

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

**NEW YORK PAVING, INC.**

**Respondent**

**and**

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

**Charging Party Union**

**and**

**ELIJAH JORDAN, an Individual**

**Case Nos.: 29-CA-234894  
29-CA-233990**

**EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Please take notice that pursuant to the National Labor Relations Board Rules and Regulations, Section 102.46, New York Paving, Inc. (“NY Paving” or the “Respondent”), by its attorneys Meltzer, Lippe, Goldstein & Breitstone, LLP, respectfully submits the following Exceptions to the Decision of the Administrative Law Judge Lauren Esposito, dated January 27, 2020 (“ALJ Decision”) in the above-referenced matter:

1. The Administrative Law Judge (“ALJ”) abused her discretion by denying Respondent’s request to draw an adverse inference against the Counsel for the General Counsel (“GC”) and Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “Charging Party”) due to their failure to introduce into the evidence the New York Independent Contractors Alliance, Inc. (“NYICA”) and United Plant and Production Workers Local Union 175 collective bargaining agreement, which was effective July 1, 2014 through June 30, 2017

(“2014-2017 CBA”) prejudicing Respondent for the reasons set forth in these Exceptions as well as in Respondent’s Brief In Support of Its Exceptions to the Decision and Order of the Administrative Law Judge (the “Brief”). (ALJ Decision, p. 34:20-34:30, Appendix B).<sup>1</sup> The ALJ disregarded well-settled law establishing when a party, that has a burden of persuasion on a particular issue, fails to introduce documents that are within its control, an adverse inference should be drawn against that party regarding any factual questions the documents may prove. Given the underlying allegations that NY Paving violated Section 8(a)(1) and (5) of the National Labor Relations Act (“Act”) by assigning certain work to the employees not represented by Local 175 without bargaining with Local 175, the 2014-2017 CBA would have been the best and the strongest evidence to determine the contours of Local 175’s unit work. The utmost significance of the 2014-2017 CBA was even noted by the ALJ: “I ultimately determined that the collective bargaining agreement’s unit description constituted significant evidence regarding the scope of NY Paving’s bargaining obligation.” (ALJ Decision, P. 34:25-34:27).

2. The ALJ erred in finding that the GC satisfied the burden of proof in demonstrating the *prima facie* case of violation of Sections 8(a)(1) and (5) of the Act by NY Paving for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p.

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<sup>1</sup> All citations to the Decision of the Administrative Law Judge Lauren Esposito, dated January 27, 2020 are identified as “ALJ Decision” followed by a page and line number. All citations to the official transcript for this proceeding are identified as “Tr.” followed by the page number. References to the General Counsel’s (“GC”) exhibits shall be noted as “GC Ex.” followed by the exhibit number. References to New York Paving, Inc.’s (“NY Paving”) exhibits shall be noted as “Resp. Ex.” followed by the respective exhibit numbers.

33:20). Without the 2014-2017 CBA, the GC failed to present sufficient evidence demonstrating Codes 49 and 92, the disputed work that was allegedly unlawfully transferred by NY Paving, was Local 175's unit work, allegedly triggering NY Paving's obligation to bargain with Local 175.

3. The ALJ erred in determining Codes 49 and 92 constituted Local 175's unit work, and NY Paving was obligated to bargain with Local 175 prior to assigning same to the members of Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO ("Local 1010") for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 33:20). Without the 2014-2017 CBA, the GC did not present sufficient evidence demonstrating Codes 49 and 92 were Local 175's unit work, allegedly triggering NY Paving's obligation to bargain with Local 175.
4. The ALJ abused her discretion by denying Respondent's request to draw an adverse inference against the GC due to the failure to introduce in the evidence the 2014-2017 CBA for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, P. 34:20-34:30, Appendix B). Respondent was denied due process and deprived of a fair hearing regarding the 2014-2017 CBA and its effect, if any, on NY Paving's obligation to bargain with Local 175 prior to assigning the disputed work to the employees who were not represented by Local 175.
5. The ALJ erred in concluding NY Paving could have introduced the 2014-2017 CBA in evidence for the reasons set forth in these Exceptions and in the Brief. (ALJ

Decision, p. 35:3-35:10). The ALJ's conclusion completely disregarded GC's burden of proof in setting forth sufficient evidence to demonstrate NY Paving violated Sections 8(a)(1) and (5) of the Act. Shifting the burden to NY Paving is patently erroneous and a denial of due process. The burden was on the GC to introduce the best evidence supporting the allegations in the Complaint in this matter.

