

Nos. 14-1252, 14-1276

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AGGREGATE INDUSTRIES

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case Nos. 26-CA-23675 and 26-CA-23734). The Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631 was the charging party before the Board. Aggregate Industries (“the Company”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on October 31, 2014, and reported at 361 NLRB No. 80. The Board seeks enforcement of that order against the Company.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
AGC	Association of General Contractors
Board	National Labor Relations Board
Company	Aggregate Industries
Frehner*	Frehner Construction Company
Laborers Union	Laborers International Union of North America, Local 872
Regal	Regal Materials, Inc.
SNP	Southern Nevada Paving, Inc.
SNRM	Southern Nevada Ready Mix
Union	Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631

* The Board's Decision and Order uses abbreviations for the three companies that were merged into Aggregate Industries. For consistency purposes, this brief uses those abbreviations, where necessary.

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Aggregate Industries (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order against the Company, finding that it violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”). The Board’s Decision and Order

issued on October 31, 2014, and is reported at 361 NLRB No. 80. (A. 1-4.)¹ It is final with respect to all parties.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Company filed its petition for review on November 20, 2014, and the Board cross-applied for enforcement on December 11. Both filings were timely; the Act places no time limitation on such filings.

STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the scope of the bargaining unit, transferring unit work, and changing its employees’ terms and conditions of employment.

2. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) of the Act by dealing directly with employees regarding their terms and conditions of employment, and denying

¹ “A.” references are to the deferred joint appendix. “SA” references are to the supplemental appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

employment to employees who refused to agree to work under the unilaterally imposed terms.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by dealing directly with its sweeper truck drivers about their terms and conditions of employment, unilaterally assigning sweeper truck work to drivers represented by another union, and unilaterally changing those drivers' terms and conditions of employment.

RELEVANT STATUTES AND REGULATIONS

Relevant provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

The Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631 ("the Union") represents two discrete bargaining units of employees—the Construction Unit and the Ready-Mix Unit—whose respective job positions and wages at the Company are set forth under two different labor agreements—the Construction Agreement and the Ready-Mix Agreement. This case involves the Company's treatment of two types of Construction Unit drivers— the off-site material haul drivers and the mechanical sweeper truck drivers.

In 2011, the Company announced and implemented its plan to move nearly 60 off-site material haul drivers from the larger Construction Unit, with higher wages and benefit rates, to the smaller Ready-Mix Unit, with reduced wages and

benefits. Following the transfer, the drivers continued to do the same work, in the same location, with the same trucks, but they received lower compensation and belonged to a different bargaining unit. Additionally, around the same time it unilaterally transferred the off-site material haul drivers and their work, the Company also unilaterally reassigned mechanical sweeper truck driving duties from the Union to the Laborers International Union of North America, Local 872 (“the Laborers Union”).

The Company’s treatment of the Construction Unit drivers prompted the Union to file unfair-labor-practice charges. Acting on those charges (A. 274-277), the Board’s General Counsel issued a complaint alleging numerous violations of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. 15, 24-26; A. 278-292.)

Following a hearing, an administrative law judge dismissed the allegations concerning the off-site material haul drivers and affirmed the allegations involving the sweeper truck drivers. (A. 25-28.) After the parties filed exceptions and briefs, on July 8, 2013, the Board (Chairman Pearce and Members Block and Griffin) issued a decision, reversing the judge’s dismissals and affirming his findings as to the sweeper truck drivers. 359 NLRB No. 156.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, No. 12-1281, 134 S.Ct. 2550, 2014 WL 2882090 (June 26, 2014), which

held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Block and Griffin. The Board then set aside the July 8, 2013 Decision and Order. On October 31, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Schiffer) issued the Decision and Order before the Court, which incorporates the prior Decision and Order. (A. 1-4.)

I. THE BOARD'S FINDINGS OF FACT

A. The Company Buys Several Construction-Related Businesses and Merges Them into One Entity

The Company quarries aggregate, which includes crushed stone, rock, sand, and gravel, and hauls the aggregate to different construction sites. It also operates ready-mix concrete batch plants, hauls cement and ready-mix, and conducts ready-mix operations at construction sites. (A. 5, 15; A. 44-47, 99)

The Company started operating in the Las Vegas market in 2003 when it began purchasing several Nevada companies in various construction-related sectors. First, in 2003, the Company purchased Southern Nevada Paving, Inc. (“SNP”), a paving and grading business. Then, in 2004, the Company purchased Frehner Construction Company (“Frehner”), a construction company that worked on major public projects and partially owned the Sloan Quarry, where aggregate material is mined and processed. (A. 7, 15; A. 45-47, 60, 208.) Historically, neither SNP nor Frehner performed any ready-mix work, such as hauling aggregate

to and between batch plants and hauling cement powder from cement plants to batch plants. (A. 16 n.8; A. 46-47.)

Also, in 2004, the Company purchased a ready-mix manufacturing company and a paver manufacturing company, combining them into Regal Materials, Inc. (“Regal”). (A. 15; A. 53-54.) In 2008, Regal built a batch plant at the Sloan Quarry and began conducting its ready-mix operations under the trade name Southern Nevada Ready Mix (“SNRM”). (A. 5, 15; A. 53-54, 214-15, 263.)

In August 2010, the Company consolidated SNP, Frehner, and Regal into one entity, Aggregate Industries-SWR, Inc. The Company first merged SNP and Regal into Frehner, and then Frehner changed its name to Aggregate Industries-SWR, Inc. (A. 5, 16; A. 259-61, 484-86.) SNRM was also a registered trade name of Aggregate Industries-SWR, Inc. (A. 16; A. 42-48, 70-71, 259-60, 459, 484-86.) Despite this merger, the Company still uses SNP, Frehner, and SNRM as fictitious company names and organizes its business into separate operating divisions under those names. (A. 5; A. 87-91, 461-63.)

B. The Construction Agreement Governs the Terms and Conditions of Employment of Construction Unit Employees, Including Off-Site Material Haul Drivers and Sweeper Truck Drivers

For years, the Union has represented SNP and Frehner employees (“the Construction Unit”) under the terms of the Construction Agreement. Since at least 1994, SNP and Frehner have been signatories to the Construction Agreement with

the Union. (A. 5, 15-16; A. 48, 278.) SNRM was never a signatory to the Construction Agreement. (A. 91-92.)

From 2001 to 2010, SNP and Frehner were members of the Association of General Contractors (“AGC”), a multiemployer association that negotiated the Construction Agreement with the Union. (A. 5, 16; A. 51-52, 268, 293-356.) The most recent Construction Agreement was effective from June 1, 2007 to June 30, 2010. (A. 5; 293-356.) In April 2010, Frehner and SNP notified the Union that it was withdrawing bargaining authority from the AGC and would instead bargain for separate contracts alongside the AGC. (A. 5; A. 455-58.)

The Construction Unit includes five classifications of drivers who operate different types of dump trucks and off-road equipment. (A. 5; A. 281, 332-33.) Material haul drivers deliver aggregate from quarries to construction sites, drive dump trucks on construction sites, and haul trash from construction sites to dump sites. (A. 16 n.9; A. 46-47, 72-73, 332-33.) This case concerns the off-site material haul drivers, who haul materials from the Sloan Quarry to construction sites, and the mechanical sweeper truck drivers, who operate vehicles that brush aside dirt on the Company’s construction sites and at its truck yard.

During the time in question, SNP employed approximately 60 material haul drivers. Frehner had no truck drivers and instead relied on SNP’s material haulers

to deliver material to jobsites. (A. 5-6, 16 n.8, 19 n.26; A. 46-47, 261-62, 453, 487.)

C. The Parties Negotiate the Ready-Mix Agreement; Wages Under the Construction Agreement Differ Significantly From the Ready-Mix Agreement

In 2006, the Board certified the Union as the bargaining representative of a unit of approximately 18 drivers and mechanics at Regal (“the Ready-Mix Unit”). (A. 6 & n.4, 15-16; A. 441.) In December 2007, after an election held pursuant to a decertification petition, the Board again certified the Union to represent the same bargaining unit. (A. 6, 15-16; A. 54-56, 160-61, 442.)

Following that certification, Union Business Agent Dewaine “Dewey” Darr and Regal negotiated the Ready-Mix Agreement, which was effective from July 1, 2008, to May 31, 2012. (A. 6; A. 41, 357-92.) Because Regal was now doing business as SNRM, SNRM was the signatory employer to the Ready-Mix Agreement. (A. 57-58, 160-62, 357-92.) The Ready-Mix Agreement contains 10 driver classifications, including Transport Drivers (Bulk) and Transport Drivers (S&G). (A. 6; A. 385.) Transport Drivers (Bulk) haul cement powder from cement plants to batch plants. Transport Drivers (S&G) drive “plant haul,” or sand and rock used to create ready-mix, from quarries to batch plants and between different batch plants; they also haul aggregate from the Sloan Quarry to SNRM-owned batch plants. (A. 6 & n.2; A. 161-69, 171-73, 227.)

