

Aggregate Industries and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters. Cases 28–CA–023220 and 28–CA–023250

July 8, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On June 6, 2011, Administrative Law Judge Burton Litvack issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Acting General Counsel and the Charging Party filed reply briefs. The Respondent filed cross-exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The principal issues presented are whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally moving a classification of drivers and the work they performed from coverage under the Construction Agreement to coverage under the less-favorable Ready-Mix Agreement; by bypassing the drivers' exclusive collective-bargaining representative, Teamsters Local 631 (Union), and dealing directly with those drivers; and by denying employment opportunities to those drivers who refused to agree to work under the terms and conditions of the Ready-Mix Agreement. The judge dismissed these allegations. For the reasons set forth below, we reverse and find that the Respondent violated the Act as alleged.

Contrary to the judge, we find that the Respondent's movement of the drivers was a change in the scope of the bargaining units—a permissive subject of bargaining—and therefore could not be implemented without first reaching agreement with the Union. We further find that even if the Respondent's action is properly characterized

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's conclusions of law and remedy, and substitute a new Order and notice, to conform to the violations found, and to correct inadvertent errors.

as a transfer of unit work, and therefore constituted a mandatory subject of bargaining, the Respondent violated the Act by acting without giving the Union sufficient notice and opportunity to bargain concerning the change.³

I. FACTS

A. The Respondent's Operations; the Construction Agreement

The Respondent quarries and hauls aggregate (crushed stone and related materials), performs grading and paving work, operates ready-mix (concrete) batch plants, hauls cement and ready-mix, and conducts ready-mix operations at construction sites. It operates under various trade names, including Frehner Construction, SNP, and Regal Materials. Frehner and SNP haul aggregate from Respondent's Sloan Quarry to construction sites and on those construction sites. Regal Materials hauls aggregate to and between batch plants and hauls cement powder from cement plants to the batch plants.

For many years, the drivers employed by Frehner and SNP have been represented by the Union. From at least 2001 until 2010, Frehner and SNP were members of the Association of General Contractors (AGC), which negotiated the Construction Agreement, a multiemployer contract, with the Union and other labor organizations. The most recent Construction Agreement ran from June 1, 2007, to June 30, 2010. In April 2010, Frehner and SNP withdrew bargaining authority from the AGC. They continued to bargain alongside the AGC but advised the Union that both Frehner and SNP were bargaining for separate contracts.

The bargaining unit specified by the Construction Agreement (the Construction bargaining unit) includes five classifications of drivers. This case involves the "off-site material haul" drivers, who haul aggregate from Sloan Quarry to construction sites. Until the events underlying this case, they were the only drivers employed by the Respondent who made deliveries to or on construction sites.

³ We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally reassigning mechanical sweeper truckdriving job duties to employees in the bargaining unit represented by Laborers' International Union of North America, Local 872 (Laborers) when the work had previously been performed by employees in the Teamsters-represented Construction Bargaining unit; by unilaterally changing the terms and conditions of employment of two mechanical sweeper driver employees by treating them as members of the Laborers' bargaining unit; and by dealing directly with the two mechanical sweeper drivers regarding their terms and conditions of employment.

B. The Ready-Mix Agreement

In 2006, the Board certified the Union as the representative of a unit of drivers and mechanics at Regal Materials (the Ready-Mix bargaining unit).⁴ In December 2007, the Union won a decertification election and was again certified to represent the same unit. After the December 2007 certification, the Union and Regal Materials negotiated a collective-bargaining agreement—the Ready-Mix Agreement—effective July 1, 2008, to May 31, 2012. The Ready-Mix Agreement includes the classifications “Transport Drivers (Bulk)” and “Transport Drivers (S&G).” Transport Drivers (Bulk) transport cement powder from cement plants to batch plants, and Transport Drivers (S&G) drive “plant haul” from quarries to batch plants as well as between batch plants.⁵

There is a substantial difference in wage rates under the Construction Agreement and the Ready-Mix Agreement. During the last year of the Construction Agreement (from July 1, 2009, to July 1, 2010), drivers were paid between \$30.29 and \$31.28 per hour, with \$6.45 per hour paid to benefit funds and a training trust. During the same time period, Transport Drivers (S&G) under the Ready-Mix Agreement were paid between \$23 and \$24.80 per hour, with \$4.16 paid to benefit funds.

C. The Respondent Unilaterally Moves the Drivers Who Deliver to Construction Sites out of the Construction Bargaining Unit and into the Ready-Mix Bargaining Unit

On July 9, 2010,⁶ the Respondent’s vice president and regional counsel, Sean Stewart, announced to Wayne Dey, the Union’s representative with responsibility for administering the Construction Agreement, that the Respondent was “going to move” the drivers who hauled aggregate from Sloan Quarry to construction sites from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement. Stewart indicated that he wanted only “to discuss whether we could keep our own drivers”; that is, he asked Dey whether the Respondent could continue to employ the same individuals currently covered by the Construction Agreement to haul the same material in the same trucks but under the terms of the Ready-Mix Agreement. Dey told Stewart that he

did not think he or the union representative representing the Ready-Mix unit employees would agree to the movement of the drivers in that manner. In their next conversation, on August 13, Dey told Stewart that the Union would oppose the Respondent’s plan. On August 20, the Union reiterated its position in writing. On September 24, the Respondent requested that the Union dispatch 64 drivers to perform work, under the terms of the Ready-Mix Agreement, beginning 4 days later. The particular work had previously been performed by offsite material haul drivers working under the terms of the Construction Agreement. The Union did not fill the dispatch request.

On September 27, Stewart sent a letter to the Union stating that the Ready-Mix Agreement gave the Respondent the right to deliver materials under the terms of that agreement. On September 28, the parties met in an attempt to resolve the dispute, but no agreement was reached.

At the end of the September 28 session, both sides agreed to consider resolving their differences by settling on a schedule of transition rates, under which the wage rate for the drivers in dispute would be lowered in steps from the Construction Agreement rate to the Ready-Mix Agreement rate. Later that day, the Respondent sent a letter to the Union stating that, because the Union had not dispatched drivers under the Ready-Mix Agreement as requested, the Respondent was exercising its option to procure workers from other sources.

In the meantime, Stewart drafted a transition rates proposal, but in a telephone conversation on September 30, Dey informed Stewart that the Union would not agree to resolve the dispute in that manner. Stewart nevertheless asked Dey to pick up a copy of the Respondent’s proposed transition rates and to hand out copies to the drivers at a union meeting that night. Dey said that he would do so. Later that day, Dey called Stewart and told him that the Respondent’s transition proposal was unacceptable. He warned Stewart that if the Respondent implemented it, the Respondent “would have a fight on [its] hands.”

On October 1, the Respondent met with the affected drivers at Sloan Quarry; the Respondent invited Dey and other union representatives to attend, but they were not permitted to speak. Stewart told the drivers about moving them to coverage under the Ready-Mix Agreement but said that the Respondent would apply its transition proposal to any drivers who agreed to the move.

By letter dated October 5, the Respondent informed the Union that it would commence performing the affected drivers’ work under the Ready-Mix Agreement and offered to pay the proposed transition rates to current

⁴ The unit was described in the certification as “All full-time and regular part-time drivers and mechanics employed by the Employer out of its concrete batch plant in or about Clark County, Nevada; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.”

⁵ Transport Drivers (S&G) also haul aggregate from the Sloan Quarry to batch plants operated by SNRM, another subsidiary of the Respondent.

⁶ All dates are in 2010, unless otherwise specified.

employees. The Respondent presented a notice with the same offer to each of the drivers. The document contained a section for the drivers to fill out and return if they wanted to continue to be employed as of October 11, under the Ready-Mix Agreement. About 60 drivers agreed.

From October 12 to 15, the Union picketed. On October 15, the Respondent and the Union agreed that, pending resolution of the instant unfair labor practice charges, the affected drivers would work under the Ready-Mix Agreement, with the phased-in wages offered by the Respondent on October 1. The drivers who accepted the proposal are doing the same work, using the same trucks, and hauling the same material to and from the same locations as they did when they worked under the Construction Agreement. They are, however, no longer covered by that agreement, and they are getting paid less.

II. ANALYSIS

A. Bargaining Unit Scope is a Permissive Subject of Bargaining

The Board and the courts have drawn a distinction between mandatory and permissive subjects of bargaining. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). Generally speaking, mandatory subjects are those encompassed within the definition of collective bargaining set forth in Section 8(d) of the Act: “wages, hours, and other terms and conditions of employment.” *Id.* at 349 (quoting Sec. 8(d)). All other lawful bargaining subjects are permissive. *Id.* at 349. A party may insist to impasse on, and then implement, a bargaining proposal concerning a mandatory subject. *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007), *enfd.* 550 F.3d 1183 (D.C. Cir. 2008). But if the subject is a permissive one, the other party may refuse to discuss it; a proposal cannot thereafter be implemented absent an agreement to do so. *Hill-Rom Co., Inc. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992); *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 5 (2011), *enfd.* 699 F.3d 50 (1st Cir. 2012).

A proposal to alter the scope (composition) of an existing bargaining unit is a permissive subject of bargaining. See, e.g., *Hill-Rom*, 957 F.2d at 457. Thus, an employer (or union) cannot unilaterally change a bargaining unit, even after bargaining to impasse. *Wackenhut Corp.*, 345 NLRB 850, 853 fn. 8 (2005).⁷ But a transfer of unit

work is a mandatory subject of bargaining. *Id.* It is the task of the Board to distinguish between the two.

It can be difficult to draw this line, particularly when the unit is defined, not in terms of the job classifications it covers, but in terms of the nature of the work performed by the unit. See, e.g., *Hill-Rom*, 957 F.2d at 458. This, however, is not such a case, as both the Construction Agreement and the Ready-Mix Agreement define their respective bargaining units in terms of the constituent job classifications. In *Wackenhut Corp.*, 345 NLRB at 352, the Board held that once a specific job has been included within a bargaining unit, the employer cannot remove it without the consent of the union or action by the Board. See *Hampton House*, 317 NLRB 1005, 1005 (1995) (same).

An employer may not, under the guise of transferring unit work, alter the scope of the bargaining unit. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975–976 (10th Cir. 1990); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77–78 (4th Cir. 1979). The Board has rejected attempts by employers to characterize a change as a transfer of work when the same employees continue to do the work. See, e.g., *Beverly Enterprises, Inc.*, 341 NLRB 296, 296 (2004) (“The same employees continue to do the work. The Respondent attempted to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit.”); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140–1141 (1982), *enfd.* 721 F.2d 187 (7th Cir. 1983).

B. The Respondent Altered the Scope of the Bargaining Units

In the present case, the judge found that the Respondent’s plan to move the work was simply a transfer of unit work, a mandatory subject of bargaining for which the Union’s consent was not required. “[T]he correct characterization of Respondent’s actions,” the judge observed, “is that of a transfer of material hauling duties from drivers covered under the Construction Agreement to drivers covered under the Ready-Mix Agreement.” Relying on the fact that the Respondent did not eliminate the offsite material haul classification from the bargaining unit in the Construction Agreement or create a nonbargaining unit position and assign the work of Construction Bargaining unit employees to employees in the new job classification, the judge declined to adopt the Acting General Counsel’s view that the transfer was properly characterized as a change in the scope of the bargaining units. In so holding, however, the judge acknowledged that the Acting General Counsel’s position was “equally compelling.”

⁷ The principal rationale for finding the scope of a bargaining unit to be a permissive subject is that, if the scope of the bargaining unit were a mandatory subject, “an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees’ guaranteed right to representatives of their own choosing.” *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400–1401 (D.C. Cir. 1988).

The Acting General Counsel and the Union argue that when the Respondent moved construction site hauling work and the drivers who perform it from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement, it altered the scope of those bargaining units. They contend that this change was not simply a transfer of unit work because, as a result of the Respondent's action, about 60 drivers no longer bargain collectively with other Construction bargaining unit employees and no longer receive Construction Agreement wages. The Union acknowledges that the Respondent would have been entitled to pursue a reduction in wages and benefits in bargaining for a new Construction Agreement, but asserts that "[w]hat the Respondent did instead—transfer the off-site material haul driver positions to the Ready-Mix [b]argaining [u]nit—was an evasion of the duty to bargain."

We find merit in the Acting General Counsel's and the Union's arguments. We conclude, contrary to the judge, that the Respondent's action in moving the drivers at issue constituted a change in the scope of the two bargaining units. Accordingly, we further conclude, in agreement with the Acting General Counsel and the Union, that the move was a permissive subject of bargaining and, therefore, that the Respondent was not privileged to implement it in the absence of the Union's consent.

Until October 2010, offsite material haul work was performed by drivers in the Construction bargaining unit. In October, the Respondent moved those jobs to the Ready-Mix bargaining unit, and uses the same drivers to perform the work. Those drivers perform the same work in the same locations, with the same trucks, using the same procedures, but they are no longer members of the same bargaining unit and no longer receive Construction Agreement wages. By unilaterally making those changes, the Respondent changed the scope of both units, diminishing the Construction Bargaining unit and enlarging the Ready-Mix bargaining unit.

In finding that this matter should be characterized as a transfer of unit work and not a change in unit scope, the judge relied on the fact that the Respondent did not entirely eliminate the disputed driver classification from the Construction bargaining unit. Although the judge is correct in that limited factual respect, his analysis fails to take into account the Respondent's movement of about 60 drivers from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement. In doing so, the Respondent severed their connection to the Construction bargaining unit, and substantially reduced the size (and bargaining power) of that unit. This, in our view, was a change in unit scope, a permissive subject of bargaining. See generally *Walt Disney World Co.*, 359

NLRB No. 73, slip op. at 4 (2013). Because the Respondent took this action without the Union's consent, we conclude that it violated Section 8(a)(5) and (1) of the Act.

