

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

IRVING READY-MIX, INC.

and

CASES 25-CA-31485
25-CA-31490 Amended
25-CA-31548

CHAUFFEURS, TEAMSTERS & HELPERS
LOCAL UNION NO. 414, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

**RESPONDENT IRVING READY-MIX, INC.'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Irving Ready-Mix, Inc. ("Irving"), by counsel, and, pursuant to National Labor Relations Board Rules and Regulations Section 102.46, submits Irving's exceptions to the Decision of the Administrative Law Judge ("ALJ") in the above captioned case dated December 17, 2010 ("the Decision"), as follows:

Exception No. 1. Whether the ALJ's findings that since 2008 Irving has failed to make required or guaranteed weekly retirement fund contributions on behalf of unit employees and that on January 10, 2010 Irving provided information to the Union showing that Irving had failed to make required weekly retirement fund contributions of \$70,200 in 2009 are contrary to and not supported by the evidence of record in this case?

- The parts of the Decision to which this objection is made are found at p.5, lines 22-49; p.7, line 24; p.15, lines 29-35; p.16, lines 1-17 and 43-51; p.19, lines 13-17; p.20, lines 5-13 and 34-36; p.21, lines 12-19; Appendix pp. 1-2.
- The portions of the record on which this exception is based are: Transcript ("Tr.") pp. 11, 24, 51-53, 62, 64, 299-304, 310-311; General Counsel Exhibit ("GCX") 2 pp.1

3, 11-12, 20-21, and 22; Respondent Exhibit (“RX”) 24 pp. 1 and 2 and RX 25 pp.1 and 2.

- The ALJ’s findings that Irving failed to make required or guaranteed weekly retirement fund contributions on behalf of unit employees since 2008 and on January 10, 2010 disclosed information showing the amount of weekly retirement fund contributions not made by Irving in 2009 is incorrect and contrary to the admitted evidence of record. The evidence of record shows that in September 2009 Irving was unable to make its lump-sum annual payment for retirement benefits of qualified employees as calculated on a per week worked formula for calendar year 2008, and that on January 20, 2010, Irving disclosed the amount of retirement benefits that Irving would be required to pay on a lump-sum basis later in 2010 for qualified unit employees as calculated on a per week worked formula for calendar year 2009.

Citation of Authority and Argument In Support of Exception No. 1

Irving’s last collective bargaining agreement (“the CBA”) with Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (“the Union”) covering Irving’s ready-mix truck drivers was in effect from June 1, 2005 to and including May 31, 2010. (GCX 2 pp. 1, 3 and 20-21). Pursuant to the terms of the CBA, beginning June 1, 2007, Irving was required to make a contribution of \$75.00 “per week into a retirement fund for each full-time non-probationary employee” with some noted exceptions. (*Id.* at p. 22).

Irving’s General Manager Derek Ray (“Ray”) testified, without contradiction by others, that there is a 1,000 hours worked per year minimum requirement that an employee must meet in order to be eligible for any retirement fund contribution from Irving for that year. (Tr. at 11, 24, 51-53).

That 1,000 hours worked qualifier is contained in the retirement plan benefit book (Tr. at 24). Following Irving's practice pursuant to the CBA, if a covered full-time non-probationary employee worked at least 1,000 hours in the calendar year, the \$75 per week retirement fund contribution amount would be retroactively calculated for all weeks during that calendar year in which the employee had worked at least one (1) hour and paid on an annual, lump sum basis. (Tr. at 51-53).

Irving's payment for the 2008 work contribution was due in September 2009. (Tr. at 300). Irving was unable to make that payment due to a lack of funds and the Union was made aware of the non-payment in September 2009. (Tr. at 62, 64, 300, 302-303, 310-311). On December 4, 2009, Ray provided Union President George Gerdes ("Gerdes") with a detailed written accounting of the 401(k) contributions for CBA covered employees that Irving was required to have paid for calendar year 2008 work. (Tr. at 299-300; RX 24 pp. 1 and 2). Irving entered into a voluntary program with the government to come up with a plan for the payment of the full amount owing for the calendar year 2008 contribution delinquency amount. (Tr. at 310).

On January 20, 2010, Ray provided Gerdes with a detailed written accounting of the calendar year 2009 employee 401(k) account contribution that Irving would be required to pay into the accounts of qualified employees later in 2010. (Tr. at 300-302; RX 25 pp. 1 and 2). The payment for the 2009 calendar year benefit was not delinquent in January 2010. Id.

Irving's undisputed and uncontested practice pursuant to the CBA was to make a retirement fund contributions for qualified covered employees on a per week worked formula, as retroactively calculated on an annual basis, leading to a lump-sum payment in the following year. There is no evidence of record to contradict Ray's testimony on the subject or to suggest that Irving's practice of calculation and payment violated the CBA. The evidence of record does not support the ALJ's

findings that Irving was delinquent in retirement fund payment in 2008, or that Irving was required to pay into the retirement fund each week without regard to the 1,000 hours worked qualifier, or that Irving was delinquent on retirement fund payments for calendar year 2009 work in January 2010. Further, Irving argues that the issue of retirement fund payment deficiencies caused by Irving's lack of financial resources is not properly a matter for the Board's consideration as a violation of the Act. The Union was aware of the problem and Gerdes attended a meeting with Irving representatives and Irving's retirement fund financial advisors at which Irving's payment options were reviewed. (Tr. at 62, 64, 302-304). It is a contractual issue which could be subject to a timely grievance. (GCX 2 pp. 11-12). There is no evidence to show any grievance was filed or that Irving ever refused any grievance. Irving has never denied its obligation to make retirement fund payments that accrued under the CBA prior to its termination on May 31, 2010.

For all these reasons, Irving respectfully submits that the ALJ's findings on weekly contribution payments and delinquency of 2009 calendar year contributions in January 2010, and any finding of a violation of the National Labor Relations Act ("the Act") based thereon should be reversed and not affirmed.

Exception No. 2. Whether the ALJ's finding that Irving violated its bargaining obligation by unilaterally changing employee pension benefits since on or about January 26, 2010 is contrary to and not supported by the evidence of record in this case?

- The parts of the Decision to which this objection is made are found at p.5 lines 22-49; p.15, line 29-35; p.16, lines 1-17 and 43-51; p.19 lines 13-14; p.20, lines 5-13 and 34-36; p.21, lines 12-19; and Appendix pp. 1-2.

- The portions of the record on which this exception is based are: the Decision Tr. at 62-65, 72-73, 237-238, 249-250, 255-256, 299-304 and 310-311; GCX 1(i) p.3, GCX 1(k) p.3, GCX 2 pp. 1, 3, and 20-22, GCX 3, GCX 6 pp.2-3, and GCX 7 pp.2-3; RX 19 p.1, RX 24 pp. 1 and 2, and RX 25 pp.1 and 2.
- The ALJ's finding that Irving violated its bargaining obligation with the Union since on or about January 26, 2010 by unilaterally changing employee pension benefits is simply erroneous and totally unsupported by the evidence of record in this case. The evidence of record in this case shows only that Irving failed to make a required employer contribution into its employee retirement plan in September 2009 (for calendar year 2008 benefits) solely as the result of Irving's financial inability to make the payment, and that the calendar year 2009 retirement plan benefit amount required to be paid by Irving on behalf of its ready-mix truck driver employees was identified and provided to the Union on January 20, 2010, but was not due and payable until later in 2010.

Citation of Authority and Argument In Support of Exception No. 2

Irving's CBA with the Union covering Irving's full-time and part-time ready-mix truck drivers was in affect from June 1, 2005 to and including May 31, 2010. (GCX 2 pp.1, 3 and 20-21). The contract was properly terminated on May 31, 2010. (Tr. at 237-238; GCX 2 p.20; RX 19 p.1). Pursuant to the terms of that CBA, Irving was required to make a contribution into its employee retirement plan on behalf of eligible employees. (GCX 2 p.22).

Ray testified that in September 2009, Irving became delinquent in its contribution to the employee retirement plan 401(k) accounts for calendar year 2008 benefits. (Tr. at 300). He testified

that Irving simply did not have the cash available to make the payment. (Tr. at 303). Irving's Secretary/Treasurer Judy McKeever ("McKeever") also testified that Irving was unable to make the 401(k) fund payment in September 2009 due to a lack of available money. (Tr. at 237, 249-250). The payment for calendar year 2008, which became delinquent in September 2009, covered Irving's union and non-union employees. (Tr. at 304, 310-311). Therefore, the record shows that Irving's employees covered by the CBA were treated no differently than those not represented by the Union.

Ray and McKeever testified that effective January 1, 2009, Irving changed its retirement fund plan's terms related to Irving's non-union (non-ready-mix driver) employees to eliminate Irving's obligation to make required company contributions on behalf of those employees for future years. (Tr. at 255-256; 304). Both testified that Irving's obligation to make payment into the retirement fund on behalf of its ready-mix drivers continued for calendar year 2009 as part of the CBA. (Tr. at 255-256, 304; GCX 2). Ray and McKeever testified that Irving's required payment into the retirement fund 401(k) accounts of Irving's ready-mix truck driver employees for calendar year 2009 benefits was not required to be paid until later in or at the end of 2010. (Tr. at 249-250, 301-302).

The Union's President George Gerdes ("Gerdes"), testified that in September 2009 he learned of Irving's failure to make the 2008 calendar year retirement fund contribution. (Tr. at 62, 64). On December 4, 2009, Ray faxed to Gerdes a detailed report of the 401(k) contribution that Irving was required to have made in September 2009 for its ready-mix truck driver employees for calendar year 2008. (Tr. at 299-300; RX 24 pp. 1 and 2). On January 20, 2010, Ray faxed to Gerdes a detailed account of the amount Irving would be required to pay into its ready-mix truck drivers' 401(k) accounts for calendar 2009. (Tr. at 300-302; RX 25 pp. 1 and 2). Gerdes, the Union Steward

at Irving, and Ray met with Irving's financial advisors for Irving's 401(k) fund on March 31, 2010 about the situation and Irving's payment options. (Tr. at 64-65, 302-304).