Wage rates differ substantially between the Construction Agreement and Ready-Mix Agreement. During the last year of the Construction Agreement, drivers were paid between \$30.29 and \$31.28 per hour, with \$6.45 per hour paid to benefit funds. During the same period, under the Ready-Mix Agreement, Transport Drivers (S&G) received between \$23 and \$24.80 per hour, with \$4.16 paid to benefit funds. (A. 6; A. 332-35, 385-86.)

During negotiations for the Ready-Mix Agreement, the parties briefly discussed whether SNP could transfer some material haul trucks to SNRM to transport plant mix from the Sloan Quarry to its batch plants. (A. 18; A. 209-11.) The Union proposed that, if SNRM was going to use SNP trucks, the trucks would have to be registered to SNRM with “SNRM” written on the doors. The Union explained that only then could the employees be dispatched to construction sites under the Ready-Mix Agreement. (A. 18 n.22; A. 162-63, 168-70, 173-75, 182-84.) As Company Vice President Sean Stewart testified, this change “wasn’t something that [SNRM was] willing to do at that point.” Consequently, no trucks were transferred. (A. 18 n.22; A. 114.) Ultimately, the Ready-Mix Agreement allowed SNRM to use SNP’s equipment and drivers for material hauls from the Sloan Quarry to its batch plants, but required it to pay those drivers at Construction Agreement wage rates. (A. 17 & n.18.) When Ready-Mix Unit employees

performed work on construction sites, the Company was also required to pay them Construction Agreement rates. (A. 18 n.20; A. 264.)

Finally, the parties agreed to move nine heavy-haul drivers at the Sloan Quarry from the Construction Unit to coverage under the Ready-Mix Agreement, and memorialized this change in a written Memorandum of Understanding. (A. 17; A. 60-63, 161-62, 167, 454.) SNRM then requested that the nine drivers be dispatched to perform the same work under the Ready-Mix Agreement, and the Union complied. (A. 17; A. 60-63, 443-52.)

D. The Company Announces Its Intent To Move Off-Site Material Haul Drivers from Coverage Under the Construction Agreement to the Ready-Mix Agreement

Between July 2008 and July 2010, SNRM owned and operated only ready-mix concrete delivery trucks, and employed about 20 transport drivers plus the nine heavy-haul drivers on the Sloan Quarry. It did not employ any off-site material haul drivers covered under the Construction Agreement. SNRM continued to use SNP's material haul trucks and drivers for deliveries from the Sloan Quarry to its batch plants, paying the drivers Construction Agreement wages. (A. 18-19; A. 72-73.)

On July 9, 2010, several company managers met with Wayne Dey, who had since replaced Darr as Union Business Agent. At the meeting, Vice President Sean Stewart told Dey that the Company was "going to move" the off-site material haul

drivers from coverage under the Construction Agreement to coverage under the Ready-Mix Agreement. Stewart explained that the Company only wanted “to discuss whether we could keep our own drivers.” (A. 6; A. 67-68.) Stewart asked whether the Company could use the same individuals currently working under the Construction Agreement to haul the same material in the same trucks, but under the terms of the Ready-Mix Agreement. (A. 6; A. 67-68.) Dey responded that he did not think he or Union Representative Johnny Gonzalez, who serviced the Ready-Mix Agreement, would agree. Before that meeting, no company official had ever informed the Union that it planned to move the off-site material haulers from the Construction Agreement to the Ready-Mix Agreement. (A. 19 n.30; A. 68-69.)

Later, during an August 13 phone call, Dey informed Stewart that the Union opposed the Company’s plan to move the drivers. He explained that off-site material haul work had always been performed under the Construction Agreement, and could not be transferred to the Ready-Mix Agreement. (A. 6, 9, 15; A. 76, 244-45.) That same day, Stewart sent a letter to the Union stating that the Company was merging SNP and SNRM into Frehner, which would become Aggregate Industries SWR, Inc. (A. 459.) The letter further explained that “material deliveries for the [C]ompany will be performed by [Union] employees

under the rules and regulations of the [Ready-Mix Agreement].” (A. 6; A. 73, 77, 459.)

In an August 20 letter, Dey challenged Stewart’s assertion that the Ready-Mix Agreement would govern the off-site material haul work. Dey explained that “material deliveries to job sites have historically and customarily been performed only under the construction agreement” and are “part of the bargaining unit work” under that agreement. (A. 6; A. 460.)

E. The Company Asks the Union To Dispatch Off-Site Material Haul Drivers Under the Ready-Mix Agreement, and the Union Refuses; the Company Proposes Transition Rates for the Affected Drivers

On September 24, the Company requested that the Union dispatch 64 off-site material haul drivers to work under the Ready-Mix Agreement starting on September 28. Prior to that request, those drivers had performed that particular work in the Construction Unit under the Construction Agreement. The Union did not fill the dispatch request. (A. 6; A. 96-99, 130, 250, 466-70.)

On September 27, Stewart sent another letter to the Union, stating that the Ready-Mix Agreement gave the Company the right to use off-site material drivers to deliver materials under the terms of that agreement. (A. 6; A. 80, 464-65.) The next day, the parties met to discuss the issue, but reached no resolution. The Union and the Company agreed to “go home and think about” possible transition wage rates, under which off-site material haulers’ wages would be lowered gradually

from the Construction Agreement rate to the Ready-Mix Agreement rate. (A. 6, 16; A. 101, 103-04, 253-54, 264.) That same day, the Company sent a letter to the Union advising that the Company was “exercising its option [under the Ready-Mix Agreement] to procure workers from any source or sources” because the Union had not filled the Company’s September 24 dispatch request within the required 48-hour period. (A. 6; A. 471.)

On September 30, Stewart called Dey to continue discussing potential transition wage rates for the affected drivers. Dey replied that the Union would not agree to the rates. Stewart then asked Dey to pick up copies of the transition proposal for distribution at a union meeting that night. Dey agreed to do so. (A. 6, 20-21; A. 103-04, 254-55, 472.) Later that day, however, Dey called Stewart and told him that the proposal was unacceptable. Dey warned that the Company “would have a fight on [its] hands” if it implemented the proposal. (A. 6, 20-21; A. 73, 76-79.)

F. The Company Meets with Off-Site Material Haul Drivers About Its Transition Rates and Requires Them to Agree To Work Under the Ready-Mix Agreement; the Company Moves the Drivers to the Ready-Mix Unit

On October 1, one day after presenting its transition proposal to the Union, the Company met with SNP’s off-site material haul drivers. (A. 6; A. 132, 133.) The Company invited Dey and other union representatives to attend, but it did not allow them to speak. (A. 6; A. 106, 200-02.)

Vice President Stewart informed the drivers about the Company's plan to move them to coverage under the Ready-Mix Agreement. When Dey tried to answer the drivers' questions about the move, Stewart interrupted him and instructed that he could speak with his members after the meeting ended. (A. 6, 21; A. 104-07, 118, 200-02.) Stewart further explained that the Company was also seeking drivers from other sources because the Union refused to dispatch the drivers under the Ready-Mix Agreement. Stewart then distributed a document outlining the hourly wages and benefits that the Company would give any drivers who desired to continue working for the Company and who agreed to work under the terms of the Ready-Mix Agreement, effective as of October 4. (A. 6, 21; A. 107, 115, 119, 195-99, 472, 477.)

Shortly after that meeting, the Company put a form similar to the one disseminated at the meeting in the affected drivers' mail slots. If the drivers wanted to continue to be employed as of October 11, they had to complete the form and agree to work under the terms of the Ready-Mix Agreement. (A. 6, 18; A. 110, 199, 473.)

On October 5, the Company sent a letter to the Union stating that, beginning October 11, it would "commence performing material hauls under the terms and conditions of the [Ready-Mix Agreement]," with the graduated pay scale it presented to the drivers on October 1. The Company included a copy of the form it

had placed in the drivers' mail slots and noted that, to qualify for continued employment, current employees had to return the form by October 8. (A. 6, 18; A. 474-76.) Fifty-nine drivers agreed and accepted the Company's proposal. (A. 6; A. 125, 479-80.)

On October 12, the Union started picketing at the Sloan Quarry and filed an unfair-labor-practice charge the next day. (A. 7, 19; A. 120-23, 130, 274-75.) The picketing continued until October 15, when the parties agreed that, pending the resolution of the unfair-labor-practice charge, the drivers would work under the Ready-Mix Agreement with the proposed transition wage rates. (A. 7, 19; A. 122, 255-56, 265.)

Since then, the off-site material haul drivers who were moved to the Ready-Mix Unit have performed the exact same work, with the same trucks and at the same locations, as under the Construction Agreement, but are receiving the lower Ready-Mix Agreement wages. (A. 7; A. 194-96, 205-07, 479-80.)

