

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

IN THE MATTER OF:

TRI-MESSINE CONSTRUCTION COMPANY, INC.
AND ITS ALTER EGO CALLAHAN PAVING CORP.

Respondents

and

LOCAL 175, UNITED PLANT AND PRODUCTION
WORKERS,

Charging Party

and

HIGHWAY, ROAD AND STREET CONSTRUCTION
LABORERS LOCAL 1010, LIUNA, AFL-CIO,

Party in Interest

Case Nos. 29-CA-194470

Case Nos. 29-CA-206246

**RESPONDENTS' BRIEF IN SUPPORT OF THEIR
EXCEPTIONS TO ALJ'S DECISION AND PROCEEDINGS**

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I. STATEMENT OF THE CASE

Respondents Tri-Messine Construction Company, Inc. and Callahan Paving Corp. (“Respondents”) respectfully submit this brief in support of their exceptions of the ALJ decision and proceedings in the above-referenced matter in accordance with Section 102.46(b), (c) and (e) of the Rules and Regulations of the National Labor Relations Board (“NLRB”).

Al Messina, owner and President of Tri-Messine, saved the jobs of dozens of employees. Had he not acted, *every* employee in the company including himself would have lost their job and the company would have closed. No contributions would have been made to the Local 175 Funds because the work would have not been performed and company would have closed. This is admitted to by the Charging Party. Yet Messina’s reward for his conduct is an order from an administrative law judge stating that his actions were unlawful and he must pay monies to individuals and pension and welfare funds that indisputably would not have received a dime if he had not acted. The findings of fact and conclusions of law set forth by the ALJ are erroneous as a matter of law and must be reversed.

A. Background

Tri-Messine is a paving contractor that for years performed work for Consolidated Edison of New York (“Con Edison”). The undisputed facts elicited at the hearing demonstrated that in 2016 approximately 97% of Tri-Messine’s work was directly related to its multi-million dollar, multi-year paving contract with Con Ed. Tri-Messine’s employees were represented by Local 175, United Plant and Production Workers (“Local 175”).¹

¹ The union subsequently changed its name to Construction Council 175, Utility Workers Union of America, AFL-CIO.

In October 2014 Con Edison announced that for *all* future construction contracts, contractors would be required to comply with its Standard Terms and Conditions for Construction Contracts (hereinafter “Standard Terms & Conditions”) which stated in part:

With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the construction site only union labor from building trades locals (affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the Work to the extent such labor is available.

It is undisputed that Local 175 was not and has never been affiliated with the Building & Construction Trades Council of Greater New York (“B&CTC”).

In the Fall of 2016, Con Edison’s 2017 - 2020 paving contract for Brooklyn, Queens and the Bronx came up for bid. Several contractors submitted bids and Tri-Messine was determined to be the lowest bidder. Nonetheless, Al Messina, President and sole owner of Tri-Messine was repeatedly advised by representatives of Con Edison that the contract would not be awarded to Tri-Messine unless it first demonstrated that all of its collective bargaining agreements covering workers performing Con Edison work were with labor organizations affiliated with the B&CTC. Con Edison representative Michael Perrino, who was subpoenaed by Local 175, confirmed this.

Faced with the undeniable loss of his entire business, as well as the loss of employment of *all* 65 workers (union and non-union), Tri-Messine, after *repeatedly discussing* this issue with Local 175, determined it was unable to perform the work. Callahan Paving Corp. was formed. Callahan, in turn, entered into a collective bargaining agreement with Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO (“Local 1010”) — a union affiliated with the B&CTC and a labor organization that had jurisdiction over paving work — so that the Con Edison work could be performed. Callahan also ensured that it had contracts with Local 282 of the International Brotherhood of Teamsters (“Local 282”) and Local 15 of the International

Union of Operating Engineers (“Local 15”), two other unions affiliated with the B&CTC. The work was subcontracted to Callahan in *March 2017* once the new contract began. There was no choice in the matter; either the work on the new contract was performed by unions affiliated with the B&CTC or the work would be lost forcing Tri-Messine to lay off *all* of its employees and go out of business. Callahan offered employment to virtually every former Tri-Messine employee who was willing to work thus saving the jobs of dozens of its employees.

Throughout the months leading up to the eventual subcontract, Tri-Messine regularly met with Local 175 representatives to discuss the situation and advised them of what was transpiring. Of course, Local 175 was well aware of what was transpiring as another contractor, Nico Construction, went through the same issue a year earlier.² Local 175 commenced several unsuccessful legal proceedings seeking to stop Con Edison from enforcing its STCC. During these proceedings Local 175 specifically acknowledged that Con Edison was demanding that contractors only hire B&CTC contractors and that if the STCC requirements were enforced, these contractors would (a) have to utilize labor other than Local 175 or (b) go out of business.

B. Filing/Dismissal of Unfair Labor Practice Charges

On or about March 7, 2017 Local 175 filed charge 29-CA-194470 with the Board alleging violations of § 8(a)(1), (2), (3) and (5) of the National Labor Relations Act against Con Edison Company of New York, Inc. and its “joint employer” Tri-Messine Construction Company, Inc. and its “alter ego” Callahan Paving Corp.:

² The facts describing how Nico was also required to use 1010 labor are set forth in ALJ Gardner’s decision in that case. *See Nico Asphalt Paving, Inc.*, 2018 NLRB LEXIS 530 (November 2, 2018)

. . . violated the above-referenced sections of the act by (i) repudiating a collective bargaining agreement with the Union; (ii) discriminating in regard to the hire and tenure of employment, and other terms and conditions of employment, so as to discourage or encourage membership in a labor organization; (iii) dominating and/or interfering with the formation and administration of Local 175, and contributing to the financial and other support of another labor organization, to wit, Local Union 1010; and (iv) failing to bargain the effects of their actions with Local 175.

(GC Exhibit 1(a). On April 28, 2017 the Regional Director:

. . . approved the withdrawal of the allegation that Con Ed and Tri-Messine Callahan violated Section 8(a)(1) and (3) of the National Labor Relations Act by terminating employees because of their membership in Local 175 . . .

Thus, Con Edison was no longer part of this matter. Also, on August 30, 2017 the Regional Director:

. . . approved the withdrawal of the portion of the charge that alleges that the Employer violated the Act by domination and/or interfering with the formation and administration of Local 175, and contribution to the financial support of another labor organization.

On September 14, 2017, Local 175 filed an amended charge 29-CA-194470 alleging violations of § 8(a)(1), (2), and (5) of the Act against Tri-Messine Construction Company, Inc. and Callahan Paving Corp. because of their:

. . . (i) unlawfully recognizing LIUNA Local 1010 and executing a collective bargaining agreement with LIUNA Local 1010; (ii) repudiating its collective bargaining agreement with Local 175; (iii) refusing to recognize Local 175 as the exclusive bargaining representative for certain of its employees; (iv) failing to bargain over the layoff of its entire workforce; and (v) failing to bargain the effects of their actions with Local 175.

(GC Exhibit 1(c)).³

In addition, on September 14, 2017, Local 175 filed charge No. 29-CA-206246 under § (a)(1) and (3) of the Act against Tri-Messine stating it had:

³ The amended charge made no reference to § 8(a)(3) of the Act.

. . . violated the above-referenced sections of the Act by terminating bargaining unit employees because of their support for, and membership in, Local 175. By these and other acts, the Employer has intimidated, coerced and restrained employees in their exercise of their rights under the Act.

(GC Exhibit 1(e)).

On October 2, 2017 Local 175 filed Charge 29-CB-207278 against Local 1010 alleging violations of § 8(b)(1) and (2) of the Act. This included a claim that Local 1010 had prematurely executed a collective bargaining agreement with Callahan. (*Id.*) This Regional Director approved the withdrawal of this charge on December 18, 2017.

C. Complaint and Hearing

On or about December 27, 2017 the General Counsel issued its complaint in this matter. Respondents filed their answer on or about January 3, 2018. The hearing in this case was held before Administrative Law Judge Jeffrey Gardner (“ALJ”) in Brooklyn, New York on April 10, 11 and 12, 2018. All parties participated in the proceeding, including the Respondents, Local 175, and the General Counsel. In addition Local 1010 participated as a “party in interest.” Thereafter, Respondents, the General Counsel, and Local 1010 submitted post-hearing briefs. The ALJ rendered his decision on or about December 17, 2018, finding the Respondents violated §§8(a)1, (2), (3), (5) and §8(d) of the Act by refusing to recognize Local 175, repudiating the collective bargaining agreement, signing a contract with Local 1010, terminating Local 175 employees and failing to bargain with Local 175 over its decision. Neither the General Counsel nor the Charging Party has filed any exceptions as of this date.

The Respondents except to the findings of fact and conclusions of law that undergird this portion of the decision and requests that the Board vacate the ALJ’s decision and remedy in its entirety.

II. FACTS

A. Background

Tri-Messine performs permanent restoration of roadway, *i.e.*, street paving in New York City. (47, 48).⁴ The Company has been in business since 1966. Al Messina has been the President of Tri-Messine since 1997. (45). Tri-Messine's office is located at 6851 Jericho Turnpike in Syosset, New York. It also rents truck yards in Flushing, Queens and the Bronx. (49-50). Al Messina is married to Patricia Messina. (46). In the past Ms. Messina performed work for Tri-Messine as a secretary and bookkeeper. (55).

Tri-Messine's employees were represented by Local 175 for a number of years. (GC Exhibit 6).⁵ Tri-Messine had a good relationship with Local 175. (509). There were never any strikes or picketing by Local 175 directed at Tri-Messine. (509). In fact, Messina would often socialize with his employees outside of work. (*Id.*). He would go out with employees after work, watch football with them, and invite them to his house in Pennsylvania, etc. (*Id.*). The most recent contract between Local 175 and the New York Independent Contractors Alliance ("NYICA"), of which Tri-Messine was a member, covered the period July 1, 2014 - June 30, 2017 and applied only to "qualified employees." (GC Exhibit 6, p. 9). It also contained a provision allowing either party to terminate the agreement at its expiration. *Id.* p. 7.

B. Tri-Messine's Work for Con Edison

Con Edison has been a customer of Tri-Messine since 1984. (503). In 2012 Tri-Messine bid for and was awarded a three year paving contract covering the period 2013-2015. (547-548).

⁴ Numbers located in parentheses indicate references to page numbers in the transcript of the proceedings held on April 10 through April 12, 2018.

⁵ References to General Counsel's exhibits shall be designated as "GC Exhibit ___" followed by the Exhibit number; and references to Respondents' Exhibits shall be designated as "Resp. Exhibit ___" followed by the Exhibit number.

The contract was later extended by Con Edison for one year, *i.e.*, to cover calendar year 2016. (548-549).

According to Messina, Con Edison made up almost all of Tri-Messine's work. "Ninety-seven percent of our work is Con Edison or companies that work for Con Edison." (71). He further testified:

In most years, Con Edison is 98 to 99 percent of our work. And in the best year that we ever had any other customers, it was probably 93 or 94 percent of our work. (503).

In response to questioning from the General Counsel, Messina testified as follows:

Q I just want to ask you about some of the numbers that you put out there in response to your attorney's questioning. You said that Con Ed made up what percentage of Tri-Messine's work?

A Some years, 97 to 98 percent. I think at the low, 92 to 93 percent.

* * * *

Q And what was the percentage in 2016?

A I believe it was 97 percent Con Ed-related work.

(544-546).

And in response to counsel for the Party in Interest, Messina stated:

Q Mr. Messina, when General Counsel was asking you about your revenues from sales, you mentioned a \$30 million number. What does that number pertain to?

A I believe that's the approximate sales of 2017, which Con Edison makes up about 93 percent of.

Q And how does that compare to your gross revenues from sales in 2016?

A It's -- I think the gross sales in 2016 were 25 -- a little over 25 million.

Q And what percent in 2016 of that 25 million was Con Edison work?

A Ninety-seven percent.

(564).

In addition, Tri-Messine performed work for subcontractors of Con Edison. The subcontracting work, which amounted to approximately 10% of Tri-Messine's work, is also subject to the Standard Terms & Conditions (565). Thus, if the Con Edison work was lost, the subcontracting work would also disappear (564, 568). For example, Messina testified:

Q If you lost the Con Ed contract, what impact, if any, would that have on the sub work that you mentioned? Safeway, MECC, all the other -- what would happen to that?

A If I don't have the Con Ed work, I wouldn't have that work. The reason why they called me is because I'm the paver in their area for Con Edison. And they call up and say you do the work for Con Edison and we want you to do our paving because they're working for Con Edison, too. So I would lose all that business and be -- be out of business.

(568). This work could only be done by unions affiliated with the B&CTC as well.⁶

As noted, in 2016 the Con Edison work and the subcontracts related to Con Edison work made up approximately 97% of Tri-Messine's work. The additional 2-3% of Tri-Messine's work consisted of a very small number of clients, including: 58AJVINDUSTRIES LTD; JP Plumbing; Lady Liberty Contracting Corp.; Sentas Sewer Services, LLC; and TriBoro Plumbing & Heating Corp. (77, GC Exhibit 5-a).

According to Messina, the work for these small companies would only amount to a total of \$10,000 per year. (505-506, GC Exhibit 5-a). One other company, Liberty Water & Sewer LLC had annual sales of only \$500,000. These sales could in no way sustain the company going forward. As Messina testified "Like I said, our insurance bill -- our general liability insurance bill is more than that [\$500,000]" (506).⁷

⁶ For example, Messina testified that "Tri-Messine can't perform the work for Safeway, because Safeway works for Con Edison and Con Edison requires we use labor affiliated with the building trades, so we have to use 1010 men for the Safeway work as well." (73). Similarly Con Edison's Section Manager Michael Perrino testified that Tri-Messine could not perform the work for Safeway without violating the Standard Terms & Conditions. (464).

⁷ All of the other customers listed on GC Exhibit 5-a were either Con Edison or its subcontractors, *i.e.*, J. Fletcher Creamer & Son, Inc., MECC Contracting, Network Infrastructure, Inc., Safeway Construction, Step Mar

Also, in September, 2017 Tri-Messine secured a one time temporary contract with National Grid. (506). This was obviously *after* the termination of the Local 175 agreement and after the decision to subcontract to Callahan had been made. Moreover, by performing the National Grid work with Local 1010 members, Messina was then able to hire additional former Local 175 employees who, once the National Grid contract was completed, were able to continue to perform work for Con Edison as members of Local 1010. (507). Also, it was not feasible to perform the minimal non-Con Edison work unless it could be done in conjunction with the Con Edison work. (507-508).

C. Con Edison's Standard Terms & Conditions for Construction Contracts

In late 2014, while his current 2013-2015 contract with Con Edison was still in effect, Messina received a telephone call from Steve Sebastopoli and Tom Portier, employees in the Purchasing Department at Con Edison advising him that there was a "clarification" regarding the Standard Terms & Conditions for Construction Contracts:

They just wanted to give me a head's up that there was a clarification to the standard terms and conditions that would require us -- on the contracts that were coming up, because our contract was actually supposed to expire in December of 2015, that they would be going forward, that we would have to adhere to the standard terms and conditions that all unions that we use would be affiliated with the Building and Construction Trades of Greater New York Council.

