, on behalf of IMI, represented to him and the other members of the Local 89 negotiating committee that IMI would not make any changes to its maintenance operations. (Id.). Cooper testified, "[Webster] sat across the table [and said] that that work was going to be continually done the way they had operated in the past." (Tr., p. 135). In other words, Cooper maintained that Webster gave him an oral assurance that Louisville mechanics would have the exclusive right to perform maintenance work on any trucks working out of the majority of the Southern Indiana locations. Cooper's testimony, however, is not credible.

First, Holt and Janes flatly denied Cooper's claim. Holt testified that he never heard Webster or Janes make any statement to Local 89 that IMI would guarantee to continue to use Louisville mechanics to perform Southern Indiana mechanical work. Given that Holt was the Maintenance Director for IMI and that he was actively involved in IMI's efforts to open a Southern Indiana maintenance shop, this is a statement he would have noted and remembered. (Tr., pp. 76-77).

Janes also denied that any such statement was made: "Never made, no." (Tr., p. 253). Instead, as Janes explained multiple times, the only statement made by IMI to Local 89 was that it was unwilling to make any changes to the contract language, thus maintaining flexibility to service the fleet as needed. (Tr., p. 252). Judge Amchan asked Janes directly, "Did you hear Mr. Cooper say something to the effect that a promise was made … and your testimony is that ain't so?" Janes responded unequivocally, "Yes, that's correct." (Tr., pp. 272-273).

Second, Cooper's notes from the negotiations belie his claim about Webster's promises. Despite his claim, it was revealed during cross-examination that Cooper's notes from the

negotiating meetings do not record any promise or commitment from Eddie Webster. Instead, the only notation made by Cooper regarding this critical promise or commitment allegedly made by Webster was that IMI had "rejected" the proposal. Cooper testified:

> Q. I say, on GC Exhibit 6, 6/13/11, ten a.m., on the first page of that exhibit there's no reference to Proposal Number 8. And I was wondering why there was no reference to that?
>
> (Pause.)
>
> A. There's a reference on Page 3. And there's also a reference on Page 5 where I have written down, "Out-of-town pay withdraw. Address Company proposals."
>
> Q. All right. Well, you can't explain why there's nothing on the first page about 8?
>
> A. It was withdrawn on June 14th at two fourteen p.m.
>
> …
>
> Q. All right. On 10 it said, "What are the issues?" And then as I flip back here to the third page, about the sixth line down from the -- well, the seventh line down from the top of that page, it says, "We are waiting on a Company response to Union Proposal 4, 8, and 10."
>
> Now, as I go over to the next page, if you look up at … nine lines from the bottom of that page. The ninth line from the bottom of the page it says -- your notes say, "Defined area for shop and drivers." Under that you have "Reject."
>
> That was the Company's response, to reject that proposal?
>
> A. That's what's written down there.
>
> Q. These are your notes, and that was the Company's response. They rejected the proposal.
>
> A. That's correct.
>
> Q. So there were discussions over it, you waited on a proposal on it. And following that -- those discussions, or whatever, it was rejected. And the Company said -- but you said in your earlier testimony, you said all you wanted from that proposal was a confirmation of what the Company

said -- supposedly said to you in 2009, about that that work would remain there.

And you said in the 2011 negotiations that Eddie Webster gave you that representation; but, yet, your notes don't reflect that.

Your notes reflect that that proposal was rejected by the Company. There's no note here about Eddie Webster. And I looked through all of these pages. Eddie Webster's name doesn't even appear here. And that's the last time that that was discussed.

So your notes conflict with your testimony. There is no confirmation given by the Company that whatever they supposedly said in 2009 would continue in 2011.

In fact, they said just the opposite, we reject that proposal. Is that fair?

A. That proposal was twofold. It related with the mechanics, and it also related with the drivers.

Q. That entire proposal was rejected. You don't show partially accepted, partially rejected, define area for shop and drivers; reject.

A. That's what it says.

Q. You made the notes.

A. Yeah.

Q. And there's no note in here about Eddie Webster agreeing to that, is there?

A. Eddie Webster was a spokesman for the Company --

Q. I don't care --

A. -- at that time.

Q. -- I don't care what Eddie Webster was. I'm asking was there any note in there about Eddie Webster, and any representation made by Eddie Webster?