G. The Company Moves Two Sweeper Truck Drivers from the Construction Unit to Another Unit Covered By the Laborers Agreement and Assigns Them the Same Work They Performed Under the Construction Agreement, Without the Union's Consent

The Union represents mechanical sweeper truck drivers, who work on the Company's construction sites and the Sloan Quarry. After the 2010 merger, two of SNP's sweeper truck drivers, Andrew Barnum and Mike Crane, continued to work

for the Company under the Construction Agreement, operating the same trucks on job sites and at the Sloan Quarry. (A. 26; A. 134-38, 152-55.)

In September 2010, Barnum and Crane discussed leaving the Union. (A. 26, 27 & n.53; A. 140-41.) In early October, Barnum contacted Company Trucking Operations Manager Mike Kuck about whether he and Crane could withdraw from the Union and join another union, while still maintaining their jobs with the Company. (A. 26-27; A. 143, 154-55.) Kuck replied that “he didn’t know but he would look into it and he would get back to [Barnum].” (A. 26; A. 140-41.) Barnum then informed Union Business Agent Dey that he wanted to switch to another union, and Dey responded that he would not let that happen. (A. 26; A. 140-43, 154-55.)

About one week later, Barnum and Crane followed up with Kuck regarding their request. Kuck told them that the Company could probably switch them into the Operating Engineers Union or the Laborers Union.² Barnum and Crane decided to “go with the Laborers.” (A. 26-27 & n.53; A. 146-47.) On October 8, Vice President Stewart sent a letter to the Laborers Union, assigning it the work of street sweepers and informing them that Barnum and Crane have requested to join the Laborers Union. (A. 481-83.) Kuck then suggested to Barnum and Crane that

² After the 2010 merger, sweeper drivers were represented by either the Union or the Operating Engineers Union. The Laborers Union never demanded that its members perform the Company’s sweeper driver duties or claimed that work for its members. (A. 26-27; A. 157.)

they go to the Laborers hiring hall to be re-dispatched under the Company's collective-bargaining agreement with the Laborers Union ("Laborers Agreement"). (A. 27; A. 146-49, 157-58.)

On October 29, Barnum and Crane went to the Laborers' hiring hall and were re-dispatched to the Company. They began driving mechanical sweeper trucks under the Laborers Agreement, and performed the same work with the same trucks as in the Construction Unit under the Construction Agreement, as well as some additional laborer work. It is undisputed that the Company did not notify or bargain with the Union regarding this change. (A. 26; A. 149-51, 158.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and Schiffer) disagreed with the administrative law judge's recommended findings regarding the Company's treatment of the off-site material haul drivers. Specifically, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by: (i) changing the scope of the Construction Unit by moving the off-site material haul drivers from that unit to the Ready-Mix bargaining unit without the Union's consent; (ii) unilaterally moving off-site 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; (iii) changing Construction Unit employees' terms and conditions of employment by

requiring them to work under the Ready-Mix Agreement; (iv) bypassing the Union and dealing directly with its Construction Unit employees; and (v) thereafter denying employment to those employees who refused to agree to work under the Ready-Mix Agreement. (A. 1, 5, 11-12.)

The Board affirmed the judge's findings as to the sweeper truck drivers, agreeing that the Company violated the Act by: (i) bypassing the Union and dealing directly with two mechanical sweeper truck drivers in the Construction Unit; (ii) unilaterally changing those two drivers' terms and conditions of employment by moving their work from the terms of the Construction Agreement to the Laborers Agreement; and (iii) unilaterally assigning mechanical sweeper truck work from Construction Unit employees to employees represented by the Laborers Union. (A. 1, 5 n.1, 11-12.)

The Board's Order requires the Company to cease and desist from its unlawful conduct. Affirmatively, the Order requires the Company to return the off-site material haul drivers to the Construction Unit, rescind all unilateral changes in their terms and conditions of employment, continue in effect the terms of the Construction Agreement, and make those drivers whole. The Order also requires the Company to return and assign the work of its sweeper truck drivers to Construction Unit employees who are represented by the Union, and to make

employees Barnum and Crane whole. Lastly, the Company must post and distribute a remedial notice. (A. 1-2, 12.)

SUMMARY OF ARGUMENT

1. The Company moved nearly 60 Construction Unit drivers to coverage under the Ready-Mix Agreement, without bargaining with the Union. The extent of the duty to bargain depends on whether the proposal concerns a permissive or mandatory bargaining subject. A change in unit scope is a permissive subject, which an employer cannot implement without the Union's consent. A transfer of unit work is a mandatory subject, over which the parties must bargain to impasse. Under either characterization, the Company's actions violated Section 8(a)(5) and (1) of the Act.

Substantial evidence supports the Board's finding that the Company unlawfully changed the scope of the Construction Unit by moving the off-site material haul drivers to the Ready-Mix Unit, without the Union's consent. Those drivers performed the same work, but were paid under the Ready-Mix Agreement and no longer bargained with other Construction Unit employees. Moreover, in removing almost 60 drivers from the Construction Unit, the Company significantly reduced the size and bargaining power of that unit.

Substantial evidence also supports the Board's alternate finding that the Company unilaterally transferred off-site material haul work from the Construction

Agreement to the Ready-Mix Agreement. The Company repeatedly conveyed to the Union that it would move the affected drivers and their work to the Ready-Mix Agreement, and that it was entitled to do so. The Board properly found that, by demonstrating its fixed intent to transfer the drivers, the Company presented the Union with a *fait accompli*, which precluded the parties from bargaining to impasse and excused the Union from requesting to bargain over an already-decided matter. The Board also reasonably found that by unilaterally altering the scope of the unit and transferring the affected drivers' work, the Company unlawfully changed employees' terms and conditions of employment. The Company's claim that the Union agreed to the transfer lacks evidentiary support and wrongly relies on contract interpretation instead of the credited testimony.

2. The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by dealing directly with the off-site material haul drivers is also supported by substantial evidence. The Company met with the drivers about its wage transition proposal and required them to agree to those terms as a condition of continued employment. This conduct eroded the Union's role as those drivers' collective-bargaining representative and was, therefore, unlawful.

Likewise, substantial evidence illustrates that the Company thereafter denied employment to employees who refused to agree to work under the Ready-Mix Agreement. The Company's failure to challenge this finding in its opening brief

waives appellate review. Thus, if the Court concludes that the Company's unilateral changes violated the Act, the Court should summarily affirm this finding.

3. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by dealing directly with sweeper truck drivers Barnum and Crane, unilaterally assigning them the same work that they previously performed in the Construction Unit after joining the Laborers Union, and unilaterally changing their terms and conditions of employment. The Company does not dispute that it instructed Barnum and Crane on how to withdraw from the Union and join the Laborers Union. It also admits that it assigned them sweeper truck work as members of the Laborers Union, without notifying or bargaining with the Union. By treating those drivers as members of the unit covered by the Laborers Agreement, the Company unilaterally changed their terms and conditions of employment, violating the Act. The Company insists that a work jurisdictional dispute between the Union and the Laborers Union protected its conduct, but the Board flatly rejected that claim and the Company has not shown that such a dispute existed.

STANDARD OF REVIEW

The Court's review of Board decisions is "quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Court "must uphold the Board's findings of fact if supported by substantial evidence on the

record as a whole.” *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 306-07 (D.C. Cir. 2003) (internal quotation marks omitted); *see* 29 U.S.C. § 160(e). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will affirm the Board’s interpretation of the Act if it is “reasonably defensible.” *Regal Cinemas, Inc.*, 317 F.3d at 306-07.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING THE SCOPE OF THE BARGAINING UNIT, TRANSFERRING UNIT WORK, AND CHANGING ITS EMPLOYEES’ TERMS AND CONDITIONS OF EMPLOYMENT

A. Introduction

The Company, in an attempt to evade its duty to bargain with the Union, unilaterally removed 59 of those drivers from the Construction Unit to the Ready-Mix Unit, where the affected drivers continued to perform the same tasks but for less pay. The Board reasonably found (A. 7-8) that this change in unit scope was a permissive subject of bargaining and could not be done without the Union’s consent, which the Union did not give. Even characterized as a transfer of unit work, a mandatory bargaining subject, the Board found that the Company’s conduct was unlawful because the Company failed to give the Union the opportunity to bargain over the change and instead presented the Union with a *fait*

accompli, rendering futile any request by the Union to bargain. (A. 8-9.) The Company's conduct caused an unlawful unilateral change in the affected drivers' terms and conditions of employment. (A. 10.) Finally, in effecting the unlawful change, the Company dealt directly with the employees instead of their chosen bargaining representative, and denied employment opportunities to those drivers who refused to work under the terms of the lower-paying Ready-Mix Agreement.