Contracting Corp. and Vali Industries. Messina repeatedly testified that if he lost the Con Edison work, these contracts would be lost as well:

Q So if you didn't have the Con Ed work, you wouldn't have those customers?

A Correct.

Q And which of those customers are you referring to?

A MECC Contracting, Network Infrastructure, Safeway Construction, Step Mar Contracting, and Valley Industries.

(504, 549). Perrino confirmed that any construction work for Con Edison subcontractors had to be consistent with the Standard Terms & Conditions. (464).

(510). Local 175 was not a member of the B&CTC. Sebastopoli and Portier indicated that a letter would be sent to Messina but no such letter was ever received. (511). Immediately after receiving this phone call Messina contacted Local 175 representatives Anthony Franco and Roland Bedwell. (*Id.*). They advised Messina that they had received the same telephone call from Michael Pietronico, the owner of Nico Asphalt as well as a call from the owner of Manna Construction. (*Id.*). Franco testified that Messina and other contractors called him to discuss the new requirements (366). He was hoping that this was another instance of Con Edison saying something but not following through on it. (367).

D. Local 175's Filings With the New York State Public Service Commission

Shortly after Con Edison announced its clarification concerning the scope of the Standard Terms & Conditions, Local 175 filed a petition with the New York State Public Service Commission ("PSC") claiming that Con Edison's Standard Terms & Conditions were unlawful. It also claimed that the implementation of the terms and conditions would severely impact its members:

- "Con Edison's contract terms require contractors to make a difficult decision between declining to bid for multi-million dollar contracts with a concomitant risk of unemployment for their employees, or violating their employees' rights to select their own collective bargaining representative and abrogating their contractual obligations to Local 175." (Resp. Exhibit 1, at p. 8).
- "Since Con Edison's new policy will make it impossible for New York City contractors whose asphalt paver employees are represented by Local 175 to bid on the work, hundreds of asphalt pavers who are members of Local 175 will lose their jobs, because their employers will no longer be permitted to work on Con Edison contracts." (*Id.* at pp. 5-6).
- "Two contractors, Nico Asphalt Paving, Inc. and Tri-Messine Construction, Inc., that have collective bargaining agreements with Local 175, have been advised by Con Edison that they may finish working on contracts that have previously been

awarded, but, if they want to bid on any new contracts, they will need to execute collective bargaining agreements with Locals 1010 or 731.” (*Id.* at p. 7).⁸

- “Con Edison’s Contract Terms require contractors to make a difficult decision; between declining to bid for multimillion dollar contracts, with the concomitant risk of unemployment for their employees, or violating their employees’ right to select their own collective bargaining representative and abrogating their contractual obligations to Local 175.” (*Id.* at p. 8).⁹

E. Fall 2015 - Manhattan Pre-Bid Conference

In the fall of 2015 Messina attended a pre-bid conference for Con Edison’s *Manhattan* contract that was scheduled to begin in 2016. Once again the issue of the Standard Terms & Conditions issue arose:

Q . . . Was anything mentioned about the standard terms and conditions at this meeting?

A Yes. Mike Perrino stood up and said that he just wanted to give everyone a head’s up that the standard terms and conditions were going to be a requirement of the contract. And then he read them out -- read them out loud so that we knew what they were.

(513). After the meeting, representatives of Con Edison told Messina that Local 1010 had jurisdiction over the paving work to be performed. (98-99). Messina understood at that time that Local 175 workers could not perform the Con Edison work. (101).

⁸ As set forth *infra*, p. 44 all of these allegations are critical. The ALJ concluded that it was “unproven” that Tri-Messina could not continue to perform Con Edison work in light of its enforcement of the STCC (Dec. p. 14). Obviously, Local 175 (the Charging Party) felt otherwise as it specifically pled that Tri-Messina could not perform Con Edison work using Local 175 labor. Moreover, as set forth *infra*, there was undisputed testimony from Al Messina, Michael Perrino of Con Edison and Anthony Franco of Local 175 that the Con Edison work had to be performed by unions affiliated with BTC unions or it would be lost.

⁹ In *New York Independent Contractors Alliance Inc. v. Consolidated Edison Company of New York, Inc.*, Index No. 708737/2017 (Sup. Ct. Queens Cnty., April 19, 2018), the Court dismissed challenges to the Standard Terms and Conditions by the New York Independent Contractors Alliance for numerous reasons including, *res judicata*, lack of standing, no justiciable controversy and no private right of action. At page 2 of the decision it expressly notes that Local 175’s prior challenges before the PSC had been unsuccessful. <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=J1IWzEt8Cn8njx0zNP0rZA==&system=prod>. The Supreme Court decision is currently on appeal.

Messina called Franco and Bedwell to advise him as to what had been said at the Manhattan pre-bid meeting. (513). They responded that Con Edison could not do what it was proposing to do. (513-514). Messina, testified he was concerned about the matter “because I knew I would be bidding my contracts in a year from then.” (513). Messina did not bid on the Manhattan work.

F. Messina’s Meetings and Discussions With Local 175 Representatives

As a result of what had been discussed at the Manhattan Pre-Bid conference, Messina met frequently with both Bedwell and Franco to discuss the situation.

Q ...Did you have discussions with the union about this issue on a regular basis?

A That’s all we talked about for, you know, from the time we found -- it was after the pre-bid meeting -- it was after the actual bid of the Manhattan contract. The contractor who got the bid was using 1010 labor to do the work. And so every meeting that I had with Roland and/or Anthony was all about Con Edison, what they were -- you know, what they were doing and how the union was trying to fight it.

* * * *

Q What did they tell you about Nico Paving?

A The union told me that they [Nico] were doing work with 1010 labor and that they don’t have any 175 men anymore.

(514). Messina testified that he met with Bedwell and Franco regularly, and as time went on very frequently, *i.e.*, he met with Bedwell at least once or twice per week, and with Franco every week or every two weeks. (514-515). During these meetings, Local 175 advised Messina that it had filed lawsuits to try and stop Con Edison from enforcing the Standard Terms & Conditions. (517). It was also seeking to merge with a union that was affiliated with the B&CTC (*Id.*) but was unable to do so (392).

In early 2016 Nico Asphalt Paving Corp., a company that also had a contract with Local 175 and performed work for Con Edison entered into a “general services agreement with City Wide.” City Wide then entered into a collective bargaining agreement with Local 1010 in order

to satisfy Con Edison's STCC. At around this time — more than one year before Tri-Messina subcontracted the work to Callahan — Messina met with Anthony Franco and advised him of his intentions if Con Edison did not change its rules:

Q. And Mr. Messina told you around that time that he might have to sign a contract with Local 1010 if the same -- Con Ed enforced the requirement . . . ?

A. Yes.

(318)

Moreover, about one month later, shortly after a federal antitrust lawsuit was filed by Local 175 against Con Edison in February 2016, Messina again met with Franco and Bedwell

Q Okay. When you spoke with Mr. Bedwell or Mr. Franco, did they advise you what, if any, the Union was doing to try and fix the situation?

A Yes. They told me they were -- they had filed a lawsuit, I think in federal court that they were against Con Edison. They had some kind of an antitrust case. . .

* * * *

Q And did you discuss with them what would happen if the union efforts were not successful?

A Yes. I told them that like Nico, I'd be forced to use 1010 labor to perform the work.

Q And what impact would that have on your work force?

A They wouldn't be able to do 175. I wouldn't be able to use 175 members any more.

(518, emphasis added). Thus, long before the actual subcontracting of work, Messina had advised Local 175 of his intentions. There was no demand to bargain by Local 175 (393).

At no time did Messina ever refuse to meet with Local 175 (515). Indeed, Franco testified that he met with Messina in 2016 and discussed the new Con Edison requirements. (365). Once the Con Edison issue with the Standard Terms & Conditions arose, Franco testified that he would meet more frequently with Messina (379). He also testified that another contractor, Manna Construction had advised him that unless Manna signed with Local 1010, Local 731 and Local 15, it would not receive Con Edison contracts. (381).

G. Messina's Attempts to Convince Con Edison to Allow Tri-Messine to Continue Using Local 175 Labor

In the summer of 2016 Messina received a telephone call from Con Edison advising him that it was putting out the bids for the new contract for *Brooklyn, Queens and the Bronx* for work that was to begin in January 2017, and that in order to be awarded the contract Tri-Messine would have to be in compliance with the Standard Terms & Conditions.

Q ...What if anything did Con Ed tell you about the use of your Local 175 workers at that time?

A They told us that we had to use labor affiliated with the building trades, creating accounts or for the paperwork.

Q And who told you that?

A I received a call from Michael DelBlasso, Michael Perrino and brought it up at the pre-bid meeting, which I believe was in October as well. And then, Michael DelBlasso and David Blaut called me to tell me specifically.

(92).

As noted, Tri-Messine had already received a one year extension of the Con Edison contract allowing it to continue its contract until the end of 2016. Nonetheless Messina offered to extend the contract at no increase for one additional year, through 2017, if Tri-Messine could continue to use the same Local 175 labor. This offer was rejected by Con Edison as was Tri-Messine's offer to extend the contract by one year with a 5% discount if it could continue to use the 175 labor (516-517, 199-200).

Messina also tried to convince Con Edison that the Standard Terms & Conditions should not apply to his company because B&CTC labor was not "available" to him.¹⁰ When questioned by counsel for the Charging Party, he testified as follows:

Q Did you advise Con Edison that you had a contract with Local 175?

A Yes.

¹⁰ Messina testified that when he first learned about the Standard Terms & Conditions requirement he spoke with Local 175 and others and thought that under the circumstances, B&CTC employees were not "available." (215). This obviously turned out not to be the case.

Q And did you advise them that labor from a Union affiliated with the Building Trades Council was then currently not available to you due to your Union contract?

A Yes, I did.

Q And what was their response?

A They told me that the other [paving] contractor in Manhattan had a contract with a labor union that was affiliated with Building Trades and I needed to do the same thing if I wanted to work with them.

(200; *see also* 519).

H. October 2016 Pre-Bid Meeting

1. Testimony of Al Messina

In October 2016, Messina attended a pre-bid meeting for Con Edison's Brooklyn, Queens and Bronx paving contracts. Messina testified that at the meeting:

They [David Blaut and Michael DelBasso of Con Edison] said that they wanted to make everyone aware that the standard terms condition[s] must be met and any of the unions must be affiliated with the Building and Construction Trades of Greater New York Council.

(520).

Similarly, when asked by the General Counsel what he had been told Messina testified:

Q Okay. And what precisely did the Con Ed representatives say about this provision and what it would mean for the contractors who were bidding on their work?

A While I was at two separate pre-bid meetings it was mentioned at both of them, and it was -- they just wanted to point out that clause and that going forward any new contracts this would apply to. That you had to use unions having this jurisdiction over the work and they had to be affiliated with the Building and Construction Trades Council of Greater New York.

(98). Messina immediately advised Local 175 of what transpired at this meeting (521).

2. Testimony of Michael Perrino

Messina's testimony as to what had occurred at the pre-bid meeting was confirmed by Michael Perrino, Section Manager for Con Edison. Mr. Perrino, who had been subpoenaed by

the Charging Party (Local 175), testified that he told Mr. Messina that Tri-Messine had to abide by the Standard Terms & Conditions in order to get the Con Edison work.

. . . the gist of the conversations were Al being concerned with conforming to the T's and C's of the contract because it had stated that use of the building trades and, you know, associated with the Building Construction Trades of Greater New York was in effect. And I had explained to him that, you know, with that that Tri-Messine had to conform with those requirements. And not only with the unions Building Trade Unions of Greater New York, but with that that had jurisdiction over that work.

Q Did you identify from Mr. Messina what unions that would be?

A I identified it as 1010 as the paver's union.

* * * *

Q Do you -- when -- do you recall advising Al Messina that he had to have a contract, a collective bargaining agreement with a union belonging to the Building and Construction Trades Council?

A At the time when this -- when it was during this pre-award time period, yes.

(459-460, 465). As noted, Perrino specifically told Messina he needed to have a contract with Local 1010. (467). Perrino testified that once Con Edison's Standard Terms & Conditions were amended or clarified, no construction contracts were awarded to contractors who did not comply with the Standard Terms & Conditions (473).¹¹ The Standard Terms and Conditions requirements, however, did not apply to *service* contracts (479).

I. November 2016 Pre-Award Meeting

Tri-Messine won the bid for the Bronx, Queens and half of Brooklyn (521). On or about November 3, 2016 Messina attended a pre-award meeting at which he was again advised that in

¹¹ Perrino also testified that pursuant to his job duties as Section Manager for Con Edison, the Con Edison Purchasing Department would notify him of when contracts were going out to bid and when contracts were at the pre-award stage. (443). In the case of Tri-Messine:

When it was coming close to pre-award phase of that contract, I was alerted by purchasing department that Tri-Messine was the low bidder of the contract. And so with that, I had to ask purchasing are they in compliance with the T's and C's of the construction contract because that's what it would fall under.

(458).

order for the contract to actually be awarded to Tri-Messine, it needed to have collective bargaining agreements with unions affiliated with the B&CTC.

Q Did the issue of Con Edison's standard terms and conditions come up at this November, 2016, pre-award meeting?

A Yes.

Q Was it discussed a little, a lot? How were --

A That was the main topic, because they -- Con Edison knew that I had a contract [with Local 175], and they wanted to be sure before that I was awarded the work that I would be able to meet their requirement to use unions affiliated with the building trades.

Q And just again, who was at this meeting?

A David Blaut, Michael DelBlasso, Kevin Nolan. I'm not sure of the other Con Ed personnel.

(523). Moreover, on the form signed by Messina at the pre-award meeting it specifically stated that he was required to adhere to "Con Edison Standard Terms and Conditions for Construction Contracts dated 10/15/14." (GC Exhibit 9, p. 2). After this meeting, Messina advised Bedwell and Franco that Con Edison was not allowing Local 175 labor to perform work under the new contract. (535).

J. Messina's Subsequent Conversations With Con Edison

Based on the statements made at the November 2016 pre-award meeting, Messina understood that Tri-Messine would not receive the new 2017 Con Edison contract unless he could demonstrate that the work would be performed by B&CTC affiliated unions. Indeed, Messina testified that he was being pressured by Con Edison to ensure that the proper collective bargaining agreements were signed.

...When I left there, Con Edison made it -- you know, there was no uncertain about it that it had to be done before they would award the actual work.

And they were asking for updates, calling for updates once or twice a week. And I received calls at in December at a Christmas party at night 7:00 -- which I've never received a call in my life from Con Ed after 3:00 -- to ask me what was going on. I had to make -- they wanted to know right then and there, like was it going

to get done, was I going to be able to perform the work using -- you know, following the standard terms and conditions.

(524). When asked about this on cross examination by counsel for the Charging Party, Messina testified:

Q What exactly were they [Con Edison] asking you?

