

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

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

Respondents

Case 29-CA-194470
29-CA-206246

and

CC LOCAL 175, UTILITY WORKERS OF
AMERICA, AFL-CIO

Charging party

and

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

Party in Interest

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. STATEMENT OF THE CASE

In its exceptions to the Administrative Law Judge's ("ALJ") Decision, Tri-Messine Construction Co., Inc. and its alter ego Callahan Paving Corp., ("Respondent") fails to establish that the ALJ made any factual or legal error in his well-reasoned and supported Decision. Rather, Respondent asks the Board to ignore decades of well-settled law in order to exonerate Respondent's unlawful scheme of repudiating its collective bargaining agreement with Construction Council Local 175, UWUA, AFL-CIO ("Local 175"), unilaterally creating an alter ego to which it transferred all bargaining unit work, and terminating its entire workforce based on nothing more than unproven speculation of what *might* have happened if it lost one specific customer- Consolidated Edison of New York ("Con Ed"). As the ALJ correctly found, the Board has long held that the loss of a customer does not excuse unilateral action and accordingly, the potential loss of Con Ed as a customer did not permit Respondent to create an alter ego, repudiate the Local 175 collective bargaining agreement, unlawfully recognize another union, terminate its workforce, and transfer all unit work to the alter ego. Moreover, Respondent fails to point to any objective evidence supporting its claim that Respondent was faced with a dire financial emergency that would have excused Respondent's conduct under Board law. Rather, the evidence adduced at trial shows that Respondent engaged in a months-long scheme of creating an alter ego to which it could transfer all unit work, Con Ed and non-Con Ed work, to avoid its obligations and responsibilities under the Local 175 agreement and the National Labor Relations Act (the Act).

The ALJ's Decision is firmly based on the record evidence and current Board law. Respondent's exceptions offer no basis in fact, law, or equity to overturn the ALJ's well-supported Decision.

II. PROCEDURAL HISTORY

Based on charges filed by Construction Council Local 175, UWUA, AFL-CIO (“Local 175”), on March 7, 2017, and September 14, 2017, the Regional Director for Region 29, of the National Labor Relations Board, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on December 22, 2017, alleging that Tri-Messine and its alter ego Callahan (collectively “Respondents”) violated Sections 8(a)(1), (2), (3), and (5) of the Act. (GC-1) On January 3, 2018, Respondent filed an Answer to the Consolidated Complaint and Notice of Hearing denying the majority of the allegations. (GC-1) The case was heard before Administrative Law Judge Jeffrey Gardner on April 10, 11, and 12th, 2018.

On December 17, 2018, Judge Gardner issued his Recommended Decision and Order finding that Respondent violated the Act as alleged in the Consolidated Complaint. The case was thereafter transferred to the Board. Respondent filed Exceptions to the Administrative Law Judge’s Decision on January 14, 2019. This brief responds to Respondent’s exceptions and demonstrates that the Judge’s findings of fact and conclusions of law should be upheld.

III. FACTS¹

A. Tri-Messine’s Operations

Tri-Messine performs asphalt paving work in the construction industry throughout New York City and Long Island, New York. (GC-2) Tri-Messine operates its business out of an office located at 6851 Jericho Turnpike, Suite 240, Syosset, New York. (GC-2) In connection with its business operations, Tri-Messine utilizes one yard located at 126-16 26th Avenue, Flushing, New York and another yard located at 3441 Provost Avenue, Bronx, New York. (GC-2) Tri-Messine

¹ All references to the official transcript will appear as “Tr.[page 3];” References to the Administrative Law Judge’s Decision will appear as “ALJD Pg.[#];” References to the Respondent’s Brief in Support of Exceptions will appear as “Res. Brf. Pg. [#].”

has two storage yards in Flushing, New York. One storage yard is located at Flushing Asphalt. The second yard is rented from a company called City Gates. (Tr. 53-54)

B. Tri-Messine's Long-Standing Relationship with Local 175

On June 16, 2009, Local 175 was certified as the exclusive collective bargaining representative of Tri-Messine's asphalt paving employees.² On June 9, 2009, Al Messina executed a Paving Division Assumption Agreement with Local 175 which recognized the New York Independent Contractors Alliance (NYICA) as the representative of Tri-Messine for the purposes of contract negotiations with Local 175. In addition, the Assumption Agreement bound Tri-Messine to the existing collective bargaining agreement between NYICA and Local 175 ("Local 175 CBA"), and to any collective bargaining agreement negotiated on behalf of NYICA thereafter. In addition, the Assumption Agreement provided that either party could terminate the Assumption Agreement in accordance with the renewal and/or Termination Provisions of the Alliance collective bargaining agreement. (GC-7)³

The most recent collective bargaining agreement was effective by its terms from July 1, 2014, through June 30, 2017. (Tr. 82-83; GC-6) Based on these collective bargaining agreements, Tri-Messine performed asphalt paving work for various entities, including for Con Edison, with employees who were Local 175 members. (Tr. 84)

² "All full-time and regular part-time workers who primarily perform asphalt paving, including foreman, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/ safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators employed by the Employer, who work primarily in the five boroughs of New York City, but excluding all employees who primarily perform the laying of concrete, concrete curb setting work, or block work, truck drivers, clerical employees, guards and supervisors as defined in Section 2(11) of the Act." (GC-21)

³ The Local 175 collective bargaining agreement contained in GC-6 provides in Article IV that, "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. (GC-6) (GC-6)

C. Consolidated Edison's Standard Terms Agreement

Con Ed maintains an agreement with its construction contractors entitled "Consolidated Edison Company of New York, Inc. Standard Terms and Conditions for Construction Contracts," (hereinafter "STCC or Standard Terms Agreement." (GC-8) The STCC sets forth various terms for contractors regarding the work that they will perform for Con Ed. The provision at issue in the instant case is found on Page 16 of the STCC under the heading "Labor." That provision states the following, in relevant part:

"A contractor shall, unless otherwise specifically stated herein, provide all labor required to fully complete the Work... 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 that such labor is available." (GC-8, pg. 16)

At the hearing, Michael Perrino, Section Manager for Consolidated Edison of New York, testified that this provision constituted a clarification since prior versions of this provision did not contain the same labor union restriction. (Tr. 473-474) However, during his testimony, Michael Perrino admitted that even after the 2014 clarification, Con Ed did not enforce this provision. Rather, Perrino admitted that he knew that both Tri-Messine and Nico Asphalt were performing work for Con Edison with employees who were members of Local 175. (Tr. 450) Perrino also admitted that Con Ed never objected to Local 175's continued performance of Con Ed work after the 2014 clarification. (Tr. 447-448), explaining that it was Local 1010 that objected to the fact that Con Ed was not enforcing the "Labor" section of the STCC and was allowing contractors to use labor from unions not affiliated with the BCTC. (Tr. 448)

D. October 2016: Tri-Messine Bids on New Con Ed Work

In or around October 14, 2016, Tri-Messine (and other contractors) bid on a new contract for paving work with Con Ed. (Tr. 91) Al Messina admitted at trial that he knew he was not

guaranteed to win the bid or the work. (Tr. 91) Prior to placing their bids, contractors, including Tri-Messine, attended a pre-bid meeting organized by Con Ed where Con Ed discussed the work involved in the new contract. (Tr. 94) Con Ed also told the contractors that page sixteen of the STCC entitled “Labor” (set forth above) would apply to the new contract. (Tr. 97-98) Con Ed did not tell any contractor that they had to terminate workers to comply with the STCC. (Tr. 107-108)

E. November 14, 2016: Tri-Messine Creates Alter Ego Callahan Paving to Get Rid of Local 175 and Perform Con Ed Work

i. *Tri-Messine Created Callahan So That Tri-Messine Could Continue to Perform Con Ed Work*

Al Messina admitted that he created Callahan so that Tri-Messine could perform the Con Ed work because of Tri-Messine’s relationship with Local 175. Since they were not affiliated with the BCTC, Tri-Messine would not be in compliance with the requirement of Page 16 of the STCC. (Tr. 138-139) That the motive behind the creation of Callahan was to enable Tri-Messine to continue to perform ConEd work is also clearly laid out in the “Subcontract” between Tri-Messine and Callahan which states that because Tri-Messine has a contract with Local 175, who is not part of the BCTC, Tri-Messine will use Callahan to perform the work for Con Ed.⁴

The Subcontract also sheds light on the financial control that Tri-Messine has over Callahan. The Subcontract provides that Callahan will perform paving services as “Tri-Messine shall request” in accordance with “the specifications, if any, and the time requirements provided

⁴ “Whereas, Tri-Messine has been advised by Con Edison that it may only employ employees who are “union labor from building trades locals (affiliated with the Building and Construction Trades Council of Greater New York) having jurisdiction over the work to the extent such labor is available. .Whereas, Tri-Messine has a contract with Local 175 of the United Plant & Production Workers (“Local 175”) which is a labor organization that is not affiliated with the Building and Construction Trades Council of Greater New York. .Whereas, Tri-Messine desires to engage Callahan to perform certain paving services in support of contracts and/or jobs secured by Tri-Messine that it is not qualified to perform and Callahan represents that it is qualified to perform such services and desires to accept such engagement.” (GC-14)

by Tri-Messine.” In addition, the parties agreed that “Tri-Messine shall provide to Callahan such equipment, facilities, administrative services and such other services as Tri-Messine shall determine...” (GC-14) With regard to payment for Callahan’s services, the Subcontract provides that “Tri-Messine shall invoice its customers for the Work performed by Callahan” who in turn would “pay to Callahan, subject to Callahan’s complete, proper and timely performance of the Work...” (Id.)

ii. Callahan’s Operations

Callahan Paving was incorporated on November 14, 2016. (GC-4) The sole director and shareholder is Al Messina’s wife, Patricia Messina. Respondents admitted that Patricia Messina used her personal assets, including assets that she co-owned with Al Messina, to fund the creation of Callahan. (GC-2) Payroll records for Tri-Messine uncovered at trial show that Patricia Messina received an “officer’s bonus” of one million dollars during the week of December 25th through December 31st, 2016, immediately following the creation of Callahan. This further supports the admission that Patricia Messina used capital provided by Tri-Messine to fund the creation of Callahan. (GC-19)⁵

Callahan’s address is the same address as Tri-Messine’s - 6851 Jericho Turnpike, Syosset, New York. (GC-4) Respondent stipulated that Callahan shares office space with and utilizes the same office equipment as Tri-Messine. (GC-2)⁶ Respondent asserted that Callahan pays Tri-Messine rent for use of the Jericho Turnpike office, however, Messina was unable to

⁵ Al Messina admitted that Patricia was never an officer of Tri-Messine. (Tr. 183) She worked as a secretary and bookkeeper for Tri-Messine for about eighteen years. (Tr. 55-56) Al Messina admitted that the only officer of Tri-Messine at that time was him. (Tr. 195)

⁶ It also appears that the companies shared at least one office staff member. The record showed that employee Patricia Hinds worked for Tri-Messine for twenty years. (Tr. 170) She then became the first employee to appear on Callahan’s payroll. (Tr. 172; GC-18(a)) During this first week, Hinds received one week of paid time off. Messina admitted that Hinds was entitled to two weeks of vacation due to her employment at Tri-Messine. (Tr. 170)

recall how much rent was paid and Respondent presented no evidence establishing any rent payments from Callahan to Tri-Messine. (Tr. 49)

Respondent stipulated that Callahan performs the same type of work as Tri-Messine - asphalt paving in New York City. Respondent admitted that all of the work that Callahan performs is subcontracted from Tri-Messine. Respondent also admitted that Callahan utilizes Tri-Messine's two main yards located at 126-16 26th Avenue, Flushing, New York and 3441 Provost Avenue, Bronx, New York. Respondent stipulated that Callahan uses Tri-Messine's heavy construction equipment, including trucks and other vehicles to perform its work for Con Ed and for National Grid. Respondent admitted that Callahan does not compensate Tri-Messine for the use of these vehicles or for the use of its equipment. The vehicles and equipment that Callahan uses to perform the Con Ed and National Grid work are owned and insured by Tri-Messine. (GC-2) With regard to materials, Tri-Messine stipulated that it purchases all asphalt and concrete and then provides these materials directly to Callahan without cost. (GC-2)

With regard to Tri-Messine's management, Respondents stipulated that all operations, customer, and labor relations are managed by Al Messina. (GC-2) With regard to Callahan, Messina admitted that although his wife Patricia Messina is the sole owner of Callahan, she is not involved in any of Callahan's operations, including labor relations and customer relations. (GC-2; Tr. 56) Al Messina testified that he is the supervisor for Callahan and does not report to anyone at Callahan. He admitted that he makes "all the decisions" at Callahan. (Tr. 46) In fact, Messina admitted that he is in charge of all hiring of employees at Callahan. (Tr. 143) Respondents stipulated that there is one other supervisor at Callahan, Andrew Cinquemani, who has the authority to recommend the hiring, firing, discipline, granting of time off, assigning of

work, and who creates work schedules. (GC-2) Al Messina testified that Callahan operates exclusively as a subcontractor for Tri-Messine. Callahan has no other customers. (Tr. 59-60)

With regard to the work that Callahan performs, Al Messina admitted that although Tri-Messine was awarded the majority of the Con Ed work, Tri-Messine did not perform that work. Rather, Tri-Messine shifted the work to Callahan. (Tr. 61) Messina testified that the Con Ed work involves Callahan removing temporary base and then installing permanent base in New York City roadways. (Tr. 64) This work takes place throughout the Bronx, Brooklyn, and Queens and will last until about 2020. (Tr. 64) With regard to non-Con Ed work, Messina testified that as of March 6, 2017, Tri-Messine gave Callahan a few jobs for another company, Liberty Water and Sewer (Tr. 141) and for National Grid. (Tr. 70)

F. December 2016- January 13, 2017: Alter Ego Callahan Negotiates a collective bargaining agreement with Local 1010 that Covers the Same Bargaining Unit Already Covered by the Local 175 collective bargaining agreement

In November or December 2016, Al Messina and his attorney met with Local 1010 representative Francisco Fernandez and Local 1010's attorney. (Tr. 112) Messina admitted that at this meeting, the parties discussed the fact that Tri-Messine was the low bidder⁷ and had won the Con Ed work and that Tri-Messine wanted to secure a contract with Local 1010. (Tr. 113) Messina did not recall if the parties discussed which company would sign the Local 1010 contract - Tri-Messine or Callahan. Messina testified that at this meeting, Local 1010's Francisco Fernandez told Messina that "they wouldn't give me a contract...[Local 1010] couldn't sign a contract with me." (Tr. 113) After this rejection, Messina's wife Patricia then asked Local 1010 for a meeting.

A meeting between Patricia Messina and Local 1010 took place at some point between November 2016 and January 2017. Based on conversations with Patricia about the meeting, Al

⁷ The transcript states "real bitter" as opposed to low bidder. This appears to have been a typo.

Messina testified, Local 1010 gave Patricia Messina a copy of a collective bargaining agreement but the contract was not signed on that day. Instead, Local 1010 and Tri-Messine engaged in negotiations regarding which employees Callahan could hire and whether any of those employees could be employees of Tri-Messine who were represented by Local 175. (Tr. 114) Callahan wanted flexibility to hire some of the Local 175-affiliated former Tri-Messine employees (Tr. 115), but as Al Messina testified, that there were certain provisions in the Local 1010 contract that would not have allowed Patricia Messina to hire the employees she wanted (including employees of Tri-Messine) – including a provision requiring the exclusive use of the Local 1010 hiring hall. These negotiations were reflected in a series of emails between Tri-Messine/ Callahan attorney Mark Reinharz, and Local 1010 attorney Andrew Gorlick (GC-10).