As shown below, the Board properly found (A. 7-8) that the Company's conduct marked an attempt to evade its duty to bargain with the Union and violated the Act. The Company's challenges to the Board's findings disregard the credited evidence and settled law, and in the aggregate, lack merit.

B. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees.”³ The Board, with court approval, recognizes a distinction between mandatory and permissive subjects of bargaining. *See NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). Section 8(d) (29 U.S.C. § 158(d)) requires the parties to meet and bargain over employees' “wages, hours,

³ A violation of Section 8(a)(5) derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights (29 U.S.C. § 157). *See S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6 (D.C. Cir. 2008).

and other terms and conditions of employment,” which are mandatory bargaining subjects. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988). All other lawful subjects are permissive, and parties are not required to bargain over them. *Idaho Statesman*, 836 F.2d at 1400.

With respect to mandatory bargaining subjects, “neither party is legally obligated to yield.” *Borg-Warner Corp.*, 356 U.S. at 349. Absent an agreement, an employer may implement a proposal concerning a mandatory subject only if the parties bargain to impasse. *Raymond F. Kravis Ctr. for the Performing Arts*, 351 NLRB 143, 144 (2007), *enforced*, 550 F.3d 1183 (D.C. Cir. 2008). Regarding permissive bargaining subjects, an employer may not unilaterally implement a proposal, without union or Board approval. *Idaho Statesman*, 836 F.2d at 1400.

It is settled that the scope of an existing bargaining unit is a permissive subject of bargaining. *Idaho Statesman*, 836 F.2d at 1400-01; *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 475 (D.C. Cir. 1988). The reasons why an employer may not force a change in the bargaining unit are “as simple as they are fundamental.” *Boise Cascade Corp.*, 860 F.2d at 475. Indeed, “if it 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*, 836 F.2d at

1400-01. This Court has defined the scope of a bargaining unit as “what employees the unit represents.” *Boise Cascade Corp.*, 860 F.2d at 474. And “the statutory interest in maintaining stability and certainty in bargaining obligations requires adherence to that unit in bargaining.” *Shell Oil Co.*, 194 NLRB 988, 995 (1972), *enforced sub nom. OCAW v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973); *see Boise Cascade Corp.*, 860 F.2d at 475 (“parties cannot bargain meaningfully about . . . conditions of employment unless they know the unit of bargaining”) (quoting *Douds v. Int’l Longshoremen’s Assn.*, 241 F.2d 278, 282 (2d Cir. 1957)).

In contrast, a transfer of unit work is a mandatory subject of bargaining. *Wackenhut Corp.*, 345 NLRB 850, 853 n.8 (2005); *see Regal Cinemas, Inc.*, 317 F.3d at 312 (employer unlawfully transferred unit work by moving work performed by unionized projectionists to managers and assistant managers “to reduce its labor costs”); *Solutia, Inc.*, 357 NLRB No. 15, 2011 WL 2784219, at *1, *11 (2011) (finding unlawful transfer of unit work where employer shifted testing work from one group of employees to smaller group at another lab, and failed to bargain over it), *enforced*, 699 F.3d 50 (1st Cir. 2012). Indeed, the allocation of work is particularly suitable to bargaining, because “[a] change in . . . work assignments will almost always involve factors within the union’s control.” *Geiger Ready-Mix Co. v. NLRB*, 87 F.3d 1363, 1369 (D.C. Cir. 1996).

Though distinguishing between the two subjects can be difficult, “whatever the difficulty, it is clear that an employer may not, ‘under the guise of the transfer of unit work . . . alter the composition of the bargaining unit.’” *Boise Cascade Corp.*, 860 F.2d at 475 (quoting *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 602 F.2d 73, 77-78 (4th Cir. 1979)). The Board has rejected attempts to characterize a change in unit scope as a transfer of work where “[t]he same employees continue to do the work.” *Beverly Enters., Inc.*, 341 NLRB 296, 296 (2004). And “when the bargaining unit is defined with reference to specific jobs,” an employer’s change in the “union’s jurisdictional work will be regarded as an attempt to alter the bargaining unit.” *Idaho Statesman*, 836 F.2d at 1402.

In reviewing the Board’s classification of bargaining subjects as mandatory or permissive, the Court affords the Board’s judgment “considerable deference.” *Regal Cinemas, Inc.*, 317 F.3d at 307, as Congress “made a conscious decision” to delegate to the Board “the primary responsibility of marking out the scope . . . of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see* 29 U.S.C. § 158(d). The Court will affirm the Board’s findings that an employer altered the scope of the unit or transferred unit work, if they are supported by substantial evidence. *Boise Cascade Corp.*, 860 F.2d at 475 (change in unit scope); *Regal Cinemas, Inc.*, 317 F.3d at 306-07 (transfer of unit work).

C. The Company Unlawfully Changed the Scope of the Construction Unit by Unilaterally Moving Off-Site Material Haul Drivers to the Ready-Mix Unit

The Board reasonably found (A. 7-8) that the Company's unilateral transfer of off-site material haul drivers from the Construction Unit to the Ready-Mix Unit altered the scope of the Construction Unit. Because "the move was a permissive subject of bargaining," which the Company "was not privileged to implement in the absence of the Union's consent," the Board properly concluded that the Company evaded the duty to bargain by unilaterally moving those drivers out of the Construction Unit. (A. 8.)

Prior to the move, Construction Unit drivers performed all the Company's off-site material work. (*See* pp. 7-8, 11.) Following the move, the affected 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." (A. 8.) Given that the drivers performed the same work after the transfer as before, the Board reasonably found (A. 7-8) that the Company's transfer marked an impermissible change in unit scope. *See, e.g., Beverly Enters., Inc.*, 341 NLRB at 296 (employer changed scope of unit by moving work performed by unit employees to another part of its business and having same employees perform that work, but as nonunit employees); *Facet Enters., Inc.*, 290 NLRB 152, 159-60 (1988) (employer's

“sham” transfer of unit employee to newly created supervisory position, where that employee continued to perform the same functions, was an unlawful change in unit scope), *enforced in relevant part*, 907 F.2d 963 (10th Cir. 1990).

Moreover, by transferring the off-site material haul drivers and their work to coverage under the Ready-Mix Agreement, the Company removed those specific jobs from the Construction Unit. As the Board observed (A. 7), both the Construction Unit and Ready-Mix Unit “define their respective bargaining units in terms of the constituent job classifications.” (A. 298, 332-33, 359, 385.) As this Court has recognized, “the close correspondence between the composition of the bargaining unit and the specific jobs it performs makes it likely that a change in the unit’s functions will have a concomitant effect on the scope of the unit.” *Idaho Statesman*, 836 F.2d at 1402. Indeed, “once a specific job has been included within the scope of the unit . . . the employer cannot remove or modify the position without first securing the consent of the union.” *Holy Cross Hosp.*, 319 NLRB 1361, 1361 n.2 (1995) (citing *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)); *see Wackenhut Corp.*, 345 NLRB at 852 n.7 (employer unlawfully altered bargaining unit by eliminating sergeant position and its duties from unit, without union’s consent). Given that the Company removed off-site material haul positions, which were specifically included in the Construction Unit, the Board properly found that the Company impermissibly changed the scope of the

Construction Unit. *See, e.g., Mt. Sinai Hosp.*, 331 NLRB 895, 895 n. 2, 907-908 (2000) (employer’s unilateral reclassification of employees modified unit where position was specifically included in unit and employees continued to do same work thereafter), *enforced*, 8 F. App’x 111 (2d Cir. 2001) (unpublished).

Furthermore, as the Board found (A. 8), the Company removed about 60 drivers from the Construction Unit, effectively “sever[ing] their connection” to that unit. *See Hill Rom Co.*, 957 F.2d at 457 (unilateral alterations of unit scope are unlawful because it gives employer “the power to sever the link between a recognizable group of employees and its union as the collective bargaining representative of those employees.”). Because of the Company’s unilateral action, “about 60 drivers no longer bargain collectively with other Construction bargaining unit employees and no longer receive Construction Agreement wages.” (A. 8.) As such, the Company’s movement of off-site material haul drivers out of the Construction Unit obstructed their right to representation and deprived them of the bargained-for terms of the Construction Agreement.

