

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

-----X	:	
E.W. HOWELL CO., LLC	:	
	:	Case 29-CA-195626
and	:	
	:	
NORTHEAST REGIONAL COUNCIL OF	:	
CARPENTERS AND JOINERS AMERICA	:	
-----X	:	

RESPONSE TO NOTICE TO SHOW CAUSE

E.W. Howell Co., LLC (“EWH”), the Respondent in the above-captioned case, by and through its undersigned counsel, and pursuant to Section 102.24(b) of the Board’s Rules and Regulations, submits this Response to Notice to Show Cause as to why the Board should deny the motion for partial summary judgment of the General Counsel and the General Counsel’s request that the alleged unlawful subcontracting and transfer of bargaining unit work allegations in this matter be severed pursuant to its partial motion for summary judgment (the “Motion”). In further support of this Response, EWH respectfully directs the Board’s attention to the Declaration of Howard Rowland (“Rowland Dec.”), dated August 3, 2018, submitted with this Response.

INTRODUCTION

The General Counsel’s Motion misstates EWH’s position. This is not a garden variety test of certification. In fact, EWH submits that the facts in this case present issues of first impression: **Can a bargaining order issue against a construction industry employer in which there was a solitary vote for unionization by a nonemployee made eligible to vote by the *Daniel/Steiny* formula where there are no employees of the employer in the unit**

certified by the Board? All authority relied upon by the General Counsel and the Charging Party in previous submissions concerning the Motion is distinguishable. The attempt to avoid these issues by arguing that they have been waived because they were not raised in the representation proceeding is plainly wrong.

First, there can be no dispute that EWH has continuously asserted that the Board's certification based upon the vote of a single nonemployee in favor of the union is insupportable, both in the representation proceeding and in this unfair labor practice proceeding. (*See, e.g.*, Ex. D to MSJ). Second, EWH's alleged bargaining obligation could not have and did not arise until the election in this matter was conducted and the results certified on August 1, 2016. There was no refusal-to-bargain issue to raise in the representation proceeding. Accordingly, there was nothing for EWH to waive in the representation proceeding insofar as the present unfair labor practice charge. Only after the certification of results in the representation proceeding and the Charging Party's request for bargaining on November 11, 2016, could and did a refusal-to-bargain issue arise. At that time, however, and for a period of more than seven months before, EWH had no employees in the unit that had been certified. There was, therefore, unlike the garden variety test-of-certification case, no one for whom to bargain (*see* EWH Answer, ¶¶5, 20-21 (Ex. J to MSJ)) since week ending April 5, 2016 and, therefore, no obligation to bargain with the Northeast Regional Council of Carpenters and Joiners America ("NRCC" or the "Union")¹. Importantly, the General Counsel attempts to overcome this reality by alleging in conclusory fashion that the reason there were no employees in the certified unit was because of EWH's unlawful subcontracting and/or transferring of bargaining unit work to others. *See* MSJ, Ex. I, at ¶11(a). Obviously, therefore, these allegations are inextricably tied to the General Counsel's

¹ EWH has been informed that effective May 30, 2018, the Northeast Regional Council of Carpenters has dissolved and the affiliated Long Island local union is now affiliated with the New England Regional Council of Carpenters. For continuity with prior filings, EWH will continue to refer to the NRCC in this Response.

position and should not be severed from the case. It is precisely because this case is not a garden variety test-of-certification case—due to the absence of any employees of EWH in the certified unit at the time of the election and certification—that the General Counsel’s allegations that such absence of employees was due to EWH’s unlawful subcontracting and/or transferring of bargaining unit work, are integrally related to the unfair labor practice case and should not be severed. Accordingly, the General Counsel will have to establish that EWH unlawfully subcontracted or transferred bargaining unit work, and thereby unlawfully eliminated the bargaining unit, in order to create a bargaining obligation. Therefore, the General Counsel’s allegations of such improper subcontracting and/or transferring of bargaining unit work are an integral part of this case and must be heard together with all other evidence.

