

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE**

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 REPLY BRIEF
TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Irving Ready-Mix, Inc. ("Irving"), by counsel, hereby submits Irving's reply to Acting General Counsel's Answering Brief to Irving's Exceptions to the Administrative Law Judge's Decision (the "Answering Brief"). Irving replies to each of the subject areas raised by Counsel for Acting General Counsel ("Counsel for AGC") in the Answering Brief, in turn.

The ALJ's Holding That The Nature of Irving's Relationship with the Union Was Governed Under Section 9 of the Act Rather Than Section 8(f) of the Act Constitutes Err

Contrary to Counsel for AGC's assertion, Irving does not argue that it withdrew recognition from the Chauffeurs, Teamsters & Helpers Local Union No. 414, a/w International Brotherhood of Teamsters (the "Union"). (*See* Answering Brief, p.3). Irving has steadfastly maintained that it had no obligation to recognize or bargain with the Union following the termination of its collective bargaining agreement ("CBA") with the Union on May 31, 2010. (*See* GCX 1(k) at 3, 5 and 6; GCX 8, 16, and 23).

Counsel for AGC does not dispute the Section 8(f) legal standards, analysis and factual applications provided in Irving's Exceptions to the Administrative Law Judge's Decision ("Irving's Exceptions") Nos. 5, 6, 7, 8 and 9, all of which show that Irving's prior relationship with the Union

was properly governed under Section 8(f) of the Act, rather than Section 9. Instead, Counsel for AGC continues to rely on the Board's prior decision in J.P. Sturrus Corporation, 288 N.L.R.B. 668 (1988) as the sole basis for the argument that Irving's prior CBA and relationship with the Union were governed under Section 9, rather than Section 8(f). Irving's Exception No. 4 shows why that reliance is misplaced. (See Irving's Exception No. 4, pp. 13-21).

Contrary to Counsel for AGC's assertion, neither Techno Construction Corp., 333 N.L.R.B. 75 (2001) nor Hudson River Aggregates, Inc., 246 N.L.R.B. 192, 199 (1979) held that ready-mix companies, such as Irving, "do not fall within in the line of businesses engaged primarily in the building and construction industry." (See Answering Brief at p.3). Techno Construction merely references the holding in J.P. Sturrus, but not as controlling authority pertinent to the case at issue in Techno Construction. 333 N.L.R.B. at 82. Hudson River is irrelevant since it concerned employees of a quarry owner employer who were "engaged exclusively in mining and processing, and the on-premises cartage of unfinished and processed stone." 246 N.L.R.B. at 194-195, 199.

Counsel for AGC takes issue with the word "installation" as used by Irving concerning the work of its ready-mix drivers related to ready-mix concrete. (See Answering Brief, p.4). Ready-mix concrete in a liquid state has unique characteristics that require it to be installed in an appropriate location, in appropriate amounts and rates, and at the appropriate state of consistency, in part by way of the operation of the ready-mix truck's various power equipment components, or it is not installed. (See Irving's Exceptions No. 6, pp. 33-40). If others at the construction site do not perform their functions of leveling or finishing the ready-mix concrete, that part of the installation process is faulty. The fact that any one facet of the process involves different components and job duties than another does not legitimately negate the existence or importance of the other facets.

Counsel for AGC attempts to explain away the driver work issue by claiming “there are several crucial differences between the work performed by Techno and that done by the Respondent in this case.” (Answering Brief, p.5). Counsel for AGC offers that Techno’s dump trucks “are used to remove dirt and soil from trench’s [sic] which are being excavated and then to backfill the trench with the same rocks and soil once the trench is ready to be closed” and that Techno’s semi-trailer dump truck is “filled with unneeded soil and asphalt” for removal off site. (*Id.*) (emphasis added). Common sense dictates that dump trucks do not “remove” dirt and soil from trenches, “backfill” trenches or “fill” themselves. Dump trucks haul and dump materials, which the Board determined in Techno Construction qualified as building and construction work when a substantial portion of the truck driver’s hauling time was performed doing that work on site. 333 N.L.R.B. at 83-84. It is ironic that Counsel for AGC describes Techno’s dump truck drivers’ work by including reference to dirt and soil removal, backfilling, and filling work performed by others, not the truck drivers, in support of its effort to distinguish Techno’s drivers from Irving’s, but continually claims that the work of others involved in the ready-mix concrete installation process with the driver somehow negates the building and construction work performed by Irving’s drivers as part of that process.

Irving’s drivers are hauling materials, ready-mix concrete and maybe related supplies, on sites from the moment of arrival on job sites and at least thirty (30) percent of their total paid work time is spent doing that work along with power equipment operation work on construction sites. (Tr. at 342). Therefore, Counsel for AGC’s claim that Irving’s drivers have “only minimal” involvement in this construction process” is inaccurate. (See Answering Brief, p. 5).

