

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

IMI SOUTH, LLC, d/b/a  
IRVING MATERIALS

Case Nos. 9-CA-073769<sup>1</sup>  
9-CA-080462

and

GENERAL DRIVERS, WAREHOUSEMEN  
AND HELPERS, LOCAL UNION NO. 89  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

*Kevin Luken, Esq.*

for the General Counsel.

*James U. Smith, III, Kevin M. Morris, Esqs., (Smith and Smith, Louisville, Kentucky)*

for the Respondent.

*Robert Colone, Esq.*

for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky on October 17 and 18, 2012. Teamsters Local Union No. 89 filed the charge in case 9-CA-080462 on May 7, 2012. The General Counsel issued the complaint in this matter on August 17, 2012. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally transferring the bargaining unit work of its Louisville mechanics to unrepresented mechanics working at New Albany, Indiana. The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate any of its Louisville

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<sup>1</sup> Case No. 9-CA-073769 was remanded to the Regional Director on November 8, 2012 to process the informal settlement that I approved on the record during the hearing. Thus, this decision only pertains to the allegations in Case No. 9-CA-080462.

mechanics after they had unconditionally offered to return to work after the Union's September 7, 2011 to April 29, 2012 strike against Respondent.<sup>2</sup>

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On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

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##### I. JURISDICTION

The Respondent, IMI South, d/b/a Irving Materials, is a corporation which produces and distributes ready mix concrete from a number of facilities in a number of states, including one in Louisville, Kentucky and another in New Albany, Indiana. Respondent annually purchases and receives goods valued in excess of \$50,000 from outside of the State of Kentucky at its Louisville facility. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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##### II. ALLEGED UNFAIR LABOR PRACTICES

Teamsters Local 89 has represented employees at a number of Respondent's facilities for many years. At Respondent's Louisville facility, Local 89 has represented Respondent's employees, including truck drivers, batch operators and truck mechanics at least since 1993. Local 89 also represents employees, including truck drivers and batch operators at several of Respondent's facilities in Southern Indiana, including New Albany. Prior to 2009, Local 89's bargaining unit at New Albany, Indiana included truck mechanics despite the fact that there had not been any truck mechanics working at that facility since about 1993. Maintenance and repair work on Respondent's trucks operating in Southern Indiana was performed by members of the Louisville bargaining unit, working out of the Louisville facility until September 7, 2011. They worked on the concrete trucks either on the road or at the Louisville shop.

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During negotiations for a 2009-2012 collective bargaining agreement in New Albany, truck mechanics were excluded from the description of the bargaining unit. Despite the fact that drivers and mechanics from Louisville worked in Southern Indiana, the 2008-2011 collective bargaining agreement for the Louisville facility did not, on its face, cover most work in Southern

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<sup>2</sup> The complaint specifically alleges that Respondent refused to reinstate Louisville mechanics Steve Sandbach and Simon Hodge. At the hearing the General Counsel amended the complaint to allege a violation for failing and refusing to reinstate any similarly situated employee (i.e., any unit mechanic who had gone on strike—in the event that Hodge and/or Sandbach were unavailable or declined reinstatement).

<sup>3</sup> There are 2 exhibits designated as G.C. exhibit 1. One is the formal papers. The other is a list of Respondent's facilities at which Local 89 represents employees. Whenever I refer to G.C. Exh. 1, I am referring to the list of facilities.

At Tr. 42, line 2, 64 should be 65.

Indiana. The mechanics at Louisville serviced Respondent's trucks operating out of the following locations in Southern Indiana: Corydon, Salem, Scottsburg, New Albany, Clarksville and Greenville.

5 Article I of the July 1, 2008 – June 30, 2011 collective bargaining agreement covering unit employees at the Louisville facility, entitled Declaration of Intent, Section 2, Coverage, stated:

10 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.

15 In January 2011, Kevin Swaidner became the President of IMI's South Division. Soon afterwards, Christopher Holt, the Fleet Maintenance Director at the Louisville facility, discussed with Swaidner his concern regarding the State of Kentucky's plans to repair the Kennedy Bridge, which spans the Ohio River between Louisville and Southern Indiana. In 2011 and at the present time, there are three bridges between Louisville and Southern Indiana.<sup>4</sup> They are the Kennedy Bridge, which is part of Interstate 65 and takes traffic north in the direction of Indianapolis; the Sherman Minton<sup>5</sup> Bridge, which is part of Interstate 64, taking traffic west towards St. Louis; and the Second Street or George Rogers Clark<sup>6</sup> Bridge. Commercial traffic is prohibited from using the Second Street Bridge, thus leaving only one bridge available to Respondent's trucks if either the Kennedy or Minton Bridge closed. At the time Holt first discussed the repair work on the Kennedy Bridge, the State had not indicated when these repairs would take place.