Moreover, in the unlikely event, at the hearing of this case, the General Counsel is able to amply demonstrate that there was, in fact, a bargaining unit, the evidence will establish that, at best, there was only a stable one-person unit and, therefore, no basis for a bargaining obligation.

The fact that the General Counsel challenges EWH’s assertion that there is no unit by alleging that the absence of any unit members is due to unlawful subcontracting and/or transfer of bargaining unit work makes the issues the General Counsel seeks to sever inextricably intertwined with all of the relevant facts in the case. Accordingly, because the issues of the Union’s certification, EWH’s bargaining obligation (if any), and EWH’s subcontracting practices all relate to the composition of EWH’s workforce, they should be considered together based upon evidence presented at the hearing. Severing the allegations identified by the General Counsel would not reduce the evidence necessary for consideration at hearing, and it would waste resources by multiplying the proceedings unnecessarily.

SUMMARY OF RELEVANT FACTS

EWH, through its membership in the Building Contractors Association, Inc. (“BCA”), a construction industry multiemployer association, had been party to successive section 8(f) pre-hire agreements with the NRCC (the “Prehire Agreements”) (Rowland Dec. ¶5). The most recent of the Prehire Agreements between EWH and the NRCC had a term of July 1, 2011 through May 31, 2016 (the “Last Prehire Agreement”) (*Id.* at ¶6). The geographical jurisdiction of the Last Prehire Agreement includes and is limited to those carpenters hired by EWH, out of its Plainview, New York office, and working in Nassau and/or Suffolk counties (“Long Island Carpenters”).

Change of Business Structure

During the term of the Prehire Agreements, and consistently from at least mid-2013, *i.e.*, for at least three years prior to the expiration of the Last Prehire Agreement, all carpentry subcontracting was done by EWH in accordance with the Prehire Agreements’ terms, *i.e.*, to union signatories (*Id.* at ¶8; Rowland Dec. ¶17). Most of EWH’s carpentry work was subcontracted. This included, without limitation, labor, material, equipment, scaffolding, hoisting and services required to complete cold-formed metal framing; rough carpentry; sheathing; thermal insulation; fire-resistive joint systems; joint sealants; expansion control; hollow metal doors and frames; flush wood doors; door hardware; gypsum board shaft wall assemblies; non-structural metal framing; gypsum drywall and acoustical panel ceilings work (“Subcontracted Carpentry Work”) (*Id.* at ¶9). There was, however, a small portion of EWH’s carpentry work that was done by EWH’s own carpenters who were employed on its own payroll. This included constructing temporary protection barriers and enclosures, meeting safety requirements, site set-up and break-down of temporary trailers, patching sheetrock, and minor

punch list/corrective work (“Self-Performed Carpentry Work”) (Rowland Dec. ¶10). During the Last Prehire Agreement, EWH did increasingly less of the Self-Performed Carpentry, instead increasingly subcontracting more of that work to the union signatories who had been performing the Subcontracted Carpentry Work based on its business objectives and changing market conditions in accordance with its right to do so in accordance with Article 26 of the NRCC agreement. (*Id.* at ¶¶12-14). In fact, EWH President and CEO Rowland made the decision to permanently cease doing the Self-Performed Carpentry, and to subcontract all carpentry work. (*Id.* at ¶12__). Since the week ending April 5, 2016, therefore, EWH has employed no Long Island Carpenters.

Termination of Section 8(f) Agreement

On March 24, 2016, more than 28 months ago, EWH terminated the Last Prehire Agreement in accordance with Article Thirty-Three (“Duration of Agreement”) by providing timely notice to the NRCC of EWH’s intention to terminate the Last Prehire Agreement at its expiration on May 31, 2016. (Rowland Dec. ¶7). Accordingly, beginning June 1, 2016, there was no longer any contractual or bargaining relationship between EWH and the NRCC. This allowed EWH to have the additional flexibility to subcontract all of its carpentry work to both union and nonunion subcontractors in the changing and increasingly competitive construction marketplace on Long Island. (*Id.* at ¶14). Until the expiration of the Last Prehire Agreement, all subcontracting was only to union signatories, and thereafter to both union and nonunion subcontractors. (*Id.* at ¶17.)