C. Assuming that the Move was a Transfer of Unit Work, the Respondent's Implementation of it Violated the Act

Even if the Respondent's actions are properly characterized as a transfer of unit work, we would find that the Respondent violated the Act, because we find, contrary to the judge, that the parties did not bargain to impasse over the change, nor did the Union waive its right to bargain over the change.⁸ Instead, we find that the change at issue was presented to the Union as a *fait accompli*.

The Board has repeatedly held that where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain, the change is a *fait accompli* and a failure by the union to request bargaining will not constitute a waiver. See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). As the Board stated in *Dresser-Rand Co.*, 358 NLRB No. 97, slip op. at 36 (2012):

[I]f the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*." [Citations omitted.] [Emphasis added.] *Ciba Geigy Pharmaceutical[al]s Division*, 264 NLRB 1013 (1982). Further, "it is . . . well established that a union cannot be held to have waived bargaining over a change that has been presented as a *fait accompli*. . . ." *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

The Board has also stated that "no impasse is possible where an employer presents the union with a 'fait accompli' as to a matter over which bargaining to impasse is required." *Castle Hill Health Care Center*, 355 NLRB 1156, 1189 (2010); see also *S & I Transportation, Inc.*, 311 NLRB 1388, 1390 fn. 4 (1993).

⁸ Because finding a violation pursuant to this alternative theory does not materially affect the remedy, we find it appropriate to find both violations. See, e.g., *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000) (Board agreed with judge that employer's unilateral action was an unlawful change in bargaining unit scope, but also found that even if the change was a transfer of unit work and not a change in unit scope, the change still violated Sec. 8(a)(5) and (1) in the absence of agreement, impasse, or waiver), *enfd.* 8 Fed. Appx. 111 (2d Cir. 2001).

Relying on the length of time between the Respondent's July 9 announcement of its plans and the October 11 implementation, the judge found that there was time for bargaining to have occurred and therefore that the announcement did not signal a *fait accompli*. We find, however, that the record supports the conclusion that, at the time of the announcement, the Respondent did present the Union with a *fait accompli* because it had a fixed intent to transfer the disputed drivers and their work and thus presented the Union with no opportunity for meaningful bargaining.

At the July 9 meeting, Respondent Representative Stewart told Union Representative Dey that they were "going to" move the material haulers, not that they were "considering" doing so.⁹ Stewart's August 13 letter to the Union¹⁰ conveyed the same unconditional message—that the Respondent was not merely proposing a change subject to bargaining, but was informing the Union that the change would occur. See *Pontiac Osteopathic Hospital*, supra, 336 NLRB at 1023–1024 (finding notice to employees that employer intended to implement changes shows that employer considered changes to be a final decision not subject to bargaining).

At the time of the events at issue, as well as throughout this litigation, the Respondent has asserted that the parties had already explicitly bargained and agreed, in the negotiations leading to the 2008 Ready-Mix Agreement, to the disputed change. The judge rejected this assertion as a matter of fact. The Respondent's repeated assertion of that false statement in 2010—that it had no duty to bargain over the change because the parties had already discussed it and agreed to it—conveyed an unequivocal message that there would be no further bargaining. The Board has found a *fait accompli* in similar circumstances. See *Westinghouse Electric Corp.*, 313 NLRB 452, 453

(1993), enfd. mem. 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995).

We find in these circumstances, where the Respondent clearly had no intention of altering its plans, that the Union was presented with a *fait accompli*. See *Ciba Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982). In other words, it would have been futile for the Union to have requested bargaining over the matter, and we therefore conclude that the Union's failure to do so is excused. See *Solutia, Inc.*, supra, 357 NLRB 58, slip op. at 64 ("no specific demand was necessary given that Respondent had already decided, even before notifying" the union of its intended changes, that the decision was not negotiable). Accordingly, even assuming that this change was a mandatory subject of bargaining, we find that the Union did not waive its right to bargain over it by failing to request bargaining.

In addition, in light of our *fait accompli* finding, we reject the judge's conclusion that the parties had bargained to impasse over the matter. See *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999) ("no impasse is possible where an employer presents the union with a 'fait accompli' as to a matter over which bargaining to impasse is required"), enfd. in part and denied in part 233 F.3d 831 (4th Cir. 2000). Accordingly, we find no merit to the Respondent's contention that it was privileged to act unilaterally because the parties had reached lawful impasse on the matter.

Having rejected the Respondent's waiver and impasse defenses, we find that, even if the transfer is properly characterized as a mandatory subject of bargaining, the Respondent's unilateral movement of offsite material hauling drivers and their work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement violated Section 8(a)(5) and (1).¹¹

D. The Respondent Unilaterally Changed the Terms and Conditions of Employment of the Material Haul Drivers

The judge found that the Respondent did not unlawfully change the terms and conditions of employment of the material haul drivers after they were transferred to coverage under the Ready-Mix Agreement. Consistent with

⁹ Stewart testified:

Q. Okay. And during this July 9th meeting, you told Wayne Dey that the Company was considering moving the material haulers from the Construction Agreement over to the Ready Mix Agreement?

A. I informed Wayne that we were going to move them and the main purpose of our meeting was to discuss whether we could keep our own drivers. When I say our own, we wanted to keep the drivers we had.

Q. But that wasn't my question. You told him at that meeting—did you tell him you were moving them or you were considering moving them?

A. We were going to move them.

Tr. 83–84.

¹⁰ In that letter, Respondent informed the Union that "[m]aterial deliveries for the company will be performed by Teamster employees under the rules and regulations of the [Ready-Mix] bargaining agreement."

¹¹ We also find no merit in the Respondent's strained argument that, as a result of an August 2010 amalgamation of its various subsidiaries, all of the Respondent's Teamsters-represented employees constitute one bargaining unit under the Ready-Mix Agreement. The evidence is clear that the Respondent continued to exist as the employing entity, and that it continued to recognize and bargain with the Union as the representative of employees covered by the Construction Agreement, at all relevant times. Accordingly, there can be no claim that the corporate amalgamation somehow privileged the Respondent to alter the existing bargaining units in the absence of the Union's agreement or action of the Board.

his other findings, he found that the Union had timely notice of the proposed transition rates and failed to request bargaining over them. We reverse.

As discussed above, the Respondent violated the Act by unilaterally moving the drivers, a permissive subject of bargaining, in the absence of the Union's agreement. The Union was under no obligation to bargain over the terms by which that movement might be facilitated. As the Union has persuasively argued, the appropriate forum for renegotiation of the disputed drivers' wages was in bargaining for successor agreements to the Construction Agreement. The Respondent's decision to act unilaterally violated Section 8(a)(5) and (1) of the Act.

E. The Respondent Engaged in Unlawful Direct Dealing and, Thereafter, Denied Employment Opportunities to Drivers

The consolidated complaint alleges that the Respondent unlawfully bypassed the Union and dealt directly with Construction bargaining unit drivers when it met with them for the purpose of changing their terms and conditions of employment and when it required them to agree to the terms and conditions of the Ready-Mix Agreement as a condition of keeping their jobs. The consolidated complaint further alleges that the Respondent unlawfully denied employment to those Construction bargaining unit drivers who refused to agree to work under the terms and conditions of the Ready-Mix Agreement.

We find, in agreement with the Acting General Counsel, that the Respondent's conduct undermined the Union's position as collective-bargaining representative and therefore constituted unlawful direct dealing. See *Allied-Signal, Inc.*, 307 NLRB 752, 753-754 (1992). The Respondent presented its wage transition proposal directly to the assembled drivers on October 1, the day after the Respondent presented it to the Union. The Respondent also placed a copy of the proposal in each employee's company mailbox, along with a form to be completed and returned to the Respondent if the employee wanted to continue working. We find that this conduct, done without the consent of the Union, eroded the Union's position as exclusive bargaining representative, and constituted unlawful direct dealing. See *Smith's Complete Market*, 237 NLRB 1424, 1429, 1435 (1978) (employer's discussion in an employee meeting of a pension proposal it had presented to the union earlier that day as a "concept" constituted direct dealing); *Dayton Newspapers*, 339 NLRB 650, 653 (2003) (employer's attempt to obtain a waiver directly from drivers in exchange for returning to work constituted direct dealing), *enfd.* in relevant part 402 F.3d 651 (6th Cir. 2005).

The fact that union representatives attended the October 1 meeting does not preclude a finding of direct dealing. The union representatives were not there to bargain on behalf of the employees and, indeed, were not even permitted to speak. The union representatives were relegated to the status of passive observers, further undermining the Union's position as the unit employees' collective-bargaining representative. Nor does the fact that the Union told the Respondent that it was not interested in bargaining about transition rates preclude a direct dealing finding. By doing so, the Union did not agree that the Respondent could deal with employees as if the work force had no bargaining representative. See *Allied-Signal*, *supra*.

In short, the Respondent's meeting with the drivers constituted unlawful direct dealing. It follows from all of the foregoing findings that the Respondent further violated the Act by denying employment to those employees who refused to agree to the unlawfully imposed terms.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 3, 4, 5, and 6 and renumber the subsequent paragraphs.

"3. The Respondent violated Section 8(a)(5) and (1) by changing the scope of the Construction bargaining unit by moving offsite material haul drivers from the Construction bargaining unit to the Ready-Mix bargaining unit without the Union's consent.

"4. The Respondent violated Section 8(a)(5) and (1) by unilaterally moving offsite material haul work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement without giving the Union sufficient notice and an opportunity to bargain about the change.

"5. The Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of Construction bargaining unit employees by requiring them to work under the terms of its Ready-Mix Agreement.

"6. The Respondent violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with its Construction bargaining unit employees, and by denying employment to Construction bargaining unit employees who refused to agree to work under the terms and conditions of its Ready-Mix Agreement."

AMENDED REMEDY

In addition to the remedies recommended by the judge with respect to the Respondent's unlawful conduct concerning the mechanical sweeper drivers, we shall order the Respondent to cease and desist from the above-described conduct with respect to the offsite material haul work/drivers.

We shall also order the Respondent to restore the status quo ante with respect to both the Construction bargaining unit and the Ready-Mix bargaining unit by returning the employees performing offsite material haul work back to the Construction Bargaining unit from the Ready-Mix bargaining unit, rescinding all unilateral changes in the employees' terms and conditions of employment, and continuing in effect all the terms and conditions of employment contained in the Construction Agreement for those employees previously covered by that agreement. In addition, the Respondent shall be ordered to make whole any former Construction bargaining unit employee performing offsite material haul work under the Ready-Mix Agreement for any lost wages and other benefits suffered as a result of the Respondent's unlawful conduct, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).¹²

We shall also order the Respondent to reinstate and make whole any former Construction bargaining unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement. Backpay for employees who lost employment as a result of the Respondent's unlawful actions shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), we shall order the Respondent to reimburse former Construction bargaining unit employees an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no

¹² Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970). If the Respondent's unilateral changes involve the failure to make contractually required contributions to the Union's fringe benefit funds, we shall order the Respondent to make all required benefit fund contributions, including any additional amounts applicable to such funds as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, we shall require the Respondent to reimburse unit employees for any expenses resulting from the Respondent's failure to make the required contributions to the funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

unlawful action against them. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate periods.¹³

ORDER

The Respondent, Aggregate Industries, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the scope of the Construction bargaining unit by moving offsite material haul drivers from the Construction bargaining unit to the Ready-Mix bargaining unit without the Union's consent.

(b) Unilaterally moving offsite material haul work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement without giving the Union sufficient notice and an opportunity to bargain about the change.

(c) Changing the terms and conditions of employment of Construction bargaining unit employees by requiring them to work under the terms of its Ready-Mix Agreement.

(d) Bypassing the Union and dealing directly with its Construction bargaining unit employees, and denying employment opportunities to Construction bargaining unit employees who refuse to agree to work under the terms and conditions of its Ready-Mix Agreement.

(e) Bypassing the Union and dealing directly with its mechanical sweeper truckdrivers in the Construction bargaining unit with regard to their terms and conditions of employment.

¹³ No exceptions were filed to the judge's failure to include the Board's standard electronic notice-posting language in the Order pursuant to *J. Picini Flooring*, 356 NLRB No. 9 (2010). In fn. 60 of his decision, the judge found it inappropriate to require the Respondent to disseminate the notice electronically because he found that each employee has a mail slot for employment-related documents and that there was no record evidence "to suggest that Respondent regularly communicates with its employees via e-mail or other electronic means." The absence of evidence at the merits stage of an unfair labor practice proceeding that an employer regularly communicates with its employees via e-mail or other electronic means would normally be insufficient to warrant the omission of the Board's standard *J. Picini* electronic notice-posting language from a Board order. *J. Picini* specifically provided that this type of evidence may appropriately be raised at the compliance stage, as well as at the merits stage. *Id.*, slip op. at 4. We note, however, that when the judge asked the Respondent's vice president and regional counsel, Sean Stewart, whether the Respondent communicated with the drivers by email, Stewart testified, "No. Everything with the drivers is printed out and given to them or in person." Tr. 164-165. In light of this testimony, and in the absence of exceptions on this matter, we adopt the judge's decision not to order electronic dissemination of the notice in this case. We shall, however, order the Respondent to place a copy of the notice in each driver's mail slot, in lieu of electronic posting.

(f) Unilaterally, without notice to the Union or affording the Union an opportunity to bargain, assigning mechanical sweeper truckdriving work to drivers who are represented by the Laborers Union, when such work had previously been performed by drivers who were included in the Construction bargaining unit.

