

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

HIGHWAY ROAD AND STREET CONSTRUCTION  
LABORERS LOCAL 1010, LABORERS INTERNATIONAL  
UNION OF NORTH AMERICAN (LIUNA), AFL-CIO

Charged Party

Case No.: 29-CD-203385

and

NEW YORK PAVING INC.

Charging Party

and

LOCAL LODGE CC175, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Interested Party

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POST-HEARING BRIEF ON BEHALF OF NEW YORK PAVING INC.

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

**CASE NO.: 29-CD-203385**

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**I. OVERVIEW**

The extensive record in this Section 10(k) proceeding contains overwhelming evidence establishing the need for and propriety of an award precluding Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL-CIO (“Local 175”) from claiming seed and sod, excavation, saw cutting and clean-up work in New York City currently performed by members of the Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (“LiUNA”), AFL-CIO (“Local 1010”) who are employed by New York Paving, Inc. (“NY Paving”).

The merits of the dispute are entirely against Local 175. NY paving currently assigns seed and sod, saw cutting, clean-up and excavation work to Local 1010 members and strongly prefers to continue its current practice because assigning the disputed work to the members of Local 175 would be grossly inefficient and therefore unworkable. Assigning all four (4) aspects of the work in dispute to Local 1010 members enables NY Paving to optimize its operations by requiring the same Local 1010 crew to perform several work functions simultaneously, or in conjunction with working on the sidewalks. While a Local 1010 member assigned to excavate streets can also simultaneously excavate sidewalks, or a Local 1010 member assigned to clean-up sidewalks can also perform seed and sod work, a Local 175 member could not do anything else after completing work on the street and thus would sit idle for the majority of the time for which he or she would be paid. In that case, the additional Local 175 members who would be needed would be completely unproductive. Further area and industry practice dictates that the

disputed work should be assigned to Local 1010 members. These factors are thus compelling and in favor of the *status quo*, and all of the other factors are either somewhat in favor of the *status quo* or neutral. None weigh in favor of Local 175.

## II. JURISDICTION

NY Paving, the employer in this case, is engaged in the construction industry and provides both asphalt and concrete paving (and repaving), construction, seal coating and related services to its customers. For many years, NY Paving has paved streets and parking lots throughout the New York City area on behalf of public and private entities including Con Edison and National Grid. (Tr. 266-70).<sup>1</sup> In conducting its operations during the calendar year ending December 31, 2016, which period is representative of its annual operations generally, NY Paving, in the course and conduct of its business operations described above, provided services valued in excess of \$50,000 to the City of New York, which entity is directly engaged in interstate commerce. (Tr. 8-9, 732-33; Board Ex. 2, ¶ 8; Board. Ex. 3, ¶ 8). Furthermore, the parties stipulated NY Paving is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. (Tr. 8-9, 732-33; Board Ex. 2, ¶ 8; Board. Ex. 3, ¶ 8).

The parties also stipulated Local 1010 and Local 175 are labor organizations within the meaning of Section 2(5) of the Act. (Tr. 8-9, 732-33; Board Ex. 2, ¶ 6-7; Board. Ex. 3, ¶ 6-7).

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<sup>1</sup> All citations to the hearing transcript for this Section 10(k) proceeding are identified as “Tr.” followed by the page number. Joint exhibits shall be referred to as “Joint Ex.” followed by the exhibit number. References to the Board’s exhibits shall be noted as “Board Ex.” followed by the exhibit number. References to New York Paving, Inc.’s (“NY Paving”) exhibits shall be noted as “Employer Ex.” followed by the respective exhibit numbers. Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL-CIO’s (“Local 175”) exhibits shall be referred to as “Union Ex.” followed by the exhibit number. Finally, the Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (“LiUNA”), AFL-CIO’s (“Local 1010”) exhibits shall be noted as “Resp. Ex.” followed by the exhibit number.

### III. THE DISPUTE

#### A. Background and Pertinent Facts of the Dispute

NY Paving provides, among others, asphalt paving and repaving, construction, seal coating and related services to its customers in New York City, including various utility companies. (Tr. 266-70). In connection with providing these services, NY Paving employs individuals who are represented by various unions, including Local 1010 and Local 175. Both unions have been certified to represent certain employees of NY Paving. Local 1010's Certification of Representative certified Local 1010 as the exclusive collective bargaining representative of NY Paving employees engaged primarily in concrete and related work. (Joint Ex. 5). Local 1010 and NY Paving entered into a Collective Bargaining Agreement in connection with this representation. (Joint Ex. 1A, 1B and 1C). Local 175's Certification of Representative certified Local 175 as the exclusive collective bargaining representative of NY Paving employees primarily engaged in asphalt paving and related work. (Joint Ex. 3). Further, during the hearing in this matter, NY Paving stipulated it followed the Collective Bargaining Agreement between New York Independent Contractors Alliance, Inc. ("NYICA") and Local 175 even though NY Paving was not a member of NYICA. (Union Ex. 1; Tr. 140-48, 157-62, 642-43).

Recently, a dispute arose between Local 1010 and Local 175 pertaining to certain work performed by NY Paving and which union members were entitled to perform such disputed work. Specifically, on April 28, 2017, counsel for Local 175 served a grievance notice upon NYICA describing an alleged grievance it had with NY Paving. (Joint Ex. 6). This grievance explicitly mentioned Local 1010 by name in its subject line and stated, in pertinent part:

On or about April 1, 2017 [NY Paving] assigned certain dig out work, (excavation work), seed and sod installation, clean up work, saw cutting

and binder work previously done by members of [Local 175] to members of Local 1010 contrary to past practice and contrary to the terms of Article VIII of said Collective Bargaining Agreement. In using Local 1010 members to perform work normally performed by Local 175 members, numerous Local 175 members were laid off and lost earning opportunities.

(Joint Ex. 6). Local 175 also filed an unfair labor practice charge against NY Paving wherein, among others, Local 175 alleged:

[NY Paving] in and around the month of April, started assigning [Local 175's] work of dig ups, seed and sod installation, clean up work, saw cutting and the laying of binder to Local 1010 members to provide more work for 1010 members.

(Joint Ex. 7). As a result of Local 175's grievance and unfair labor practice charge, on July 25, 2017, Local 1010's counsel sent a letter to NY Paving's counsel threatening "should [NY] Paving assign the work in question to its Local 175 employees, Local 1010 will take *any and all actions necessary* to protect its members' rights to continue to perform the work in question at [NY] Paving, *including but not limited to picketing and work stoppages.*" (Joint Ex. 4) (emphasis added). NY Paving deemed Local 1010's July 25<sup>th</sup> letter a violation of Section 8(b)(4)(D) of the Act. As a result of Local 1010's threat, NY Paving filed the instant Charge on July 26, 2017. (Board Ex. 1). On August 22, 2017, the Board issued a Notice of 10(k) Hearing. (Board Ex. 1). This 10(k) hearing took place on September 5 and 6, 2017, and October 2 and 10, 2017 (the "Hearing"). During the Hearing, the parties stipulated both Local 1010 and Local 175 claimed the work in dispute, and there was/is no agreed-upon method for voluntary adjustment of the jurisdictional dispute to which all parties are bound. (Board Ex. 2, ¶¶ 11-12; Board. Ex. 3, ¶¶ 11-12).

## **B. The Work in Dispute**

During the Hearing, the parties stipulated that the following work is in dispute: excavation work, seed and sod installation, clean-up work and saw cutting work performed by

NY Paving in New York City. (Board. Ex. 3, ¶¶ 11-12).<sup>2</sup> NY Paving performed this disputed work in New York City for National Grid. (Tr. 266-68).<sup>3</sup>

Specifically, after National Grid and/or Howland<sup>4</sup> [*sic*] (National Grid's subcontractor) dug out streets and installed gas pipes (either gas mains or service lines), they backfilled the holes/trenches to a certain degree. (Tr. 272). Prior to October 1, 2016, National Grid and/or Hallen partially backfilled the holes in the street leaving approximately twelve (12) inches of space below street level. NY Paving's job was to simply fill those holes with asphalt only. (Tr. 272). This was known as "one step paving." (Tr. 272-73). However, starting on October 1, 2016, the New York City Department of Transportation ("NYC DOT") changed applicable regulations requiring service cuts in the streets to be backfilled to grade. (Tr. 577; Employer Ex 1). Further, starting on April 1, 2017, the NYC DOT required utility companies to install concrete base rather than asphalt base in the service cuts. (Tr. 112-13). As a result of the foregoing regulatory changes, National Grid and/or Hallen started to backfill the service cuts to grade with dirt commencing on October 1, 2016. (Tr. 577-78). In order for NY Paving to install asphalt base (prior to April 1, 2017) or concrete base (after April 1, 2017), NY Paving had to

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<sup>2</sup> On October 10, 2017, the parties agreed binder work was not in dispute. (Tr. 732-33). Further, the parties agreed "dig-up work," dig-out work" and "excavation work" all refer to the same thing. (Tr. 733). Therefore, hereinafter the foregoing three (3) terms may be used interchangeably in this document.