A They wanted to know if I was going to be able to be in compliance with the standard terms and conditions in order to be awarded the bid and if not, they were going to move on and award it to another contractor, the next lowest bidder.

(561).

The urgency of this situation could not have been greater. Indeed, Messina testified about what would occur if he did not meet the Standard Terms & Conditions:

That if I didn't get it done they were going to not award me the contracts and I would go out of business, and have to lay off 65 employees, some eight of them, nine of them were my family.

(563).

This was confirmed by Local 175. Anthony Franco testified that during the middle of January he had a conversation with Messina:

Well, we -- we had a conversation and it was, I think at that point Con Ed had told him unequivocally that you have to have a contract with Local 1010. And at that point he had no choice but to sign a contract with 1010 and he did.

(369).

In light of the clear directives to him by Con Edison that Tri-Messine must have contracts with unions affiliated with the B&CTC, Messina, consistent with his prior statements to Bedwell and Franco, determined that he had no choice but to comply with the Standard Terms & Conditions. In November 2016, Callahan Paving Corporation was formed. (GC Exhibit 4). Callahan was owned in its entirety by Patricia Messina, Al Messina's wife. (114). While Callahan is located at the same address as Tri-Messine, it pays its own rent (49). Nevertheless the work was not subcontracted at that time; rather it remained with Local 175 for the remainder of

2016 and until March 3, 2017, when Con Ed demanded that BCTC labor must be used (129).¹² In fact, Messina was hoping that the work would not have to be subcontracted at all. (239-240).

K. Callahan's Meetings and Negotiations With Local 1010

In December 2016 Patricia Messina and her counsel met with representatives of Local 1010 to negotiate a collective bargaining agreement. (114). At the meeting Callahan sought to modify the provision in the draft contract presented to it by Local 1010 that all new employees be hired through the 1010 hiring hall. (GC Exhibit 10). Messina testified that "I believe the attorney was trying to negotiate the contract so that she could have hired any employees that she wanted to." (115). Several e-mails were exchanged between counsel for Callahan and Local 1010 in which Callahan offered to pay employees more than the Local 1010 contract rate if Callahan could hire its employees directly. (114). This was rejected by Local 1010 as well as alternative proposals of just allowing Callahan to select some of the new hires. (GC Exhibit 10). On January 13, 2017 Patricia Messina signed the 1010 collective bargaining agreement. (GC Exhibit 11).

L. Counsel's Request to Meet in January 2017

In January of 2017 counsel for Local 175, Eric Chaikin contacted counsel for Tri-Messine and asked to have a meeting to discuss the issues relating to the Standard Terms & Conditions and their effect on Local 175 members. After a January 10, 2017 telephone discussion by counsel, Local 175 counsel sent an e-mail as follows:

Mark: Thanks for speaking to me regarding Tri-Messine and the issues Local 175 is confronted with in regards to Consolidated Edison insisting on Tri-Messine having a collective agreement with Local 1010, LIUNA. . . .

(GC Exhibit 22). Counsel for Tri-Messine responded approximately one hour later:

¹² While the new contract was supposed to begin January 1, 2017, Con Ed continued to provide Tri-Messine work under the earlier Tri-Messine-Con Edison contract until that work was completed on March 3, 2017 (129 -130, 26).

Let's meet to discuss issues related to the 175 contract. Can you come to my office in Garden City with your client on Friday [January 13] around 2:30 p.m.? I will have Al Messine [sic] here.

(*Id.*). The meeting was agreed to but the Union did not show up as scheduled. (120). Counsel for Tri-Messine sent an e-mail to Chaikin asking where he was (GC Exhibit 22) but there was no response to the e-mail (293). Thereafter Mr. Messina spoke with the Union who advised him that no meeting with counsel was necessary.

I just spoke with Roland who contacted Anthony Franco and was told there is no need to have a meeting with the attorneys. I will meet with Anthony alone on Wednesday. I will call you after the meeting . . .

(*See* GC Exhibit 12).

M. Other Meetings With Local 175

Messina testified that he met with Mr. Franco the following Wednesday (January 18, 2017).¹³ In fact he described a number of meetings he had or scheduled with Local 175 representatives and employees in January 2017 regarding the impact of Con Edison's implementation of the Standard Terms & Conditions.

But we had one meeting with me, him [Anthony Franco] and Roland, which I believe was at the very beginning of January where I told them that I had to perform the work with 1010 and that I was going to be subcontracting out work the Callahan and that I was going to have a meeting with the men to let everyone know what was going on. And then I had a meeting with the men. And then I believe we met again, just me and him [Anthony Franco], at the diner. And that was on the 18th.

¹³ Messina testified about how he repeatedly met with Local 175 as to the status of his dealings with Con Edison.

. . . but we [Messina and Local 175] had spoken 20 times about the fact that Con Ed was enforcing the standard terms and conditions and I would have to use 1010 labor instead of 175.

(127).

(528).¹⁴ Messina advised Franco and Bedwell at the early January 2017 meeting that 1010 had rejected Callahan's request that it be permitted to use Tri-Messine employees when the new Con Edison contract would begin sometime in 2017, and that all 1010 employees would have to be hired through the hiring hall. (528). Accordingly, Messina told Franco and Bedwell that those employees who could not be placed in Local 15 (Operating Engineers) or Local 282 (Teamsters), would have to be laid off. (*Id.*). Messina then held a meeting with the union and all the employees in the Flushing truck yard in early/mid-January 2017:

Q What did you tell them?

A I told them that because of Con Edison's standard terms and conditions, that 175 wasn't qualified to do the work anymore, that I would have to subcontract the work to Callahan Paving, and that I would move whoever I could into 10 -- into Local 282. If they had a CDL or something like that, or if they operate a machine, I would put them in Local 15. And if not, I would -- I told them at the hiring hall clause in the contract that we try to negotiate it, but we weren't successful, and that I would do my best to hire them, but that they should go down if they were interested in, you know, coming to work for Callahan, they should go down to Local 1010 and try to gain membership.

Q And you said the Union was present at this gathering?

A Anthony and Roland, yes.

Q What, if anything, was the -- did Anthony or Roland say anything?

A Roland just told the guys that we all have to stick together and try to, you know, remain as a unit, and that they understood that I was being forced to do it, and that I was going to try to find work for as many men as I could, and they would try to find work for whoever couldn't get work at Callahan.

(529-530). Messina offered to, and did in fact, meet with each of the Local 175 employees in order to assist them in finding employment. (151-152, 530-531).

Q Is it fair to say you spoke to all 44 of the Local 175 Tri-Messine employees about working at Callahan?

A Yes.

¹⁴ These meetings were in addition to the meeting scheduled at Tri-Messine's counsel's office for which the union failed to appear without warning.

Q And you offered them positions at Callahan if you were able to get them into a different union, correct?

A Correct.

(156). This was confirmed by Franco (395) and foreman Andrew Cinquemani (491). Messina also continued to meet with Franco and Bedwell in February and March of 2017. (532). On February 28, 2018 Messina sent a letter to Local 175 advising it that could no longer use its labor on Con Edison work because its members did not meet the Standard Terms & Conditions set forth by Con Edison, *i.e.*, "Local 175 does not meet the qualifications to perform the Consolidated Edison work" (GC Exhibit 17-a). In the letter, he again offered to discuss this with the union. There was no response to the letter.

N. Messina's Attempts to Save the Jobs of Tri-Messine's Employees, *i.e.*, Acting Like a "Mensch"

The new Con Edison contract went into effect on Monday, March 6, 2017. (531). On that day Tri-Messine's work was subcontracted to Callahan. (532). Of the approximately 44 regular full-time Local 175 employees working for Tri-Messine at the time, a number were immediately moved into other unions.

Q . . . Do you remember approximately how many men you were able to move immediately into the Teamsters and Operating Engineers?

A Six people were able to go into the Teamsters, and 11 people into the Operating Engineers.

(531). Eventually almost all of the individuals who were working with Tri-Messine who wanted to work for Callahan were hired by Callahan. (*See* GC Exhibit 16). Those that did not return either chose to remain with Local 175 (*i.e.*, worked elsewhere), had left the industry or were unable to work. (*See* GC Exhibit 16). Individuals who moved to the other unions either received the higher rate of pay provided by the particular collective bargaining agreement or continued to be paid at the higher Local 175 rate. For example, the individuals who worked as Operating

Engineers received the substantially higher rate of pay as an operating engineer, while individuals who worked under the Local 282 Teamster contract or Local 1010 contract received the higher rate of pay provided under the Local 175 contract. (536-537).

In response to questioning by counsel for the Charging Party, Messina testified:

Q So you actually gave not only your Tri-Messine former employees who had enjoyed higher rate[s] under the 175 contract, but you gave the higher rates of the 175 contract to Local 1010 employees employed by Callahan?

A And also Local 282 employees because their rate was lower than the rate that everyone else was getting, yes.

Q Like I said, you're amazing. Okay.

(231). This decision, ensuring that employees would not be paid less than what they had received at Tri-Messine, earned Messina the indisputable title of "mensch." (See 21, 378).

O. Local 175's Anti-Trust Challenge to the Standard Terms & Conditions

In February 2016 Local 175 filed a complaint alleging that the Standard Terms & Conditions violated federal and state antitrust law. In support of its claims the plaintiffs alleged as follows:

33. Under Con Edison's new Contract Terms, only contractors who have collective bargaining agreements with LIUNA Local 1010 can perform utility asphalt patch-paving work for Con Edison. All other contractors are excluded from the market.

34. On or about October 15, 2014, Con Edison formalized its new position by revising its standard Contract Terms. For the first time, the revised Contract Terms explicitly state that contractors must use workers belonging to unions affiliated with the BCTC, and therefore may not use workers affiliated with Local 175 and the contractors that employ them.

* * * *

39. In late December 2015, Phil Lentini, a member of Local 175, was specifically informed by Robert James, a LIUNA organizing representative, that LIUNA had made a deal with Con Edison to the effect that Con Edison would no longer award contracts to contractors affiliated with Local 175.

* * * *

41. In or around the fall of 2014, Con Edison contacted at least two NYICA-affiliated contractors who perform utility asphalt patch-paving work for Con Edison and are affiliated with Local 175. Con Edison informed those contractors that, while they would be allowed to finish their existing contracts with Con Edison, they would not be allowed to rebid for Con Edison contracts unless they signed collective bargaining agreements with LIUNA Local 1010. Since LIUNA Local 1010 will not enter into a collective bargaining relationship with any contractor that has a collective bargaining relationship with Local 175, Con Edison's new position bars Local 175 contractors from Con Edison's utility asphalt patch-paving contracts and other contracts. A LIUNA Local 1010 representative made similar threats

42. Further, a Local 175 contractor was informed by Con Edison that it was the low bidder for a contract for Con Edison, but to receive the contract, it would have to sign a collective bargaining agreement with a union that belonged to the BCTC.

* * * *

45. In or about October 2014, a representative of Tri-Messine Construction ("Tri- Messine") was contacted by a Con Edison representative. The Con Edison representative informed Tri-Messine that it would be permitted to finish its existing contracts with Con Edison, but Tri-Messine would not be able to rebid those contracts unless it signed a collective bargaining agreement with LIUNA Local 1010.

* * * *

51. In October 2014, Mr. Petranico told a representative of Local 175 that Mr. Petranico had been called to Con Edison's main office and was told that, while he would be allowed to finish his existing contracts with Con Edison, Con Edison would not allow him to rebid contracts unless he signed with LIUNA Local 1010 because it is the only member of the BCTC that performs asphalt paving.

* * * *

57. Under Con Edison's Contract Terms, Citywide may not use Local 175 members to perform work for Con Edison. Thus, as a result of Con Edison's agreement with LIUNA and LIUNA Local 1010, members of Local 175 will be deprived of work they otherwise would have performed.

* * * *

66. . . . Similarly, Local 175 members will be forced either to forego utility asphalt patch-paving work or leave Local 175 and join LIUNA Local 1010.

* * * *

72. Local 175 workers have been directly injured as a result of Con Edison's anticompetitive conduct, and have been threatened with continuing injury. They have lost work from Con Edison contracts that they have traditionally performed, and have been threatened with further loss of work.

* * * *

80. Local 175 workers have been directly injured as a result of Con Edison's conspiracy to monopolize the market for utility asphalt patch-paving in New York City, and have been threatened with continuing injury. They have lost work from Con Edison that they have traditionally performed, and have been threatened with further loss of work.

(Resp. Exhibit 2, emphasis added).¹⁵

On February 27, 2017 Judge Kimba Wood issued her decision in *New York Indep. Contractors Alliance, Inc. and Local 175 of the United Plant & Prod. Workers Union v. Consol. Edison Co. of New York, Inc.*, 2017 U.S. Dist. Lexis 27381 (S.D.N.Y. Feb. 27, 2017) (Resp. Exhibit 3). In her Opinion and Order Judge Wood found no antitrust violation. (See Resp. Exhibit 3). She concluded that the Plaintiffs had failed to demonstrate that Con Edison had entered into an agreement with anyone on this issue. (*Id.*). Moreover, she held there would likely be no impact on competition as Local 175 contractors would only be obligated to make payments under their contracts until the end of its term, and therefore, the additional cost would be temporary. (*Id.*). Accordingly the Court dismissed the complaint in its entirety. (*Id.*).

¹⁵ Again, these allegations demonstrate that Local 175 was well aware that Con Edison was requiring construction contractors to use BCTC labor, contrary to the ALJ's assertion that this was "unproven."

P. Termination of the 2014-2017 Local 175 Collective Bargaining Agreement

The Local 175 collective bargaining agreement *terminated* on June 30, 2017 (GC Exhibit

6). Article IV of the contract (entitled Term-Renewal) provided as follows:

This Agreement shall continue in effect until and including June 30, 2017, and during each year thereafter unless on or before the fifteenth (15th) day of March 2017, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party.

In the event that written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed by June 30th of the year in which the notice shall have been served.

(*Id.*, emphasis added). Thus, either party had the right to *terminate* the contract at its expiration.

On March 13, 2017, Tri-Messine sent a letter via overnight mail to Local 175 advising it that it was *terminating* its agreement effective June 30, 2017. (*See* GC Exhibit 24(b)). (*See also* GC Exhibit 24(a) (“I did advise you that on March 13, 2017, in accordance with Article IV of the agreement, Tri-Messine elected to terminate the contract effective June 30, 2017”). Previously, on February 28, 2017, Tri-Messine had withdrawn from NYICA, the employer association that had negotiated the Local 175 contract on behalf of its members. (GC Exhibits 17-a and 17-b). Counsel for Local 175 testified that he understood that Tri-Messine had terminated the agreement effective June 30, 2017 (299) and “were not intending to renew” after that date (285).

There was no immediate response to the March 13, 2017 termination letter. However, on March 27, 2017 counsel for Local 175 sent an e-mail to counsel to Tri-Messine asking if it could speak “regarding a variety of issues stemming from allegations of alter ego and joint employer.” Counsel for Tri-Messine expressed a willingness to speak but there was no follow up from Local 175. (Resp. Exhibit 4).