(g) Unilaterally, without notice to the Union or affording the Union an opportunity to bargain, changing the terms and conditions of its mechanical sweeper truckdrivers by treating them as employees in the bargaining unit covered by the Laborers' collective-bargaining agreement.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo ante with respect to both the Construction Bargaining unit and the Ready-Mix bargaining unit, by returning the employees performing offsite material haul work back to the Construction bargaining unit from the Ready-Mix unit, rescinding all unilateral changes in the employees' terms and conditions of employment, and continuing in effect all the terms and conditions of the Construction Agreement for those employees.

(b) Make former Construction bargaining unit employees performing offsite material haul work under the Ready-Mix Agreement whole for any loss of wages and other benefits suffered as a result of its unlawful actions, in the manner set forth in the amended remedy section of this decision.

(c) Reimburse former Construction bargaining unit employees for any expenses resulting from the Respondent's failure to make any required contributions to benefit funds, in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, offer any former Construction bargaining unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make any former Construction bargaining unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the amended remedy section of this decision.

(f) Reimburse former Construction bargaining unit employees an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no unlawful action against them.

(g) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to former Construction bargaining unit employees, it will be allocated to the appropriate periods.

(h) Within 14 days from the date of this Order, remove from its files any reference to the loss of employment opportunities for any former Construction bargaining unit employee who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement and, within 3 days, thereafter, notify them in writing that this has been done and that the unlawful action will not be used against them in any way.

(i) Restore the status quo ante by returning and assigning the work of driving its mechanical sweeper trucks to employees who are represented by the Union and employed in the Construction bargaining unit.

(j) Make sweeper truckdrivers Andrew Barnum and Mike Crane whole for any loss of wages and other benefits suffered as a result of its unilateral change, in the manner set forth in the remedy section of the judge's decision.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, and its truck yard in Sloan, Nevada, and distribute in the employees' mail slots, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

es are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change the scope of the Construction bargaining unit by moving offsite material haul drivers from the Construction bargaining unit to the Ready-Mix Bargaining unit without the Union's consent, or unilaterally move offsite material haul work from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement without giving the Union sufficient notice and an opportunity to bargain about the change.

WE WILL NOT change the terms and conditions of employment of Construction bargaining unit employees by requiring them to work under the terms of our Ready-Mix Agreement.

WE WILL NOT bypass the Union and deal directly with our Construction bargaining unit employees, and WE WILL NOT deny employment opportunities to Construction bargaining unit employees who refuse to agree to work under the terms and conditions of our Ready-Mix Agreement.

WE WILL NOT bypass the Union and deal directly with our mechanical sweeper truckdrivers in the Construction

bargaining unit with regard to their terms and conditions of employment.

WE WILL NOT unilaterally, without notice to the Union or affording the Union an opportunity to bargain, assign mechanical sweeper truckdriving work to drivers who are represented by Laborers' International Union of North America, Local 872 (Laborers), when such work had previously been performed by drivers who were included in the Construction bargaining unit.

WE WILL NOT unilaterally, without notice to the Union or affording the Union an opportunity to bargain, change the terms and conditions of our mechanical sweeper truckdrivers by treating them as employees in the bargaining unit covered by the Laborers' collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL restore the status quo ante with respect to both the Construction bargaining unit and the Ready-Mix bargaining unit, by returning the employees performing offsite material haul work back to the Construction bargaining unit from the Ready-Mix unit, rescinding all unilateral changes in the employees' terms and conditions of employment, and continuing in effect all the terms and conditions of the Construction Agreement for those employees.

WE WILL make former Construction bargaining unit employees performing offsite material haul work under the Ready-Mix Agreement whole for any loss of wages and other benefits suffered as a result of its unlawful actions, plus interest compounded daily.

WE WILL reimburse former Construction bargaining unit employees for any expenses resulting from the Respondent's failure to make any required contributions to benefit funds, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, offer any former Construction bargaining unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any former Construction bargaining unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, less any net interim earnings, plus interest compounded daily.

WE WILL reimburse former Construction bargaining unit employees an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no unlawful action against them.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to former Construction bargaining unit employees, it will be allocated to the appropriate periods.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the loss of employment opportunities for any former Construction bargaining unit employees who lost employment for refusing to work under the terms and conditions of the Ready-Mix Agreement, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful action will not be used against them in any way.

WE WILL restore the status quo ante by returning and assigning the work of driving our mechanical sweeper trucks to employees who are represented by the Union and employed in the Construction bargaining unit.

WE WILL make sweeper truckdrivers Andrew Barnum and Mike Crane whole for any loss of wages and other benefits suffered as a result of our unilateral change, plus interest compounded daily.

AGGREGATE INDUSTRIES

John Giannopoulos, Esq. and *Pablo A. Godoy, Esq.*, for the General Counsel.

James T. Winkler, Esq. (Littler, Mendelson, P.C.), of Las Vegas, Nevada, for the Respondent.

Richard G. McCracken, Esq. and *Patrick Domholdt, Esq. (McCracken, Sterman & Holsberry)*, of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 28-CA-023220 was filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters (the Union), on October 13, 2010. The original and first amended unfair labor practice charges in Case 28-CA-023250 were filed by the Union on November 9 and December 22, 2010, respectively. After investigations, on December 29, 2010, the Acting Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint, alleging that Aggregate Industries (the Respondent) engaged in, and continues to engage in, acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices and asserting certain affirmative defenses. Based upon a notice of hearing, on February 15-

17, 2011, a trial on the merits of the alleged unfair labor practices was conducted before the above-named administrative law judge in Las Vegas, Nevada. At the hearing, all parties were afforded the opportunity to call witnesses on their respective behalves, to cross-examine witnesses, to offer into the record relevant documentary evidence, to argue legal positions orally, and to file posthearing briefs. Each party filed a posthearing brief, and each brief has been carefully considered. Accordingly, based on the entire record,¹ including the posthearing briefs and my observations of the credibility of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a State of Delaware corporation, with offices and places of business in various States of the United States, including offices and facilities located in Las Vegas, Nevada, has engaged in the business of producing construction materials. During the 12-month period ending October 13, 2010, in conducting its business operations described above, Respondent, through subsidiary corporations, purchased and received at its Las Vegas, Nevada facilities goods and materials valued in excess of \$50,000, directly from suppliers located outside the State of Nevada. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges that Respondent changed the scope of the work of its so-called construction bargaining unit employees by moving delivery of materials work from the construction bargaining unit employees to its ready-mix bargaining unit employees; that Respondent changed the terms and conditions of employment of construction bargaining unit employees by requiring them to work under the terms of its ready-mix collective-bargaining agreement; that Respondent changed the terms and conditions of employment of two sweeper driver employees by moving the work of the sweeper drivers from the terms and conditions of its construction collective-bargaining agreement to the terms and conditions of its Laborers' collective-bargaining agreement; that Respondent changed the scope of the work of its construction bargaining unit employees by removing mechanical sweeper driving work from the construction bargaining unit and assigning such work to the bargaining unit covered by the Laborers' collective-bargaining agreement; and that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the aforementioned acts and conduct without prior notice to the Union and without affording the Union an opportunity to bargain with it concerning the acts and conduct

¹ I grant counsel for the Acting General Counsel's motion to correct the record.

or the effects of the acts and conduct on the construction bargaining unit employees. The consolidated complaint further alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with its construction bargaining unit employees by meeting with its employees for the purpose of changing their terms and conditions of employment and requiring said employees to agree in writing to the terms and conditions of employment of its ready-mix collective-bargaining agreement as a condition of continuing to be employed by Respondent; by denying employment opportunities to construction bargaining unit employees who refused to agree to work under the terms and conditions of its ready-mix collective-bargaining agreement; and by dealing directly with sweeper drivers for the purpose of changing the terms and conditions of their employment by Respondent.

In addition to generally denying the commission of any of the above-alleged unfair labor practices, Respondent affirmatively alleges that the allegations of the consolidated complaint are barred by Section 10(b) of the Act; that Respondent's actions are privileged by the most favored nations clause of its ready-mix collective-bargaining agreement; that Respondent's Las Vegas area subsidiary corporations have, at all times material herein, constituted a single employer and that there exists one bargaining unit covering two collective-bargaining agreements with the Union; and that the actions of Respondent with regard to its sweeper drivers involve a jurisdictional work dispute which is not subject to unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Material Haul Drivers

Respondent, a State of Delaware corporation, is a subsidiary of the Holcim Group, a Switzerland-based company, which, through subsidiary companies located throughout the world, is engaged in business as a manufacturer and supplier of construction industry building supplies including ready-mix concrete and rock, sand, and gravel aggregates. The record establishes that, commencing in 2003, Respondent began operating in the Las Vegas, Nevada area by purchasing existing companies, who were engaged in business in different segments of the building and construction industry. Thus, in November 2003, Respondent purchased the business of Southern Nevada Paving, Inc. (SNP), a State of Nevada corporation, which, for several years, had been engaged in the building and construction industry as an excavation, paving, and grading contractor on private road and large building projects such as shopping centers, hotels, and casinos. Subsequent to the acquisition, until 2010, while a corporate subsidiary of Respondent, SNP continued to operate as a legal entity under its same name, performing the same work with the same work force. Then, in May 2004, Respondent purchased the business of Frehner Construction Company, Inc. (Frehner), a State of Nevada corporation, which, since 1970, had been engaged as a general contractor on large public works construction projects such as highways, bridges, and dams. Thereafter, until 2010, while a corporate subsidiary of Respondent, Frehner continued to operate as a legal entity under its own name, performing the same work in the building

and construction industry. At the time of the purchase and continuing thereafter, Frehner owned a 50-percent interest in a quarry located in Sloan, Nevada; the other half interest in the quarry (Sloan Quarry), was, and continues to be, owned by Aggregate Industries—WCR, a State of Colorado corporation. At the Sloan Quarry, the owners mine aggregate materials, processing the rock through various crusher machines in order to create different sizes of aggregates for sale. Also in May 2004, Respondent, which owned the corporate name Regal Materials, purchased two Las Vegas area business entities, Regency Ready-Mix, a ready-mix concrete manufacturer, and Bradstone Pavers, which manufactured decorative pavers and blocks for driveways, roads, and highways, combined both under the corporate name, Regal Materials, and began engaging in the ready-mix concrete business under the fictitious name, Regal Ready-Mix. At the time of purchase, Regal Materials, Inc. d/b/a Regal Ready-Mix (Regal), operated only one Las Vegas area ready-mix concrete production facility, termed a batch plant, which was located in Summerlin, and employed approximately 18 full-time and regular part-time ready-mix concrete delivery drivers and mechanics. In 2006, the Union was victorious in a representation election amongst Regal's drivers and mechanics and was certified as their exclusive representative for purposes of collective bargaining. In late 2007, after a year of contract bargaining between the parties, Regal's bargaining unit employees filed a decertification petition, and after a decertification election, the Board again certified the Union as the exclusive bargaining representative of Regal's employees in the same bargaining unit.² Subsequently, in early February 2008, while retaining its delivery trucks, Regal closed its Summerlin batch plant and laid off its ready-mix concrete drivers and mechanics; however, in March or April, Respondent reconsidered its earlier actions, decided to become a competitor in the Las Vegas area ready-mix concrete business, reopened its Summerlin batch plant, and began construction of two other batch plants—one on the grounds of the Sloan Quarry and another in North Las Vegas (the Delhi batch plant). Thereafter, until 2010, Respondent operated its Las Vegas area ready-mix concrete business under the name, Regal Materials, Inc. d/b/a Southern Nevada Ready-Mix (SNRM). The record further establishes that, while, through August 2010, Respondent wholly owned SNP, Frehner, and SNRM, Sean Stewart worked as the general counsel of each business entity, Steve Jensen was the human resources director for each, and there was an "overlap" of supervision on identical work performed by SNP and Frehner, each was held out as a separate business entity, negotiating collective-bargaining agreements with the Union and bidding for and performing work in the Las Vegas area building and construction industry under its own name. Then, on or about August 7, 2010, Respondent merged SNP and Regal into Frehner and, on the same date, renamed the business Aggregate

² There is no dispute that the decertification petition and the subsequent certification involved the ready-mix delivery drivers and mechanics, who were based at Regal's Summerlin plant.

Industries—SWR, Inc.³ In this regard, while subsequent to the merger, Respondent replaced the names on its equipment with Aggregate Industries—SWR and bargained with the Union under the latter name, at least through the start of the hearing, Respondent's website continued to list SNP, Frehner, and SNRM, by name, as separate divisions of Aggregate Industries—SWR, Respondent retained the names, SNP, Frehner, and SNRM as fictitious company names, and Sean Stewart⁴ admitted that, prior to the merger, he informed the Union that, thereafter, Aggregate Industries—SWR would continue to exist as "separate divisions that would operate construction and operate ready-mix."