<sup>3</sup> NY Paving's work for Con Edison was limited to sidewalks. (Tr. 283-285). After Con Edison installed the electric lines in the sidewalks, it backfilled the holes, which were then excavated by NY Paving and filled with concrete. (Tr. 283-85). Because sidewalks are made from concrete and therefore fall within Local 1010's jurisdiction, Local Lodge 175 did not dispute any work performed by Local 1010 members on sidewalks. (Tr. 284).

<sup>4</sup> While throughout the transcript the witnesses referred to National Grid's contractor as "Howland," the company's name is Hallen Construction Co. and it will be referred to as "Hallen" throughout this document.

first excavate the backfilled holes. (Tr. 577-83). The dispute regarding excavation work in this 10(k) proceeding pertains to which union should perform the foregoing excavation work of the backfilled holes. NY Paving's Operations Manager, Peter Miceli ("Miceli") testified prior to October 1, 2016, only five percent (5%) of the work required excavation, while the remainder of work was "one step paving." (Tr. 577-78).

As part of the new regulations, starting on October 1, 2016 NYC DOT also required the utility companies to perform full-depth cutbacks of the holes in the streets prior to excavation and eventual restoration. (Tr. 577). Whereas before to October 1, 2016, NY Paving had to simply fill the holes left behind by National Grid or Hallen, after that date, NY Paving was now required to first saw cut around the hole approximately one (1) foot on each side to make the hole square or rectangular in shape, excavate, and only after that occurred, install concrete or asphalt base. (Tr. 577). Miceli testified after 2011 and before October 1, 2016, saw cutting work at NY Paving was almost exclusively related to sidewalks, which is indisputably within Local 1010's jurisdiction. (Tr. 137).

Miceli stated seed and sod work almost universally related to sidewalk work after the utility company, as a result of service cuts, dug out lawn on an individual's property. (Tr. 125, 127, 591-92). Seed and sod work involved restoring the residents' lawns and/or sidewalks with seed and sod after the utility company or NY Paving completed the relevant sidewalk and/or gas service work. (Tr. 125, 127, 591-92).

Finally, the clean-up work in dispute related to the clean-up activities performed subsequent to concrete-related work by Local 1010 and asphalt-related work by Local 175, including but not limited to putting out and removing cones, barricades, tape and "men working"

signs, sweeping the job site, and removing any excess asphalt after paving was completed. (Tr. 49-51, 58-59, 130-31, 133, 674-75).

As more fully set forth below, NY Paving has presented compelling evidence – as to each element considered by the Board in deciding Section 10(k) jurisdictional disputes – that all four (4) aspects of the foregoing disputed work should be awarded to Local 1010. And, Local 175 has failed to present persuasive evidence to the contrary.

### **C. Application of the Statute**

There is no doubt Sections 8(b)(4)(D) and 10(k) of the Act apply in this case. Section 10(k) of the Act provides, in pertinent part:

[w]henver it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.

Before proceeding to determine the existence of a jurisdictional dispute, the Board must satisfy certain criteria under Section 10(k). First, it must decide whether “reasonable cause” exists to believe Section 8(b)(4)(D) has been violated. Int’l Union of Elevator Constructors, Local 3, AFL–CIO (Otis Elevator Co.), 364 NLRB 131, \*2 (October 21, 2016). This requires determining whether there is “reasonable cause” to believe (1) there are competing claims to the work in dispute and (2) the charged union used proscribed means - such as a threat to picket the charging party employer if the work is reassigned - to enforce its claim. See, e.g., Electrical Workers Local 3 (Slattery Skanska, Inc.), 342 NLRB 173, 174 (2004); and Laborers Int’l Union of North America (Eshbach Brothers, LP), 344 NLRB 201, 202 (2005). This “reasonable cause” standard is substantially lower than that required to establish the statute has in fact been violated.

In addition, the Board's Section 10(k) procedure, unlike the unfair labor practice procedure, does not call for assessments of the credibility of witnesses. See, Plumbers Local 562 (Charles E. Jarrell Contracting), 329 NLRB 529, 531 (1999) (*quoting Plumbers Local 562 (C & R Heating & Service Co.)*, 328 NLRB 1235, 1235 (1999)) and Otis Elevator Co., 364 NLRB, at \*3. However, the Board will not proceed under Section 10(k) if there is an agreed upon method for voluntary adjustment of the dispute that binds all parties. See, e.g., Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1139 (2005), Otis Elevator Co., 364 NLRB, at \*3.

### **1. There Are Competing Claims for the Work**

On September 5, 2017 (and again on October 10, 2017), the parties entered into a stipulation agreeing that both Local 1010 and Local 175 claim the work in dispute. (Tr. 8-9, 732-33; Board Ex. 2, ¶ 11; Board. Ex. 3, ¶ 11).

### **2. Local 1010 Has Engaged in a Proscribed Activities**

Section 8(b)(4)(D) of the Act provides that it is an unfair labor practice to encourage individuals to engage in a strike, or to threaten, coerce, or restrain any person engaged in commerce, where an object thereof is "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." Moreover, "[a] threat to strike and picket to force or require an employer to reassign disputed work constitutes reasonable cause to believe Section 8(b)(4)(D) has been violated." Laborers' Int'l Union of North America. Local 76 (Albin Carlson Co.), 286 NLRB 698, 699-700 (1987). "A charged party's use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe Section 8(b)(4)(D) has been violated." IBEW Local 71 (Thompson Electric), 354 NLRB 344, \*4 (2009); see also Laborers' Int'l Union of North

America. Local 894 (Donley's, Inc.), 360 NLRB 104, 108 (2014) (finding a charged party used means proscribed by Section 8(b)(4)(D) when it sent a letter to the employer threatening to strike if the work in dispute was reassigned).

Here, Local 1010, through its July 25, 2017 letter advised NY Paving “should [NY] Paving assign the work in question to its Local 175 employees, Local 1010 will take *any and all actions necessary* to protect its members’ rights to continue to perform the work in question at [NY] Paving, *including but not limited to picketing and work stoppages.*” (Joint Ex. 4) (emphasis added). Local 1010 specifically *directed* its attorneys to write this letter to NY Paving after Local 1010 learned Local 175 had filed a grievance in connection with the work in dispute. (Tr. 762-64). In the first week of October 2017, Lowell Barton (“Barton”), Local 1010’s Vice President, Organizing Director and Business Agent, personally visited NY Paving and spoke with NY Paving’s representatives. (Tr. 764-66). During this visit, Barton again informed NY Paving Local 1010’s intention was to take any and all actions necessary to protect Local 1010’s claim to the disputed work. (Tr. 764-66). Indeed, Barton (and Local 1010) threatened to “pull all the [Local 1010] workers” should NY Paving reach a settlement with Local 175 in regards to such work. (Tr. 766). Undoubtedly, verbal threats from Barton, who holds prominent positions with Local 1010 and serves on Local 1010’s executive board, as well as the written threat from Local 1010’s attorneys demonstrate that a true threat existed with respect to the disputed work.