Q. Tri-Messine's Willingness to Engage in Effects Bargaining

In *May* 2017, counsel for Local 175 contacted counsel for Tri-Messine to provide dates to negotiate a new collective bargaining agreement and to discuss the effects of the termination of employees. (GC Exhibit 24-a). On May 18, 2017, counsel for Tri-Messine responded by noting that Tri-Messine had already announced that it had terminated its contract effective June 30, 2017. (GC Exhibit 24-b). Moreover, Tri-Messine had no employees at the time as all of the work was being performed by Callahan which had a collective bargaining agreement with Local 1010. Despite the passage of several months from when Local 175 had become aware of the necessary subcontracting decision and efforts by Tri-Messine to ensure job stability for its former employees, counsel for Tri-Messine nevertheless offered to meet to discuss the impact or effects of its decision to subcontract. However, no response was received from Local 175 (GC Exhibit 24-a) and Local 175 admitted it never followed up on Tri-Messine's offer to meet (339).

III. QUESTIONS PRESENTED

The primary legal questions implicated by these exceptions are, based upon the errors enunciated in Respondents' exceptions and as set forth in the legal argument section below:

1. Whether an employer who terminates a collective bargaining agreement in accordance with its provisions can be responsible for contributions to a union pension and welfare fund post-termination (Exceptions 24, 27, 44).
2. Whether an employer who terminates a collective bargaining agreement in accordance with its provisions is legally obligated to negotiate a new contract. (Exceptions 24, 27, 44).
3. Whether employees who do not meet the standards or qualifications set by a customer can be considered qualified (Exceptions 32, 34).
4. Whether the termination of employees who are unable to meet a customer's qualifications is unlawful (Exceptions 31, 45).
5. Whether a charge alleging violations of §8(a)(3) filed more than 6 months after the alleged unlawful conduct is timely (Exception 40).

6. Whether an employer can be held responsible for failing to adhere to a contract when performance is impossible (Exceptions 3, 4, 17, 25, 31, 33).

7. Whether an employer can be considered an alter ego when the original employer is incapable of performing the work that the second company is performing (Exceptions 2, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 37, 38, 42).

8. Whether punishing an employer who subcontracts work in order to save the jobs of dozens of employees and avoid going out of business is consistent with the NLRA? (Exceptions 39, 47, 48).

9. Whether requiring an employer to make payments to pension and welfare benefit funds — contributions that they would not have received in the first place (because the work could not have been done) — is punitive in nature. (Exceptions 39, 47, 48).

10. Whether an employer has to bargain with a union over core entrepreneurial decisions (Exceptions 22, 43, 44).

11. Whether an employer who regularly meets with the Union and continually advises it of severe economic issue and its intentions has satisfied its duty to bargain (Exceptions 5, 6, 7, 9, 10, 13, 14, 15, 25, 34, 35, 42).

12. Whether a union who is offered the opportunity to meet with the employer and its chosen representatives waived its right to bargain when it insisted that the parties meet without their chosen representatives (Exception 8).

13. Whether a union that admits that it did not make any request to bargain with an employer has waived its right to bargain under the law (Exceptions 1, 10).

14. Whether an employer who does everything in its power to keep the employment of his workers, including hiring them at higher rates of pay can be said to have discriminated against such employees (Exceptions 12, 29, 30, 32).

ARGUMENT

POINT I THE ALJ'S DECISION FAILED TO ADDRESS CRITICAL AND DISPOSITIVE ISSUES RAISED IN THE PROCEEDINGS BELOW

Several critical issues raised by the Respondents were *completely ignored* by the ALJ in his December 17 decision. This includes the fact that it is undisputed that Tri-Messine, in accordance with the clear terms of the Local 175 contract, had the right and did exercise such

right to *terminate* its agreement with Local 175. The effect of such a *termination* under well settled present is to relieve the employer of any further contractual and/or statutory obligations.

Second, the ALJ never addressed the fundamental issue as to whether the Local 175 employees were “qualified” employees under the agreement. The Local 175 agreement specifically provided that only qualified employees were covered by the contract. Because Local 175 was no longer able to comply with Con Edison’s STCC, they were no longer qualified to perform the work.

Third, under the doctrine of impossibility of performance — a doctrine recognized by the Board — Tri-Messine was permitted to take the action it did to save its business and the employment of dozens of employees.

Because none of the critical issues was addressed by the ALJ, Respondents are setting forth these points at the beginning of its argument.¹⁶

A. The ALJ’s Decision Ignored the Fact That Tri-Messine’s Termination of the Local 175 Collective Bargaining Agreement Effective June 30, 2017 Ended All Liability and Obligations as of That Date

As set forth *infra*, the ALJ’s finding that Tri-Messine and Callahan were alter egos and engaged in unfair labor practices is unsupported by the record. However, even if the ALJ’s legal conclusion were accepted, the fact remains that Tri-Messine’s relationship with Local 175 was terminated as of June 30, 2017. This critical issue, although raised in Respondent’s answer (¶43), at the hearing (303-304), and brief to the ALJ (pp. 63-66) was not addressed by the ALJ.

Article IV of the parties’ 2014-2017 contract provided it would renew for an additional year unless either party served by March 15 written notice of termination or proposed changes.”

¹⁶ A fourth issue, also not addressed by the ALJ — whether the subcontracting of work to Callahan constituted a mandatory subject of bargaining — was also not addressed by the ALJ. This issue is discussed in Point III A, *infra*.

(GC Exhibit 6, p. 7, emphasis added). The ALJ concluded that the collective bargaining agreement had been terminated:

By letter dated February 28, 2018, Tri-Messine notified the Union that “Local 175 does not meet the qualifications to perform the Consolidated Edison work.” (GC Exh. 17-a). Thereafter, by letter dated March 13, 2018, Tri-Messine advised the Union that it was terminating the contract, as provided for by its terms, effective June 30, 2017. Tri-Messine had earlier provided notice to terminate its NYICA agreement as well.

Dec. at p. 5 (emphasis added). Although he concluded that Tri-Messine had properly terminated the agreement, the ALJ never addressed the consequences of such a *termination*. Indeed, under well settled Board and judicial precedent, all statutory and contractual obligations ended for Tri-Messine as of June 30, 2017 — the date the Local 175 agreement terminated. Thus as of July 1, 2017 neither Tri-Messine nor Callahan was required to negotiate with Local 175, nor were they required to use any Local 175 labor as of that date. Certainly any contractual or statutory claims after that date (and any corresponding liability) would be without foundation.

It is well settled that “[r]ights and duties under a collective bargaining agreement do not otherwise survive the contract’s termination at an agreed expiration date.” *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988). As the Court noted in “*Automatic*” *Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612 (6th Cir. 1997):

...when the collective bargaining agreements between Petitioners and the unions with section 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. They cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting. As the Supreme Court has stated, “The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer ‘from refusing to make a collective contract or hiring individuals on whatever terms’ the employer ‘may by unilateral action

determine.”” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

Id. at 619.

Similarly, in *New York News, Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991), the parties entered into a collective bargaining agreement that allowed either party to terminate the agreement upon its expiration. The employer terminated the agreement and the Court held that its actions were entirely lawful:

Citing Article 25(a)’s nonmandatory language ..., the district court rejected the Guild’s position that the News had a contractual obligation to negotiate in good faith for a successor collective bargaining agreement before exercising its right to terminate the Agreement. Instead, the court correctly found that each of the parties had an unqualified right to terminate the Agreement after its expiration by providing written notice. We believe that Article 25(a) is not susceptible of competing interpretations. *See AT & T Technologies*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 582-83. Therefore, because it is undisputed that the News sent the Guild written notice of termination after expiration of the Agreement, the Agreement was terminated pursuant to its terms, and the district court did not err in granting the News a declaration to this effect.

Id. at 84-85. *Accord, Int’l Bhd. of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161, 164-65 (4th Cir. 1996) (finding letters sent by employer to union indicating its desire to terminate the collective bargaining agreement upon its expiration effectively terminated agreement).

These cases are in accord with Board precedent that a bargaining representative may contractually relinquish a statutory right if the relinquishment is expressed in clear and unmistakable terms. *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962).

For example, in *Cauthorne Trucking*, 256 NLRB 721 (1981), *enforcement granted in part, denied in part*, 691 F.2d 1023 (D.C. Cir. 1982), the parties’ pension agreement provided:

IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and

between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued.

Id. at 722. The Board held that this provision constituted a waiver. It concluded that this language, explicitly stating that all company obligations under the pension agreement shall "terminate" upon expiration of the contract, expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration.

In *Senator Theater*, 277 NLRB 1642, 1643 (1984), *enforcement denied*, *NLRB v. Gateway Theatre Corp.*, 818 F.2d 97 (D.C. Cir. 1987),¹⁷ the Board held:

We find that with respect to the intended duration of the relationship the parties agreed at their 16 June 1983 meeting that the Respondent would be free to 'walk away' after the expiration of approximately 6 months. Accordingly, we conclude that when the Respondent terminated its relationship with the Union on 20 March 1984, it was exercising a right created by its agreement with the Union and did not thereby violate Section 8(a)(5) and (1) of the Act. Having lawfully terminated its relationship with the Union, the Respondent was free to alter terms and conditions of employment without bargaining.

Here, the collective bargaining agreement between Tri-Messine and Local 175 did not merely expire, it "terminated." As noted, the parties negotiated a provision under which either party had the absolute right to terminate the agreement provided it was done so by March 15, 2017. This condition was fulfilled by Tri-Messine and the union admittedly understood that Tri-Messine had terminated the contract of June 30, 2017 (299) (*see also* GC Exhibit 24-b). The ALJ should have concluded that effective July 1, 2017 there was no contractual or statutory obligations towards Local 175. Certainly any contributions to the Local 175 benefit plans could

¹⁷ The court denied enforcement of the Board's decision only on the unrelated issue that the discharge of the workers had violated § 8(a)(3).

lawfully cease as of that date. Accordingly the ALJ's findings and proposed remedy relating to post June 30, 2017 must be reversed as a matter of law.

B. As of March 6, 2017 Local 175 Employees Were Not Qualified to Perform Con Edison Work

Article VIII, Section 2 of the 2014-2017 collective bargaining agreement between Local 175 and Tri-Messine provided:

This Agreement is applicable to qualified employees who are employed under the classification as set forth in Article IX, Section 6 of the Agreement.

(GC Exhibit 6, p. 9, emphasis added). Local 175 is not and has never been affiliated with the B&CTC. Once Con Edison determined that under its Standard Terms & Conditions only B&CTC labor having jurisdiction could perform Con Edison work, Local 175 had no right to perform this work. Therefore, Tri-Messine's Local 175 workforce was not qualified to perform the work for Con Edison.

Indeed, the General Counsel asked Al Messina why Callahan workers were being used to perform the Con Edison work:

Q Why not Tri-Messine's workers?

A Tri-Messine is not currently able to perform any work, because the union that we have a contract with, Con Edison rules that they're not qualified to perform paving work for that.

(52).

Similarly, Messina testified as follows:

Q . . . The reason that Callahan had to perform the work was because Tri-Messine had a contract with 175, correct?

A The work had to be performed with the Union that affiliated with the building trades, and 175 was not so they weren't qualified. Per Con Edison, they weren't qualified to perform the work and all that.

(139). *See also* Tr. at 502 ("Con Edison said that the union had to be affiliated with the Building Trades of Greater New York Council. And 175 is not.").

In *American Flint Glass Workers' Union*, 133 NLRB 296, 304 (1961), the Board stated:

In the interpretation of a contract words are to be given their ordinary meaning unless the circumstances indicate that a different construction has been adopted by the parties. Restatement of Contracts, 235; 12 American Jurisprudence, Contracts, 236. And where the words of an integrated written agreement are unambiguous, their meaning is to be determined from the agreement itself.

See also *Silver State Disposal Service*, 326 NLRB 84, 86 (1998) (“in interpreting contractual language, words must be given their ‘ordinary and reasonable meaning’”) quoting *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3d Cir. 1981). Further, when construing the language of an agreement “no part of a contract’s language should be construed in such a way as to be superfluous.” *CVS & Local 338 Retail*, 2016 NLRB LEXIS 416, at *6 (June 7, 2016), quoting Restatement (Second) of Contracts § 203(a).

The word “qualified” is defined as follows:

. . . having complied with the specific requirements or precedent conditions (as for an office or employment): **eligible** (*see* <https://www.merriam-webster.com/dictionary/qualified>);

. . . Competent or knowledgeable to do something; **capable** (*see* <https://en.oxforddictionaries.com/definition/qualified>);

having met conditions or requirements set (*see* <https://www.collinsdictionary.com/us/dictionary/english/qualified>

(emphasis in bold).¹⁸

Clearly, as of March 6, 2017 workers performing work under the Local 175 agreement were neither “eligible,” “capable” nor able to meet “the conditions or requirements” necessary to

¹⁸ Significantly the Merriam Webster Dictionary defines the word “unable” as follows:

not able: incapable: such as
a : unqualified, incompetent . . .

<https://www.merriam-webster.com/dictionary/unable> (emphasis added).

perform Con Edison work. Applying the agreement to any individual would in effect, render the word “qualified” meaningless or superfluous and contrary to rules of contract construction.

Moreover, courts have routinely held that a person who is unable to work is not considered to be “qualified.” See *O’Connell v. Potter*, 274 F. App’x 518, 519, 2008 U.S. App. LEXIS 9016, at *1 (9th Cir. 2008) (“because she was unable to work, she could not perform her employment duties and was not a qualified individual”); *Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338, 359 (S.D.N.Y. 2009) (“the undisputed evidence shows that Robertson and his doctor both contended that he was ‘unable to work,’ thus indicating that he was not qualified for a courier position”); *Talmadge v. Stamford Hosp.*, 2013 U.S. Dist. LEXIS 76404 (D. Conn. May 29, 2013) (“plaintiff was not qualified for the OR nurse position because he was prohibited from working in an operating room or accessing narcotics until mid-November”); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (Plaintiff was not qualified for her position because she was not released for work by her doctor and was incapable of coming to work); *McCoy v. Pa. Power & Light Co.*, 933 F. Supp. 438, 443 (M.D. Pa. 1996) (failure to maintain security clearance “renders an employee ineligible, *i.e.*, not qualified, to work”).

In *Plumbers & Pipefitters Local 525*, 266 NLRB 515 (1983), a dispute arose as to whether Local 501 of the Operating Engineers or Plumbers and Pipefitters Local 525 would perform certain work. The Board concluded that Local 525 should perform the work because Local 501 workers were not qualified.

Finally, the record shows that Local 501 has no source of journeyman plumbers other than those who “walk in” off the street. Under these circumstances, Local 501 has not established that it would meet the Employer’s fluctuating need for qualified employees. Thus, the Employer would be unable to ensure meeting its obligations under its contract with the Stardust Hotel if it utilized employees represented by Local 501.

Id. at 518.

