

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ARGOS USA LLC d/b/a)	
ARGOS READY MIX, LLC,)	
)	
Respondent,)	
)	Cases 12-CA-196002
and)	12-CA-203177
)	
CONSTRUCTION AND CRAFT WORKERS)	
LOCAL UNION NO. 1652, LABORERS')	
INTERNATIONAL UNION OF NORTH)	
AMERICA, AFL-CIO)	
)	
Charging Party.)	

**RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL'S CROSS-EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

FISHER & PHILLIPS LLP
DOUGLAS R. SULLENBERGER
1075 Peachtree Street, NE
Suite 3500
Atlanta, Georgia 30309
Telephone: (404) 231-1400
Facsimile: (404) 240-4249
dsullenberger@fisherphillips.com

FISHER & PHILLIPS LLP
REYBURN W. LOMINACK, III
1320 Main Street
Suite 750
Columbia, South Carolina 29201
Telephone: (803) 255-0000
Facsimile: (803) 255-0202
rlominack@fisherphillips.com

Attorneys for Respondent

August 23, 2019

A. INTRODUCTION

This answering brief addresses the arguments in counsel for the General Counsel's (CGC) cross-exceptions that the judge: 1) failed to find that ready mix drivers are not required to complete specific tasks while waiting to discharge cement at a jobsite; and 2) failed to find that Respondent permits its managers and supervisors to carry and use cell phones inside their vehicles.¹

B. ARGUMENTS

1. Drivers are Always Working When at a Jobsite.

CGC cross-excepts to the judge's failure to specifically find that Respondent's ready mix drivers are not required to complete specific tasks while waiting to discharge cement at a jobsite. CGC argues that drivers merely have to check the drum every 15 to 20 minutes to see if it has stopped rotating and that, consequently, they are not on "working time" during much of the time they are on a jobsite waiting to pour concrete. (GC Exceptions Br. 33.)

Contrary to CGC's position, Respondent's ready mix drivers are *always* on working time when they are at a jobsite, even though they may be waiting to pour concrete. As employee Jose Perez testified, the drum is always rotating and must be constantly monitored to see if it stops *or to see if there is any change in the rotation*. According to Perez, "[T]he drum doesn't supposed (sic) to alter its rotation or stop by itself" (Tr. 165). He continued, "[I]f there is any change of the rotation or if the drum will stop, we will realize right away" (Tr. 165). Obviously, for a driver to realize "right away" that the rotation of the drum has changed or stopped, he must constantly remain vigilant. Thus, Perez's testimony does not support the proposition that drivers are not working during the time they are waiting to pour concrete.

¹ CGC also cross-excepts to the judge's reliance on *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. (2016). CGC argues that both decisions were wrongly decided and should be overruled. For the reasons set forth in its exceptions brief, Respondent agrees with CGC on those points.

Second, CGC overstates the amount of time drivers have to wait to pour concrete while at a jobsite. Perez testified that he has a 30 to 90 minute wait time at a job site only between 1 and 3 times per week (Tr. 163). Given that drivers average 3 to 5 two-hour deliveries per day in a given five-day week (Tr. 93, 109, 182, 365), that equates to, at most, 4.5 hours of “waiting time” (i.e., 90 minutes, 3 times per week) out of an average of 40 hours of delivery time per week. Thus, even if this waiting time is non-working time, it can hardly be considered “substantial.”

Third, merely because drivers may be waiting at a job site to pour concrete does not mean they are on non-working time. In fact, an administrative law judge has held that ready mix drivers were on working time even when they were waiting to be dispatched. See *Ready Mixed Concrete Company*, Case 17-CA-20734 (2001) (not reported in Board volumes) (“It has long been established that work time is for work. And that an employer may set rules prohibiting solicitation on work time, and such is presumptively valid. It goes without saying that an employer can define what constitutes work, e.g., waiting in the break room to be dispatched. I conclude that the employees did not have a right under Section 7 to leave the waiting room while they were on the clock to be solicited by the union representatives.”).

Accordingly, the judge did not err in failing to specifically find that Respondent’s ready mix drivers are not required to complete specific tasks while waiting to discharge cement at a jobsite. The record evidence establishes that drivers are always on working time while at a jobsite, including when they are waiting to pour concrete, because they always have tasks to perform.

2. Managers and Supervisors Do Not Operate Ready Mix Trucks.

CGC next cross-excepts to the judge’s failure to find that Respondent permits its managers and supervisors to carry and use cell phones inside their vehicles. CGC argues that the fact that managers and supervisors carry and use their cell phones undermines Respondent’s legitimate

business reasons for the prohibition on possession and use of cell phones in ready mix trucks. (GC Exceptions Br. 33-35.) CGC's argument fails for multiple reasons.

Respondent's ready mix trucks are "70,000 pound missiles" when fully loaded (Tr. 431), and Respondent's other vehicles, including those operated by Respondent's supervisors and managers, weigh under 10,000 pounds. It is common sense that a 70,000 pound vehicle is much more difficult to maneuver and stop than a vehicle weighing less than 10,000 pounds. Moreover, Respondent's light-duty vehicles, unlike the ready mix trucks, have the capability of hands-free operation, and drivers are only allowed to make or receives calls if done so hands-free (GC Exh. 5, pp. 6-7).

Consequently, the judge did not err in failing to expressly find that managers and supervisors are permitted to use hands-free cell phones while operating light duty vehicles, because that evidence does not undermine Respondent's position that possession and use of cell phones in 70,000 pound ready mix trucks poses a serious threat to driver and public safety.

C. CONCLUSION

For the foregoing reasons, the Board should overrule CGC's cross-exceptions 5 and 6.

s/ Reyburn W. Lominack III
FISHER & PHILLIPS LLP
DOUGLAS R. SULLENBERGER
1075 Peachtree Street, NE
Suite 3500
Atlanta, Georgia 30309
Telephone: (404) 231-1400
Facsimile: (404) 240-4249
dsullenberger@fisherphillips.com

FISHER & PHILLIPS LLP
REYBURN W. LOMINACK, III
1320 Main Street
Suite 750
Columbia, South Carolina 29201
Telephone: (803) 255-0000
Facsimile: (803) 255-0202
rlominack@fisherphillips.com

Attorneys for Respondent

August 23, 2019

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ARGOS USA LLC d/b/a)	
ARGOS READY MIX, LLC,)	
)	
Respondent,)	
)	Cases 12-CA-196002
and)	12-CA-203177
)	
CONSTRUCTION AND CRAFT WORKERS)	
LOCAL UNION NO. 1652, LABORERS')	
INTERNATIONAL UNION OF NORTH)	
AMERICA, AFL-CIO)	
)	
Charging Party.)	

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2019, a true and correct copy of the foregoing RESPONDENT’S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL’S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION was filed using the National Labor Relations Board’s E-filing system, and a copy of the aforementioned was thereafter served upon the following parties via electronic mail as follows:

Cristina Ortega
Counsel for the General Counsel
National Labor Relations Board
51 S.W. 1st Ave., Room 1320
Miami, FL 33130-1608
cristinam.ortega@nlrb.gov

Andrei Rolle
President
Construction and Craft Workers’
Local Union No. 1652
2020 N.W. 32nd St.
Pompano Beach, FL 33064-1306
floridalaborer@bellsouth.net

s/Reyburn W. Lominack III
REYBURN W. LOMINACK III
FISHER & PHILLIPS LLP
ATTORNEYS FOR RESPONDENT