In addition to finding the affected drivers’ connection with their former unit was severed, the Board also properly recognized (A. 8) that, by moving nearly 60 off-site material haulers to the Ready-Mix Unit, the Company “substantially reduced the size (and bargaining power) of [the Construction Unit]” while simultaneously “enlarging the Ready-Mix [] Unit.” Contrary to the Company’s

assertion (Br. 40), it is of no moment that the off-site material haul driver position still exists in the Construction Unit. At the time of the transfer, that unit contained approximately 60 material haul drivers. (A. 16 n.8.) Thus, in transferring almost all of the off-site material haulers out of the Construction Unit, the Company essentially eliminated that position from the unit and significantly diluted that unit's bargaining strength. *See United Tech. Corp.*, 292 NLRB 248, 249 & n.9 (1989), *enforced*, 894 F.2d 1569 (2d Cir. 1989) (employer may not "transfer substantial groups of employees out of the unit"). Indeed, the Board has found that the unilateral transfer of even *one* employee out of a bargaining unit impermissibly changes the scope of the unit. *See Facet Enters., Inc.*, 290 NLRB at 152. Therefore, it follows that the Company's removal of nearly 60 drivers from of the Construction Unit impermissibly altered the scope of that unit.

Accordingly, substantial evidence supports the Board's finding that the Company's movement of the off-site material haul drivers out of the Construction Unit, without the Union's consent, violated Section 8(a)(5) and (1) of the Act.

D. The Company Unlawfully Transferred Unit Work Without Affording the Union Notice and an Opportunity to Bargain Over the Change

The Board properly found that, assuming the move was a transfer of unit work (a mandatory bargaining subject), the Company's unilateral implementation of that change was unlawful because the Company presented the Union with a *fait*

accompli by informing the Union that the move was final and non-negotiable. (A. 8-9.) In doing so, the Company deprived the Union of a meaningful opportunity to bargain; as such, the parties did not bargain to impasse over the change, nor did the Union waive its right to bargain over a matter that the Company deemed non-negotiable. (A. 9.) Therefore, substantial evidence supports the Board’s finding that the Company’s unilateral transfer of off-site material haul work from the Construction Agreement to the Ready-Mix Agreement violated the Act. (A. 8-9 & n.8.)

1. An employer may not present a proposed change to a mandatory subject of bargaining as a *fait accompli*

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing unit employees’ terms and conditions of employment, without bargaining to impasse or affording the union sufficient notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962); *S. Nuclear Operating Co.*, 524 F.3d at 1356. This Court recognizes that “[t]he allocation of work to a bargaining unit is a ‘term and condition of employment’” under the Act and, is therefore, a mandatory bargaining subject. (See pp. 25-26.) *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982); *Regal Cinemas, Inc.*, 317 F.3d at 311. As a result, “an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling [its] statutory duty to bargain.” *Road Sprinkler Fitters*, 676 F.2d at 831.

An employer may not present a proposed change to employees' terms and conditions of employment as a *fait accompli* because, in doing so, it deprives the union of an opportunity to bargain. *Regal Cinemas, Inc.*, 317 F.3d at 314; *Pontiac Osteopathic Hosp.*, 336 NLRB at 1023. The Board will find a *fait accompli* where the employer conveys that it intends to implement the change and considers the change to be final and non-negotiable. *See, e.g., Solutia, Inc.*, 357 NLRB No. 15, 2011 WL 2784219, at *1, 11; *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023-24 (2001). Thus, "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 Ctr.*, 355 NLRB 1156, 1189 (2010). Similarly, "a union is 'not required to go through the motions of requesting bargaining,' [] if it is clear that an employer has made its decision and will not negotiate." *Regal Cinemas, Inc.*, 317 F.3d at 314. This Court will uphold the Board's finding that an employer presented a union with a *fait accompli* if it is "reasonable." *Id.* at 307, 314.

2. The Company presented its plan to transfer unit work as a *fait accompli*

The Board reasonably found that "the parties did not bargain to impasse" over the transfer of unit work and that the Union did not waive its right to bargain over the matter. (A. 8-9.) Instead, substantial evidence shows that the Company had a "fixed intent" to transfer the disputed drivers and their work and, thus,

presented the transfer as a “*fait accompli*,” giving “the Union no opportunity for meaningful bargaining.” (A. 8, italics added.)

The Company repeatedly conveyed “the same unconditional message” to the Union that it would transfer the off-site material haul drivers to coverage under the Ready-Mix Agreement. (A. 9.) The Company first demonstrated its fixed intent on July 9 when Vice President Stewart informed Union Business Agent Dey that the Company was “going to” move the off-site material haul drivers from representation under the Construction Agreement to representation under the Ready-Mix Agreement, not that it was only “considering” doing so. (A. 9 & n.9; A. 67-68.) Then, in an August 13 letter to the Union, Stewart stated that “[m]aterial deliveries for the [C]ompany will be performed by [Union] employees under the rules and regulations of the [Ready-Mix Agreement],” further indicating that the move was inevitable. (A. 9 & n.10; A. 459.) Again demonstrating its resolve, the Company presented the plan to Construction Unit employees on October 1 and, four days later, told the Union that, starting October 11, it would begin performing off-site material haul work under the Ready-Mix Agreement. (A. 6; A. 473-77.) *See Pontiac Osteopathic Hosp.*, 336 NLRB at 1023-24 (where employer sent letter to union stating it intended to implement wage and benefit revisions, effective one month later, employer presented union with *fait accompli*).

The Company claims (Br. 37) that Stewart's statement to Dey that the Company was "going to move" the off-site material haul drivers "did not occur." But Stewart's testimony establishes that he "informed Wayne that [the Company was] going to move [the drivers]." (A. 9 n.9.) When asked a clarifying question as to whether he told Dey that the Company was "*moving* them or [was] *considering* moving them," Stewart responded, "We were going to move them." (A. 9 n.9; A. 67-68.) (Emphasis added.) Thus, the record does not support the Company's contention.

Moreover, the Company steadfastly maintained that it had a right to implement the transfer on its own. On September 27, Stewart sent another letter to the Union, stating that the Ready-Mix Agreement gave the Company "the rights to make such changes." (A. 20; A. 464-65.) The next day, even after the parties agreed to consider possible transition wage rates, the Company told the Union that it would "be exercising its option to procure workers from any source or sources." (A. 6; A. 471.) *See Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993) (finding *fait accompli* where employer announced which unit positions would be transferred, communicated that the decision was "management's right" to implement, and unilaterally implemented it).

The Company also claimed that it did not have to bargain over the change because the parties had discussed and agreed to this change during the 2008

Ready-Mix contract negotiations. (A. 9; A. 83-86, 464-65, SA 26.) But, as the Board noted, the judge “rejected this assertion as a matter of fact.” (A. 9, 22 n.44.) In that vein, the Company’s “repeated assertion of that false statement” to the Union “conveyed an unequivocal message that there would be no further bargaining,” buttressing the Board’s finding that the Company “clearly had no intention of altering its plans.” (A. 9.)

The Company denies (Br. 37, 45) that it had a fixed intent to transfer the disputed drivers, claiming that Stewart merely “hoped” to use off-site material haul drivers for ready-mix work and only “asked the Union if they could find a way to approve such action.” However, that depiction of events contradicts its overarching position (Br. 21, 26-36) that the Ready-Mix Agreement permitted the Company to unilaterally transfer off-site material haul work out of the Construction Unit. It is also at odds with the facts of this case, which depict the Company’s determination to effect the change as soon as possible, regardless of the Union’s consent.

Therefore, the Board reasonably found (A. 8-9) that, by repeatedly stating that it would be moving the off-site material haul drivers and their work, and that it had the right to do so, the Company presented the Union with a *fait accompli*. See *Westinghouse Elec. Corp.*, 313 NLRB at 453.

3. The Company’s presentation of the transfer as a *fait accompli* excused the Union from making a futile request to bargain and prevented the parties from reaching impasse

Given the lack of notice and opportunity to bargain, the Board properly found that “it would have been futile for the Union to have requested bargaining over the matter.” (A. 9.) Indeed, “no specific demand was necessary given that [the Company] had already decided, even before notifying” the Union of its intended changes, that the decision was “not negotiable.” *Solutia, Inc.*, 357 NLRB No. 15, 2011 WL 2784219, at *1, 11; *see Westinghouse Elec. Corp.*, 313 NLRB at 453 (where employer “clearly indicated” that decisions were “solely within management’s discretion and not subject to collective bargaining,” union did not waive right to bargain by failing to request bargaining in two-month period between announcement and implementation of plans). Though the Company maintains that the Union waived its right to bargain because it had sufficient notice of the planned transfer (Br. 44-45), “[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated.” *Regal Cinemas, Inc.*, 317 F.3d at 314. Therefore, the Board properly “excused” the Union’s failure to request bargaining. (A. 9.)

In that vein, the Board also properly found (A. 9) that the parties did not bargain to impasse over the move. The Board has held 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.” *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999), *enforced in relevant part*, 233 F.3d 831 (4th Cir. 2000). Moreover, the record evidence dispels any realistic assertion that the parties could have bargained to impasse, given that the Company initially announced that it would move off-site material haul work to the Ready-Mix Agreement and continually maintained that it was entitled to do so. (A. 9, 22 n.44.) The Company’s suggestion (Br. 45-46) that the parties bargained to impasse because the Company’s wage transition proposal “was rebuffed by the Union without any counter proposal or willingness to negotiate” misses the mark. The Union was not required to convey any “willingness to negotiate” over the transition rates upon being presented with a *fait accompli*. Because a transfer of unit work is a mandatory subject of bargaining, for which adequate notice and an opportunity to bargain was required, the Company was not “privileged to act unilaterally.” (A. 9.)