Local 175 failed to present a shred of documentary or testimonial evidence at the Hearing demonstrating any of Local 1010’s threats were a sham. Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1140 (2005) (citing Laborers’ Indiana District Council (E&B Paving), 340 NLRB 150 (2003)); see also Int’l Union of Operating Engineers Local 18 (Donley’s Inc.), 363 NLRB No. 184, \*2 (2016) (“The Board ... has previously rejected [collusion argument] as

mere supposition in the absence of supporting evidence. The Respondent proffered no such supporting evidence in Donley's I, Donley's II, or the instant proceeding that even suggests that Local 894's and 310's picketing and strike threats were the product of collusion and not genuine.") (internal citations omitted). Indeed, Local 175's drummed up attempt at discrediting the validity of Local 1010's threats by alleging collusion between Local 1010 and NY Paving woefully failed. Throughout the hearing, Local 175 attempted to elicit testimony from its witness, Glenn Patrick, as well as NY Paving's various witnesses to demonstrate that Local 1010 somehow colluded with NY Paving simply because Local 1010's President, Joe Sarro was married to one of NY Paving's owners, Diane Bartone.<sup>5</sup> (Tr. 261-62, 375-76). However, the only testimony Local 175 was able to elicit in connection with its speculation was the fact that Joe Sarro and Diane Bartone are married. (Tr. 375-76). Indeed, if Local 175 wished to prove its theory (which NY Paving denies), Local 175 could have presented witnesses or evidence to corroborate Local 175's theory; Local 175 could have even subpoenaed Joe Sarro and/or Diane Bartone to testify at the Hearing. Local 175 has failed to do either and therefore, its theory of collusion remains just that – an unproven theory unsupported by any Board precedent.

Further and to the extent there was any evidence of a *potential* collusion – which there was not – any such evidence was successfully refuted through testimony that Joe Sarro was fired from NY Paving and banned from entering its premises. (Tr. 583-84). Further, NY Paving has multiple owners and Diane Bartone owns the smallest share of the company compared to the other four (4) owners. (Tr. 584-85). Clearly, if the marital relationship between the smallest percentage owner of NY Paving (Diane Bartone) and Local 1010's President (Joe Sarro) did not

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<sup>5</sup> As the record makes clear, both NY Paving and Local 1010 objected to any line of questioning by Local 175 into this speculative theory. Local 1010 even moved to strike all testimony pertaining to Joe Sarro, which motion was denied by the Hearing Officer.

prevent NY Paving from banning Joe Sarro from its premises, it would have also not prevented Local 1010 from threatening NY Paving with economic action to preserve the disputed work for its members. Local 175 has utterly failed to demonstrate otherwise. Thus, the Board should find there is reasonable cause to believe Local 1010 engaged in the proscribed activities.

**3. The Parties Have Not Agreed on a Method for Voluntary Adjustment of the Dispute**

On September 5, 2017 (and again on October 10, 2017), the parties stipulated there is no agreed-upon method for voluntary adjustment of the jurisdictional dispute to which all parties are bound. (Tr. Tr. 8-9, 732-33; Board Ex. 2, ¶ 12; Board. Ex. 3, ¶ 12).

**D. Merits of the Dispute**

Having established that the three preliminary jurisdictional prerequisites are satisfied in this case,

Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors. NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting), 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors in a particular case. Machinists Lodge 1743 (J.A. Jones Construction), 135 NLRB 1402 (1962).

Eshbach Brothers, 344 NLRB, at 203. The Board has traditionally considered the following seven (7) factors in the determination of awarding the disputed work: (1) Board certifications and collective bargaining agreements; (2) current assignments; (3) past practice; (4) employer preference; (5) area and industry practice; (6) relative skills and training; and (7) economy and efficiency of operations. See Otis Elevator Co., 364 NLRB, at \*4-\*5. In this case, there is no need for any “balancing” because, as more fully discussed below, all of the most relevant factors weigh heavily in favor of the *status quo* (i.e., awarding the disputed work to the members of Local 1010) and no factor weighs in favor of Local 175.

## **1. Certifications and Collective Bargaining Agreements**

Both unions were certified to represent certain employees of NY Paving. The Certification of Representative, dated January 5, 2006, certified Local 1010 as the exclusive collective bargaining representative of the following NY Paving employees:

All full-time and regular part-time site and *grounds improvement, utility, paving & road building workers who primarily perform the laying of concrete, concrete curb setting, or block work, including foremen, form setters, laborers, landscape planting and maintenance employees, fence installers and repairers, slurry/seal coaters, play equipment installers, maintenance safety surfacers, and small power tools and small equipment operators* employed by the Employer, who work primarily in the five boroughs of New York City.

(Joint Ex. 5) (emphasis added). All aspects of the work in dispute are covered in this Certification, including landscape planting (seed and sod installation), maintenance (clean-up work); small power tools and operation of same (saw cutting), and grounds improvement and utility work (excavation work).

The Certification of Representative, dated October 16, 2007, certified Local 175 as the exclusive collective bargaining representative of the following NY Paving employees:

All full-time and regular part-time workers *who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators* employed by the Employer, who work primarily in the five boroughs of New York City.

(Joint Ex. 3) (emphasis added). Liberally construed, only the following aspects of the disputed work may be covered in the Local 175 Certification: landscape planting (seed and sod installation), maintenance (clean-up work), and small equipment operators (saw cutting).

Overall, the Local 1010 Certification seems to squarely include all four (4) aspects of the work in dispute, while Local 175 Certification covers (barely) only three (3).

The Collective Bargaining Agreement between Local 1010 and NY Paving, effective July 1, 2011 through June 30, 2014 (Joint Ex. 1A), and further amended by the Side Letter, dated November 8, 2011 (Joint Ex. 1B)<sup>6</sup> (collectively “1010 Agreement”) cover the following pertinent work performed by NY Paving employees:

work on all highways, roads, streets, avenues, alleys, aprons, airports, runways, taxi ways, (including shoulders and malls there) parks, plazas, malls, housing projects, playgrounds, site work, athletic fields and all incidental work thereto; said work extends to the edge of the building structure and/or right of way; said work also extends to an entrance or exit that continues into a public street or highway, and from sub grade to the finished surface.

The above-defined work includes:

- (a) regulating, grading, paving and repaving;
- (b) *the removal of old pavement, curbs and sidewalks to the subgrade;*
- (c) placing, distributing, puddling, raking and grading of all concrete:
  - (i) *for concrete highways and similar highways;*
  - (ii) *when utilized as a base for other types of pavement;*
  - (iii) for all concrete curbs and sidewalks.
- (d) the carrying, setting and stripping of all forms of concrete and steel curbs, sidewalks, concrete highways and similar highways;
- (e) the carrying and setting of all precast concrete curbs, sidewalks and highway slabs from subgrade to finished surface;
- (t) *road finishing*, including but not limited to, broom, burlap, spray and slurry finishes;
- ...
- (i) *operating small power tools and operating small power equipment;*
- (j) *restoration of all paving*, relocation, adjusting and setting of roadways and street casting, subsequent to subway, sewer, and gas mains, duct line construction and similar construction projects;
- (k) the installation of all types of paving blocks, slate brick, hex block, marble, precast, set in sand, dirt or asphalt, or any other material used in the paving procedure;
- (l) *landscaping which is incidental to paving work and encompasses grading, mixing, distributing and raking of topsoil and fertilizers; also the planting and maintenance of trees, shrubs, grass, beach grass and similar plant matter;*
- ...
- (o) *maintenance and protection of traffic safety for work under the Local's jurisdiction.*

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<sup>6</sup> The Collective Bargaining Agreement and the Side Letter between Local 1010 and NY Paving were further modified and extended from July 1, 2014 through June 30, 2017 by the Memorandum of Agreement, dated July 7, 2015. (Joint Ex. 1C).

(Joint Ex. 1A and 1B) (emphasis added). The 1010 Agreement’s jurisdiction encompasses, among others, the “removal of old pavement,” placing of concrete on highways, “road finishing,” operating small power equipment, “restoration of all paving,” landscaping, and maintenance of traffic safety. Based on the foregoing, Local 1010’s Agreement provides Local 1010 jurisdiction over all four (4) types of disputed work: seed and sod installation, saw cutting, clean-up, and excavation work.

The Collective Bargaining Agreement between NYICA and Local 175, effective July 1, 2014 through June 30, 2017 (“Local 175 Agreement”), which purportedly applied<sup>7</sup> to NY Paving covers the following pertinent work performed by NY paving:

All Asphalt Paving work including but not limited to *Site and Grounds Improvement. Utility, Paving and Road Building Work*, when referred to in this Agreement, is hereby defined as:

(a) Prepare for and perform all types of asphalt paving, slurring including methacrylate and other similar materials and milling of streets and roads, and *all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all materials, install and repair fences and all incidental work thereto to continue into parks, plazas, malls, housing projects, playgrounds, said work including but not limited to public highways and roads and bridges; including, but not limited to all subsequent work prior to final paving.*<sup>8</sup>

...

