

**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

**EXCEPTIONS OF RESPONDENTS TO DECISION OF  
ADMINISTRATIVE LAW JUDGE AND PROCEEDINGS  
AND REQUEST FOR ORAL ARGUMENT**

Respondents Tri-Messine Construction Co., Inc. and Callahan Paving Corp., by their attorneys Bond. Schoeneck & King, PLLC, pursuant to §102.46 of the National Labor Relations Board Rules and Regulations, takes exception to the following findings, conclusions and recommendations of the Administrative Law Judge (“ALJ”) dated on December 17, 2018.

1. The Respondents except to the findings that there was “no credible evidence of a clear waiver,” that the Union waived its right to bargain over the terms and conditions of employment” ALJ Dec. at p 2, fn. 3; Tr. 371, 393, GC Ex, 10.

In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

2. The Respondents except to the findings that “Tri-Messine historically obtained [from Con Edison] in the range of 90% of its revenue” ALJ Dec. p. 5: 13-14.

Con Edison was 97% of Tri-Messine’s business in 2016. Tr. 564. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

3. The Respondents except to the findings that “Messina testified that he *believed* that Con Ed was ready to enforce the provision, and at some point would not continue giving Tri-Messine the work unless it had an agreement with a BCTC union.” Dec. , p. 5; 31-33.(emphasis added).

Messina was repeatedly told by Con Edison that work under the new contract must be performed by a BCTC union. (Tr. 92, 98, 369, 459-460, 465, 467, 520, 523, 561). In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

4. The Respondents except to the findings that “[n]o evidence was presented that Local 175 workers were ever turned away from a Con Ed worksite because of their union affiliation. Dec. p., 5; 41-42.

Messina was repeatedly told by Con Edison that he needed to sign a contract with a BCTC union in order to continue to perform Con Edison work. (Tr. 92, 98, 369, 459-460, 465, 467, 520, 523, 561). In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

5. The Respondents except to the findings that “[a]t the time Callahan signed its CBA with Local 1010, the Union remained unaware of the creation of Callahan, and unaware that both Tri-Messine and Callahan had been negotiating with Local 1010 for recognition and a contract.” Dec. p. 6:23-25.

The Union was advised in advance that the work would have to be given to Local 1010. Tr. 518, 528. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

6. The Respondents except to the findings that "[i]was not until after Callahan signed its Local 1010 CBA that Messina finally advised the Union of Callahan's existence, and that Tri-Messine was soon going to be laying off employees." Dec. p. 6:23-25;

The Union was advised in advance that the work would have to be given to Local 1010 and the union further failed to meet with Respondents' attorneys to discuss the matter. Tr. 388, 518, 528; GC Exs. 12, 22. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

7. The Respondents except to the findings that "prior to the actual signing of the Local 1010 CBA, there were only rumors that Tri-Messine was creating an alter ego and dealing with Local 1010." Dec. p. 6:31-325

Bothe Messina and Franco testified that in 2016 and 2017, before the Callahan contract was signed, that they discussed the fact that the work would have to be performed by Local 1010. Tr. 388, 518, 528; GC Exs. 12, 22. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

8. The Respondents except to the findings that "though 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: 34-36.

The *Union* cancelled the January 13, 2017 meeting insisting that no attorneys need be present (GC Exhibits 12, 22); Tr. 120, 124-125, 127, 295. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

9. The Respondents except to the findings that on January 18, 2017 "Messina advised Franco at this meeting that Callahan had been created, and that it had already signed a CBA with Local 1010." Dec. p. 6: 38-42.

Messina testified the meeting was in early January 2017 and Franco testified that he was told in 2016 that the work would have to be performed by Local 1010. Tr. 388, 518, 528. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

10. The Respondents except to the findings that "Franco testified that he did not request to bargain at that time, in part because the Union already had a contract that was still in effect, and in part because this new entity had already signed a contract with Local 1010." Dec. p. 6, 42-45.

Franco testified that he did not ask Mr. Messina to bargain because it was a "done deal" as "the decision had already been made by Con Ed." Tr. 393. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

11. The Respondents except to the findings that "for Tri-Messine employees who also held membership in Local 282 Teamsters Union or Local 15 Operating Engineers Union (or who had the qualifications to join one or the other of those unions, with which both Tri-Messine and Callahan had signed contracts Messina was apparently able to by-pass the Local 1010 hiring hall requirement and have Callahan hire those employees directly as members of Local 282 or Local 15." Dec. p. 7: 17-21.

The employees who performed work for the other unions did not bypass Local 1010 as they were doing other kinds of work performed by the particular union. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

12. The Respondents except to the findings that “[o]nly nine of the former Tri-Messine employees were never offered employment by Callahan.” Dec. p. 7: 28-29

Of the 10 employees who were not employed by Callahan, five specifically declined offers, two were on workers' compensation, and one testified that he wanted to remain with Local 175 (253). Only two individuals were not offered because their whereabouts were unknown. GC. Ex.

12. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

13. The Respondents except to the findings that “[t]he Union was neither informed of nor bargained with over the decision to subcontract all of Tri-Messine's work. Dec. p. 7: 40-41

The Union was advised in advance that the work would have to be given to Local 1010 and the union further failed to meet with Respondents' attorneys to discuss the matter despite offers. Tr. 127, 388, 518, 528; GC Exs. 12, 22. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

14. The Respondents except to the findings that “Messina acknowledged that he intentionally held off on notifying the Union of this until the February 28, 2018 letter in which Tri-Messine characterized Local 175 members as no longer being qualified to perform the work.” Dec. p. 7: 41-43.

Messina testified that waited to send the letters because he was hoping that Local 175 would be able to change the BCTC and therefore no subcontracting would be necessary. Tr. 233. Messina

testified that at meetings in early 2016 and in early January 2017 he told the Union that the work would have to be performed by Local 1010. Franco testified that he was told by Messina in 2016 that the work would have to be performed by Local 1010. Tr. 388, 518, 528. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

15. The Respondents except to the findings that prior to February 28, 2018, "although aware of Callahan's creation from Messina's conversation with Franco, the Union did not know of Tri-Messine's plans to lay off all of its employees." Dec. p. 8:1-2.

Messina testified that in December 2016 and at a meeting in early January 2017 he told the Union that the work would have to be performed by Local 1010. Franco testified that he was told by Messina in 2016 that the work would have to be performed by Local 1010. Tr. 388, 518, 528.

16. The Respondents generally except to the credibility findings. Dec. p. 8: 13-50 and 9:1-2.

In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

17. The Respondents except to the findings that Michael Perrino was "equivocal when it came to the specifics of whether Tri-Messine could have continued performing Con Ed work with its existing employees – standing by the STCC language on the one hand, but acknowledging that Con Ed had never actually enforced it and never directed." Dec. p. 8:40-42. Perrino bluntly testified that he told Al Messina that the Con Ed contract would not be awarded if the labor providing the work was not in accordance with the STCC (Tr. 459-460, 465, 467). In

addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

18. The Respondents generally except to the findings that Tri-Messine and Callahan were alter egos. (Dec. pp. 9 – 12). The bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

19. The Respondents except to the findings that “the facts of this case conclusively show that Tri-Messine and Callahan share the same business purpose.” Dec. p. 10:25-26. Callahan was formed to perform work which Tri-Messine was unable and/or unqualified to perform. Tr. 303, 529. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

20. The Respondents except to the findings that there is substantial evidence that Callahan was formed as a way to avoid Tri-Messine's agreements with the Union and thus the Act's bargaining requirements. Dec. p. 11:37-38

The Local 175 Agreement only covered “qualified employees.” As of March 2017, once Con Edison insisted that only unions affiliated with the BCTC be used to perform its work, the Local 175 employees were no longer qualified. (GC Exhibit 6, p. 9). In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

21. The Respondents except to the findings that “Callahan was formed to avoid dealing with the Union and to avoid bargaining obligations under the Act.” Dec. p. 11:46-47 Callahan was formed to use labor that could perform the work that Tri-Messine could not perform. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

22. The Respondents except to the findings that “it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union.” Dec. p. 12:3-4.

Callahan was not an alter ego, Respondents were not required to bargain with the union over a non-mandatory subject of bargaining and in any case, did offer to meet with the union to discuss this issues but the union was not interested in meeting with attorneys present. Tr. 120, 124-125, 127, 295, 388, 393 518, 528; GC Exs. 12, 22. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

23. The Respondents except to the findings that “one entity was formed or used to replace the duly elected collective bargaining representative with a different union in violation of the Act.” Dec. p. 12:11-13.

Callahan was formed to use labor that could perform the work that Tri-Messine could not perform. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

24. The Respondents except to the findings that Callahan was and is the alter ego of Tri-Messine, it is subject not only to the bargaining obligations of Tri-Messine, but also to the continued application of the bargaining agreement binding Tri-Messine.” Dec. p. 12:21-23.