Paragraph 7(a) of the Order Consolidating Cases, Consolidated Complaint And Notice Of Hearing filed in the case against Irving on August 26, 2010 ("the Consolidated Complaint") alleges "Since on or about January 26, 2010, Respondent has changed employee pension benefits." (GCX 1(i) p.3). Irving denied that allegation. (GCX 1(k) p. 3). The record of this case is totally devoid of any fact, or even the inference of fact, to show that Irving unilaterally changed its employee pension benefits related to its ready-mix truck drivers on or about January 26, 2010 as alleged in the Consolidated Complaint and as found by the ALJ. The record is devoid of any evidence to show that Irving ever intended to not make required contributions to its employees' 401(k) accounts for calendar years 2008 and 2009.

Irving's proposals for a new agreement submitted to the Union during contract negotiations in May 2010 included a proposal that Irving not be obligated to make contributions into the retirement fund for any employee beginning June 1, 2010, but specifically noted "This change does not impact the Employer's [Irving's] obligation to make payments into the retirement fund which accrued prior to June 1, 2010". (GCX 6 pp. 2-3; GCX 7 pp. 2-3). Irving is obligated by law to make payments for accrued benefits and is working with the government to come up with a plan to pay the amounts owing on delinquent contributions. (Tr. at 310-311).

The Union's proposals for a new contract that were submitted to Irving in May 2010 make no reference to any alleged unilateral change in Irving's employee pension benefits on or about January 26, 2010. (GCX 3). Gerdes testified that pursuant to the CBA, the Union had the ability to take recourse against Irving as a result of Irving's failure to make the required retirement fund

payments. (Tr. at 63-65, 72-73). In other words, the evidence of record shows that the Union considered Irving's failure to make the retirement fund payments not a unilateral change in the terms of employee pension benefits, but a matter of payment delinquency, a contract violation, covered by the CBA. (GCX 2 at p.22).

The first two cases cited by the ALJ in support of his ruling on this issue are inapposite to Irving's situation. Irving did not voluntarily discontinue retirement plan contributions such as occurred in Castle Hill Health Center, 355 N.L.R.B. No. 196, slip op. at 37-38 (2010). Irving did not actually change any pension payment plan covering unit employees for the 2008 or 2009 calendar years as compared to the policy change enacted without bargaining in Merrill & Ring, Inc., 262 N.L.R.B. 392, 393-394 (1982). The third case cited by the ALJ, Gulf Coast Automotive Warehouse, 256 N.L.R.B. 486 (1981), supports Irving. Therein, it states that the determination of whether a unilateral change violates the Act is a factual determination. 256 N.L.R.B. at 489. The facts of this case show only that Irving lacked the funds to make a retirement account payment, the Union was aware of the situation, and Irving has never attempted to avoid its payment obligation. Under these circumstances, without any showing that Irving's failure to make a contribution due to financial inability was inherently destructive of employee rights or the product of anti-union animus, the ALJ's finding of an unfair labor practice on this issue is flawed as a matter of law. See N.L.R.B. v. Great Dane Trailer, Inc., 388 U.S. 26, 34 (1967).

For all these reasons, Irving respectfully submits that the ALJ's finding that Irving violated its obligation to bargain with the Union since on or about January 26, 2010 by unilaterally changing employee pension benefits and any finding of a violation of the Act based therein should be reversed and not affirmed.

Exception No. 3. Whether the ALJ's determination that Irving's failure to make required pension contributions since January 26, 2010 constitutes a unilateral change in pension benefits in violation of Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act") which is not barred as untimely by Section 10(b) is contrary to law and not supported by the facts and evidence of record in this case?

- The parts of the Decision to which this objection is made are found at p.5, lines 22-49; p.15, lines 29-35; p.16, lines 1-17 and footnote 11, lines 43-51; p.19, lines 13-17; p.20, lines 5-13 and 34-36; p.21, lines 12-19; and Appendix pp. 1-2.
- The portions of the record on which this exception is based are: Tr. at 62-65, 72-73, 237-238, 249-250, 255-256, 299-304 and 309-310; GCX 1(g), GCX 1(h), GCX 1(i) p.3, GCX 1(k) pp. 3 and 5, GCX 2 pp. 1 and 20-22, GCX 3, GCX 6 pp.2-3, and GCX 7 pp.2-3; RX 19 p.1, RX 24 pp.1 and 2, and RX 25 pp.1 and 2; General Counsel's Post-Hearing Brief at p.19.
- The ALJ's finding that Irving's failure to make required retirement fund contributions and Irving's January 20, 2010 notice to the Union of calendar year 2009 pension contribution amounts qualify as a timely violation of the Act on or about January 26, 2010 as a unilateral change in benefits is contrary to law and the evidence of record, should be not affirmed, and, instead, that claim should be ruled untimely and barred pursuant to Section 10(b) of the Act.

Citation of Authority and Argument In Support of Exception No. 3

Irving incorporates by reference as if fully set forth herein the Citation of Authority and Argument In Support of Exception No. 2, *supra.* at pages 5 to 8. For the reasons stated therein, there

is no Section 8(a)(5) and (1) violation related to the alleged unilateral change in employee retirement benefits in January 2010 since no such change occurred. However, Irving had reason to not object to the evidence of Irving's failure to make required employee retirement plan payments.

The occurrence of Irving's failure to make a required pension contribution in September 2009 for calendar year 2008 due to Irving's financial inability to make the payments is directly relevant as evidence of Irving's dire financial condition and the Union's knowledge of Irving's financial condition as early as September 2009. Again, the record of this case is devoid of any evidence or argument to show that Irving's failure to make a required retirement plan contribution was due to any unilateral change in an employee pension benefit plan. The record shows that Irving has never denied its obligation to make contributions that accrued during the term of its prior CBA with the Union. See, GCX 6 and 7 at pp. 2-3, respectfully.

The Union became aware of Irving's failure to make the retirement fund payments in September 2009. (Tr. at 62, 64). That establishes the time frame within which the Union had clear and unequivocal notice of the issue. The Union had written notice on December 4, 2009 of the detailed amount owing by Irving for calendar year 2008 benefits that Irving was unable to pay in September 2009. (Tr. at 299-300; RX 24 pp. 1 and 2). On January 20, 2010, the Union was provided with a written, detailed accounting of calendar year 2009 benefits for unit employees that Irving would be required to pay later in 2010. (Tr. at 249-250, 300-302; RX 25 pp. 1 and 2). If the Union thought the failure to make a fund payment was a change in a benefit plan, a violation of the Act regardless of motive, it should have filed an unfair labor practice charge on the issue within six(6) months of receiving notice of the non-payment in September 2009, the written detail in December 2009, or the 2009 benefit accounting on January 20, 2010. See Leach Corp., 312

N.L.R.B. 990, 991 (1993). The original unfair labor practice charge alleging a change in employee pension benefits was filed on July 26, 2010, more than six (6) months after January 20, 2010. (GCX 1(g) and GCX 1(h)). The claim is properly time barred pursuant to Section 10(b).

Paragraph 7(a) of the Consolidated Complaint alleges” Since on or about January 26, 2010, Respondent has changed employee pension benefits.” (GCX 1(i) at p.3). Irving denied that allegation and raised the affirmative defense of Section 10(b) in its Answer and Affirmative Defenses to the Consolidated Complaint filed in this case on September 9, 2010. (GCX 1(k) pp. 3 and 5). Since no evidence was presented at the hearing in this case regarding any alleged unilateral change being made in Irving’s employee pension benefits at any time on or about January 26, 2010, there was no apparent basis for application of that 10(b) defense. In General Counsel’s Post-Hearing Brief, the only reference to this issue is as follows: “Further, its [Irving’s] failure to make pension contributions since January 26, 2010, also violates Section 8(a)(5)” and “Counsel for Acting General Counsel alleges that the Respondent’s failure to pay pension benefits extends from January 26, six months prior to the filing of the charge in Case 25-CA-31548 and, therefore, is within the 10(b) period of the Act.” General Counsel’s Post-Hearing Brief at p.19.

That simple reference, unrelated to any evidence of a unilateral change in pension benefits in support of the allegation raised in the Consolidated Complaint, is meaningless. Any attempt to somehow revive a claim for 2008 calendar year contributions which would have been untimely in March 2010, six (6) months after September 2009, by reaching back to point six months prior to the filing of an unfair labor practice charge in July 2010 on some undefined basis is simply baffling. The ALJ’s decision to characterize Irving’s failure to pay into the retirement plan accounts of its union and non-union employees due to financial inability as an unilateral change in an employee

benefit plan by Irving and to then apply that purported unilateral change to include a payment that Irving was required to pay, but could not, in September 2009, based on a charge filed in July 2010 is clearly erroneous and untimely in violation of Section 10(b). The failure to pay occurred in September 2009, not January 2010.

Counsel for Acting General Counsel cannot be allowed to avoid a Section 10(b) defense, which he clearly felt was at issue, by vague pleading without presentation of evidence, and piggy backing of limitation periods. For that matter, to the extent that Irving is claimed to have been obligated to make contributions into its employee retirement fund for calendar year 2009 benefits on January 20, 2010, the date that Ray notified Gerdes of the amount that would be owing, that claim is also time barred by Section 10(b) since the unfair labor practice charge alleging a change in employee pension benefits was not filed until July 26, 2010, more than six (6) months after January 20, 2010. (See Tr. at 301;GCX 1(g) and 1(h); RX 25 at pp.1 and 2).

Moreover, the premise that the detailed accounting that Ray faxed to Gerdes on January 20, 2010 of the amount that Irving would be required to pay into the retirement fund for calendar year 2009 qualified as a violation of the Act or even a breach of the CBA is baseless. The undisputed evidence of record is that the calendar year 2009 contribution was not due on or about January 26, 2010. That payment was not due until later in 2010. (Tr. at 249-250 and 301-302). Therefore, there could be no violation of the Act related to those amounts as alleged in the Charge.