30 In May 2011, Swaidner told Holt to prepare to open a maintenance shop in Southern Indiana. Respondent initially planned to operate this shop at the start of 2012. It did not inform the Union of its plans, nor did it ever indicate whether the operation of this shop was intended to be a temporary measure to address the expected bridge closings or a permanent measure. Respondent hired an outside contractor to start work preparing a maintenance shop at its New Albany, Indiana facility on June 8, 2011.

35 Collective bargaining negotiations for a successor contract to the July 1, 2008 – June 30, 2011 contract commenced on June 13, 2011. At the initial session, the Union presented Respondent a proposal consisting of a list of 12 items. Item 10 was, "Define area for the shop and Drivers."<sup>7</sup> The Union thus sought to extend the territory covered by the agreement, as

<sup>4</sup> There are plans to construct other bridges nearby in the future.

<sup>5</sup> U.S. Senator from Indiana and Justice of the U.S. Supreme Court, 1949-1956.

<sup>6</sup> Revolutionary War Hero, who captured the British fort at Vincennes in 1779.

<sup>7</sup> There was also some discussion at hearing about item 8, "out of town pay to include all employees for any work performed outside of the contract area." Article IX of the 2008-2011 contract covered out of town pay in Section 24, G.C. 2, p. 23. That provision defines contract area with reference to one location in Indiana; Clarksville (loading only). I assume the reference in that Section to Lawrenceburg is

written, to include Southern Indiana for both the drivers and mechanics, Tr. 178-79. In effect, what the Union attempted to do was to codify an established past practice. The proposal was rejected by Respondent, G.C. Exh. 6, 5<sup>th</sup> unnumbered page.

5           There is conflicting testimony as to what else was said about item 10 during the negotiation session. I credit the following testimony of Respondent's Human Resources Director, James Janes:

10           Q. [by Respondent's counsel] By Proposal Number 10 what was, what did the Union tell you that they were attempting to do?

A. They sought to increase their territory to include territory for mechanics to include Southern Indiana, which would be the Corydon, Salem, Scottsburg and Madison locations as well as New Albany.

15           Q. Did Mr. Cooper [Jeffrey Cooper, the Union's lead negotiator] identify those particular areas in Southern Indiana or did you just assume that those were the areas he was talking about?

A. I believe Southern Indiana was how he described it, all work in Southern Indiana....We understood it to be all IMI South facilities in Southern Indiana, which is Madison, Salem, Scottsburg, Corydon, New Albany.

20           Tr. 250-51.

25           After, the Union made this proposal, Respondent caucused and rejected this proposal. It was not discussed again in collective bargaining negotiations, which continued into 2012. Respondent told the Union that it "maintained our rights to service that [Southern Indiana] in the most flexible way that we need to," Tr. 117.<sup>8</sup>

30           Upon expiration of the 2008-2011 contract on June 30, 2011, the parties agreed to extend the life of the contract. The Union terminated this extension in late August 2011. On September 7, 2011, the Union went on strike against Respondent at the Louisville facility. Union

to Lawrenceburg, Kentucky, near Lexington, not Lawrenceburg, Indiana, a suburb of Cincinnati. The Union sought to obtain "out of town" pay for mechanics working in Southern Indiana, which drivers were entitled to under the 2008-11 agreement. Respondent rejected this proposal.

The company cites this proposal for the proposition that the Union recognized that mechanics' work in Indiana was not covered by the 2008-11 agreement. The inclusion of an identical provision in the 2012 agreement is additional support for the company's contention that the Union waived its bargaining rights over the mechanics' work in Southern Indiana.

<sup>8</sup> I decline to credit the testimony of union witnesses Cooper and Hodge that Respondent promised that the Louisville mechanics would continue to service Southern Indiana. Respondent's witnesses denied that any such promise was made. There is no documentary corroboration for this testimony. Moreover, even if such promises were made, they would have been negated by Section 4 of the "zipper clause" of the parties' agreement of February 16, 2012. As set forth fully below, this provision annulled all prior agreements or understandings between Respondent and the Union, which were not set forth in the agreement.

employees at the New Albany facility engaged in a sympathy strike that lasted from about September 9, until mid-November.

5 On September 9, government inspectors found a structural defect on the Sherman Minton Bridge and shut it down immediately. This bridge was not reopened for about six months. As a result, repair work on the Kennedy Bridge, the only remaining bridge open to commercial traffic, was delayed. In response to the closing of the Sherman Minton Bridge, Respondent decided to open the maintenance shop in New Albany as soon as possible, Tr. 50.