As in *Plumbers & Pipefitters*, effective March 6, 2017 the Con Edison work could not be performed by Local 175 employees based on their lack of qualifications. Local 175 could not supply workers who would be permitted to perform the work. As Messina repeatedly testified “[the work] couldn’t begin because we weren’t being awarded the contract unless we showed Con Edison that we had signed contracts with unions that were affiliated with the building trades.” (128). Therefore, assigning the work to Local 1010 was entirely lawful. *See also Trs. of the N.Y. City v. Tappan Zee Constructors LLC*, 2015 U.S. Dist. LEXIS 163726 (S.D.N.Y. Nov. 30, 2015) (employer could use non-bargaining unit employees to perform work and was under no obligation to contribute to union pension and welfare funds when union was unable to supply qualified employees to perform unit work); *Canterbury Educational Serv., Inc.*, 316 NLRB 253, 255 (1995) (employee unable to work deemed not qualified).

Although the issue was specifically raised in Respondents’ answer, even debated multiple times at the hearing (52, 139, 323, 433-435, 502, 529) and discussed at length in Respondents’ Memorandum of Law to the ALJ, this issue was never addressed by the ALJ in his decision. Accordingly because Con Edison demanded compliance with its STCC and Local 175 could not meet these conditions, it was not qualified to perform the work and Respondents actions were entirely lawful and consistent with the then applicable collective bargaining agreement.

C. In Light of the Exceptional and Unusual Circumstances, The Doctrine of Impossibility Allowed Tri-Messine to Subcontract its Work to Callahan

While he repeatedly noted how Tri-Messine had been placed in an extremely difficult situation, the ALJ failed to follow or even address Board law on the issue of impossibility of performance.¹⁹

¹⁹ *See, e.g.*, Dec. at p. 13 (“However constrained Messina may have felt about his available options. . .”); Dec. at 14 (“it cannot be denied that Messina was facing a difficult situation with competing demands from various sides”) and

The undisputed testimony of Al Messina and Michael Perrino of Con Edison was that either a union affiliated with the B&CTC performed the Con Edison construction work, or Messina would lose the entire Con Edison contract and his business and several dozen employees would be out of work. Further, in its prior pleadings, Local 175 repeatedly asserted the obvious — that Con Edison was preventing Local 175 from performing work on its construction contracts (Rep. Ex. 1 and 2). Anthony Franco of Local 175 also understood that Messina's entire business would be lost (393). Indeed, Messina was doing everything to try and keep the work with Local 175, but was simply unable to do so.

A Yes, 175 told me they were working on that [trying to change Con Edison's position], and they were also working on something that might let them merge or join with a union that was affiliated with the building trades.

Q Now what did you think, if anything, would happen if 175 was successful in those efforts?

A Well, if Con Edison would have allowed -- well, if 175 would have been able to join, be affiliated with the building trades, we could have used them to perform Con Edison's work, and that's why we waited till February 28th to actually send out the letters, as opposed to sending them out at the beginning.

(233). In an exchange with ALJ Gardner, Messina again reiterated his desire to keep Local 175.

Yeah. I was meeting with Roland and Anthony back and forth once a week to -- they were keeping me informed on how things were going with their various efforts with Con Edison, and then also that they might be able to merge, or become one with a union that was a member of the building trades. So we waited till -- to formally, like, send the letter, even though they, you know, we told them way in advance what was going on. But we formally sent the letter, we waited until the last minute in case they were able to pull something off.

JUDGE GARDNER: If they pulled something off, so to speak, on February 21st, right, a week sooner, did you have a plan for what would happen in that case?

THE WITNESS: We wouldn't have had to subcontract the work out.

Dec. at p. 14 ([w]hile I can appreciate the challenge that ConEd's STCC threatened to present to Tri-Messine's business . . . ,

JUDGE GARDNER: And Tri-Messine would have just done the work with its existing employees?

THE WITNESS: Yes.

JUDGE GARDNER: And what would have become of Callahan, do you know?

THE WITNESS: Nothing

(239-240, emphasis added). Even counsel for Local 175 admitted during his testimony that Messina would not have subcontracted the work to Callahan if he absolutely did not have to do so.

Q Do you think Mr. Messina would have subcontracted all of the work out if he could have had the 175 people do it in the first place?

A I'm sure he wouldn't.

(320).

Under these circumstances performing the work with Local 175 labor would have been impossible.

The doctrine of impossibility of performance has long been recognized by the Board. For example, in *Associated Musicians of Greater New York*, 176 NLRB 365 (1969), the union advised the employer that if it hired three individuals who were not in good standing, any union workers who performed with them would be brought up on charges. As a result many union workers refused to perform with these individuals and the employer eventually declined to use any of the three members who were not in good standing. The General Counsel claimed that this was a violation of the Act but the Board disagreed.

In the law of contracts, the well-established doctrine of impossibility of performance relieves an obligor of his contractual liability if unforeseen circumstances render performance impossible. Although this is not a contract question, we are persuaded that the law of labor relations should provide an employer with some equivalent measure of flexibility in such extreme and unusual circumstances as are presented here. Thus, because of the failure of Miller, Arthur, and Bass to retain good standing in the Union, Carroll was placed in the position of having

to adopt one of two alternative courses of conduct: he would have to find replacements either for Miller, Arthur, and Bass, or for Anelli, Cardelli, and, in all probability, the remainder of the complement. Carroll chose the former alternative; there is no showing that the other course was, as a practical matter, open to him. We are unwilling to hold on these facts that his conduct violated the Act.

See 176 NLRB at 367.

The situation here is far more exigent than in *Associated Musicians*. Here Tri-Messine literally had no choice but to subcontract its work. It could either close its business and layoff all of its workers or subcontract the work to Callahan, saving the Con Edison contract and the jobs of dozens of its employees. It cannot be faulted for these actions. To the contrary, its actions should be applauded given the fact that virtually all of the workers were ultimately hired by Callahan. *See also Freightliners Equip. Co.*, 120 NLRB 1614, 1624 (1958) (“I also have no question but that the 1950 contract became a nullity and was impossible of performance upon Richards’ receivership and the layoff of his drivers by the receiver and during the subsequent period of several years during which Richards’ Scranton business was defunct and he had no employee drivers there.”); *Bricklayers Local No. 1*, 194 NLRB 649, 651 n.7 (1971) (“[a]s stated in 6 *Corbin on Contracts*, chap. 74, § 1321: ‘If the specific performance promised by a contractor becomes impossible, either by the destruction of the specific subject matter, the death of a necessary person, *or the nonexistence of the specifically contemplated means of performance*, his duty is discharged--unless the parties expressed a contrary intention.’”) (emphasis in original).²⁰

²⁰ In addition, to the doctrine of impossibility of performance the Board also recognizes a separate doctrine that employers must act when facing exigent circumstances. “[A]n employer may act unilaterally if faced with an economic exigency justifying the change.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.D.C. 2000). *See also Visiting Nurse Servs., Inc. v. NLRB*, 177 F.3d 52, 56 (1st Cir. 1999); *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81 (1995). An economic exigency must be a “heavy burden” and must require prompt implementation. *RBE Elecs. of S.D., Inc.*, 320 NLRB at 81. The employer must additionally demonstrate that “the exigency was

POINT II THE ALJ ERRONEOUSLY FOUND THAT TRI-MESSINE AND CALLAHAN ARE ALTER EGOS

“[T]he application of the alter ego doctrine is essentially an equitable one to be applied in a given case at the discretion of the trier of the facts.” *Joe Costa Trucking*, 238 NLRB 1516, 1523 (1979). “To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers.” *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, at p. 4 (2016). Most relevant to this case, however, “the Board also considers whether the new entity was formed to evade responsibilities under the Act.” *Deer Creek Elec., Inc.*, 362 NLRB No. 171 (2015).

The focus of the alter ego doctrine . . . is on “the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations . . . (citations omitted).

Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 748 (2d Cir. 1996) (emphasis added). *See also Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982) (emphasis added) (“[t]he focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective

caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.” *Id.* at 82 (footnote omitted).

It is hard to imagine a more serious economic exigency than that faced by Tri-Messine at the end of 2016 and beginning of 2017. Tri-Messine had the options of (a) not bidding or performing the Con Edison work (97% if its business in 2016) (564), thus laying everyone off and going out of business because of circumstances completely out of its control; or (b) subcontracting the work so that it could preserve the jobs for most of its workers. Its future viability was at stake. Under these circumstances, there can be no finding of an unlawful unilateral change. Indeed, even if the work of Callahan and Tri-Messine are considered to be similar, the fact remains that there was an economic exigency that left Tri-Messine no option other than to subcontract the work to allow labor acceptable to Con Edison to perform the work. These were clearly “extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action...[.]” *RBE Electronics of S.D.*, 320 NLRB at 81. Moreover, the Union admitted that the decision was beyond anyone’s control. *See also Central Rufina*, 161 NLRB 696, 699-700 (1966), (Board upheld the employer’s decision to contract out work due to mechanical difficulties with its equipment.); *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971) (employer unilaterally ceased operations after two of its delivery trucks were stolen in one week and it lacked the funds to continue operations).

bargaining agreement through a sham transaction or technical change in operations”); *Elec. Data Systems Corp.*, 305 NLRB 219 (1991), *enforced in pertinent part*, 985 F.2d 801 (5th Cir. 1993).

The ALJ erroneously concluded that Tri-Messine and Callahan were alter egos. His mechanical analysis however, not only defies logic but ignores the fundamental issue that Tri-Messine could not perform the work that Callahan was performing. Neither, the General Counsel or ALJ cite to any decision issued by the Board or court which found an alter ego when the first company was *unable to perform or continue to perform* the work that the second company was able to perform.

Incredibly, the ALJ stated that:

Respondent argues that Tri-Messine and Callahan cannot be alter egos or single employers because the Con Ed work could not continue to be performed by Tri-Messine. As an initial matter, that factual assertion is unproven. The alleged impediment to continuing to perform Con Ed work was the STCC restriction, which Con Ed had failed to enforce for the over two years since the STCC was amended in 2014, and still was not enforcing at the time Messina and Patricia unilaterally created Callahan, nor through the beginning of 2017 when Tri-Messine was continuing to perform Con Ed work with Local 175 members.

Dec. p. 14. This conclusion has no support whatsoever.

Messina testified that he was repeatedly told by numerous Con Edison employees that the contract would not be awarded unless he first secured a labor contract with Local 1010. This occurred as early as the Fall 2015 Pre-Bid Conference for Manhattan work (Tr., 513), which Messina did not even bid on.

The following year, he was advised of the requirement by Con Edison employees before, during and after the October 2016 Pre Bid Conference for work on other boroughs. In response to question from the General Counsel Messina testified:

Q ...What if anything did Con Ed tell you about the use of your Local 175 workers at that time?

A They told us that we had to use labor affiliated with the building trades, creating accounts or for the paperwork.

Q And who told you that?

A I received a call from Michael DelBlasso, Michael Perrino and brought it up at the pre-bid meeting, which I believe was in October as well. And then, Michael DelBlasso and David Blaut called me to tell me specifically.

* * *

Q And they did -- did they discuss anything with regard to unions that can perform the work?

A They referenced the terms and conditions. They had terms of conditions where it said that you must use Union affiliated with the building trades

(92, 95).

When questioned by counsel for the Charging Party, Messina testified as follows:

Q Did you advise Con Edison that you had a contract with Local 175?

A Yes.

Q And did you advise them that labor from a Union affiliated with the Building Trades Council was then currently not available to you due to your Union contract?

A Yes, I did.

Q And what was their response?

A They told me that the other [paving] contractor in Manhattan had a contract with a labor union that was affiliated with Building Trades and I needed to do the same thing if I wanted to work with them.

(200; *see also* 519).

Further, Michael Perrino, one of the many Con Edison employees dealing with Messina testified (pursuant to a subpoena issued Local 175) that he “explained to [Messina] . . . that Tri-Messine had to conform with those requirements [STCC].” (459) He specifically “identified 1010 as the union” (460)

Also, in litigation commenced prior to the filing of any unfair labor practices against Tri-Messine and Callahan, Local 175 specifically stated that Con Edison was advising contractors

such as Tri-Messine that they would not be awarded contracts if they did not hire labor affiliated with B&CTC. For example, in its February 2016 filing with the New York State Public Service Commission Local 175 stated:

Two contractors, Nico Asphalt Paving, Inc. and Tri-Messine Construction, Inc., that have collective bargaining agreements with Local 175, have been advised by Con Edison that they may finish working on contracts that have previously been awarded, but, if they want to bid on any new contracts, they will need to execute collective bargaining agreements with Locals 1010 or 731.

Resp. Ex. 1 at p. 7. Similar allegations were made by Local 175 in their unsuccessful anti-trust lawsuit against Con Edison. *See e.g.*, Resp. Ex. 2, ¶ 45. (“In or about October 2014, a representative of Tri-Messine Construction (“Tri- Messine”) was contacted by a Con Edison representative. The Con Edison representative informed Tri-Messine that it would be permitted to finish its existing contracts with Con Edison, but Tri-Messine would not be able to rebid those contracts unless it signed a collective bargaining agreement with LIUNA Local 1010”).

The ALJ’s conclusion that it was “unproven” that Tri-Messine could not continue to perform the Con Edison work thus not only ignored the uncontroverted evidence that the work had to be performed by Local 1010, but Charging Party’s own admissions. Indeed, even counsel for Local 175 admitted that Messina would not have subcontracted the work if he absolutely did not have to do so (320).

Next, the ALJ concluded that even if Con Edison required Tri-Messine to use B&CTC labor, it would be irrelevant to his determination of alter ego status.

Whatever the reasons for the unilateral creation of Callahan – and it cannot be denied that Messina was facing a difficult situation with competing demands from various sides - this is nevertheless exactly the type of disguised continuance of a previously operating business that the alter ego analysis is designed to prevent. While I can appreciate the challenge that Con Ed’s STCC threatened to present to Tri-Messine’s business, the Board does not recognize a company’s financial challenges as justification for ignoring its

existing collective bargaining relationships or agreements and forming a new entity. See *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), *enf'd.* 25 892 F.3d 362, 374 (2018).

Dec. at p. 14.

The ALJ's reliance on *Island Architectural Woodwork* is completely misplaced. In that case the employer, unlike Tri-Messine was simply faced with an economic issue for many of its customers who wanted work to perform more cheaply. Island Architectural decided *on its own* to create a new company, Verde, to perform the work more efficiently. No outside company required it to use any form of labor. Island Architectural continued to exist and was capable of performing the work both before and after Verde was created. Here Callahan was formed not to perform the work more efficiently or cheaply but because Tri-Messine simply could not continue to perform the work at all. This is a critical distinction overlooked by the ALJ.