(c) *any laboring work related to the preparation and cleanup of all Turf and all material, used as a base for Turf including drainage, all landscaping, all labor related to planting and maintenance, cleanup, installation and removal of play*

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<sup>7</sup> During the Hearing, NY Paving denied being a member of the New York Independent Contractors Alliance, Inc. (“NYICA”). It merely stipulated to following the Local 175 Agreement (Union Ex. 1) by conduct. (Tr. 140-148, 157-62, 642-43).

<sup>8</sup> The prior version of the Local 175 Agreement (effective July 1, 2011 through June 30, 2014) included the same description of the covered work except it also included “the digging trenches, cable pulling, duct installation” in the last sentence of the subsection cited herein. (Employer Ex. 2).

- equipment, slurry/seal-coating, line striping and *saw cutting*, shall be performed by persons under the jurisdiction of Local 175;
- (d) *maintenance and protection of traffic safety for all work sites.*
  - (e) all other General Construction work related to Asphalt Paving
  - (f) Safety Watchman ... *Traffic control and all elements to ensure a safe work environment.*

(Union Ex. 1) (emphasis added). Similar to the 1010 Agreement, Local 175 Agreement provides Local 175 jurisdiction over four (4) types of disputed work, including saw cutting, clean-up, seed and sod installation (*i.e.* landscaping) and excavation work (*i.e.* preparation work for resurfacing).

Thus, collective bargaining agreements with both Local 1010 and Local 175 purport to cover the same disputed work but because the Board Certification for Local 1010 appears to cover more types of disputed work than the Board Certification for Local 175, this factor appears to favor the assignment of the disputed work to Local 1010.

## **2. Current Assignments**

Current assignment of the disputed work is clear and undisputed. Peter Miceli, NY Paving's Operations Manager, testified regarding NY Paving's current assignment of each of the disputed work tasks. As of the date(s) of the Hearing, employees who were members of Local 1010 performed the following tasks at NY Paving: (i) concrete excavation since April 1, 2017 (Tr. 114); (ii) all seed and sod work (Tr. 125); (iii) clean-up work related to concrete work, including but not limited to sidewalks (Tr. 129-31); and (iv) all saw-cutting work (Tr. 135). Therefore, this element overwhelmingly supports maintenance of the *status quo*.

### **3. Employer Preference, and Economy and Efficiency of Operations**<sup>9</sup>

During the Hearing, it became readily apparent NY Paving preferred an award of the disputed work to Local 1010 members due to, among others, the associated efficiency of operations and business economy considerations.

#### *i. Seed and Sod*

Miceli testified that one hundred percent (100%) of seed and sod work is incidental to NY Paving's concrete sidewalk work. (Tr. 127). Miceli also testified NY Paving prefers to assign the seed and sod work to pre-existing twelve (12) to thirteen (13) sidewalk clean-up crews (which are comprised of Local 1010 members) because these crews are already doing work on the sidewalks (performing clean-up, "pouring forms" and "sealing the joints"). (Tr. 127). Because NY Paving does not have a separate crew that performs seed and sod work, but rather assigns this task to pre-existing Local 1010 crews who clean-up sidewalks after concrete excavation, it is more economical for NY Paving to continue this practice. Essentially, rather than create a new crew comprised of Local 175 members, NY Paving delegates seed and sod work to Local 1010 clean-up crews who are already present on the sidewalks to perform other tasks incidental to sidewalk work. (Tr. 128-27).

Local 175 has produced no evidence to either dispute NY Paving's efficiency analysis or demonstrate it would be more efficient for NY Paving to deviate from its current practice and assign seed and sod work to the employees who are members of Local 175.

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<sup>9</sup> Employer Preference, and Economy and Efficiency of Operations are two (2) distinct elements of the seven (7) factors traditionally considered by the Board in awarding the disputed work. Because these two (2) factors appear to be significantly related, the discussions pertaining to them are combined to avoid duplicative analysis.

*ii. Clean-Up*

Miceli testified approximately eighty percent (80%) of all clean-up work performed by NY Paving in New York City is incidental to concrete work. (Tr. 133). Because employees who are members of Local 1010 were already at the locations where the clean-up work is supposed to be performed subsequent to the completion of concrete work, NY Paving preferred Local 1010 members perform clean-up and also believed it to be more economical. (Tr. 133-35). Indeed, it is more economical for a concrete clean-up crew comprised of Local 1010 members to perform clean-up work while simultaneously performing other tasks associated with sidewalk concrete work (for example, to seal the joints, fix graffiti, pull all the forms, and remove all barricades) than to assign a second crew comprised of Local 175 members who will only perform clean-up work. (Tr. 133-35).

As with seed and sod work, Local 175 has failed to produce any evidence to demonstrate NY Paving's preference of assigning clean-up work to Local 1010 members was somehow untrue and/or assigning Local 175 members to perform clean-up work would be more efficient (or preferable).

*iii. Saw Cutting*

Miceli repeatedly and consistently testified, NY Paving preferred employees who are members of Local 1010 to perform saw cutting work because (i) they were saw cutting concrete (Tr. 140); (ii) it was more efficient because they can also saw cut sidewalks (Tr. 165-172); and (iii) NY Paving did not have sufficient amount of asphalt saw cutting work to warrant a Local 175 crew because saw cutting asphalt had decreased tremendously for reasons stated below (Tr. 136-37, 140).

Indeed, prior to 2011, NY Paving had an equal amount of concrete and asphalt saw cutting work. But, one-step paving changed that. (Tr. 136). With one-step paving, no saw cutting was required and therefore, ninety-nine percent (99%) of saw cutting became associated with sidewalks, which are made from concrete. (Tr. 137). Not only is saw cutting increasingly associated with concrete work, NY Paving also preferred Local 1010 crew to perform that work because the same crew could also simultaneously saw cut sidewalks. (Tr. 165-66, 172). Indeed, Miceli stated, “the 1010 guys prefer it because we’re also doing the sidewalk while we’re there ... you may have 30, 40 cuts on a block – in the street and I’ll have 30, 40 cuts on the sidewalk, and they’re all taking concrete.” (Tr. 169). Further, it was more efficient for NY Paving to be able to saw cut streets and sidewalks simultaneously while the Local 1010 crew is on the block with the equipment: “while I’m on the location, and I have access, I need to be able to do both things.” (Tr. 171). It simply did not make sense for NY Paving to assign street saw cutting to a Local 175 crew because NY Paving would not benefit from the increased efficiency of being able to assign that same crew to simultaneously saw cut sidewalks.

Finally, Local 175 would have NY Paving create a hybrid saw cut crew consisting of Local 175 and Local 1010 members. However, Local 175 members would not be able to also saw cut sidewalks and therefore, NY Paving’s desired efficiency would be negated. (Tr. 195-96). As with other disputed work, Local 175 has not demonstrated how assigning Local 175 members saw cutting tasks would make NY Paving’s operations more efficient.

#### *iv. Excavation*

At the hearing, Miceli testified after the NYC DOT changed its regulations requiring that concrete be poured in the excavated hole rather than asphalt (which was the practice before April 2017), NY Paving preferred to assign crews comprised of Local 1010 members to both excavate

and pour concrete, followed by Local 175 crews to top the hole with hot asphalt. (Tr. 174, 577-83; Employer Ex. 1). Further, NY Paving believed the foregoing set-up to also be more economical for several reasons.

As an initial matter and as Miceli testified,

now we're ... putting concrete back in the hole. We're breaking out concrete. You know, we have – everything going concrete either in the street or in the sidewalk 100 percent of the time. *It just makes sense to have the 1010 guys do it. It's the best way. It's the quickest way. It's the most cost effective way for [NY Paving].* And that's why we do it.

(Tr. 594) (emphasis added). Local 175 would have NY Paving assign the crews in the following manner: a crew consisting of Local 175 members to perform excavation, followed by a crew comprised of Local 1010 members to pour concrete, and then followed by another Local 175 crew to put the final top layer of asphalt.<sup>10</sup> (Tr. 581-82). Currently, the first two steps are performed by a *single* Local 1010 crew. Local 175 would have NY Paving assign three (3) different crews to what is currently being done by two (2) crews. (Tr. 581-82). Clearly, NY Paving did not believe this option to be economical or efficient. Specifically, Miceli testified that it was already a “nightmare” ensuring that a Local 175 “topper” crew followed the excavation crews in a timely manner to ensure the most efficient operation. (Tr. 582). It would be “much harder” to manage and coordinate three (3) separate crews. (Tr. 582-83).