A. Well, at the top of the first page it says for the Company Jason James, Eddie Webster --

Q. I'm saying is there –

A. -- Michael Vasquez, Jim Spalding –

…

Q. Was it Eddie Webster who made the rejection on Proposal Number 10?

A. Eddie Webster was the one speaking for the Employer.

Q. So Eddie Webster rejected Proposal Number 10.

A. Eddie Webster would have been the one speaking for the Employer.

(Tr., pp. 210-215) (emphasis added); (GC Exhibit 6, Cooper's Notes, unnumbered p. 4). In summary, despite claiming that getting Webster's commitment was the defining moment for Local 89 with respect to Proposal Number 10, Cooper made absolutely no note of it in his otherwise extensive and detailed notes from those negotiations. In fact, Cooper took the time to write that IMI had "rejected" Proposal Number 10, but made no effort to record the critical oral commitment that allegedly was so vital to his negotiation strategy.

Third, Cooper further undermined his claims when he admitted that he learned about the existence of the New Albany maintenance shop in January 2012.[1] After learning about the New Albany maintenance shop, Cooper asked no questions of IMI, Webster, Janes, or Holt, and made no statements or objections to IMI about the New Albany maintenance shop. Instead, he proceeded to make a contract proposal to IMI that included no changes to the relevant contract

[1] Considering that Cooper had responsibility for the collective bargaining agreement covering the New Albany plant, had regular business and meetings at that facility, and received regular communications from bargaining unit members working in New Albany, it is highly implausible that Cooper did not learn of the preparations being made for the New Albany maintenance operations before January 2012. In fact, given that one mechanic began operating from that facility in September 2011, and that more formal operations with two full time mechanics began in October 2011, it seems more likely that Cooper learned of these operations at least by the time the New Albany sympathy strike ended in November 2011. Nevertheless, it is undisputed that Cooper learned about the existence of the New Albany maintenance facility in January 2012. It is also undisputed that he made a final proposal to IMI sometime after January 2012, without saying anything about it. (Tr., pp. 160-171).

language and that omitted any reference to Proposal Numbers 8 and 10. In other words, Cooper learned a fact that flatly contradicted the statement he alleges Webster made to him during the negotiations, and Cooper then simply sat on his hands. Likewise, Cooper took no action despite learning a fact that was in conflict with one of the primary aims of the Louisville mechanics. But Cooper had no interest in negotiating this issue directly with IMI because he had already heard IMI's answer: "Rejected." (Tr., pp. 132, 174-176).

Cooper made a similar claim regarding a statement allegedly made during negotiations in 2009 between IMI and Local 89 for a contract covering the New Albany plant. Cooper claimed that IMI asked to remove language from the collective bargaining agreement covering New Albany mechanics because IMI had not employed mechanics in that area for twenty years. (Tr., p. 131).

Again, Janes, who was present for all of the 2009 negotiation sessions, absolutely denied that any commitment or statement was made during these negotiations to preserve all Southern Indiana work for the Louisville mechanics. In any event, any statements that were made during 2009 negotiations necessarily came before January 2011. It was not until January 2011 that Swaidner became IMI's President, or that he and Holt first discussed the potential traffic issues created by the bridges project. In short, there is no proof that IMI made any oral commitment to preserve work for the Louisville mechanics during the 2009 negotiations. (Tr., pp. 269-271, 272-273).

Cooper further undermined his credibility when he clumsily tried to justify his use of "contract area" in Proposal Number 8. Proposal Number 8 provided for "Out-of-town pay to include all employees for any work performed outside of the contract area." (GC's Exhibit 5,

"2011 Union Contract Proposals," Item #8). Obviously, if Southern Indiana was included within the "contract area," then this proposal provided no benefit to Louisville mechanics while performing work in Southern Indiana. They would still be within the "contract area" as claimed by Local 89, and not entitled to any increased wages.

It was obvious to all of the parties, however, that this language was intended to provide the mechanics the same rights to "out-of-town pay" that were available for drivers. That right was defined in Article IX, Section 24 of the Agreement, and provided, "Drivers from the Louisville, Middletown and Shepherdsville Plants delivering outside the contract area, defined as Louisville, Middletown, Shepherdsville, Mt. Washington, Shelbyville, Clarksville IN (loading only) and Taylorsville shall receive one dollar ($1.00) per hour above the current contract rate for all hours worked." (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 23) (emphasis added). With the exception of loading (and not delivering) in Clarksville, all work performed in Southern Indiana by the Louisville drivers was considered "outside the contract area" and was subject to a higher wage rate. Thus, through Proposal Number 8, Local 89 obviously was attempting to obtain that same benefit for its mechanics.