The record establishes that the Union has had a long history of representing certain employees of both Frehner and SNP pursuant to the terms of successive construction master agreements between the Union and Nevada Contractors Association and Associated General Contractors (AGC). Thus, through 2010, Frehner and SNP were each members of the AGC, which negotiates collective-bargaining agreements on behalf of its members with the Union and other unions, including the Operating Engineers Union and the Laborers Union, and, thereby, parties to the aforementioned successive collective-bargaining agreements,⁵ the most recent of which (the Construction Agreement), was effective from July 1, 2007, through June 30, 2010.⁶ Two months prior to the start of negotiations for a successor Construction Agreement, in June 2010, SNP and Frehner each withdrew its proxy from the AGC to represent it during bargaining and, after the Union demanded to bargain with both companies, each commenced bargaining with

the Union along with the AGC but on a separate basis.⁷ However, subsequent to August 7, SNP and Frehner continued negotiating with the Union but under the new corporate name, Aggregate Industries—SWR. Basically, the Union represents each signatory employer's material haul dump and transit truck drivers, water and fuel truckdrivers, forklift drivers, off road equipment drivers, sweeper truckdrivers employed by the signatory contractors,⁸ and covers both onsite and offsite work by the bargaining unit employees of each signatory contractor.⁹

At some point in early 2008, following the Union's certification as the exclusive bargaining representative of Regal's drivers and mechanics and the latter's layoff of its bargaining unit employees and closure of its Summerlin facility and upon becoming aware that Regal was considering reopening its existing batch plant and constructing two others, representatives of the Union approached Regal, and the parties commenced discussions on Regal's future plans.¹⁰ Then, when the latter reopened its Summerlin batch plant, their discussions morphed into negotiations for a collective-bargaining agreement. Wayne King, the secretary/treasurer, Dewaine (Dewey) Darr, a business agent, and an attorney primarily represented the Union during bargaining, and representing SNRM were Stewart, Jensen, and Pat Ward, Respondent's regional president. At the time, the Union had existing collective-bargaining agreements with two other ready-mix concrete manufacturers, Nevada Ready-Mix and Rinker Materials, which, in 2007, was purchased by Cemex, and Darr informed SNRM that the Union desired the collective-bargaining agreement with SNRM to "mostly . . . mirror the other two contracts." According to Stewart, there were three distinct aspects to the bargaining—the ready-mix concrete delivery drivers, who had been laid off from the Summerlin plant prior to the contract negotiations and rehired during the discussions,¹¹ nine off-road equipment operators who were employed by Frehner at the Sloan Quarry and working under the terms and conditions of employment set forth in the Con-

³ Apparently, the merger was an aspect of Respondent's nationwide plan to limit the number of affiliated corporations and to make its business enterprise more manageable.

⁴ Under initial questioning by counsel for the Acting General Counsel, Stewart denied that Respondent continues to hold Aggregate Industries—SWR as operating as three separate divisions.

⁵ Apparently, on occasion, Frehner would execute a proxy for AGC to represent it during contract negotiations with the Union and be bound to the master labor agreement. On other occasions, Frehner would withdraw its proxy and, by itself, negotiate a collective-bargaining agreement with the Union, the terms of which would be virtually identical to the master labor agreement.

⁶ In part, art. 3 of the Construction Agreement states:

It is further agreed and understood that employees covered by this Agreement shall continue to be assigned all work which they have historically or customarily been assigned by the Employer to perform. The Employer agrees that such work assignments under this Agreement are to be awarded to employees under this Agreement as opposed to any other represented or unrepresented employees of the Employer and that if there is any dispute or claim raised by any other employees of the Employer as to such work assignments, the Employer agrees to assign the work to the employees covered by this Agreement.

Art. 43 of the agreement is entitled "Supplemental Agreements" and states, "Supplemental Agreements may be negotiated covering Signatory Employers engaged in commercial sand and gravel operations to allow for competitive wage/fringe amounts prevailing in that industry." Dana Wiggins, a former director of labor relations for AGC, testified that said provision "gives the contractor the right to negotiate a rock, sand, and gravel agreement for his trucking so he's not competing against people at a lesser rate."

⁷ Frehner and SNP made initial contract proposals to the Union, which, among other requests, would have decreased wage rates significantly.

⁸ Frehner did not employ drivers, who transported materials to its jobsites and, instead, relied on SNP material haul drivers or drivers of outside vendors to deliver construction material to its jobsites. On the other hand, SNP employed a complement of approximately 60 material haul drivers, who operated such equipment as 10-wheel dump trucks, double belly dump trucks, double side dump trucks, and end dump trucks, to deliver construction materials to its jobsites. Neither company employed drivers, who drove ready-mix concrete delivery trucks.

⁹ The record establishes that the Construction Agreement bargaining unit material haul drivers deliver aggregates and other materials, including asphalt, from quarries to construction sites, drive dump trucks on construction sites, and haul trash from construction sites to dump sites.

¹⁰ At some point during the bargaining, Regal informed the Union that it would thereafter be known as SNRM, and I shall refer to this entity as SNRM.

¹¹ At the time and through August 2010, SNRM employed no material haul drivers. When SNRM reopened its Summerlin plant and began production at its Delhi batch plant, it utilized SNP's material haul drivers to transport material from the Sloan Quarry to those batch plants.

struction Agreement, and the hauling of aggregate materials. As to the ready-mix concrete delivery drivers, the record evidence is that the parties eventually agreed upon terms and conditions of employment virtually identical to those of the Union's collective-bargaining agreements with Nevada Ready-Mix and Cemex, memorializing them in a collective-bargaining agreement (the Ready-Mix Agreement),¹² effective from July 1, 2008, through May 31, 2012. Regarding the nine Frehner employees, who worked under the terms of the Construction Agreement at the Sloan Quarry, the record discloses that three drove water trucks and water pulls and six operated large rock hauling vehicles, which hauled material around the site and "the farthest they would go would be ready-mix plants that are set up within a mile where they don't have to go on main roads";¹³ that SMRM wanted them to be covered under its contract with the Union rather than Frehner's collective-bargaining agreement with the Union; that the Union viewed SNRM's request as reasonable as the latter was going to assume responsibility for operating the quarry, and that the parties eventually entered into a Memorandum of Understanding, agreeing that the nine employees would thereafter work for SNRM under the terms of its contract with the Union with implementation delayed until January 2009.¹⁴

The third aspect of the parties' bargaining is most relevant to the instant matters and a point of contention between them. While agreeing to accept almost all of the terms and conditions of employment of the Nevada Ready-Mix and Cemex collective-bargaining agreements demanded by the Union, SNRM insisted that the appendix A of the agreements also be incorporated in the parties' eventual collective-bargaining agreement. Those appendices set forth wage rates for ten classifications of bargaining unit employees including, transport driver (bulk) and transport driver (S&G), the latter of which covers aggregates material haul drivers,¹⁵ and a similar appendix were eventually included in the parties' Ready-Mix Agreement.¹⁶ Ac-

¹² At the hearing, witnesses and attorneys referred to this agreement as the Ready-Mix Agreement or the Rock, Sand, and Gravel Agreement. I shall refer to it as the former.

¹³ Three ready-mix concrete batch plants, including that owned by SNRM, are located within a mile of the quarry.

¹⁴ The Union's new administration, which assumed office in January 2009, initially challenged the implementation of the parties' agreement on the nine employees but, upon becoming aware of the terms of the Memorandum of Understanding, withdrew its objections.

¹⁵ The record establishes that material haul drivers, employed by ready-mix concrete companies, deliver aggregates, in the form of so-called plant mix, from quarries to batch plants, deliver aggregates, of various sizes, to construction projects under subcontract arrangement with contractors signatory to the Construction Agreement, and, pursuant to retail sales agreements, deliver aggregates to customers on construction sites or elsewhere. In this regard, Larry Miller, the corporate administrator for Nevada Ready-Mix Corporation, testified that his company owns a quarry site at which it mines, crushes, screens, and washes concrete aggregates and other building materials, and "we haul the material ourselves" to customers on construction sites or ready-mix concrete batch plants in dump trucks, transfer trucks, and other road haul trucks.

¹⁶ Analysis of art. 34 of the Construction Agreement and app. A discloses that, effective July 1, 2009, the wage rates for construction mate-

rial haul drivers ranged between \$30.29 and \$31.28 per hour, while ready-mix material haul drivers were paid either \$24.50 or \$23 per hour.

ording to Darr, fully cognizant that SNRM did not own any aggregate transport trucks but, rather, utilized SNP's equipment¹⁷ and drivers¹⁸ for material hauls, union representatives asked why the company was insisting upon inclusion of the transport driver (S&G) classification in the collective-bargaining agreement, and Ward replied "that, if we needed equipment for the ready-mix, we would obtain [trucks] through Colorado . . . and that would be ready-mix trucks and material trucks." Stewart testified that, in response to Darr's question, the parties actually "discussed . . . how we would truck materials under the [Ready-mix] Agreement. . . . We weren't sure how to do it. We had construction trucks doing both. . . . The same guy was doing . . . material deliveries" to batch plants and working on construction sites, and "we needed the flexibility to be competitive and we delivered materials. We tried to figure out how to do that at that time." Darr testified that he responded, mentioning that, during visits to the Sloan Quarry, he noticed between 10 to 15 SNP "non-utilized" trucks always parked daily and asking Ward "if he had extra [SNP] trucks, why wouldn't you just paint them [SNRM] and . . . utilize those trucks as you plant haul, why would you be using construction trucks to haul your material into all three of your plants at construction wages." Stewart testified that Darr went further, saying "[Y]ou'll have an advantage because you'll be able to truck your materials under the [ready-mix collective-bargaining agreement]." While Darr insisted that he referred only to plant hauls (material hauls from the Sloan Quarry to SNRM's batch plants), Stewart recalled Darr saying, "[I]t would have been our plant hauls and then materials that we made at Sloan Quarry that we sold both to outside customers, internal customers, ourselves and to other ready-mix customers."¹⁹ While he specifically denied stating that, after Respondent transferred material haul trucks from SNP to SNRM, the latter would be able to haul aggregate materials to construction projects at ready-mix agreement wage rates, Darr later contradicted himself. Thus, after noting that Nevada Ready-Mix and Cemex drivers haul aggregates to jobsites on a subcontract basis and for direct retail sales, he conceded that "what [SNRM] did with their trucks that had to [have] SNRM on them was up to them . . . [the trucks] had to say SNRM on

rial haul drivers ranged between \$30.29 and \$31.28 per hour, while ready-mix material haul drivers were paid either \$24.50 or \$23 per hour.

¹⁷ While "primarily" engaged in paving and excavation operations, SNP also was in the business of hauling aggregate materials around the Las Vegas area. In doing so, SNP utilized so-called "dual use trucks," with the same equipment being used on jobsites and for material hauls.

¹⁸ In using SNP's drivers for its material hauls, SNRM was required to pay Construction Agreement wage rates.

¹⁹ Stewart testified, "Dewey said specifically to me . . . that they would be able to transfer the Sloan Quarry to the Ready-Mix and that also we'd be able to run material trucks under SNRM. Now, he did have the stipulation that if we did that, we would have to change the name on the door so there was a distinction between SNP trucks and SNRM trucks. And we discussed that in detail and it wasn't something that we were willing to do at that point."

The record reveals that, unlike Nevada Ready-Mix, SNRM did not own or produce its own aggregate for its ready-mix concrete business.

them to haul plant mix but they were allowed to use those trucks just like [Cemex] and [Nevada] Ready-Mix. It was never our intent to stop that.”²⁰ In any event, Stewart testified that he responded to Darr that the latter’s suggestion was not feasible at the time because SNP was utilizing its trucks on construction for 4 days a week and for material hauling just 1 day a week—“my heartburn was we weren’t ready to take [such a step].” Thus, following Darr’s suggestion, “we would’ve had to have taken the SNP truck, relicensed it, registered it under [Regal] . . . so that we could put SNRM on the door. In addition, we would’ve had to . . . laid off the driver . . . and redispached him under the [ready-mix] list.”²¹ Finally, asked whether, during the 2008 negotiations,²² Darr referred to trucks or people, Stewart conceded that the former “was talking about trucks . . . about assets” and that he knew that if SNRM wanted drivers for its trucks, it was required to seek dispatches from the Union.²³

²⁰ There does not seem to be any dispute that material haul drivers, employed by a signatory to a ready-mix agreement, may haul aggregates to a jobsite whether on a subcontract basis for a Construction Agreement contractor or on a direct retail sale basis to a Construction Agreement contractor. In such a circumstance, the driver must drop his load at a designated stockpile site. If delivering to a jobsite on a subcontract basis, a ready-mix agreement signatory must pay its material haul drivers at the prevailing or Construction Agreement wage rate; while, if doing so on a retail sale basis, the contractor may pay its drivers at the ready-mix agreement wage rate. Finally, on either basis, if the material haul driver is utilized for work on the jobsite (for example, delivering aggregates from the stockpile to the worksite), he or she must be paid at the Construction Agreement wage rate.

²¹ Stewart testified that Darr told the SNRM negotiators that, after the foregoing steps, pursuant to the Construction Agreement rules, a truck could no longer be utilized for construction work if no ready-mix work was available. Indeed, art. 4 of the agreement sets restrictions on the use of nonsignatory contractors for material hauling work—the signatory contractor must have utilized all of its equipment and no other signatory contractors have available equipment.

²² Respondent contends that Darr, on behalf of the Union, agreed that, by entering into the Ready-Mix agreement, Respondent would have the right to transport aggregates from the Sloan Quarry to construction sites just as Cemex and Nevada Ready-Mix did, and to pay its material haul drivers at the Ready-Mix Agreement wage rate for doing so. In this regard, I note that, in 2008, SNRM did not employ any material haul drivers and did not own its own rock. Moreover, if such an agreement was reached, the parties failed to enter into a Memorandum of Understanding, memorializing their said agreement. In this regard, Sean Stewart testified that there was no such document as “we were not willing to commit to transferring material driver trucks at that time because of the type of work that we were doing. So there was no definite date set for any transfer [of] material drivers,” further, when asked why Respondent failed to implement the Union’s agreement at any time after July 2008, Stewart testified that there were two reasons. First, in 2008, SNP had a great deal of construction work, and its trucks were “tied up on projects.” Next, the Union was specific that, if SNRM was going to operate material haul trucks, its logo would have to be on the doors of the vehicles—“So that would have required us to take assets that were busy on construction sites and put new names on the doors and send them out with [SNRM],” and doing so would have been “silly.”