10 By mid October 2012, if not earlier, two mechanics working out of the New Albany Shop were performing maintenance and repair work on Respondent's trucks in Southern Indiana. Respondent never notified the Union of this fact. The Union's lead negotiator, Jeffrey Cooper, became aware of the New Albany maintenance operation from other sources after January 1, 2012, but prior to the conclusion of collective bargaining negotiations. Cooper contacted the  
15 Union's New Albany steward soon thereafter and asked the steward for the names of the New Albany mechanics, Tr. 134. There is no evidence that he asked the steward for any other information about the shop.

20 Cooper had visited the New Albany facility for grievance meetings between June and September 7, 2011, when the Respondent was refurbishing the shop, on approximately ten occasions.<sup>9</sup> There is no evidence that he made any other inquiry regarding the preparations regarding the New Albany shop prior to the strike, or its operation afterwards. Respondent never advised the Union whether the opening of the New Albany Shop was a temporary measure to address the bridge closing and/or the strike, or a permanent measure.<sup>10</sup>

25 On February 16, 2012, at a joint meeting of the Union and Respondent, Respondent accepted the Union's proposed collective bargaining agreement, Exh. R-5.<sup>11</sup> This agreement contained a coverage provision that was identical to the 2008-2011 provision. It also contained a "zipper clause" that was also identical to that in the 2008-11 contract, Exh. R-5, p. 30.

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ARTICLE XV  
EXTENT AND NATURE OF AGREEMENT

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

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<sup>9</sup> Cooper testified that on these visits he would not go into the facility beyond the office just inside the gate, Tr. 165.

<sup>10</sup> An employer is not required to bargain over "nonpermanent, stopgap, or temporary measures to deal with a strike, *Titan Tire Corp.*, 333 NLRB 1156 fn. 7 (2001); *Land Air Delivery*, 286 NLRB 1131, 1132 fn. 7 (1987).

<sup>11</sup> This union proposal was virtually identical to a proposal made by the Respondent on February 3, 2012. The company proposal contained a strike settlement, which was rejected by the Union and then withdrawn by Respondent. The 2012 contract was apparently ratified in late April just prior to the Union's unconditional offer to return to work.

5                   Section 2: This Agreement embraces in their 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 are strictly limited to the terms stated.

                  Section 3: [omitted due to irrelevance]

10                   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.

15                   The Union made an unconditional offer to return to work on April 29, 2012 and informed its members to report to work on April 30. The new collective bargaining agreement was apparently executed on May 1, 2012. Respondent did not reinstate any of the 6 mechanics who had been working at Louisville prior to the strike. It hired 2 permanent replacements in Louisville and continued to perform the maintenance and repair work for Southern Indiana out of New Albany. The mechanics in New Albany are not part of Local 89's New Albany bargaining unit.

#### *Analysis*

25                   Generally, an employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee relationship in an expired contract until a new agreement is reached or good-faith bargaining leads to impasse, e.g., *R.E.C. Corp.*, 296 NLRB 1292, 1293 (1989). During negotiations, an employer's obligation encompasses a duty to refrain from implementation of a change in such terms and conditions unless or until an overall impasse has been reached, *Bottom Line Enterprises*, 302 NLRB 373, 374 (1992). A long-  
30                   time established practice becomes an implied term and condition of employment by mutual consent of the parties—even if this practice deviates from the letter of the parties' written agreement, e.g., *Riverside Cement Co.*, 296 NLRB 840, 841 (1989); *Intermountain Rural Electric Association v. NLRB*, 984 F. 2d 1562 (10<sup>th</sup> Cir. 1993); *Smith Industries*, 316 NLRB 376 (1995); *The Sacramento Union*, 258 NLRB 1074-75 (1981); also see *Lafayette Grinding Corp.*,  
35                   337 NLRB 832 (2002).

40                   There is no question that Respondent had a long-  
time established practice of assigning the maintenance work in Southern Indiana to bargaining unit mechanics at its Louisville facility. Thus, Respondent was obligated to bargain with the Union over any change to that practice regardless of the fact that the language of the collective bargaining agreement did not reflect this practice. The limited exception provided by an economic exigency compelling prompt action is not applicable in this case, *Bottom Line Enterprises, supra*. Respondent began planning for the transfer of mechanics work to New Albany months before the emergency closure of the Sherman Minton Bridge. At that time no firm date had been set for the repairs of the Kennedy Bridge  
45                   either.

Thus, when the Union proposed delineation of the geographical scope of the new contract on June 13, Respondent had the opportunity to inform the Union of its plans and to engage in bargaining over that plan, as well as other issues, in reaching a final overall agreement or impasse. If the opening of the New Albany Shop was a temporary measure to address the anticipated bridge closings, or unanticipated closing of the Sherman Minton Bridge, Respondent was obligated to so inform the Union.