Further, NY Paving preferred to assign excavation work to Local 1010 members because they could perform excavation in the streets and pour concrete, and perform work on sidewalks (which are made from concrete) at the same time. (Tr. 117, 123). Obviously, it also is more economical to have one (1) crew perform both tasks at the same time: “with concrete base going

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<sup>10</sup> Miceli further testified formulating a “mixed” excavation crew consisting of both Local 175 and Local 1010 members would be similarly inefficient. (Tr. 174).

in the hole and with them [*sic*] having to build the new sidewalks while they're there, you know, it's a no-brainer, 1010 ... has got to do it." (Tr. 123).

Local 1010 foreman, Declin Fee ("Fee") repeatedly testified because he was assigned a relatively large crew (approximately five (5) to six (6) Local 1010 members), he has performed excavation and sidewalk work on the same day with his crew on several NY Paving projects. (Tr. 473-74). Specifically, since April 1, 2017, Fee's crew performed both types of work simultaneously "on and off" for almost every day for two (2) or three (3) months on several projects (West 12<sup>th</sup> Street, East 7<sup>th</sup> Street, Avenue Z, and Seagate projects).<sup>11</sup> (Tr. 471-72; 477-79, 524, 568-69). Fee testified on these bigger projects, when his crew finished digging and pouring sidewalks, he ordered his crew to excavate the streets rather than have the men wait around doing nothing (*i.e.*, waiting for the dump truck to return). (Tr. 472-73, 477. 484-85). Indeed, sometimes a dump truck may take up to three (3) hours to return to the job site; Fee frequently used that waiting period to have his crew excavate the street. (Tr. 543). Further, Fee's crew performed excavation and sidewalk work simultaneously "fairly often." (Tr. 509, 528). Clearly, if NY Paving were to assign a Local 175 crew to perform excavation work, NY Paving could not simultaneously assign them sidewalk work because it is not within Local 175's jurisdiction, thereby increasing the cost of operation and decreasing efficiency.

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<sup>11</sup> Local 1010's Shop Steward, Steven Sbarra's "(Sbarra)" testimony that Local 1010 crews did not perform street excavation and sidewalk work on the same day should be disregarded by the Board. (Tr. 237-38, 286-87). First, Fee provided exhaustive testimony that his crew (comprised of Local 1010 members) frequently performed sidewalk and road excavation work on the same day with the same crew. See supra Section III.D.3.iv. Further, both Miceli and Fee testified as to why Sbarra would not have personal knowledge regarding what larger crews (including Fee's crew and other crews of similar size) do on daily basis. Because Sbarra performed clean-up work at NY Paving, and larger crews perform their own clean-up, Sbarra would not have knowledge of what larger crews did on a daily basis as he (Sbarra) was not involved in cleaning-up for those crews. (Tr. 480-83, 548-49, 585-87).

As an additional efficiency consideration, being able to perform excavation and sidewalk work simultaneously enabled NY Paving to complete the job in less time and thereby cause significantly less inconvenience to the public and residents due to street closures, lack of parking, etc. Both Miceli and Fee testified the residents were much more satisfied if the work was finished as expeditiously as possible, and having the ability to excavate streets and work on sidewalks simultaneously promoted finishing the assigned work faster. (Tr. 545, 586). Fee stated, “it is easier for me to just do everything as opposed to splitting it and constantly inconveniencing everyone on the block or having to shut down the street multiple different times. It’s easier to do all the work in one shot and be done with it.” (Tr. 508). If excavation work were assigned to Local 175, NY Paving would have to assign sidewalk (Local 1010) and excavation (Local 175) crews at different times on the same block, which would delay the project significantly, and be less satisfactory to the residents and the community. (Tr. 631).

Local 175’s attempt to undermine NY Paving’s efficiency and economy considerations pertaining to the assignment of excavation work to Local 1010 members, similar to its other arguments, woefully fails. On Miceli’s cross examination by Local 175, Miceli testified only approximately twenty-five percent (25%) of the excavation work is performed in conjunction with the sidewalk work. (Tr. 611). However, since April 1, 2017, because the projects where excavation and sidewalk work was performed simultaneously were so successful and popular, NY Paving anticipated these types of projects to occur more frequently in future. (Tr. 631).

Further, in order to challenge NY Paving’s efficiency and economy considerations, Local 175 also attempted to elicit testimony from various witnesses indicating that Local 1010’s excavation crews have two (2) to three (3) men more than Local 175 excavation crews did before April 1, 2017. (Tr. 71-72, 78, 359-60, 362, 654-64). However, multiple witnesses, including

Local 175's witnesses, testified the reason for more men on the excavation crews was threefold: (i) employee training (Tr. 184-85); (ii) increased safety considerations because excavations have become more dangerous (Tr. 248); and (iii) many excavation jobs require being hand dug, which obviously requires more manpower. (Tr. 407-08, 684-90).<sup>12</sup> These reasons would dictate assigning a higher number of workers to excavation crews regardless of whether the crew was comprised of Local 1010 or Local 175 members. Therefore, Local 175's argument, similar to its other theories, must fail.

In conclusion, NY Paving prefers to maintain its past practice of assigning the disputed work to Local 1010 members due to the gross inefficiency that would result if the work were assigned to Local 175 members. Assignment of the work to the employees represented by Local 175 would merely add employees without any increase in the amount of work performed. Under these circumstances, it is easy to understand why NY Paving prefers to continue assigning the disputed work to Local 1010 members rather than adding numerous wholly unproductive full-time Local 175 members to its projects. Not surprisingly, NY Paving does not prefer that result, and instead would like to maintain its current practice. This factor is thus wholly in favor of the assignment of seed and sod, clean-up, saw cutting, and excavation work to Local 1010.

#### **4. Past Practice**

##### *i. Seed and Sod*

There has been a long history of Local 1010 members performing seed and sod work at NY Paving. Seed and sod work has been assigned to the members of Local 1010 for at least past

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<sup>12</sup> By his own admission, Local 175 witness Glenn Patrick's ("Patrick") testimony regarding Local 1010 crews was limited to only those Local 1010 excavation crews that he (Patrick) personally observed during the day, and by no means included all Local 1010 excavation crews at NY Paving. (Tr. 409-10).

ten (10) years because seed and sod was overwhelmingly related to sidewalk work (*i.e.*, concrete work, which is indisputably within Local 1010's jurisdiction). (Tr. 125-27, 591-92). Miceli further testified the only exception to seed and sod work being assigned exclusively to Local 1010 members was when NY Paving *rarely* assigned that work to Local 175 foremen on rainy days to keep them busy. (Tr. 125-27, 591-92). Miceli's testimony was corroborated by several witnesses. For example, Pasquale Labate ("Labate"), Local 175 Shop Steward and foreman, testified Local 175 members had not performed seed and sod work in the last ten (10) to twelve (12) years. (Tr. 45-47, 57-58, 66). Local 1010's Shop Steward, Steven Sbarra ("Sbarra") similarly testified Local 1010 members have performed seed and sod work exclusively for the last ten (10) years except in 2007 when a Local 175 foreman was occasionally assigned to perform this work on weekends. (Tr. 213-16, 238, 310).

The foregoing testimony regarding seed and sod work was largely unrebutted by Local 175's witnesses. Indeed, Local 175's witness, foreman Louis Dadabo ("Dadabo"), testified while he was aware Local 175 members performed seed and sod work for NY Paving in the past, NY Paving has assigned that work to Local 1010 members for *at least* the last five (5) years. (Tr. 667-68). Further, yet another Local 175 witness, James Lombardi ("Lombardi") testified even though he performed seed and sod work in mixed crews, after becoming a foreman in 2007, NY Paving only assigned him that work on rainy days to keep him busy. (Tr. 316-20, 341-42).