“[O]perational continuity is a factor in alter ego as well as successorship cases.” *Cadet Constr. Co.*, 287 NLRB 564, 564 n.3 (1987). Con Edison directed that only B&CTC affiliate unions could perform this work, and therefore Local 175 could no longer *continue* to perform the work. It was no longer “its work” when Tri-Messine lawfully subcontracted it to Callahan, a company solely owned by Patricia Messina (someone who had no interest in Tri-Messine), so that the work could in fact get done by qualified employees. See *Redway Carriers*, 202 NLRB 938, 941 (1973) (“the absence of any significant carryover in customers . . . indicate an extinguishment of the continuity of [the previous employer's] enterprise”); *Local 812 GIPA v. Canada Dry Bottling Co.*, 2000 U.S. Dist. LEXIS 18712, at *11 (S.D.N.Y. Dec. 29, 2000) (no sham transaction or alter ego status found; “Even if Canada Dry and Coors New York were a single entity, it is undisputed that Coors Colorado was going to stop using Canada Dry for distribution in the New York area. This is a legitimate business purpose justifying the formation of MBD with Manhattan Beer, an existing reputable organization, for the continued distributing

of Coors . . . In light of the evidence that the threatened loss of Coors Colorado's business was a motivating factor in the formation of MBD, and the persuasiveness with the NLRB the perceived loss of business had, the Court does not find any evidence of this transaction being a sham to circumvent the collective bargaining agreement”). Indeed, unlike any cases the General Counsel will cite in this matter, it is indisputable that all of the work now performed by the alleged alter ego could not have been performed by Tri-Messine.

The alternative which incredibly is argued by the General Counsel is that Tri-Messine should go out of business and lay off its entire workforce. This is hardly consistent with national labor policy or common sense.

In addition, the General Counsel cited the Board’s decision in *Ref-Chem Company*, 153 NLRB 488 (1965), for the proposition that satisfying a customer does not excuse unlawful conduct. *Ref-Chem* is distinguishable, however, because there the client was ostensibly telling the employer do terminate employees because of their union activities. This was not the case here. Indeed, in a case decided after *Ref-Chem*, *Fidelity Maintenance & Construction Company, Inc.*, 173 NLRB 1032 (1968), the Board limited *Ref-Chem*’s applicability to cases only where the customer had expressed a clear unlawful motive. In *Fidelity*, the customer (Columbia) directed Fidelity, its maintenance contractor, to lay off 35 of its existing employees performing work at its facility. This was done in accordance with its contract. The Board found that there was “nothing in the evidence to indicate that the December 8, layoff was discriminatorily motivated, that Fidelity which had no reason to believe that Columbia might be discriminatorily motivated, did anything other than carry out Columbia's directive, as it was bound by its contract to do.” *Id.* at 1038, It then distinguished *Ref-Chem* noting that:

In the *Ref-Chem* case, where the Board sustained a finding that a contractor violated Section 8(a)(3) of the Act, when it discharged

certain employees at the request of the plant owner, because it was established that the contractor knew that the owner's request was based on the fact that the discharged employees had solicited employees to join and support the Union. No such showing was made here.

Id. at 1038 n. 27. As in *Fidelity* the Board has yet to make any finding that Con Edison's STCC were unlawful.²¹

The ALJ cited *Massachusetts Carpenters Cent. Collection Agency v. A.A. Building Erectors, Inc.*, 343 F.3d 18 (1st Cir. 2003), but claimed it was not binding precedent and the facts were distinguishable (but never said how). In that case Kalwall Corp., a designer, manufacturer and seller of fenestration systems set up A.A. Building to perform its union installation work. A.A. and Kalwall had the same owners, worked out of the same address and had the same phone and fax numbers. Kalwall continued to subcontract some of its work to non-union installers. A.A.'s union contract, however, required that all of its work be performed by union labor. Accordingly the Funds sued A.A. and its alleged alter ego Kalwall for unpaid contributions. The First Circuit affirmed the District Court's granting of summary judgment finding that the two companies were not alter egos despite the fact that they were "joined at the hip." *Id.* at 20.

We need not disagree with the premise of this assertion in order to reject plaintiffs' argument that the alter ego doctrine should apply in this instance. The doctrine is not a formalistic mechanism for reflexively regarding distinct jural entities as legally interchangeable whenever the entities' relationship is marked by a sufficient number of the doctrine's characteristic criteria -- *e.g.*, continuity of ownership between the corporations, management overlap, similarity of business purpose, evidence that the nonunion entity was created to avoid an obligation in a collective bargaining agreement. *See Hospital San Rafael*, 42 F.3d at 50. Rather, the doctrine is a tool to be employed when the corporate shield, if respected, would inequitably prevent a party from receiving what

²¹ Moreover, in *Ref-Chem* the employer *speculated* that if it did not fire employees, the customer *might* terminate its contract. In this case there was clear evidence that the contract would not be awarded if a union affiliated with the B&CTC was not performing the work.

is otherwise due and owing from the person or persons who have created the shield.

Id. at 21-22 (emphasis added). In finding no alter ego status, the Court focused on two factors:

First, there is no evidence that A.A. Building deceived the UBC about its structure, ownership, relationship with Kalwall, or the fact that Kalwall regularly subcontracts with nonunionized installers. . .

Second, and relatedly, there is absolutely no indication that the relationship between A.A. Building and Kalwall has changed over the years or has caused the UBC to receive less than that for which it bargained. This matters because, in all the cases involving application of the labor law alter ego doctrine to which plaintiffs have drawn our attention (or which we have read on our own), the union membership with rights under a collective bargaining agreement has been somehow worse off following some change in the structure or operations of the employer with whom the collective bargaining agreement was negotiated. Here, plaintiffs have provided us with no reason to apply the doctrine other than pointing out that, unbeknownst to them until recently, many of the criteria necessary for an alter ego finding characterize the relationship between Kalwall and A.A. Building. As we have explained, this is not enough.

Id. at 22 (emphasis added). *Accord, Resilient Floor Covering Pension Fund v. M & M Installation, Inc.*, 651 F. Supp. 2d 1057, 1063 (N.D. Cal. 2009). *See also Trs. of the Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 248 (6th Cir. 2005) (rejecting alter ego theory when union fund could not show it was worse off as a result of the s alleged subcontracting)

Indeed, in *Flynn v. Interior Finishes, Inc.*, 425 F. Supp. 2d 38, 53 (D.D.C. 2006), the court rejected a finding of alter ego between two companies because the Funds were not harmed by any of the conduct of the defendants, i.e., they did not receive less than what they were entitled to be paid. Relying on both A.A. Building and A&M Installations the court found that “[a]s defendants correctly suggest . . . the alter ego doctrine -- an equitable doctrine -- should not

be invoked in the absence of inequity. . . [B]ecause the union membership and the Fund are not worse off than before, the purposes of the alter ego doctrine would not be served by its application in this case' *Id.* at 53, 55

Here, it cannot be denied that the employees were far better off by the subcontracting to Callahan as it permitted them to work. Moreover, the Local 175 Funds would have received nothing because Tri-Messine would not have been able to perform the Con Edison work in the first place.

In this case it would be grossly inequitable to apply the alter ego doctrine because:

- The Con Edison work could not continue to be performed by Tri-Messine; as a result the Funds would not have received any additional contributions;
- There was no deception by Tri-Messine or attempt to avoid its legal obligations; and
- It cannot be claimed that the subcontracting of work to Callahan made any of the employees worse off; to the contrary, the subcontracting saved their jobs.

In making an alter-ego determination, the Board also considers “whether the purpose behind the creation of the suspected alter ego was to evade another employer’s responsibilities under the Act.” *Island Architectural Woodwork, Inc., supra*, at p. 4. *See also I.W.G., Inc.*, 1999 NLRB LEXIS 488, at *9 (July 9, 1999) *quoting Watt Elec. Co.*, 273 NLRB 655, 658 (1984) (in determining alter ego status, Board considers whether “the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act”); *Advance Elec.*, 268 NLRB 1001, 1002 (1984) *quoting Fugazy Cont’l Corp.*, 265 NLRB 1301 (1982) (“[o]ther factors which must be considered in determining whether an alter ego status is present in a given case include ‘whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead its purpose was to evade responsibilities under the Act’”). *See Hotel & Rest. Emps. Local 274 (Warwick Caterers)*, 282 NLRB 939, 943

(1987) *citing Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d at 507. “Unlawful motivation is an additional factor frequently considered in determining whether alter ego status exists.” *M&J Supply Co., Inc.*, 300 NLRB 444, 449, (1990) *citing Gilroy Sheet Metal*, 280 NLRB No. 121 fn. 1 (June 24, 1984); *Perma Coatings*, 293 NLRB 803, 804 (1989) (“the absence of union animus nevertheless generally militates against finding a ‘disguised continuance’ of the predecessor”).

There was no sham, scheme or disguise here. Messina attempted to save his company and his workers’ jobs. He was not trying to cut corners or avoid statutory or contractual obligations. Indeed, if Callahan had not been created, all of the individuals formerly affiliated with Tri-Messine would have lost their employment. Instead many of these individuals immediately commenced working for Callahan under other collective bargaining agreements Callahan had with unions that are affiliated with the B&CTC.²² Others were hired by Callahan once they became members of Local 1010. Had Callahan not been established these individuals may not have found employment at all.

Tri-Messine never sought to hide the fact that it was subcontracting the work to Callahan in order to perform the Con Edison work, contrary to the General Counsel’s assertions in its opening statement that there was some kind of “scheme” to avoid its responsibilities. Messina was frank and open with the union and constantly advised it of what he was thinking and planning to do based on the dire circumstances. Indeed, Messina routinely discussed the Con Edison situation with Franco and Bedwell, sought their input and continually advised them what the plans were if Con Edison insisted on only using labor affiliated with the B&CTC. Indeed, Messina told Franco more than one year in advance that he would have to subcontract the work

²² As noted, those that went to Teamsters Local 282 continued to receive the higher Local 175 rate. Those that went to Local 15 of the Operating Engineers received the higher Local 15 rate.

if Con Edison insisted on B&CTC labor. Franco agreed that Messina should not have to lose his business. (393). Moreover, the union had at least as much information as Tri-Messine as it had been involved in the same process with another contractor, Nico Construction. Thus there was nothing sinister about what Tri-Messine was doing and hoping to accomplish. Far from an unlawful purpose, the decision to subcontract was made to preserve the jobs of employees who as of March 6, 2017 were indisputably prohibited from working on Con Edison projects with any union not affiliated with the B&CTC.

As Messina testified:

Q Were you trying to avoid your obligations under the contract between Tri-Messine and Local 175?

A Not at all.

Q What were you trying to do?

A I was just trying to stay in business and keep everybody working.

(525-526). Moreover, Messina testified that if somehow at the last minute Con Edison changed its mind, Tri-Messine would never had subcontracted the work to Callahan, and instead he would have kept the work with Tri-Messine. (239).

Contrary to the allegations set forth in the complaint none of the employees were discriminated against because of their affiliation with Local 175. Tri-Messine had a long and largely peaceful relationship with Local 175. Moreover, as noted, the work being performed by Callahan was not Local 175's work. The Standard Terms & Conditions issued by Con Edison clearly precluded Local 175 from performing the work. In accordance with the Local 175 contract, these individuals were not qualified to perform the work and thus subcontracting the Con Edison work to Callahan was entirely lawful.²³

²³ Not only are Tri-Messine and Callahan not alter egos but even if found to be a "single employer" the employees of both companies would nonetheless have to be placed in separate bargaining units.

POINT III THE ALJ ERRONEOUSLY FOUND THAT CALLAHAN VIOLATED SECTION 8(a)(5) AND (1) AND 8(d) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AND BY FAILING TO APPLY THE COLLECTIVE BARGAINING AGREEMENT IN EXISTENCE BETWEEN THE UNION AND TRI-MESSINE

The ALJ's concluded that Tri-Messine had repudiated the collective bargaining agreement with Local 175 and failed to satisfy its obligation to bargain when it subcontracted the work to Callahan. In his decision the ALJ found as follows:

Tri-Messine ceased its own operations, redirected all of its paving work to Callahan, and ceased making the contractually required fund payments to the Local 175 funds. . . .

I also find that Messina's announcement of Callahan's creation, its contract with Local 1010, and Tri-Messine's layoff of all its workers was delivered as a *fait accompli*, rendering useless any attempt to bargain over those decisions. This was true both with

The Board's cases hold that especially in the construction industry a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." *Central New Mexico Chapter, National Electrical Contractors Assn., Inc.*, 152 N.L.R.B. 1604, 1608 [***387] (1965).

South Prairie Constr. Co. v. Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976).

In *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977) the Board set forth the factors to be considered in whether there should be separate units.

... The ultimate unit determination is thus resolved by weighing all the factors relevant to the community of interests of the employees. Where, as here, we are concerned with more than one operation of a single employer, the following factors are particularly relevant; the bargaining history; the functional differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.

(emphasis added). See *A--1 Fire Protection, Inc.*, 250 NLRB 217, 220 (1980) (Board and courts have acknowledged that in the construction industry a single employer may have different companies perform work under different conditions).

Under these factors, there is no basis for finding a single unit appropriate. First, Tri-Messine has no employees. Second, even if it did, it is undisputed that the Con Edison work makes up over 95% of the work and can only be performed by Local 1010 workers of Callahan. Placing Callahan employees in the same unit with individuals who cannot perform the same kind of work and are in fact barred from performing the work would hardly involve employees with the same community of interest.

regard to Messina's conversation with Franco as well as his meetings with the employees in January and March.

Decision at p. 12. These findings are clearly erroneous for several reasons. As set forth below the decision to subcontract was (a) a non-mandatory subject of bargaining and (b) in any case Tri-Messine repeatedly offered an to meet and did meet with the union to discuss these issues.²⁴

A. Tri-Messine Had No Legal Obligation To Bargain Over The Decision To Subcontract The Work To Callahan as it Was a Core Entrepreneurial Decision

In *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that an employer was required to bargain over its decision to subcontract bargaining unit work to an outside contractor. The Court underscored that a key consideration in this area is whether the employer's conduct "is suitable for resolution within the collective bargaining framework[.]" *Id.* at 214.

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning . . . the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area.

Id. at 223. "When labor costs underlie the employer's decision to subcontract bargaining unit work, the decision is particularly amenable to the collective-bargaining process." *Finch, Pruyn & Co., Inc.*, 349 NLRB 270, 274 (2007).

In *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court held that an employer which provided cleaning and maintenance services to commercial establishments

²⁴ Also, as noted in Point I, A. *supra*, the subcontracting was consistent with the contract that required "qualified" employees to perform the work and in any case the contract terminated as of June 30, 2017 so there can be no liability after that date (Point I. B.).

was not required to bargain with a union over the employer's decision to discontinue operations at a nursing home, even if such decision resulted in the discharge of its employees working there after the employer was unable to secure an increase in its management fee. The Court reasoned that the employer's decision to shut down part of its business constituted a significant "change in the scope and direction of the enterprise [which] is akin to the decision whether to be in business at all[.]" *Id.* at 677.

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. . . . This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . Nonetheless, in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

Id. at 678-679 (emphasis added). See *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982), ("if, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation"). See also *Minted Int'l, Inc.*, 364 NLRB No. 63 at *14 (2016) ("[u]nder the principles in *Dubuque Packing Company, Inc.*, 303 NLRB 386 (1991), the issue of a bargaining obligation focuses on whether the employer's decision is

amenable to bargaining”). *Accord, Mike-Sell’s Potato Chip Co.*, 2017 NLRB LEXIS 374, *39-41 (July 25, 2017).