As described above, Callahan and Tri-Messine were not alter egos. Moreover, neither Callahan nor Tri-Messine had any obligation to the Union after June 30, 2017, i.e., no obligation to negotiate a new contract or continue terms and conditions as Tri-Messine terminated the agreement effective June 30, 2017. GC Ex. 6, Article IV, GC Ex. 24a, 24b. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

25. The Respondents except to the findings that “Callahan, Tri-Messine’s alter ego, had repudiated the Local 175 CBA and the collective bargaining relationship with Local 175, in violation of the Act.” Dec. p. 12:39-40

Callahan is not the alter ego of Tri-Messine. The work performed by Callahan as of March 6, 2017 was work that could not be performed by Tri-Messine. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

26. The Respondents except to the findings 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.” Dec. p. 12;43-45.

The *Union* considered the situation to be a “done deal” because “the decision had already been made by Con Ed.” Tr. 393. Respondents never refused to meet with the Union (Tr. 393) and in fact discussed the situation with the Union for months in advance although the union refused to meet with Respondents and their attorney. Tr. 388, 518, 528; GC Exs. 12, 22. In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

27. The Respondents except to the findings that “[b]ecause . . . Tri-Messine and Callahan were and are alter egos, the Union’s prior bargaining agreement with Tri-Messine remains valid and continues to apply to Callahan’s bargaining unit employees.” Dec. p. 13:17-19.

Tri-Messine and Callahan were not alter egos. Moreover, even if Tri-Messine and Callahan were alter egos, the Tri-Messine agreement terminated on June 30, 2017 eliminating any obligations

as of June 30, 2017. GC Ex. 6, Article IV, GC Ex. 24a, 24b. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

28. The Respondents except to the findings that "Callahan, as the alter ego of Tri-Messine, was required to recognize Local 175, and Respondents violated the Act when Callahan instead recognized Local 1010 as the collective bargaining representative of its employees." Dec. p. 13:19-21.

Callahan was not an alter ego of Tri-Messine and Callahan was performing work that Tri-Messine was unable to perform. Tr. 303, 529. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

29. The Respondents except to the findings that the fact that "it was [the employees'] Local 175 affiliation that resulted in their terminations cannot seriously be disputed. Dec. p. 13: 29-30.

Local 175 members could not perform the work because the customer, Con Edison determined that it did not meet the STCC previously issued and were now being enforced. (GC Ex, 8, 17-a). In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

30. The Respondents except to the findings that "Respondent's conduct had as its primary purpose and result the discouraging of membership in Local 175." Dec. p. 13:34-35. The purpose of Respondents' conduct was to stay in business and perform work for Con Edison and keep everybody working. Tr. 544. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

31. The Respondents except to the findings that “Tri-Messine terminated its employees solely because of their membership in Local 175, and that but for that union membership, they would not have been terminated.” Dec. p. 13:45-46.

Local 175 could not perform the work because the customer, Con Edison determined that Local 175 did not meet the STCC previously issued and were being enforced. (GC Ex, 8, 17-a). In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

32. The Respondents except to the findings that the “terminations violated Section 8(a)(3) and (1) of the Act.” Dec. p. 13:47-48.

The purpose of Respondents’ conduct was to stay in business and perform work for Con Edison and keep everybody working. Tr. 544. In addition, Local 175 could not perform the work because the customer, Con Edison determined that it did not meet the STCC previously issued and were being enforced. (GC Ex, 8, 17-a). In addition, the bases of these objections are described more fully in Respondents’ Brief in Support of Exceptions.

33. The Respondents except to the finding that it was unproven that Tri-Messine could not continue to perform Con Edison work. Dec. p. 14; 9-11.

Messina testified that he was told by several individual at Con Edison that only Local 1010, i.e. unions affiliated with the BCTC could perform the work. Tr. 92, 98-99, 101, 200, 513-514, 519-520, 523-524. Michael Perrino likewise testified that 1010 workers would have to be used. Tr. 459-460, 465, 467. Similarly Local 175 filed pleadings in an anti-trust case against Con Edison specifically asserting that Con Edison was not permitting contractors to use Local 175 labor. Resp. Ex. 2, ¶¶ 33, 34, 39, 41, 42, 45, 49, 51, 57, 66, 72, and 90. Local 175 made the same assertions in a state court proceeding. *See* Resp. Ex. 1, pp., 5-6, 7, 8. Franco testified that it

would not have made sense for Messina to keep the 175 workers because he would then have lost the contract. Tr. 390. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

34. The Respondents except to the finding that Respondents ignored the collective bargaining agreement between Tri-Messine and Local 175. Dec. p. 4: 23-24.

The Tri-Messine collective bargaining agreement covered qualified employees and by definition, Local 175 workers were not qualified to perform the Con Edison work as of March 6, 2017. GC Exhibit GC Exhibit 6, p. 9). In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

35. Respondents except to the findings that Respondents sought to conceal Callahan from the Union. Dec. p. 14:31-32.

Both Messina and Franco testified that in 2016 and 2017, before the Callahan contract was signed, they discussed the fact that the work would have to be performed by Local 1010 because of the enforcement of the STCC by Con Edison. Tr. 388, 518, 528; GC Exs. 12, 22. Moreover, the work was not subcontracted to Callahan until March 6, 2017. GC Ex. 14. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

36. Respondents except to the findings that it is not disputed that Messina did not advise the Union of Callahan's creation or of its negotiations with Local 1010 until after Callahan had signed a CBA with Local 1010. Dec. p. 14:38-40.