Under the facts of this case, Irving's failure to make any required retirement plan contribution prior to June 1, 2010 as required by the terms of its CBA with the Union may have qualified as the basis for a timely grievance pursuant to that CBA, but does not constitute a unilateral change in an employee pension benefit plan such as would constitute a violation of the Act. The original unfair

labor practice charge filed on July 26, 2010 based upon an alleged change in employee pension benefits on or about January 26, 2010, besides being totally unsupported, is either untimely or premature. For these reasons, Irving respectfully submits that the ALJ's finding that Irving changed employee pension benefits on or about January 26, 2010 is meritless and untimely and requests that the ALJ's decision on this issue, and any finding of a violation of the Act based thereon be reversed and not affirmed.

Exception No. 4. Whether the Board precedent on which the ALJ relied in determining that the nature of the bargaining relationship between Irving and the Union concerning Irving's ready-mix truck drivers was one existing under Section 9 of the Act rather than Section 8(f) of the Act is inappropriately based on a Section 8(e) analysis and, therefore, should be reversed or disregarded for purposes of the determination of the instant case?

- The parts of the ALJ's Decision to which this objection is made are p.3, lines 19-28; p.12, lines 35-40; p.13, lines 1-41; p.14, lines 1-50; p.15, lines 1-27 and 37-51; p.19, lines 7-22 and 30-35; p.20, lines 1-13 and 20-44; p.21, lines 1-26; and Appendix pp. 1 and 2.
- The portions of the records on which this exception is based are Tr. at 174, 204, 213, 228, 235, 342 and 371; GCX 2 pp. 1, 3 and 20.
- The Board precedent on which the ALJ relied in reaching the decision that Irving's bargaining relationship with the Union existed under Section 9 of the Act rather than Section 8(f) was based on a work at the site analysis pertinent to the proviso to Section 8(e) of the Act and is flawed as a matter of law as the basis for conducting a Section 8(f) analysis in this case. The fact that such precedent has been cited in

later Board decisions serves to only compound the problem but does not correct the issue. The ALJ erred in relying on that flawed Board precedent. A proper application of validly established, Section 8(f) related Board precedent to the facts of this case results in a finding that Irving's bargaining relationship with the Union existed under Section 8(f) of the Act and, therefore, Irving had no obligation to recognize or bargain with the Union upon the termination of Irving's CBA with the Union on May 31, 2010.

Citation of Authority and Argument In Support of Exception No. 4

The Board cases relied upon by the ALJ in reaching the decision that Irving, as a ready-mix concrete company employer, is not an employer engaged primarily in the building and construction industry, and therefore, unable to properly enter into a Section 8(f) pre-hire agreement, all center on the Board's decision in J.P. Sturrus Corp., 288 N.L.R.B. 668 (1988) ("J.P. Sturrus"). That is the primary case at which Irving draws aim and respectfully requests that the Board reconsider and reverse or disregard on this issue.¹

The respondent in J.P. Sturrus employed ready-mix concrete drivers, and, like Irving, contended that its labor agreement with the Union covering its ready-mix truck driver employees was

¹ The Board's decisions in Mastronardi Mason Material, 336 N.L.R.B. 1296 (2001) enf. 64 Fed. Appx. 271 (Ind. Cir. 2003) and Engineered Steel Concepts, 352 N.L.R.B. 589 (2008) are also relied upon by the ALJ in his decision as cases which cite J.P. Sturrus and, therefore, allegedly confirm the validity of the holding in J.P. Sturrus. See Decision at p. 3, 12-16. Irving respectfully submits that the citation in those cases to J.P. Sturrus does not act to remedy or correct the failings of the J.P. Sturrus decision, as set out herein, but only further complicates and blurs the Section 8(f) analysis and qualification issues presently before the Board.

properly governed under Section 8(f) of the Act rather than Section 9 of the Act. J.P. Sturuss, 288 N.L.R.B. at 671. The ALJ in that case disagreed and on that issue ruled, in pertinent part, as follows:

The Respondent herein is a supplier to companies some of which may be deemed to be within the provisions of Section 8(f) of the Act, but this fact does not mean that Respondent is in the building and construction industry any more than a hardware store which furnishes hammers and nails to building contractors is engaged in the building and construction industry... Respondent's only contact with the building and construction industry takes place when some, but not all, of its employees make deliveries of concrete to building sites from the plant. The fact that a delivery man may pour concrete at a jobsite from a cement mixer, often at the request or direction of the customer, does not invest him with the status of a customer's employee any more than a truck driver becomes a customer employee because he unloads a van and places cargo in a warehouse at a customer's request, nor does this fact serve to incorporate the Respondent into the building and construction industry. A deliveryman driving a cement mixer may visit several different customers. In those instances where customers are also the owners of the building sites, it is more than likely that they are not themselves a part of the building and construction industry, within the meaning of Section 8(f) of the Act, but merely homeowners, farmers, or businessmen who require one or more loads of concrete at their respective premises. The Board has held that redi-mix concrete delivery companies are not engaged in the building and construction industry within the meaning of either Section 8(e) or Section 8(f); Inland Concrete Company, 225 N.L.R.B. 209; Island Dock Lumber Company, 145 N.L.R.B. 484. The fact that the Respondent's newer equipment discharges concrete from the front of the truck rather than from the side or rear of the truck is a distinction without a difference.

288 N.L.R.B. at 671-672 (footnote omitted)².

² The portions of that ALJ's decision regarding the employer's stable complement of employees, years of existence at a single location and the number of successive labor agreements between the parties prior to the expiration of the agreement at issue are all dicta and should properly be disregarded as such. The seminal Board case on the issue of pre-hire agreements and the presumption of 8(f) status for construction industry labor agreements is John Deklewa & Sons, Inc., ("Deklewa") 282 N.L.R.B. 1375 (1987), enfd. sub nom. Iron Workers Locals v. N.L.R.B. 843 F.2d (3rd Cir. 1988), denied 488 U.S. 889 (1988). In Deklewa, the fact that the employer had engaged in numerous, successive contracts with the union over a period of 25 years was considered immaterial to the determination of the employer's Section 8(f) status eligibility. See Deklewa 282 N.L.R.B. at 1376. The Deklewa, approach on those factors is appropriate since the wording of Section 8(f) of the Act makes no reference to such limitations and actually presumes the employer may have an existing complement of employees. See 29 U.S.C. § 158(f).

The real focus of the ALJ's decision in J.P. Sturrus was that an employer of ready-mix truck drivers is not engaged in the building and construction industry for purposes of Section 8(f) based on the Board's prior decisions in Inland Concrete Company ("Inland Concrete"), 225 N.L.R.B. 209 (1976) and Island Dock Lumber Company ("Island Dock"), 145 N.L.R.B. 484 (1963). The ALJ in J.P. Sturrus claimed that those cases were controlling. 288 N.L.R.B. at 671. That finding and the Board's later affirmation of it constitutes the core "problem" of the J.P. Sturrus decision.

The issue in both Inland Concrete and Island Dock concerned the coverage of material delivery work at the site of construction pursuant to the construction industry proviso to Section 8(e) of the Act. See Inland Concrete, 225 N.L.R.B. at 210, 216; see also Island Dock, 145 N.L.R.B. at 490. The construction industry proviso to Section 8(e) of the Act provides an exception for otherwise illegal restrictions on the subcontracting of work, as follows:

"Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work."

29 U.S.C. § 158(e). The Inland Concrete and Island Dock decisions each cited to the House Conference Report on the amendments to the Act which brought about the construction industry proviso to Section 8(e), as follows:

The portion of the ALJ's decision in J.P. Sturrus regarding a thirty (30) day union security clause is also meaningless. 288 N.L.R.B. at 672. Section 8(f) of the Act allows for a union security clause effective on the 8th day of employment in construction industry agreements, but does not require such a clause be in the contract for the agreement to qualify under Section 8(f). See also Techno Construction Corp., 333 N.L.R.B. 75, 83 (2001) (legal ability to include a 7 day union security clause does not require inclusion or indicate that a contract without a 7 day clause is not covered under Section 8(f)).

“The proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to and delivered on the site of the construction.”

225 N.L.R.B. at 216; 145 N.L.R.B. at 491 (both citing H. Conf. Rept. 1147, 86th Cong., 1st sess., p. 39; II Leg. His. 943).

Under that setting, it was determined in Inland Concrete that the delivery of ready-mix concrete by way of a concrete-mobile truck and the delivery of pre-cast concrete pipe with placement at the site of construction by means of a boom truck constituted the transportation and delivery of supplies, materials or products and not work at the site of the construction covered by the construction industry proviso to Section 8(e). 225 NLRB at 216-217. Likewise, in Island Dock it was determined that the delivery of ready-mix concrete constituted the delivery of materials which does not come within the construction industry proviso to Section 8(e). 145 NLRB at 491. Therefore, neither of those job functions could be subject to a subcontracting restriction otherwise illegal under Section 8(e) of the Act.

For present purposes, it is important to note the following:

- Neither Inland Concrete nor Island Dock contained any reference to Section 8(f) of the Act, and, therefore, the ALJ’s claim in J.P. Sturris that those cases “held that ready-mix companies are not engaged in the building and construction industry with the meaning of either Section 8(e) or Section 8(f) of the Act” is incorrect. 288 N.L.R.B. at 671. (emphasis added).
- Neither Inland Concrete nor Island Dock included any analysis or finding regarding the building and construction industry status of the employers of the ready-mix truck

or pre-cast concrete boom truck drivers for purposes of Section 8(e) or 8(f), and, therefore, the claim in J.P. Sturrus that such findings were made is incorrect. Id.

- Neither Island Concrete nor Island Dock contained any analysis or findings regarding the status of either ready-mix truck or boom truck drivers as being engaged in the building and construction industry apart from the specific transportation and delivery restrictions applicable to the proviso to Section 8(e) work at the site analysis, and, therefore, the decision in J.P. Sturrus to simply write off the work of ready-mix truck drivers as “delivery” based on those cases for purposes of Section 8(f), without analysis, is totally unsupported.

Despite these deficiencies in the ALJ’s decision in J.P. Sturrus, on review, the Board affirmed that ALJ’s ruling, specifically noting as follows:

“2. We agree with the judge’s finding that the Respondent is not in the building and construction industry within the meaning of Section 8(f) of the Act. In doing so, we note that its drivers occasionally, and at their own discretion, assist the contractor at the construction site with screeting and spreading of concrete, after they have poured it, when the contractor’s own employees are unavailable. The drivers are not required or asked to perform these functions by the Respondent or the contractor; nor were they asked to do so by Wheeler, the Respondent’s predecessor. Rather, the drivers offer their assistance on occasion in order to finish the job faster so that they can move on to their next assignment. The drivers also regularly hose the contractor’s tools as part of their cleanup. We find that these incidental tasks do not bring the Respondent within the building and construction industry as contemplated by Section 8(f) of the Act.

