

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25

SPEEDWAY REDIMIX, INC. AND SPEEDWAY  
CONSTRUCTION PRODUCTS CORP., AS A  
SINGLE EMPLOYER

And

Cases 25-CA-176012  
25-CA-176052

CHAUFFEURS, TEAMSTERS AND HELPERS  
LOCAL UNION NO. 414, A/W THE  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE

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Counsel for the General Counsel respectfully submits this brief to the Administrative Law Judge in support of the General Counsel's position. For the reasons set forth below, the General Counsel asserts Speedway RediMix, Inc. ("Respondent Speedway RediMix, Inc.") and Speedway Construction Products Corp., ("Respondent Speedway Construction Products Corp.") violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), as a single employer under the Act, by unlawfully insisting to impasse over permissive subjects of bargaining by its proposals to modify Articles 1, 2, and 3 of the collective-bargaining agreement.

I. STATEMENT OF THE CASE

At the hearing on April 26, 2016, all parties agreed to a set of stipulated facts contained in Joint Exhibit 1 A-N<sup>1</sup>. Since at least January 2015, Respondent Speedway RediMix, Inc. has been a corporation with an office and place of business in Fort Wayne, Indiana ("Speedway RediMix, Inc. facility") located on 4820 Industrial Road, and has been engaged in the business of

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<sup>1</sup> The parties did not agree to the stipulation of Joint Exhibit 1(C); therefore, it is not included in the joint exhibit but was entered as G.C. Exhibit 3.

supplying and delivering ready mix concrete. Similarly, since at least January 2015, Respondent Speedway Construction Products Corp. has been a corporation with an office and place of business in Fort Wayne, Indiana (“Speedway Construction Products Corp. facility”) also located on 4820 Industrial Road, and has been engaged in the business of supplying and delivering ready mix concrete and other construction products. The parties stipulated and Your Honor found that since April 19, 2016, Respondent Speedway RediMix, Inc. and Respondent Speedway Construction Products Corp. (collectively referred to as Respondent) is a single employer. (TR 42; Joint Exhibit 1)

Since about at least 2000, Respondent Speedway RediMix, Inc. has recognized the Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w the International Brotherhood of Teamsters (“Union”) as the exclusive collective-bargaining representative of the following bargaining unit (“ the Unit”):

The Employer agrees to recognize, and does hereby recognize the Union, its agents, representatives, or successors, as the exclusive bargaining agency for all ready mix truck drivers of the Employer performing work out of permanent or portable plants in the following counties: Allen, Steuben, DeKalb, Noble, Whitley, Huntington, Adams, Wells and Wabash.<sup>2</sup>

This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 1, 2013 through March 31, 2016.

The chronology and facts regarding the negotiation of the 2016 successive collective-bargaining agreement are not in dispute. The parties stipulated to most of the facts and the remaining facts were largely undisputed. (Joint Exhibit 1 (A-N)) Geoffrey Lohman was retained as an attorney to represent the Union during the 2016 negotiations for a successive collective-bargaining agreement. William Hopkins and Adam Bartrom were retained as attorneys to

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<sup>2</sup> With the exception of Wabash County which was removed for jurisdictional reasons unrelated to this matter. (TR 70; Joint Exhibit 1(N))

represent Respondent Speedway RediMix, Inc. during the 2016 negotiations for a successive collective-bargaining agreement. (Joint Exhibit 1). The parties stipulated that Hopkins and Bartrom are 2(13) agents under the Act. (TR 36-42) As well, the facts establish that Lohman is a 2(13) agent of the Union under the Act.

On January 21, 2016, the Union via George Gerdes, the secretary-treasurer, sent Respondent Speedway RediMix, Inc. via Brian Ray, President, a 60-day notice requesting negotiations for a successive collective-bargaining agreement. (TR 67; Joint Exhibit (B)) The parties stipulated that since at least 2016, Brian Ray held the position of President of Speedway RediMix, Inc. and since 2016, Brian Ray has been a supervisor of Speedway RediMix, Inc. within the meaning of 2(11) of the Act. (Joint Exhibit 1) On February 18, 2016, Gerdes had a letter delivered to Ray proposing negotiation dates. (G.C. Exhibit 3). On about March 2, 2016, Ray sent Gerdes a letter in response to his February 18<sup>th</sup> letter. (Joint Exhibit 1 (D))

At some point, the Union and Respondent Speedway RediMix, Inc. agreed to conduct bargaining sessions at the Union's union hall. The parties did not agree to any bargaining guidelines or rules. The bargaining sessions were held on the following dates:

March 10, 2016;  
March 22, 2016;  
March 24, 2016;  
March 29, 2016;  
March 31, 2016;  
April 14, 2016; and  
April 19, 2016.