Stable One-Person Unit

For at least seventeen months prior to the expiration of the Last Prehire Agreement, *i.e.*, from January 1, 2015 through May 31, 2016, EWH employed only one Long Island Carpenter

who worked full time for longer than six weeks at EWH. (*Id.* at ¶24.) This individual was Thomas Lightsey, who worked alone for EWH for 28 of the 45 weeks in which he worked. Mr. Lightsey did not work at all during the last six months of the Last Prehire Agreement, *i.e.*, from week-ending December 1, 2015 through May 31, 2016. (*Id.* at ¶24). During 2015, Mr. Lightsey performed 76.5% of all Long Island Carpenter work hours. (*Id.* at ¶¶30-31). The remaining 23.5% was scattered among six carpenters who worked only sporadically. (*Id.* at ¶31). In only five of the weeks in the nearly eight months between April 7, 2015 and December 1, 2015 did any other Long Island Carpenter work with Mr. Lightsey, with total weekly hours for these other carpenters ranging from 2 to 24.

For at least fourteen months prior to the expiration of the Last Prehire Agreement, *i.e.*, from April 1, 2015 through May 31, 2016, EWH had at most a stable one-person unit of Long Island Carpenters. In 2016, over the course of the last five months of the Last Prehire Agreement, the collective work performed by EWH's Long Island Carpenters totaled 249.5 hours, an average of 9.98 hours per week over twenty-five (25) weeks, *i.e.*, a work average of slightly more than one day per week for one Long Island Carpenter. (*Id.* at ¶32). For at least seven weeks prior to the expiration of the Last Prehire Agreement, *i.e.*, from week-ending April 5, 2016 through May 31, 2016, EWH did not employ any Long Island Carpenters. For more than 28 months, from week-ending April 5, 2016 through August 13, 2018, the date of this Response to Notice to Show Cause, EWH will not have employed any Long Island Carpenters.²

² In late-February 2017, on the Stony Brook University Medical Center worksite, a project governed by the terms of a project labor agreement ("Stony Brook PLA") to which the NRCC and other trades were signatory, and on which EWH had been acting as the general contractor for nearly three years, EWH temporarily and on a part-time emergency basis used two carpenters (Armando Lopes and Antonio Alves), away from their work for EWH at Brooklyn College, a project governed by the terms of a project labor agreement ("Brooklyn College PLA") to which NRCC was not a party to assist on the Stony Brook PLA. The worksite of the Brooklyn College PLA is outside the geographic jurisdiction of the NRCC. It is within the legally recognized separate and distinct jurisdiction of the New York City District Council of Carpenters. The emergency work performed by Lopes and Alves on this occasion involved concrete work that EWH did not self-perform within the jurisdiction of NRCC.

Section 9(a) Election

On June 9, 2016³—nine days after the expiration/termination of the Last Prehire Agreement—the NRCC filed with the National Labor Relations Board, Region 29, a representation petition seeking to establish a section 9(a) relationship with EWH by demonstrating itself as the majority status bargaining representative of EWH’s unit employees within the jurisdiction of the NRCC. On June 9, 2016, EWH had no Long Island Carpenters on its payroll. On June 20, 2016, EWH and the NRCC entered into a Stipulated Election Agreement (the “SEA”), which, *inter alia*, set an election date of July 8, 2016. EWH also had no Long Island Carpenters on its payroll on June 20, 2016. The SEA provided for two categories of eligible voters: (1) “carpenters employed by the Employer” and (2) “[a]lso eligible to vote are all employees” who meet the *Daniel/Steiny* eligibility formula. (Ex. B to MSJ).