The emails show that prior to January 6, 2017, Callahan was engaged in negotiations with Local 1010 regarding the ability to hire Tri-Messine bargaining unit employees. (Tr. 117; GC-10) However, the record shows that on January 6, 2017, Local 1010 insisted that Callahan would have to use the Local 1010 hiring hall. (Tr.117-118; GC-10) Al Messina admitted, and the evidence revealed, that Patricia Messina signed the Local 1010 collective bargaining agreement on January 13, 2017, just a few days after receiving notification from Local 1010 that Callahan had to hire employees through the Local 1010 hiring hall. (Tr. 118)

G. Local 175 Contacts Tri-Messine to Discuss Rumors that Tri-Messine Had Created an Alter Ego

Eric Chaikin, attorney for Local 175, testified that on January 10, 2017, he called Tri-Messine's attorney, Mark Reinharz (Tr. 269) to set up a meeting to discuss rumors he had heard that Tri-Messine created an alter ego and entered into a relationship with Local 1010. At this point, Chaikin did not know for sure whether Tri-Messine had created an alter ego and attorney

Reinharz did not notify Chaikin that the alter ego had been created. (Tr. 269-270)⁸ Chaikin later memorialized this conversation in an email. (GC-22) Reinharz responded to Chaikin's email by offering a date, time, and place to meet. (GC-22) The meeting was supposed to take place on Friday, January 13, 2017 (the same day that Callahan signed the Local 1010 collective bargaining agreement), however, the parties subsequently agreed to meet without the attorneys. (Tr. 272) Chaikin testified that he never told Reinharz that he or his client was refusing to meet. (Tr. 272) In fact, the parties did meet without the attorneys on January 18, 2017, as will be discussed below. Chaikin testified that no representative of Tri-Messine, including Reinharz, ever called him to advise him of Tri-Messine's decision to terminate bargaining unit employees prior to the terminations taking place on March 3, 2017. (Tr. 273)

H. January 18, 2017: Al Messina Informs Local 175 Fund Manager Anthony Franco of the Alter Ego and the Termination of the Local 175 Workers

Anthony Franco is the Local 175 Welfare, Pension, Annuity, and Training and Apprentice Funds Manager. (Tr. 362) Franco testified that although he had discussions with Al Messina in May 2016 and in prior months regarding Con Ed wanting Tri-Messine and other contractors to sign contracts with Local 1010, (Tr. 365) Con Ed often did not follow through.⁹ For this reason, Messina and Franco decided to wait to see whether Con Ed would enforce its requirement that its contractors had to sign with Local 1010. (Tr. 367) Franco testified:

“We were waiting to see what Con Ed did, if anything because this had...been going on for a long, long time. Con Ed sometimes makes, I don't want to say threats, but they say things but they never follow through with them.” (Tr. 367)

⁸ On cross-examination, Respondent's counsel Reinharz implied in his questioning of Chaikin that this conversation might have been more involved. However, Reinharz chose not to testify to offer his own version of the conversation. Thus, Chaikin's version of the conversation remains un rebutted.

⁹ Notably, on cross examination, Franco testified that he and Local 175 Business Agent Roland Bedwell had met with representatives of Con Ed as early as 2014 and that during this meeting, the Con Ed representatives stated that they were going to start enforcing the Standard Terms Agreement “when the new contracts came out.” (Tr. 386) Notwithstanding this meeting, Local 175 continued to perform Con Edison work at Tri-Messine for years - through March of 2017.

These conversations between Franco and Messina continued past May 2016 until about February 2017. Franco testified that during all of these conversations, Messina never stated that he had made a decision to lay off employees. (Tr. 368-369) Franco testified that he and Messina were hopeful that Con Ed would not have been able to enforce the Standard Terms Agreement. (Tr. 374-375, 411)

Franco testified that in or around the second week of January 2017 at a meeting at a diner in Syosset, New York, Messina advised Franco that Messina had signed a contract with Local 1010 and had to lay employees off. (Tr. 369-370)¹⁰ Franco testified that Messina said that he had bad news and that he had to sign a contract with Local 1010. Messina then stated that he would do all that he could to keep the workers at the new company, including putting them into unions other than Local 175. Messina also said that he would inquire whether some of his Local 175 workers could become Local 1010 members, but that Local 175 employees who could not become Local 1010 members or who could not be transferred to other unions would be laid off.

Franco testified that Messina did not offer to bargain with Franco over the layoffs. Franco testified that he did not ask Messina to bargain over the layoffs because Messina had already created the alter ego Callahan, which had already signed a contract with Local 1010. (Tr. 371, 392)

- i. *Al Messina's Testimony Establishes that Tri-Messine Did Not Notify Local 175 That Tri-Messine Was Laying Off Its Local 175 Unit Employees*

Al Messina admitted that he met with Anthony Franco in January 2017 about upcoming layoffs. Corroborating Franco's testimony, Al Messina testified that prior to his January 18th meeting with Franco, he had general conversations with Local 175 representatives concerning the fact that Local 175 was fighting Con Ed's enforcement of the STCC. Al Messina testified,

¹⁰ Local 175 Business Manager Roland Bedwell was supposed to attend the meeting, but got called away on business. Bedwell then asked Franco to go in his place and Franco did. (Tr. 370)]

“And so every meeting that I had with Roland [Bedwell] and/or Anthony [Franco] was all about Con Edison, what they were—you know, what they were doing and how the union was trying to fight it.” (Tr. 514) Messina later testified that he was aware that Local 175 had filed certain lawsuits against Con Ed, fighting Con Ed’s effort to (add). (Tr. 517) Messina also testified that Local 175’s representatives had told him that they were trying to become part of the BCTC. (Id.) Thus, Messina’s testimony corroborates Franco’s assertion that the parties’ conversations about the Con Ed situation were general and centered on the parties waiting to see whether Con Ed would, unlike in the past, enforce the STCC and waiting for the results of the pending litigation. Prior to January 18th 2017, Tri-Messine did not notify Local 175 that it was going to layoff its workforce.

I. January 2017: Tri-Messine Terminates All Forty-four Paving Employees Because of their Union Affiliation

Former Tri-Messine employee Frank Wolfe testified that in early January 2017, Messina held a meeting at the Queens yard with all Tri-Messine Local 175 laborers. Local 175 representatives Roland Bedwell and Anthony Franco were also present. (Tr. 244) Wolfe testified that Messina told the workers that Tri-Messine was not allowed to bring on Local 175 laborers and that there had to be a new company called Callahan Paving. Messina then added that none of the workers present would be allowed to transfer to Local 1010, which was the new labor union with whom Messina had signed. (Tr. 245) Wolfe testified that Messina concluded by stating that all the workers would be let go and they would no longer be working there. (Id.) Wolfe recalled that his last day was March 3, 2017. Wolfe was never called back to work at Tri-Messine or Callahan. (Tr. 247)

J. March 13, 2017: Respondent Serves Notice of Intent to Terminate Local 175 CBA at the contract’s expiration.

On March 13, 2017, Respondent sent Local 175 a letter notifying Local 175 that Tri-Messine intended to terminate the CBA, stating::

“This will serve as an official notice. The collective bargaining agreement covering the Tri-Messine Construction Corp. (“Tr-Messine”) expires on June 30, 2017. Pursuant to Article IV (Term-Renewal) Tri-Messine is providing written notice of termination of the agreement.” (GC-24(b))

- i. Respondent mistakenly believes that this notice extinguishes Respondent’s duties and obligations to Local 175.*

On May 12, 2017, Local 175 attorney Eric Chaikin emailed Respondent’s attorney requesting dates to begin bargaining for a new collective bargaining agreement. (GC-24(a)). On May 18, 2017, in response, Respondent’s attorney replied that “we can certainly meet to discuss any concerns you might have under the current agreement but, as you can see, Tri-Messine elected to terminate its agreement effective June 30, 2017...” (Id.) Chaikin responded to Respondent’s counsel that same day informing counsel that while Respondent had sent the letter terminating the CBA, Respondent still had an obligation to recognize and bargain with Local 175. (Id.) On May 23, 2017, Respondent’s counsel informed Chaikin that while Respondent would meet to discuss the issues that Chaikin raised, he did not believe that Respondent engaged in any conduct that violated the Act. (Id.)

K. April and May 2017: Local 175 Demands Bargaining for a New CBA

On April 11, 2017, Local 175 faxed its form collective bargaining agreement re-opener letter to Tri-Messine to request bargaining for a successor collective bargaining agreement. (Tr. 275; GC-23) Chaikin did not receive any response to this opener letter. Chaikin then reached out to Tri-Messine’s attorney Reinharz to try to re-open negotiations. (Tr. 276) On May 12, 2017, Chaikin sent Reinharz an email requesting dates to commence negotiations for a successor collective bargaining agreement. (GC-24(a)) In a reply email, Reinharz told Chaikin that

although Tri-Messine would meet with him to discuss any concerns under the “current agreement,” Tri-Messine had elected to terminate its agreement effective June 30, 2017. (GC-24(a)) Chaikin understood Reinharz to mean that Tri-Messine would not renew the collective bargaining agreement beyond June 30, 2017. (Tr. 285) In response, Chaikin informed Reinharz, in relevant part, that Tri-Messine still had an obligation to bargain regarding a renewal agreement and/or regarding the effects of terminating employees and not permitting them to work for Callahan. (Tr. 284; GC-24(a)) Reinharz responded that although Tri-Messine would agree to meet to discuss the “impact of certain decisions on your members,” Tri-Messine had elected to terminate the contract effective June 30, 2017. (GC-24(a)) Tri-Messine thereafter refused to meet and negotiate with Local 175. (Tr. 284-285) The parties never met.

L. Tri-Messine Was Not Confronted with a Dire Financial Emergency: Tri-Messine’s Customers

Respondent failed to prove that it was faced with a dire financial emergency that permitted Tri-Messine to repudiate the Local 175 collective bargaining agreement and shift all the work to its alter ego Callahan. Rather, the evidence adduced at trial established that Tri-Messine had and continues to secure customers other than Con Edison whose work is also being performed by Callahan. Al Messina admitted that Tri-Messine has customers that have no relationship to Con Ed and that these customers do not have any labor union restrictions like Con Ed. These customers included: JVD Industries, JP Plumbing, Lady Liberty Contracting Corp., Liberty Water and Sewer LLC, National Grid, Centa Sewer Services, and Triboro Plumbing. (Tr. 77-78) In addition, Messina explained that Tri-Messine performs work for the following contractors who in turn perform work for Con Edison: J. Fletcher Creamer and Son, MECC Contracting, Network Infrastructures, Step Mar Contracting, Safeway Construction, and Valley

Industries. (Tr. 504)¹¹ All of non-Con Ed work is currently performed by Callahan with Local 1010 workers since Tri-Messine no longer employs any workers. (Tr. 72)

In support of its claim that Tri-Messine faced an economic exigency, Al Messina testified that Tri-Messine's Con Ed work makes up anywhere from ninety-three to ninety-nine percent of Tri-Messine's overall business.¹² Messina vaguely claimed that if Tri-Messine lost this Con Ed work, Tri-Messine would be "out of business" since it would not be able to "pay rent or insurance." (Tr. 503) However, other than making this claim during his testimony, Respondent did not offer any other testimonial or documentary evidence to substantiate its assertion. Messina asserted that all information regarding Tri-Messine's financial status is in a document that can be generated by his office. (Tr. 545) Notwithstanding that his office could generate this alleged document, Tri-Messine did not produce any documentary evidence to support its purported financial defense. (Tr. 547) Nor did Respondent explain how or why Tri-Messine found itself in this alleged dire financial emergency that required prompt action.

In light of the fact that Messina admitted that Tri-Messine was not guaranteed the Con Ed work in the first place, and in fact did not win the entire Con Ed bid since half of the Brooklyn work was awarded to another company (Tr. 91), it is disingenuous for Tri-Messine to claim that it had to unilaterally create an alter ego, repudiate the Local 175 CBA, transfer all unit work to the alter ego, and terminate its entire workforce in order to secure the Con Ed work since

¹¹ It was unclear whether Con Ed would have objected to Local 175's performance of work for these subcontractors since there was no evidence presented regarding under which Con Ed service contract these subcontractors were or are working. If the subcontractors are working under a pre-2016 Con Ed service contract, the subcontractor may not be subject to the STCC labor requirement just as Tri-Messine was not subject to the labor requirement prior to 2016. Although Mike Perrino testified that he believed that a Con Ed contractor would violate the STCC if it used a subcontractor that was not affiliated with the BCTC (Tr. 464) there was no evidence presented that Con Ed in fact enforced its STCC labor requirement against any subcontractor performing work for a Con Ed contractor.

¹² On cross examination, Messina admitted that the ninety-three to ninety-nine percent number is inaccurate. Messina clarified that the work that Tri-Messine performs directly for Con Ed is actually ten percent lower than the ninety-three to ninety-nine percent figure. For example, for 2016, direct Con Ed work made up about 87% of Tri-Messine's business. (Tr. 546-547) Messina explained that the ten percent reduction comes from the fact that ten percent of Tri-Messine's work is performed for subcontractors of Con Ed. (Tr. 546)

there was always a chance Tri-Messine would not win the bid. Instead, the evidence adduced at trial plainly shows that Tri-Messine continues to bid on and win substantial service contracts such as the contract with National Grid. (Tr. 70)

M. Tri-Messine Employees Were Qualified to Work: The Term “Qualified” in Article VIII, Section 2 of the Local 175 CBA Means Employees’ Skills and Abilities.

Article VIII of the Local 175 CBA is entitled, “Site and Grounds Improvement, Utility, Milling, Paving and Grading Road Building Work- Employees Covered.” Section 1 of this article is entitled, “Paving, Site and Grounds Improvement and Road Building Work.” This section defines paving, site and grounds improvement and road building work in six separate paragraphs in great detail.¹³ Section 2 of Article VIII states the following: “This Agreement is applicable to qualified Employees who are employed under the classification as set forth in Article IX, Section 6 of this Agreement.” (GC-6) Article IX, Section 6 is entitled, “Work Classifications- Wages.” That Section sets forth all job classifications covered by the agreement and their corresponding wage rates. (Id.) Thus, Article VIII is devoted to the definition of the work and classifications of employee covered by the Local 175 CBA. Nowhere in the clause is there any reference to customers or other third parties having the right to determine whether employees are qualified to perform work under the CBA and/or to be covered under the Local 175 CBA .

Local 175 Attorney Eric Chaikin’s Testimony Regarding the Term “Qualified” Establishes that the term as used in the CBA refers to employees’ skills and abilities

¹³ As an example, the first of the six paragraphs of Section 1 defines paving work as: Prepare for and perform all types of asphalt paving, slurring, including methacrylate and other similar materials and milling of streets and roads, and all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all materials, install and repair fences and all incidental work thereto to continue into parks, plazas, malls housing projects, playgrounds, said work including but not limited to public highways and roads, and bridges, including, but not limited to all subsequent work prior to final paving.”

Long-time attorney for Local 175, Eric Chaikin testified that the term “qualified” as used in Article VIII, Section 2, of the Local 175 refers to employees’ skills and abilities. (TR. 433)

With regard to Respondent’s understanding of the term, it is key that Al Messina never actually testified about what this word meant in the context of the CBA. Although Respondent’s counsel mentioned the Article in his questioning of Messina, Messina responded to a different question:

Q. It says, this agreement is applicable to qualified employees who are employed under the classification as set forth in Article 9, Section 6 of this agreement. Do you consider the 175 workers to be qualified to perform Con Ed work after Con Ed issued the new standard terms and conditions for the construction contracts in the Fall of 2014?