The record in this case clearly demonstrates NY Paving has assigned seed and sod work to Local 1010 members almost exclusively for the last ten (10) years. In contrast, there is no similar record of Local 175 members performing seed and sod work with any frequency or consistency. The only deviation from NY Paving's established practice was the occasional assignment of seed and sod work to Local 175 foremen only, and even then on weekends and/or

rainy days to ensure the foremen had sufficient work. Accordingly, NY Paving's past practice of assigning seed and sod work to Local 1010 members nearly exclusively is undisputed (especially in the past 10 years).

*ii. Clean-Up*

During the Hearing, numerous witnesses testified about the long-standing method for assigning the clean-up work at NY Paving. Indeed, many witnesses agreed clean-up work related to asphalt was performed by Local 175 and clean-up work related to concrete was performed by Local 1010. (Tr. 49-51, 98-100, 217-19, 378-79, 421-22). Indeed, Miceli stated, “[n]othing has changed since 2000. Asphalt guys clean up the asphalt work. 1010 guys clean up the sidewalk work.” (Tr. 592). According to Miceli, that system has been in place “[f]orever and a day” at NY Paving. (Tr. 131). Accordingly and based on NY Paving's past practice, clean-up related to concrete work was assigned to Local 1010, and clean-up related to asphalt work was assigned to Local 175. To the extent the dispute pertains to clean-up incidental to excavation work, because NY Paving considers excavation concrete work after April 1, 2017, any clean-up associated with excavations should similarly fall within Local 1010's jurisdiction.

To the extent there was any testimony during the Hearing regarding clean-up of excavation work, such testimony was inconsistent. In other words, Local 175 failed to present persuasive evidence demonstrating NY Paving assigned clean-up work incidental to excavation only to Local 175. For example, Labate testified prior to April 1, 2017, Local 175 did not put out barricades on excavation jobs because they worked during alternate side parking and merely displayed a few cones while working. (Tr. 80-83, 87, 90-91). Local 175 witness Patrick stated after April 1, 2017, Local 175 usually picked up barricades, however, if the pickup truck was full, Local 175 would leave the barricades for Local 1010 to retrieve. (Tr. 373-74). Another

Local 175 witness, Dadabo testified while he cleaned-up after his own crew, after April 1, 2017, Local 1010 removed the barricades after an excavation assignment was completed. (Tr. 674-75, 677). Lombardi (also Local 175's witness), on the other hand, indicated during "one step paving" the utility company, rather than Local 175, left existing metal plates and/or barricades in place, which Local 175 did not pick up. (Tr. 320-27). Finally, Sbarra testified prior to April 1, 2017, when Local 175 members worked on the street, they put-out and picked up their own barricades. (Tr. 238-40).

Because there is conflicting testimony indicating that either Local 1010 or Local 175 previously performed clean-up work related to excavation, the past practice element regarding clean-up work may, at best, be deemed neutral. But, NY Paving submits the more reasonable conclusion drawn from those witnesses who testified in a forthright manner is that such past practice favors Local 1010 performing this disputed work.

*iii. Saw Cutting*

The evidence demonstrates Local 1010 and Local 175 shared saw cutting work equally prior to 2011. But, it is also apparent Local 1010 has performed saw cutting work practically exclusively since 2011 (except for the six (6) month period from October 2016 to April 2017). Therefore, this factor also favors assignment of saw cutting work to members of Local 1010.

Years ago, NY Paving assigned saw cutting work to the members of both Local 175 and Local 1010. As Miceli testified, prior to 2011, NY Paving had a single two (2) member crew comprised of one (1) Local 1010 and one (1) Local 175 member performing saw cutting work because the amount of saw cutting of concrete and asphalt was approximately the same. (Tr. 136-39). In 2011 however, the NYC DOT changed its regulations and started to require "one-step paving," which essentially eliminated saw cutting associated with street service cuts; rather,

the utility company was permitted to simply jackhammer the service cut, and then NY Paving paved. (Tr. 136-39). Because of this change in the applicable regulations and consequential transition into “one-step paving” in or about 2011, asphalt-related saw cutting practically disappeared. (Tr. 136-39). After this change, from 2012 through September 2016 (approximately four (4) years and nine (9) months), ninety-nine percent (99%) of saw cutting done by NY Paving was performed on sidewalks by Local 1010 because it was concrete-related work. (Tr. 136-39, 169).<sup>13</sup>

On October 1, 2016, NYC DOT again revised its regulations and started to require, *inter alia*, that all street service cuts be saw cut instead of jackhammered. (Tr. 577-79). Therefore and as a result of this change in applicable regulations, NY Paving assigned street saw cutting work to Local 175 members *for only six (6) months* (from October 1, 2016 to March 30, 2017) only because during this period asphalt was being installed in the street excavation performed by Local 175. (Tr. 577-83). After April 1, 2017 (consistent with the foregoing regulation), NY Paving started to assign saw cutting work exclusively to Local 1010 members because the asphalt filling was replaced by concrete. (Tr. 580).

Miceli’s testimony regarding saw cutting work was further corroborated by other NY Paving and Local 175 witnesses. For example, Dadabo testified he has not observed Local 175 members saw cut in the last seven (7) years. (Tr. 668-72). Similarly, Fee, who was Local 1010 saw cut foreman, indicated he had never heard of a saw cut crew of Local 175 members. (Tr. 497-500).

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<sup>13</sup> Miceli testified Local 175’s Business Agent, Roland Bedwell complained to Miceli regarding the elimination of saw cutting work for the single Local 175 member who had performed such work. Significantly after Miceli explained to Bedwell there was not enough asphalt saw cutting work left to justify assignment of a Local 175 member, Bedwell understood and did not further pursue this issue by filing a grievance or arbitration against NY Paving. (Tr. 136-39).

Local 175's attempt at demonstrating NY Paving's purported past practice of assigning saw cutting work exclusively to Local 175 members was patently unsuccessful. During the Hearing, Local 175 presented only two (2) witnesses who testified regarding saw cutting work. The first witness, Dadabo, as indicated above, corroborated Miceli's testimony. The second witness, Lombardi, who has not worked at NY Paving since March 21, 2013 and therefore did not have personal knowledge of the work assignments at NY Paving after that date, did not testify regarding routine past practice of assigning saw cutting work to Local 175 members. (Tr. 339). Rather, Lombardi's testimony further supported evidence presented by Miceli. Indeed, Lombardi testified while he used to saw cut with Local 175 and Local 1010 members during the period from 2005 to 2013, he also admitted that starting in 2011, the mixed saw cutting crews at NY Paving were not "as consistent." (Tr. 313-16, 340-42). Notably, Lombardi further acknowledged his participation in a mixed saw cutting crew decreased and became sporadic after 2007 when he (Lombardi) got his own asphalt crew. (Tr. 313-16, 347-49). Finally, Lombardi offered no testimony as to any specific instances after 2011 and prior to his last day of employment at NY Paving on March 21, 2013 of him (Lombardi) actually performing any saw cutting work for NY Paving.

In sum, the evidence as to saw cutting work is clear. NY Paving has assigned saw cutting work to members of Local 1010 practically exclusively commencing in 2011 (approximately seven (7) years) (with the exception of the brief six (6) month period from October 1, 2016 through March 30, 2017 when Local 175 performed saw cutting) and Local 175 has not produced any evidence to demonstrate otherwise. Accordingly, like seed and sod, the evidence of NY Paving's past practice favors assignment of saw cutting work to Local 1010.

iv. *Excavation*

NY Paving's past practice in connection with excavation work is clear: as of the date(s) of the Hearing, Local 175 and Local 1010 members performed excavation work at NY Paving for approximately the same length of time. Miceli extensively testified regarding NY Paving's past practice of assigning excavation work; this testimony was further corroborated by Sbarra, Labate and Dadabo. As an initial matter, Miceli noted for at least the last thirty (30) years, NY Paving based its decisions on who to assign the excavation work on what was going to be put into the excavated hole. (Tr. 116-17, 188-89). "[W]hataver went back in the hole, concrete, asphalt, that's who did the dig out." (Tr. 115). For example, excavation related to concrete, such as sidewalks and bus stops, was always assigned to Local 1010 members. (Tr. 114).