288 N.L.R.B. at 668.

Irving contends that the problem with J.P. Sturrus is further compounded by the wording of the Board’s affirmation of the ALJ’s decision in that case. The Board’s affirmation centers not on the required building and construction work that ready-mix truck drivers perform as part of the

driver's work duties, as would be required for a Section 8(f) analysis, but on the incidental things that the driver may do on job site to help others with their work apart from the work duties which were considered "delivery" under a Section 8(e) analysis. The proper focus should be on that work the ready-mix truck driver performs as part of the ready-mix truck driver's duties. Further, the Board's affirmation accepts the ALJ's unsupported conclusion on the employer's building and construction status without conducting any analysis of the employer's business consistent with controlling Board precedent on the issue. See Carpet, Linoleum and Soft Tile Indio Paint, 156 N.L.R.B. 951 (1966).

Irving's CBA with the Union covering Irving's ready-mix truck drivers was not limited to work performed in a shop area. (GCX 2 pp. 1, 3 and 20). A ready-mix truck driver performs work on job sites, just different work than the work performed by others at the site. (Tr. at 213, 265). The operation of a ready-mix truck requires substantial training and the development of skills. (Tr. at 174, 204, 228).

A factor not raised in Inland Concrete, Island Dock, or J.P. Sturrus is the amount of time that ready-mix truck drivers devote to building and construction work, which is important to a proper Section 8(f) analysis of the driver's work. Irving's ready-mix truck drivers spend approximately six (6) percent of their total paid work time loading and mixing ready-mix concrete in their trucks at the Irving batch plants, twenty-five (25) percent of their total paid work time driving to and from construction sites, and 30-35% of this total paid work time actually on job sites hauling materials, operating the truck's power equipment and performing necessary clean-up. (Tr. at 342, 371).

Post J.P. Sturrus, in Techno Construction Corp., drivers who performed boom truck equipment operation work on job sites, unloading materials, were determined to be engaged in the

performance of on-site construction work in the building and construction industry for purposes of Section 8(f). 333 N.L.R.B. at 79. Further, it was determined in Techno Construction that truck drivers who spend a “substantial” portion of their work time hauling materials on job sites are also engaged in the building and construction industry for purposes of Section 8(f) coverage. (Id. at 83-84). It makes rational sense that if a driver operates equipment, part of the truck, on the construction job site or spends a substantial portion of work time performing truck driving duties on construction job sites, the driver is engaged in the building and construction industry for purposes of Section 8(f).

The decision in Techno Construction, as affirmed by the Board, highlights the flaws of J.P. Sturris specifically related to the Section 8(f) analysis of truck driver power equipment operation. Techno Construction references J.P. Sturris and even Inland Concrete, but notes the distinction in the wording of and purposes for the construction industry proviso to Section 8(e) as compared to Section 8(f). 333 N.L.R.B. at 82-83; See also Church’s Fried Chicken, 183 N.L.R.B. 1032, 1037 (1970) (“employer in the construction industry” for purposes of Section 8(e) concerns retention of control over labor relations of subcontractors to whom work is assigned at the site of construction). Based upon those distinctions, and obviously regardless of the holding in Inland Concrete that the driving and operation of a boom truck was not construction work at the site for purposes of the proviso to Section 8(e), the ALJ in Techno Construction ruled, and the Board affirmed, that such work was construction work covered under Section 8(f). Techno Construction, 333 N.L.R.B. at 75, 79, 83-84.

Irving respectfully submits that the analysis conducted and conclusions reached in Techno Construction are compatible with prior Board precedent, other than J.P. Sturris, and do not misstate prior Board precedent or create illogical analysis or results as does J.P. Sturris. If the Section 8(f)

conclusion in J.P. Sturrus based in part on Inland Concrete was proper, the decision in Techno Construction was incorrect because the Section 8(e) holding in Inland Concrete regarding boom truck operation and truck driving would have precluded a contrary Section 8(f) finding on that work in Techno Construction. A logical extension of the unsupported conclusion in J.P. Sturrus about employer building and construction status would be that the employer in Techno Construction could not be an employer engaged primarily in the building and construction industry for purposes of Section 8(f) simply because it employs boom truck drivers whose material unloading work is not exempted by the proviso to Section 8(e).

The J.P. Sturrus decision misstates prior Board precedent. It makes unsupported leaps without analysis regarding Section 8(f) coverage for employers and employees based upon unrelated findings under an analysis of the construction industry proviso to Section 8(e), and otherwise breaks without explanation from controlling Board precedent pertinent to the analysis of Section 8(f) coverage for an employer which is cited both before and after J.P. Sturrus. See Carpet, Linoleum and Soft Tile Indio Paint, 156 N.L.R.B. 951 (1966); see also Bell Energy Management Corp, et al., 291 NLRB No. 23 (1988). For all of these reasons, Irving respectfully submits: that (i) the Board's decision in J.P. Sturrus should be reversed or disregarded for purposes of determination of Section 8(f) issues in the instant case; and (ii) that the ALJ's decision in reliance on J.P. Sturrus and other Board cases that cite to J.P. Sturrus as precedent for finding that Irving and its ready-mix truck driver employees do not qualify for coverage under Section 8(f) of the Act, and any finding of a violation of the Act based thereon should be reversed and not affirmed by the Board.

Exception No. 5. Whether the ALJ erred by not determining that Irving is an employer engaged primarily in the building and construction industry and, therefore, eligible for coverage under Section 8(f) of the Act?

- The parts of the Decision to which this object is made are found at p.3, lines 19-28; p.12, lines 35-40; p.13, lines 14-41; p.14, lines 1-50; p.15, lines 1-27 and 37-51; p.19, lines 7-22 and 30-35; p.20, lines 1-43; p.21, lines 1-26; and Appendix pp. 1 and 2.
- The portions of the record on which this exception is based are: Tr. at 13, 138, 239, 242-245, 342, 346; GCX 2 pp. 1-25; RX 20 pp. 1-4.
- The ALJ's finding that Irving is not an employer engaged primarily in the building and construction industry, and, therefore, ineligible for coverage under Section 8(f) of the Act is incorrect and based on flawed Board precedent. An appropriate analysis of Irving's business pursuant to validly established, Section 8(f) related Board precedent shows that Irving is engaged primarily in the building and construction industry and, therefore, eligible for coverage as an employer covered under Section 8(f) of the Act.

Citation of Authority and Argument In Support of Exception No. 5

The ALJ found that Irving is not engaged in the building and construction industry based upon the Board's decision in J.P. Sturrus, 288 N.L.R.B. 688 (1988), and certain later cases which cite to J.P. Sturrus. Irving has identified reasons why J.P. Sturrus does not provide appropriate authority. See, supra, pp. 14-21. The proper determination of Irving's status is critical.

Section 8(f) of the Act allows an employer in the building and construction industry to enter into a labor agreement with a union without the union being established as the majority supported

representative of the covered bargaining unit employees if: (1) the employer is engaged primarily in the building and construction industry; (2) the agreement covers employees who are engaged in the building and construction industry; and, (3) the agreement is with a labor organization of which building and construction employees are members. 29 U.S.C. § 158(f).³ Unlike a bargaining relationship within the meaning of Section 9 of the Act, a Section 8(f) relationship may be terminated by either the labor organization or the employer at the expiration of the labor agreement and there is no ongoing obligation on the employer to recognize or bargain with the union. John Deklewa & Sons, 282 N.L.R.B. at 1386-87. Using an appropriate analysis, Irving argues that it qualifies for coverage under Section 8(f) as an employer engaged primarily in the building and construction industry.

a. **The Appropriate Analysis to Determine an Employer's Building and Construction Industry Status**

The appropriate analysis with respect to determining whether an employer is engaged primarily in the building and construction industry is set forth in Carpet, Linoleum and Soft Tile Indio Paint, 156 N.L.R.B 951 (1966). In that case, the General Counsel contended that the employer, a retail hard and soft floor covering business, should not be considered an employer *engaged primarily* in the building and construction industry. Id. The union claimed privilege for the contract covering the employer's flooring installers pursuant to Section 8(f) claiming that the employer was so engaged. Id.

³ There is no evidence in the record to show that the Union was ever elected or selected as a Section 9(a) representative by an uncoerced majority of Irving's ready-mix driver employees or that Irving ever recognized it as such. Furthermore, the CBA's Recognition clause, Article 3, makes no reference to the Union having majority supported status. (GCX 2, pp. 3-4).

In Indio Paint, the trial examiner noted that despite numerous references to the “building and construction industry” within the Act’s legislative history, the congressional proceedings reflect no precise definition of building and construction. 156 NLRB at 957. As such, the presumption was made that Congress used those terms “in the traditional sense in which [they are] customarily used in common parlance as well as technical industrial parlance.” Id. (citing Animated Displays Company, 137 NLRB, 999, 1021 (1962); enfd in pertinent part 327 F.2d 230 (6th Cir. 1964). With respect to technical usage, the trial examiner relied on construction work being defined, in relevant part, as follows:

Construction covers the erection, maintenance and repair (including replacement of integral parts), of immobile structures and utilities, together with service facilities which become *integral parts* of structures and are essential to their use for any *general* purpose. It includes structural additions and alterations. Structures include buildings...and all similar work which are built into or affixed to the land...Construction covers those types of immobile equipment which, when installed, become an integral part of the structure and are necessary to any *general* use of the structure.

Indio Paint, 156 N.L.R.B. at 957-958.

The trial examiner in Indio Paint further expounded upon the definition of building and construction, set out in pertinent part below, and reached his conclusion as follows:

With respect to common parlance, the word “build” has been defined as follows: “To form by *ordering and uniting materials by gradual means* into a composite whole”. Construction has been defined, comparably as follows: “The act of *putting parts together* to form a complete and integrated object.” Webster’s Third New International Dictionary. Both concepts have been cited as synonymous with fabrication.

