

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: December 12, 2016

TO: Patricia K. Nachand, Regional Director  
Region 25

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Teamsters Local 414 (Speedway Redimix, Inc.), 530-6033-7008  
Speedway Redi-Mix, Inc., and Speedway 530-6050-0140  
Construction Products Corp., as a Single 530-6050-0800  
Employer, and Speedway Construction Products  
Cases 25-CB-175570, 25-CA-176012, 25-CA-  
176052, & 25-CA-181780

This case was submitted for advice as to whether Speedway Redi-Mix, Inc. (the “Employer”) insisted to impasse over bargaining proposals that were permissive subjects of bargaining under *Antelope Valley Press*.<sup>1</sup> We conclude that the proposals were permissive subjects and that the Employer’s insistence to impasse over the proposals therefore violated Section 8(a)(5). The Region also asks whether Speedway Construction, a related entity, violated Section 8(a)(3) by refusing to hire eight of the Employer’s drivers. We conclude that Speedway Construction did not violate Section 8(a)(3) and the Region should dismiss that allegation, absent withdrawal.

### FACTS

The Employer produces and delivers ready mix concrete in Northeast Indiana. The Chauffeurs, Teamsters, & Helpers, Local Union 414 (the “Union”) represents approximately 30 drivers employed by the Employer. Eight of those drivers are employed at its Fort Wayne, Indiana facility, while the remaining 22 drivers work out of various ready mix plants in eight adjacent Indiana counties. The most recent collective-bargaining agreement between the Employer and the Union was effective from May 1, 2013 to March 31, 2016.

Speedway Construction also produces and delivers concrete, but additionally produces and delivers a variety of other goods and services, including landscape materials, building supplies, and other construction-related products. Speedway

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<sup>1</sup> 311 NLRB 459 (1993).

Construction employs approximately 29 drivers, all of whom are represented by the International Association of Machinists, District Lodge 90, Local Lodge 2569 (the “Machinists”). All 29 Speedway Construction drivers work out of the same Fort Wayne facility as the Employer’s eight drivers. In addition to operating out of the same facility, Speedway Construction and the Employer share much of the same operational and managerial structure, and have the same logo. The Region has determined that Speedway Construction and the Employer are a single employer.

On March 20, 2015, the Union filed unfair labor practice charges against the Employer and Speedway Construction alleging that the two entities, as a single employer, had violated Section 8(a)(1), (2), (3), and (5) by threatening to close the Fort Wayne facility if the Employer’s eight drivers working at the facility did not withdraw their membership in the Union and change their employment to Speedway Construction.<sup>2</sup> The Region found merit to the charges, and the parties reached an informal settlement agreement on October 5, 2015. The settlement agreement required the Employer to make the drivers whole, apply the Union’s collective-bargaining agreement to the drivers rather than the Machinists’ contract, resume assigning work to the Employer drivers, and bargain in good faith with the Union as the exclusive bargaining representative of the Employer’s drivers. The Union additionally filed a grievance on March 31, 2015, alleging that since March 16, 2015, the Employer has been unlawfully transferring bargaining unit work from the collective-bargaining unit represented by the Union to non-unit employees of “another entity controlled by the owners of the [Employer],” i.e., Speedway Construction’s employees. That grievance is still pending and the parties are in the process of selecting an arbitrator.

The Union and the Employer began bargaining for a successor collective-bargaining agreement on March 10, 2016.<sup>3</sup> The parties met five times between March 10 and March 31 and, although they made progress in negotiations, the Union expressed its opinion that the Employer had been violating the parties’ contract by its operation of Speedway Construction, and that all delivery of ready-mix concrete from the Fort Wayne facility should fall under the Union’s jurisdiction. The Union also indicated that it intended to use the pending March 2015 grievance to attempt to resolve this issue.

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<sup>2</sup> Cases 25-CA-148537, 25-CA-153195, & 25-CA-153204. Those eight drivers had, in fact, withdrawn their membership from the Union and been hired by Speedway Construction.

<sup>3</sup> All remaining dates are in 2016, unless otherwise noted.