²³ As set forth above, whatever agreement may have been reached by the parties regarding any transfer of trucks from SNP to SNRM, the

SNRM and the Union completed negotiations and entered into their Ready-Mix Agreement on July 11, 2008, and from that date until the merger of SNP, SNRM, and Frehner in August 2010,²⁴ SNRM owned and operated only ready-mix concrete delivery trucks from its three batch plants and employed drivers and mechanics under the terms of its aforementioned collective-bargaining agreement with the Union.²⁵ For deliveries of aggregate materials from the Sloan Quarry to its three batch plants or to retail purchasers of its aggregates, SNRM continued to utilize SNP’s material haul trucks and drivers, who were paid pursuant to the terms of the Construction Agreement. The record establishes that SNP’s and Frehner’s combined construction revenues began declining in 2009; such revenues had been approximately \$350 million in that year and were projected to be only \$120 million in 2010. Conversely, as a consequence of its expansion in operations during 2008 and 2009, SNRM’s revenues substantially increased. Also, according to Sean Stewart, two business developments occurred during the summer of 2010, which necessitated changes in its material hauling operations. First, two major construction projects were scheduled to end in or about September, and Respondent anticipated that “a substantial number of trucks would be returning to Las Vegas that had been dedicated to those projects.” Such meant that Respondent “would have to find a way to use [the trucks] delivering materials or selling materials.” Fortuitously, Stewart testified, in June 2010, Cemex, which purchased all of its aggregates from the Sloan Quarry and utilized its own trucks and drivers to haul said material to its local batch plants, approached Respondent “about the possibility of not only making the material for them but delivering [the aggregate] to their [batch] plants, which for us was a good idea since they’re one of our major competitors.” Stewart estimated that SNRM would need 15 to 20 trucks to deliver the aggregate material for Cemex to the latter’s ready-mix concrete manufacturing facilities.

In the foregoing circumstances (ongoing negotiations between the Union and SNP and Frehner for a successor to their Construction Agreement, the possible parking of several material haul trucks, a decline in Respondent’s construction business

transfer of the material haul drivers to coverage under the Ready-Mix Agreement, and the usage of the material haul drivers, it is clear that the parties failed to draft a memorandum of understanding on the issues. Thus, Stewart admitted that “other than the [language of the Ready-Mix Agreement], there is nothing” in writing, permitting Respondent to transfer drivers from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement.

²⁴ The record evidence is that, between July 2008 and August 2010, SNP, Frehner, and SNRM each had stable work forces, with SNP’s and Frehner’s employees being dispatched to work for said employers by the Union pursuant to the terms of the Construction Agreement and SNRM’s employees being dispatched to it by the Union pursuant to the terms of the Ready-Mix Agreement.

²⁵ In January 2009, a new administrative assumed the governing positions of the Union. Thus, the secretary-treasurer was John Phillipenas, Wayne Dey became the business agent responsible for servicing the Construction Agreement, and Johnny Gonzalez became the business agent in charge of servicing the ready-mix agreements with Nevada Ready-Mix, Cemex, and SNRM.

offset by an increase in its ready-mix concrete business possibly aided by gaining work for Cemex, and the pending merger of Frehner, SNP, and SNRM), on July 9, 2010,²⁶ Wayne Dey, the Union's business agent, telephoned Stewart²⁷ and asked whether he could come to the latter's offices to discuss a possible grievance situation.²⁸ Upon arriving, Dey was met by Stewart²⁹ and five of Respondent's managers. After discussing the incident, which involved the grievance, one of the managers raised "the issue we had with the trucks coming back . . . and the fact that we did not anticipate a very good year in construction." Then, Stewart explained that Respondent was undertaking a corporate "reorganization" and gave to Dey "a kind of timeframe." Continuing, Stewart told Dey "that we were moving to Aggregate Industries as a name and we would have separate divisions that would operate construction and operate ready-mix and rock, sand, and gravel but it would be under one name." Then, Stewart asked Dey if the latter was aware that Respondent was signatory to a ready-mix collective-bargaining agreement, and Dey said he "did know" Respondent was a ready-mix signatory. Stewart then "told him that we were planning to move the trucks that we were bringing back to town under the [Ready-Mix] Agreement" and that "we wanted to do all of our material hauls under the [Ready-Mix Agreement]. We understand there's going to be jobs for onsite work, and we're willing to keep a group of trucks for that. That's when we got into a discussion where Wayne said that's hard to do because if you need more in a day, you can't just transfer a driver back and forth." Dey also said that he had "anticipated" Respondent would like to operate its material haul trucks under that agreement, and that "he didn't think there was anything he could do to stop that." According to Stewart, he and Dey next discussed SNP's material haul drivers, who had returned with the material haul trucks, and Respondent's intent to move the drivers from the Construction Agreement to the Ready-Mix Agreement,³⁰ and "I asked Wayne if there's any way that we can keep our same drivers . . . Wayne informed me that there was no call by name out of the [hiring halls] anymore so it'd be impossible for us to call them out by name."³¹ Also, Dey told

Stewart that he did not think Johnny Gonzalez, the business agent, who operated the ready-mix driver hiring hall dispatch list, would permit construction drivers to "jump" over other ready-mix drivers on the ready-mix driver out-of-work list and that he needed to speak to Gonzalez. Finally, Dey suggested we look at how Cemex does it, where Cemex has everyone under the [ready-mix] collective-bargaining agreement, and, if the company does construction work, they have to pay a higher rate. Finally, Stewart testified that Dey's "concern was he didn't think there was any way to take drivers who had been driving . . . under construction and move [them] to ready-mix."³²

Stewart testified that there was no further contact between Respondent and the Union on the subject of the material haul drivers until August 13³³ when, on that date, Wayne Dey telephoned him and said "we're going to have to object to [Respondent's] stated intent to move its material haul drivers from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement]. The attorney had looked into it, and we're going to object to it. I said, so we're not going to be able to keep our own drivers, we're going to have to lay them off. He said, no, you're not going to be able to transfer trucks because that work has always customarily been done under the Construction Agreement."³⁴ After speaking to Dey, Stewart drafted the following letter, and sent it to the Union by facsimile:

As discussed with the Union in prior meetings, Aggregate Industries is reorganizing its business structure in the Las Vegas area. As part of the reorganization, [SNP and Regal are being merged into Frehner, and Frehner's name will be changed to Aggregate Industries—SWR, Inc.

In conjunction with the name changes, Aggregate Industries—SWR, Inc. will be adjusting the size and application of its trucking fleet to meet market demand. Material hauls for the company will be performed by Teamster employees under the rules and regulations of the [Ready-Mix Agreement]. The contracting division will continue to utilize teamsters under

²⁶ The record establishes that as of July 2010 other than the 9 quarry drivers, SNRM employed 20 ready-mix concrete drivers who hauled ready-mix from batch plants to customers in large bubble trucks; Frehner employed no truckdrivers; and SNP employed approximately 60 material haul drivers, water truckdrivers, and sweeper truckdrivers.

²⁷ The following account of the meeting and, indeed, of all the conversations and meetings thereafter is taken from the uncontroverted testimony of Sean Stewart. Neither counsel for the Acting General Counsel called Wayne Dey as a witness during the hearing.

²⁸ Dey asserted that SNP appeared to be using a third party for material deliveries when some of its equipment was parked.

²⁹ While aware of Dey's reason for desiring to meet, Stewart testified that his intent was "we wanted to start doing all of our material hauls that we had done previously under the construction agreement under the [ready-mix] agreement."

³⁰ This was the first time Respondent had informed the Union of its plan to move the material haul drivers from SNP and representation under the Construction Agreement to SNRM and representation under the Ready-Mix Agreement.

³¹ Under the Union's administration prior to January 2009, call-by-names from the Union's hiring halls was permitted. The new admin-

istration discontinued this hiring hall procedure. Thus, all dispatches were done in seniority order.

³² According to Stewart, his discussion with Dey, regarding retaining SNP's existing material haul drivers but placing them under the terms and conditions of employment of the Ready-Mix Agreement, was about not having to go through the process of laying them off and then hiring them after dispatch from the Union's hiring hall. Asked whether, during his meeting with Dey, they discussed merely transferring the material haul drivers from the Construction Agreement bargaining unit to the Ready-Mix Agreement bargaining unit, Stewart responded, "No, no, not at all." What Stewart wanted was to be able to call for the drivers "by name" from the Union's ready-mix drivers hiring hall, "but I knew that the procedure had changed and I was asking Wayne if there's any way to get around it so we could keep our same drivers."

³³ According to Stewart, at this point, "we hadn't talked to the drivers at all . . . We had just talked to Wayne about [transferring] trucks to [ready-mix] and we wanted to man them with our existing drivers."

³⁴ Stewart denied ever stating to Dey that Respondent would just transfer the material haul drivers from one bargaining unit to the other, thereby bypassing the hiring hall procedure of the collective-bargaining agreements.

the Construction [Agreement] for on site material hauls, water trucks, and equipment transfers.

Two days later, by letter, Wayne Dey responded to Stewart, writing that “the delivery of materials to job sites . . . must continue to be done under the construction agreement. Material deliveries to job sites have historically been performed only under the construction agreement. This is part of the bargaining unit work under the construction agreement and may not be done under any other agreement.”

Stewart further testified that, for the next 21 days, he and Dey exchanged several letters concerning the material haul drivers, “and we had come to a stalemate that the Union was not going to allow us to lay off drivers and rehire them” after dispatch from the Union. Then, on September 24, Respondent, by facsimile, submitted a dispatch request to the Union for 64 drivers in four job classifications (22 transfer drivers, 20 double belly drivers, 12 double-side dump drivers, and 10 end dump drivers) covered under the terms of the Ready-Mix Agreement. The Union failed to act upon Respondent’s dispatch request, and, 2 days later, on September 26, Stewart and Dey spoke, with Stewart asking “if we were going to get drivers, and [Dey] said, no, there would be no drivers coming from the hall” inasmuch as “he didn’t agree that we had the right to transfer the trucks and the work under the [Ready-Mix] collective-bargaining agreement.” That same day, pursuant to article 3 of the Ready-Mix Agreement, which permits a signatory employer to procure employees from other sources if the Union fails to dispatch workers, Respondent “started to look for outside sources to fill our trucks. . . . We put an advertisement in the newspaper.” Also, “we put the word out on the street” and solicited company employees as to whether they knew anyone looking for material haul work. The next day, September 27, by facsimile, Stewart sent a letter to the Union, disagreeing with the latter’s view “that delivery of materials had always been covered under the construction contract.” Continuing, Stewart asserted that a signatory contractor to the Construction Agreement always has a “freedom of choice in the purchase of materials” and that, during bargaining for the Ready-Mix Agreement,

[T]he Union agreed that, in order for [Respondent] to remain competitive in the materials business, [Respondent] had to be allowed to compete under the same terms and conditions as other competitors who were signatory to a [ready-mix] agreement

.....

In June of 2008, [the Union and Respondent] entered into a [ready-mix] agreement which covers, among other things, the delivery of materials. At the time of signing, [the Union] encouraged [Respondent] to transfer trucks to the [ready-mix] division so that [Respondent] could compete directly with other signatory material suppliers. At that time, [Respondent’s] construction divisions were so busy that the trucks were needed for construction work on site more than they were needed for material deliveries from the commercial plant. As a result, [Respondent] chose not to immediately make changes but to wait for a more appropriate time.

[The Union] was aware of [Respondent’s] plans to reclassify work under the current Teamsters labor agreement, and, in fact, [the Union] assisted [Respondent] in the process of doing so. In late December of 2008 and early January of 2009 [Respondent] transferred all Teamster workers at its commercial site from the construction agreement to the [ready-mix] agreement. Prior to the change, [the Union’s] representatives met with the affected drivers and explained the need and reasoning behind the changes.

The next day, September 28, Stewart and other managers for Respondent met with union officials including Dey and its attorney. Stewart testified that the discussion during the meeting that day was “whether or not we had the right to move trucks and call for drivers under the [Ready-Mix Agreement]. Both parties were pretty entrenched in their position[s].” He added that “the meeting was very heated and very short. There was no discussion on how we would [gain the dispatch of drivers] or if we would do it.” At one point, a company representative raised the possibility that Respondent could no longer afford to continue operating its material haul trucks under the Construction Agreement, and “we discussed the possibility of downsizing.” According to Stewart, at the end of the meeting, “as we were leaving . . . their attorney asked the parties if we’d ever discussed a transition rate. . . . We said we hadn’t; they said we hadn’t, and so we were both supposed to go home and think about it.” Shortly after the conclusion of the above meeting, assertedly taking the Union attorney’s remark as a suggestion, Stewart drafted Acting General Counsel’s Exhibit 26, entitled “Proposal for Existing Drivers interested in Transferring to Active Agreement,” in which he set forth a proposal for any SNP material haul driver who was interested in continuing to work for Aggregate Industries—SWR after Monday, October 4, 2010, under the terms and conditions of employment of the Ready-Mix Agreement. Under that proposal, a material haul driver would be paid a \$27.83 hourly wage rate between October 4 and December 31, 2010, a \$24.50 hourly wage rate from January 1 through March 31, 2011, and a wage rate commensurate with the Ready-Mix Agreement wage rate after April 1, 2011. In addition, Respondent proposed that each material haul driver would receive the latter agreement’s benefits package after October 4, 2010.