A No.

Q Why not?

A Con Edison said that the union had to be affiliated with the Building Trades of Greater New York Council. And 175 is not. (TR 502)

As demonstrated by this exchange, Respondent’s counsel asked Messina if he considered the 175 workers to be qualified to perform Con Ed work. Respondent did not ask Messina about his interpretation of Article VIII, Section 2 and whether that provision allowed customers like Con Ed to dictate whether employees were qualified to work.

Rather, Messina later admitted that he had never actually thought about the meaning of the term “qualified” in the Local 175 CBA until Con Ed amended the STCC.

Q. But prior to Con Ed changing its terms and conditions, what did that phrase "qualifying" mean to you?

MR. REINHARZ: I'm going to object.

MS. MEHLSACK: Objection.

JUDGE GARDNER: Overruled.

THE WITNESS: I never even -- I never thought about it before this. (TR. 560-561)

Thus, Messina’s testimony shows that the parties never contemplated allowing a customer like Con Ed to dictate whether employees covered by the Local 175 CBA were qualified to work.

Rather, Tri-Messine’s Local 175 workers have always been qualified to perform work since it is

undisputed that these workers have historically performed work for Con Ed. (Tr. 84)

IV. ARGUMENT

1. The ALJ's Decision Was Fully Supported by the Record and by Board Law

The ALJ's decision that Respondent violated the Act as alleged in the Consolidated Complaint was properly founded upon the overwhelming record evidence that Tri-Messine and Callahan are alter egos. The alter ego relationship was proven mostly through Respondent's own stipulations and admissions. Having correctly concluded that Tri-Messine and Callahan are alter egos, the ALJ correctly found that Respondent violated Sections 8(a)(5) and (d) of the Act by unlawfully repudiating its collective bargaining agreement with Local 175 and then refusing to apply its terms to its alter ego Callahan's employees. The ALJ rightly disregarded Respondent's claim that this was a case of subcontracting and properly analyzed this case under the Board's alter ego precedent.

The ALJ also properly determined that since Tri-Messine and Callahan are alter egos, Respondent violated Section 8(a)(2) of the Act when alter ego Callahan unlawfully recognized Local 1010 as the exclusive collective bargaining representative of its employees when those employees were already represented by Local 175.¹⁴ This conclusion was based on the strong alter ego finding and the contract signed by Callahan and Local 1010.

Finally, the ALJ rightly concluded that Respondent violated Section 8(a)(3) of the Act when it terminated its entire workforce because they were members of Local 175 and forced those same employees to relinquish their Local 175 memberships in order to be hired by alter ego Callahan. This determination was solidly based on the record testimony of Tri-Messine owner Al Messina who admitted that he terminated his workforce because they were Local 175 members.

¹⁴ Respondent does not except to this finding.

The ALJ soundly rejected Respondent's claim that it had no choice but to engage in this conduct in order to avoid losing Con Ed's business. The ALJ properly concluded that Board law does not permit unilateral action by an employer simply to keep a customer. The desire to keep a customer or to remain competitive does not constitute an economic exigency.¹⁵ The ALJ's decision was well-supported by the administrative record and by current Board law. Respondent's exceptions fail to support any legal or factual errors in the ALJ's decision. Consequently, as will be shown below, Respondent's exceptions should be rejected full scale.

2. Respondent's Exceptions Offer No Bases on Which to Overturn the ALJ's Decision

- a. Response to Point #1: The ALJ did not ignore any critical issue since the issues cited by Respondent do not constitute viable defenses.

In its "Point I," Respondent argues that the ALJ erred by ignoring the following "critical" issues: 1) that the contract between Local 175 and Respondent was properly terminated on June 30, 2017, and therefore, Respondent was under no duty to recognize or bargain with Local 175 and none of the provisions of the Local 175 CBA survived the termination; 2) that under the Local 175 contract, Respondent's employees were not "qualified" to perform the Con Ed work and therefore Respondent was not obligated to use Local 175 employees to perform the Con Ed work; and 3) that under the doctrine of impossibility, Respondent was permitted to engage in the unlawful conduct in order to save its business. As will be discussed, the ALJ properly disregarded these points since they so clearly do not constitute viable defenses to any allegation in the Consolidated Complaint.

i. The ALJ Correctly Disregarded Respondent's Argument That it Had No Obligations Towards Local 175 after the Local 175 contract expired.

Respondent argues that the ALJ erred by ignoring its argument that since it provided timely notice of its intent to terminate the Local 175 CBA upon its expiration, it had no further

¹⁵ See e.g. *RBE Electronics*, 320 NLRB 80 (1995); *Farina Corp.*, 310 NLRB 318, 321 (1993)

duties or bargaining obligations towards Local 175. As Board law clearly stands in direct contradiction to this proposition, it is not surprising that the ALJ did not discuss this argument. As established below, Respondent's duty to recognize and bargain with a 9(a) representative extends past the expiration (or termination) of any specific CBA.

Respondent also argues that because the language of the Local 175 CBA's "Term-Renewal" clause provision since that provision gives the parties the right to terminate the CBA, Local 175 waived its statutory right to recognition and bargaining.. The ALJ did not discuss Respondent's argument because it is patently clear that Local 175 did not waive any rights via this contractual provision. In support of these arguments, Respondent cites various circuit court decisions which are inapposite and non-binding on the Board. As discussed below, Respondent is wrong on the law and regardless of any notice of intent to terminate the CBA, Respondent was still obligated to recognize and bargain with Local 175 and pay into Local 175's benefit funds.

The ALJ correctly found that Board law requires recognition and bargaining of an incumbent 9(a) representative even after the expiration of a CBA, and Board law requires that employers continue to make benefit fund contributions after the expiration of a CBA.

It is well settled Board law that at the expiration of a collective bargaining agreement where the incumbent union is the employees' 9(a) representative, the employer is obligated to continue to recognize and bargain with the incumbent union unless and until the union is shown to have lost majority support. *Raymond Interior Systems*, 357 NLRB 2174, 2185 (2011) (and cases cited therein). When relationships in the construction industry are governed by Section 9(a),¹⁶ the employer cannot unilaterally change terms and conditions of employment

¹⁶ In an 8(f) relationship, by contrast, either party may repudiate the contract and terminate the parties' bargaining relationship when the contract expires. See *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). The employer has no duty to bargain over a successor agreement, and the union cannot picket or strike to compel renewal of an expired Section 8(f) agreement or require bargaining for a successor agreement. Id. at 1387.

upon contract expiration, and it must continue to recognize and bargain with the union after the contract expires. *Msr Indus. Servs., LLC*, 363 NLRB No. 1 (Aug. 31, 2015)

After a CBA expires, an employer's obligation to comply with and give effect to the terms and conditions of employment embodied in the expired CBA continues until the employer has fulfilled or been relieved of its duty to bargain about proposed changes to employees' terms and conditions. *Beitler-McKee Optical Co.*, 287 NLRB 1311 (1988). This duty includes continuing to make contributions to union benefit funds. See e.g. *Delta Sandblasting Co., Inc.*, 367 NLRB No. 17 (Oct. 16, 2018) ("It is well established that benefit fund contributions are mandatory subjects of bargaining that generally survive expiration of the contract. Thus, in the absence of a contrary agreement or other applicable exception, an employer violates Section 8(a)(5) by failing to continue making such contributions after the contract expires."); *Staffco of Brooklyn, LLC*, 364 NLRB No. 162 (2016) ("An employer's obligation to maintain the status quo includes "making contributions to fringe benefit funds as specified in the expired collective-bargaining agreement." citing *N. D. Peters & Co.*, 321 NLRB 927, 928 (1996).")

Respondent misapprehends Board law.

In its Exception, Respondent argues that its timely notice of termination of the CBA completely severed all statutory duties and obligations towards Local 175 and that "any contributions to the Local 175 benefit plans could lawfully cease as of [June 30, 2017]"¹⁷ Respondent's argument is in stark contravention of Board law. Tellingly, Respondent offers no Board case to support its claim that the timely termination of the Local 175 CBA extinguished its bargaining obligations towards Local 175. Rather, Respondent provides just two circuit court decisions, one of which Respondent misquoted, and the other which involved a different issue

¹⁷ Resp. Brf. Pgs. 32-33.

than that presented here. Respondent's argument is without merit and contrary to established Board law.

As the ALJ correctly found, supported by well-settled Board law, even if Respondent timely terminated the CBA, it was obligated to maintain the status quo, and make all fund contributions under the expired CBA.

Respondent's obligation to continue to recognize and bargain with Local 175 is made clear in *Kirkpatrick Elec. Co., Inc.*, 314 NLRB 1047, 1052 (1994). As the ALJ explained in *Kirkpatrick Electric*, with Board approval,¹⁸ "KEC's obligation to recognize and bargain with the Union flows not from a contract permitted under Section 8(f) of the statute, but from Section 9(a) of the Act... Thus, even if KEC had timely canceled the assignment of its bargaining rights to NECA, and even if it had timely terminated its obligation under the 1988-1991 CBA, KEC still (ordinarily) would have been obliged to recognize and bargain with the employees' Section 9(a) bargaining representative."

Just as in KEC, it is undisputed that Local 175 is the 9(a) representative of Respondent's employees based on a Board-conducted election and certification in 2009. (GC-21) Respondent's bargaining obligations towards Local 175 flow from Local 175's status as the employees 9(a) certified bargaining representative. Consequently, even if Respondent had timely notified Local 175 of its intent to terminate the CBA at its expiration, Board law is clear that Respondent is still under a duty and obligation to recognize and bargain with Local 175 unless and until Local 175 lost majority support among the unit employees. Moreover, Respondent is required to maintain the status quo regarding employees' terms and conditions of employment. *Beitler-McKee Optical*

¹⁸ Although the ALJ found that since the union was the employees' 9(a) representative, the employer had an obligation to recognize and bargain with the union after the contract's expiration, he dismissed the 8(a)(5) allegation because the unit had shrunk to just one employee.

Co., 287 NLRB 1311 (1988). This includes the obligation to make benefit fund contributions.

Delta Sandblasting Co., supra, 367 NLRB No. 17 (Oct. 16, 2018).

The cases cited by the Respondent are misquoted, inapposite, and are not binding precedent.

Derrico v. Sheehan Emergency Hospital

Respondent cites *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26–27 (2d Cir. 1988), for the proposition that “rights and duties under a collective bargaining agreement do not otherwise survive the contract’s termination at an agreed expiration date.” This decision does not involve a matter that was before the Board or an interpretation of Section 8(a)(5) of the Act and Respondent took this quote out of context. The Court’s decision in *Derrico* involved the issue of whether an implied employment contract was created after the expiration of a collective bargaining agreement. The Plaintiff in that case argued that because Board law provides that an expired CBA’s terms continue after its expiration, an implied contract existed between an individual and the employer even after the CBA’s expiration under which the plaintiff could sue the employer in state court. The second circuit disagreed and found that although the expired CBA’s terms defined the status quo to which the employer was bound, the CBA as a contract ceased to exist and, therefore, there was no implied contract as a basis for the plaintiff to sue his employer in state court.

Respondent cherry-picked just one line from the Second Circuit’s decision, but the entire passage must be read to fully understand the Court’s holding that an expired collective bargaining agreement does not create an implied employment contract for individual employees covered by that contract.¹⁹ The dicta cited by Respondent, (“Rights and duties under a collective

¹⁹ “It is true that the parties must maintain the *status quo* until they have negotiated to impasse, and an employer’s unilateral change of terms and conditions of employment during this process constitutes a failure to bargain in good faith under NLRA section 8(a)(5). See *NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962).

bargaining agreement do not otherwise survive the contract's termination at and agreed expiration date") refers to the court's ruling that the **contract**, as a whole, no longer exists at its expiration other than to define the status quo. However, as discussed above, a 9(a) representative's rights do not come from the CBA. Rather, they are rights granted them under the NLRA as the exclusive bargaining representative of Respondent's employees. The Second Circuit did not rule on an employer's statutory bargaining obligations under the Act. Rather, the court plainly affirmed the duty imposed on an employer to maintain the status quo at the expiration of a CBA, bargain, and to refrain from all unilateral changes. (i.e. "It is true that the parties must maintain the *status quo* until they have negotiated to impasse, and an employer's unilateral change of terms and conditions of employment during this process constitutes a failure to bargain in good faith under NLRA section 8(a)(5)." *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d, *supra.*) Consequently, this case does not stand for the proposition for which Respondent presents it.

Automatic Sprinkler Corp. v. NLRB

Not binding precedent:

Respondent also cites *Automatic Sprinkler Corp. of America v. NLRB*, 120 F.3d 612 (6th Cir. 1997), for the proposition that upon the termination, as opposed to expiration, of a collective bargaining agreement, the parties to the terminated agreement have no further duties or

A corollary to this principle is that after expiration of a CBA and before impasse in bargaining, it is an unfair labor practice for an employer unilaterally to alter the *status quo* defined by the expired contract. *See, e.g., Rester Refrigeration*, 790 F.2d at 425 (employer "must honor" terms of expired CBA); *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095, 1102 (11th Cir.1983) (unfair labor practice "to withhold, discontinue, or cancel" benefit under expired contract before impasse); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir.1979) (affirming NLRB's finding of section 8(a)(5) violation because bargaining had not reached impasse at time employer announced intent to replace terms of expired contract with "new schedule" of wages and benefits). The terms of an expired agreement thus retain legal significance because they define the *status quo*. Rights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date. *See Local 1251 International Union of United Automobile Workers v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir.1968) (in banc); *Procter & Gamble Independent Union v. Procter & Gamble Manufacturing Co.*, 312 F.2d 181, 184 (2d Cir.1962), *cert. denied*, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed.2d 1053 (1963).

obligations to each other. Respondent's reliance on *Automatic Sprinkler* is flawed for several reasons. First, this is a Sixth Circuit decision in which that court declined to enforce a Board order and it is not binding precedent on the Board.

The vast majority of the Automatic Sprinkler decision involved the Court's analysis of the duty to bargain over subcontracting:

Second, the Court's decision primarily dealt with the issue of whether an employer had to bargain over its decision to permanently subcontract unit work after the parties CBA was terminated and where that CBA historically permitted subcontracting. In that case, the effective CBA permitted the employer to subcontract unit work to subcontractors. After the most recent CBA expired, the employer decided to permanently subcontract all unit work to subcontractors. The employer refused to bargain with the union about this permanent subcontracting. The Board found that the employer violated 8(a)(5) but the Sixth Circuit disagreed.