On April 12, the same eight Employer drivers who in March 2015 had been unlawfully coerced into transferring their employment to Speedway Construction, again submitted employment applications to work for Speedway Construction.

The parties met two additional times, on April 12 and 19, and largely reached agreement on a successor contract. At the parties' final bargaining session on April 19, however, the Employer introduced new additions to the contract that would protect its ability to use nonunit employees to do unit work, i.e., through Speedway Construction. The Employer's proposed deletions and additions are listed below, in strikethrough and boldface, 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 are 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 informed the Employer that these last-minute proposals were permissive subjects of bargaining which altered the scope of the bargaining unit and refused to agree to them. On the following day, April 20, the Employer e-mailed the Union and stated its position 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. The Employer also requested that the parties meet again to discuss the proposals. On May 3 the Union replied, reiterating its belief that the proposals altered the scope of the bargaining unit and were therefore permissive, and declining to meet and bargain.

On May 4, the Employer filed an unfair labor practice charge against the Union alleging that the Union had unlawfully refused to meet and bargain in violation of Section 8(b)(3). On May 6, the Union filed unfair labor practice charges against the Employer and Speedway Construction alleging that both parties as a single employer had unlawfully insisted to impasse over permissive subjects of bargaining.

At some point in early May, Speedway Construction sent letters to the eight Employer drivers declining their applications for employment. The letters explained that, although the drivers were qualified for employment with Speedway Construction, it wished to avoid any action that could be construed as violating the settlement agreement it entered into in October 2015. On August 9, one of the drivers filed unfair labor practice charges alleging that—at the request of the Union—Speedway Construction had unlawfully refused to hire the eight applicants. Unlike in 2015, there is no evidence that the eight applicants were unlawfully coerced into submitting their applications in 2016.

#### ACTION

We conclude that the Employer unlawfully insisted to impasse over its proposals to change Articles 1, 2, and 3, as the proposals were permissive subjects of bargaining, under *Antelope Valley Press*, because they would prevent the Union from asserting its status as the collective-bargaining representative for work performed under its

jurisdiction. We also conclude that Speedway Construction lawfully refused to hire the Employer's eight drivers in 2016.

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.<sup>4</sup> It is equally well-established that “[u]nit scope is not a mandatory bargaining subject.”<sup>5</sup> Thus, a party may propose to bargain over the scope of the unit, but may not insist to impasse on that subject.<sup>6</sup>

In *Antelope Valley Press*, the Board developed a two-step test to determine whether an employer's work-assignment proposal is a mandatory or permissive subject of bargaining.<sup>7</sup> First, if the employer's proposal changes the unit description, it is a permissive subject.<sup>8</sup> 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.”<sup>9</sup> The Board has characterized the *Antelope Valley* test as attempting to determine whether an employer's proposal targets “*who* the Union represent[s] [] rather [than] *what work* the employees perform[].”<sup>10</sup>

The Board recently applied the *Antelope Valley* test in *WCCO-TV* and found that the employer there had not unlawfully insisted to impasse because its work-

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<sup>4</sup> *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting unit work is a mandatory subject of bargaining).

<sup>5</sup> *Bozzuto's, Inc.*, 277 NLRB 977, 977 (1985).

<sup>6</sup> *See id.*; *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

<sup>7</sup> 311 NLRB at 461.

<sup>8</sup> *Id.*

<sup>9</sup> *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.

<sup>10</sup> *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993) (emphasis in original).

assignment proposal was a mandatory subject of bargaining.<sup>11</sup> In *WCCO-TV*, the employer had a contract with a union representing photojournalists and sought to incorporate into the parties' successor contract a prior letter of agreement that granted the employer the right to cross-utilize reporters or producers represented by another union to perform bargaining unit work on a daily basis.<sup>12</sup> The parties reached impasse over the inclusion of the letter of agreement or similar language.<sup>13</sup> The Board concluded that, under the first prong of the *Antelope Valley* test, the employer's proposed language did not change the unit description because the union would still represent the unit of photojournalists.<sup>14</sup> The Board further 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.<sup>15</sup>

In *Taylor Warehouse Corp.*, on the other hand, 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* test.<sup>16</sup> 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.<sup>17</sup> Over time, the employer increasingly assigned bargaining unit work to the non-union employees.<sup>18</sup> 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

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<sup>11</sup> 362 NLRB No. 101, slip op. at 2 (May 29, 2015).