On July 8, 2016, per application of the special construction industry *Daniel/Steiny* voter eligibility formula, two (2) persons were permitted to vote in the election, even though EWH employed no Long Island Carpenters and had no intention of hiring any for the foreseeable future, and even though no former employee had a reasonable expectation of future employment. (Rowland Dec. at ¶20.) And, to date, for more than 28 months, EWH has not employed any Long Island Carpenters due to the change in its business structure.

At the time of the election, and for at least three months prior, there were no employees in the “unit” as defined within the SEA⁴: “All full-time, regular part-time journeymen and

³ The Complaint mistakenly reads that the NRCC’s election petition was filed on June 6, 2018. *Compare* MSJ ¶1 with Ex. A to MSJ. Respondent mistakenly failed to correct the date in its Answer although it otherwise admits that a petition for election was filed.

⁴ EWH no longer had any Long Island Carpenters on its payroll once it released its only reasonably steady part-time Long Island Carpenter in week-ending April 5, 2016. EWH ceased doing Self-Performed Carpentry Work and instead, for the balance of the Last Prehire Agreement, subcontracted it to the union signatories that had been performing the Subcontracted Carpentry Work. Once the Last Prehire Agreement was terminated at its expiration

apprentice carpenters employed by the Employer out of its Plainview, New York facility and working in Nassau and Suffolk counties.”⁵ Of the two individuals permitted to vote, only one of them, Mr. Lightsey, actually voted, casting his vote in favor of the NRCC. Since he last worked for EWH as a Long Island Carpenter more than 32 months ago, *i.e.*, in week-ending December 1, 2015, Mr. Lightsey (i) never contacted any management personnel at EWH seeking employment as a Long Island Carpenter, (ii) has neither been employed by EWH on any basis as a Long Island Carpenter nor been given any indication that he can expect reemployment by EWH, and (iii) has otherwise been gainfully employed by another employer.

ARGUMENT

The issues presented in the Complaint are interrelated and should be considered together, and all fail to substantiate any unfair labor practice for the same fundamental reason. At all relevant times, EWH has either had zero employees who would qualify as bargaining unit members, or had at most a stable one-person unit, which cannot comprise a unit for which EWH was obligated to bargain. EWH, therefore, was free to make any changes to its business practices without bargaining with the Union, which represented no workers with a continuing interest in EWH’s business. To the extent the composition of EWH’s unit is put into question by the General Counsel’s allegations of unlawful subcontracting and/or transferring of work, those issues are inextricably intertwined with the bargaining obligation the General Counsel seeks as a remedy. The Board’s certification, based, as it was, on a single vote in a two-person unit that was manufactured by the *Daniel/Steiny* construction voter eligibility formula is meaningless if there is no bargaining unit of actual employees or if that unit is a stable one-person unit.

EWH was free to subcontract all of its carpentry work to union signatory contractors as well as nonunion contractors.

⁵ The Motion misquotes the SEA at paragraph 1; *see* Ex. B to MSJ. It also misquotes the unit originally petitioned for at paragraph 1; *see* Ex. A to MSJ. Lastly, it also incorrectly indicates there was one void ballot in the Tally of Ballots when there were none. *See* Ex. C to MSJ.

I. Severance is Inappropriate Where Issues Are Interrelated

It would be contrary to Board policy, which calls for related issues to be litigated together within one case and the avoidance of repetitive piecemeal litigation, to sever the §8(a)(5) allegations concerning unlawful subcontracting and/or transfer of bargaining unit work from the remainder of the Complaint, given the connected facts and issues between the bargaining request and the unit composition (of lack thereof) in this case. *See, e.g., Quaker Tool & Die, Inc.*, 169 NLRB 1148 (1968); *Jefferson Chem. Co.*, 200 NLRB 992 n.3 (1972).