Likewise, contrary to Counsel for AGC’s position, the mere fact that the ready-mix truck driver delivered the ready-mix concrete to the job site should not preclude an appropriate

Section 8(f) analysis of the driver's work as part of the construction process. The Board showed that to be the case in Techno Construction when it looked past the fact that a boom truck driver delivered materials to a job site and determined that the driver was engaged in building and construction work while operating the truck's power equipment on the job site to unload the materials delivered. Techno Construction, 333 N.L.R.B. at 79. It reached that conclusion even though such work does not qualify as work at the site of the construction for purposes of the proviso to Section 8(e) of the Act. See Teamster Joint Counsel 42 (Inland Concrete Enterprises, Inc.) 225 N.L.R.B. 209, 216-217 (1976). The decision in Techno Construction shows the distinction between the "delivery" issues pertinent to a Section 8(e) analysis as compared to the building and construction industry analysis of a truck driver's work pertinent to Section 8(f). Therefore, there can be no real dispute that the on site power equipment operation work performed by Irving's drivers should also be considered building and construction work covered by Section 8(f).

Counsel for AGC argues that the Section 8(f) employer coverage finding in J.P. Sturris is a "natural extension" of the Section 8(e) based decision in Island Dock and Inland Concrete that "the mixing and delivery of ready-mix concrete at construction sites is not construction work but is the delivery of a material or product."¹ (See Answering Brief, p. 5). In other words, if an employee's work is not covered work at the site under a Section 8(e) analysis, then the employer is automatically excluded from coverage under Section 8(f) without analysis. That casual approach, without appropriate analysis, completely disregards the critical distinctions between the coverages and purposes of Sections 8(e) and 8(f) of the Act and prior Board precedent. Moreover, the decision in

¹ Teamsters Local 294 (Island Dock Lumber, Inc.), 145 N.L.R.B. 484, 491 (1963), *enfd.* 342 F.2d 18 (2d Cir. 1965). See also, Inland Concrete, 225 N.L.R.B. at 216-17.

Techno Construction regarding the Section 8(f) covered status of boom truck operation and on site hauling despite that work's exclusion under Section 8(e) in Inland Concrete proves that the Counsel for AGC's "natural extension" theory for employer coverage under Section 8(f) is unsupportable and inappropriate. There can be no such "natural extension" when a different result, reached by way of an appropriate analysis, is proven appropriate and necessary. Irving respectfully submits that the holding in J.P. Sturuss concerning Section 8(f) coverage for ready-mix company employers and ready-mix truck drivers stands as an unexplained, irreconcilable and unnatural deviation from prior established Board precedent. See Carpet Linoleum and Soft Tile Indio Paint, 156 N.L.R.B. 951 (1986), see also Teamsters Local 83, 243 N.L.R.B. 328 (1979).

The ALJ's Holding That Irving Violated Sections 8(a)(5) and (1) of the Act by Changing Employee Pension Benefits Is Contrary to the Facts of the Case and Incorrect as a Matter of Law

Counsel for AGC claims that Irving's acknowledgment that since September 2009 it "failed to make any employer contributions to Respondent's retirement plan on behalf of eligible full-time employees" automatically constitutes an admission of a violation of the Act. (Answering Brief, p.6). Irving disagrees. As noted in the dissenting opinion in Rapid Fur Dressing, Inc., 278 N.L.R.B. 905, 908 (1986), "[i]t has long been observed that a breach of contract is not necessarily an unfair labor practice." As a matter of fact, Irving's financial inability to make a required employer contribution "on behalf of eligible full-time employees" in September 2009 for calendar year 2008 benefits had nothing to do with the Section 7 rights of CBA unit members. The "eligible full-time employees" at issue included Irving's union represented and non-union represented employees. (Tr. at 237, 249-250, 303-304, 310-311). Irving's lack of funds was union-status blind.

Counsel for AGC 's new argument, that Irving witness Derek Ray was not competent to testify about Irving's retirement fund contribution obligations, should be disregarded. (Answering Brief, pp.6-7). The record shows that neither Counsel for AGC nor counsel for the Charging Party raised any objections to Ray's competency to provide testimony on the subject at the hearing. Counsel for Charging Party elicited the date when Irving's delinquent retirement fund contribution was due during cross examination of Ray. (Tr. at 363-364) There is no basis to now claim Ray's testimony was incompetent or inaccurate.

Counsel for AGC's concerns about the timing of Irving's missed contributions for calendar year 2008 benefits was answered by Charging Party's President George Gerdes who testified that he was aware of that missed payment in September 2009. (Tr. at 62-64). That timing is consistent and with Ray's testimony (Tr. at 300) and the stipulation relied on by Counsel for AGC. Moreover, regardless of Ray's testimony about Irving's payment timing for calendar year 2009 benefits, Irving's Secretary/Treasurer, Judy McKeever, testified at the September 2010 hearing that the required contribution for 2009 benefits "would be due at the end of the year." (Tr. at pp.249-250). Irving denies that it has the burden or obligation to make a case against itself on payment timing issues for calendar year 2009 benefits. The testimony of record shows that payment was not due or past due in January 2010 as alleged in the Consolidated Complaint.