<sup>12</sup> *Id.*, slip op. at 1-2.

<sup>13</sup> *Id.*, slip op. at 2.

<sup>14</sup> *Id.*, slip op. at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Taylor Warehouse Corp.*, 314 NLRB 516, 516-17, 527-28 (1994), *enforced*, 98 F.3d 892 (6th Cir. 1996).

<sup>17</sup> *Id.* at 518, n. 2 & 519-20.

<sup>18</sup> *Id.* at 524.

from coverage under the contract.<sup>19</sup> 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.”<sup>20</sup>

We conclude that the Employer’s proposals were permissive subjects of bargaining over which the Employer unlawfully insisted to impasse. Applying the first prong of the *Antelope Valley* test, the Employer’s proposals do not attempt to alter the unit description itself. However, the Employer’s proposals run afoul of the second prong of *Antelope Valley* because they would prevent the Union from contending that other drivers at the Fort Wayne facility who deliver ready-mix concrete should be included in the bargaining unit. Thus, as in *Taylor Warehouse*, two groups of employees are performing similar work at the same location for separate entities that are in reality a single employer. A major source of tension at the Employer’s Fort Wayne facility has been which company the Employer drivers work for, and which union the Employer 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 Speedway Construction and the Union’s ongoing grievance seeking to stop the Employer from continuing to transfer unit work to an entity it controls, Speedway Construction. The totality of the Employer’s proposals, including identifying the Employer as the only entity covered by the contract and specifically allowing other companies—including Speedway Construction—to continue operating in the same manner without violating the contract, would contractually enshrine the Employer’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 Employer 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*.<sup>21</sup>

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<sup>19</sup> *Id.* at 523.

<sup>20</sup> *Id.* at 527-28

<sup>21</sup> *Taylor Warehouse Corp.*, 314 NLRB at 527-28; *Batavia Newspapers Corp.*, 311 NLRB at 480.

Because the Employer has insisted to impasse over permissive bargaining proposals, we conclude that it has violated Section 8(a)(5).<sup>22</sup> The Region should therefore issue complaint, absent settlement.

The Region should dismiss, absent withdrawal, the allegation that Speedway Construction refused to hire eight Employer drivers in 2016 in violation of Section 8(a)(3). Under *Wright Line*,<sup>23</sup> the General Counsel would likely be unable to establish a prima facie case that Speedway Construction's decision not to hire the eight drivers was motivated by their union activity. Thus, the evidence demonstrates that the Employer would likely have hired the eight qualified drivers but was concerned that doing so might violate the terms of its October 2015 Board settlement agreement, which prohibited the Employer from assigning bargaining unit work to Speedway Construction. Moreover, even if the General Counsel were able to make out a prima facie case of unlawful discrimination, the Employer would be able to rebut that case by demonstrating that it would not have hired the employees due to its obligations under the October 2015 settlement agreement.<sup>24</sup>

/s/  
B.J.K.

ADV.25-CA-176012.Response.SpeedwayRedimix (b)(6) (b)(7)(C)

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<sup>22</sup> The Employer contends that the parties were not at impasse inasmuch as the Employer proposed additional dates for negotiations. However, we conclude that the parties were at impasse given that the Employer's permissive proposals were the only outstanding bargaining issues, the Union unequivocally refused to negotiate over them, and the parties would have otherwise reached a collective-bargaining agreement. See *Walnut Creek Honda*, 316 NLRB 139, 139 n.1 (1995) (where sole remaining issue was permissive subject of joining a multiemployer association, parties were at impasse in light of employer's insistence on proposal despite union's repeated objections and employees' strike vote), *enforced*, 89 F.3d 645 (9th Cir. 1996).

<sup>23</sup> 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *certiorari denied*, 455 U.S. 989 (1982).

<sup>24</sup> See *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 472 (2002) (employer demonstrated that it would not have renewed contracts of employees notwithstanding their union activity due to local law requiring the employer to offer employment to local, qualified employees).