In *Dorsey Trailers v. NLRB*, 134 F.3d 125 (3d Cir. 2000), the employer subcontracted work to another company for a number of reasons, including inability to find qualified personnel, a backlog of orders, and rapid loss of sales. Based on these factors the Court held that subcontracting was not considered to be a “term and condition of employment” under the Supreme Court’s decision in *First Nat’l Maint. Corp.*, *supra*.

The development of the case law alluded to above leads this Court to conclude that the Dorsey/Bankhead subcontract does not fall within the realm of “other terms and conditions of employment.” We are mindful that certain subcontracting agreements must be submitted to union bargaining; however, we believe that the type of employment relationship involved here does not warrant union bargaining.

The Board is correct in its finding that the work performed at Bankhead is the same type of work performed at the Northumberland plant. In both instances the relevant work is the building of trucks. But, in light of management’s underlying reasons for subcontracting, i.e., to avoid lost sales, this, without more, does not justify mandatory bargaining. Our review of the records and transcripts below convinces us that Dorsey’s reasons for entering into a subcontracting agreement with Bankhead properly centered around the scope and direction of Dorsey’s future viability.

Id. at 131-32.

In *Oklahoma Fixture Co.*, 314 NLRB 958, 960 (1995), the employer elected to subcontract its electrical work because it was concerned about legal liability that might cause it to lose Dillard’s Department Store — its largest customer who accounted for more than 95 percent of its revenue. The Board found that this was a core entrepreneurial decision that need not be bargained.

Accepting as we do the credited reasons for the Respondent's decision, we find that it involved considerations of corporate strategy fundamental to preservation of the enterprise. We further find that the Union had no authority or even potential control over the basis for the decision. Therefore, we conclude that the subcontracting decision was outside the scope of mandatory bargaining and that the Respondent's failure to bargain over it did not violate Section 8(a)(5) and (1) of the Act.

The decision to subcontract the work to Callahan like that in *Oklahoma Fixture Co.* was a core entrepreneurial decision that was not amenable to the collective bargaining process. Con Edison had issued its Standard Terms & Conditions mandating only the use of labor affiliated with the B&CTC. There was nothing Tri-Messine or the union could do to change that during bargaining. Moreover, Al Messina had made numerous attempts to try and change Con Edison's mind. This included:

- offering Con Edison an extension of the contract for one year at no additional cost (516-517, 199-200).
- offering Con Edison an extension of the contract for one year at a 5% discount (Id.)
- attempting to convince Con Edison that Tri-Messine was not covered by the Standard Terms & Conditions because B&CTC labor as not "available" (200, 519).

Indeed, not only did Tri-Messine seek to change Con Edison's decision, Local 175 tried as well. Anthony Franco testified that he and Roland Bedwell met with Michael Perrino, Section Manager for Con Edison, in 2014, but were told that this decision had been made from the "higher ups" and would not be changed (386).

All of these options were rejected by Con Edison who demanded that Tri-Messine enter into contracts only with unions affiliated with the B&CTC or lose the work entirely to another contractor. There was nothing the union could offer Tri-Messine, i.e., this did not turn upon labor costs or any economic issues that could be dealt with through the bargaining process. Indeed, the Union admitted that there was nothing either it or Tri-Messine could do to change the

situation. (390-391). As such, there was no obligation for Tri-Messine to bargain with the union over the decision to subcontract work to Callahan.

Finally, because the subcontracting of the work to Callahan was not a mandatory subject of bargaining, there can be no § 8(d) violation. As the Board noted in *Brown Co.*, 278 NLRB 783, 784 (2006), “only a unilateral midterm modification of a mandatory subject of collective bargaining violates the Act” (emphasis in original) citing *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971). See also *Solutia, Inc.*, 357 NLRB 58, 63, (2011) (“Section 8(d) only applies to mandatory subjects of bargaining”); *FirstEnergy Generation Corp.*, 358 NLRB 842, 848 (2012) (“[t]he statutory duty to bargain, and the prohibition on unilateral changes, extends only to mandatory and not permissive subjects of bargaining. The distinction emanates from Section 8(d) of the Act, 29 U.S.C. §158(d), which defines the scope of the duty to bargain collectively as encompassing “wages, hours, and other terms and conditions of employment”).

B. Even If Tri-Messine Were Under A Duty To Bargain With The Union Over The Decision To Subcontract, It Satisfied Its Obligations And/or The Union Waived Its Right To Bargain.

As set forth *supra*, Point A., Tri-Messine had no legal obligation to negotiate with the union over its subcontracting of Con Edison work because the decision to subcontract was a non-mandatory decision not amenable to the bargaining process. Notwithstanding the fact that it had no obligation to bargain, the overwhelming evidence, including the testimony of Al Messina and Union official Anthony Franco demonstrates that (a) Tri-Messine did negotiate and meet with the union and/or (b) the union deliberately failed to timely request negotiations with Tri-Messine representatives and/or (c) even when an untimely request for effects bargaining was made and agreed to by Tri-Messine, the union failed to follow-up.

1. Messina Routinely Met With Local 175 Representatives

Messina testified that after initially finding out about Con Edison's enforcement of the new Standard Terms & Conditions in 2014, he *immediately* called the union to alert it about this issue. From the time he first found out about the "clarification" in late 2014 until the layoffs in March 2017, Messina routinely met with Roland Bedwell and Anthony Franco and discussed the situation. While the decision was being made by Con Edison, they nevertheless discussed the matter constantly. Messina met with Bedwell weekly and at least every other week with Franco. (514-515). This included the possibility of replacing 175 workers. For example, as early as the beginning of 2016 Messina and Franco testified that they met to discuss what was happening with Nico and the fact that Local 175 had just filed a complaint in federal court challenging Con Edison. Messina told Franco "that like Nico, I'd be forced to use 1010 labor to perform the work . . . and wouldn't be able to use 175 members any more. ." (518) Franco confirmed that Messina told him around that time that "he might have to sign a contract with Local 1010 if the same -- Con Ed enforced the requirement against him . . ." (318). Thus, the suggestion that the subcontracting was sprung up on the union at the last minute is entirely false. The Union knew about Messina's plans for more than one year, depending on, of course, what Con Ed was going to do.

Also, in early January 2017 after having exhausted every avenue, Messina advised Bedwell and Franco at a meeting at a diner in Syosset that he would have no choice but to subcontract the work to another company and allow 1010 workers perform the work. (528). No demand to bargain was made by the union. Messina then met with the entire workforce in early or mid-January to advise them (and again the union) that he had no choice but to layoff the men or move them into another union, *i.e.*, Teamsters or Operating Engineers. (530). Again, there was no demand to bargain. A meeting was also scheduled at Tri-Messine's attorneys' offices on

January 13, 2017 but the union did not show. (GC Exhibits 12, 22). Thereafter, Callahan signed the agreement with Local 1010 on January 13, 2017 (effective February 1, 2017) but no subcontracting had yet to take place and did not take place until March 6, 2017. Nothing prevented the Union from asking to meet with Tri-Messine to discuss the matter further at that time. Indeed, Messina testified that if something changed in the interim he simply would not have subcontracted the work to Callahan and Tri-Messine would have continued to perform the work. (239-240). The Union simply made no demand. Moreover, Messina met again with Franco (alone) at the diner on January 18, 2017 (GC Exhibit 12; 527) and advised him as to what was occurring. Thus, in January 2017, Messina had told everyone about the plan to subcontract the work. He continued to meet with the union in January and February 2017 and sent the union a letter advising them of his intentions (GC Exhibit 17-a). There was no response to the letter.

Anthony Franco confirmed Messina's testimony. He admitted that he routinely met with Messina at a nearby McDonalds to discuss the Con Edison situation. Messina never refused to meet with him. (370, 380, 411-412). Moreover, when the Con Edison situation became an issue they spoke even more frequently. (379)

In response to questioning from the General Counsel, Franco testified that:

Q Okay. Well, let's focus on May of 2016. How -- and what form did your conversations take place?

A We would speak to each other, discuss the goings on of what was happening with Con Edison and the new standard terms and conditions, the work that was related to that, what was going on, any issue with the contractors, if -- if other contractors were affected and various different topics.

Q And what, if anything, did Mr. Messina say to you during these conversations in May regarding the Con Edison work?

A There were discussions in May and prior to that about Con Edison wanting Tri-Messine and other contractors to sign contracts with Local 1010.

(365). When Messina met with Franco in January 2017, Franco testified that Messina advised him that he had no choice but to subcontract the work:

He said he's got bad news. He had to sign a contract with Local 1010 unfortunately and that he was going to do whatever he could to try to keep the guys as busy as he could, including putting [them] into other unions, you know, so that they would be able to continue to work on the Con Edison work. And he also was going to try to 1010 to see if he can get his -- some of his guys to be able to become 1010 members so that they could -- he could keep his same workforce, but it was my understanding that there was some meetings with 1010, and 1010 wouldn't allow that, but he was going to try again to try to keep the men, you know, with the company and keep everybody, you know, intact, but he was denied that by 1010.

(371).

Later, also in January 2017, when Messina made the announcement to all of the men (and union) in the Flushing truck yard that he would be subcontracting the work, there was no objection. (394). Bedwell explained to the workers that this was not something Messina wanted to do. (373-374). Of course, the fact that there would be layoffs was not unexpected by the union. Indeed in its filing with the New York State Public Service Commission (Resp. Exhibit 1), as well as in the federal court anti-trust action (Resp. Exhibit 2), Local 175 repeatedly stated that the implementation of the Standard Terms & Conditions would mean layoffs of its members by contracts, such as the one with Tri-Messine. Thus, the suggestion that Local 175 did not understand that layoffs would be forthcoming is simply untenable.²⁵

²⁵ The General Counsel did not call Bedwell as a witness to refute any of Messina's assertions about their conversations and meetings. The ALJ should therefore have invoked the "missing witness" which "allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed towards it." *See Heart & Weight Inst.*, 366 NLRB No. 53 at p. 1 (2018).

2. The Union Never Made a Timely Request to Bargain

Not only is it clear that Messina met with the union regularly and advised them of everything that was taking place, but the union admittedly never made any demand to bargain over the layoffs of its members. This is fatal to any claim under § 8(a)(5).

“The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter.” *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982).
See also Haddon Craftsman, 300 NLRB 789, 799 (1990).

. . . [T]he duty to bargain arises on a request to bargain from the union. *Kansas Education Assn.*, *supra*, 275 NLRB at 639; *Medicenter Mid-South Hospital*, *supra*, 221 NLRB at 678-679. Waiver may occur even where a union has received no formal, written notice of the proposed change if the union in fact received sufficient notice of the proposal to give it the opportunity to make a meaningful response. *American Bus lines*, 164 NLRB 1055, 1055-1056 (1967) (union must act diligently to enforce representational rights). Waiver may also occur when a union takes no action after receiving notice, *see Reynolds Metal Co.*, 310 NLRB 995, fn. 3, 1000-1001 (1993) (union’s initial request to bargain was pursued and then abandoned); *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, ft. (1993) (union must follow up where there is discussion but no agreement; silence indicates a lack of due diligence) or makes an untimely request to bargain after receiving notice. *Kansas Education Assn.*, *supra*, 275 NLRB at 639 (request to bargain untimely where one month advance notice given and request to bargain made one month after implementation).

Vigor Indus., LLC, 363 NLRB 1, 8 (2015).

In *Citizens Nat’l Bank of Willmar*, 245 NLRB 389, 389-390 (1979), the Board noted:

It is well established that it is incumbent upon a union which has notice of an employer’s proposed change in terms and conditions of employment to timely request bargaining in order to preserve its right to bargain on that subject. The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter.

(footnotes omitted).

When an employer notifies a union of proposed changes in terms and conditions of employment, or where the union receives actual notice of those proposed changes, it is incumbent upon the union to act with due diligence in requesting bargaining. *RBE Electronics of S.D., Inc., supra*, 320 NLRB 80. Where the union does not act with diligence in requesting to bargain, it will have waived its rights. *Haddon Craftsmen, Id.; Jim Walter Resources*, 289 NLRB 1441 (1988) *Clark wood Corp.*, 233 NLRB 1172 (1977). Filing an unfair labor practice charge rather than requesting to bargain over impending changes will constitute a union waiver. *Newell Porcelain Co., Inc.*, 307 NLRB 877 (1992); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979).

Union-Tribune Publishing Co., 2001 NLRB LEXIS 569, at *41-42 (July 26, 2001). *See also Lapeer Foundry and Machine, Inc.*, 289 NLRB 952, 954 (1988) (“should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation”) *citing Paramount Liquor Co.*, 270 NLRB 339, 343 (1984) and *Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980); *U.S. Lingerie Corp.*, 170 NLRB 750, 752 (1968) (“the Union had sufficient notice of Respondent's intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights to bargain about the decision to move and the effect of such decision upon the employees' terms and conditions of employment”).

At the hearing Franco admitted that he never requested Tri-Messine to bargain:

Q Did you ask Mr. Messina at this meeting to bargain over the termination [or] layoffs?

A No. No, I did not

(371). Similarly, Messina never refused to meet with the Union. (515).

The General Counsel apparently maintains that the union was never under any obligation to bargain because the proposed changes were presented as a *fait accompli*. *See, e.g., Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004) and 343 NLRB 84 (2004). But in that case the

employer provided last minute changes to the union. Here, Messina was discussing and meeting with the union for months, if not years, since the 2014 Standard Terms & Conditions were issued. He did not present it as a *fait accompli* as he even tried to convince Con Edison to allow him to use Local 175 labor or extend his contract. If anyone, it was *the union* who considered Con Edison's conduct to be a "*fait accompli*." Franco testified as follows:

Q Did you say . . . in your affidavit, "I did not ask Mr. Messina to bargain over the last because it was a done deal. The decision had already been made by Con Ed;" did you say that?

A If that's what the affidavit says, yeah, that's what I said.

(393, emphasis added). Thus, it was *the Union* that considered the situation to be a *fait accompli* because *Con Edison* made the decision.²⁶ Indeed, Messina in response to a question from Judge Gardner, testified that if something changed at the last minute, *i.e.*, Con Edison changed its mind, he would not subcontract the work. (239-240). For more than two months in 2017 Tri-Messine continued to perform the work but there was no demand by the union to bargain.

3. Tri-Messine's Offers to Meet Were Ignored

The refusal to bargain charge is all the more frivolous given the fact that Tri-Messine, upon request of counsel for Local 175, agreed to meet with its and Local 175's representatives only for Local 175 to fail to even attend the meeting. In January of 2017 counsel for Local 175 contacted counsel for Tri-Messine and asked to have a meeting to discuss the issues relating to the Standard Terms & Conditions and their effect on Local 175 members. A meeting was scheduled for January 13 but the union did not show and did not call. Eventually the union advised Messina that it did not want to meet with the attorneys (*See* GC Exhibit 10). While Messina testified that he did in fact meet with Franco the following week, the fact remains that

²⁶ As noted, in the months and years prior to the subcontracting of work in March 2017, Local 175 had claimed in pleadings that Con Edison's clarification of the Standard Terms & Conditions would result in layoffs and loss of jobs for its members. (*See* Resp. Exhibits 1 and 2).