As stated repeatedly, the instant case is not a garden variety test of certification. This case presents rare and unusual facts that distinguish it from the typical test-of-certification circumstances where summary judgment may be appropriate. *Cf. FedEx Freight, Inc.*, 363 NLRB No. 126 (2016). Specifically, EWH's alleged refusal to bargain with the Union is based on the fact that it has no unit employees, and has no expectation that it will ever again have any unit employees (*see* Rowland Dec. ¶¶17, 21-22), notwithstanding the election results. The SEA properly described an appropriate unit consisting of EWH employees and *Daniel/Steiny* eligible individuals. However, the fact that the Region conducted an election where there were no employees on the EWH payroll and two non-employees eligible based on the *Daniel/Steiny* construction industry voter eligibility formula cannot create a bargaining obligation where there are no employees in the unit that was certified. *Brooks v. NLRB*, 348 U.S. 96 (1954) acknowledges that unusual circumstances may justify deviation from the usual one year non-rebuttable presumption of continuing majority status to support a continuing bargaining obligation following certification, and this is such a case.

On the sole occasion where the Union requested bargaining from EWH, on November 11, 2016, EWH responded promptly by stating that it had no unit employees and that it had no

intention of retaining any unit employees (*see* Rowland Dec. ¶¶22-23). The Union never again requested bargaining or information related to EWH's assertions that the unit was empty or nonexistent, presumably accepting, or perhaps knowing, EWH's assertions as true. Otherwise, one would have expected that the Union would seek information about the composition of the unit in preparation for a possible challenge of the employer's assertions. *See, e.g., ORNI 8, LLC*, 359 NLRB No. 87 (2013). The Union's silence after its one and only bargaining request demonstrated its apparent acceptance at the time that it would be nonsensical—and without any lawful foundation—to bargain over an empty or nonexistent unit. “[E]ach employer is obligated to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control.” *Miller & Anderson Inc.*, 364 NLRB No. 39, at *15 (2016).

The Motion cites no case or other authority to justify a finding of partial summary judgment where, as here, the unit at issue was constructed for election purposes solely from the *Daniel/Steiny* formula, rather than as a reflection of current or continuing worker presence. Instead, they merely cite only to cases where the employer did not challenge that it had unit employees, but rather contested, in one instance, whether a unit should be drawn plant-wide, *NLRB v. Tallahassee Coca-Cola Bottling Co.*, 409 F.2d 201, 203 (5th Cir. 1969), and in another, whether the deciding vote (among forty-seven cast) was made by a supervisor, *NLRB v. Union Bros.*, 403 F.2d 883, 886-88 (4th Cir. 1968). This precedent is of no moment in the current situation where the employer simply has no bargaining obligation and, therefore, cannot violate section 8(a)(5) because it has no employees to bargain over.

II. No 8(a)(5) Violation Where There Are Not At Least Two Unit Members

It is well-settled that an employer only has a statutory obligation to bargain with a union representative where the employer employs at least two unit employees. “[T]he Board has recognized that a §8(a)(5) unfair labor practice charge must be dismissed if ‘the General Counsel has *failed to establish*’ that the appropriate bargaining unit consisted of more than one employee during the time in question.” *NLRB v. Seedorff Masonry, Inc.*, 812 F.3d 1158, 1168 (8th Cir. 2016) (quoting *D & B Masonry*, 275 N.L.R.B. 1403, 1409 (1985)) (emphasis in original). “As the Board has recognized since 1936, ‘the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain.’” *Int’l Transp. Serv. Inc. v. N.L.R.B.*, 449 F.3d 160, 164 (D.C. Cir. 2006) (quoting *Luckenbach Steamship Co.*, 2 NLRB 181, 193 (1936)).

Here, EWH has no Long Island Carpenters in the NRCC’s jurisdiction. The last time EWH regularly employed a Long Island Carpenter was in the week ending April 5, 2016. (Rowland Dec. ¶17.) Indeed, for one year prior to the expiration of the Last Prehire Agreement on May 31, 2016, *i.e.*, from May 31, 2015 through May 31, 2016, EWH’s carpentry needs were filled by one carpenter at a time, with rare, sporadic occasions where a temporary need for an additional ad hoc carpenter arose. (*Id.* at ¶¶35-36).