Counsel for AGC's second argument on the retirement fund issue is that Irving's financial inability to pay does not absolve Irving of a finding that it unilaterally changed the employees' terms and conditions of employment and that Irving is using financial inability as an acceptable "motive". (See Answering Brief, p.7). Contrary to that assertion, Irving's financial inability to pay does not equate to a "motive" for not paying. Motive infers a choice, a reason for selecting a course of action

or conduct. Irving had no choice on the retirement fund contribution issue. Therefore, a factual determination of what occurred is appropriate to determine whether the Act was violated.

The “factual determination” shows without dispute that Irving did not voluntarily cease making any contribution and never sought to avoid its payment obligation. Counsel for AGC’s claim that Irving “never raised the defense of an inability to pay during its contract negotiations with the Union” is simply irrelevant grasping at straws. (Answering Brief, p.7). Aside from the fact that the retirement fund payment issue stands apart from negotiation issues, that claim defies reason.

The parties’ contract negotiations occurred in May 2010. (Tr. at 67, 68, 73). The Union was aware of the retirement fund payment delinquency in September 2009. (Tr. at 64). Irving shared information with the Union on the retirement fund issue in 2009, long before contract negotiations occurred. (Tr. at 299-300). Irving brought the Union into a meeting with the financial advisors of its retirement plan long before contract negotiations occurred. (Tr. at 64-65; 302-303). The Union admittedly was aware of Irving’s dire financial condition and its inability to borrow money to make the retirement fund contribution long before contract negotiation occurred, so Irving’s inability to pay was apparent going into the May 2010 negotiations. (Id.). During the May 2010 negotiations, Irving’s proposals did not avoid or seek to evade responsibility for accrued but unpaid retirement fund debt. (GCX 6, pp.2-3 and GCX 7, pp.2-3).

The factual determination shows that Irving missed a retirement fund payment in September 2009 solely due to financial inability. Irving never made a unilateral decision to not make that payment, never attempted to change its legal or contractual obligation to make that payment, never sought to hide the non-payment from the Union, and never sought to avoid its obligation to pay. Irving brought the Union in to meet with fund advisors in order to answer its questions about the

status of payment and possible repercussions. Irving entered into a federal program to work out a plan for making the payment. (Tr. at 310-311). There was no unilateral change or Section 8(a)(5) or (1) violation as alleged in the Consolidated Complaint and the ALJ's finding on the issue should not be affirmed.

Finally, Counsel for AGC's effort to twist the Consolidated Complaint allegation "Since on or about January 26, 2010, Respondent has changed employee pension benefits" (General Counsel Ex. 1(j) at ¶ 7(a)) into a timely allegation concerning events that occurred in September 2009 based upon the January 26, 2010 date's relationship to an unfair labor practice charge filed in July 2010 is as unsupportable as it is contorted. By Counsel for AGC's logic, a charge related to a discharge that occurred in September could be resurrected in the following July to a point in January simply because January is within 6 months of July, and even though no evidence is presented concerning a discharge occurring in January. That is an accurate depiction since it is undisputed that the retirement fund contribution at issue is made on a one-time per year, retroactive basis (Tr. at pp.51-52, 300) and the payment for calendar year 2008 benefits was due to be paid in September 2009, the date that Irving stipulated it became delinquent.

January may be within the 10(b) period of July, but that does not equate to the prior September. If the intent of the allegation in the Consolidated Complaint was to claim an allegedly unlawful change in pension benefits in September 2009, that is what it should have said. As it stands, no evidence was presented at the hearing concerning any alleged change in employee pension benefits on or about January 26, 2010 and the Consolidated Complaint was not amended to reflect an alleged violation in September 2009. The selection of an arbitrary date, January 26, 2010, perhaps with the mistaken thought going in that weekly rather than annual fund payments were

made, gives no notice of the undisclosed time of the alleged violation as it is now argued by Counsel for AGC. If the true intention was to reach back to September 2009, that effort should be ruled untimely pursuant to Section 10(b) based upon Irving's Section 10(b) affirmative defense.

The ALJ's Unilateral Decision to Find a Section 8(a)(1) Violation Regarding Allegedly Unlawful Interrogation Was in Error

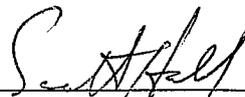
Counsel for AGC offers nothing to the unlawful interrogation issue except for the fact that a reason proffered for denying Irving's exception on the issue highlights a reason why Irving argues that its Exception No. 10 is valid. Counsel for AGC claims that Irving should have adduced evidence at the hearing to justify a reversal of the ALJ's decision that a Section 8(a)(1) violation occurred. (Answering Brief, p.9). That is the very point. Irving was denied that opportunity since the issue was not included in the Consolidated Complaint, not the subject of any amendment, and not identified at the hearing by the ALJ or anyone else as an issue in controversy. Irving was denied the opportunity to defend the matter.

CONCLUSION

WHEREFORE, all the foregoing reasons, Irving respectfully requests that Irving's Exceptions to the Decision and Order of the Administrative Law Judge be granted in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of February, 2011, a true and correct copy of the above and foregoing was forwarded by electronic mail to the following parties:

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