(Joint Exhibit 1)

On April 19, 2016, Hopkins, Bartrom and Ray were present at the bargaining session for Respondent; Lohman, Gerdes, Yates, Vanover, Roberts, and Faucett were present at the bargaining session for the Union. (Joint Exhibit 1) The parties stipulated that on April 19, 2016,

Respondent and the Union agreed to all the language for a successive contract, with the exception of Respondent's proposals made on April 19, 2016, to Article 1, Section 1.01; Article 2, Section 2.02; and Article 3, Section 3.01. (TR 72; Joint Exhibit 1) The record demonstrates that Lohman accurately reflected the terms of the agreement in a document he created in March 2017. (TR 74; G.C. Exhibit 5)

At the April 19, 2016 bargaining session, Respondent proposed the following modifications to Article 1 Section 1:01, Article 2 Section 2:02, and Article 3 Section 3:01 (proposed deletions and additions in strikethrough and boldface, respectively)(Joint Exhibit 1 (M)) respectively:

Article 1: Purpose

1:01 It is the intent and purpose of the parties hereto that this Agreement will promote and improve the industrial and economic relationship between the [sic] ~~Employer~~ **Speedway Redimix, Inc.** and its employees and set forth herein the basic agreement covering the rates of pay, hours of work, and conditions of employment to be observed between the parties hereto during the life of this Agreement. This Agreement covers only the operation of ready mix trucks ~~owned by~~ **operated by** Speedway **Redimix, Inc.** and such other duties as assigned, from time to time, by ~~the Employer~~ **Speedway Redimix, Inc.** All members of Local No. 414 agree to further the interests of the [sic] ~~Employer~~ **Speedway Redimix, Inc.** at all times. **“Employer” as used in this Agreement shall mean Speedway Redimix, Inc. and no other organization or entity whether owned by individuals related to the owners of Speedway Redimix, Inc. or not.**

Article 2: Transfer of Employer, Title or Interest

2:02 The Employer agrees that it will not rent, lease, sublease, or sell equipment to any firm, corporation, partnership or individual to defeat the provisions and terms of this Agreement. **This provision shall not prohibit either Employer or corporations owned by individuals related to the owners of the Employer to continue to operate ready mix trucks as they did prior to March, 2015.**

Article 3: Recognition

3:01 The Employer agrees to recognize, and does hereby recognize the Union, its agents, representatives, or successors, as the exclusive bargaining agency for all ready mix truck drivers of the Employer performing work out of permanent or portable plants in the following counties: Allen, Steuben, DeKalb, Noble, Whitley, Huntingdon, Adams, and Wells. Wages, hours and working conditions shall be maintained and paid according to this contract. **The parties recognize that, in the past, other ready mix companies in the area have loaded out of the same plants as the Employer including Brim Concrete, E&B Paving, Inc., Speedway Construction Products Corporation, Victory Trucking & Supply, Inc., CCI and others. Such loading will continue hereafter and shall not be considered a violation of this Agreement.** (emphasis added)

The Union opposed the proposed modifications to Articles 1, 2, and 3 set forth above and informed Respondent that these last-minute proposals were permissive subjects of bargaining. Lohman also informed Respondent that if it withdrew the proposals pertaining to Articles 1, 2, and 3 that they would have an agreement. Respondent refused to withdraw them, so the bargaining session ended. (TR77) On the following day, April 20<sup>th</sup>, Respondent e-mailed the Union and stated its position contending that the proposals were mandatory subjects of bargaining, and were offered in an effort to “avoid future misunderstandings” and address the Union’s concerns over work transfers and the scope of the work performed by the unit. In Respondent’s email, it also requested that the parties meet again to discuss the proposals. On May 3<sup>rd</sup> the Union via Lohman replied, reiterating its belief that the proposals were permissive, and declined to meet and bargain over those proposals. (Joint Exhibit 1 (N)) Lohman stated, in part, the following:

Our position is that these proposals strike at the heart of who Local 414 represents – ready mix truck drivers of the Employer performing work out of permanent and portable plants in the counties identified in the CBA (except Wabash County, which all parties recognize are represented by Teamsters Local 135). Speedway is attempting to preclude Local 414 from asserting that ready-mix truck drivers employed by Speedway Construction Products are also within the scope of the recognition clause because Speedway Construction Products and Speedway Redi-

Mix are a single employer. For instance, your proposed change to Section 3.01 indicates that it “shall not be considered a violation of this Agreement” for Speedway Construction Products Corporation to “load out of the same plants” as Speedway Redi-Mix. The proposed change to Section 1.01 would define the Employer as Speedway Redi-Mix, Inc., and preclude any argument that any other organization (including Speedway Construction Products Corp.) is a single employer and that Local 414’s recognition clause covers ready-mix drivers of such an entity. The proposed changes to Section 2.02 expressly prohibits a finding that the CBA is violated if any other “corporation owned by individuals related to the owners of the Employer continue to operate ready mix trucks as they did prior to March, 2015.

