

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

**NEW YORK PAVING, INC.**

**Respondent**

**and**

**CONSTRUCTION COUNCIL  
LOCAL 175, UTILITY WORKERS  
UNION OF AMERICA, AFL-CIO**

**Cases: 29-CA-197798  
29-CA-209803  
29-CA-213828  
29-CA-213847**

**Charging Party**

**and**

**HIGHWAY, ROAD AND STREET  
CONSTRUCTION LABORERS LOCAL UNION  
1010 OF THE DISTRICT COUNCIL OF PAVERS  
AND ROAD BUILDERS, LABORERS  
INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO**

**Party of Interest**

**PARTY OF INTEREST'S MEMORANDUM OF LAW**

Dated: New York, New York  
December 20, 2018

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## **Statement of the Case**

Interested Party, Highway, Road and Street Construction Laborers Local 1010 (“Local 1010”), by its undersigned attorneys, submits this Memorandum to Law to address the allegations of the Complaint that Respondent New York Paving violated §8(a)(2) of the National Labor Relations Act by providing assistance and support to Local 1010. Respondent New York Paving (“NYP”) is an employer in the construction industry who performs asphalt and concrete paving, mainly for utility companies. (Tr. 55:8-14). The General Counsel’s theory of the case would wreak havoc with long established law and practice in the construction industry as it seeks to turn shop stewards and working foremen into employer agents. Being a shop steward means having unique job security and being a working foreman means you get a slightly higher hourly rate under the collective bargaining agreement than rank and file laborers. In the end, if the General Counsel’s case is upheld it requires rank and file laborers to sacrifice their rights under §§7 and 8 of the Act when they seek to improve their lot as shop stewards and working foremen. Such a result is untenable.

The Complaint contains but a single allegation of unlawful assistance: that a) New York Paving (“NYP”) directed Joseph Bartone, Jr, the nephew of NYP’s owners Anthony and Diane Bartone-Sarro and the grandson of former NYP owner Joseph Bartone Sr and his wife Martha Bartone, to hand out authorization cards on behalf of Local 1010; and b) merely by virtue of his familial relationship Bartone, an employee and member of Charging Party Local 175, was an agent of New York Paving. (Compl. ¶¶ 11 and 29). In the course of the proceeding, General Counsel also presented evidence that Joseph Bartone became a working foreman after November 2017, outside the relevant time period and may not contend that he is an agent of NYP for that reason.

Further, albeit General Counsel never sought to amend the Complaint to allege any additional conduct violative of Section 8(a) (2), in her opening statement, General Counsel contended that the evidence would establish that New York Paving also assisted Local 1010 by directing employee Pasqual LaBate (“LaBate”), a Local 175 member and former Local 175 shop steward, to threaten employees with termination if they did not sign up with Local 1010. The Complaint alleges that LaBate, a working foreman for NYP, was both a supervisor and an agent of NYP. (Comp. ¶10).

Finally, General Counsel also asserts that Steven Sbarra, a shop steward for Local 1010, and a working foreman of the company called Di-Jo, is an agent of NYP. (Comp ¶ 11) The Complaint also contains an allegation that Sbarra told employees they could not work for NYP because of their support for Local 175 (Comp.¶16), but General Counsel offered no evidence whatsoever in the course of the hearing that any such statement was ever made. Albeit the Complaint does not allege that Sbarra unlawfully assisted Local 1010, General Counsel has presented evidence that Sbarra may have collected Local 1010 cards, in an apparent effort to demonstrate that this long-time shop steward of Local 1010 in supporting his own union’s organizing activities was offering assistance to NYP.