Two days later, on September 30, Stewart telephoned Dey and asked, “[I]f we were going to have a chance to get together and talk about transition rates. Wayne indicated that he had nothing for me and that the Union wouldn’t be putting together transition rates.” Nevertheless, Stewart asked Dey to come to Respondent’s offices and pick up a copy of the former’s draft proposal. Later that day, Dey did come to Respondent’s offices and “[reiterated that] the Union didn’t have any proposal for us and I asked him to . . . give [the draft] to the driver[s at a] meeting that night and he said he would.” Subsequently, Dey telephoned Stewart and told him that Respondent’s transition proposal was unacceptable and then warned Stewart that, if Respondent implemented it, “we would have a fight on our

hands.”³⁵

With the parties unable to reach agreement on Respondent’s desire to have its material haul drivers working within the former SNRM bargaining unit and under the terms and conditions of the Ready-Mix Agreement and the Union declining to bargain over Respondent’s transition wage rate proposal, Respondent scheduled a meeting with the SNP material haul drivers on October 1 at SNRM’s Sloan Quarry truck yard, at which its material haul trucks were based, and invited union officials to attend. The meeting was held as scheduled, with approximately 50 day shift material haul drivers attending. Representing Respondent were Sean Stewart, Pat Ward, and Michael Kuck, the transportation manager for Aggregate Industries–SWR; Wayne Dey and other officials attended on behalf of the Union. According to Dean Mulvaney,³⁶ who, since 2008, had worked for SNP as a material haul driver³⁷ under the terms and conditions of employment embodied in the Construction Agreement, Stewart spoke for Respondent about moving the drivers to employment under the terms of the Ready-Mix collective-bargaining agreement. He explained “what they wanted to offer us . . . as a package.” Additionally, “there was a lot of questions asked and . . . it was a little heated at times.” Mulvaney added that Sean Stewart “wasn’t sure” on some of the important issues, saying that “he didn’t have a detailed answer at that time” and that “when we’re done, you can ask . . . your [business agent] and he’ll be able to clarify maybe.”³⁸ Stewart testified that he told the attending material haul drivers that Respondent had requested the Union to dispatch them under the terms of the Ready-Mix Agreement; that the Union had refused to do so; that Respondent was now seeking drivers from other sources; that the Union had requested

Respondent to draft a phase-in agreement designed to minimize any impact on the drivers;³⁹ and that, if they were interested in continuing to work for Respondent under the terms of the Ready-Mix Agreement, they should inform Respondent’s dispatchers “and we would make arrangements to get them on the list.” He further testified that he showed the drivers a copy of Acting General Counsel’s Exhibit 26, and “I told them this had been given to Wayne Dey the night before and there were multiple drivers that said they hadn’t seen it and so I had copies

³⁵ Upon being confronted with Respondent’s attorney’s position statement to the above-captioned unfair labor practice charges, Stewart conceded that, during his conversation with Dey on August 13, the latter may have said the Union would “fight” Respondent over changing the material haul drivers to the Ready-Mix Agreement.

³⁶ Mulvaney testified that he has been a member of the Union since 1996.

³⁷ Mulvaney transports aggregate materials to construction sites and drives trash from such sites to dump sites.

³⁸ Stewart refused to permit Dey to speak during the meeting; however, Dey did meet with the attending drivers at the conclusion of Respondent’s meeting.

³⁹ Stewart conceded that his statement was not true and testified that he meant to convey to the attending material haul drivers that he had prepared AGC Exh. 26 “at the request of [the Union’s] attorney. He also maintained that he did not imply that the Union had agreed to it.

made and we left copies at the front desk.”⁴⁰ Further, Stewart admitted informing the attending drivers that Respondent had proposed the above-described proposal to the Union; that Respondent would honor the terms of Acting General Counsel’s Exhibit 26 for any employees interested in working under the new wage rates and benefits structure; and that the changes were “imminent.”⁴¹

On Tuesday, October 5, by facsimile, Sean Stewart sent a letter to the Union, informing the latter that, on the following Monday, October 11, Respondent would “commence performing material hauls under the terms and conditions of the [Ready-Mix Agreement]. All new-hire Teamster material haulers will be paid the wage rate and benefits set forth in the CBA. Stewart continued, writing that, “pursuant to discussions with Local 631 initiated by your attorney, AI is offering current employees who desire to continue working under the terms and conditions of the CBA a graduated pay scale . . . designed to lessen the financial burden to interested employees as they transition.” Two days later, Respondent placed a copy of Acting General Counsel’s Exhibit 27 in the mail slot of each of the SNP material haul drivers. The document, entitled “Aggregate Industries–SWR, Inc. Notice to Employees,” states:

On Monday October 11th, 2010 Aggregate Industries–SWR-Inc. . . . will commence performing material hauls under the terms and conditions of the 2008–2012 collective bargaining agreement. . . . All new Teamster material haulers will be paid under the terms of the CBA.

AI is offering current employees who desire to continue working under the terms and conditions of the CBA a graduated pay scale. In order to qualify, current employees must fill out and turn in this form to Dispatch no later than 3pm on Friday October 8th.

Following the foregoing, the document set forth wage rate and benefits packages for employees virtually identical to those set forth in the document, which Respondent made available for the SNP material haul drivers after the October 1 meeting. There is no dispute that some of the former SNP material haul drivers agreed to continue working for Respondent under the terms and conditions set forth in the above document. There is no record evidence that, having been informed by Respondent of its intent to implement its plan to perform material hauls under the terms of the Ready-Mix Agreement 6 days later, the Union ever requested Respondent to bargain.

Thereafter, on Monday, October 11, having implemented its transfer of material hauling work to drivers working under the Ready-Mix Agreement, Respondent continued normal operations but with limited crews working due to rain. On Tuesday,

⁴⁰ Stewart said that the document, which he made available to the drivers did not contain the October 4 implementation date.

⁴¹ Asked by me whether he is contending that Respondent acted upon Darr’s suggestion in 2010 or is he contending that union officials in 2008 actually agreed with him that you should be able to transfer material haul drivers to coverage under the Ready-Mix Agreement, Stewart answered “the latter” inasmuch as “we negotiated for the classification of drivers and one of those classifications was material hauls. And there was some discussions . . . on how to do that without interrupting construction work.”

October 12, the Union commenced picketing at the Sloan Quarry truck yard. The picketing continued for 2 days at which point the parties reached an agreement that the striking material haul drivers would return to work under the terms of the Ready-Mix Agreement pending resolution of the instant unfair labor practice charges.⁴² Dean Mulvaney testified that, subsequent to returning to work, he is performing the same work as prior to the work stoppage. Likewise, material haul driver, Phillip Willars, testified that, prior to October 2010, he hauled asphalt for SNP and that, subsequent to the work stoppage, the scope of his work remains unchanged—"I drive all kinds of different trucks, but I still do the same work."

With regard to Respondent's material haul drivers, who had been working for SNP under the terms and conditions of the Construction Agreement, the instant consolidated complaint alleges, and counsel for the Acting General Counsel argues, that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by, on or about October 1, 2010, unilaterally, without initially affording notice to the Union or an opportunity to bargain, changing the scope of the Construction Agreement bargaining unit by moving delivery of materials work from said bargaining unit to the Ready-Mix Agreement bargaining unit⁴³ and changing the terms and conditions of employment of its above-described employees by requiring them to work under the terms and conditions of the Ready-Mix Agreement. Further, as to those material haul drivers, the consolidated complaint alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by bypassing the Union and dealing directly with those employees by meeting with them on or about October 1, 2010, for the purpose of changing their terms and conditions of employment and requiring said employees to agree in writing to the terms and conditions of the Ready-Mix Agreement as a condition for continuing to be employed by Respondent, and, by, from on or about October 11 through 15, 2010, denying employment opportunities to said material haul drivers who had not agreed to work under the terms and conditions of the Ready-Mix Agreement. Initially, as to the foregoing allegations, I note that almost the entirety of the relevant record evidence is not in dispute. Thus, as opposed to his testimony regarding the 2008 negotiations for the Ready-Mix Agreement,⁴⁴ Sean Stewart's

⁴² There is no dispute that, when Respondent's material haul drivers are working on jobsites as opposed to merely delivering aggregates to stockpile sites on jobsites, they are paid at the Construction Agreement wage rate.

⁴³ While the consolidated complaint par. 7(a) alleges that Respondent unlawfully changed "the scope of the work of the Construction Unit," in his posthearing brief, counsel for the Acting General Counsel describes Respondent's alleged unfair labor practice as changing the "scope (definition)" of the Construction Agreement bargaining unit by removing the material haul drivers from coverage under that agreement and covering them under the Ready-Mix Agreement. I shall consider counsel's contention as the Acting General Counsel's allegation.

⁴⁴ What is in dispute is whether, during the 2008 negotiations for the Ready-Mix Agreement, the Union's main negotiator, Dewey Darr, agreed that, by entering into that collective-bargaining agreement, SNRM, which employed no material haul drivers and did not own or produce its own aggregate, would have the right to pay its material haul

testimony concerning the events of July through October 2010 was uncontroverted and, as he did not appear to be testifying in a disingenuous manner, I shall credit his version of the events of that time period.⁴⁵

Counsel for the Acting General Counsel and counsel for the Union contend that, on October 11, by moving all of its material hauling work from the Construction Agreement bargaining unit to the Ready-Mix Agreement bargaining unit, Respondent unilaterally changed the scope of the Construction Agreement bargaining unit in violation of Section 8(a)(1) and (5) of the Act. In this regard, of course, the general topics of bargaining fall into three broad categories—mandatory, permissive, and illegal. The mandatory subjects of bargaining are those concerning the bargaining unit employees' wages, hours, and other terms and conditions of employment and are those over which the parties must bargain in good faith. Further, an employer may not impose a unilateral change in a mandatory subject of bargaining unless it has bargained in good faith to an impasse; upon such a deadlock in bargaining, the employer may implement such a change without the consent of the labor organization. *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992). "Illegal subjects are simply those proscribed by federal, or where appropriately applied, state law." *Id.* The permissive subjects of bargaining are those matters which fall outside the purview of Section 8(d) of the Act and are those over which the parties may voluntarily engage in bargaining. However, in contrast to a mandatory subject of bargaining, not only may neither party insist to impasse over a permissive subject but also an employer may not implement its proposal without the consent of the labor organization. *Id.*; *Douds v. Longshoremen*, 241 F.2d 278 (2d Cir. 1957); *Bozzuto's Inc.*, 277 NLRB 977, 977 (1985). Put another way, once a labor organization objects to a permissive subject of bargaining, an employer may not implement its proposal. Finally, in this regard, and of utmost significance herein, the scope of a contractual bargaining unit is such a permissive subject of bargaining, and counsel for the

drivers for hauling aggregate materials not only from the Sloan Quarry to its batch plants but also from the Sloan Quarry to construction job sites at the Ready-Mix Agreement wage rate. As to this, as between Dewey Darr and Sean Stewart, notwithstanding his sometimes confusing and contradictory testimony, I found the former to have been the more forthright witness regarding said bargaining. Thus, I believe that Darr, in discussing the material haul driver classification and the matter of transferring trucks from SNP to SNRM, was concerned only with hauls from the Sloan Quarry to SNRM's batch plants and that he would never have agreed to anything which would have abrogated or diminished the terms of the Construction Agreement. Further, in this regard, as I stated at the hearing, I find it telling that Respondent failed to demand that the Union enter into a memorandum of understanding, similar to that which it negotiated for the nine Sloan Quarry employees, concerning the rate of pay for any material haul drivers whom SNRM might employ in the future for transporting aggregates to construction sites. Of course, such a document would have memorialized any 2008 agreement between the parties, binding the parties for an uncertain event at an unforeseen time, and would have certainly permitted Respondent, if it had so desired, to immediately have taken advantage of a cost saving.

⁴⁵ Likewise, Stewart was uncontroverted as to all of the background information herein, and I shall rely on such testimony.

Acting General Counsel therefore contends that Respondent could not have unilaterally removed or modified a Construction Agreement bargaining unit position without first obtaining the consent of the Union. *Id.*

My quandary is that there exists another—and equally compelling—way to characterize Respondent’s actions herein. Thus, putting aside the addling existence of the same group of employees and the same labor organization, it may well be argued that Respondent’s actions actually constituted a change in the assignment of work to employees in another bargaining unit while leaving the Construction Agreement bargaining unit intact. The significance of such a view of the facts is that, unlike altering the scope of a bargaining unit, the transfer of work out of a bargaining unit constitutes a mandatory subject of bargaining and, of course, after bargaining to impasse or waiver by the Union, Respondent was then free to implement its assignment of material hauling work to drivers, covered under the Ready-Mix Agreement, unilaterally. *Id.*

Distinguishing between these two views is not an easy task; however, contrary to counsel for the Acting General Counsel and counsel for the Union, after consideration of the record as a whole, I believe that the correct characterization of Respondent’s actions is that of a transfer of material hauling work duties from drivers covered under the Construction Agreement to drivers covered under the Ready-Mix Agreement. As to this, I note initially that neither counsel for the Acting General Counsel nor counsel for the Union actually identified in what manner Respondent altered the scope of the Construction Agreement bargaining unit; in fact, paragraph 7(a) of the consolidated complaint refers to the alleged unlawful unilateral change as “moving of delivery of materials work from the Construction Unit to the Ready-Mix Unit”; and counsel for the Union refers to it as unilaterally moving all of its material hauling work from [the Construction Agreement bargaining unit to the Ready-Mix Agreement bargaining unit].” Further, there is no contention that Respondent eliminated the material driver position from the Construction Agreement bargaining unit or eviscerated the position by creating a nonbargaining unit position and assigning the work of bargaining unit employees to employees in the new job classification. To the contrary, in his August 13 letter to the Union, Sean Stewart wrote that Construction Agreement bargaining unit drivers would continue to perform construction site material hauling work, and it is undisputed that Respondent’s drivers, who currently perform material hauling work on construction sites, are paid at the Construction Agreement wage rate. Moreover, Respondent and the Union bargained for and agreed to a Ready-Mix Agreement bargaining unit job classification, transport drivers (S&G), in which material haul truck-drivers perform virtually the identical off site driving work⁴⁶ as their driver counterparts covered by the Construction Agreement. In these circumstances, I believe Respondent’s alleged unlawful act must correctly be characterized as a transfer of work from Construction Agreement bargaining unit employees

to Ready-Mix bargaining unit employees. Therefore, as the record evidence seems clear, and there is no real dispute, that Respondent acted unilaterally without the assent of the Union, the issues are whether it did so after bargaining in good faith to impasse or, absent impasse, after the Union waived its right to demand bargaining.