6. The ALJ abused her discretion by *sua sponte* supplementing the record with the 2014-2017 CBA prejudicing the Respondent for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 34:25-34:30 and Appendix B). ALJ *sua sponte* supplemented the record with the 2014-2017 CBA almost three (3) months after the record closed and almost two (2) months after the parties filed their post-hearing briefs. NY Paving was denied due process and was prejudiced because it was deprived of the opportunity to make certain potentially exculpatory substantive arguments in its post-hearing brief regarding the allegations of unlawful transfer of work.
7. The ALJ abused her discretion by *sua sponte* supplementing the record with the 2014-2017 CBA by denying Respondent due process and by prejudicing the Respondent for the reasons set forth in this document and in the Brief. (ALJ Decision, p. 34:25-34:30 and Appendix B). The ALJ's decision disregarded the Board's decision in *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019), which prohibits the ALJs from making evidentiary rulings only to fill the evidentiary gap in the GC's *prima facie* case.

8. The ALJ abused her discretion by *sua sponte* supplementing the record with the 2014-2017 CBA by denying Respondent due process and by prejudicing the Respondent for the reasons set forth in this document and in the Brief. (ALJ Decision, p. 34:25-34:30 and Appendix B). The ALJ relied exclusively on the 2014-2017 CBA to define Local 175's unit work, including "asphalt paving work" and "bargaining unit work" to erroneously conclude Respondent violated Sections 8(a)(1) and (5) of the Act. (ALJ Decision, p. 4:5, 34:5, 34:20, 43:20).
  
9. The ALJ abused her discretion by *sua sponte* supplementing the record with the 2014-2017 CBA by denying Respondent due process and by prejudicing the Respondent for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 34:25-34:30 and Appendix B). The 2014-2017 CBA does not cover the relevant period for the underlying Complaint because it was NY Paving's position in the prior unfair labor practice hearing involving Local 175 (case nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847) that NY Paving terminated the 2014-2017 CBA on June 30, 2018.
  
10. For the reasons set forth in these Exceptions and in the Brief, the ALJ erred in noting the Respondent "does not contend that it had no obligation to bargain regarding the work described in the collective bargaining agreement" prejudicing Respondent for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 34:32-34:33). At the time Respondent filed its post-hearing brief on October 18, 2019, the 2014-2017 CBA was not in evidence thereby depriving NY Paving of the opportunity

to make numerous exculpatory arguments in its post-hearing brief based on the 2014-2017 CBA, including NY Paving's purported obligation to bargain with Local 175.

11. The ALJ erred in asserting "[t]he record further establishes that prior to 2018, NY Paving assigned all work involving the placement of asphalt to members of Local 175" for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 34:8). The record is clear Code 49, one of the disputed types of work in this matter, did not exist prior to 2018. (Tr. 608, 880).
12. The ALJ erred in concluding Respondent violated Sections 8(a)(1) and (5) of the Act by assigning the asphalt component of the emergency keyhole work to non-bargaining unit employees for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 36:30-36:35).
13. For the reasons set forth in this document and in the Brief, the ALJ erred in finding that Respondent's assignment of the asphalt component of the emergency keyhole work to the members of Local 1010 was not time barred by Section 10(b) of the Act because Local 175 did not have clear and unequivocal notice of the transfer. (ALJ Decision, p. 37:25). Respondent produced Local 175's own emails demonstrating Local 175 had clear and unequivocal notice that NY Paving assigned asphalt-component of the keyhole work to the members of Local 1010 as early as April 2018, which is outside the Section 10(b) period. (Resp. Ex. 24). The April 21, 2018 email stated "Local 1010 went out with three crews today. One in Manhattan, the Bronx and one in Bklyn. Let Charlie Priolo and Anthony Franco know. Sent pictures of one of

the crews working to both Charlie and Anthony.” (Resp. Ex. 24). The April 21, 2018 email demonstrated Local 175’s Business Manager, Charlie Priolo (“Priolo”) and Local 175’s knowledge of the alleged transfer of work in Spring 2018. This documentary evidence was consistent with the affidavit provided by Local 175’s Shop Steward, Terry Holder (“Holder”) to the GC wherein he stated he (Holder) called Priolo and Local 175’s Fund Administrator, Anthony Franco, in April 2018 to discuss the incident with Local 1010 using the asphalt vehicle. Priolo and Local 175 in fact possessed pictures of Local 1010 purportedly performing work using asphalt material as early as April 21, 2018. (Resp. Ex. 24). The foregoing documentary evidence establishes clear and unequivocal notice to Local 175.