...

By way of summary: Within these various definitions, whether technical, common, or legal, substantial consensus seems clear. Each formulation with respect to the so-called building and construction concept subsumes *the provision of labor whereby materials and constituent parts may be combined on the building site* to form, make

or build a structure. These various factors, therefore define the statutory "building and construction industry" with which we are concerned. I so find.

With these definitions, determination certainly seems warranted that Indio Paint and Rug Center's work providing labor and materials in connection with floor covering installations, both for general building contractors and homeowners, beyond peradventure of doubt, constitutes "building and construction" work. Further, since some 93 percent of the firm's 1964 gross revenue derived from such work, pursuant to contract, determination would seem to be warranted that Indio Paint and Rug Center has indeed been, throughout the period with which this case is concerned, *primarily engaged* in the building and construction industry work. I so find.

...

Indio Paint, 156 N.L.R.B. at 958 -959.

The Indio Paint decision gives guidance regarding the prospective application of that case to other cases involving a Section 8(f) analysis, as follows:

When we consider the quintessential nature of building and construction work, whether technically, commonly, or judicially defined, determinations with respect to Section 8(f) questions bottomed, simplistically, upon whatever proportionate relationship may be found, within any given firm's gross revenue, between the portion of such revenue received as compensation for the firm's installation service and that portion received as compensation for materials furnished, must be rejected. Determinations thus reached cannot, with due regard for the realities of industrial life, promote the statute's purpose.

Rather, the legislative purpose, so far as it can be determined, would seem to be better served through some more broadly gauged decisional doctrine. When business enterprise devote their facilities, time, effort, and funds principally to contract construction, whether as general building contractors, heavy construction contractors, or special trade contractors - - within the meaning of these terms as previously defined, they should be considered primarily engaged in "building and construction industry" work... When, however, some firm's gross revenue sources happen to provide the single persuasive touchstone with respect to Section 8(f) questions, such as those which this case presents, statutory determinations should be bottomed upon the proportion of that firm's gross revenue which regularly derives from contract construction, without regard to whether such revenue was received as compensation for providing labor merely, or *both* labor and materials.

156 N.L.R.B. at 960.

Finally, the Indio Paint decision opines that future cases involving special trade contract work, such as “concrete work,” may need to be decided case-by-case, but cautions that “Congress cannot have conferred statutory privileges, which Section 8(f) provides, subject to limitations reasonably calculated to create a double standard for contractual union security clauses, *inter alia*, within the building and construction trade considered as a whole.” Indio Paint, 156 N.L.R.B. at 961. Simply stated, a business such as the ready-mix concrete business should not be singled out for different treatment than is offered others within the building and construction industry.

Indio Paint set an often cited Board standard for the determination of whether an employer is engaged primarily in the building and construction industry. In 1979, the Board’s decision in Construction, Building Materials & Misc. Drivers, Loc 83., (“Misc. Drivers Loc. 83”), 243 NLRB 328 (1979) cited the above referenced summary passage from Indio Paint and concluded as follows:

Thus the Board has found that Section 8(f) applies to employers who provide both labor and materials for construction without regard to whether the greater amount of revenue comes from the labor or the materials. The exemption has also been applied to employees whose general business is not in the industry, but who are engaged in construction work on a specific project. In addition, Section 8(f) has been applied to companies in the general contracting business which involves employees working and performing services at construction sites, such as sheet metal contractors. However, the 8(f) exemption has been denied to employers whose business involves the manufacture of construction materials which are installed by employees of a different employer and to employers who have only a minimal involvement in the construction process. Construction, Building Materials & Misc. Drivers, Loc. 83, 243 N.L.R.B. at 331. (internal footnotes and citation omitted) (emphasis added).

Pertinent aspects of the decision in Misc. Drivers, Loc. 83 include: the re-affirmation of the proper analysis to be employed when determining whether an employer is engaged primarily in the building and construction industry; the inclusion within that industry of employers who provide both labor and materials for construction without regard to whether the greater amount of revenue comes

from the labor or the materials, as well as employers whose employees work and perform services at construction sites; and the understanding that a manufacturer or processor of construction materials qualifies as an employer engaged primarily in the building and construction industry if the employees of the employer are adequately linked to the installation of the employer's construction related products or those employees have more than a minimal involvement in the construction process. *Id.* Relying on the Indio Paint decision, the appellate court in Operating Engineers Pension Trust v. Beck Engineering & Surveying Co., 746 F.2d 557 (9th Cir. 1984) found that a surveying company met the employer engaged primarily in building and construction industry standard required by section 8(f) on a gross revenue percentage basis, and that its employee who actually performed surveying work was doing work "related to proposed and ongoing construction projects and is performed in large part at the job site", thereby qualifying as work in the building and construction industry. 746 F.2d at 562-564.

b. Irving Meets the Engaged Primarily in the Building and Construction Industry Standard for Section 8(f) Coverage

Irving's business is the production, delivery and installation of ready-mix concrete in a fluid state for a wide range of building and construction projects including, among other things, home construction, commercial construction, streets, sidewalks, foundations, basement floors, drive ways, and patios, among other things. (Tr. at 13, 138). Ready-mix concrete is a mixture of sand, stone, gravel, cement, water and, sometimes, additives. (Tr. at 13). Irving's ready-mix truck drivers are necessarily involved in Irving's business since Irving does not dispense ready-mix concrete into the vehicles of others. (Tr. at 346).

Irving's fiscal year runs from October 1 through September 30. (Tr. at 239). Irving's total revenues for its fiscal years ending September 30, 2007, 2008 and 2009 and the first eleven (11) months of its 2010 fiscal year through August 31, 2010, the last full month of Irving's 2010 fiscal prior to the hearing in this case in September 2010, identified by source and gross sales for each period, were as follows:

Fiscal Year	Prim Product	Assoc. Product	Haul Charges	Other Product	Total Sales
2007	\$8,664,111.63	\$158,497.07	\$33,865.00	\$660,026.86	\$9,516,500.56
2008	\$8,745,020.63	\$123,157.14	\$42,130.00	\$880,291.58	\$9,790,599.35
2009	\$5,637,211.60	\$106,591.96	\$40,865.00	\$492,692.44	\$6,277,361.00
2010	\$5,123,013.20	\$89,521.30	\$32,605.83	\$514,045.44	\$5,759,185.77

See RX 20 at pp.1-4

The column under "Prim Product" refers to sales of ready-mix concrete. (Tr. at 242). The "Assoc. Product" column refers to associated products such as heated water, calcium chloride or other ingredients called admixtures that are added to the ready-mix concrete in the mixing process which become part of the ready-mix concrete. (Tr. at 242-243). "Haul Charges" are additional charges added to small loads to offset the cost of trucking. (Tr. at 243). "Other Products" are concrete related products such as wire mesh, reinforcement rod, expansion joint, sealants, curing compound and form oil that Irving sells. (*Id.*) The income by category and "Total Sales" numbers referenced above reflect Irving's total income from each of the individual sources during the designated periods. (Tr. at 244; RX 20). Accordingly, adding the total amount of the "Prim Product" (ready-mix concrete) sales to the "Assoc. Product" (admixtures) sales together for any of the

designated periods and then dividing that sum by the "Total Sales" for the same period shows the percentage of Irving's sales of ready-mix concrete for the period compared to its total income for the period. (Tr. at 244-45; RX 20 at pp.1-4).

Doing that calculation on a combined basis for each of the fiscal periods at issue shows that over 91% of Irving's gross revenue received during Irving's 2007, 2008 and 2009 fiscal years and the first eleven (11) months of its fiscal year 2010 derived from batching, loading, mixing, delivering and installing ready-mix concrete for building and construction projects. (Id.). That 91% plus gross revenue figure is comparable to the 93% of Indio Paint and Rug Center's gross revenue figure determined appropriate to show "engaged primarily in the building and construction industry" See Indio Paint, 156 N.L.R.B. at 959.

Irving's ready-mix concrete work is performed in a continuum directly related to building and construction projects culminating in its ready-mix truck drivers performing work on construction sites. The distinction of which part of the proceeds come from labor resources as compared to materials is not relevant. Indio Paint, 156 N.L.R.B. at 960. That continuum process is also important to set Irving apart from employers that, although eligible to be considered engaged primarily in the building and construction industry, had labor agreements covering employees who had no or only minimal contact with actual construction sites. See Misc. Drivers, Loc. 83, 243 N.L.R.B. at 332. The work of Irving's ready mix truck drivers was not limited in the CBA to a shop or manufacturing area. (GCX 2, pp. 1-25). The majority of their paid work time is spent loading and mixing ready-mix concrete in their trucks, in route to or from job sites, and on construction job sites. (Tr. at p. 342). Simply stated, if Irving's drivers do not appear at and perform their work on construction job sites, Irving does not perform its part of the construction process.

For all these reasons, Irving respectfully submits that it qualifies as an employer engaged primarily in the building and construction industry under an appropriate Section 8(f) analysis. The ALJ erred in deciding to the contrary based upon J.P. Sturrus and the portions of his Decision on that issue, and any finding of a violation of the Act based thereon should be reversed and not enforced.

Exception No. 6. Whether the ALJ erred by not determining that Irving's ready-mix truck drivers are engaged in the building and construction industry and, therefore, eligible for coverage under Section 8(f) of the Act?

- The parts of the Decision to which this objection is made are found at p.3, lines 19-52; p.4, lines 1-51; p.5, lines 1-5; p.13, lines 14-41; p.14, lines 1-50; p.15, lines 1-27 and 37-51; p.19, lines 7-22 and 30-35; p.20, lines 1-43; p.21, lines 1-26; and Appendix pp. 1 and 2.
- The portions of the record on which this exception is based are: Tr. at 13-14, 128-136, 138, 140-144, 147, 152-165, 170, 174, 196-197, 199-200, 202, 204, 213, 225, 227-228, 235, 241, 262-263, 289-294, 342-348; GCX 2 pp. 1-25; RX 1, RX 2, RX 3, RX 4, RX 5, RX 6, RX 8, RX 9, RX 10, RX 11, RX 27, RX 28; and Appendices 1 and 2 to Irving's Post-Hearing Brief.
- The ALJ erred by finding that Irving's ready-mix truck drivers are not engaged in the building and construction industry, and, therefore, ineligible for coverage under Section 8(f) of the Act. An appropriate analysis of the ready-mix truck driver's work pursuant to validly established and well reasoned Section 8(f) related Board precedent shows that Irving's ready-mix truck drivers are engaged in the building and

construction industry sufficient to be considered covered as employees engaged in the building and construction industry pursuant to Section 8(f) of the Act.