EWH’s business and work assignment practices do not establish a unit of two persons, as required to impute to EWH a duty to bargain over such a unit. *See, e.g., Stack Elec.*, 290 NLRB 575 (1988) (employer had employed more than one bargaining unit employee for approximately two weeks over a three-year period, and not since over four months before the hearing in that case). Board advice memoranda demonstrate expressly that a bargaining unit may lawfully be reduced to zero members because of an employer’s change in business practice favoring

subcontracting. *See, e.g., Stanker & Galetto, Inc.*, NLRB Div. of Advice, 04-CA-88952, 2013 WL 1497117 (Mar. 19, 2013) (finding no §8(a)(5) violation because employer no longer employed any bargaining unit workers, owing to practice of subcontracting such work).

III. Daniel/Steiny Cannot Create a Bargaining Obligation

A. No Active Unit Members Exist

The four-month period without Long Island Carpenter employees that existed as of the date of the certification has since extended to 28 months, establishing beyond question that the lack of employees is the result of a business change and not a temporary occurrence.

Even if there were one employee, there would be no bargaining obligation. *See, e.g., Kirkpatrick Elec. Co., Inc.*, 314 NLRB 1047, 1053 (1994) (finding that employer had no obligation to bargain with union certified under §9(a) after the unit was reduced to one statutory employee); *Searls Refrig. Co.*, 297 NLRB 133 (1989) (no statutory duty to bargain over employment of one employee for three-month temporary period during two-year period with no employees).

In *Stack Electric*, intermittent temporary employment of a part-time employee, including short-term overlaps among such employees (*e.g.*, two weeks of part-time overlap), where no individual averaged full-time employment, was held to constitute only a one-person unit that fell below the collective status required to trigger a bargaining obligation. Because the analyzed units did not have more than a single statutory employee at all relevant times, the complaint alleging a violation of §8(a)(5) was dismissed. 290 NLRB 575, 578 (1988). Even occasional use of additional ad hoc employees will not impute an obligation to bargain where those employees are not employed on a permanent basis or with any expectation of reemployment. *See D & B Masonry*, 275 NLRB 1403, 1409 (1985) (the use of four bricklayers on a sporadic ad hoc basis

did not qualify to establish more than one unit employee, and the employer had no statutory obligation to bargain).

The present situation stands in stark contrast to *McDaniel Elec.*, 313 NLRB 126 (1993), where the employer who claimed a single-person unit actually employed two individuals for five out of the thirteen weeks prior to the hearing in the matter. The Board in *McDaniel* took particular notice of the employer's most recent staffing practices immediately prior to the hearing when evaluating whether the unit was "collective" in nature. *Id.* at 127 ("it is our view that the Respondent's most recent employment history is more relevant to our inquiry than are more remote periods"). In *McDaniel*, the recent pattern revealed that there was no stable one (or zero) person unit. Here, by contrast, the recent pattern demonstrates the incontrovertible stability of EWH's empty unit, or stable one-person unit at most, and such critical facts should be considered at the hearing.

B. Voters Lack Continuing Interest

The *Daniel/Steiny* construction voter eligibility formula cannot be used to create a bargaining obligation where none exists. Its purpose is merely to insure that an existing unit of current employees is supplemented to include employees who have previously and relatively recently worked for a construction employer and who have a reasonable expectation of future employment with the employer and, therefore, a community of interest with the existing workforce. *Metfab, Inc.*, 344 NLRB 215, 221-22 (2005); *D&B Masonry*, 275 NLRB 1403, 1409 (1985).