As of April 19, 2016, the parties have not engaged in further bargaining sessions.

## II. ARGUMENT

### **Respondent Unlawfully Insisted To Impasse Over Permissive Subjects Of Bargaining**

Respondent’s proposed language changes on April 19<sup>th</sup> to Articles 1, 2, and 3, specifically when taken together, constituted a change in unit scope that was a permissive subject of bargaining to which Respondent clearly insisted to impasse in violation of the Act.

Respondent may characterize these proposals as dealing with work assignments; however, Respondent’s proposed language grants the Respondent the unfettered right to determine who is in the bargaining unit.

It is well-established that “[u]nit scope is not a mandatory bargaining subject.” *Bozzuto’s, Inc.*, 277 NLRB 977, 977 (1985). Thus, a party may propose to bargain over the scope of the unit, but may not insist to impasse on that subject. *See Id.*; *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985). In *Antelope Valley Press*, 311 NLRB 459 (1993), the Board developed a two-step test to determine whether an employer’s work-assignment proposal is a mandatory or permissive subject of bargaining. *Id.* at 461. First, if the employer’s proposal changes the unit description, it is a permissive subject. *Id.* Second, even if the employer’s work-assignment proposal does not purport to change the description of the unit, it is a permissive

subject of bargaining if it would “deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit.” *Id.* The Board noted that, depending on the circumstances, “such a contention could be raised [by the union] in a unit clarification proceeding or in an 8(a)(5) context.” *Id.* at 461 n.8. The Board has characterized the *Antelope Valley Press* test as attempting to determine whether an employer’s proposal targets “*who* the Union represent[s] [] rather [than] *what work* the employees perform[.]” *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993) (emphasis in original).

In *Taylor Warehouse Corp.*, the Board determined that an employer unlawfully insisted to impasse over a unit scope proposal because it was a permissive subject of bargaining under the second prong of the *Antelope Valley Press* test. *Taylor Warehouse Corp.*, 314 NLRB 516, 516-17, 527-28 (1994), *enforced*, 98 F.3d 892 (6th Cir. 1996). There, two groups of employees (one union and one non-union) had worked at the same warehouse side-by-side for two entities that constituted a single employer. *Id.* at 518, n. 2 & 519-20. Over time, the employer increasingly assigned bargaining unit work to the non-union employees. *Id.* at 524. While negotiating for a successor agreement, the employer proposed a clause that defined the unit as all employees performing certain warehouse work at the facility, but which also stated that “employees of Taylor Distributing [the non-union entity], which also rents space from...Sharon Road Property” would be excluded from coverage under the contract. *Id.* at 523. The ALJ—affirmed by the Board—concluded that while the clause did not alter the unit description itself, such language would have nevertheless legitimized the transfer of work to employees outside of the bargaining unit while preventing the union from arguing that employees of the non-union entity should be properly included in the unit and, as such, was an “overt exercise in unit exclusion.” *Id.* at 527-28.

In the instant cases, Respondent's proposals do exactly the same as what occurred in *Taylor Warehouse Corp* and thus as in that case Respondent's insisted to impasse over permissive subjects of bargaining. Applying the first prong of the *Antelope Valley Press* test, the Respondent's proposals do not attempt to alter the unit description itself. However, the Respondent's proposals run afoul of the second prong of *Antelope Valley Press* because they would prevent the Union from contending that other non-Union drivers for Respondent who deliver ready-mix concrete should be included in the bargaining unit.

As in *Taylor Warehouse Corp*, two groups of Respondent employees are performing similar work at the same locations for separate entities that are in reality a single employer. It is factual that a major source of tension at the Respondent's Fort Wayne facility has been which company the Respondent drivers work for, and which union the Respondent drivers are represented by, as demonstrated by the 2015 Board settlement agreement concerning the Employer's unlawful attempt to induce its drivers to move to Respondent Speedway Construction Products Corp. (R Exhibit 3) However, Respondent's contention that it was attempting to resolve the work transfer issue through its last minute proposals is irrelevant because the language on its face violates the second prong of the *Antelope Valley Press* test. Moreover, nothing in the 2015 settlement required the language proposed by Respondent during the parties most recent bargaining sessions for a successive collective-bargaining agreement.