### *Waiver of Bargaining Rights*

A party can waive its statutory right to bargain over a mandatory subject of bargaining. To be effective, a waiver of statutory bargaining rights must be clear and unmistakable. Waiver can occur in any of three ways, by express provision in a 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, *American Diamond Tool*, 306 NLRB 570 (1992).

A Union does not generally waive its bargaining rights to a change of which it has not received notice. It is uncontroverted that Respondent never notified the Union that it was planning to transfer bargaining unit work to a shop in Southern Indiana. Moreover, Respondent failed to give the Union notice of this change even after it had been effectuated. Nevertheless, when a union has actual notice of a change in conditions of employment, from a source other than the employer, it must take advantage of that notice if it is to preserve its bargaining rights. Lack of diligence by a union amounts to a waiver of its right to bargain, *Clarkwood Corporation*, 233 NLRB 1172 (1977); *Hartman Luggage Co.*, 171 NLRB 1254 (1968).

The General Counsel argues that by the time the Union knew of the existence of the New Albany shop, the change in its past practice had become a "*fait accompli*." If so, this precludes a finding that the Union waived its bargaining rights, *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-24 (2001); *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431, 433-34 (2004).

However, the instant case is distinguishable from most or all "*fait accompli*" situations in that when the unilateral change was implemented and when the Union found out about it, bargaining unit employees were not working, they were still on strike. The Union therefore had the opportunity to inquire in subsequent collective bargaining sessions whether the establishment of the mechanic's shop in New Albany was intended as a permanent transfer of work, about which Respondent was obligated to bargain, or a temporary measure to continue operations during the strike, for which Respondent had no such obligation. One would think that Cooper would have at least inquired as to whether Respondent intended to move the mechanics' work back to Louisville when the strike and bridge work ended.

I conclude that under the circumstances, the transfer of mechanics' work to New Albany was not a *fait accompli*. The Union had an opportunity to inquire about Respondent's intentions with regard to the New Albany maintenance shop before it impacted unit employees. Had Respondent responded by admitting that the transfer was intended to be a permanent change, the Union could have demanded bargaining over this change. By failing to make any inquiry during subsequent collective bargaining sessions, agreeing to a contract that left the coverage provisions

and zipper clause unchanged, I find that the Union waived its right to bargain over the transfer of mechanics' work to New Albany.

5 The inclusion of the zipper clause in the 2012 contract is far more consequential than the zipper clause in the 2008-11 contract. The past practice of Louisville mechanics performing Southern Indiana work continued throughout the term of the 2008-11 agreement. However when the Union proposed and the company accepted the zipper clause in the 2012 agreement, Louisville mechanics were no longer performing this work due to the strike and the Union knew this work was being performed by non-unit mechanics in New Albany.

10 In a somewhat analogous case, the Board denied a union a remedy for statutory violations outside the six-month limits of Section 10(b). In *Moeller Bros. Body Shop*, 306 NLRB 191 (1992) the Board held that the Union failed to exercise due diligence to determine whether or not the employer was making the fringe benefit payments required by its collective bargaining agreement.

15 I believe that placing a burden of inquiry on the Union in this case is justified in part by the fact that the operation of the New Albany shop was contrary to the Union's June 13 proposal. Christopher Holt's testimony at Tr. 36 indicates that the New Albany shop required considerable work to prepare it for operation. In these circumstances, I conclude that the Union waived its bargaining rights regarding the transfer of mechanics' work both by the terms of the new collective bargaining agreement and its conduct after it became aware of the existence of the Southern Indiana shop. To summarize, I do so on the basis on the following considerations:

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1. The Union knew that mechanics' work was being performed in New Albany while collective bargaining negotiations were ongoing;
  2. The Union knew that Respondent had rejected its attempts to codify established past practice in the new agreement at the July 13, 2011 bargaining session.
  - 30 3. The Union proposed and the company accepted an agreement which left the geographical scope of the contract unchanged from the 2008-11 agreement.
  4. The Union proposed and the company accepted an agreement containing a zipper clause which appears to negate any past practice not memorialized in the new agreement.

35 As Respondent points out the Board reached the same conclusion in a very similar case, *Radioear, Corporation*, 214 NLRB 362 (1974).

#### Conclusion of Law

40 Respondent did not violate Section 8(a)(5) and (1) by unilaterally transferring the work of the bargaining unit mechanics from Louisville to Southern Indiana nor Section 8(a)(3) and (1) in refusing to reinstate those bargaining unit mechanics who had not been permanently and legally replaced.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

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ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 18, 2012

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Arthur J. Amchan  
Administrative Law Judge

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<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.