14. For the reasons set forth in these Exceptions and in the Brief, the ALJ erred in concluding the emails introduced by Respondent did not establish clear and unequivocal notice that NY Paving transferred the asphalt paving work involved in emergency keyhole work to non-Local 175 employees. (ALJ Decision, p. 37:35-37:38). The evidence establishes that NY Paving performed keyhole work in the Bronx, and therefore, any observation of Local 1010 performing asphalt work in the Bronx must have necessarily referred to emergency keyhole work. Not only did NY Paving’s Director of Operations, Peter Miceli (“Miceli”) testify regarding this fact (Tr. 431), both Holder and Priolo confirmed same. For example, Holder testified he knew Local 1010 was going to use the asphalt truck in April 2018 to perform asphalt work in Manhattan. (Tr. 348). He further confirmed the work usually starts in the Bronx and continues to Manhattan. (Tr. 349). Furthermore and by Holder’s own

admission, the work NY Paving performed in the Bronx was asphalt work for its client, Consolidated Edison, Inc. (“ConEd”). (Tr. 352). Because it is undisputed the only asphalt work NY Paving performs for ConEd is the emergency keyhole work, Holder knew as early as April 2018 that Local 1010 was performing emergency keyhole work in the Bronx. (Resp. Ex. 24). Priolo also admitted he observed Local 1010 performing asphalt work for ConEd in the Bronx. (Tr. 358-59).

15. For the reasons set forth in these Exceptions and in the Brief, the ALJ erred in finding that Respondent’s assignment of the asphalt component of the emergency keyhole work to the members of Local 1010 was not time barred by Section 10(b) of the Act because Local 175 supposedly exercised due diligence in attempting to investigate the transfer of work allegations. (ALJ Decision, p. 39:5). The ALJ completely disregarded Priolo’s testimony that in late 2018, he followed NY Paving’s asphalt trucks to the asphalt plant and the job sites to confirm members of Local 1010 were performing asphalt work. (Tr. 364-68). Priolo and Local 175’s duty to engage in a similar investigation and surveillance was triggered in April 2018, when Local 175 received confirmation from its own members that Local 1010 was working with asphalt, identifying the location of said work, and furnishing pictures. (Resp. Ex. 24). Therefore, and based on the available evidence, Local 175 failed to exercise due diligence during the Section 10(b) period.

16. The ALJ erred in relying on *Comcraft, Inc.*, 317 NLRB 550, 550, fn. 3 (1995) for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 39:38).

*Comcraft, Inc., supra*, is distinguishable because NY Paving employees voluntarily report to the Long Island City, NY location every morning prior to being dispatched to the jobsites. Therefore, it would not be difficult or impossible for Local 175 to monitor the shop and in fact, Local 175 did monitor the shop.

17. The ALJ erred in concluding Respondent was not excused from the obligation to bargain with Local 175 regarding the transfer of emergency keyhole work despite its client, ConEd's contractual prohibition against Local 175 from working on its projects for the reasons set forth in this document and in the Brief. (ALJ Decision, p. 41:15). The ALJ erroneously declined to apply the law and the correct legal standard as set forth in *Southern Mail, Inc.*, 345 NLRB 644, 645 n. 8 (2005) and *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996) (ALJ Decision, pp. 40-41, fn. 37), which provide the employer has no duty to bargain with the union about changes in terms and conditions of employment over which the employer had no control.

18. The ALJ erred in concluding Respondent was not excused from the obligation to bargain with Local 175 regarding the transfer of emergency keyhole work despite its client, ConEd's contractual prohibition of Local 175 from working on its projects for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 41:15). The ALJ completely disregarded the fact that (i) NY Paving's client, Hallen Construction Inc. ("Hallen") (and by extension, ConEd, which is the end user) prohibited Local 175 from performing any work on ConEd's projects, (ii) NY Paving

did not participate in making that decision, and (iii) NY Paving contractually committed to perform the keyhole work before it knew regarding ConEd's prohibition.