Regarding these issues, the governing legal principles are well established. Thus, with regard to impasse, the Board law is that:

[A] genuine impasse exists only where the parties have exhausted all avenues for reaching agreement and there is “no realistic possibility that continuation of discussion at time would have been fruitful.” There is no impasse when one of the parties makes concessions that are not “trivial or meaningless”; for a concession by either party “on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement.” . . . The essential question is whether there has been movement sufficient “to open a ray of hope with a real possibility for agreement if explored in good faith in bargaining sessions.”

Rochester Telephone Corp., 333 NLRB 30, 30 fn. 3 (2001), quoting *Hayward Dodge*, 292 NLRB 434, 468 (1989). Concerning the issue of waiver, which, counsel for Respondent contends, occurred, as stated above, prior to implementing a change in a mandatory subject of bargaining, an employer is required to provide timely notice to a labor organization and a meaningful opportunity for the latter to request bargaining. Then, upon receiving such notice, the labor organization “must act with due diligence to request bargaining or risk a finding that it has waived its right to do so.” However, if the employer’s notice provides insufficient time for negotiations before implementation or if the employer has made it otherwise clear that it has no intention of bargaining about the issue, a labor organization may be excused from the foregoing bargaining request requirement. Further, in these circumstances, a bargaining request might well be futile as the employer’s notice “informs” the labor organization of nothing more than a fait accompli. A latter finding requires objective evidence, and a labor organization’s subjective impression of its bargaining partner’s intention is insufficient. *KGTV*, 355 NLRB 1283, 1283 (2010); *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001).

While Respondent does not assert such a defense, it certainly appears that, as of October 11, the parties were at impasse over Respondent’s stated desire to have its offsite material hauling performed by drivers working under the terms and conditions of employment established by the Ready-Mix Agreement. Thus, from July 9, 2010, through mid-September, during face-to-face meetings and telephone conversations and in letters, Sean Stewart continually informed the Union that Respondent intended to have its off-construction site material hauls performed by drivers, who are working under the terms and conditions of employment embodied in the Ready-Mix Agreement, and that it wanted its former SNP material haul drivers to continue to perform the work. Likewise, Wayne Dey consistent-

⁴⁶ As the record clearly demonstrates, Construction Agreement bargaining unit material haul drivers and Ready-Mix Agreement bargaining unit transport drivers each utilize the identical equipment to transport aggregate and other materials to construction sites.

ly—and adamantly—maintained the Union’s position—raising its “objection” to Respondent’s intended course of action and demanding that the delivery of materials to jobsites remain the domain of drivers working under the terms and conditions of employment of the Construction Agreement. Then, during their meeting on September 28, after Respondent had sought the dispatch of material haul drivers from the Union’s ready-mix drivers hiring hall and the Union had refused to honor the former’s requests, each party remained “entrenched” in its position regarding which bargaining unit’s drivers should perform Respondent’s offsite material hauls. Further, on September 30, after drafting Respondent’s planned continuation of employment offer to the former SNP material haul drivers, by which, I believe, Respondent intended to effectuate the transfer of its material hauling work to drivers in the Ready-Mix Agreement bargaining unit, Stewart spoke to Dey, asking whether the Union desired to bargain over the terms of Respondent’s employment offer to the former SNP material haul drivers; which included the transition wage rate, and the latter, who, I believe, understood Stewart’s document as implementing the transfer of material hauling work to drivers in the Ready-Mix Agreement bargaining unit, initially told Stewart that “he had nothing . . . and . . . the Union wouldn’t be putting together transition rates,” later reiterated that the Union would have no proposal for Respondent, and ultimately warned Stewart that if Respondent implemented its planned course of action regarding assigning offsite material haul work to Ready-Mix Agreement bargaining unit material haul drivers, the latter “would have a fight on [its] hands.” The foregoing establishes that, at no time between July 9 and October 11, did either Respondent or the Union demonstrate any interest in making a concession from its intractably-held position, and there is no reason to believe that further meetings would have resulted in movement by either party. In these circumstances, given their intransigence, I think impasse may well have existed as of October 11 when Respondent implemented its unilateral change. *Rochester Telephone Corp.*, supra.

Nevertheless, assuming the parties had failed to meaningfully bargain to impasse, I also think the Union waived its right to bargain regarding implementation of Respondent’s plan to transfer its offsite material hauling work from drivers in the Construction Agreement bargaining unit to drivers in the Ready-Mix Agreement bargaining unit. In this regard, on September 30, Dey rebuffed Respondent’s offer to bargain regarding the latter’s continuation of employment offers for the former SNP material haul drivers—an offer to bargain which, I think Dey understood, would have opened the entire transfer of work issue for discussion. Then, on October 5, 4 days after Stewart had informed the former SNP material haul drivers regarding Respondent’s terms for them to remain employed by Respondent, he formally provided notice to the Union that the drivers’ new terms and conditions of employment, which included working pursuant to the Ready-Mix Agreement, would be implemented on October 11. Notwithstanding having, at least, 6 days’ notice prior to implementation by Respondent, presumably bent upon maintaining its legal position regarding the transfer of the driving work, the Union failed to request

bargaining, and Respondent implemented its announced change on October 11.

Counsel for the Union contends that there can be no finding of acquiescence by his client as it had been presented with a fait accompli by Respondent; therefore, it would have been futile for the Union to have requested that the former engage in bargaining. I disagree. At the outset, counsel may not justifiably assert that Respondent’s October 5 notice left insufficient time prior to implementation for the Union to engage in meaningful bargaining. In this regard, I note that the Union had been aware since July 9 that Respondent was determined to move material hauling work to drivers, who were working under the terms and conditions of employment embodied in the Ready-Mix Agreement, and that, from July 9 through the September 28 meeting, rather than engaging in meaningful bargaining, Wayne Dey merely objected and remained intransigent in the Union’s position that Respondent’s offsite material hauls must continue to be done by Construction Agreement bargaining unit drivers. Then, on September 30, after Stewart asked whether the Union desired to bargain over the terms of its proposed continuation of employment offer to the material haul drivers, Dey rejected Stewart’s offer, stating that the Union had nothing to offer and warned it would “fight” implementation. Finally, on October 5 when informed by Respondent that the terms of its continuation of employment offer would be implemented 6 days later, apparently maintaining its legal position, the Union responded with silence, failing to exercise its right to demand that Respondent bargain with regard to the above issues. In these circumstances, the Union had in excess of 90 days in which to bargain over Respondent’s stated desire to have its material hauling work performed by its drivers working under the terms of the Ready-Mix Agreement and, at most, 10 and, at least, 6 days in which to demand bargaining prior to Respondent’s implementation of its continuation of employment offers to its material haul drivers,⁴⁷ by which Respondent effectuated the transfer of its material hauling work, and, other than protesting,⁴⁸ and failed to do so. Furthermore, there is no record evidence that Stewart’s September 30 invitation to bargain was insincere or that Respondent indicated it would not bargain in good faith concerning its desire that its offsite material haul work be performed by Ready-Mix Agreement bargaining unit drivers and to have its former SNP material haul drivers perform the work. Based on the foregoing, I find that the Union had timely notice of Respondent’s intent to implement its transfer of offsite material haul driving work to drivers in the Ready-Mix Agreement bargaining unit on October 11 and, presumably

⁴⁷ In *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988), an employer provided a union with 10 days’ notice of a change and, during said time period, the union failed to request bargaining. The Board concluded that the 10 days provided a “meaningful opportunity” for the union to have requested bargaining and noted that it has, on occasion, found as few as 2 days’ adequate notice.

⁴⁸ The Board has held that “mere protest” is not sufficient to satisfy the requirement that a union must request bargaining after receipt of notice of an intended change in terms and conditions of employment or risk a finding of waiver. *KGTV*, supra, fn. 7; *Medicenter, Mid-South Hospital*, 221 NLRB 670, 673 & 678 (1975).

maintaining its entrenched legal position, failed to diligently request bargaining. The Union thereby waived its right to bargain, and Respondent's implementation of the transfer of work did not constitute an unlawful unilateral change. Therefore, I shall recommend dismissal of paragraph 7(a) of the consolidated complaint. *KGTV*, supra; *Bell Atlantic Corp.*, supra, at 1087; *Jim Walter Resources*, supra.⁴⁹

I now turn to the second consolidated complaint allegation pertaining to the material haul drivers—that Respondent unlawfully, unilaterally changed the terms and conditions of employment of its former SNP material haul drivers by requiring them to work under the terms and conditions of employment embodied in the Ready-Mix Agreement—and note that this issue is but a variant of the initial issue raised by the consolidated complaint. Thus, there is no dispute that, by virtue of its continuation of employment offers to its material haul drivers, whose terms and conditions of employment were embodied in the Construction Agreement, which became effective on October 11, Respondent unilaterally changed their terms and conditions of employment, requiring, as a condition for being retained as an employee, that said drivers agree to work under the terms embodied in the Ready-Mix Agreement and be paid at transition wage rates until that collective-bargaining agreement's wage rate became effective for them. As with Respondent's reassignment of off-site material hauling work from Construction Agreement bargaining unit drivers to Ready-Mix Agreement bargaining unit drivers, I believe that whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment of its former SNP material haul drivers depends upon whether the parties were at impasse or whether the Union waived its right to engage in bargaining. In these regards, irrespective of the question of impasse, as above, there can be no doubt that the Union's inaction constituted a waiver. Thus, Stewart gave notice to Dey on September 30 of Respondent's intent to implement its continuation of employment offer and inquired as to whether the Union wanted to bargain about the terms of said offer, and Dey inexplicably spurned Stewart's offer. Subsequently, on October 5, Stewart gave notice to the Union that Respondent would implement its offer of continued employment on October 11, and, the Union failed to request bargaining. Moreover, I do not believe that Respondent's implementation on October 11 was a *fait accompli*. Thus, the Union had, at least, 6 days prior to the October 11 implementation date to request bargaining but failed to act. Furthermore, there exists no record evidence establishing that Stewart's offer to bargain on September 30 was disingenuously stated or that Respondent would not

thereafter have agreed to bargain concerning the terms of its employment offers. Therefore, I must, and do, conclude that the Union had timely notice of Respondent's intent to implement its continuation of employment offer to its former SNP material haul drivers and that the Union failed to do so, thereby waiving its right to bargain. *Id.* In these circumstances, Respondent's unilateral change was not unlawful, and I shall recommend that paragraph 7(b) of the consolidated complaint be dismissed.

Next, with regard to the former SNP material haul drivers, I consider the allegation that, in meeting with its said employees on October 1, Respondent bypassed the Union, its employees' bargaining representative, and engaged in direct dealing in violation of Section 8(a)(1) and (5) of the Act. The Board law is clear that an employer is obligated to bargain exclusively with the designated bargaining representative of its employees with regard to their terms and conditions of employment, and, by dealing directly with employees, who are represented by a labor organization, or with any representative other than the exclusive bargaining representative regarding such matters, an employer violates Section 8(a)(1) and (5) of the Act. *SPE Utility Contractors, LLC*, 352 NLRB 787, 791 (2008). The crux of this violation of the Act is that dealing directly with represented employees undercuts the labor organization's ability to function as the bargaining representative and interferes with the employees' right to union representation. "This is true whether it concerns a decision which is contemplated or whether it concerns a decision . . . that has already been made by an employer." *Master Plastering Co.*, 314 NLRB 349, 351 (1994); *Ad-Art, Inc.*, 290 NLRB 591, 606 (1988). Finally, "an element of direct dealing with employees is the lack of consent by the designated bargaining representative to these employee contacts." *Kansas Education Assn.*, 275 NLRB 638, 640 (1985).

In assessing the merits of this unfair labor practice allegation, I note that, for some reason unknown to me, counsel for the Acting General Counsel failed to present any underlying theory or supporting legal argument in his post-hearing brief, and, given the context, I do not believe that Respondent engaged in direct dealing. Thus, on September 30, the day before the meeting, Wayne Dey had adamantly rejected Sean Stewart's offer to bargain over the terms of Respondent's continuation of employment offers to its former SNP material haul drivers and had held a meeting for those drivers during which he presumably presented the terms of the offers to them. Further, rather than in order to bypass the Union and to bargain with its former SNP material haul drivers, Respondent used the October 1 meeting with them merely to disclose its plan to transfer its material hauling work to those drivers, who agreed to work pursuant to the terms of the Ready-Mix Agreement, and to announce implementation of its continuation of employment offers. In this regard, during the meeting, Stewart set forth Respondent's intent to have its material hauling work performed pursuant to the terms of the above-collective-bargaining agreement and the Union's refusal to consent, presented the terms of the continuation of employment offers to the attending drivers, and answered their angry questions. Moreover, rather than being excluded, Dey and other union representatives were

⁴⁹ Two Board decisions, which are cited by counsel for the Union, are distinguishable. In *Bohemian Club*, 351 NLRB 1065, 1066 (2007), the Board found that a change was a *fait accompli* as "the union learned of the change week after it happened." Likewise, in *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1018 (1982), the Board found that a union was faced with a *fait accompli* when it futilely requested bargaining as "the new program had already been implemented." Herein, of course, I believe the Union had ample time to have requested bargaining prior to Respondent's implementation of its continuation of employment offer to its material haul drivers.

invited and, in fact, attended the meeting, and, while not being allowed to speak during Respondent's meeting, they met with the drivers immediately after it concluded. Perhaps, in other circumstances, a meeting, such as conducted by Respondent on October 1, might be categorized as unlawful direct dealing but not on the instant facts. Accordingly, I shall recommend that paragraph 7(c) of the consolidated complaint be dismissed.