Although the Sixth Circuit stated, in dicta, that because the CBA had been terminated as opposed to expired, the employer was "relinquished of any contractual or statutory obligations to the unions,"²⁰ the Court only cited to *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d, *supra*, discussed above as authority for this proposition.²¹ No other Board or circuit decision was cited to support this erroneous proposition. Moreover, the thrust of the Court's decision centered on the subcontracting issue and the Court's view that the employer should not be required to re-negotiate *that part* (subcontracting) of the terminated CBA. The Court did not decide the issue of what statutory obligations and duties survive the termination or expiration of a contract. The sixth circuit only dealt with the narrow issue of whether the employer in that case could be

²⁰ *Automatic Sprinkler Corp. of Am. v. N.L.R.B.*, 120 F.3d 612, 619 (6th Cir. 1997)

²¹ The sixth circuit cited the same one line statement that Respondent cited: "Rights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at and agreed expiration date." However, as discussed, this line cannot be read in isolation from the rest of the second circuit decision. The statement actually refers to whether a CBA continues to exist after its expiration as opposed to whether it simply defines the status quo.

required to bargain over a subject that had already been negotiated in a prior collective bargaining agreement. Thus, this one Sixth Circuit decision, containing one line regarding a purported difference between a contract's expiration versus termination is insufficient to overcome the wide breadth of established Board law that holds that Respondent's statutory duties and obligations survive the expiration of a CBA.

ii. **The ALJ Properly Disregarded Respondent's Argument that Local 175 Waived Its Statutory Rights in the CBA's Term-Renewal Provision.**

Respondent also argues that it had no duty to recognize or bargain with Local 175 after the CBA's termination because Local 175 waived its statutory rights in the "Term-Renewal" provision of the Local 175 CBA. However, there is simply no way to read the Term Renewal provision language as constituting a waiver of statutory rights and the ALJ correctly refused to rely on this argument.

Respondent's contract termination cases are irrelevant.

Relying on *New York News, Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991) and *International Brotherhood of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161 (4th Cir. 1996). Respondent appears to suggest that parties to collective bargaining agreements can agree on specific termination dates for the contract and once they do, they have no liability at the termination of the contract. While both cases discuss the termination of agreements, neither case deals with the issue of what the termination of a collective bargaining agreement means with regard to an employer's statutory duty to recognize and bargain with its employees' 9(a) representative. Respondent was not relieved of its statutory duties and obligations after the termination of the Local 175 CBA.

In *New York News*, the Second Circuit upheld the district court's finding that the termination of agreement provision ("Article 25") of the parties' CBA did not obligate the

employer to bargain prior to giving notice of its intent to terminate the agreement. The Second Circuit was tasked with deciding whether the lower court had properly interpreted this provision of the parties' CBA when it granted the employer's motion for a declaratory order stating that the contract had been terminated. Neither the district court nor the Second Circuit ruled on what such termination meant for the parties' collective bargaining relationship. Similarly, the Fourth Circuit's holding in *International Bhd. Of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161 (4th Cir. 1996), does not deal with the statutory rights and obligations of parties at the termination of a collective bargaining agreement. Rather, the Court in *Advin* dealt with the issue of whether the employer in that case gave proper notice to the employer association of its intent to withdraw from the employer association such that the employer was not bound by the successor agreement signed by the association. The Fourth Circuit held that proper notice had been given and the employer was not bound by the terms of the new association agreement. Respondent's reliance on *Advin* is entirely misplaced, as *Advin* had nothing to do with statutory rights of 9(a) bargaining representatives.

The ALJ correctly disregarded Respondent's argument that Local 175 waived its right to be recognized by Respondent and to bargain with it for a successor CBA.

Respondent argues that the language in the Local 175 "Term-Renewal" provision constitutes a waiver of Local 175's right to be recognized as the unit employees' 9(a) representative and of Local 175's right to bargain with Respondent for a successor CBA. Respondent cites two Board cases for this proposition: *Cauthorne Trucking*, 256 NLRB 721 (1981) and *Senator Theater*, 277 NLRB 1642 (1984). Neither case supports Respondent's positions since the waiver language in the *Cauthorne* and *Senator Theater* cases are significantly different from the language of the instant alleged waiver because the waivers in those cases are explicit.

In *Cauthorne*, the pension provision explicitly stated that,

“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...” *Cauthorne Trucking, supra*, 256 NLRB at 722.

In *Senator Theatre*, the parties verbally agreed to the duration of the bargaining relationship, which the Board found to constitute a waiver, holding:

“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. *Senator Theatre*, 277 NLRB 1642, 1643 (1986).

In stark contrast to the language in the agreements in *Cauthorne*²² and *Senator*, the language in the “Term-Renewal” provision in the Local 175 CBA does not provide that the parties can “walk away,” nor does it set forth the parties’ responsibilities (or lack thereof) post-contract expiration. Quite the opposite, the clause clearly memorializes the parties’ agreement of their *continued* relationship and negotiations post-expiration. The provision states that it will,

“continue in effect until and including June 30, 2017, and during each year thereafter unless on or before the fifteenth day (15th) day of March 2017...written notice of termination or proposed changes shall have been served. In the event that such written notice shall have been served, an agreement supplemental hereto, embodying such changes agreed upon, shall be drawn up and signed...” (GC-6)

Contrary to Respondent’s assertion, the Term Renewal provision cannot be read to constitute a clear and unmistakable waiver by Local 175 as defined by the Board, and the ALJ correctly disregarded this argument. Under Board law, a clear and unmistakable waiver requires, “bargaining partners to unequivocally and specifically express their mutual intention to permit

²² The Board in *Staffco of Brooklyn, LLC & New York State Nurses Ass’n*, 364 NLRB No. 102 (Aug. 26, 2016) discussed how it has applied *Cauthorne* narrowly. In a series of cases, the Board has distinguished *Cauthorne* and established that a clear and unmistakable waiver of the obligation to continue providing fringe benefits after expiration of the collective-bargaining agreement requires explicit contract language authorizing an employer to terminate its obligation to contribute to the funds. See *Schmidt-Tiago Construction Co.*, 286 NLRB 342, at 343 fn. 7, 365-366 (1987)

unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). As the Board found in *Hacienda Hotel, Inc.*, 351 NLRB 504, 507 (2007), “In order for parties to terminate the employer's obligation to maintain the status quo post-contract expiration, the contract would have to clearly and unmistakably refer to the *statutory* duty to maintain the status quo or otherwise make explicit that the provision would terminate upon the contract's expiration.”

The Local 175 “Term-Renewal” does not discuss statutory duties or permit unilateral action for either party regarding any employment term. The provision does not state that Local 175 shall lose its 9(a) status at the contract’s expiration nor does it extinguish Respondent’s duty to bargain upon expiration. Rather, the provision actually provides for the ongoing relationship between the parties post-expiration and requires that in the event that notice is given, the parties must negotiate a supplemental agreement. Consequently, the evidence does not establish clear and unmistakable waiver and the ALJ was correct in disregarding any such argument.

iii. **The ALJ Properly Disregarded Respondent’s Argument that its Employees Were Not Qualified to Work Because This Argument is Not Based on Either Party’s Interpretation of the Term in the Local 175 CBA or Board Law.**

Respondent claims that the ALJ ignored its argument that unit employees were not “qualified” to perform work for Respondent under the terms of the Local 175 CBA and therefore, Respondent’s actions (refusing to recognize or bargain with Local 175, terminating all the Local 175 employees, and transferring all unit work to its alter ego) were lawful and consistent with the applicable collective bargaining agreement.²³ (Res. Brf. Pg. 36) In this regard, Respondent cites two cases for the proposition that when interpreting contract language, words

²³ By “actions” Respondent must mean: refusing to recognize or bargain with Local 175, terminating all the Local 175 employees, and transferring all unit work to its alter ego.

must be given their ordinary meaning²⁴ Therefore, Respondent argues, the word “qualified” as it appears in Article VIII, Section 2 of the CBA should be given its ordinary “dictionary” meaning which includes “having met the conditions or requirements set.” (Res. Brf. Pg. 34) Respondent argues that Con Ed’s rejection of Local 175 became a qualification that the terminated workers clearly could not meet, thereby making Respondent’s conduct lawful under the Local 175 CBA. Finally, Respondent makes a confusing argument that the Board has routinely held that a person who is unable to work is not considered to be qualified and that since the Local 175 workers were unable to perform the Con Ed work, they were not qualified to work. It appears that the ALJ did not address these arguments in his decision because the arguments are preposterous, not supported by trial testimony, and rest on erroneous interpretations of Board and other court decisions.

The plain language of Article VIII shows that the term “qualified” refers to employees’ skills and abilities to perform the listed work.

On questions of contract interpretation, the Board assesses whether a party's reading of the contract has a sound arguable basis by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996). The parties' actual intent as reflected by the underlying contractual language is paramount. *Mining Specialists*, 314 NLRB 268, 269 (1994), and is determined by reviewing the plain language of the agreement. *Id.* The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Ibid.*

In this case, it is easy to determine the parties’ actual intent by looking at the underlying language of Article VIII as a whole. Section 1 of Article VIII painstakingly details the work that is covered by the CBA. Against this backdrop, Section 2 then explains that the employees

²⁴ *American Flint Glass Workers’ Union*, 133 NLRB 296, 304 (1961); *Silver State Disposal*, 326 NLRB 84 (1998).

covered by the CBA are the “qualified” employees in the classifications listed in Article IX of the CBA. There is no reference to any other qualifications imposed on employees in order to be covered by the contract. Specifically, there is no mention of Con Ed, or any of Tri-Messine’s customers, nor is there reference to any third party having the right to impose additional qualifications on unit employees. Since there is so much emphasis in Section 1 on the type of work covered, and since there is no reference to any other qualifications, the ability to perform the work listed in Section 1 can be the only possible “qualification” to which this section refers. Per, *Silver State Disposal Service*, 326 NLRB 84 (1998), cited by Respondent, this is the “ordinary and reasonable” meaning of the term qualification as used in this provision.

Respondent’s asserted definition of the term qualified is unreasonable and completely illogical. Under Respondent’s tortured definition, an employee is deemed “qualified” under the CBA between Respondent and Local 175 based upon Con Edison - who is not a party to the CBA - and potentially any other Tri-Messine customer’s whim imposing other requirements, including whether or not that customer wants Respondent’s Local 175 employees perform unit work. Under Respondent’s definition, any time a customer decides that it does not want Local 175 represented employees performing unit work, such customer has the power to render Tri-Messine’s Local 175 workers “unqualified” and has the concomitant power to render the Local 175 CBA inapplicable to all Tri-Messine’s workers. This definition is unreasonable and illogical and is obviously not based on the parties’ past practice or understanding of this contract provision, and certainly does not promote labor stability.

With regard to the parties’ past practice and understanding that “qualified” referred to employees’ skill, Respondent failed to present any evidence that the parties ever interpreted Article VIII, Section 2 as meaning anything other than unit employees’ skills and ability to

perform the listed work. Attorney for Local 175 Eric Chaikin testified repeatedly that the term “qualified” meant employees skills and abilities. Owner Al Messina did not dispute this. Rather, Messina testified only that *Con Ed* viewed the Local 175 workers as not qualified to perform Con Ed work if Con Ed enforced its STCC provision. Messina never testified that he understood the term “qualified” as referenced in Article VIII, Section 2 to mean anything other than employees’ skills and abilities. Respondent failed to produce any evidence that employees had been deemed unqualified and excluded from coverage under the Local 175 CBA in the past based on a third-party request or requirement. Rather, until Con Ed amended the STCC, owner Messina testified that he had not even thought about the significance of the term “qualified” in the CBA – likely because its meaning was obvious. Thus, this idea that the parties had a mutual understanding that the term “qualified” meant something other than employees’ skills and abilities is a newly created, self-serving interpretation of this provision, apparently created for this litigation. It is patently absurd to think that the parties would have ever contemplated disqualifying employees from coverage under the Local 175 CBA whenever a customer decided it did not like Local 175 and thus, the ALJ properly disregarded this argument.

The Local 175 employees were willing and able to work and the cases cited by Respondent are inapplicable.

Finally, Respondent confusingly argues that the Local 175 workers were “unable” to work and that under a certain line of cases, it was lawful for Respondent to re-assign the work to Local 1010, in complete derogation of its obligations to Local 175. Respondent tries to support its claim by citing non-Board decisions that are irrelevant and inapplicable. The two Board cases Respondent does cite arose in the context of a 10(k) jurisdictional dispute and a compliance hearing and have nothing to do with an 8(a)(5) unfair labor practice charge.

Non-Board Cases

Respondent first cites cases that stand for the proposition that “courts have routinely held that a person who is unable to work is not considered to be ‘qualified.’”²⁵ The majority of the cases cited by Respondent involve situations where the individuals were medically unable to work, which is wholly irrelevant to the facts of the instant case since not one Local 175 worker was medically unable to work. (See e.g. *O’Connell v. Potter*, 274 F. App’x 518, 519 (9th Cir. 2008) (The court found that the plaintiff was not a “qualified individual” under the Rehabilitation Act because she was totally incapacitated and unable to work.) *Holowecki v. Fed. Express Corp.*, 644 F. Supp. 2d 338, 359 (SDNY 2009) (Plaintiff’s own doctor asserted that he was not medically able to work.) *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1988) (Plaintiff was deemed not qualified because her doctor had not released her for work and she could not physically make it to work.) Respondent also cited two additional cases where individuals were deemed not qualified to work because they failed to maintain their security clearances and where the individual was prohibited from accessing narcotics or working in an operating room. *McCoy v. Pa. Power & Light Co.*, 933 F. Supp. 438 (M.D. Pa. 1996) (Failure to maintain security clearance); *Talmadge v. Stamford Hosp.*, 2013 U.S. Dist. LEXIS 76404 (D. Conn. 2013) (Plaintiff could not access narcotics or work in operating room). The holdings in all of these cases are plainly non-applicable here since the instant case has nothing to do with Tri-Messine employees’ failure to maintain clearances or other permits. These cases are further rendered inapplicable by the fact that the Local 175 CBA clearly explains what the term qualified means as it pertains to that contract.

Finally, Respondent cites, *Trs. Of the NY City, v. Tappan Zee Constructors, LLC*, 2015 U.S. Dist. LEXIS 163726, for the proposition that “an employer can use non-bargaining unit employees to perform work and was under no obligation to contribute to union pension and

²⁵ Res. Brf. Pg. 35

welfare funds when union was unable to supply qualified employees to perform unit work.”

(Res. Brf. Pg. 36) Respondent’s interpretation of this decision is completely erroneous.

In *Tappan Zee Constructors*, the district court held that the employer was not required to make pension and other fund payments to the Carpenters Union when the employer had already made the same payments to the Ironworkers Union who had supplied the employees to perform work which was otherwise traditionally within the jurisdiction of the Carpenters Union. What Respondent left out of its description of this holding was the fact that the district court found that the employer did not have to reimburse the Carpenters Union only because the Project Labor Agreement, of which the employer and unions were signatory, explicitly *permitted* the employer to employ employees from different unions to perform the Carpenters’ work when the Carpenters Union could not supply workers.²⁶ *Trs. Of the NY City, v. Tappan Zee Constructors, LLC*, 2015 U.S. Dist. LEXIS 163726. Consequently, in *Tappan Zee Constructors* there was explicit contractual language permitting the employer to use employees of another union to perform unit work. No such permission exists in the Local 175 CBA.

Contrary to Respondent’s assertions, the *Tappan Zee Constructors* case did not hold that under Board law an employer is free to assign unit work to another union when that union cannot supply qualified workers. Rather, it is a non-Board decision with a narrow holding that concerned an employer’s liability under the language of a specific PLA to pay into two separate unions’ benefit funds. Respondent’s interpretation of this case is erroneous and misleading.

Board Decisions

²⁶ The court then distinguished *Trustees of the Bricklayers and Allied Craftworkers, Local 5 New York Retirement, Welfare, Apprenticeship Training and Journeymen Upgrading and Labor-Management Coalition Funds v. Plaster Master*, 2001 U.S. Dist. LEXIS 26081, where the court found that the employer therein was liable to pay into two separate union funds for the work of just one employee because the employer therein unlawfully chose to use employees from another union, just like Tri-Messine did herein.