Cooper, however, realized that he could not claim that Southern Indiana maintenance work was "outside the contract area" and subject to the higher wages while also claiming that the Southern Indiana maintenance work was already included in the contract. Thus, Cooper testified that he only meant for Proposal Number 8 to provide a benefit when mechanics performed work outside of Louisville *and* Southern Indiana. Cooper was asked on cross-examination, "did you explain this to mean that if they worked in Corydon[, IN], or if they worked in Scottsburg[, IN], or if they worked in Madison, or if they worked in New Albany, that they would not be entitled

to that pay, or that they would be entitled to that pay?" (Tr., p. 196). Incredibly, Cooper eventually answered, "The mechanics work out of Louisville, and they service those Southern Indiana locations. So it's not outside of their contract area." (Tr., p. 197).

Cooper then was forced to explain, "The contract area is the Louisville, Middletown, Shelbyville, and Shepherdsville, and the mechanics service – they did service runs on the truck, and serviced all those vehicles, worked on the plants in those Southern Indiana locations." (Tr., p. 198). In other words, Local 89's theory of the case is premised upon the understanding that the phrase "contract area" had two distinct meanings in this case, one for drivers and one for mechanics. The first meaning is provided by the express language of Article IX, Section 24, and is limited to Louisville plants, with the exception of loading in Clarksville, Indiana. The second meaning was completely unrecorded in the 2008 Agreement or elsewhere, but expanded the "contract area" for the mechanics to include all or most of Southern Indiana. In addition, Local 89 is forced to contend that Proposal Number 8 provided virtually no benefit for the mechanics because they seldom, if ever, performed work outside of the Louisville and Southern Indiana plants.

III. ARGUMENT

The remaining charge in this matter alleges that IMI neglected its duty to bargain with Local 89 regarding the transfer of Southern Indiana maintenance work from Louisville to New Albany mechanics. It is undisputed, however, that the Louisville mechanics had no express contractual right to the Southern Indiana maintenance work. Thus, in order to find a violation of IMI's duty to bargain, the General Counsel first must prove the existence of an enforceable past practice binding the parties to this unwritten agreement or understanding. Second, the General

Counsel must prove that IMI subsequently failed to bargain with Local 89 about opening a maintenance shop in New Albany. Third, even if the General Counsel can meet these evidentiary burdens, IMI's obligation to bargain can be waived by express contract language or by the conduct of the parties. Thus, the General Counsel must clear three high hurdles to prove the charge against IMI. The General Counsel has failed to overcome a single hurdle.

A. No Past Practice Existed.

Before any duty to bargain can be imposed against IMI, the General Counsel first must prove the existence of a past practice cementing Local 89's right to exclusive coverage of mechanical work in Southern Indiana. Past practices are those which are "regular and long-standing, rather than random or intermittent." Sunoco, Inc., 349 NLRB 240 (2007). In order to be binding, such practices "must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Id. (emphasis added). The General Counsel has failed to prove that such a practice existed in this case.

While it is true that the IMI had permitted its Louisville mechanics to perform Southern Indiana maintenance work for a significant period of time, this was not understood to be a binding practice or commitment for at least two reasons. First, Local 89 plainly did not believe or "expect" this alleged past practice would continue. Cooper and Hodge both admitted that their express goal during the 2011 negotiations was to adopt new language into the agreement that would define the "contract area" to include the area already being worked by Louisville mechanics. (Tr., pp. 177-178, 227). By their own admission, their Proposal Number 10 would have only "clarified" or cemented the past practice that they claimed existed between the parties.

When asked to explain why he made a proposal that only clarified a term he believed was included in the Agreement, Cooper could not do so: "I can't answer that." (Tr., p. 179).

Cooper's inability to answer that simple and basic question stems from the obvious fact that the true answer is harmful to his claim. In reality, neither Cooper nor Hodge reasonably believed that "the 'practice' [would] continue or reoccur on a regular and consistent basis." Sunoco, Inc., 349 NLRB 240 (2007). Instead, they realized that no such commitment from IMI existed to secure their alleged exclusive right to provide all maintenance work in Southern Indiana. In light of IMI's quickly dwindling fleet of trucks, Cooper and Hodge understood that they needed to find a way to expand the rights of Louisville mechanics so that they could keep or obtain as much maintenance work as possible. In light of this and the lack of a reasonable belief that the practice of using Louisville mechanics to perform Southern Indiana maintenance work would continue indefinitely, the General Counsel cannot claim an enforceable past practice. The General Counsel certainly has not carried his burden of proving that any such practice existed.

