

**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**

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**RESPONDENT NEW YORK PAVING INC.'S MEMORANDUM OF LAW  
IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER  
OF THE ADMINISTRATIVE LAW JUDGE**

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## PRELIMINARY STATEMENT

Respondent New York Paving, Inc. (“NY Paving” or the “Respondent”) submits this Memorandum of Law in Support of its Exceptions to Administrative Law Judge Lauren Esposito’s (“ALJ Esposito” or “the ALJ”) Decision and Order, dated January 27, 2020 (“ALJ Decision”) issued pursuant to the unfair labor practice hearing on July 15 through 18, 2019; and August 14, 2019 (“Hearing”). ALJ Esposito found NY Paving violated Section 8(a)(1) and (5) of the National Labor Relations Act (“Act”). ALJ Esposito’s Decision should be reversed and the Complaint should be dismissed in its entirety as the Decision is contrary to applicable law and the evidence presented at the Hearing.

The central issue in this case is whether NY Paving unlawfully transferred certain work from the employees represented by Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “Charging Party”) to the employees represented by Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO (“Local 1010”). The initial rudimentary step in resolving the foregoing issue is to determine the boundaries of Local 175’s unit work, and whether the work in dispute in this matter falls within the parameters of Local 175’s unit work. The burden is on the Counsel for the General Counsel (“GC”) to establish the *prima facie* case of the violation of Section 8(a)(1) and (5) of the Act. The GC failed to satisfy the foregoing burden of proof by, among others, failing to introduce into the evidence any collective bargaining agreement governing the bargaining relationship between NY Paving and Local 175 during the relevant period of time. However, the GC’s failure was effectively and erroneously excused by ALJ Esposito.

ALJ Esposito abused her discretion when she denied Respondent’s request to draw an adverse inference against the GC and/or Local 175 due to their failure to introduce into the evidence the collective bargaining agreement between New York Independent Contractors

Alliance, Inc. (“NYICA”) and United Plant and Production Workers Local Union 175, which was effective July 1, 2014 through June 30, 2017 (“2014-2017 CBA”), which purportedly governed the relationship between NY Paving and Local 175 during the relevant period. The ALJ’s abuse of discretion was further compounded by the fact that the ALJ, without an application from the GC or Local 175, *sua sponte* supplemented the record with precisely that same document after reviewing the parties’ post-trial briefs and determining “the record in this case simply is not complete without this collective bargaining agreement.” (ALJ Decision, Appendix B). It defies logic that on the one hand, the ALJ denied NY Paving’s request to draw adverse inference against the GC due to the failure to introduce the 2014-2017 CBA into the evidence given the importance of the document in establishing the parties’ bargaining obligations, and on the other hand, *sua sponte* supplementing the record after the submission of the briefs with precisely the same document because the record was incomplete without it. ALJ Esposito’s decision significantly prejudiced NY Paving by depriving NY Paving of the right to not only cross-examine Local 175’s Business Manager Charlie Priolo (“Priolo”) regarding the provisions relevant to the allegations related to the violation of Section 8(a)(1) and (5), but also an opportunity to advance certain substantive and potentially exculpatory arguments in its (NY Paving’s) post trial-brief.

ALJ Esposito also erred in disregarding the undisputed documentary evidence presented by NY Paving demonstrating Local 175 had clear and unequivocal notice that certain asphalt work was being performed by the members of Local 1010 rather than Local 175 well before the applicable six (6) month statute of limitations period. The ALJ’s refusal to find Local 175 had clear and unequivocal notice is particularly troubling given that such notice is established by the

emails sent by the Local 175 Shop Steward. (Resp. Ex. 24).<sup>1</sup> Even if Local 175 did not have the requisite notice, constructive notice must nevertheless be imputed to Local 175 because it failed to exercise due diligence in discovering the alleged unlawful transfer of work. Indeed, Priolo testified he routinely engaged in investigating the allegations of transfer of work, including by following the trucks leaving NY Paving. (Tr. 364-68). As such, it is evident Priolo was independently aware of such transfer of work before the limitations period given this admission. Even if he was not, his (*i.e.*, Local 175's) failure to investigate within the Section 10(b) period, therefore, cannot and should not be excused.

Moreover, the ALJ disregarded the applicable National Labor Relations Board ("NLRB") decisions and federal cases (discussed herein) which stand for the proposition that the employer is not obligated to bargain with the union over the decisions mandated by the employer's customers or third-party contractors. Here, in finding NY Paving was obligated to bargain with Local 175 regarding the transfer of certain asphalt work to the members of Local 1010 as a result of the contractual prohibition by a customer, ALJ Esposito disregarded well-established law. Furthermore, in determining that the transferred work was not *de minimis*, ALJ Esposito also completely ignored the available documentary evidence demonstrating the work was minuscule and did not adversely affect any Local 175 member.

The remaining allegations of the transfer of work should similarly be dismissed because absent ALJ Esposito's erroneous "eleventh-hour" admission of the 2014-2017 CBA into the

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<sup>1</sup> All citations to the official transcript for this proceeding are identified as "Tr." followed by the page number. References to the GC's exhibits shall be noted as "GC Ex." followed by the exhibit number. References to NY Paving's exhibits shall be noted as "Resp. Ex." followed by the respective exhibit numbers.

evidence, the GC failed to satisfy her burden of demonstrating the disputed work constituted Local 175's unit work.