With regard to Respondent's reliance on *Plumbers and Pipefitters Local 525*, 266 NLRB 515 (1983), such reliance is misplaced since that case involved a jurisdictional dispute under Section 10(k) of the Act, and not an unlawful refusal to bargain under Section 8(a)(5) of the Act. In that case, the Board based its decision on to whom the disputed work should go, in part, on the fact that Local 501 lacked skilled plumbers: "...of 14 employees who claim to possess plumbing skills, only 4 or 5 are licensed journeyman plumbers. Finally, the record shows that Local 501 has no source of journeyman plumbers other than those who "walk in" off the street." *Plumbers Local 525*, 266 NLRB 515, 518 (1983). Therefore, the Board found that Local 501 could not meet the employer's need for qualified employees. Respondent argues that the *Plumbers* case is applicable to the instant case since the Con Ed work could not be performed by Local 175 and therefore, Local 175 could not provide Respondent with qualified employees who could perform the work and Respondent was therefore permitted to assign the work to Local 1010. This argument cannot be sustained. Respondent at best misreads this case, and at worst misrepresents the significance of the *Plumbers* decision.

First, the Board did not state that the employer in *Plumbers and Pipefitters* was permitted to engage in unlawful conduct as Respondent did in the instant case. Rather, the Board was only passing on which union was entitled to the work under Section 10(k) of the Act, and in so doing made one comment about Local 501's inability to provide qualified workers to the employer as a basis for concluding which union should be assigned the disputed work. There was no 8(a)(5) allegation that the employer unlawfully abrogated a CBA, terminated employees, created an alter ego, and then reassigned all unit work to the alter ego and a newly recognized union. Thus, it strains logic to understand how Respondent can argue that it was permitted to assign the work to Local 1010 based on this decision.

Importantly, the Board's holding actually shows that Board considers the term "qualified" to mean employees' skills and abilities. In the *Plumbers* case the Board based its award of the work on employees' skills and abilities since it specifically stated that Local 501 did not have enough *licensed* journeymen plumbers who possessed plumbing skills to satisfy the employer's need for workers. Therefore, Local 501 could not provide enough "qualified" workers. Clearly, the Board's use of the term qualified in the *Plumbers* case is based on employees' skills and abilities just as it is in the instant case.

Finally, Respondent cites *Canterbury Educational Serv., Inc.*, 316 NLRB 253 (1995), for the proposition that "employee unable to work deemed not qualified." (Res. Brf. Pg. 36) Similar to many of Respondent's other cited cases, Respondent's interpretation of this decision is completely erroneous. The *Canterbury* case was a compliance decision in which the Board found, in part, that the discriminatee was disqualified from receiving backpay for a certain period of time because he was medically unable to perform unit work for that period of time. Thus, the term "qualified" in that case referred only to the discriminatee's eligibility to receive backpay.

Finally, it must be pointed out that there is no dispute that the Local 175 workers had performed work for Con Ed since at least 2009. Thus, they were plainly "qualified" to perform Con Ed work.

Conclusion

Overall, the testimony adduced at trial, and a plain reading of the term "qualified" in Article VIII, Section 2 relates to employees' abilities to perform the listed job duties. Any other interpretation of that provision runs contrary to its plain language, the understanding of the parties, and Board law. For these reasons, the ALJ properly disregarded this argument.

iv. **The ALJ Properly Disregarded Respondent's Argument that the Doctrine of Impossibility and/or an Economic Exigency Excused All of its Unlawful Conduct.**

Respondent argues that the ALJ failed to address its argument that the doctrine of impossibility allowed it to “subcontract” all work to Callahan, arguing that “Tri-Messine had no choice but to subcontract its work.” (Res. Brf. Pg. 36, 39) “Impossibility” is inextricably linked to Respondent’s argument that it was faced with an economic exigency which permitted it under Board law to act unilaterally to create an alter ego, recognize another union, and transfer all bargaining unit work to that alter ego which the ALJ did address. The ALJ rejected Respondent’s argument and correctly found that Respondent’s economic defense did not privilege Respondent to unilaterally create an alter ego since “the Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of a customer.” (ALJD Pg. 12) As Board law does not recognize the loss of a customer as a defense to Respondent’s conduct, the ALJ properly disregarded Respondent’s doctrine of impossibility argument because it is irrelevant to his decision.

Economic Exigency is not a defense to a mid-contract repudiation.

The economic exigency defense is normally interposed to defend against unlawful unilateral actions by an employer. However, a defense of economic exigency is not available to an employer in connection with a mid-contract repudiation allegation. See e.g. *Tammy Sportswear Crop.* 302 NLRB 860 (1991), citing *Raymond Prats Sheet Metal Co.*, 285 NLRB 194, 196 (1987); *International Distribution Centers*, 281 NLRB 742, 743 (1986); and *Hiysota Fuel Co.*, 280 NLRB 763 (1986); *Morelli Construction Company*, 240 NLRB 1190 (1979); *Schuener Construction Co.* 258 NLRB 1275 (1983); *Willis Electric, Inc.* 269 NLRB 1145, 1146 (1984).

Thus, Respondent's economic exigency defense fails and will not justify Respondent's unlawful repudiation of the Local 175 contract allegation. Moreover, even if an economic exigency defense were viable, Respondent failed to meet its heavy burden of proving that an economic exigency existed.

The ALJ correctly found that loss of a customer does not constitute an economic exigency under Board law.

Respondent failed to meet its "heavy burden" of showing "circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action." *RBE Electronics of S.D.* 320 NLRB 80, 81 (1995), (footnotes and internal citations omitted). Unless there is a dire financial emergency, events such as losing significant accounts or contracts (*Farina Corp.*, 310 NLRB 318, 321 (1993)), operating at a competitive disadvantage (*Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994)), or a supply shortage (*Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)), will not excuse unilateral action. To successfully prove an economic exigency defense, the employer must show that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE Electronics*, supra. at 82.

Respondent failed to show that any economic exigency existed other than the possible loss of the Con Ed contract, which does not constitute an economic exigency per *RBE Electronics*, and *Farina Corp.*, supra. Respondent did not offer any financial evidence to support its dramatic claim that absent the Con Ed work, it would have had to terminate its entire workforce and go out of business, even though Messina testified that such evidence existed. Under *AD Connor Inc.*, 357 NLRB 1770 (2011)²⁷ this is simply insufficient to support such a significant claim.

²⁷ "Indeed, the failure to produce corroborating documentation or testimony from neutral sources such as the Employer's accountants, bankers, or creditors leads . . . to . . . an adverse inference regarding the veracity of the claims of financial collapse. As another judge has put it in similar circumstances, "Respondent's failure to produce such

Furthermore, Respondent's failure to support its claim of financial calamity leads to the adverse inference that such documentation would not have supported Respondents' hyperbolic claim. Respondent has utterly failed to offer any evidence or explanation as to what the dire economic exigency was and whether it "require[d] implementation at the time the action [was] taken" or whether it was "an economic business emergency that require[d] prompt action." Instead, the record evidence supports the conclusion that Respondent was not confronted with a dire financial emergency but rather with a situation that might have resulted in the loss of an account (Con Ed) – or might not have - and the operation at a competitive disadvantage—none of which are considered economic exigencies by the Board as extensively set forth above.

Board law does not recognize the doctrine of impossibility as a complete defense to an 8(a)(5) contract repudiation and the ALJ properly disregarded this argument.

In a variation on its exigent circumstance argument, Respondent argues that it was lawful to subcontract the work to Callahan under the doctrine of impossibility. However, the Board has not recognized the doctrine of impossibility as a defense to an unlawful 8(a)(5) contract repudiation and the ALJ properly disregarded this argument.

Respondent claims that "the doctrine of impossibility has long been recognized by the Board. (Res. Brf. Pg. 38) However, the CGC found just four (4) Board cases that ever mentioned this doctrine, including the case cited by Respondent, *Associated Musicians of Greater New York*, 176 NLRB 365 (1969). The Board does not hold in any of these cases that the doctrine of impossibility is a complete defense to an 8(a)(5) contract repudiation allegation: *Fairfield Nursing Home*, 228 NLRB 1208 (1977) (Doctrine of impossibility did not apply or excuse employer's failure to grant wage increase); *In Re/ Lenz and Riecker*, 340 NLRB 143 (2003) (Board did not rely on doctrine of impossibility in finding no 8(a)(5) violation; Board based its

documents and witnesses leads to an inference that such evidence would be harmful to its case." *Cooke's Crating*, 289 NLRB 1100, fn. 8 (1988). [Citations omitted.]")

decision on fact that the union had waived its bargaining rights.); and *Staffco of Brooklyn*, 364 NLRB No. 102 (2016) (Doctrine of impossibility did not excuse employer from making required pension contributions.)

In the case cited by Respondent, *Associated Musicians of Greater New York*, 176 NLRB 365 (1969), the Board used the doctrine of impossibility to excuse what would otherwise have been an unlawful discharge violation under Section 8(a)(3) of the Act. In that case, an employer admitted that it terminated three musicians because they were not in good standing with the union because the employer knew that if it retained these musicians, the other unionized musicians would refuse to perform. In dicta, the Board mentioned the doctrine of impossibility and suggested that labor law should provide employers with flexibility when confronted by “extreme and unusual” circumstances. However, the Board made clear that, “The instant case is distinguishable from those situations in which the employer himself was improperly motivated...” *Associated Musicians of Greater New York, Local 802*, 176 NLRB 365, 367 (1969). Consequently, this case cited by Respondent is inapposite since 1) it does not involve an allegation of contract repudiation, and 2) the Board made clear that the case would not apply to future situations where an employer was improperly motivated. Here, the ALJ found, based on the overwhelming evidence adduced at trial, that Respondent was improperly motivated to rid itself of Local 175. Therefore, *Associated Musicians* does not apply, even if the holding involved an 8(a)(5) allegation.

Moreover, there was no impossibility at play in this case. First, Tri-Messine did not know whether it was going to secure all the Con Ed work in the first place, thus, it was always possible that Tri-Messine would not get the Con Ed work.²⁸ This risk of not securing bid upon work is a risk inherent to the paving industry in NYC. This risk is present and has always been present in

²⁸ In fact, it did not get all of the work that Con Ed put out for bid since it lost part of the Brooklyn work.

every paving contractors' business operations and does not make their businesses "impossible." Second, it was unclear whether Con Ed would in fact enforce the STCC against Tri-Messine making entirely possible to continue to perform the Con Ed work with the Local 175 workers. Third, Tri-Messine had, and continues to have, other non-Con Ed work which shows that running its business without Con Ed work was possible. Thus, Respondent did not even prove that it was faced with an impossibility that forced it to have to engage in the unlawful conduct.

b. RESPONSE TO POINT #2: Respondent Cannot Overcome the Overwhelming Evidence Adduced at Trial that Tri-Messine and Callahan Are Alter Egos

In Point #2, Respondent claims that the ALJ erroneously found that Tri-Messine and Callahan were alter egos. (Res. Brf. Pg. 40) In this regard, Respondent primarily argues that the ALJ's decision on alter ego "ignores the fundamental issue that Tri-Messine could not perform the work that Callahan was performing." (Id.) In addition, Respondent excepts to the ALJ's conclusion that it was unproven that Tri-Messine could not continue to perform the Con Edison work. (Res. Brf. Pg. 43) Respondent also excepts to the ALJ's finding that, "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." (Res. Brf. Pg. 44) Respondent asserts that Tri-Messine's situation is materially different from any cases cited by the ALJ or the CGC in that Tri-Messine could not continue to perform the Con Ed work because of Con Ed's directive that Tri-Messine use Local 1010 labor.

None of Respondent's arguments can overcome the overwhelming evidence relied on by the ALJ, much of which Respondent stipulated to, that Tri-Messine and Callahan have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership and are therefore alter egos.

1. The ALJ Correctly Found that Callahan and Tri-Messine are Alter Egos Since Respondent Stipulated to Most of the Alter Ego Facts and Because the Evidence

Showed that Tri-Messine Created Callahan To Avoid Its Responsibilities Under the Act.

Respondent argues that the ALJ was wrong in finding that Tri-Messine and Callahan were alter egos, arguing that Callahan was formed because Tri-Messine could not perform the Con Ed work. To the extent that Respondent is arguing that Tri-Messine had no unlawful motive in creating Callahan, the evidence adduced at trial belies that assertion and in any event, unlawful motive is not dispositive of the alter ego issue. This is particularly so here where Respondent stipulated to the vast majority of facts supporting the ALJ's alter ego finding.

Board Law

In determining whether two employers constitute alter egos, the main question is “whether the two employers are the same business in the same market.” *Sobek Corp.* 321 NLRB 259, 266 (1996). The Board generally will find an alter ego relationship when two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. *Advance Electric*, 268 NLRB 1001, 1002 (1984). With regard to common ownership, where “two entities are virtually indistinguishable but for the difference in ownership of the entities by members of the same family, substantially identical ownership is established.” *Midwest Precision Heating & Cooling*, 341 NLRB 435, 439 (2004). Not all of these indicia need be present, and no one of them is a prerequisite to finding an alter-ego relationship. *El Vocero de Puerto Rico*, 357 NLRB 1585, 1585 n. 3 (2011).

The only consideration that the Board gives to a company's purpose behind the creation of an alter ego is whether the company created the alter ego for the purpose of evading responsibilities under the Act. *Cadillac Asphalt Paving Co.* 349 NLRB No. 5, slip op. at 3 (2007); *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 439 (2004), *enfd.* 408 F.3d 450 (8th Cir. 2005); *Cofab. Inc.*, 322 NLRB 162, 163 (1996), *enfd.* sub nom mem. *NLRB v. DA*

Clothing Co., 159 F.3d 1352 (3d Cir. 1998); *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). Significant to the instant case, where there is evidence that the second company was formed to take over the business of the first—in order to reduce its labor costs by repudiating the union's collective-bargaining agreement—the Board has found that the second company was formed with the unlawful motive of avoiding the first company's responsibilities under the Act. *Midwest Precision Heating & Cooling, Inc.*, supra, 341 NLRB at 439. Unlawful motivation is just one factor to be considered. *Cadillac Asphalt Paving Co.* 349 NLRB No. 5, slip op. at 3 (2007), supra.

Respondent Stipulated to Facts that Support the ALJ's Finding of Alter Ego

Respondent stipulated to the following facts that easily establish that Tri-Messine and Callahan are alter egos of one another: Tri-Messine and Callahan both perform asphalt paving work in the construction industry throughout NYC (GC-2); Callahan is owned by Al Messina's wife, yet she has no involvement in Callahan's operations (GC-2, Tr. 56); Al Messina supervises the employees of Tri-Messine and the employees of Callahan and makes all final decisions for both companies (GC-2, Tr. 46); Callahan uses equipment and vehicles supplied by Tri-Messine and Callahan does not pay Tri-Messine for use of this equipment and vehicles (GC-2); both companies operate out of the same location and utilize the same yards to store and dispatch equipment and vehicles (GC-2); Tri-Messine provides Callahan with all asphalt and concrete materials necessary to operate without cost to Callahan (GC-2); Tri-Messine no longer employs paving employees and instead Callahan performs all of Tri-Messine's work on current contracts (Tr.72); and Callahan does not bid on work and instead, Tri-Messine bids on work which Tri-Messine "subcontracts" to Callahan (Tr. 72).