Notably, the Board applied the *Antelope Valley Press* test in *WCCO-TV* and found that the employer there had not unlawfully insisted to impasse because its work-assignment proposal was a mandatory subject of bargaining. *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (May 29, 2015). It is well-established that the assignment of work is a mandatory subject of bargaining; accordingly, a party may insist to impasse upon the inclusion in a collective-bargaining

agreement of a proposal dealing with assignment of work. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting unit work is a mandatory subject of bargaining). The instant cases are distinguishable from *WCCO-TV* because Respondent's proposed language is not an assignment of work proposal. Secondly, in *WCCO-TV*, the Board, in part, concluded that nothing in the employer's proposal precluded the union from challenging the unit placement of the employees represented by the other union through "any...avenue lawfully available to it," e.g., an unfair labor practice proceeding, a unit clarification proceeding, or a contractual grievance-arbitration procedure. *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (May 29, 2015). In contrast, the language proposed by Respondent clearly deprives the Union of its right to contend that other non-unit drivers for Respondent who deliver ready-mix concrete should be included in the bargaining unit.

The totality of the Respondent's proposals, including identifying the Respondent Speedway RediMix, Inc. as the only entity covered by the contract and specifically allowing other companies—including Respondent Speedway Construction Products Corp.—to continue operating in the same manner without violating the contract, would contractually enshrine the Respondent's right to use non-Union drivers to perform unit work while depriving the Union of the right to argue that those non-Union drivers are in the unit. As such, these proposals aim to clarify *who* is in the bargaining unit, rather than grant the Respondent authority to decide *what work* employees perform, and are thus an "overt exercise in unit exclusion" essentially identical to the employer's proposals in *Taylor Warehouse*. *Taylor Warehouse Corp.*, 314 NLRB at 527-28; *Batavia Newspapers Corp.*, 311 NLRB at 480. In sum, the evidence demonstrates that on April 19<sup>th</sup>, the parties had reached agreement on all aspects of a successive collective-bargaining agreement. Then Respondent insisted to impasse on last minute proposals to Articles 1, 2, and 3

that amounted to an “overt exercise in unit exclusion” which was a permissive subject of bargaining.

III. CONCLUSION

For the foregoing reasons, and based upon the records as a whole, the General Counsel respectfully requests a finding that Respondent Speedway RediMix, Inc. and Respondent Speedway Construction Products Corp., as a single employer within the meaning of the Act, violated Sections 8(a)(1) and (5) of the Act by insisting to impasse over bargaining proposals that were permissive subjects of bargaining. The Administrative Law Judge should find and recommend the Board fashion an appropriate remedy requiring Respondents to post an appropriate Notice to Employees, to sign and execute a successive collective-bargaining agreement based on the agreed upon terms by Respondent and the Union (G.C. Exhibit 5), and to order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

DATED at Indianapolis, Indiana, this 23<sup>rd</sup> day of June 2017.

Respectfully submitted,



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PROPOSED NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** fail or refuse to bargain in good faith with the Chauffeurs, Teamsters and Helpers, Local Union No. 414, a/w the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All ready mix truck drivers of the Employer performing work out of permanent or portable plants in the following counties:  
Allen, Steuben, DeKalb, Noble, Whitley, Huntington, Adams, and Wells

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL NOT** fail or refuse to bargain in good faith with the Chauffeurs, Teamsters and Helpers, Local Union No. 414, a/w the International Brotherhood of Teamsters by insisting to impasse on changing the scope of the bargaining unit as a condition for a successive collective-bargaining agreement.

**WE WILL** sign a contract containing all of the terms and conditions agreed to on April 19, 2016, and **WE WILL** give the contract retroactive effect from April 19, 2016, until March 31, 2019, and **WE WILL** make unit employees whole for any loss of earnings and other benefits, with interest.

**SPEEDWAY REDI-MIX, INC, and SPEEDWAY  
CONSTRUCTION PRODUCTS CORP., as a Single  
Employer**

## PROPOSED CONCLUSIONS OF LAW

1. The Respondents, Speedway RediMix, Inc. and Speedway Construction Products Corp., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondents, Speedway RediMix, Inc. and Speedway Construction Products Corp., constitute a single employer within the meaning of the Act.
3. The Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.
4. The Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w the International Brotherhood of Teamsters is the exclusive representative in the following appropriate unit within the meaning of Section 9(a) and (b) of the Act:

All ready mix truck drivers of the Employer performing work out of permanent or portable plants in the following counties:  
Allen, Steuben, DeKalb, Noble, Whitley, Huntington, Adams, and Wells

5. The Respondent violated Sections 8(a)(1) and (5) of the Act by unlawfully insisting to impasse over permissive subjects of bargaining by its proposals to modify Articles 1, 2, and 3 of the collective-bargaining agreement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge has been filed electronically with the Division of Judges through the Board's E-Filing System this 23<sup>rd</sup> day of June 2017. Copies of the filing are being served upon the following persons by electronic mail:

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