Turning Sbarra’s organizing activities for his own union into unlawful assistance because Sbarra was also a working foremen at Di-Jo and a shop steward at NYP would turn the law of labor relations in the construction industry upside down and require union members to choose between sacrificing their §7 rights and their rights of free speech under §8 on the one hand and obtaining the job security that comes with the shop steward’s position and earning the higher rate under the collective bargaining agreement that comes with being a working foremen on the other hand. Under the Local 1010 CBA, the shop steward is the first employee on the job site and cannot

be laid off by the employer without prior approval of the Business Manager of the Local. (Jt. Ex. 2, Local 1010 CBA, at p. 4). Also under the Local 1010 CBA, working foremen earn more than other laborers except for the specially skilled jobs of formsetter and screed person (Jt Ex. 2, Local 1010 NYP CBA at pp. 17-18).

As for Bartone and LaBate, there is no credible evidence that they had apparent authority to speak for NYP on the subject of Local 1010; and to the extent that the credible evidence demonstrates that they both spoke with their fellow Local 175 bargaining unit members about Local 1010 based on their own personal assessment of the situation, both men clearly have the right under the Act to express their support for a rival union. In the General Counsel's view of the case, they must sacrifice their rights under §§ 7 and 8 because of their positions as shop steward and working foremen in LaBate's case and as a family member in Bartone's case. Like the Local 1010 CBA, the Local 175 agreement with NYP also provides the foreman with a higher rate of pay than other laborers, except for the skilled raker and the operating engineer positions. (GC Ex. 4, pp. 12-14).

Assuming *arguendo* they are deemed a supervisor in LaBate's case and an agent in both cases, §8(c) of the Act, by its express terms, prohibits the General Counsel from using their statements of support for a rival union, unaccompanied by threats of reprisal or promises of benefit, as evidence of any unfair labor practice. The General Counsel has failed to present credible evidence that either man made threats or promises.

In any event, as we demonstrate below, General Counsel's §8(a) (2) allegations must fail because General Counsel has failed to meet her burden to demonstrate by a preponderance of the evidence that NYP's working foremen generally, and LaBate (or Sbarra for that matter) specifically, were statutory supervisors under the Act. To the extent, the General Counsel seeks to

claim that LaBate was an agent or supervisor because of his former status as a shop steward for Local 175 there is no such allegation in the Complaint, nor is there any evidence whatsoever that LaBate's authority as a shop steward derived from the company. It was solely based upon his appointment by Local 175 under the Collective Bargaining Agreement. (GC Ex. 4, p. 6). Furthermore, it is well established that a shop steward is a first line representative of his or her union and any claim by General Counsel that a shop steward's authority makes her an agent of the employer is contrary to well established law and labor relations practices.

Nor has General Counsel presented sufficient evidence to demonstrate under the common law of agency, which governs the Board's determinations, that LaBate, Bartone or Sbarra were agents of NYP. Moreover, General Counsel's attempt to rely upon the duties of the working foremen at NYP to morph LaBate, and Sbarra into statutory supervisors is inconsistent with her contention that Greg Schmaltz's termination violated the Act. Schmaltz was a working foremen just like the others and if working foremen at NYP are statutory supervisors, Schmaltz is not protected by the Act, unless General Counsel can contend and prove that Schmaltz was disciplined for refusing to violate the Act. General Counsel neither alleges nor offers any evidence to support any such claim.

While General Counsel accuses NYP of seeking to "rob" its employees of their choice of collective bargaining representative (Tr. 38:11-17), it is the unsupported §8(a) (2) allegations if upheld that will thwart the Act's objectives by preventing NYP's employees from expressing their choice in a free and fair election.

### **Argument**

- A. General Counsel cannot meet her burden to demonstrate by a preponderance of the evidence that La Bate, Bartone or Sbarra are supervisors or agents of NYP.**

Section 2(11) of the Act provides that a supervisor is one who possesses, "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the 12 supervisory indicia enumerated in that section, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky Community Care*, 532 U.S. 706, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001)). It is well settled that the party asserting supervisory status bears the burden of proof on the issue by a preponderance of the evidence. *Id.* at 694.