In addition to these stipulated facts that support the ALJ's alter ego finding, the "subcontract" between Tri-Messine and Callahan shows that Tri-Messine exercises significant, almost exclusive control over the operations at Callahan since it provides that Tri-Messine will determine all equipment, facilities, administrative services and other services necessary for the operation of Callahan. The subcontract agreement also provides that Tri-Messine will handle all billing and payments for and to Callahan. (GC-14)

Since Respondents stipulated to virtually all facts that establish an alter ego relationship, the ALJ correctly found that there is no real dispute that an alter ego relationship can be found based on this record.²⁹ This is likely why Respondent puts forth only equitable arguments, all of which fail against this overwhelming evidence of an alter ego relationship.

The ALJ correctly found that Tri-Messine's motivation in creating Callahan is irrelevant to the alter ego analysis.

As noted above, it is a well-established principle of Board law that unlawful motivation is not a necessary element of an alter-ego finding, although the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade responsibilities under the Act. See e.g. *Diverse Steel, Inc.*, 349 NLRB 946, 946 (2007). Thus, the ALJ was correct when he rejected Respondent's argument that no alter ego relationship could be found because Callahan was created out of necessity as opposed to union animus, because Tri-Messine could not perform the work. Well settled Board law instructs that the purpose behind Tri-Messine's creation is just one small factor to be considered in the alter ego analysis. Given that the ALJ had myriad stipulated facts establishing alter ego status, it was unnecessary for the ALJ to rely on (or even consider) Respondent's motivation.

²⁹ It is no surprise that the ALJ concluded that, "Respondent does not argue that the facts here would support a finding that the two entities are sufficiently separate so as to preclude a finding of alter ego." (ALJD Pg. 14)

In its discussion of this exception, Respondent further claims that the ALJ's reliance on *Island Architectural Woodwork Inc.*, 364 NLRB No. 73 (2016), was somehow misplaced. Respondent claims that the *Island* case is distinguishable because there, the employer decided to create the alter ego "on its own," while here, Tri-Messine had to create the alter ego because of a third party's (Con Ed) requirement that Tri-Messine use labor from a specific union. (Res. Brf. Pg. 44) Respondent misreads the *Island* case, whose facts that are remarkably similar to those presented herein. In *Island*, the offending employer, Island Architectural, decided to create the alter ego, Verde Demountable Partitions, a non-union company, in order to satisfy a customer, "the Firm," to keep this customer's business. The Firm wanted Island to mass produce demountable partitions which Island could not do itself due to Island's high labor costs. (Island had a CBA with the Carpenters union that covered all work.) Therefore, Island's owner and his daughter decided to create Verde in order to mass produce the partitions and keep the Firm's business. The Board found that Island and Verde were alter egos. Thus, Island created an alter ego to keep a customer and remain competitive just as Tri-Messine did in the instant case.

Consequently, Respondent's claim that the ALJ's reliance on the *Island* case is misplaced is just plain wrong. Island did not create Verde "on its own." Rather, Island created Verde to satisfy a customer (the Firm), just as Tri-Messine created Callahan to satisfy Con Ed. In both cases, the employers created the alter ego company to keep a customer's business – a reason soundly rejected by the Board as a justification for the unilateral creation of an alter ego. *Island Architectural Woodwork Inc.*, 364 NLRB No. 73, *supra*; *Atlas Glass and Mirror*, 273 NLRB 179 (1984); *Farina Corp.*, 310 NLRB 318 (1993).

The evidence adduced at trial irrefutably demonstrated that Tri-Messine created Callahan for the purposes of evading its responsibilities under the Act.

Though not necessary for the alter ego finding, the evidence adduced at trial clearly showed that Al Messina created Callahan so that Tri-Messine could get rid of Local 175. Not only does the evidence show that Messina created Callahan so that **Tri-Messine** could continue to perform the Con Ed work, but the evidence also establishes that Tri-Messine continued to perform its other **non-Con Ed work** with Callahan's Local 1010 employees, including work for National Grid and Liberty Water and Sewer which shows that Tri-Messine just wanted to rid itself of the Local 175 relationship for all work, not just Con Ed work.

During his testimony, Messina candidly admitted that it was his idea to form Callahan "so that **we** could continue performing work for Con Edison..." (Tr. 526) Thus, Messina's testimony irrefutably demonstrates that he created Callahan so that Tri-Messine could escape the constraints of its Local 175 collective bargaining agreement in its hope to continue to perform the Con Ed work. Moreover, Messina admitted that Callahan also performed work for National Grid (Tr. 60) and for Liberty Water and Sewer (Tr. 141), companies that are unrelated to Con Edison. Had Tri-Messine truly harbored no animus towards Local 175, it would have hired Local 175 workers to perform work for National Grid and Liberty Water. Such compelling evidence leads to only one conclusion: Tri-Messine's true motivation behind the creation of Callahan was to get out from under the Local 175 CBA and perform **all** work with Local 1010 workers- its preferred union. The record evidence amply supports the ALJ's conclusion that Tri-Messine formed Callahan as a way to avoid Tri-Messine's agreement with Local 175.

The ALJ's finding that Respondent did not prove that Con Ed would have enforced the STCC against Tri-Messine was a minor point and inconsequential to the ALJ's ultimate alter ego conclusion.

Respondent also excepts to the ALJ's finding that Respondent did not prove that the Con Ed work could not have been performed by Tri-Messine. (Res. Brf. Pg. 41) The ALJ found that although Respondent argued that Tri-Messine and Callahan are not alter egos because the work

could not be performed by Tri-Messine, Respondent did not prove the lynchpin of its defense - that the work could not, in fact, be performed by Tri-Messine. However, this "finding" was not a necessary part of the ALJ's finding that Tri-Messine and Callahan were alter egos. In fact, the ALJ characterized his comments as just "an initial matter" which was "irrelevant to the determination." (ALJD Pg. 14) As discussed above, the overwhelming record evidence supports the alter ego finding without any inquiry into the bona fides of Respondent's claim that it could not perform the Con Ed work. However, contrary to Respondent's assertions, record evidence supports the conclusion that Con Ed might not have enforced the STCC against Tri-Messine and may have let Tri-Messine perform the work with the Local 175 workers.

In that regard, the evidence established that the parties understood that Con Ed often did not follow through on directives given to contractors. Local 175 Funds Manager Anthony Franco testified that he and Messina had agreed to "wait and see" whether Con Ed would enforce the STCC since "Con Ed sometimes makes, I don't want to say threats, but they say things but they never follow through." (Tr. 367) In fact, Con Ed's own Section Manager Michael Perrino testified that even after Con Ed's 2014 clarification of the STCC, which required ConEd contractors to utilize labor affiliated with the BCTC, Con Ed did not enforce the provision. Perrino testified that he knew that both Tri-Messine and Nico Asphalt were performing work for Con Ed after the 2014 clarification utilizing Local 175 labor for at least two years. (Tr. 450) Perrino admitted that Con Ed never objected to the use of Local 175 workers, and that rather, it was Local 1010 that objected to Con Ed not enforcing the STCC. (Tr. 447-448) The testimony further revealed that although Tri-Messine was awarded the Con Ed work at the end of December 2016, or the beginning of January 2017, it continued to perform the Con Ed work with

Local 175 workers until March 2017, when Tri-Messine decided to terminate workers and transfer all work its alter ego.

Based on the above testimony, and although not necessary to the ALJ's finding of alter ego status, the ALJ correctly determined that Respondent failed to prove that Tri-Messine absolutely could not perform the Con Ed work. The record evidence shows that Con Ed had not enforced the STCC for at least two years after it made the change to the STCC. The record also shows that Con Ed's own Section Manager knew that contractors were performing work with Local 175 workers and that they never objected.

The cases cited by Respondent are inapposite and erroneously interpreted.

Respondent cites a few Board and other court decisions to support its argument that an alter ego relationship cannot be found because Tri-Messine could not perform the Con Ed work. Respondent cites *Cadet Constr. Co.*, 287 NLRB 564 n.3 (1987) for the proposition that Tri-Messine could no longer continue to perform the Con Ed work and that this factor militates against finding an alter ego relationship. It is hard to understand how Respondent interpreted this case in this way. The Board in *Cadet* discussed operational continuity as a factor that the Board considers when analyzing an alter ego claim. The Board found that there was a two year hiatus between the closing of the first employer and the creation of the second employer which supported the conclusion that there was no alter ego relationship. This is clearly not the case here. Here, there was no hiatus in operations at all. Even after Callahan was created, Tri-Messine continued to operate, bidding on work and subcontracting that work to Callahan. The *Cadet* is totally inapplicable. Similarly, it is unclear how *Redway Carriers*, 202 NLRB 938 (1973), supports Respondent's case. Just like in *Cadet*, the Board in *Redway* also found that there was a lengthy hiatus in operations between the employer and the alleged alter ego such that the Board

did not find that the two companies were alter egos. Again, that is not the case here as Tri-Messine never ceased its operations.

In this exception, Respondent also attempts to distinguish a case cited by the CGC, *Ref-Chem Company*, 153 NLRB 488 (1965). The CGC cited this case for the proposition that the NLRA prohibits the discharge of employees because of their union activity even where an employer was pressured by a customer to do so. Respondent argues that the instant case is different from *Ref-Chem* since in *Ref-Chem* the customer had expressed a clear unlawful motive and in this case Con Ed did not. This is simply not true. According to Messina's own testimony, Con Ed made it abundantly clear to him that it did not want Local 175 performing Con Ed work and that it wanted Respondent to sign with Local 1010 instead. This is textbook discrimination based on union affiliation and Respondent knew it. This was why Tri-Messine created Callahan: to continue the Con Ed work because Tri-Messine knew it could not just impose a new union on its Local 175 represented employees because to do so would constitute a clear violation of the Act. Consequently, Respondent cannot argue that it did not know that Con Ed's request was unlawfully motivated and therefore, the *Ref-Chem* case is fully applicable.

Respondent's argument that Tri-Messine and Callahan cannot be alter egos because no Local 175 members were harmed is erroneous and not based on Board law.

Finally, Respondent seems to argue that because the "subcontracting" to Callahan purportedly did not "harm" employees, no alter ego relationship can be found. In support of this argument, Respondent cites a few district and circuit court decisions involving claims brought under the Employee Retirement Income Security Act ("ERISA") which all involved an alleged alter ego's obligations to pay into certain union benefit funds. The courts therein refused to find alter ego relationships where doing so would be inequitable because the union funds involved

therein were not harmed. These cases are totally inapplicable to the instant case since they are not Board decisions and those cases involved the analysis of the alter ego doctrine as it related to obligations under ERISA- a completely different statute and standard than the NLRA. Moreover, the “harm” discussed in those cases involved harm to union funds only, not union members. Lastly, in those cases, the courts did not find any evidence of intent by the employers therein to evade responsibilities under the collective bargaining agreements as Tri-Messine did here.³⁰

Even if the above cases were somehow applicable to the instant matter, it is hard to see how Respondent can argue that the Local 175 members and funds were not harmed by Respondent’s unlawful conduct. Not only did Tri-Messine fire all forty-four of its workers, but the few that returned to work for Callahan had to forgo their Local 175 membership altogether and join different unions. In so doing, these Local 175 members lost all benefits that had accrued and vested via their membership in Local 175. In addition, the Local 175 funds stopped receiving any contributions from Respondent on June 30, 2017. Respondent cannot possibly argue in good faith that the Local 175 members and funds were unharmed by Respondent’s unlawful conduct. To the extent that Respondent might be claiming that it saved its business and employees’ jobs by creating the alter ego Callahan, as established above, Respondent presented no evidence whatsoever to prove that it would have gone out of business had it not secured the Con Ed work.

Conclusion

³⁰ For example, Respondent cited the following cases: *Massachusetts Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 21 (1st Cir. 2003) (In ERISA suit, court found no alter ego, in part, because no evidence was presented of unlawful intent to deceive the union or avoid obligations under a CBA, and that the result of finding an alter ego relationship would have run contrary to first circuit law.); *Flynn v. Interior Finishes Inc.*, 425 F. Supp. 2d 38 (D.D.C. 2006) (In ERISA suit, court held that a non-union entity should not be required to make pension fund contributions under the alter ego doctrine when its unionized counterpart discloses the relationship between the two entities prior to entering into a collective bargaining agreement with the union and the union receives the full benefit of that agreement.) *Local 812 GIPA v. Canada Dry Bottling Co. of New York*, No. 98 CIV. 3791 (LMM), 2000 WL 1886616, at *4 (S.D.N.Y. Dec. 29, 2000) (ERISA suit: Alter ego relationship not found, and alleged alter ego not obligated to reimburse union funds, primarily because no evidence was presented that the creation of the alter ego was a sham.)

Respondent has utterly failed to present any basis to reverse the ALJ's well supported determination that Tri-Messine and Callahan are alter egos. Most of the alter ego evidence came from Respondent itself in the form of stipulations and testimony and is thus undisputed. Respondent's unpersuasive equitable arguments based on non-binding and factually distinct district and circuit case law, are insufficient to overcome the overwhelming evidence presented at trial that Tri-Messine and Callahan are alter egos. Accordingly, Respondent's exceptions must be rejected and the ALJ's decision upheld.

c. RESPONSE TO POINT #3: RESPONDENT INCORRECTLY CHARACTERIZES THIS CASE AS A SUBCONTRACTING CASE.

Respondent excepts to the ALJ's conclusion that it violated 8(a)(5) and (d) of the Act by repudiating the Local 175 CBA, by failing to apply the Local 175 CBA to employees working for Callahan, and by refusing to bargain with Local 175. (Res. Brf. Pg. 51) Respondent's exception to the ALJ's conclusion rests upon its disingenuous claim that the 8(a)(5) and (d) violations involve analyses of Tri-Messine's subcontracting of work to Callahan. In that regard, Respondent argues that subcontracting unit work to Callahan was not a mandatory subject of bargaining and, consequently, Respondent was entitled to unilaterally subcontract all work to Callahan. Respondent then extends this argument and asserts that Tri-Messine offered to meet with Local 175 about the subcontracting and did meet with Local 175, and that alternatively, Local 175 waived its right to bargain over the subcontracting. (Res. Brf. Pg. 52) Respondent's myopic focus on the subcontracting in this case runs contrary to the record evidence and well established Board law.

In this exception, Respondent attempts to divert attention away from its unfair labor practices of creating an alter ego, repudiating the Local 175 CBA, unlawfully recognizing another union, and diverting all unit work to that alter ego by focusing its argument on the

specious claim that it lawfully subcontracted the unit work from Tri-Messine to Callahan. However, this focus on subcontracting is nothing more than a red herring. As alter egos, Tri-Messine and Callahan are the same entity. Thus, Tri-Messine did not actually subcontract work to anyone, it just changed the name of the entity performing the work. As will be shown, Board law requires that this case be analyzed as an alter ego case and not a subcontracting case.

1. The ALJ Correctly Analyzed Respondent's Conduct Under the Board's Well-Settled Alter-Ego Law and Properly Rejected Respondent's Claim of Subcontracting.

The ALJ correctly analyzed Respondent's unlawful conduct based on the alter ego status of Tri-Messine and Callahan and not upon a subcontracting analysis and, accordingly, found that Respondent violated 8(a)(5) and (d) of the Act. In that regard, the ALJ properly found that:

“The Board has held that the collective bargaining agreement of an employer applies to its alter ego as of the date of the alter ego's first use of bargaining unit employees....As such, because 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...it is not disputed 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.” (ALJD Pg. 12)

Thus, the ALJ implicitly rejected Respondent's argument that this is a subcontracting case that should be analyzed under the Board's line of cases dealing with subcontracting and whether it is a mandatory subject of bargaining. As alter egos, Tri-Messine and Callahan are the same entity and thus, no subcontracting could have taken place. The ALJ's rejection of Respondent's subcontracting argument is perfectly aligned with Board precedent.