Second, the undisputed evidence revealed that the mechanical work performed on trucks working from the Madison, Indiana plant was removed previously from Louisville mechanics and given to mechanics in Carrolton, Kentucky. While this was not a recent occurrence, the change evidenced that the parties' failure to assign Southern Indiana maintenance work to any specific mechanics was a product of convenience and inertia, rather than an unwritten understanding that the work was reserved for the Louisville mechanics. Again, the evidence reveals that the parties did not have a reasonable expectation or belief that the Southern Indiana maintenance work performed by the Louisville mechanics was to be considered permanently

within their jurisdiction. Because no such understanding existed, the General Counsel has failed to meet his burden of proving the existence of a past practice.

B. The Parties Engaged in Negotiations Regarding the Scope of Louisville Mechanics Contract Area.

Another fundamental flaw in the General Counsel's case is the fact that IMI engaged in negotiations with Local 89 regarding the scope of the "contract area" for Louisville mechanics. At the very first negotiation meeting between the parties in 2011, Local 89 made two proposals relating to the scope of the contract area and seeking to cement or expand the rights of Louisville mechanics to future maintenance work in Southern Indiana. IMI immediately, at the very same meeting, responded by expressly rejecting those proposals and indicating that it intended to maintain its authority to deal with maintenance issues flexibly. The parties then continued with negotiations and executed an agreement that contained two provisions demonstrating that the contract area was limited to Louisville facilities.

First, Article I, Section 2 provides, "The territory covered by this Agreement shall be the Kentucky territory defined as Louisville and Middletown, in addition to driving personnel at the Shelbyville and Shepherdsville locations." (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 5) (emphasis added). Thus, after discussing the potential scope of the contract area, the parties entered into an agreement that expressly limits its territory to four locations in the Louisville, Kentucky metropolitan area. In other words, the parties agreed that the contract territory covered only Kentucky work.

Second, Article IX, Section 24, also defined the "contract area" as "Louisville, Middletown, Shepherdsville, Mt. Washington, Shelbyville, Clarksville IN (loading only) and Taylorsville. (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 25). While this

section was aimed at providing a specific benefit to drivers, the parties were again expressing their clear understanding that the contract area was limited to Kentucky locations.

The fact that the issue was raised first by Local 89 during the initial negotiation meeting, instead of IMI is of no import. The critical issue is not who raised the topic, but whether the parties actually negotiated regarding that topic. More critically, however, this issue was literally raised in the first proposal of the first meeting between the parties. It was discussed within days of IMI deciding to locate the new maintenance facility in New Albany, and before any significant work had been done. While the General Counsel, during the hearing, seemed to imply that IMI's failure to initiate the discussion on this issue on its own was meaningful, a clear and careful review of the evidence demonstrates that IMI had no legitimate opportunity to raise the issue any earlier than it was raised by Local 89.

Janes summarized the events well, "The Union brought the topic to us. Because they brought the topic to us there was no need for a discussion later. We negotiated during the first day on defining the territory. We refused to accept the, the proposed definition of the territory and ultimately agreed on a ratified agreement that included the previous language." (Tr., pp. 275-276). In short, the parties discussed defining the territorial scope of the agreement, and then entered into an agreement that defined the territory consistently with IMI's interpretation and wishes. Nothing more was, or could have been, required of IMI.

Because IMI engaged in negotiations with Local 89, the charge should be dismissed.

C. Local 89 Waived Any Duty to Bargain that Existed By The Express Language of the New Agreement and By Its Conduct.

Not only is there no enforceable past practice in this matter, but the duty to negotiate changes to past practices can be waived. "Under Board law, a waiver 'can occur in one of three

ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.'" NYP Holdings, Inc., 353 N.L.R.B. No. 687 (2008). Here, all three forms of waiver are present.