Citation of Authority and Argument In Support of Exception No. 6

The second element that must be shown in order for a bargaining relationship to fall within the coverage of Section 8(f) is that the agreement covers employees who are engaged in the building and construction industry. (29 U.S.C. § 158(f)). A proper analysis of the evidence of record shows that Irving's ready-mix truck drivers meet that standard.

a. **The Proper Analysis for Determining Whether An Employee Is Engaged In the Building And Construction Industry**

As noted earlier, in Construction, Building Materials & Misc. Drivers, Loc. 83, the Board ruled that to be covered under Section 8(f), employees must have more than a minimal involvement in the construction process. 243 N.L.R.B. at 331. In 2001, the Board provided an answer regarding the level of employee involvement, along with a standard regarding types of truck driver work that qualify as construction work, both of which directly contradict the Section 8(e) "delivery of materials" approach adopted in J.P. Sturuss.

In Techno Construction Corp., 333 N.L.R.B. 75 (2001), the respondent employer repudiated its relationship with the union at the expiration of its labor agreement covering its four (4) truck drivers, claiming that the relationship was covered under Section 8(f) rather than 9(a) of the Act. 333 N.L.R.B. at 78. A major issue in the case was whether those truck drivers performed work in the construction industry as would be required to qualify under Section 8(f). (Id.) There was no consensus in hearing testimony on what percentage of time any of the drivers spent on the job sites hauling materials as compared to away from the sites. (Id. at 79). The ALJ specifically noted that

time spent by the drivers on job sites while operating a boom truck to load or unload materials was the performance of on-site construction work within the meaning of Section 8(f). (Id.)

After mentioning both Island Dock and Inland Concrete with regard to the findings in those cases and others related to Section 8(e) hot cargo clauses, and after noting the distinctions in wording and purpose between Sections 8(e) and 8(f), the ALJ in Techno Construction Corp. quoted the Board's decision in adopting J.P. Sturuss, 333 N.L.R.B. at 82. That done, and regardless thereof, the ALJ moved forward and determined that for purposes of Section 8(f), employees must be "substantially engaged in construction work, this means that the construction portion of their work must be more than minimal, but need not constitute a majority of their work." 333 N.L.R.B. at 83-84. He cited references to Board precedent indicating that 30% could be considered "substantial". Id. Using that analysis, the ALJ found that truck drivers who spend a substantial portion of their work time hauling materials on construction job sites and those who operate power equipment, a boom truck, on construction job sites to deliver or remove materials were engaged in construction work within the meaning of Section 8(f) since that was a substantial part of their work. 333 N.L.R.B. at 79, 83-84.

The Board adopted the ALJ's decision. 333 N.L.R.B. at 75. In doing so, the Board stated, "we specifically agree with his definition of 'employees engaged...in the building and construction industry under Section 8(f) of the Act and with his application of that definition to the facts of this case.'" (Id. at FN2). The Board's endorsement of that ALJ's analysis is consistent with its prior description of the amount of building and construction involvement required for employee coverage under Section 8(f), which must be more than minimal. See Misc. Drivers Loc. 83, 243 N.L.R.B. at 331.

In Techno Construction Corp., contrary to J.P. Sturrus, Section 8(e) and 8(f) were treated as separate and distinct provisions serving different purposes. Hauling materials and equipment operation to load and unload materials on job sites were considered construction industry work for purposes of Section 8(f), and not just delivery or removal of materials as decided in Inland Dock and Inland Concrete under a Section 8(e) analysis. Employees need only have a substantial portion, less than a majority, of their work be construction related to be considered engaged in the building and construction industry for purposes of Section 8(f). The Board's decision in Techno Construction Corp. based upon 8(f) standards directly contradicts the unsupported conclusions adopted in J.P. Sturrus based upon prior, Section 8(e) cases.

- b. **Irving's Ready-Mix Truck Drivers Meet the Performing Work In The Building And Construction Industry Standard for Section 8(f) coverage**

An Irving ready-mix truck, also referred to as a "mixer", resembles and functions as a large cement mixer on wheels. (See Tr. at 128-134; RX 1). It is a six (6) wheel drive vehicle with a large drum that can carry up to eleven (11) cubic yards of ready-mix concrete. (Tr. at 134-135). Irving has five (5) batch plants which are located in Fort Wayne, Indiana and Kendallville, Indiana. (Tr. at 13, 14, 241). Irving's batch plants are outdoor type facilities with associated conveyors and bins necessary to the ready-mix business. (Tr. at 343-345, RX 4 and 5).

At Irving's batch plants, concrete powder, aggregate, water and any other required ingredients are dispensed into the truck's barrel or drum. (Tr. at 13-14, 134-136, 241; RX 6). Once the ready-mix concrete ingredients are in the drum on the truck, the truck's driver operates the drum via foot pedal located inside the truck's cab. (Tr. at 132, 135). Pushing the pedal one way causes the drum to rotate in a direction that mixes the ingredients. (Tr. at 132). Pushing the pedal the other way

causes the drum to rotate in the opposite direction, which in turn causes the discharge of the ready-mix concrete from the drum by way of a chute located at the front of the truck. (Id.) Ready-mix concrete should be installed within one and one half (1 ½) hours, and no more than three (3) hours, after mixing to prevent deterioration or setting. (Tr. at 155, 346). Once mixed in a liquid state, ready-mix concrete cannot be warehoused or simply dumped in a pile for later use. (Tr. at 347).

The ready-mix truck driver monitors a slump meter located inside the truck's cab which indicates the consistency of the mixture in the drum as the drum turns. (Tr. at 135-136). If the slump meter indicates that the load is too stiff, additional water can be added either while still at the batch plant, or later from the truck's internal water tank. (Tr. at 131, 134-136). The location of the project site to which the ready-mix concrete must be delivered, the use for the ready-mix, the specific type of concrete mixture for the load and the desired slump for the load are all identified on the delivery ticket issued to the driver at the batch plant. (Tr. at 152-157, 197, 225; RX 8, RX 9, RX 10, RX 11, RX 27 and RX 28). Water added by the driver at the construction site at the customer's request is documented by the driver in the event an issue is later raised regarding the quality of the ready-mix. (Tr. at 199-200; RX 8, RX 9, RX 10, RX 11, RX 27 and RX 28). After being loaded, the driver uses the hose on the truck connected to the truck's internal water tank to clean the truck's hopper area of dust, stone or other residue before driving the truck to the designated construction site. (Tr. at 154). Nothing in the CBA limited Irving's ready-mix truck drivers to work only at Irving's batch plants. (GCX 2).

Once at the designated job site, the Irving driver checks in with the customer to determine what is necessary for that project. (Tr. at 138). Irving's drivers are trained to document arrival and initial discharging times to show the freshness of the ready-mix based upon the customer's schedule

for the load. (Tr. at 152-161, 199; RX 8, RX 9, RX 10, RX 11, RX 27 and RX 28). The type of project determines what the driver is requested to do at the job site. (Tr. at 131, 202). At the job site, the Irving driver folds out the chutes located at the top of the truck and may need to add additional chutes that are carried on the truck if need be in order to reach the specific location where the ready-mix concrete is required to be installed. (Tr. at 131).

The installation of ready-mix concrete at project sites requires coordination of effort between the driver and others working at the site. (Tr. at 144, 227, 235). Irving's ready-mix truck drivers communicate with others at the job site to determine where the ready-mix concrete is needed, and in what quantities it is needed, and they must regulate the rate of discharge to work in unison with the others at the site. (Tr. at 140-144). If the driver discharges the ready-mix in quantities that cannot be handled by the others at the site, it could cause a problem such as wall forms to pop out or additional work on the part of the others working at the job site. (Tr. at 141, 235; RX 2).

It requires training and experience to develop the skills necessary to operate a ready-mix truck. (Tr. at 174, 204, 228). Irving's drivers regularly have to move the truck while pouring in order to regulate the installation of the ready-mix concrete in a way that is conducive to the needs of the project and those with whom the driver is working on the project. (Tr. at 141, 170, 196; RX 2 and 3). During a single load, the driver may have to drive the truck around on the site in order to access the forms or areas into which the ready-mix is to be installed. (Tr. at 142, 170, 196). If the project involves a sidewalk or driveway pour, the driver has to operate the truck's chute, causing it to move to the left and right while discharging in order to fan the ready-mix out for others at the site, attempting to regulate the flow to within one-half ($\frac{1}{2}$) inch of the desired thickness of the pour. (Tr. at 143). Sometimes drivers have to stop pouring the ready-mix while others on the site are working

with the ready-mix already poured, doing sections of a project at a time. (Tr. at 144). The ready-mix truck driver may have to operate the truck from outside of the truck using four (4) knobs that extend from the front of the truck if the driver needs to be outside in order to see the location of the pour or cannot hear or otherwise communicate with the customer during the discharge process from inside the truck's cab. (Tr. at 164-165). One knob unfolds the chute affixed to the top of the truck, one moves the chute up and down, one moves the chute right and left and the other controls the flow of the ready-mix from the truck into the chute. (Id.)

Irving's ready-mix truck drivers sometimes deliver other ready-mix related supplies on the truck, such as reinforcement bar, concrete sealer and form oil. (Tr. at 147; 262-263). The truck is designed to carry such items. (Id.) On some projects, the ready-mix truck driver is required to install a certain level of ready-mix in an area and then wait while reinforcement bar or mesh are installed on top of what has been poured before the driver installs additional ready-mix in order to top off the area to the required thickness. (Tr. at 147). After installing the ready-mix concrete at the job site, the driver washes up the truck, normally at the job site, to remove residue. (Tr. at 147). The drivers sometimes wash tools for the contractor at the site. (Id.)