As it pertains to excavation of street service cuts, Miceli testified on October 1, 2016, NYC DOT issued new regulations requiring, *inter alia*, pouring of concrete base rather than asphalt in excavated street cuts as well as saw cutting. (Employer Ex. 1; Tr. 577). However, the NYC DOT gave the utility companies a grace period until April 1, 2017 to start pouring concrete base. (Tr. 577). Along with this change, starting on October 1, 2016, the utility companies also started backfilling the excavated holes, which had to be saw cut and excavated by NY Paving. (Tr. 577). According to Miceli and Dadabo, prior to October 1, 2016, NY Paving did "one step paving" which did not require any excavation; rather, the utility companies left the holes approximately twelve (12) inches below street level, and NY Paving simply filled them in one step with asphalt. (Tr. 112-13, 187, 588-89, 602, 654, 690-91). Indeed, "one step paving" – which was approximately ninety-five percent (95%) of NY Paving's work prior to October 1, 2016 – did not involve excavation (*i.e.*, a disputed work in this proceeding). (Tr. 112-13, 187, 588-89, 602, 654, 690-91). The remaining five percent (5%) of NY Paving's work involved

excavation in the Bronx once per month. NY Paving assigned this work to Local 175 members because the excavated holes were filled with asphalt. (Tr. 578, 600, 710-11). However, according to Miceli, this extremely small amount of excavation work performed by Local 175 prior to October 1, 2016 solely in the Bronx was significantly different from the excavation involved in the instant proceeding in that it occurred rarely and involved much smaller holes. (Tr. 578).

After October 1, 2016, one hundred percent (100%) of NY Paving's work required to be excavated, which involved exactly the type of excavation that is disputed by the parties in this proceeding. (Tr. 578). In accordance with its long-standing practice (but prior to the effective date of the NYC DOT's revised regulations), NY Paving assigned the foregoing excavation work to Local 175 members because the excavated holes were filled with twelve (12) to sixteen (16) inches of asphalt and no concrete. (Tr. 112-13, 578, 580). As Dadabo succinctly noted, "back then it was all one step, which meant the hole was already open and you're doing one step that had nothing to do with the [excavation]. And we also were digging out the street and applying the one-step process of putting the asphalt back. That's when the roadway was all asphalt. They were putting back strictly asphalt with no concrete." (Tr. 663).

Commencing on April 1, 2017 however (and in compliance with the modified NYC DOT regulations), NY Paving assigned excavation work exclusively to Local 1010 members since approximately nine (9) to twelve (12) inches of concrete, rather than asphalt base, had to be used in every excavation. (Tr. 112-13, 124-25, 577). That concrete base was then topped with approximately two (2) five to (5) inches of asphalt by a Local 175 crew. (Tr. 112-13). NY Paving deemed excavation work after April 1, 2017 within Local 1010's jurisdiction because predominantly concrete was being used, rather than asphalt. And, from the consistent forthright

testimony of several witnesses, at NY Paving, what goes in the excavated hole determines which union performs the work. (Tr. 115-17, 188-89, 581).

In light of Miceli's testimony that prior to October 1, 2016, Local 175 members performed a very small number of excavations, which were significantly different from excavations performed after October 1, 2016, Local 175 essentially performed the relevant type of excavations for only six (6) months (from October 2016 through March 2017). More importantly, Local 1010 performed similar excavation work at NY Paving effective April 1, 2017 through today. (Tr. 588-89).

During the Hearing, Local 175 presented testimony attempting to demonstrate that Local 175 members performed excavation work at NY Paving for much longer than six (6) months. Similar to its other attempts, Local 175 failed in this regard as well because two (2) of Local 175's witnesses testified that "one step paving," which did not require any excavation, was the majority of the work performed. In fact, Lombardi stated while he did perform service cut-related excavation, "one step paving" started in 2010 or 2011 and it became the majority of Local 175's work. (Tr. 327-29, 346-47). Similarly, Patrick testified before October 1, 2016, the overwhelming majority (*i.e.*, seventy-five percent (75%)) of service cuts were done through "one step paving," which did not involve any excavation. (Tr. 361, 395-96, 429-30). In contrast, Miceli testified only five percent (5%) of Local 175's work prior to October 1, 2016 involved excavation in the Bronx. (Tr. 578). Miceli's testimony is more credible because as the Operations Manager of NY Paving, Miceli had a more comprehensive knowledge about all work performed by Local 175 members at NY Paving as opposed to Patrick, whose testimony was based solely on his own work. Patrick's ability to credibly testify regarding the excavation work performed by Local 175 members was further undermined by his testimony admitting the

majority of his (Patrick's) work at NY Paving involved "one step paving," milling and binder work. (Tr. 429-33). Notably missing from that list was excavation work.

The evidence in this case demonstrates both Local 1010 and Local 175, as of the conclusion of the Hearing, performed excavation work for six (6) months. Therefore, the past practice element in connection with excavation work is, at best, neutral. But, given the most recent past practice favors Local 1010 due to the foregoing revised regulations, NY Paving submits that the relevant past practice is for Local 1010 members to perform such excavation work.

In conclusion, the past practice evidence in connection with seed and sod, and saw cutting work clearly favors NY Paving. We submit recent past practice evidence regarding clean-up and excavation work also favors NY Paving.

##### **5. Area and Industry Practice**

Overwhelming evidence of area and industry practice was presented by Local 1010 in connection with the excavation work through its witness, Lowell Barton, as well as the relevant Local 1010 certifications and collective bargaining agreements. Barton, who is Local 1010's Vice President, Organizing Director, Business Agent and serves on Local 1010's executive board testified extensively that Local 1010 routinely performs excavation work for the various construction companies in New York City.

As an initial matter and as it pertains to the excavation work, Barton testified "excavation of roadway has been in Local 1010's jurisdiction since I've started. It's something we've always done and continue to do ... It's something we've always done. It's part of our work. You can't build a road unless you take out the old one." (Tr. 878-79). Indeed, Local 1010's current collective bargaining agreement with members of the General Contractors Association of New

York (“GCA”), as well as the template collective bargaining agreement Local 1010 offers to the independent contractors (*i.e.*, employers who are not members of the GCA), both cover excavation work. (Tr. 750, 757-60, 767-68). Specifically, Local 1010’s collective bargaining agreement with the GCA covers the “removal of old pavement by *excavating*, milling, or any other method...” (Tr. 767-68, Resp. Ex. 1, Art. VII, ¶3). Similarly, Local 1010’s current template collective bargaining agreement with the independent contractors includes “removal of old pavement by *excavating*, milling, or any other method...” (Tr. 758-60; Resp. Ex. 3, Art. VI, ¶3).

In addition to including excavation in its jurisdiction clauses in the foregoing collective bargaining agreements, Barton further testified Local 1010 provides workers who perform excavation work to the various contractors from its referral list. (Tr. 760). Further, Local 1010’s training program covers excavation work. (Tr. 760). In fact, approximately ninety percent (90%) of Local 1010’s one thousand six hundred (1,600) active members perform excavation work for various utility companies in New York City. (Tr. 774-75).

In further support that the area and industry practices dictate assignment of excavation work to Local 1010 members, Barton testified approximately thirty-one (31) construction companies perform close to all construction work for the utility companies in New York City. (Tr. 858, 861). Out of these thirty-one (31) companies, Barton identified twenty-two (22) that have a collective bargaining agreement with Local 1010 (either through the GCA or independently), and Local 1010 members perform the utility road restoration work, including excavation for these companies.<sup>14</sup> (Tr. 796-861).