E. The Company Unilaterally Changed the Affected Drivers’ Terms and Conditions of Employment

Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally changed off-site material haul drivers’ terms and conditions of employment by requiring them to work under the Ready-Mix Agreement. An employer violates its duty to bargain if it unilaterally imposes changes in unit employees’ terms and conditions of employment, without affording the union notice and an opportunity to bargain.

Wayneview Care Ctr., 664 F.3d 341, 347 (D.C. Cir. 2011). “Such unilateral action ‘detracts from the legitimacy of the collective bargaining process by impairing the union’s ability to function effectively, and by giving the impression to members that a union is powerless.’” *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990).

As discussed (pp. 27-31), the Company changed the scope of the Construction Unit by moving the off-site material haul drivers from the Construction Unit to the Ready-Mix Unit, without the Union’s consent. Because a change in unit scope is a permissive subject of bargaining, the Board found that the Union was “under no obligation to bargain over the terms by which that movement might be facilitated.” (A. 10.) Indeed, as the Board explained, “the appropriate forum for renegotiation of the disputed drivers’ wages [would have been] in bargaining for successor agreements to the Construction Agreement,” a lawful option that the Company decidedly bypassed. (A. 10)

Moreover, viewing the change as a transfer of unit work, the Board reasonably found that because the Company presented the transfer as a *fait accompli*, it was not possible for the parties to reach impasse and for the Union to waive its right to bargain over the newly imposed terms and conditions. *See Castle Hill Health Care Ctr.*, 355 NLRB at 1189; *Regal Cinemas, Inc.*, 317 F.3d at 314.

Because the Union never agreed to the change and was not required to bargain over it, the Company's "decision to act unilaterally" was unlawful. (A. 10.)

F. The Company Presents No Viable Defense for Its Unlawful Unilateral Changes

An employer that fails to bargain with the union must show that it was exempted from the duty to bargain. *See Cypress Lawn Cemetery Ass'n*, 300 NLRB 609, 628 (1990) (employer must demonstrate why its refusal to bargain was privileged); *see also Van Dorn Plastic Machinery Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) ("It is an accepted proposition of law that proof on matters which relate to justification for the employer's actions rest with the employer."). The Company's proffered defenses rely on distorted facts, discredited evidence, and immaterial contractual provisions. Thus, while the Company accuses the Board of trying to "massage the facts" (Br. 40) to support its conclusion, it is the Company that seeks to recast the evidence to bolster its claims.

1. The Union never agreed to the transfer of the affected drivers and their work

The Company contends (Br. 36-37) that, during the 2008 negotiations between the Union and SNRM for the Ready-Mix Agreement, the Union agreed to transfer the off-site material haul drivers and their work to coverage under that agreement. However, the Board rejected this assertion "as a matter of fact." (A. 9, 18 n.22, 22 n.44.) As the Board explained, the parties "failed to draft a

memorandum of understanding” as to the transfer of drivers. The Board found this failure quite “telling,” since the parties had previously entered into a written memorandum of understanding when the parties agreed to transfer nine heavy haul drivers from coverage under the Construction Agreement to the Ready-Mix Agreement. (A. 22 n. 44; A. 454.) In fact, Stewart conceded that “other than the [language of the Ready-Mix Agreement], there is nothing” in writing that would have allowed the Company to transfer the off-site material haul drivers and their work. (A. 18 & n.23; A. 113.) As the Board noted (A. 22 n.44), such a document would have memorialized any agreement on the off-site material haulers and enabled the Company to “take advantage of the cost saving,” having already bargained over and reached an agreement.

The Board also reasonably determined that former Union Business Agent Darr “would never have agreed to anything which would have abrogated or diminished the terms of the Construction Agreement.” (A. 22 n.44.) As the judge observed, 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.” (A. 18 n.22.) Thus, the Union made clear to the Company that it could not simply apply the Ready-Mix Agreement to SNP’s off-site material haul drivers because they were never covered by that agreement. Instead, the Company would have to register SNP’s material haul trucks as SNRM trucks, and only then could it request that the

Union dispatch SNP drivers to SNRM to be covered by the Ready-Mix Agreement.

Vice President Stewart's credited testimony confirms the Union's understanding and negates the Company's contention that the parties agreed to transfer the off-site material haulers to coverage under the Ready-Mix Agreement. Stewart testified that he "knew that if SNRM wanted drivers for its [ready-mix] trucks, it was required to seek dispatches from the Union." (A. 18 & n.23.) He also admitted that the parties had only discussed moving "trucks" or "assets" to SNRM, not "people." (A. 224-25). And after corroborating Darr's position that "[the Company] would have to change the name on the door so there was a distinction between SNP trucks and SNRM trucks," and thus between the Construction Unit and Ready-Mix Unit, Stewart conceded that they "discussed that in detail and it wasn't something that [the Company was] willing to do at that point." (A. 18 n. 19; A. 114.)

The Company also misinterprets (Br. 28) Darr's testimony that the Union never intended to stop SNRM from hauling plant mix, as evidence of the Union's consent to the unlawful transfer of the off-site material haul drivers. In explaining the Union's concern that the Company might attempt to pay Ready-Mix wages for Construction Unit work, Darr testified: "[The Company was] allowed to use those trucks just like [other ready-mix companies] . . . it was never our intent to stop that,

but we wanted to make sure that it said SNRM on the door of their transport trucks.” (A. 173.) This testimony fully comports with the judge’s finding (A. 18) that, during negotiations, the Union wanted to ensure that before employees were properly dispatched under the Ready-Mix Agreement, the Company’s trucks were registered to SNRM with SNRM on the doors.

Finally, the Company overemphasizes Darr’s statement that the Union wanted the Ready-Mix Agreement to “mostly, mirror” the Union’s contracts with two other ready-mix companies which permitted those companies to deliver materials to a construction site and pay its material haul drivers the lower ready-mix agreement wages. (Br. 28-31.) First, the Company ignores that Darr, in stating that the Union wanted the Ready-Mix Agreement to be similar to the other agreements, was specifically referring to Appendix A of those agreements, which only lists classifications and base wage rates and does not discuss delivery of materials to construction sites. (A. 173, 179-81, 321-22, 504, 522.) Critically, the Company ignores the judge’s finding that “Darr, in discussing the material haul 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,” not hauls from the Sloan Quarry to construction sites. (A. 22 n.44.) Thus, the Company misreads Darr’s testimony, and the credited evidence undermines its

argument that the Union agreed that Construction Unit drivers could perform off-site material hauls for Ready-Mix Agreement wages.

2. The Board's findings do not require contract interpretation

The Company, citing to various provisions within the Construction Agreement and the Ready Mix Agreement, seeks to twist this case from one resting on the credited testimony into one implicating contract interpretation issues. (Br. 26.) However, the contract clauses on which the Company relies are inapposite to this case, rendering meritless any argument that either collective-bargaining agreement authorized the transfer of the affected drivers and their work.

First, the Company posits (Br. 40-42) that Article 43 of the Construction Agreement, entitled "Supplemental Agreements," enabled the Company to bargain for the Ready-Mix Agreement, which, in turn, allowed it to move the off-site material haul drivers and their work to the Ready-Mix Agreement.⁴ This argument is unavailing. The provision gives commercial sand and gravel employers that are signatories to the Construction Agreement the right to negotiate supplemental agreements for competitive wages prevailing in the rock, sand, and gravel industry.

⁴ Article 43 states: "Supplemental Agreements may be negotiated covering Signatory Employers engaged in commercial sand and gravel operations to allow for competitive wage/fringe amounts prevailing in that industry, special conditions for-hire heavy haul transports, demolition work, landscaping, tankers, and truck repairman trainee." (A. 340.)

(A. 340.) But, as the record makes clear, SNRM was never a signatory to the Construction Agreement, and that agreement became effective before the 2010 merger of Frehner, SNP, and SNRM. Simply put, the Company is not a signatory to the Construction Agreement, so this provision does not apply to it. Thus, the Company's contention (Br. 41) that the Ready-Mix Agreement was a "Supplemental Agreement" to the Construction Agreement is inherently flawed.⁵

Moreover, in relying on Article 43 of the Construction Agreement, the Company also improperly equates (Br. 41-43) its "right to bargain" for more competitive wages with a right to unilaterally implement lower wages. (Emphasis in original.) Even if Article 43 granted a non-signatory employer, such as SNRM or the Company, the right to bargain for competitive wages, the Company's position erroneously presumes that it bargained over moving the affected drivers and paying them lower wages. Therefore, Article 43 does not support the Company's argument (Br. 42) that, by entering into the Construction Agreement, the Union "bargained away any right to contend that such bargaining was

⁵ The Company exaggerates the import (Br. 42) of AGC Director Dana Wiggins's interpretation of Article 43. Wiggins admitted that Article 43 had been in the Construction Agreement long before he began working for the AGC, and that he was unaware of what was discussed in negotiations for that agreement. (A. 271-72.) As such, the Board did not err in declining to give Wiggins's opinion any evidentiary weight.