First, Local 89 waived the enforcement of any alleged past practice by the express terms of the Agreement. The result in Radioear Corp., 214 N.L.R.B 362 (1974), is directly analogous to the pending charge in this case. In Radioear, the NLRB determined that a zipper clause was sufficient evidence of express waiver where the union had unsuccessfully sought to negotiate into the contract a right it claimed as a "past practice" and then yielded to the company's decision to preclude such language. In that case, the union attempted to claim that the employer had unlawfully ended the past practice of providing a "turkey money" bonus without engaging in required bargaining. However, during the course of negotiations, the union had proposed a "maintenance-of-benefits" clause that would have confirmed the right to this bonus and other benefits into the new agreement. The employer refused to accept the maintenance-of-benefits clause, and the union ultimately yielded its attempts to include that language. As a result, the NRLB held that the zipper clause contained in the agreement, coupled with the union's acceptance of the company's rejection of the maintenance-of-benefits clause, was sufficient to demonstrate a waiver of the past practice.

The facts in this case closely parallel those in Radioear. Here, Local 89 offered Proposal Number 10 during contract negotiations, a proposal it admits merely sought to acknowledge the alleged past practice in the new agreement. IMI refused, however, and explained that its rejection of the proposed language was intended to preserve its flexibility in maintaining its fleet

of trucks. Local 89 quickly acquiesced in that rejection, and executed the new agreement which contained a zipper clause. In part, Article XV, Section 4 provided, "By the execution of this Agreement, the parties hereto have annulled any prior Agreement or understanding, whether written, verbal or implied, which may have existed between Irving Materials, Inc. and Truck Drivers Local Union No. 89, or any member of either organization." (GC Exhibit 2, July 1, 2008 Collective Bargaining Agreement, p. 29). This language, coupled with Local 89's yielding on its insistence to define the "contract area" for Louisville mechanics to include Southern Indiana, constitutes a waiver of any past practice that may be alleged to exist.

Second, Local 89 waived enforcement of the alleged past practice through its conduct. It is undisputed that Cooper learned about the opening of the New Albany maintenance shop in January 2012, well before the parties agreed on a final contract. Still, Cooper did and said nothing. His failure to protest this alleged unilateral change and failure to request further bargaining on the subject also constituted waiver. See Justesen's Food Stores, 160 N.L.R.B. 687 (1966) (failure to protest unilateral action can constitute waiver); NLRB v. Spun-Jee Corp., 385 F.2d 379 (2^{d} Cir. 1967) (failure to request bargaining despite knowledge of a unilateral change can constitute waiver). The Sixth Circuit has held that a union must act with due diligence once it has notice of a proposed change by the employer. YHA Inc. v. NLRB, 2 F.3d 168 (6th Cir. 1993).

Cooper and Local 89 make no excuse for having sat on their rights after learning about the opening of the New Albany maintenance shop. Instead of acting on the information, they proceeded to execute a new agreement without comment to IMI presumably in the hope that later filing an unfair labor practice charge would accomplish what their negotiating strategy had failed

to do. If they truly preferred the opportunity to bargain with IMI about the opening of the New Albany maintenance shop, they had ample opportunity to do so in January, February, March, and April 2011. In truth, they had no interest in such a negotiation because they already were aware of what the result would be.

The filing of an unfair labor practice charge does not relieve a union of its obligation to demand bargaining when it has notice of a change in the terms or conditions of employment. NLRB v. Oklahoma Fixture Co., 79 F.3d 1030 (10th Cir. 1996). Thus, Local 89 waived, through its conduct, any right it had to insist upon bargaining about the opening of the New Albany maintenance shop.

Third, waiver may also be found by the ALJ both by conduct and by express language. NYP Holdings, Inc., 353 N.L.R.B. No. 687 (2008). Local 89 attempted to incorporate the alleged past practice into the agreement, acquiesced in IMI's refusal to adopt such language, remained quiet after learning that IMI had opened a maintenance shop in New Albany, in express violation of an alleged past practice, and then executed a new agreement that contained clear language precluding the enforcement of any oral or unwritten agreements or understandings. Taken together, these acts demonstrate a waiver by Local 89 of the right to bargain about the opening of the New Albany maintenance shop. As a result, we respectfully submit that the charge must be dismissed in its entirety.

IV. CONCLUSION

No past practice existed, and thus, Louisville mechanics had no right or claim to preserve all Southern Indiana maintenance work for themselves. Even had such a practice existed, the parties addressed the scope of the contract area during negotiations, and neglected to include any

language incorporating Southern Indiana work into the new agreement. Finally, Local 89 waived, by deed and by language, any right it had to insist upon a duty to bargain over the opening of the New Albany maintenance shop. As such, IMI respectfully submits that the Complaint should be dismissed in its entirety.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on December 10, 2012, I electronically filed the foregoing with the National Labor Relations Board. In addition, I certify that an electronic copy of the foregoing was sent to:

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