Both Messina and Franco testified that in 2016 and 2017, before the Callahan contract was signed, they discussed the fact that the work would have to be performed by Local 1010 because of the enforcement of the STCC by Con Edison.. Tr. 388, 518, 528; GC Exs. 12, 22. Moreover,

the work was not subcontracted to Callahan until March 6, 2017. GC Ex. 14. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

37. Respondents except to the findings that "Patricia [Messina] was made the owner of Callahan, despite being uninvolved in its operations and with no experience in the operations of Tri-Messine before that, can only be explained by the intent to create the false appearance of Callahan's being a separate entity from Tri-Messine." Dec. p. 13:34-35

Other than being Mr. Messina's wife there is nothing in the record to show that this was done to create a false appearance. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

38. Respondents except to the findings that "it is clear that indeed there was an attempt to conceal even the creation of the alter ego in this case. And Messina specifically withheld from the Union the plan to subcontract the entirety of Tri-Messine's operations to the new entity until immediately prior to its implementation. Dec. p. 14:40-43.

Bothe Messina and Franco testified that in 2016 and 2017, before the Callahan contract was signed, they discussed the fact that the work would have to be performed by Local 1010 because of the enforcement of the STCC by Con Edison. Tr. 388, 518, 528; GC Exs. 12, 22. Moreover, the work was not subcontracted to Callahan until March 6, 2017. GC Ex. 14. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

39. Respondents except to the findings that there was harm done to the employees by the subcontracting of work to Callahan. Dec. p. 14: 44-49; p. 15: 1-25.

Both Messina and the union recognized that if Tri-Messine did not subcontract the work to Callahan, all of the employees would have lost their jobs. Tr. 503, 390. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

40. Respondents except to the finding that the allegations in the complaint based on the amended charge in Case. No. 29-CA-194470 and 29-CA-206246 were timely, Dec. pp. 15-16. Neither of the aforementioned charges were filed within 6 months after the alleged unfair labor practices and do not relate back to the original charge. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

41. Respondents generally except to all conclusions of law in the decision. Dec. pp. 16-17. The bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

42. Respondents except to the finding that Tri-Messine Asphalt Paving, Inc. and Callahan Paving, Corp. were and are alter egos of each other. Dec. p. 16:32-33. Callahan was not the alter ego of Tri-Messine as Callahan was performing work that Tri-Messine was unable to perform. Tr. 303, 529. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

43. Respondents except to the finding that "by failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees, Tri-Messine Asphalt Paving, Inc., has violated Section 8(a)(5) and (1) of the Act." Dec. p. 16:35-37. Respondents were not required to bargain with the union over a non-mandatory subject and in any case, did offer to meet with the union to discuss this issues, did discuss this issue with the union on numerous occasions but the union was not interested in meeting with attorneys. Tr. 120,

124-125, 127, 295, 388, 393 518, 528; GC Exs. 12, 22 In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

44. Respondents except to the finding that by failing and refusing to apply the Tri-Messine bargaining agreement that its alter ego, Tri-Messine Asphalt Paving, Inc. had and continues to have with the Union, Callahan Paving, Corp. violated Section 8(a)(5) and (1) and 8(d) of the Act. Dec. p. 16: 39-41

Respondents maintain that the subcontracting was a non-mandatory subject of bargaining not covered by §8(d) and that they were not alter egos as Tri-Messine could not perform the work in question. Tr. 303, 529. GC Ex. 17-a. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

45. Respondents except to the finding that recognizing Local 1010 as the collective bargaining representative of its unit employees, while still bound by the agreement with Local 175, Callahan Paving, Corp. violated Section 8(a)(2) and (1) of the Act. Dec. p. 16:1-3

Local 175 could not perform the work in question (GC Ex, 8, 17-a) and the charge itself is untimely. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

46. Respondents except to the finding that "by terminating all of its employees on March 3, 2017, Tri-Messine has violated Section 8(a)(3) and (1) of the Act." Dec. p. 15:5-6.

The purpose of Respondents' conduct was to stay in business and perform work for Con Edison and keep everybody working. Tr. 544. In addition, Local 175 could not perform the work because the customer, Con Edison determined that it did not meet the STCC previously issued and were being enforced. (GC Ex, 8, 17-a).

47. Respondents generally except to the remedy imposed. It is inappropriate and punitive in nature. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

48. Respondents generally except to the Order. It is inappropriate and punitive. In addition, the bases of these objections are described more fully in Respondents' Brief in Support of Exceptions.

49. To the extent that Respondents' Brief in Support of the Exceptions references any of the ALJ's findings/conclusions not excepted above, Respondents except to those findings/conclusions.

50. Respondents respectfully request oral argument on these important issues.

January 14, 2019  
Garden City, New York

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I certify that on this 14<sup>th</sup> 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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