The instant case is not a subcontracting case because, as established above, Respondent formed an alter ego and simply shifted the work to the alter ego in order to avoid the Local 175 collective bargaining agreement. There was no partial plant closure or subcontracting to an independent contractor or other third party as occurred in *Fibreboard Paper Products v NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp.*, 452 U.S. 666 (1981), cited by

Respondent. In fact, the Board in *Otis Elevator*, 269 NLRB 891 (1984) discussed the effect of an alter ego finding on a party's bargaining obligations. In finding that the respondent therein did not have to bargain over the relocation of its research department because (add the reason), the Board cautioned, "Further, no alter ego or other sham devices were employed to disguise a unilateral reduction in labor costs in an operation over which the employer maintained surreptitious control." *Otis Elevator*, 269 NLRB 891, 893 (1984).

Based on this precedent, the Board has subsequently distinguished between cases where the question is whether an employer has truly made a core entrepreneurial decision that takes work out of the unit versus a situation where the employer has kept the work in the same unit because the new employer was actually a disguised continuation of the former employer. See e.g. *Haley & Haley Inc.*, 289 NLRB 649 (1988); *Amateyus Ltd.* 280 NLRB 219 (1986). Where the situation involves an employer shifting work to its alter ego thereby keeping the work in the same unit, the Board will utilize alter ego principles as opposed to a *First National Maintenance* subcontracting analysis to determine if the shifting of work to the other entity violates the Act. *Haley & Haley*, supra at 652. Consequently, the *First National* cases do not apply to the instant matter since this case does involve a "sham device" (alter ego) that was employed to disguise efforts by Tri-Messine to retain a customer through the alter ego while Tri-Messine maintained total control over the alter ego. None of the cases Respondent cites in it exceptions involve a situation where the two contracting entities are found to be alter egos.³¹ Therefore, the cases

³¹ For example, Respondent cites the following cases: *Fibreboard Paper Products*, 379 U.S. 203 (1964) (subcontracting to independent contractor found to be mandatory subject of bargaining and not a core entrepreneurial decision; no alter ego allegation); *First National Maintenance*, 452 U.S. 666 (1981) (Board analyzed employer's decision to close part of its plant and found it to be a core entrepreneurial decision not subject to bargaining; no alter ego allegation); *Bob's Big Boy Family Restaurants*, 264 NLRB 1369 (1982) (subcontracting to third party company found to be mandatory subject that did not involve change in scope and direction of business; no alter ego allegation); *Dorsey Trailers v. NLRB*, 134 F.3d 125 (3d Cir. 2000) (subcontracting to third party company not a mandatory subject of bargaining; no alter ego allegation) *Oklahoma Fixture Co.*, 314 NLRB 958

Respondent cites are completely inapposite and irrelevant to the facts of the instant case where the ALJ's finding that Tri-Messine and Callahan are alter egos is overwhelmingly supported by the probative record evidence.

Even if this case were considered to be a subcontracting case, which it cannot, Tri-Messine's decision to subcontract work to Callahan does not constitute a core entrepreneurial decision under Board law that would excuse notice and bargaining. In *Fireboard*, the Supreme Court found that the employer violated Section 8(a)(5) and (d) of the Act by failing to bargain over the subcontracting of bargaining unit work to an independent contractor. The majority based this decision on the fact that the employer's decision to subcontract was not a core entrepreneurial decision and did not change the basic operation of the company. Rather, the Court found, "the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." *Fibreboard, supra*, 379 U.S. at 213. Similarly, in another case cited by Respondent, *Bob's Big Boy Family Restaurants*, 264 NLRB 1369 (1982), the Board also found the employer's decision to subcontract its shrimp processing to a third party not to constitute a core entrepreneurial decision because, "The only difference is that the processing work is now performed by Fishing employees pursuant to the subcontract rather than by Respondent's employees." *Id* at 1371.

Similarly, Tri-Messine's decision to create Callahan and subcontract work to Callahan did not involve any change in the scope of Tri-Messine's operations. Callahan continues to perform the same work that Tri-Messine performed in the same jurisdiction, out of the same yards, with the same materials, using the same equipment and vehicles as Tri-Messine. The only difference is that Callahan uses different employees. Under the Board law described above, Tri-

(1995) (subcontracting to independent electrical contractor not mandatory subject of bargaining since it involved core entrepreneurial decision; no alter ego allegation.)

Messine's decision to subcontract to Callahan would constitute a mandatory subject of bargaining and Respondent would still be obligated to notify and bargain with Local 175 over the subcontracting of unit work.

2. The ALJ Correctly Found that Respondent Failed to Notify and Bargain with Local 175 Regarding the Termination of its Workforce Since Respondent's Announcement of these Events Was Presented as a Fait Accompli.

Respondent argues that even if the subcontracting to Callahan constituted a mandatory subject of bargaining and Respondent had an obligation to notify and bargain with Local 175, it satisfied that obligation or, alternatively, Local 175 waived its right to bargain over the matter. Respondent's assertions are wrong because they are based on its erroneous view that this case is about subcontracting and because any notification given to Local 175 was presented as a fait accompli as properly determined by the ALJ.

It is crucial to understand that the ALJ's finding that Respondent unlawfully created an alter ego and repudiated the Local 175 CBA does not involve an analysis of whether Respondent notified and bargained with the Union. This is because as alter egos, Respondent simply was not permitted to engage in this conduct regardless of notice and bargaining. Consequently, the notice and bargaining issue only relates to Respondent's decision to lay off its workforce. It is unclear if Respondent understands this distinction since Respondent focuses its argument on the alleged notice it gave regarding purported subcontracting rather than its decision to layoff employees. To the extent that Respondent is arguing that it notified and bargained with Local 175 about the layoffs, such an argument is not support by the record evidence or Board law.

Board law required notice and a meaningful opportunity to bargain over the termination of Respondent's workforce.

An employer violates Section 8(a)(5) when it unilaterally institutes changes in mandatory terms of employment without bargaining in good faith. *NLRB v. Katz*, 369 U.S. 736 at 743

(9162). The termination or layoff of employees is a mandatory subject of bargaining. See e.g. *Cook DuPage Transportation Company*, 354 NLRB 262 (2009). In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *Wackenhut Corp.*, 345 NLRB 850, 868 (2005); *Brimar Corp.*, 334 NLRB 1035, 1035 (2010). Once notice is received, the union must act with “due diligence” to request bargaining, or risk a finding that it has waived its bargaining right. See *KGTV*, 355 NLRB 1283 (2010).

The Board will find a waiver only if the waiver is clear and unmistakable.

The Board's waiver principles are well established. Waiver is not lightly inferred and must be “clear and unmistakable.” See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), *enfd.* 176 F.3d 494 (11th Cir. 1999), *cert. denied* 528 U.S. 1061 (1999). Thus, the party asserting waiver must establish that the parties “unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).⁶ Such a showing may be based on an express provision in the contract, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two. See, e.g., *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d. Cir. 1982), *enfg.* *Chesapeake & Potomac Telephone Co.* 259 NLRB 225 (1981).

The Board will not find a waiver where the change is presented as a fait accompli as it was here.

The Board has consistently found that “where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful

opportunity for the union to bargain,” the change constitutes a *fait accompli*, such that the union's failure to demand bargaining does not constitute a waiver. *Aggregate Industries*, 361 NLRB No. 80 (2014), 359 NLRB No. 156 at p. 4 (2013); see also *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The obligation to bargain requires that the employer “at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (1983) (citations omitted). Informing the union of a change in a manner which precludes meaningful bargaining divests the union of its obligation to demand bargaining or have inaction construed as a waiver. *Id.*

In determining what constitutes a *fait accompli*, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. *KGTV*, 355 NLRB No. 213 at p. 2-3 (2010). While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a *fait accompli*, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. See *Aggregate Industries*, 359 NLRB No. 156 at p. 5 (employer representative presented *fait accompli* by telling union representative that the employer was “going to” transfer bargaining unit employees); *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented *fait accompli* by telling union that layoff was a ““done deal””); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023-1024 (notice stating that changes “will be implemented” and other “unequivocal language” evidence of *fait accompli*).

The Board also evaluates the timing of the employer's statements vis-a-vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a “fixed intent” to make the change at issue which obviates the

possibility of meaningful bargaining. *Aggregate Industries*, 359 NLRB No. 156 at p. 5; *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enf.d.* 722 F.2d 1120 (3rd Cir. 1983) (“if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*”); *Northwest Airport Inn*, 359 NLRB No. 83 at p. 4 (2013) (*fait accompli* established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation “made no difference”).

The record evidence overwhelmingly shows that Tri-Messine owner Messina did not and could not have made a decision to terminate Unit employees until after January 6, 2017, the date on which Local 1010 informed Messina that he had to use the Local 1010 hiring hall exclusively to hire employees for Callahan and that he could not keep his own workers. Thus, Respondent's argument that it gave notice of the alter ego and its intent to layoff workers on various occasions prior to January 6, 2017, fails as it is contrary to the record evidence.

Messina admitted that it wasn't until Local 1010 told his attorney on January 6, 2017, that Messina could not hire his own workers at Callahan and instead had to use the Local 1010 hiring hall that he decided to layoff his Local 175 workforce. (Tr. 528) Before January 6, 2017, Messina did not know that Local 1010 would require Messina to use its hiring hall exclusively at Callahan and that it would not permit Messina to hire any of his Local 175 workers.

Consequently, it could only have been after January 6, 2017, that Respondent could have communicated its decision to layoff workers to Local 175. Thus, Respondent's argument that it notified Local 175 of the layoff prior to January 6, 2017, is without merit.

The evidence adduced at trial shows that Respondent's notice to Local 175 of its intent to layoff its entire workforce took place on January 18, 2017, at the meeting between Anthony Franco and Al Messina. (Tr. 124, 528) By the time that actual notice was given on January 18, 2017, Respondent had already created Callahan (on November 14, 2016) and had signed a CBA with Local 1010 (on January 13, 2017), as the ALJ correctly found. These undisputed facts of Respondent's creation of alter ego Callahan and signing of the Local 1010 contract formed the basis for the ALJ's finding that Respondent did not properly notify and bargain with Local 175 over the decision to create the alter ego or to terminate workers.

3. The ALJ Properly Found that the Record Evidence Clearly Demonstrated that Respondent Presented Local 175 With a Fait Accompli

As the ALJ correctly found, the record evidence demonstrated that by the time of the January 18, 2017, meeting between Local 175 Funds Manager Anthony Franco and Tri-Messine owner Al Messina,, Tri-Messine had already created the alter ego and listed the alter ego as the subcontractor that would perform the Con Ed work, advancing its plan to get rid of Local 175. (GC-20(b)) The record evidence also showed that Callahan had already negotiated with Local 1010 and signed the Local 1010 collective bargaining agreement just days prior to the January 18, 2017, meeting. (GC-10, GC-11) Thus, the record evidence conclusively established that Tri-Messine already made its decision and implemented its plan to get rid of Local 175 and its members by the January 18, 2017, meeting, which compelled the ALJ's conclusion that Local 175 was presented with nothing more than a fait accompli at the January 18, 2017, meeting when Respondent notified Local 175 of the creation of the alter ego and upcoming terminations. Moreover, Messina's language at the meeting was unequivocal, definitive and established that

his mind was made up and his decision was final.³² Thus, there was nothing for Local 175 to bargain over. To the extent that Respondent argues that its meeting with workers and February 28th letter to Local 175 retroactively served as proper notice, such argument is absurd. That Respondent notified its workforce of its decision to layoff its employees and then advised Local 175 in writing is immaterial as the violation had already occurred.

Local 175 did not ignore Respondent's "requests" to meet.

Finally, Respondent argues that it offered to meet with Local 175 in January, February, and May of 2017, and that Local 175 ignored Respondent's "requests" to meet. Although the ALJ did not make an explicit finding on this argument, this assertion is untrue and not supported by the record.

With regard to Respondent's alleged January offer to meet with Local 175, Respondent argues that Local 175 unlawfully insisted that the parties meet without attorneys present and that this constituted a rejection of the offer to meet. This argument is absurd and contrary to the record evidence. The email between Al Messina and his attorney contained in GC Exhibit 12 clearly shows that Respondent's Al Messina agreed to meet Local 175 representatives without attorneys present.³³ It is undisputed that Messina and Franco did meet on January 18, 2017. Thus, the parties met and it untrue that Local 175 rejected Respondent's offer to meet.

With regard to the February and May "offers" they do not constitute proper offers to meet and bargain because Respondent had already implemented its unlawful scheme and had already terminated the Local 175 workforce. The February 28, 2017 letter, in which Respondent notified

³² The language that Messina chose showed that the decision had already been made and the plan implemented since the language he used was all in the past tense: -- he *had* bad news; he *had to* sign a contract; employees who could not become members of other unions *had to* go home. In fact, when Franco objected to the conduct and told Messina that he would have to file unfair labor practice charges, Messina just wished Franco "luck" rather than attempting to negotiate.

³³ "I just spoke to Roland who contacted Anthony Franco and was told that there was no need to have a meeting with the attorneys. I will meet with Anthony alone on Wednesday." (GC-12)

Local 175 of its intent to terminate workers, was simply a reiteration of the fait accompli presented to Local 175 on January 18, 2017. By the time of the February 28th letter, Respondent had already held its meeting with the Local 175 workers in the yard and informed them that they were all being terminated. In fact, just three days after this letter, the Local 175 workers worked their last day. Similarly, by the time Respondent sent its May 12, 2017, email to Local 175's attorney suggesting that they were willing to discuss any "concerns" under the "current agreement," employees had already been terminated and all unit work had been shifted to Callahan and Local 1010. Consequently, neither the February 28th letter or the May 12th email were anything more than reiterations of the fait accompli presented on January 18th and did not constitute good faith notice and offers to bargain over effects or otherwise since all decisions had already been made and implemented.

4. The ALJ Properly Disregarded Respondent's Assertion that its Mere Speculation Prior to January 18, 2017, that it Might Have to Layoff Workers Triggered Local 175's Obligation to Demand Bargaining.

Respondent argues that Local 175 waived its right to bargain over Respondent's conduct, particularly the termination of Respondent's workforce, because during the parties' regular meetings, Respondent mentioned that it might have to "layoff" workers if Con Ed enforced the STCC. In addition, Respondent argues that Local 175 made statements in certain Public Service Commission and other court filings that show that Local 175 "knew" that Tri-Messine would have to lay off workers. Under Board law, these "inchoate and imprecise announcements" of potential future plans are insufficient to have triggered Local 175's obligation to request bargaining.

The Board has long held that a union's obligation to demand bargaining is only triggered "by a clear announcement that a decision affecting the employees' terms and conditions of

employment has been made and that the employer intends to implement this decision.” *Oklahoma Fixture Co.*, 314 NLRB 954 at 960-961 (1994). By contrast, an “inchoate and imprecise announcement of future plans about which the timing and circumstances are unclear” is insufficient to trigger the union's obligation to demand bargaining. *Id.* at 961 (internal quotations omitted); *see also Centurylink*, 358 NLRB 1192, 1193 (2012), appeal dismissed, 2014 WL 1378759 (D.C. Cir. 2014); *San Juan Teachers Assn.*, 355 NLRB 172, 174 (2010). The Board has found that employer statements containing indefinite terms are insufficient to trigger a union's responsibility to demand bargaining or risk having its inaction construed as a waiver. *See San Juan Teachers Assn.*, 355 NLRB 172, *supra* (employer description of reduction in hours as “one of the options,” “more strategic,” and a course of action that the employer was “going to have to take a look at” insufficiently specific to require a bargaining demand); *Pan American Grain Co.*, 343 NLRB at 318, 338 (statement that employer “intended to continue with staff reductions in the future” inadequate notice of layoff); *Oklahoma Fixture Co.*, 314 NLRB at 960-961 (employer's announcement that it was “considering” subcontracting insufficient to require bargaining demand). The Board has also held that unions are not required to demand bargaining “at any point before the Respondent confirm[s] that the decision [will] be implemented on a specific date.” *Centurylink*, 358 NLRB 1192, 1193 (2012).