Finally, concerning the former SNP material haul drivers, the consolidated complaint alleges that Respondent unlawfully denied employment opportunities to those former SNP material haul drivers who refused to agree to work under the terms and conditions of the Ready-Mix Agreement. Contrary to the Acting General Counsel, I have found that the Union waived its right to bargain regarding Respondent's transfer of material hauling work to Ready-Mix Agreement bargaining unit drivers and concerning the terms of its continuation of employment offer to the above employees. Consequently, Respondent's implementation of neither of those changes in the terms and conditions of employment of the material haul drivers may be found unlawful, including Respondent's requirement that each driver sign a document, agreeing to continue working under the terms of the Ready-Mix Agreement. In these circumstances, I find no merit to the above allegation and shall recommend dismissal of paragraph 7(d) of the consolidated complaint.

The Sweeper Truckdrivers

The record next reveals that, in addition to material haul trucks, Respondent utilizes sweeper trucks at its construction sites and vehicle yards and employs sweeper truckdrivers to operate said vehicles. Thus, prior to the August merger, SNP utilized three mechanical sweeper trucks, which have brooms that push aside the dirt, on its construction sites and at its truck yard, and Frehner utilized two vacuum sweepers, which vacuum up dirt and dust, on its jobsites. SNP employed members of the Union to operate its equipment, and Frehner utilized members of the Operating Engineers Union, whose collective-bargaining agreement with AGC contains a sweeper driver job classification, to operate its equipment.⁵⁰ According to Sean Stewart, in 2004, during its contract negotiations with AGC, after presenting evidence to AGC that it had successfully organized three sweeper companies, Laborers International Union of North America, Local 872 (the Laborers), demanded and was granted a sweeper driver job classification in its new collective-bargaining agreement. Then, in 2005, after the Laborers filed a grievance against either SNP or Frehner for contracting with a nonunion sweeper company, the parties settled the matter, "and, from that point forward, if we needed additional sweeper help, we would hire the [Laborers-represented] sweeper companies."⁵¹

⁵⁰ According to Michael Kuck, any available operating engineer employee on a jobsite could operate a sweeper truck.

⁵¹ Apparently, there no longer are any Teamsters Union or Operating Engineers Union-represented sweeper truck companies.

Asked if the Laborers Union had ever demanded to represent either SNP's or Frehner's sweeper drivers, Stewart testified that "on numerous occasions" during 2010 the Laborers Union secretary/treasurer had requested that the sweeper driving work be assigned to the Laborers

The record further reveals that two of SNP's sweeper truckdrivers, Andrew Barnum and Mike Crane, continued to work for Aggregate Industries—SWR, Inc. after the merger, operating the same mechanical sweepers on job sites and in the truck yard at Sloan Quarry. According to Barnum, he and Crane had often discussed withdrawing from the Union, and, "mostly due to the fact that . . . our benefits package was being reduced," during a telephone conversation with Michael Kuck in October about a job, "I finally just asked him . . . with the situation that's going on . . . is it possible that [we] might be able to withdraw from the Teamsters—still maintain [our jobs] here at AI—and be able to join another union or transfer into a different union." Kuck replied that "he didn't know but he would look into it and he would get back to me." Subsequently, Barnum testified, he spoke to Wayne Dey, and he told Dey he wanted to switch to another union; Dey replied that he wouldn't let that happen. Then, after the Union commenced its picketing against Respondent and while it continued, Barnum encountered Kuck and asked what was going on with his earlier request about switching unions. Kuck said he was "looking into it" and would get back to Barnum.

Michael Kuck confirmed that, in early October, Barnum spoke to him regarding his and Crane's desire to no longer be represented by the Union and asked what options were available to them for continuing to work for Respondent. Barnum asked whether Respondent would be willing to switch them to another union, either the Operating Engineers or the Laborers. Kuck said he would speak with his supervisors but would have to also hear from Crane. Then, "I spoke to Sean about it and what our options were, and he said that we could switch over to the Laborers."⁵² Kuck then telephoned Barnum, and, according to the latter, said Barnum had two options—"because most of the trucks had already been in the [Operating Engineers], they could probably switch us into Operators and . . . he said that it looked like we could switch into [the Laborers Union]." Barnum told Kuck he would think about it and get back to him. Thereafter, Barnum testified, he spoke to Crane, and they discussed their problem "in detail" and reached a decision. He then telephoned Kuck, and told him that, after he and Crane⁵³ had looked over "everything that was going on with the pension and the Operators [they would] rather go with the Laborers due to the fact that their . . . benefits were strong." Kuck said he would take care of it and would call Barnum and let him know when their dispatches would be available. Some time later, Kuck telephoned Barnum and "let me know that dispatch is available for me at the Laborers hall and I just needed to go down and get signed up with the Laborers to be redispached

Union. On this point, Kuck contradicted Stewart, denying that the Laborers had ever demanded or claimed the sweeper driver work.

⁵² Stewart testified that, after Kuck spoke to him he initially did nothing, hoping the matter would "blow over." Then, when the request was renewed to Kuck, "I sent a letter of assignment to the Laborers 872, explaining our current situation. Then, I made a call to the [Laborers] to see if they would be willing to dispatch these drivers." Stewart admitted he undertook the foregoing without notice to the Union or affording it an opportunity to bargain.

⁵³ Barnum said that this was a "joint" decision by Crane and him.

out.” Thereafter, on October 29, he and Crane went to the Laborers’ hiring hall, joined that labor organization,⁵⁴ and were dispatched to Respondent,⁵⁵ performing the same sweeper work utilizing the same equipment and some additional laborer work.

Pertaining to the two sweeper truckdrivers, the consolidated complaint alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by dealing directly with said employees for the purpose of changing their terms and conditions of employment, and by unilaterally, without notice to the Union or affording it an opportunity to bargain, changing said employees’ terms and conditions of employment by moving the work of sweeper drivers from coverage under the Construction Agreement to coverage under its collective-bargaining agreement with the Laborers Union, and by changing the scope of the work of the Construction Agreement bargaining unit employees by moving the sweeper drivers from the Construction Agreement bargaining unit and assigning such work to the bargaining unit covered by the Laborers Union collective-bargaining agreement. In these regards, I note that the facts are not in dispute and that, on all but one issue discussed below, the three witnesses, who testified regarding the issues, Stewart, Michael Kuck, and Andrew Barnum, were mutually corroborative. Initially, turning to Respondent’s alleged unlawful assignment of its mechanical sweeper driving work to drivers in the Laborers’ bargaining unit, I have previously stated that a transfer of work out of a bargaining unit by an employer constitutes a mandatory subject of bargaining. *Hill-Rom Co.*, supra. Further, when an employer unilaterally, without affording notice or an opportunity to bargain to the labor organization, which represents certain of its employees, assigns bargaining unit work to employees outside the bargaining unit and the job duties and functions remain essentially the same, such acts and conduct violate Section 8(a)(1) and (5) of the Act. *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993); cf. *Hanson SJH Construction*, 342 NLRB 967, 969 (2004). Herein, Respondent admits that it assigned mechanical sweeper truckdriving duties, which had been previously performed by Construction Agreement bargaining unit drivers, to sweeper truckdrivers, represented by the Laborers, and that it did so without notice to or affording the Union an opportunity to bargain. Moreover, I have found that, since changing their union affiliations, employees Barnum and Crane have continued to perform the same sweeper truck duties utilizing the same equipment.

In its defense, citing *J.L. Allen Co.*, 199 NLRB 675 (1972), and *Brady-Hamilton*, 198 NLRB 147 (1972), Respondent contends that it engaged in the above-described acts and conduct in the context of a work jurisdictional dispute between the Union and the Laborers and that, therefore, it was insulated from any asserted violations of Section 8(a)(1) and (3) and Section 8(a)(1) and (5) of the Act. Contrary to counsel, I do not believe that there existed herein any work jurisdictional dispute between the Union and the Laborers over which group of bargain-

ing unit employees should perform Respondent’s mechanical sweeper truck job duties. In this regard, there is no evidence that drivers, represented by the Laborers, have ever performed mechanical sweeper truck work for Respondent. Moreover, in agreement with counsel for the Acting General Counsel, I also do not believe that the record warrants the conclusion that the Laborers ever demanded that the work be assigned to employees represented by it or ever claimed the work. On this point, Michael Kuck, who is Respondent’s transportation manager and obviously in a position to have such knowledge, contradicted Sean Stewart and denied that the Laborers have ever demanded that its members perform Respondent’s sweeper driver job duties or claimed said work for its members. Surely, Stewart would have alerted Kuck to the Laborers’ repeated requests to perform the mechanical sweeper truckdriving work for Respondent. In these circumstances, I find that Respondent engaged in acts, violative of Section 8(a)(1) and (5) of the Act, by unilaterally, without notice to or affording the Union an opportunity to bargain, assigning sweeper truckdriving work to employees, who are in the bargaining unit represented by the Laborers. *McDonnell Douglas Corp.*, supra.⁵⁶

Finally, with regard to the allegation of the consolidated complaint that Respondent bypassed the Union and engaged in unlawful direct dealing with its Construction Agreement bargaining unit employees, Andrew Barnum and Mike Crane, I have found that, upon being informed by Barnum that said employees desired to join another labor organization, Mike Kuck and him discussed the employees’ options and other labor organizations whose collective-bargaining agreements covered the same work and which they might join. Respondent failed to inform the Union of said conversations. There can be no doubt that any change in the employees’ bargaining representative would directly impact their terms and conditions of employment, and I think that Kuck and, later, Stewart clearly were aware of this. Further, after Barnum stated that he and Crane desired to join the Laborers, Respondent apparently facilitated their membership in the labor organization. As an employer is obligated to bargain only with the representative of its employees, the foregoing patently establishes unlawful direct dealing, and it makes no difference that employees initiated the contacts. *Kansas Education Assn.*, supra at 640 fn. 11. Accordingly, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

⁵⁶ Clearly, Respondent also changed Barnum’s and Crane’s terms and conditions of employment by recognizing the Laborers as their representative for purposes of collective bargaining and treating them as employees in the bargaining unit covered by the Laborers’ collective-bargaining agreement. Inasmuch as Respondent concedes it failed to give notice to the Union or afford it an opportunity to bargain when it assigned mechanical sweeper truck work to the Laborers, I find merit to the consolidated complaint allegation that Respondent violated Sec. 8(a)(1) and (5) of the Act by unilaterally changing the sweeper truck drivers’ terms and conditions of employment. *LTD Ceramics*, 341 NLRB 86, 87 (2004); *Bouille Clark Plumbing*, 337 NLRB 743 (2002).

⁵⁴ According to Barnum, while the nominal initiation fee was \$500, he and Crane were each required to pay only \$90.

⁵⁵ Both sweeper drivers then went to the Union’s office and were given “honorable” withdrawals from the labor organization.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. In or about October 2010, during conversations with two mechanical sweeper truckdrivers, by bypassing the Union and dealing directly with said employees regarding their respective terms and conditions of employment, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

4. In or about October 2010, by unilaterally, without affording notice to the Union or affording it an opportunity to bargain, assigning mechanical sweeper truckdriving job duties to employees in the bargaining unit represented by the Laborers Union when such work had previously been done by Construction Agreement bargaining unit employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5. In or about October 2010, by unilaterally, without affording notice to the Union or affording it an opportunity to bargain, changing the terms and conditions of employment of two mechanical sweeper truckdrivers by treating them as members of the Laborers' bargaining unit, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless specifically set forth above, Respondent engaged in no other unfair labor practices.

REMEDY

I have found that Respondent has engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. Accordingly, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Specifically, I shall recommend that Respondent be ordered to cease and desist from bypassing the Union and directly dealing with its Construction Agreement bargaining unit sweeper truckdrivers. Further, I shall recommend that Respondent be ordered to cease and desist from unilaterally, with-

out affording notice to the Union or affording the latter an opportunity to bargain, assigning mechanical sweeper truck work to bargaining unit employees, who are represented by the Laborers, when said work had always been performed by drivers included in the Construction Agreement bargaining unit and that Respondent be ordered to restore the status quo ante by returning the work to Construction Agreement bargaining unit sweeper truckdrivers and by making sweeper truckdrivers Barnum and Crane whole for any lost wages⁵⁷ and other benefits, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),⁵⁸ caused by its unlawful unilateral change.⁵⁹ Moreover, I shall recommend that Respondent be ordered to post a notice, setting forth its above obligations.⁶⁰

[Recommended Order omitted from publication.]

⁵⁷ Back pay shall be computed in the manner set forth in *Ogle Protection Service, Inc.*, 183 NLRB 682, 683 (1970).

⁵⁸ Interest shall be compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

⁵⁹ By recommending that Respondent be required to restore the status quo ante, I recognize that, as the Union would have the right to refer two new sweeper truckdrivers to Respondent to operate its mechanical sweeper trucks, Laborers-represented employees Barnum and Crane may be left without jobs. However, within the parameters of the alleged unfair labor practices and in the absence of an allegation that Respondent's acts and conduct were violative of Sec. 8(a)(1) and (2) of the Act, I have no jurisdiction to require either employee to again change his union affiliation or to require Respondent to utilize either Barnum or Crane to perform the sweeper truck duties.

⁶⁰ I shall not require Respondent to disseminate the notice electronically to its employees. Thus, in *J. Picini Flooring*, 356 NLRB 11 (2010), the Board required that the notice therein be transmitted electronically to the respondent's employees as it customarily communicated to its employees in such a manner. There is no record evidence in these matters to suggest that Respondent regularly communicates with its employees via email or other electronic means. In fact, each employee has an actual mail slot in which Respondent inserts mail or other employment-related documents.