‘permissive’ or that it could refuse to bargain over efforts” to obtain more competitive wages.⁶

Furthermore, the Company’s argument (Br. 46) that the Ready-Mix Agreement’s “Favored Nations” clause permitted its conduct does not pass muster. As the Company observes (Br. 46), that provision states that, if the Union enters into a collective-bargaining agreement with any other ready-mix employer with which the Company competes, and that agreement contains more favorable terms than the Ready-Mix Agreement, the Company may “adopt the more favorable terms and conditions” of the other collective-bargaining agreement. (A. 383.) However, the Company did not even purport to do what that clause allows. It did not keep the Construction Unit intact and then apply to off-site material haul drivers only those terms and conditions in the Ready-Mix Agreement that were more favorable to the Company. Instead, it unilaterally moved those drivers out of the Construction Unit and into the Ready-Mix Unit, with entirely different terms

⁶ To the extent the Company suggests otherwise (Br. 43-44), the Union’s 2009 request for bargaining and filing of a grievance over the transfer of the nine Sloan Quarry drivers is irrelevant to whether Article 43 protects the Company’s unilateral action. The Union withdrew its grievance after realizing that the previous union administration had bargained over and agreed to transfer the nine drivers, as stated in the 2008 Memorandum of Understanding. Thus, the Union never “acknowledged” (Br. 44) that Article 43 bore any relation to the Company’s unilateral movement of the off-site material haulers to the Ready-Mix Agreement, or that the Ready-Mix Agreement was a “supplemental agreement.”

and conditions of employment. Therefore, the Company's reliance on this contractual provision is misplaced.

In short, substantial evidence supports the Board's findings that the Company unilaterally transferred off-site material haul drivers and their work to coverage under the Ready-Mix Agreement. The Board properly found that, in doing so, the Company unilaterally changed those drivers' terms and conditions of employment by requiring them to work under the Ready-Mix Agreement. The Company's argument that the Union agreed to moving the off-site material haul drivers and their work to the Ready-Mix Unit, citing the 2008 negotiations and various contractual provisions, does not withstand scrutiny.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY DEALING DIRECTLY WITH UNIT EMPLOYEES, AND DENYING EMPLOYMENT TO EMPLOYEES WHO REFUSED TO AGREE TO WORK UNDER UNILATERALLY IMPOSED TERMS

As the Board reasonably found (A. 10), when the Company met with off-site material haul drivers and, thereafter, required them to agree to work under the Ready-Mix Agreement as a condition of continued employment, the Company bypassed the Union and dealt directly with Construction Unit employees. In doing so, the Company also denied employment to those who refused to agree to the newly imposed terms. The Company's claim (Br. 35-36) that the Union consented to the Company's communications with the drivers is wholly unfounded.

A. The Company Bypassed the Union and Dealt Directly With Off-Site Material Haul Drivers

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by dealing directly with union-represented employees without first bargaining with those employees' collective-bargaining representative. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990) (“*Toledo Blade*”). As this Court recognizes, direct dealing is “the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union’s role in the process.” *Toledo Blade*, 907 F.2d at 1224. Indeed, the effect of direct dealing is to “exert a highly divisive force among the members of [a] bargaining unit” and to “give[] the [e]mployer the opportunity to destroy the cohesiveness of the [u]nion’s membership.” *Id.* As such, an employer’s “communications [to employees] themselves can provide a basis for finding an unfair labor practice.” *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134-35 (2d Cir. 1986). The Board will find that an employer’s communication constitutes unlawful direct dealing if it is “likely to erode ‘the Union’s position as exclusive representative.’” *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992) (quoting *Modern Merchandising*, 284 NLRB 1377, 1379 (1987)).

Substantial evidence supports the Board’s finding that the Company dealt directly with the off-site material haulers 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.” (A. 10.) As discussed (pp. 14-15), the Company met with the affected drivers about its proposed transition rates, which it had only presented to the Union the day before. Adding insult to injury, the Company thereafter placed forms in each driver’s mailbox, which required the drivers to consent to the transition rates and terms of the Ready-Mix Agreement in order to continue employment. Fifty-nine drivers agreed. The Company was, therefore, able to “exert a highly divisive force among the members of [a] bargaining unit” and “destroy the cohesiveness of the [u]nion’s membership.” *Toledo Blade*, 907 F.2d at 1224. Thus, the Board properly found (A. 10) that “this conduct, done without the Union’s consent, eroded the Union’s position as collective-bargaining representative, and constituted unlawful direct dealing.” *See, e.g., Dayton Newspapers*, 339 NLRB 650, 653 (2003) (employer’s attempt to obtain waiver directly from drivers in exchange for returning to work constituted direct dealing); *Smith’s Complete Market*, 237 NLRB 1424, 1429, 1435 (1978) (employer’s discussion in employee meeting regarding pension proposal it presented to the union earlier that day constituted direct dealing).

The Company suggests (Br. 35-36) that the Union consented to the Company’s direct dealing because it had prior knowledge of the October 1 meeting

and union representatives attended the meeting. However, that claim overlooks the Board's specific finding that "[t]he union representatives were not there to bargain on behalf of the employees and, indeed, were not even permitted to speak." (A. 10.) At the meeting, Stewart interrupted Dey as he tried to answer employees' questions and instructed him to speak with his members afterwards, demonstrating that the Union had no control over the meeting, let alone the Company's decision to transfer the drivers. Therefore, as the Board found, the union representatives were "relegated to the status of passive observers, further undermining the Union's position" as Construction Unit employees' bargaining representative. (A. 10.) And though the Union "was not interested in bargaining about the transition rates," having been presented with a *fait accompli*, the Union never agreed that the Company "could deal with employees as if the work force had no bargaining representative." (A. 10.) *See Allied Signal, Inc.*, 307 NLRB at 753-54 (union's decision not to bargain over proposed change in smoking policy did not permit employer to directly deal with unit employees).

The Company incorrectly asserts (Br. 35) that the dispatch procedures set forth in Article 3.2 of the Ready-Mix Agreement justified its direct dealing. That section, while permitting dispatch requests, did not authorize the Company to

completely bypass the Union.⁷ Though the provision allows the Company to procure employees “regardless of union affiliation,” the Company ignores that it also requires “that such workers or mechanics shall obtain clearance from the Union before commencing work.” (A. 360.) There was no such clearance here.

Accordingly, the Board properly found that the Company unlawfully bypassed the Union and dealt directly with its Construction Unit employees.

B. The Company Denied Employment to Off-Site Material Haul Drivers

Substantial evidence also supports the Board’s finding that the Company “further violated the Act by denying employment to those employees who refused to agree to the unlawfully imposed terms.” (A. 10.) As part and parcel of its plan to move the off-site material haulers and their work to coverage under the Ready-Mix Agreement, the Company required those drivers to agree to work under the Ready-Mix Agreement as a condition of continued employment. By forcing them to work under terms for which the Union never bargained or risk losing their jobs, the Company presented them with an insufferable ultimatum, denying employment

⁷ Article 3.2 of the Ready-Mix Agreement (A. 360-61) states:

Reasonable advance notice . . . will be given by the Employer to the Union or its agents upon ordering such workers or mechanics. In the event that forty-eight (48) hours after such notice, the Union or its agents shall not furnish such workers, then the Employer may procure workers from any source or sources. Regardless of union affiliation, provided however, that such workers or mechanics shall obtain clearance from the Union before commencing work.

to those who refused to succumb to the Company's economic pressuring.⁸

Therefore, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act.

In its brief to the Court, the Company does not contest this finding. It is settled that a party's failure to raise an issue in the opening brief abandons it. *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (refusing to consider claim because company "made no such argument in its opening brief"); Fed. R. App. P. 28(a)(9)(A) (opening brief must state party's "contentions and the reasons for them"); *see also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues mentioned in opening brief but not argued until reply brief were waived). Accordingly, if the Court upholds the Board's findings regarding the Company's unlawful unilateral changes, discussed above (pp. 27-50), the Court should summarily affirm this uncontested violation. *See N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (granting summary enforcement for uncontested violations).