Tri-Messine and its counsel immediately responded to the union request to meet and discuss the issues facing them.²⁷ The union, however, not only failed to show up to the meeting, but then insisted that any meetings take place without counsel present.²⁸

In February 2017 Tri-Messine sent a letter to the union advising of its intent to subcontract and its reasons and also wrote that “if you would like to discuss this, please feel free to contact me.” (GC Exhibit 17-a). There was no response from the union.

On March 27, 2017 counsel for Local 175 sent an e-mail to Tri-Messine’s counsel asking if they could speak “regarding a variety of issues stemming from allegations of alter ego and joint employer.” Counsel for Tri-Messine expressed a willingness to speak, but there was no follow up from Local 175. (Resp. Exhibit 4).

Further on May 12, 2017 counsel for Local 175 sent an e-mail to counsel for Tri-Messine requesting that the parties meet to bargain a new contract. (See GC Exhibit 24-c). Counsel for Tri-Messine responded noting that Tri-Messine had terminated the contract and attached letters evidencing the termination. (See GC Exhibits 24-c and 24-b). Nonetheless counsel for Tri-Messine specifically agreed to meet to “discuss any concerns you might have under the current agreement.” (GC Exhibit 24-c) (emphasis added). Counsel for Local 175 acknowledged that a letter terminating the contract had been received but insisted that Tri-Messine still needed to

²⁷ In his decision, the ALJ completely mischaracterizes these events by describing them as “[t]hrough the attorneys agreed to meet on January 13, 2017, the same day Callahan signed the Local 1010 CBA, that meeting never took place, as the parties met instead without counsel the following week.” Dec. p. 6. He thus ignores the fact that the union improperly refused the offer of Tri-Messine to having a meeting with counsel present.

²⁸ This, of course, was improper as § 8(b)(1)(B) makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of its representatives for purposes of collective bargaining. *See Int’l Bhd of Elec. Workers*, 296 NLRB 1095, 1101 (1989) (“when a union engages [refuses to meet or otherwise recognize the] . . . employer representatives, it violates Section 8(b)(1)(B) because of the restraint on the employer’s selection of its representatives, and it violates Section 8(b)(3) because such conduct does not meet the requirements for good-faith bargaining. An underlying theory of the 8(a)(5) and 8(b)(3) violations in many cases is that insistence on the other party’s being represented by someone other than its chosen representatives amounts to an insistence on a non mandatory, *i.e.*, permissive, subject of bargaining.”).

negotiate a new collective bargaining agreement with Local 175. (See GC Exhibit 24-a). Then, *for the first time*, on May 18, 2017, counsel for Local 175 raised the issue of bargaining over the effects of the subcontracting. (*Id.*). Thereafter on May 22, 2017 counsel discussed the situation. On May 23, 2017 counsel for Tri-Messine sent an e-mail stating its position that Tri-Messine had elected to terminate the agreement effective June 30, 2017 but was still willing to meet to discuss the impact of decisions on Local 175 members, despite the passage of several months. Counsel for Tri-Messine noted that it would wait to hear from counsel as to how Local 175 planned to proceed. Local 175 failed to respond any further. (See GC Exhibit 24-a).

BY MR. REINHARZ: I did indicate in my email to you on May 24, 20 -- that Tri-Messine was willing to discuss the impact of certain decisions, such as the layoffs. Isn't that right?

A Your email advised a willingness to meet to discuss impact of certain decisions on 175 members.

Q And did you follow up with me in response to this email?

A I don't believe I did.

* * * *

Q I never told you that I would never talk to you about the issues facing Tri-Messine; is that fair to say?

A That's fair to say.

Q Okay, I was willing -- I talked to you on the phone whenever you called, or sent me an email, I responded to you; isn't that right?

A That's correct.

Q I never said I'm not willing to negotiate; isn't that right?

A That's correct.

(339, 341).

In *Taylor-Winfield Corp.*, 1995 NLRB LEXIS 502, at *10-11 (May 30, 1995), it was held that when a union had waited months to request bargaining over the effects of a decision to close a plant, it had waived its rights to engage in "effects" bargaining:

In this case, the Union did not request "effects" bargaining until well over 4 months following notification of the tentative plant closing decision, which was, itself, accompanied by an invitation to engage in bargaining about the decision and its effects. Indeed,

the Union's December 15, 1993, request to bargain about "effects," came fully 2 months after it was notified that the decision to close had been finalized and effectuated. When the parties, finally, did meet, on December 23, the Union made no concrete proposals, even at that very late date, but simply listed topics for discussion. The record evidence provides no explanation for the failure of the bargaining representative to take advantage of the opportunity to bargain.

I conclude that, under the governing case law, the Union, by its months of unexplained inaction, waived its right to engage in "effects" bargaining concerning closure of the Warren, plant. Accordingly, the refusal to bargain allegations must be dismissed.

See also Sierra Int'l Trucks Inc., 319 NLRB 948, 950 (1995) ("the Board, in determining whether a union has waived its right to bargain regarding effects of a sale or closure on bargaining unit employees, has looked to whether the union requested such bargaining within a reasonably brief period of time following notice of the sale or closure"); *Ogden Ent's Servs., Inc.*, 1995 NLRB LEXIS 806, at *19 (Aug. 24, 1995) quoting *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954 (1988) ("[o]nce an employer has notified a union, it is essential that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the decision, we find that the company has satisfied its bargaining obligation.").

In light of the fact that Tri-Messine notified the union as early as 2016 that it was seeking to subcontract the work and use 1010 labor if Con Ed required it to do so (and of course the union knew months, if not years, before that the Standard Terms & Conditions would negatively impact its members (Resp. Exhibits 1 and 2)), any request for impact bargaining in May 2017 was much too late. It is all the more untimely given the fact that the union admitted that when advised of the situation 2016 and January 2017 it did not ask to bargain over these issues. Further, even though the effects bargaining request was untimely, Tri-Messine expressed willingness *in writing* to meet over this issue, but the union never followed up to schedule a

meeting. As such, any claim that Tri-Messine failed to bargain over the effects of the decision to subcontract is completely without merit.

In short, there simply was no failure to bargain with Local 175 over the decision to subcontract and/or lay off workers and/or effects.

POINT IV THE ALJ ERRONEOUSLY FOUND THAT TRI-MESSINE VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY TERMINATING ITS EMPLOYEES

The ALJ concluded that “the fact that so many of the terminated employees were either immediately or subsequently hired by Callahan upon affiliating with a different union demonstrates beyond a doubt that Respondent’s conduct had as its primary purpose and result the discouraging of membership in Local 175.” This conclusion stands logic on its head. Tri-Messine always had a strong relationship with Local 175. Messina socialized with many of the members and invited them to his home in Pennsylvania. His actions were not intended to discourage memberships in Local 175; rather his purpose was to save the jobs of his employees.

Once Con Edison advised Tri-Messine that it could not perform the work using Local 175 labor, the work was subcontracted to Callahan who in turn used labor that was approved by Con Edison. Local 1010, insisted, however that all employees be hired through the 1010 hiring hall. In fact, if Callahan failed to follow these procedures, it could be subject to stiff penalties. (*See* GC Exhibit 11 at pp. 5-6). Callahan initially offered Local 1010 to pay its employees more than 1010 had even requested if it could use the existing Tri-Messine work force. Local 1010 refused. Callahan then made additional proposals but these too were rejected by Local 1010. (*See* GC Exhibit 10). Callahan did everything possible to try and persuade Local 1010 to allow existing Local 175 Tri-Messine employees to move directly from Tri-Messine to Callahan. Seventeen workers were immediately moved to Local 282 and Local 15. (GC Exhibit 16). These individuals were either paid the significantly higher Local 15 wage rate, or if the employee

moved to Local 282, they continued to be paid the higher Local 175 wage rate. Other employees that went to the Local 1010 and were eventually hired by Callahan over the next several months were also paid the higher Local 175 rate of pay. Everyone who had worked for Tri-Messine before March 2017 was offered a job and most accepted the offer.²⁹ To suggest there was animus here against individuals Messina socialized with, considered to be his friends, and who he did everything possible to find union jobs for, is completely without merit.

Indeed, the necessary elements of a § 8(a)(3) violation include: union or other protected concerted activity by employees, employer knowledge of the activity, and a connection between the union animus by the employer and the adverse employment action. *See, e.g., Consol. Bus Transit*, 350 NLRB 1064, 1065 (2007); *Desert Springs Hosp. Med. Ctr.*, 352 NLRB 112 (2008); *Am. Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). Here there is no evidence of any protected activity by Tri-Messine's employees that led to any decision not to hire.

Moreover, there was no timely charge asserted alleging a §8(a)(3) violation. As set forth above, the first charge (29-CA-194470) herein was filed on March 7, 2017 alleging violations under § 8(a)(1), (2), (3) and (5) of the Act. However, on April 28, 2017 the Board approved withdrawal of the alleged unlawful termination of employees in violation § 8(a)(1) and (3). While a second charge in Case No. 29-CA-206246 was filed on September 14, 2017 asserting violations of § 8(a)(3) for the termination of Local 175 employees, the charge clearly sought to relitigate what already had been withdrawn as of April 28, 2017. Further, Tri-Messine

²⁹ Of the 44 former Tri-Messine regular employees represented by Local 175 listed in GC Exhibit 12, 33 are listed as working for Callahan as of December 2017 in one of its three unions. One additional employee, Christopher Smith, joined Callahan since the chart was created. (157-159). Of the 34 employees working for Callahan, 29 obtained jobs immediately or the following month April. Of the 10 employees who were not employed by Callahan, five specifically declined offers (Salvatore Alaimo, Antonio Astuto, Charlie Falzone, Robert Maresco and Giovanni Sciove), two are on workers' compensation (Abip Stebleva and Patrick Taylor) and the reasons for the remaining three are listed as "unknown" (Jonathan Otten, Salvatore Pecoraro and Frank Wolfe) (GC Ex. 12). Of course, Wolfe was called as a witness for the General Counsel and testified that he is working for New York Paving as a member of Local 175. (253). Thus, almost everyone who had been working for Tri-Messine who wanted to work for Callahan was ultimately hired.

subcontracted the work to Callahan on March 6, 2017 – and those employees were laid off more than six months prior to the filing of the new charge. Section 10(b) of the Act provides that “no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” The fact that the earlier charge was withdrawn is of no moment as the Board “treat[s] withdrawn and dismissed charges alike and [does] not allow the reinstatement of either beyond the 6-month limitations proviso absent fraudulent concealment by the respondent.” *Northwest Towboat Ass’n*, 275 NLRB 143, 144 (1985), citing *Ducane Heating Corp.*, 273 NLRB 1389, 1391 (1985). Thus, any claim of any unlawful termination of employees was either dismissed or is untimely.

POINT V THE REMEDY PROVIDED IS PUNITIVE IN NATURE

The remedy provided by the ALJ is inappropriate and punitive. First, it ignores the fact that Tri-Messine properly terminated the collective bargaining agreement effective June 30, 2017. Under well settled precedent, Tri-Messine was under no obligation to continue pension or welfare benefits after that date. Indeed, as noted as of that date its contractual and statutory obligations ceased as of June 30, 2017.³⁰ No payments need be made from that date forward.

Second, as previously noted, if Tri-Messine did not subcontract the work to Callahan it would have been ineligible to work for Con Edison. Approximately 97% of its business would have been lost and it would have gone out of business resulting in unemployment for all (503). All 44 Local 175 employees of Tri-Messine would have lost their jobs if the work was not subcontracted. Instead, 17 employees were immediately hired by being placed in other unions (often at higher wage rates, and received pension and welfare benefits). The overwhelming majority of remaining employees who wished to work for Callahan were ultimately hired and receive the same OR BETTER wages and benefits than they did prior to the subcontracting. (GC

³⁰ See Point I A, *supra*.

Exhibit 16).³¹ Thus even a limited remedy of back pay would under the special circumstances of this case be punitive as many of the employees continued to receive the same or better wages after the work was subcontracted to Callahan, *i.e.*, with no loss of employment. “The remedy chosen [by the Board] must ‘achieve the remedial objectives which the [NLRA] sets forth.’” *Yorke v. NLRB*, 709 F.2d 1138, 1144-45 (7th Cir. 1983), *cert. denied* 465 U.S. 1023 (1984) (*quoting Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-11 (1940)). Indeed, during the hearing it was undisputed that Callahan had paid over \$2,500,000 in pension and welfare benefits to the 1010 funds during the period March 2017- February 2018. (541). The benefits Callahan employees currently receive are comparable to what they were receiving under the Local 175 contract. (488-489).

“A make-whole remedy . . . should place the employee in the same position she would have been in had the unlawful discrimination not occurred.” *Hotel Emples. & Rest. Emples. Int’l Union, Local 26*, 344 NLRB 567, 568, (2005). Accordingly, rather than being remedial, any remedy requiring the payment of any monies would be punitive as it would result in employees or funds receiving compensation far greater than what they would have received if the subcontracting had not taken place, *i.e.*, jobs vs. no jobs or double payment of fund contributions. “In a regulatory and remedial statute such as the Act the sanctions are not punitive or retributive in nature.” *Booster Lodge No. 405*, 185 NLRB 380, 392 (1970). “The remedies for violations of the Act are remedial in nature and not punitive in nature.” *Ryan Iron Works, Inc.*, 345 NLRB. 893, 902 (2005). *See also Interplastic Corp.*, 270 NLRB 1223, 1227 (1984) (“the Act is remedial, not punitive, in its aims”).

Further, demanding that Tri-Messine bargain with Local 175 would serve no purpose as there is virtually no work that Local 175 can perform. Demanding that Tri-Messine or Callahan

³¹ See n. 29.

recognize 175 and use 175 labor would result in it being disqualified from performing Con Edison work. This would result in the loss of jobs for all of Callahan's employees. This is certainly contrary to NLRA's goal of "protect[ing] the right of workers . . ." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962). *See also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754, 105 S. Ct. 2380, 2396 (1985) *citing* 29 U. S. C. § 151 ("the ultimate goals of the Act [which] was the resolution of the problem of '[depressed] wage rates and the purchasing power of wage earners in industry.'" It would, of course, also be contrary to the clear "Term Renewal" provision of the agreement (GC Exhibit 6) the parties negotiated in which they agreed that either party could terminate as of June 30, 2017 with no obligations to one another thereafter.

In short, not only have there been no violations by the Respondents but any remedy at this point would be punitive and/or resulting in the loss of jobs and wages for all employees.

CONCLUSION

For all of the foregoing reasons, the decision of the ALJ should be reversed and the complaint dismissed in its entirety.

Dated: Garden City, New York
January 14, 2019

BOND, SCHOENECK & KING, PLLC

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CERTIFICATE OF SERVICE

I certify that on this 14th day of January, 2019 I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nlrb.gov> and a copy of same to be served by e-mail on the following parties of record.

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