The wide range of hauling and equipment operation construction related duties performed by Irving's ready-mix truck drivers on job sites is obvious. Moreover, consideration of those duties makes it equally obvious that they represent a skilled trade within the construction process. The exercise of those skills, both driving and operating the truck, comprises a substantial portion, more than half, of their paid work time. (Tr. at 342). See Techno Construction Corp., 333 N.L.R.B. at 84 ("substantial means less than majority"). Irving's ready-mix truck drivers spend approximately six percent (6%) of their total paid working time being batched and mixing their load at an Irving batch

plant, approximately 25% of their total paid working time driving to and from job sites (half while loaded and mixing), and approximately 30-35% of their total paid working time on job site. (Tr. at 342). Their remaining paid working time may be at the batch plant waiting to load, cleaning their truck or doing other chores. (Tr. at 348).

The importance of the work performed by Irving's driver related to work performed by others at project sites was described in the administrative hearing testimony of Sheldon Byler, a concrete contractor who has had substantial experience with Irving for over 20 years. (Tr. at 289-290). Byler described the importance of the communication with the drivers about what needed to be done at project sites, starting and stopping the pouring process as need be, operating the truck's chute to lay out the ready-mix where needed, and moving the truck around the work site. (Tr. at 291-293). Byler also described the problems caused by an uncooperative or unskilled ready-mix truck driver. (Tr. at 293).

Byler testified about drivers who are uncooperative, who will not "go down that hill" on a project site to get the ready-mix concrete where it is needed. (Tr. at 293). He identified problems with unskilled drivers, such as ones who did not properly place the ready-mix concrete and left piles that needed to be moved; drivers who could not control the chute which then hit and broke forming material; and drivers who dropped the truck's chute into sub-grade areas containing wire mesh or reinforcement bar which then hooked the reinforcement bar or wire mesh and pulled it out of place. (Id.) According to Byler, the ready-mix truck driver's ability to provide the specific amount of ready-mix concrete in the specific place required is a necessary part of the overall effort to put the ready-mix concrete in place (Tr. at 293-294). Byler testified that regardless of whether the driver

is moving the chute side to side or the truck forward or backward, the driver has to get the ready-mix on the ground or in the form "where we need it". (Tr. at 292-293).

Like others in the building and construction industry, Irving's ready-mix work is seasonal since the construction industry in the northern Indiana area slows in the winter months and rain can result in no work for Irving's ready-mix truck drivers. (Tr. at 162). Moreover, approximately 98% of the work done by Irving ready-mix truck drivers is done outdoors. (Tr. at 163).

The facts clearly show that Irving's ready-mix truck drivers meet the on-site power equipment operation standard and on-site hauling standard for building and construction work affirmed by the Board in Techno Construction. Thirty (30) to thirty-five (35) percent of Irving's drivers' paid work time is spent performing those functions. That substantial portion of their paid work time, sufficient alone under Techno Construction, becomes all the more convincing on this issue when you add the six (6) percent truck batching and mixing time and the twenty five (25) percent of their work time driving to and from job sites. Irving employees unite ingredients to form a product which its ready-mix truck drivers mix and maintain by mixing prior to installation on a construction site where they spend a substantial part of their work time performing necessary and essential work operating the ready-mix truck to install the ready-mix concrete so that it becomes an integral part of a building or structure and doing necessary clean-up work.

Irving represents a specialized trade. A ready-mix truck is simply construction in motion, a huge cement mixer on wheels combined with installation equipment that Irving's drivers drive and operate on building and construction sites.⁴ Certainly, the driving and operation of the ready-mix

⁴ Current published Davis-Bacon wage and benefit guidelines for federally funded Heavy and Highway and Building projects in Allen and Noble Counties relative to truck drivers include

trucks on job sites, even if narrowly considered to be unloading of material, meets the equipment operation test for on-site construction work adopted in Techno Construction Corp., 333 N.L.R.B. at 79. Irving does not and cannot merely deliver and dump ready-mix concrete at a project site stockpile for its later use the same as could be done with stone or sand.

The fact that others at the project site may work with Irving's drivers during the ready-mix installation process positively enhances the 8(f) analysis. There is nothing in Section 8(f), or in the analysis of the meaning of "engaged primarily in the building and construction industry" as provided in Indio Paint and other Board decisions of which Irving is aware, that speak to that issue. The primary issue under the 8(f) analysis is the nature of the industry in which Irving is primarily engaged, and in which its contact covered unit of ready-mix truck drivers are substantially engaged. The ready-mix truck drivers' function carries its own set of duties. (Tr. 213, 235). If Irving's employees work with others on construction sites or perform additional, incidental work for others on construction sites in the process of performing their ready-mix truck work, then additional support exists to find Irving engaged primarily in the building and construction industry since that would show that its employees are working with those of other employers who are similarly engaged in the building and construction industry to form, make or build a structure.

For all these reasons, Irving respectfully requests that the Board find that Irving's ready-mix truck drivers properly qualify as employees who perform work in the building and construction industry under an appropriate Section 8(f) analysis. Irving respectfully submits that the ALJ's

rates for "mixer trucks (all types)" and "mobile mixer trucks". See pertinent portions of General Decision: IN 20100006 06/04/2010 and General Decisions: IN 20100002 06/04/2010, attached at Appendices 1 and 2, respectively, to Irving's Post-Hearing Brief.

finding to the contrary based upon J.P. Sturuss, and any violation of the Act based thereon should be reversed and not affirmed.

Exception No. 7. Whether the ALJ inappropriately failed to incorporate the ready-mix concrete mixing and slump monitoring duties Irving's ready-mix truck drivers perform from the time that the ready-mix truck is loaded (batched) into the truck until the time that the ready-mix concrete is discharged on a job site as building and construction work covered under Section 8(f)?

- the parts of the Decision to which this objection is made is at page 3, lines 30-52; and, page 4, lines 1-36.
- The portions of the record upon which this objection is based are Tr. pages 132, 135-136.
- The ALJ's failure to include the Irving ready-mix truck driver's work duties of ready-mix concrete mixing and slump monitoring from the time that the ready-mix truck is loaded (or batched) until the time that the ready-mix concrete is discharged on job sites as building and construction work covered under Section 8(f) improperly dilutes the full understanding of a ready-mix truck driver's work that properly qualifies as work in the building and construction industry, which begins even before the ready-mix truck arrives on a job site.

Citation of Authority and Argument In Support of Exception No. 7

The fact that ready-mix concrete mixing and slump monitoring occur at the batch plant and in transit, not only while on job sites, more accurately expresses the character of the ready-mix truck operation duties, and the locations at which those duties are performed. (Tr. at 132, 135-136). Those work duties performed while at the batch plant, in transit and at job sites should properly be

considered part of the continuum of the building and construction work performed as part of the ready-mix truck drivers' hauling and operation work performed in the building and construction industry for the purpose of assessing the drivers' qualification under Section 8(f) of the Act. For these reasons, Irving respectfully requests that those job duties also be considered as part of the Section 8(f) analysis of the ready-mix truck driver's work in the building and construction industry.

Exception No. 8. Whether the ALJ erred by not finding that the Union is a labor organization of which building and construction employees are members as provided in Section 8(f) of the Act?

- The parts of the Decision to which this objection is made are found at p.13, lines 14-41; p.14, lines 1-50; p.15, lines 1-27; p.19, lines 6-22; p.20, lines 1-13, 25-44; p.21, lines 1-26; and Appendix pp. 1 and 2.
- The portion of the record on which this exception is based are: Tr. at 238; GCX 1(a) and GCX 1(c); RX 19 pp. 1 and 2.
- The ALJ erred by failing to make a finding regarding the Union's status pertinent to the standards set out for coverage under Section 8(f) of the Act and that failure deprives Irving a full and fair opportunity to show that its CBA and bargaining relationship with the Union existed and were governed under Section 8(f) of the Act. The evidence of record clearly shows that the Union is a labor organization of which building and construction employees are members as required in Section 8(f) of the Act.

Citation of Authority and Argument In Support of Exception No. 8

The third requirement for bargaining relationship qualification under Section 8(f) is that the labor agreement at issue is with a labor organization of which building and construction employees

are members. 29 U.S.C. § 158(f). The ALJ improperly failed to make any finding on this issue in the Decision. Irving does not consider the finding on this issue to be difficult, or really in doubt, since the Union has acknowledged that it meets the criteria.

On the FMCS form enclosed with the Union's March 4, 2010 contract termination notice letter that was sent to Irving and in the original June 2, 2010 and June 4, 2010 Unfair Labor Practice Charges that the Union filed against Irving in this case, the Union specifically identified Irving's type of establishment as "construction". (Tr. at 238; GCX 1(a) and GCX 1(c); RX 19 pp.1 and 2.) This shows that the Union considers Irving to be engaged in the construction business and proves that the Union is a labor organization of which building and construction employees are members since it claims to represent employees, Irving's employees, who work for a construction industry employer. Therefore, this factor under an appropriate Section 8(f) analysis is met.

For these reasons, Irving respectfully submits that the ALJ erred by failing to find that the Union is a labor organization of which building and construction employees are members and respectfully requests that the Board make such a finding.

Exception No. 9. Whether the ALJ erred in finding that Irving's CBA and collective bargaining relationship with the Union were governed pursuant to Section 9 of the Act rather than Section 8(f) of the Act, and, therefore, that Irving had an ongoing obligation to recognize and bargain with the Union after the parties' CBA terminated on May 31, 2010?

- The parts of the Decision to which this objection is made are p.3, lines 19-52; p.4, lines 1-51; p.5, lines 1-5; p.12, lines 35-40; p.13, lines 1-41; p.14, lines 1-50; p.15, lines 1-27 and 37-51; p.16, lines 30-31; p.19, lines 6-22 and 30-35; p.20, lines 1-44; p.21, lines 1-26; and Appendix pp. 1 and 2.