In *Oakwood*, the board clarified what "assign," "responsibility to direct" and "independent judgment" means. See *Croft Metals, Inc.* 348 NLRB 717, 720-721 (2006). The term "assign" refers to the authority to designate significant overall duties to employees and not the designation of discrete tasks. *Id.* at 721. Responsibility to direct encompasses the authority to direct the work and take corrective action and carries with it accountability for the failure to do so. *Op. Cit.* Finally, "independent judgment" means that at a minimum the foreman must be acting or recommending action "free of the control of others and form an opinion or evaluation by discerning or comparing data." *Id.* at 721. In light of these standards, it is clear on the record that General Counsel falls well short of meeting her burden to prove that by virtue of their duties as working foremen, LaBate or Sbarra were statutory supervisors). The credible evidence demonstrates that working foremen are like the Lead Persons whom the Board found in *Croft Metals* were not

supervisors, because even assuming *arguendo* it may be said that they had responsibility to direct, they lacked any of the other indicia, like hiring, firing, laying off, promoting or disciplining and to the extent that they did responsibly direct, there is no evidence that their direction involves any degree of discretion above the merely routine and hence does not entail the use of independent judgment as that term is used in Section 2(11) of the Act.

NYP's Director of Operations Pete Miceli, who oversees all of the work NYP does for utility companies (Tr 53:12-14) and Robert Zaremski, NYP's Operations Manager, testified without contradiction about the duties of LaBate specifically and/or working foremen generally as follows. There are three asphalt bargaining unit crews: top crew, milling crew and binding crew. (Tr. 189:22-23). Local 175 shop stewards select the men who work on the company's asphalt crews. (Tr. 113:5-16). In the morning Miceli or Robert Zaremski or Louis Sarro tell the foremen what crews are going on that day; the foremen have no input into the decision. (Tr. 189:23-190:14). The composition and number of people on a crew is pretty much fixed, depending upon whether it is a top, binding or milling crew. (Tr. 190:15-17; 1165:11-15). Normally the crews are set for the week. (Tr. 191:2-4). Zaremski calls the shop stewards the night before how many men he will need for the next day. (Tr. 1164:22-25). NYP does not know who at the union selects the shop steward. (Tr.1178:5-6). The shop steward calls the union for men to fill the crew. (Tr. 191:19-23). The foremen have no authority to hire or fire the laborers; they have no disciplinary authority. (Tr. 189:5-8; 153:11-16). To the extent that they might warn employees about job performance deficiencies, there is no evidence that such warnings affected employees' job status. Cautions of this type are not evidence of disciplinary authority. *Heritage Hall*, 333 NLRB 458, 460 (2001). Nor do the foreman make promotions or effectively make recommendations for promotion. Occasionally Miceli will meet with the foremen as a group to ask them to identify men on their

crews who might be foreman material in the future. (Tr. 188: 22-189:4). Foreman do not schedule employees. (Tr. 188:20-21).

The working foremen are members of the bargaining unit and their compensation and benefits are fixed by the collective bargaining agreement. Their pay rate is not the highest laborer rate and is only slightly above the rank and file laborer rate. ( GC Ex. 4, pp. 12-14: Jt. Ex. 2). Contributions to benefit funds and benefits are identical for all members of the bargaining unit. (GC Ex. 4: pp 15-16; Jt. Ex. 2, pp. 20-21). Foremen drive their crews to work in a company truck (Tr. 188:12-13). Foremen work alongside the men in the crew; LaBate testified that when he was a working foremen he spread hot asphalt like the other members of the crew. (Tr.326:12-16).

LaBate, who was also a Local 175 shop steward from 2014 to 2017, testified that if more men were needed for particular crew the decision as to who would be selected (by the shop steward) to work on a particular crew was determined by “what the guys could do,” i.e what skills they had. ( Tr. 323:4-16).

The General Counsel offered no evidence to contradict the foregoing evidence which establishes that: 1) the working foremen did not perform any of the supervisory duties listed in § 2(11) of the Act; and 2) to the extent that General Counsel may argue that the working foremen had authority responsibly to direct, the evidence establishes that they did not exercise independent judgment in the performance of their putative supervisory duties.