The facts of the instant case show that all conversations that took place between Respondent's owner Al Messina and Local 175 representatives prior to January 18, 2017, regarding Con Ed's possible enforcement of the STCC involved only Respondent's conditional statements regarding what “might” or “could” happen if Con Ed enforced the STCC. (Messina: “...like Nico, I'd be forced to use 1010 labor...”; Franco: “he might have to sign a contract with

Local 1010...” (Res. Brf. Pg. 57))³⁴ Similar to the equivocal language in *Oklahoma Fixture, supra* and *Centurylink, supra*, Respondent’s language prior to January 18, 2017, was too “inchoate and imprecise” to trigger Local 175’s obligation to demand bargaining. Prior to the January 18, 2017, meeting between Franco and Messina, Respondent did not communicate to Local 175 a specific plan to terminate workers by a specific date. In fact, as shown above, the evidence establishes that Respondent did not even make its decision to terminate the workforce until January 6, 2017. Thus, prior to January 18, 2017, the parties simply discussed what *might* happen if Con Ed enforced the STCC and the ALJ properly disregarded any argument that these equivocal conversations triggered Local 175’s obligation to request bargaining.

With regard to Respondent’s arguments that the statements that Local 175 made in certain Public Service Commission and other court filings show that Local 175 “knew” that Tri-Messine would have to lay off workers; these filings do not support Respondent’s claim. Local 175’s 2014 Public Service Commission brief, and the 2016 SDNY complaint were filed in 2014 and 2016 respectively and Respondent was not a party to either case. In neither pleading does Local 175 admit that Tri-Messine informed Local 175 of a clear decision to layoff workers. Thus, neither pleading supports the argument that Respondent properly notified Local 175 of its decision to terminate its entire workforce.

The only conclusion that the record evidence supports is that Respondent communicated its decision to terminate its workforce to Local 175 on January 18, 2017. Thus, on January 18, 2017, Local 175 had an obligation to demand bargaining over Respondent’s stated decision to

³⁴ Though Messina mentioned during his testimony a meeting between himself, Roland Bedwell, and Anthony Franco in which layoffs may have been discussed, he could not recall any such meeting with any specificity. Messina could not remember the date, time, or substance of any such meeting. (Tr.554-555) The only meeting Messina credibly testified to was the meeting on January 18, 2017, with Anthony Franco and this is the only meeting that can be credited. Contrary to Respondent’s assertion, the fact that the CGC did not call Roland Bedwell to testify about an alleged that meeting that Al Messina could not recall, does not warrant any adverse inference since Messina did not present any facts to dispute.

terminate workers. However, by January 18, 2017, Respondent's plan to create the alter ego, recognize Local 1010, and transfer all unit work to the alter ego had already been implemented. Thus, the ALJ properly concluded that Local 175 was presented with a classic *fait accompli* and accordingly, Local 175 was not required to demand bargaining.

5. The ALJ correctly found that Respondent violated 8(d) by its complete repudiation of the Local 175 CBA.

Relying on its erroneous and unsupported claim that it subcontracted work to Callahan, Respondent then contends, incredibly, that there can be no 8(d) violation because the subcontracting to Callahan was not a mandatory subject of bargaining. This argument fails for two reasons. First, as established above, the ALJ correctly found that the evidence irrefutably showed that Tri-Messine and Callahan are alter egos and, accordingly, Respondent violated 8(a)(5) and 8(d) of Act. Therefore, Callahan was bound by the Local 175 CBA and Callahan's failure to apply and honor the terms of the Local 175 violated Sections 8(a)(5) and (d) of the Act. As the evidence establishes that Tri-Messine and Callahan are alter egos and that there was no subcontracting, whether the alleged subcontracting of unit work to Callahan constituted a mandatory subject is completely irrelevant to the finding of a violation.

Second, Respondent did more than just fail to notify and bargain with Local 175 over subcontracting; instead, Respondent repudiated the entire Local 175 collective bargaining agreement. Section 8(d) of the Act provides that when a collective-bargaining contract is in effect, "the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract." It is undisputed that Respondent stopped applying the Local 175 CBA to employees after it fired them on March 3, 2017, including ceasing all fund contributions to Local 175. It is also undisputed that Respondent refused to apply the Local 175 CBA to employees performing unit work for Callahan. The Local 175 CBA

did not expire until June 30, 2017. Therefore, the evidence conclusively establishes that Respondent violated 8(d) when it unilaterally terminated the Local 175 CBA on March 3, 2017, and refused to honor the terms of the agreement thereafter. Consequently, the ALJ's finding that Respondent violated 8(d) of the Act by its complete repudiation of the Local CBA is well supported by the record evidence.

D. RESPONSE TO POINT #4: THE RECORD IS REPLETE WITH EVIDENCE OF RESPONDENT'S ANIMUS TOWARDS LOCAL 175.

In this exception, Respondent claims that the ALJ's conclusion that Respondent violated Sections 8(a)(1) and (3) of the Act by terminating its entire workforce was erroneous because: 1) Respondent harbored no animus towards Local 175 because Al Messina had a good relationship with Local 175's members, 2) Local 1010 would not permit Respondent to employ Local 175 workers at Callahan, and 3) the charge is barred by 10(b). All these arguments fail as they are contrary to the record evidence and Board law.

1. The ALJ Properly Found and the Record Evidence Conclusively Shows that Respondent Harbored Animus Towards Local 175 Based on Respondent's Admissions and Because Respondent Refused to Use Local 175 Members for Non-Con Ed Jobs.

Respondent argues that the ALJ could not have found that Tri-Messine harbored animus towards Local 175 because Al Messina had a strong social relationship with the Local 175 members. However, although Al Messina might have had good interpersonal relationships with his employees, Messina admitted that he fired them because of their membership in Local 175. Messina admitted that he terminated his Local 175 members so that he could secure the 2016 Con Ed contract because he believed that Con Ed would not permit Local 175 employees to work on Con Ed's jobs. (Tr. 151-152) Thus, Respondent's animus towards Local 175 is clear; Respondent was intent on getting rid of its Local 175 workers – solely because of their affiliation

with Local 175 – in Respondent’s effort to secure the Con Ed work. Clearly, Respondent believed that a relationship with Local 175 could mean fewer opportunities for work and Respondent discriminated against Local 175 for these economic reasons. Based on these admissions at trial, the ALJ correctly found that it was employees’ Local 175 union affiliation that caused their discharge. Thus, animus towards Local 175 is easily established by this record, regardless of how Messina may have felt about individual workers.³⁵

With regard to Respondent’s claim that no 8(a)(3) can be found because Local 1010 “insisted” that Respondent use its hiring hall exclusively,³⁶ this argument is like the tail wagging the dog. Local 1010 would never have been in a position to insist on anything had Respondent not created an alter ego, shifted all unit work to the alter ego, and unlawfully recognized Local 1010 as the exclusive representative of employees. Thus, placing the blame on Local 1010 is no defense to Respondent’s unlawful conduct. Moreover, the evidence adduced at trial showed that no third party, including Con Ed or Local 1010, told Respondent to terminate its workforce. That decision was made and implemented by Respondent alone.³⁷

Finally, although Respondent claimed that it engaged in the unlawful conduct to comply with Con Ed’s requirements, the record shows that Tri-Messine actually did it to get rid of Local 175 on all of its jobs - including those that were not with Con Ed. In that regard, Tri-Messine admitted at trial that it had non-Con Ed work (National Grid and Liberty Water and Sewer) for which it could have employed Local 175 workers, yet it chose not to. (Tr. 72, 77-78, 504) Al Messina admitted that Tri-Messine and Callahan continue to perform work for various customers that do not have the same labor union restrictions that Con Ed has, yet they still perform this

³⁵ The contemporaneous 8(a)(2) and (5) violations further support the existence of animus. (Mid-Mountain Foods, Inc., 332 NLRB 251, 251 fn.2, 260 (2000), *enfd.* 11 Fed.Appx. 372 (4th Cir. 2001).

³⁶ Res. Brf. Pg. 66

³⁷ Al Messina and Con Ed’s Manager Mike Perrino both testified that Con Ed never told Tri-Messine that it had to terminate workers. (Tr.107-108; 478)

work with Local 1010 workers, and not Local 175 workers. (Tr. 77-78) Clearly, compliance with Con Ed's STCC was not Respondent's only concern. Rather, the evidence shows that Respondent used the Con Ed situation to completely rid itself of the Local 175 relationship. Consequently, the ALJ's finding of animus towards Local 175 to establish that Respondent violated 8(a)(3) of the Act by terminating its Local 175 workforce, is well supported.

2. The ALJ Correctly Found that the 8(a)(3) Charge is Not Barred by Section 10(b) of the Act and the Case Cited by Respondent is Inapposite.

Respondent argues that because there was a withdrawal of an 8(a)(3) allegation during the case's pendency at the Region, which was not made part of the case, a new 8(a)(3) allegation could not be sustained and the ALJ erred in finding a violation since the charge is untimely. In support of this argument, Respondent cites to *Northwest Towboat Ass'n*, 275 NLRB 143 (1985). However, the cases relied upon by the Board in *Northwest Towboat* were specifically limited by the Board in *Redd-I, Inc.*, 290 NLRB 1115, 1-1116 (1988). In *Redd-I* the Board refused to apply *Winer Motors*, 265 NLRB 1451 (1982) or *Ducane Heating Corp.*, 273 NLRB 1389 (1985) because those cases attempted to reinstate dead allegations in the absence of pending timely filed charges. In *Redd-I*, the Board found instead that "we would apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, *without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed.*" (emphasis added) Consequently, *Northwest Towboat* is inapplicable to the instant case since there was no attempt to reinstate dead 8(a)(3) allegations and since there was a pending timely filed, closely related 8(a)(2) and (5) charge.

Moreover, there were no withdrawal letters that were made part of the record and Respondent's reliance on such letters is improper and contrary to the requirements of Section

102.46 of the Board's Rules and Regulations.³⁸ To the extent that there may have been prior allegations that Local 175 withdrew in Case No. 29-CA-194470, the prior allegations involved a different employing entity.³⁹ In any event, as discussed above, since *Redd-I* the Board does not foreclose the prosecution of an untimely charge that is closely related to a timely filed charge just because the same allegation may have appeared previously in a withdrawn charge.⁴⁰ Thus, the ALJ properly found that the 8(a)(3) charge could be related back to the timely filed 8(a)(2) and (5) charge in this case and that the charge was not barred by 10(b) of the Act.

3. RESPONSE TO POINT #5: THE ALJ'S REMEDIES ARE NOT PUNITIVE.

In this final exception, Respondent argues that the make whole and bargaining remedies ordered by the ALJ are punitive and not remedial. However, the ALJ ordered traditional make-whole and bargaining remedies and Respondent fails to explain how the listed remedies are punitive.⁴¹ Rather, Respondent just re-iterates its position that it did not violate the law in any way, which was already addressed earlier in this Answering Brief.⁴² As discussed, the

³⁸ (j) Each exception must. .(c) provide precise citations of the portions of the record relied on. .”

³⁹ The charge was initially filed on March 7, 2017, against “Consolidated Edison Company of New York, Inc. and its Joint Employer Tri-Messine Construction Company and its alter ego, Callahan Paving Corp.” That charge included an 8(3) allegation that Consolidated Edison and Tri-Messine/Callahan as joint employers violated 8(3) of the Act. (GC-1(a)) On September 14, 2017, a new charge was filed against Tri-Messine *only* alleging that Tri-Messine violated 8(a)(3) by terminating bargaining unit employees.

⁴⁰ See e.g. *Nickels Bakery of Indiana*, 296 NLRB 927 (1989); *Bryant and Stratton*, 321 NLRB 1007 (1996); and *Whitewood Maintenance*, 292 NLRB 1159 (1989).

⁴¹ The ALJ ordered Respondent to: honor and abide by the Local 175 CBA and make whole bargaining unit employees for any loss of earnings and other benefits; offer affected employees reinstatement to their former positions; make affected employees whole for loss of benefits and earnings that resulted from Respondent's discrimination against them; compensate effected employees for their search for work expenses; make whole employees for expenses ensuing from Respondent's failure to make required fund contributions; make union funds whole for losses suffered; compensate affected employees for excess tax consequences; make payroll and other records available to the Board in order for the Board to determine all monies owed; post a traditional notice to employees; and provide the Regional Director a sworn certificate of compliance.

⁴² In this regard, Respondent argues that the Local 175 CBA was properly terminated on June 30, 2017 (it wasn't- Respondent still had to recognize and bargain), that it had no choice but to subcontract work in order to save its business and jobs (Respondent did not prove this at trial), that the majority of employees were re-hired by Callahan into different unions (at least 11 employees were not re-called, and those that were had to give up their membership in Local 175), and Respondent cannot negotiate with Local 175 since Local 175 cannot perform Con Ed work (the

overwhelming evidence adduced at trial proves that Respondent engaged in all of the violations alleged in the Consolidated Complaint. Since Respondent has failed to explain how the ALJ's traditional remedies are punitive, this exception should be rejected.

V. Conclusion

Respondent has failed to present any factual or legal basis to overturn the ALJ's well-reasoned and well-supported Decision. As it did at trial, in its exceptions Respondent primarily relies upon a defense that it "had no choice" but to engage in the unlawful conduct alleged because it had to comply with Con Ed's STCC. However, the potential loss of customer is simply not a valid defense to an 8(a)(5) and (d) unlawful repudiation of a contract and failure to bargain allegation. Moreover, it is simply untrue that Respondent had no choice since the evidence showed that losing the Con Ed work was always a risk, Con Ed may not have enforced the STCC against Respondent, Respondent had other non-Con Ed work, and since Respondent and Local 175 may have been able to come up with solutions to Respondent's dilemma had Respondent properly notified and bargained with Local 175. As the Board stated in *Gunderson Rail Services*, 364 NLRB No. 30 (2016), "any contention that the union could have offered nothing through collective bargaining is speculative, as the respondent could not claim to know what solutions the give and take of bargaining might have generated." Whatever solutions could

evidence showed that Respondent has other non-Con Ed work and Respondent did not definitively prove that Con Ed would not permit it to use Local 175 members to perform its work).

have been explored, Respondents were legally bound to include Local 175 in the dilemma and bargain with them towards such a mutually beneficial solution.

Overall, Respondent's exceptions offer no basis in fact or law to overturn the ALJ's Decision and should be rejected. All of the ALJ's findings of fact, conclusions of law, remedies, and his Order should be affirmed. With regard to Respondent's request for oral argument, such a request is unnecessary given the extensive briefing the parties engaged in both on the trial level and now at the Board level. Moreover, Respondent's exceptions do not offer any novel legal theories which have not already been addressed by the Board in long-standing case precedent. The request for oral argument should be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily A. Cabrera", written over a horizontal line.

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