⁸ The Company misleadingly implies (Br. 27) that the Union and Company initially entered into a "bilateral agreement" for those drivers to work under the Ready-Mix Agreement. However, the Union only "agreed" for the drivers to cease picketing and begin working under the unlawfully imposed terms, pending the resolution of the unfair-labor-practice charge. *See* p. 15.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY DEALING DIRECTLY WITH ITS SWEEPER TRUCK DRIVERS, UNILATERALLY ASSIGNING SWEEPER TRUCK WORK TO DRIVERS REPRESENTED BY ANOTHER UNION, AND UNILATERALLY CHANGING THOSE DRIVERS’ TERMS AND CONDITIONS OF EMPLOYMENT

The facts concerning the Company’s dealings with mechanical sweeper truck drivers Barnum and Crane are undisputed. (A. 27.) Amidst the Company’s overarching plan to pay Construction Unit employees lower wages for the same work—as evidenced by its numerous unlawful changes regarding the off-site material haul drivers and their work—the Company bypassed the Union again, this time dealing directly with Construction Unit employees Barnum and Crane to help them withdraw from the Union. Ultimately, following the Company’s interference, the sweeper drivers performed “the same sweeper work utilizing the same equipment,” but were part of the Laborers Union and covered by the Laborers Agreement. (A. 27.) The Company admits (Br. 47) that it assigned those drivers the same duties they previously performed under the Construction Agreement, after they changed their union affiliations, and that it did so without giving the Union notice or an opportunity to bargain over the change. (A. 27; A. 158, SA 22.) On these uncontested facts, the Board reasonably found (A. 5 n.3, 27) that the Company violated the Act.

A. The Company Unlawfully Bypassed the Union and Dealt Directly With Employees Barnum and Crane

As explained (pp. 47-48), an employer may not communicate directly with represented employees regarding their terms and conditions of employment if its conduct is likely to diminish “the Union’s position as exclusive representative.” *Allied Signal, Inc.*, 307 NLRB at 753 (citation omitted) (internal quotation marks omitted). Here, the Company did exactly that. In fact, the Company “facilitated [Barnum’s and Crane’s] membership in the [Laborers Union]” “for the purpose of changing their terms and conditions of employment.” (A. 27-28.) After Barnum approached Trucking Operations Manager Kuck, and asked if he and Crane could join another union while performing their same duties, Kuck instructed them on how to be re-dispatched to the Company. *See Spector Freight Sys.*, 260 NLRB 86, 94 (1982) (employer must bargain solely with its employees’ bargaining agent “even if the employees themselves initiate direct dealings with the employer”). It is undisputed that Kuck never contacted the Union about that conversation or about moving those drivers to another unit in another union.

Because “there can be no doubt that any change in the employees’ bargaining representative would directly impact their terms and conditions of employment,” the Board properly found that the Company was required to notify the Union, and “Kuck and, later, Stewart clearly were aware of this.” (A. 28.) *See Latex Indus.*, 252 NLRB 855, 858 (1980) (union has statutory right to be consulted

about changes in employees' terms and conditions of employment). The Company's failure to do so—and its direct dealing with the employees—violated the Act.

B. The Company Unilaterally Assigned Work Previously Performed by Construction Unit Employees to Drivers Represented by the Laborers Union and Changed the Employees' Terms and Conditions of Employment

A transfer of unit work out of the bargaining unit constitutes a mandatory subject of bargaining. *Wackenhut Corp.*, 345 NLRB at 853 n.8. An employer violates Section 8(a)(5) and (1) of the Act by unilaterally assigning unit work to employees outside of the unit, while the job duties and functions remain essentially the same, without giving the union notice or an opportunity to bargain. *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993). Here, the Company assigned Construction Unit work to Barnum and Crane after they joined the Laborers, “admittedly without first giving notice to the [Union].” (Br. 47.) Thus, the Board reasonably found (A. 5 n.1, 11-12, 27) that the Company unilaterally assigned Barnum and Crane the same work they had previously done as Construction Unit employees, except now they were represented by the Laborers Union and covered by the terms of the Laborers Agreement.

The Board also reasonably found (A. 5 n.3, 11-12) that the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally changed Barnum's and Crane's terms and conditions of employment by “treating them as members of

the Laborers' bargaining unit." (A. 5 n.1.) *See Wayneview Care Ctr.*, 664 F.3d at 347. In moving those drivers and their work from the Construction Unit to a unit represented by the Laborers Union, without notifying or bargaining with the Union, the Company impermissibly "recogniz[ed] the Laborers as [those employees'] representative for purposes of collective bargaining." (A. 28 n.56.) Consequently, those employees no longer bargain collectively with other Construction Unit employees, though their duties remain the same. Given the Company's unilateral assignment of work and its failure to notify or bargain with the Union, the Board properly found that the Company's unilateral change in its sweeper truck drivers' terms and conditions of employment was unlawful. *See LTD Ceramics, Inc.*, 341 NLRB 86, 87 (2004) (once employer knew that union did not agree to its proposal, but failed to rescind policy and engage in "unconditional bargaining," employer acted in derogation of duty to bargain).

C. The Board Properly Rejected the Company's Claim of a Work Jurisdictional Dispute

As discussed, the Company does not dispute that it assigned sweeper truck duties to the Laborers' bargaining unit without notifying the Union and giving it an opportunity to bargain. The Company primarily maintains (Br. 46-49) that a jurisdictional dispute over the sweeper truck work exists between the Union and the Laborers Union, which insulates it from any liability. However, there is no evidence of such a dispute, and the judge plainly dismissed that claim. (A. 27.)

This Court has explained that “the quintessential jurisdictional dispute involves a conflict ‘between rival groups of employee[s]’ where ‘the employer ordinarily stands aloof,’ with no particular interest in the outcome.” *Int’l Longshoremen’s and Warehousemen’s Union, Local 14 v. NLRB*, 85 F.3d 646, 652 (D.C. Cir. 1996) (quoting *Int’l Longshoremen’s and Warehousemen’s Union, Local 62-B v. NLRB*, 781 F.2d 919, 923-24 (D.C. Cir. 1986) (“*Alaska Timber*”)). Here, there was no conflict between rival groups of employees. Instead, the Company, without consulting the Union, transferred two employees to the Laborers Union and reassigned those employees the same work they had performed as members of the Union. Thus, “the dispute was entirely of the Company’s making, and [it] was not neutral in the dispute.” *Alaska Timber*, 781 F.2d at 925; see *Highway Truckdrivers & Helpers, Local 107 (Safeway Stores)*, 134 NLRB 1320, 1322-23 (1961) (no jurisdictional dispute when employer reassigned work from union drivers, who had performed the work for over ten years, to members of other unions).

In rejecting the Company’s claim of a jurisdictional dispute, the judge properly credited Kuck’s denial “that the Laborers have ever demanded that its members perform [the Company’s] sweeper driver job duties or claimed said work for its members.” (A. 27.) As the judge noted (A. 27), Kuck “is the [Company’s] transportation manager and obviously in a position to have such knowledge.” The

Company challenges (Br. 48) the judge's crediting of Kuck over Stewart on this point, but it has not shown why this credibility determination should be overturned. *See Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998) (citations omitted) (this Court will defer to administrative law judge's credibility determinations, unless they are "hopelessly incredible" or "patently insupportable"); *see also Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (attacks on credibility findings "almost never worth making"). Though the Company highlights (Br. 47) that the Laborers Agreement also includes a sweeper truck classification, that fact fails to illustrate the existence of a jurisdictional dispute, let alone one between the Union and the Laborers Union. Given the credited testimony and the lack of any evidence, the Board properly dismissed the Company's attempt to fabricate a jurisdictional dispute.

The Company's cited cases (Br. 47-49) do not aid its argument because those cases involve valid jurisdictional disputes. The Company cites *J.L. Allen Co.*, 199 NLRB 675 (1972), for the general proposition that a jurisdictional dispute between two unions insulates an employer's conduct from Section 8(a)(5). With no such dispute here, that principle is inapposite to this case. Similarly, *AMS Construction, Inc.*, 356 NLRB No. 57, 2010 WL 5387527, at *2-4 (2010), lends no support to the Company's claim. In that case, two unions made competing claims for the same work, with one union filing a grievance and the other threatening a

work stoppage. No such evidence is present in this case. Instead, the only evidence proffered regarding a work dispute is Stewart's self-serving testimony, which the judge properly rejected. Thus, the Company cannot escape liability for its unlawful actions by conjuring up a fictitious work dispute.

Accordingly, substantial evidence supports the Board's finding that the Company unilaterally assigned mechanical sweeper truck driving work to drivers who are now represented by the Laborers Union, when that work had previously been performed by the Construction Unit employees.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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June 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AGGREGATE INDUSTRIES)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1252, 14-1276
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-23220
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,439 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 12th day of June, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of June, 2015

ADDENDUM OF STATUTES AND RULES

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

. . . .

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any

United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Federal Rules of Appellate Procedure are as follows:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

.....

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)

.....