As a result, assuming *arguendo* that General Counsel has demonstrated that LaBate engaged in any conduct that would constitute unlawful assistance by NYP to Local 1010 if he were a NYP supervisor, it is respectfully submitted that the Administrative Law Judge may not find that

NYP has violated §8(a) (2) of the Act because the General Counsel has failed to demonstrate by a preponderance of the evidence that LaBate was a supervisor within the meaning of the Act. Assuming *arguendo* that General Counsel, albeit without any specific allegation in the Complaint, attempts to argue that Sbarra was a supervisor because he too was a working foreman, the same principle applies.<sup>1</sup>

As for the purported agency status, of LaBate, Bartone, and Sbarra, the Board applies common law agency principles when examining whether an employee is an agent of an employer as defined by Section 2(13) of the Act. The question to be asked is whether under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987) (citing *Einhorn Enterprises*, 279 NLRB 576 (1986), [\*31] citing *Community Cash Stores*, 238 NLRB 265 (1978)). The party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305 (2001).

First of all, when it comes to Sbarra, his agency status, even if it were proved, is irrelevant to the complaint because General Counsel has failed to offer any evidence whatsoever to support the allegation in Paragraph 12 of her Complaint, which is the assertion that Sbarra told employees that they could not work for NYP because they were Local 175 supporters. The only evidence of Sbarra providing assistance of any kind to Local 1010 is Greg Schmaltz's testimony that Steve Sbarra collected the card he had signed for Local 1010. (Tr.856:10-11). That act in itself may not

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<sup>1</sup> It is respectfully submitted that any attempt by the General Counsel to amend her complaint at this late date to allege that Sbarra was a supervisor must be handily rejected as too late and highly prejudicial.

be alleged as unlawful assistance by NYP to Local 1010, as it is undisputed that Steve Sbarra is a shop steward for Local 1010 and as such his collecting the cards is lawful protected activity.

The only evidence offered by General Counsel of Steve Sbarra's purported agency status is his alleged involvement in the firing of Shomari Patrick ("SPatrick"). (Tr.1116:6-11). In the first place, it is undisputed that Sbarra did not terminate SPatrick. Miceli testified that he decided first that SPatrick would not be moved into the Local 1010 bargaining unit and after that to terminate SPatrick because the latter had worked on an asphalt paving crew without authorization. Miceli directed Sbarra to terminate SPatrick. (Tr.1408:12-1412:10). Second, SPatrick could not identify who the Steve was who he said told him he was terminated "because of his uncle." (Tr. 573:2). More importantly, he testified that "Steve" told him that "it was not his call; the boss has told him to fire (sic)." (Tr. 572:23-573:4-6). Assuming *arguendo* that the General Counsel has produced sufficient evidence upon which it may be concluded that the Steve who spoke to SPatrick was Steve Sbarra, in light of Sbarra's statement to SPatrick that the decision to fire him was not his but the company's, no employee could reasonably assume that Steve Sbarra had apparent authority to speak for the company on labor relations matters.

When it comes to Joe Bartone, there is no basis upon which the Administrative Law Judge may find agency status. The sole basis upon which the General Counsel alleges that Joseph Bartone was an agent of NYP is his status as the grandson of the company's former owner Joseph Bartone Sr. and the nephew of its current owner Anthony Bartone and his wife Diane Bartone Sarro and the fact that he lived with the Bartones for a few months until he could afford his own apartment. As a matter of law, mere family relationship without more indicia of managerial

responsibilities is insufficient to establish agency. 2002 NLRB GCM LEXIS 1, Case NO. 13 CA-39525 citing *inter alia*, *Sonicraft Inc.* 295 NLRB 766 (1989).

As for LaBate, the sole basis upon which the General Counsel claims that it would be reasonable for employees to believe that he had apparent authority to speak for the company on labor relations matters was his “authority” as a working foremen over the production and quality of work. It is well established that General Counsel must establish specifically that LaBate had apparent authority to speak for the company in labor relations matters and it is not enough for her to establish that he had apparent authority when it came to the production and quality of work at the job site. In fact, General Counsel offers no evidence that LaBate ever served as a conduit for the company in labor relations matters or any policy matters. General Counsel presented no evidence that the company ever used working foreman to address the employees on company policy matters generally or labor relations matters specifically. In fact, when the company had policy matters to address with its employees it called company meetings and addressed the employees directly.