Here, the *Daniel/Steiny* formula was actually used to create a unit of nonemployees with no expectation of employment and, therefore, the Board's certification is of no moment because

there is no underlying bargaining unit upon which to base a bargaining obligation.⁶ EWH had no employees on its payroll, but *Daniel/Steiny* generated the names of two nonemployees as eligible voters. In the first place, *Daniel/Steiny* can only be used to supplement an existing unit. See *Metfab, Inc.*, 344 NLRB at 221-22. Secondly, even for *Daniel/Steiny* to be applied, it can only be applied to those who have been laid off and “who have a reasonable expectation of reemployment within a reasonable time in the future, and thus have a continuing interest in the employers’ working conditions.” *D&B Masonry*, 275 NLRB at 1409 (internal citations omitted). To the extent the General Counsel appears to maintain that the two *Daniel/Steiny* voters had a reasonable expectation of employment but for EWH’s alleged unlawful subcontracting and/or transfer of work, the facts related to that issue are inextricably intertwined with the General Counsel’s seeking a bargaining order and should not be severed from the overall case.

Neither of the two voters deemed eligible in the Union election have performed unit work for EWH since the election. Nor has anyone else on the EWH payroll. The test of time has demonstrated that, as of the election, they lacked a reasonable expectation of reemployment, and continue to lack such an expectation, which illustrates the flaws in the certification of an empty unit based on a single vote by a nonemployee who has no continuing interest in the bargaining unit, the touchstone of voter eligibility. See, e.g., *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992) (the contours of a bargaining unit should be drawn “to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer.”)

IV. EWH Work Assignment Issues Are Interrelated

The Motion to sever the refusal to bargain allegations concerning subcontracting and/or transfer of work from the other allegations is misconceived because the issues are naturally

⁶ See Answer ¶¶22-23 (Ex. J to MSJ).

intertwined, as described above. The Complaint wrongly alleges that EWH violated §8(a)(1) and §8(a)(5) by refusing to bargain with the union, unilaterally transferring bargaining unit work and unit positions to non-unit employees, and subcontracting unit work. (Compl. ¶¶10, 11(a).)

EWH's defense to the allegation that it has unlawfully failed to bargain is also a defense to the allegation that it has unlawfully made unilateral changes to the terms and conditions of employment: it was free to take all of these actions where the unit constituted fewer than two employees because it had no obligation to bargain with the Union over any subject. *See, e.g., Stack Elec.*, 290 NLRB at 578.

Furthermore, the evidence demonstrating the lack of work of Long Island Carpenters will similarly demonstrate that EWH has continued a long-term practice of subcontracting carpentry work, which now includes the formerly Self-Performed Carpentry Work. Since the expiration/termination of the Last Prehire Agreement, EWH has availed itself of the option of using union or nonunion subcontractors as appropriate based on client demands and bid conditions. (Rowland Dec. ¶16).

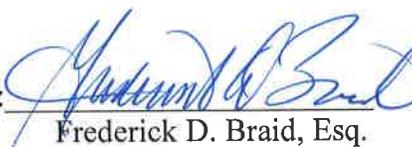
Yet the implication of the Complaint, which is completely unfounded, is that EWH is diverting work that should be performed by Long Island Carpenters to its subcontractors, notwithstanding that EWH's subcontracting practices are fully lawful (*see, e.g., Weis Builders, Inc. v. Int'l Union of Operating Eng'rs*, No. 15-cv-2619, 2017 WL 497767 (N.D. Ill. Feb. 7, 2017)). To the extent that the General Counsel intends to argue that any of EWH's former carpenters should have been recalled or otherwise hired to perform work in the NRCC's jurisdiction to constitute a unit, those issues should be considered with the overall evidence of EWH's work assignments, which demonstrate that EWH has not had Self-Performed Carpentry Work at a sufficient level to support a bargaining unit of Long Island Carpenters for years.

CONCLUSION

For the reasons stated above, EWH respectfully requests that the Board deny the Motion and allow EWH to present hearing evidence in its defense.

Dated: New York, New York
August 13, 2018

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing and the accompanying documents have been filed electronically with the National Labor Relations Board on August 13, 2018, and that a copy has been sent via email to counsel of record as follows:

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/s/ Katherine H. Marques