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<sup>14</sup> C.A.C. Industries’ Certification of Representative (Resp. Ex. 4); Grace Industries, Inc.’s Certification of Representative (2005) (Resp. Ex. 6); Certification of Representative (2012)

Based on his experience, Barton also testified regarding Local 1010's area and industry practices as they pertain to saw cutting, clean-up, and seed and sod installation work. Specifically, Local 1010 members currently perform seed and sod installation, saw cutting of both asphalt and concrete, and clean-up after an excavation as well as subsequent to the pouring of concrete in New York City. (Tr. 768-69). Barton's long-standing leadership positions with Local 1010 and his thirty-two (32) year's experience as a Local 1010 member made him more than qualified to testify regarding Local 1010's general practices as well as area and industry standards. Similarly, based on his thirty (30) year's experience working at NY Paving, Miceli

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(Resp. Ex. 7); Judlau Contracting, Inc.'s Certification of Representative (Resp. Ex. 8); Manco Enterprises, Inc.'s Certification of Representative (Resp. Ex. 9); Peduto Construction Corp.'s Certification of Representative (Resp. Ex. 12); S. Difazio & Sons Construction Inc.'s Certification of Representative (Resp. Ex. 13); Safeway Construction Enterprises' Certification of Representative (Resp. Ex. 14); Triumph Construction Co.'s Certification of Representative (Resp. Ex. 15); Tully Construction Co. Inc.'s Certification of Representative (2005) (Resp. Ex. 16); Tully Construction Co. Inc.'s Decision and Certification of Representative (2009) (Resp. Ex. 18); Bancker Construction Corp.'s Local 1010 GCA Authorization (Resp. Ex. 19); C.A.C. Industries, Inc.'s Local 1010 GCA Authorization (Resp. Ex. 20); Diego Construction, Inc.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 21); Grace Industries LLC's Local 1010 GCA Authorization (Resp. Ex. 22); J. Track, LLC's Local 1010 GCA Authorization (Resp. Ex. 23); John P. Picone Inc.'s Local 1010 GCA Authorization (Resp. Ex. 24); Danella Construction of NY, Inc.'s Local 1010 GCA Authorization (Resp. Ex. 25); Judlau Contracting, Inc.'s Local 1010 GCA Authorization (Resp. Ex. 26); Mottco Contracting Corp.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 27); MFM Contracting Corp.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 28); Network Infrastructure, Inc.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 29); Peduto Construction Corp.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 30); Safeway Construction Enterprises, LLC's signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 31); Step-Mar Contracting Corp.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 32); Triumph Construction Corp.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 33); Tully Construction Co. Inc.'s Local 1010 GCA Authorization (Resp. Ex. 34); Vali Industries' signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 35); VNA Utility Construction Co., Inc.'s signature page to Local 1010 2015-2018 Independent CBA (Resp. Ex. 36); John P. Picone Inc.'s Local 1010 GCA Authorization (Resp. Ex. 37); see also Board Ex. 8.

also testified that the industry standards require the work in dispute be assigned to Local 1010 members. (Tr. 153-56).

Unlike Local 1010, Local 175 failed to present any evidence whatsoever to demonstrate that area and industry practices somehow dictate the assignment of the disputed work to Local 175. Unlike Local 1010, Local 175 presented no witnesses or evidence in connection with area and industry standards.

Also, Local 175's attempts at discrediting Barton's testimony similarly failed. Local 175's sole criticism of Barton's testimony regarding industry and area standards was to challenge whether the excavation work Barton testified about extended beyond the scope of the excavation work in dispute in the instant matter. However, Barton testified on cross examination that out of the thirty-one (31) companies he discussed, approximately fifty percent (50%) of them perform excavations that are twelve (12) inches or less (*i.e.*, virtually similar to the disputed excavation work performed by NY Paving). (Tr. 930-31).

Therefore, and in light of Local 175's utter failure to present any persuasive evidence supporting the area and industry practice and assignment of the disputed work to Local 175, this factor also overwhelmingly favors maintenance of the *status quo* (*i.e.*, Local 1010 should continue performing the excavation, seed and sod, clean-up and saw cutting work for NY Paving).

## **6. Relative Skills and Training**

At the hearing, NY Paving and Local 1010 presented ample evidence regarding the training they provided to the employees/members to perform excavation work incident to utility road restoration. For example, Miceli testified NY Paving provided training to Local 1010 members by including them in the excavation crews, thereby allowing them to observe the

excavation work, how it should be done, and what to look for. (Tr. 184). These 1010 members worked “hands on” with the crew foreman to identify the various markings in the streets in order to avoid hitting various utility lines in the ground when excavating. (Tr. 185). Training new employees in excavation work was necessary because NY Paving planned to add excavation crews comprised of Local 1010 members in the Fall 2017. (Tr. 185).

Barton also testified Local 1010 trains all its members to perform excavation work safely in the streets of New York City. (Tr. 760). In contrast, Local 175 presented no evidence whatsoever it had trained its members to perform excavation or any other disputed work. Therefore, the training component of this element favors assignment of the disputed work to Local 1010 members, particularly because Local 1010 as well as NY Paving both provide the required training to perform such work, and NY Paving is satisfied with the quality of their work.

As for the skills component of this factor, Miceli testified while some equipment used by Local 1010 and Local 175 for excavations may be the same (*i.e.*, backhoe), other equipment is “[t]otally different.” (Tr. 118-19). For example, in order to pour concrete, Local 1010 members used the mixer machine, operation of which requires specific skills. (Tr. 119). Most Local 1010 members knew how to operate the concrete mixer machine. (Tr. 119). Further, Local 1010 members used steel trowels, hand trowels and other equipment to finish the concrete, *i.e.* to spread it out and level it. (Tr. 120). Local 175 members did not use this type of equipment and tools in asphalt work. (Tr. 119-120). Finally, “[t]ime is of the essence” when finishing concrete because if the workers wait too long, the concrete will set and no further alterations can be made. (Tr. 119). Local 1010 members have skills to operate the necessary (and different) equipment to pour concrete and finish it, while Local 175 members do not. (Tr. 113).

While certain tasks related to pouring concrete after an excavation require specific skills, including the ability to operate specialized equipment, there was testimony indicating that most of the work in dispute herein is largely unskilled work. (Tr. 183). However, and for the reasons set forth above, NY Paving prefers Local 1010 members perform excavation, clean-up, saw cutting and seed and sod work for efficiency reasons (*i.e.*, all four (4) types of disputed work are incidental to concrete work). See supra Section III.D.3. As Miceli stated, “[t]he only reason to do this work now is because there’s concrete going back in, I’ve got concrete work on the sidewalk, I used 1010.” (Tr. 184).

Further, to the extent Local 175 members performed some of the disputed work, as more fully discussed above, any such work was either extremely limited or occurred many years ago. Therefore, Local 175 cannot now claim its members have more skills in connection with the disputed work compared to Local 1010 members, who actually currently perform these tasks for NY Paving on regular basis.<sup>15</sup>

In light of the foregoing, while the skills component of this element may be considered by some as equal, because Local 1010 members are typically assigned the disputed work on a regular basis, these workers more likely have greater experience with excavation, saw cutting, seed and sod, and clean-up work in comparison to Local 175 members.

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<sup>15</sup> To the extent Local 175’s witness, Patrick presented limited testimony regarding his alleged training of Local 1010 members on how to perform excavation should be rejected by the Board. (Tr. 383-84). As an initial matter, during four (4) days of the Hearing, there was no other evidence (testimony or documentary) regarding Patrick (or any other Local 175 member) training Local 1010 members on performing excavation or any other work. Further, as set forth in Section III.D.4.iv, supra, Local 175 and Local 1010 members both performed excavation for the same period – six (6) months. Therefore, any implication by Patrick that Local 175 members are somehow more experienced than Local 1010 members in excavation work is simply without merit.

In sum, the skills component of this element is largely neutral because of the relatively low skill level required to perform the disputed work and employees who are members of both unions may be capable of performing same. However, this factor should nevertheless weigh in favor of Local 1010 because both NY Paving and Local 1010 have trained the employees for the excavation work in general, and specifically for the work to be done by NY Paving, and, Local 1010 members have actually performed such work. Local 175, on the other hand, has failed to present sufficient evidence to prevail on this factor.

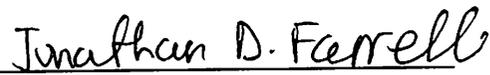
#### **IV. RELIEF SOUGHT**

For the foregoing reasons, NY Paving respectfully requests that it be allowed to continue to assign seed and sod, excavation, clean-up and saw cutting work in New York City to Local 1010. It also asks for a ruling that Local 175 is not entitled to claim such work or to engage in violations of Section 8(b)(4)(D) to obtain same.

## V. CONCLUSION

The relevant factors in this case overwhelmingly support NY Paving's position that it should be allowed to continue to assign seed and sod, excavation, clean-up and saw cutting work in New York City to Local 1010. The factors of collective bargaining agreements and Board Certifications, current practice, employer preference, economy and efficiency, area and industry practice, and skills and training are compelling in that regard. The factor of past practice either favors Local 1010 or is neutral, and certainly does not favor Local 175. Under these circumstances, there is no question seed and sod, excavation, clean-up and saw cutting work in New York City should be awarded to Local 1010.

**Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Post-Hearing Brief on behalf of New York Paving, Inc. has been served via Federal Express delivery this 8<sup>th</sup> day of December, 2017.

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