As a result, the General Counsel has failed to meet her burden to demonstrate by a preponderance of the evidence that LaBate, Bartone or Sbarra are supervisors or agents within the meaning of the Act.

**B. Assuming arguendo, that General Counsel can demonstrate that LaBate, Bartone and Sbarra are supervisors or agents, she has failed to demonstrate that they made statements constituting assistance to Local 1010 that were accompanied by threats of reprisal or promise of benefit that are unprotected under §8(c) of the Act.**

General Counsel claims that NYP engaged in conduct violative of §8(a)(2) by virtue of communications by its alleged agents and supervisors concerning Local 1010’s organizing

campaign. The question before the ALJ therefore is whether those communications exceeded the bounds of §8(c). Only if the words in question are a “threat of reprisal” rather than a mere prediction of adverse consequences may they be used as evidence of unfair labor practices. *NLRB v. Golub Corp.* 388 F. 2d 921, 928 (2d. Cir. 1967). A threat of reprisal means a threat of retaliation, i.e. a threat that will be deliberately inflicted in return for an injury – “to return evil for evil.” *Id.*

First, when it comes to the allegation at Paragraph 16 of the Complaint that Steve Sbarra told employees they could not work for NYP because of their support for Local 175, General Counsel offered no evidence whatsoever of the statement.

Second when it comes to both Bartone and LaBates alleged statements concerning Local 1010’s organizing campaign and their alleged solicitation of authorization card signatures, both credibly denied making any threats. Bartone testified that when he distributed Local 1010 cards he was motivated by the desire to be in a stable union and he made not threats. (Tr.1215:4-15; 1218:8-10). He also credibly testified that he had blamed his actions on NYP in a text message to Salvatore Franco, Anthony Franco’s son, because it was easier than admitting that he was abandoning Local 175, which would mean that he was being the “bad guy” to men he had to face on the job every day. (Tr. 1216:23-1217:13). General Counsel introduced no evidence of any threats of retaliation or promise of benefit by Bartone.

LaBate also denied making any threats of reprisal. (Tr. 133614-16) while acknowledging that he did talk with fellow employees about Local 1010 and the possible consequences of Local 1010’s organizing campaign, offering his opinion about signing or not signing Local 1010 cards. (Tr.1327:19-16). LaBate’s denial is consistent with the testimony of General Counsel’s own witnesses who described statements by LaBate about Local 1010’s organizing campaign. For

example General Counsel's witness Bartilucci emphatically denied that LaBate issued a threat. (Tr. 382:18-22).

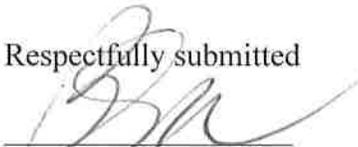
As a result, even assuming *arguendo* that LaBate and Bartone are agents of NYP, there is insufficient evidence to take any of their communications outside the bounds of speech protected under §8(c) and none of their communications which General Counsel claims constitute unlawful assistance to Local 1010's organizing campaign may be used as evidence of unfair labor practices under §8(a)(2) of the Act.

### Conclusion

It is respectfully submitted that for the afore-stated reasons, the Administrative Law Judge must find that: a) General Counsel has failed to meet her burden to demonstrate that Messrs. LaBate, Bartone or Sbarra were supervisors or agents of NYP under the Act; and b) assuming *arguendo* they were agents of NYP, their communications alleged to constitute assistance to Local 1010 are protected speech under §8(c) of the Act and may not be used as evidence of unfair labor practices. As a result, the allegations of the Complaint that NYP violated §8(a) (2) of the Act must be dismissed.

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December 20, 2018

Respectfully submitted

  
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