19. The ALJ erred in concluding Respondent was not excused from the obligation to bargain with Local 175 regarding the transfer of emergency keyhole work despite its client, ConEd's contractual prohibition of Local 175 from working on its projects for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, P. 41:15). The ALJ's reliance on *RBE Electronics of S.D.*, 320 NLRB 80 (1995) and *Ardit Co.*, 364 NLRB No. 130 (2016) was erroneous because the legal standard articulated therein is inapplicable to the instant case. Similarly, those decisions are factually distinguishable from the instant case in that they did not involve a contractual prohibition by a third-party and/or a customer resulting in the change in the terms and conditions of employment.

20. The ALJ erred in concluding the transfer of asphalt component of the keyhole work was material, substantial and significant for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 41:25). The ALJ disregarded the evidence demonstrating the asphalt component of keyhole work constituted only a very small percentage of both the total keyhole work performed by NY Paving, and the total monthly hours worked by the members of Local 175. (Resp. Ex. 21; Tr. 613-15, 888).

21. The ALJ erred in concluding the transfer of the asphalt component of the keyhole work was material, substantial and significant for the reasons set forth in these

Exceptions and in the Brief. (ALJ Decision, p. 41:25). The GC failed to demonstrate the assignment of the minimal asphalt-portion of the keyhole work to non-unit members adversely affected any Local 175 employee.

22. The ALJ erred in determining that the work known as Code 49 and Code 92 falls within Local 175's unit work for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 45:15, 45:40).
23. The ALJ erred in concluding that Respondent did not perform Code 49s solely in the context of sawcutting and excavation process for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 44:10). Respondent presented undisputed evidence demonstrating NY Paving did not perform Code 49s prior to 2018, and the only reason for creating such a code was to make the sinking holes safe for the final goal of sawcutting and eventual excavation.
24. The ALJ erred in concluding Code 49s were not an integral part of the sawcutting and excavation process for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 44:25). In arriving at the foregoing determination, the ALJ disregarded the un rebutted testimony of NY Paving's witnesses.
25. The ALJ erred in determining the Board's decision in *Highway Road and Street Construction Laborers Local 1010*, 366 NLRB No. 174 (Aug. 24, 2018) ("Section 10(k) Decision") did not encompass the work involved in performing Codes 49 and 92 for the reasons set forth in this document and in the Brief. (ALJ Decision, p. 44:5,

46:5). The Board's Section 10(k) Decision awarding certain work to Local 1010 encompassed Codes 49 and 92 because they are the initial and essential steps of excavation work (which was awarded to Local 1010).

26. The ALJ erred in not considering the persuasive authority in *NLRB v. Seedorf Masonry, Inc.*, 812 F.3d 1158 (8th Cir. 2016) for the reasons set forth in these Exceptions and in the Brief. *NLRB v. Seedorf Masonry, Inc.*, *supra*, required the ALJ to consider the Board's Section 10(k) Decision and the factors enunciated by the Board to determine whether Codes 49 and 92 were properly assigned to Local 1010. The ALJ failed to perform said analysis, thereby prejudicing Respondent.

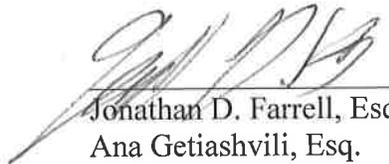
27. The ALJ erred in finding Respondent's animus against Local 175 for the reasons set forth in these Exceptions and in the Brief. (ALJ Decision, p. 28:15, 30:1). The sole evidence used by the ALJ to arrive at the foregoing determination was her finding that NY Paving violated Section 8(a)(5) of the Act by unlawfully transferring asphalt work to the members of Local 1010. Because Respondent did not violate Section 8(a)(5) of the Act, the ALJ's finding of animus against Local 175 must be reversed.

28. With respect to the Section 8(a)(1) and (3) of the Act Complaint allegations that were dismissed by the ALJ, the ALJ erred in finding Steven Sbarra (“Sbarra”) was an agent of NY Paving pursuant to Section 2(13) of the Act for the reasons set forth in these Exceptions and the Brief. (ALJ Decision, p. 24:15). In arriving at her conclusion, the ALJ disregarded applicable law and relevant testimonial and documentary evidence and therefore, the ALJ’s finding of Sbarra’s agency status must be reversed.

Dated: April 29, 2020  
Mineola, New York

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Exceptions to the Decision of the Administrative Law Judge on behalf of Respondent New York Paving, Inc. (29-CA-234894, 29-CA-233990) has been filed electronically and served via email this 29<sup>th</sup> day of April, 2020 on the following:

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