- The portions of the record on which this objection is based are Tr. pp. 11, 13-14, 39, 128-149, 152-165, 170, 174, 196-197, 199-200, 202-204, 213, 225, 227-228, 235, 238-246, 262-263, 289-294, 321, 342-348 and 371; GCX 1(a), GCX 1(c), GCX 2 pp. 1-25, GCX 8 and GCX 23; RX 1-6, RX 8-11, RX 19 pp. 1 and 2, RX 20 pp. 1-4, RX 27-28, and Appendices 1 and 2 to Irving's Post-Hearing Brief.
- The ALJ erred by finding that Irving's CBA and bargaining relationship with the Union were governed under Section 9 rather than Section 8(f) of the Act, and his finding should be reversed and not affirmed. The evidence of record in this case clearly shows that under an appropriate analysis, Irving's collective bargaining relationship with the Union was properly governed by Section 8(f) of the Act rather than Section 9 of the Act. All of the necessary elements for Section 8(f) coverage are present and there is no evidence of record which rebuts the presumption of Section 8(f) status. Therefore, Irving's obligation to recognize and bargain with the Union terminated when the parties' CBA terminated on May 31, 2010, and Irving could lawfully make unilateral changes in terms and conditions of employment thereafter.

Citation of Authority and Argument In Support of Exception No. 9

Irving has already shown why the Board precedent on which the ALJ relied in finding that Irving does not qualify as an employer engaged primarily in the building and construction industry and that its ready-mix truck drivers do not qualify as engaged in the building and construction industry is flawed and should not be followed in this case. Irving hereby incorporates by reference as if fully set forth herein the Citation of Authority and Argument in Support of Exception No. 4 at pages 14 to 21, supra.

Irving has already shown why, when using an appropriate analysis, Irving should properly be considered an employer engaged primarily in the building and construction industry as required for coverage under Section 8(f) of the Act. Irving hereby incorporates by reference as if fully set forth herein the Citation of Authority and Argument in Support of Exception No. 5 at pages 22 to 30, supra.

Irving has already shown why, when using an appropriate analysis, its ready-mix truck drivers employees should properly be considered as employees engaged in the building and construction industry as required for coverage under Section 8(f) of the Act. Irving hereby incorporates by reference as if fully set forth herein, the Citations of Authority and Argument in Support of Exceptions Nos. 6 and 7 at pages 31 to 40 and pages 40 to 41, respectively, supra.

Further, Irving has shown why the Union should properly be considered a labor organization of which building and construction employees are members consistent with requirements for coverage under Section 8(f) of the Act. Irving hereby incorporates by reference as if fully set forth herein the Citations of Authority and Argument in Support of Exception No. 8 at pages 41 to 42, supra.

Since Irving has shown that it is an employer engaged primarily in the building and construction industry, its ready-mix truck drivers are engaged in the building and construction industry and the Union is a labor organization of which building and construction employees are members, all the requirements for coverage under Section 8(f) are met. See 29 U.S.C. § 158(f). That means there is a rebuttal presumption that Irving's bargaining relationship with the Union falls under Section 8(f), and the burden of proving a Section 9 relationship falls on the party making that assertion. Madison Industries, Inc., 249 N.L.R.B. 1306, 1308 (2007) citing John Deklews & Sons,

282 N.L.R.B. 1375, 1385 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3rd Cir. 1988). Irving's prior CBA with the Union covering Irving's ready-mix truck drivers does not identify the Union as a majority supported representative and does not indicate that Irving ever recognized it as such. (GCX 2 pp. 3-4). There is no evidence of record in this case to support any finding of Section 9, majority supported status on the part of the Union. If the party asserting a Section 9 relationship fails to carry that burden, the relationship is governed under Section 8(f) and upon the labor agreements' expiration, the union enjoys no presumption of majority status and either party may repudiate the Section 8(f) relationship. John Deklews & Sons, 282 N.L.R.B. at 1386.

That stated, there is no valid basis for the ALJ's ruling that Irving's collective bargaining relationship with the Union was governed under Section 9 of the Act and that Irving had a continuing obligation to recognize and bargain with the Union after the parties' CBA terminated on May 31, 2010. The Decision's reference to the number of successive agreements between the parties is meaningless. See Decision at p.14. The employer in John Deklewa & Sons, had engaged in multiple, successive agreements covering a span of 25 years and that was not considered as a factor in determining Section 8(f) bargaining relationship status. 282 N.L.R.B. at 1376. Likewise, the reference in the Decision to the continuity of employee employment and lay off and recall are meaningless. See Decision at p. 14. In Deklewa & Sons, the Board determined that in Section 8(f) relationship cases it would no longer distinguish between "permanent and stable" and "project by project" work forces for election petition unit determination purposes. Id. at 1385. That shows that continuity of employment for unit employees is also not a proper factor in assessing eligibility for Section 8(f) coverage. Further, those factors are not pertinent according to the wording of Section 8(f). See U.S.C. § 158(f).

The reference in the Decision to the CBA's union security clause is similarly meaningless. (See Decision at p.14). While some Board decisions may look to the existence of a 7 day union security clause as evidence of Section 9 status, others do not. See Techno Construction Corp., 333 N.L.R.B. at 83. Irving asserts that those Board cases which find no relevance to the inclusion or exclusion of a 7 day union security clause for purposes of Section 8(f) analysis are clearly better reasoned since the wording of Section 8(f) of the Act only allows, but does not require, the inclusion of a 7 day union security clause in a labor agreement governed by Section 8(f). See 29 U.S.C. § 158(f).

Finally, there is no dispute in this case that the CBA terminated and that Irving repudiated its relationship with the Union upon the CBA's termination. The Union sent timely written notice consistent with the CBA's terms to terminate the CBA on May 31, 2010. (Tr. at 238; GCX 2 at p.20; RX 19 at pp.1 and 2). Irving considered the bargaining relationship terminated upon the termination of the CBA and notified both the Union and its employees of its decision to no longer recognize or bargain with the Union following the CBA's termination. (Tr. 39, 321; GCX 8, and GCX 23). Irving was then free to unilaterally set terms and conditions of employment for its ready-mix truck drivers.

For all these reasons, Irving respectfully submits that the ALJ erred in finding that Irving's collective bargaining relationship with the Union was governed pursuant to Section 9 of the Act and that Irving had an ongoing obligation to recognize and bargain with the Union after the CBA terminated on May 31, 2010. Irving respectfully submits that those findings and any finding of a violation of the Act based thereon should be reversed and not affirmed. Irving also respectfully requests that the Board rule that Irving's collective bargaining relationship and CBA with the Union

existed and were governed under Section 8(f) of the Act and that Irving was not obligated to recognize or bargain with the Union following the termination of the parties' CBA on May 31, 2010.

Exception No. 10. Whether the ALJ's ruling that Derek Ray unlawfully interrogated employment applicants regarding their willingness to cross a picket line based solely upon testimony directed to an unrelated allegation in the Consolidated Complaint and without any amendment of the Consolidated Complaint denied Irving a full and fair opportunity to defend the claim and is not supported by the evidence of record?

- The parts of the Decision to which this objection is made are found at p. 18, lines 25-51; p.19, lines 18-20 and 30-51; p.20, lines 45-46; and Appendix pp. 1 and 2.
- The portions of the record on which this exception is based are: Tr. at 321-322. 369; GCX 1(i) p.2; Decision p.18.
- The ALJ's unsolicited finding that Ray illegally interrogated employment applicants about the applicants' willingness to cross a picket line should be reversed and not affirmed since it is based on testimony regarding an unrelated allegation in the Consolidated Complaint, denied Irving an adequate opportunity to present a defense and the record does not establish a showing that Ray's alleged interrogation was a material hiring decision factor or otherwise violated the Act.

Citation of Authority and Argument In Support of Exception No. 10

The Consolidated Complaint contains no allegation regarding any alleged interrogation of applicants by Ray. To the contrary, the Consolidated Complaint alleges only that Ray made illegal, anti-union statements to a prospective applicant, which Ray denied, and the ALJ credited Ray's denials. (Tr. at 321; GCX 1(i) p.2; Decision p.18). There was no effort to amend the Consolidated

Complaint based upon Ray's testimony regarding conversations he had with applicants unrelated to the alleged anti-union statements, so the issue of unlawful interrogation was never fully explored or briefed.

Ray's comments to applicants about a potential strike did not amount to a pre-hire interrogation concerning the applicant's union background or support, or indicate whether any applicant was rejected based upon information received such as was found in Smith's Complete Market, 237 N.L.R.B. 1424, 1431 (1978). Ray testified that he told applicants about the potential of a strike and the need for drivers if that occurred. (Tr. at 322). "I wasn't hiring a driver just to hire a driver. I was hiring a driver to fill a need in case my regular drivers went on strike. That is why I prefaced every conversation with any driver I talked to." (Tr. at 369). That reference goes only to the potential need for employees and the circumstances at issue.

There is nothing in the record to show that Irving made an applicant's declaration on a willingness or lack of willingness to cross a picket line a part of the employment application process or the basis for denying an application, such as the case in Planned Building Services, 341 N.L.R.B. 670, 677 (2006). While Ray, essentially, wanted applicants to understand the situation and the circumstance, a strike, that could result in Irving's need for drivers, the record in this case does not preclude a finding that an applicant's ultimate choice on whether to cross a picket line was left open and not shown to be a determining factor in the hiring process.

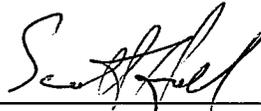
The fact that this issue was not raised in the Consolidate Complaint, and not the subject of a motion to amend, prevented Irving from being aware of the issue and mounting a defense by more fully developing Ray's testimony on the issue. There is a wide range between what Ray may have

wanted to know about the intentions of applicants, and what he actually asked or determined. Without notice of the issue, Irving was unable to properly defend on the issue.

For all the foregoing reasons, Irving respectfully submits the record does not support the ALJ's finding that Irving unlawfully interrogated applicants regarding their willingness to cross a picket line and respectfully requests that the ALJ's decision on this issue, and any finding of a violation of the Act based thereon should be reversed and not affirmed by the Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

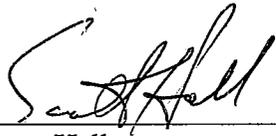
The undersigned hereby certifies that on the 14th day of January, 2011, a true and correct copy of the above and foregoing was forwarded by electronic mail to the following parties:

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