Finally, ALJ Esposito's finding that Steven Sbarra ("Sbarra"), Local 1010's Shop Steward, was an agent of NY Paving pursuant to Section 2(13) of the Act should be reversed because under the circumstances of this case, a reasonable NY Paving employee would not have concluded Sbarra was acting on behalf of NY Paving given his (Sbarra's) limited participation in conveying information regarding crew and work assignments.

As ALJ Esposito's Decision is based on erroneous findings not supported by the record, contradicts well-established law and is logically inconsistent, it must be reversed, and the allegations that NY Paving violated Section 8(a)(1) and (5) of the Act, and that Sbarra was an agent of NY Paving within the meaning of Section 2(13) of the Act be dismissed.

### FACTS

#### **A. Background Information Regarding NY Paving**

NY Paving provides, among other services, asphalt paving and repaving, construction, seal coating and related services to its customers in New York City, including various utility companies, such as Consolidated Edison, Inc. ("ConEd") and National Grid, PLC ("National Grid"). (Tr. 421-22). NY Paving also performs some work for Hallen Construction Inc. ("Hallen"), which is a subcontractor to ConEd and National Grid. (Tr. 421-22). In connection with providing these services, NY Paving employs individuals who are represented by various unions, including Local 175 Local 282, IBT; Local 1298, LIUNA; Local 14-15, IUOE; Local 138, IUOE; and Local 1010. (Tr. 542-43, 837-38). Members of Local 175 perform asphalt paving work at NY Paving, while members of Local 1010 perform concrete work. (Tr. 838).

**B. The Relationship Between NY Paving and Local 175 Soured Due to Local 175's Actions.**

NY Paving's relationship with Local 175 was good since its (Local 175's) inception until a few years ago. (Tr. 838; Resp. Ex. 23, p. 1353). The relationship between NY Paving and Local 175 soured approximately two (2) years ago due to Local 175's incessant campaign to cycle as many members through NY Paving as possible. (Tr. 838; Resp. Ex. 23, p. 1353). This incessant influx of the new Local 175 members every week created significant operational problems for NY Paving. (Resp. Ex. 23, p. 1354, 55).

In addition to the incessant cycling of its members through NY Paving, Local 175 also claimed the dig-out work (also known as excavation work), sawcutting, seed and sod installation, and cleanup work. (Section 10(k) Decision, p. 1).<sup>2</sup> Briefly, in 2016, New York City changed its regulations requiring that the open holes in the roads be filled with concrete rather than asphalt. (Tr. 948; Judge Gollin's Decision<sup>3</sup>, p. 6). Even though this change was scheduled to become effective in September 2016, New York City did not in fact start enforcing its regulation until April 1, 2017. (Tr. 948; Judge Gollin's Decision, p. 6). NY Paving's Director of Operations, Peter Miceli ("Miceli") had multiple conversations with Local 175's former Business Manager, Roland Bedwell ("Bedwell") in 2016 and 2017 regarding these rule changes and its implications for the asphalt employees. (Judge Gollin's Decision, p. 6). According to Miceli, starting in April 2017,

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<sup>2</sup> The ALJ took judicial notice of the Board's decision in *Highway Road and Street Construction Laborers Local 1010*, 366 NLRB No. 174 (Aug. 24, 2018) ("Section 10(k) Decision"). (Tr. 632, 685, ALJ Decision, p.2). The Section 10(k) Decision is more fully discussed in the Facts Section "C", *infra*.

<sup>3</sup> The ALJ took judicial notice of Judge Andrew S. Gollin's Decision in *New York Paving, Inc.*, JD-33-19 (case nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847) (Apr. 5, 2019) ("Judge Gollin's Decision"). (Tr. 685, ALJ Decision, p.2). No exceptions were filed to Judge Gollin's Decision. Judge Gollin's Decision is more fully discussed in the Facts Section "E," *infra*.

the excavation work would be performed by members of Local 1010 because it was concrete work as concrete was going back into the hole. (Judge Gollin's Decision, p. 6). Further, due to this new type of excavation work, NY Paving also hired at least 200-250 new Local 1010 members to perform the work. (Judge Gollin's Decision, p. 6). Bedwell, however, in Local 175's usual fashion, summarily rejected Miceli's logical explanation as to why the excavation work was properly within Local 1010's jurisdiction. (Judge Gollin's Decision, p. 6). Apparently, Bedwell objected to NY Paving adding so many new employees to the Local 1010 unit, while Local 175 was struggling to keep their existing members busy. (Judge Gollin's Decision, p. 6).

Bedwell wanted the new 200-250 excavation positions to go to Local 175 rather than Local 1010. (Judge Gollin's Decision, p. 6). Even though Miceli explained to Bedwell that because concrete was going in the holes, excavation work would properly be assigned to Local 1010 members, Local 175 nevertheless proceeded to file a grievance against NY Paving on April 28, 2017. (Section 10(k) Decision, p. 1). In the grievance, Local 175 alleged NY Paving wrongfully assigned excavation, seed and sod installation, cleanup, sawcutting and binder work to the members of Local 1010. (Judge Gollin's Decision, p. 6). Clearly, in its usual fashion, regardless of whether Local 175 believed its position pertaining to excavation work was correct, NY Paving had to accept Local 175's desires, otherwise NY Paving would have to suffer adverse consequences.

**C. The Board's Section 10(k) Decision Dealt a Significant Blow to Local 175's Position.**

As a result of Local 175's grievance filed against NY Paving on April 28, 2017 and Local 1010's responsive threat issued to NY Paving, NY Paving filed an unfair labor practice charge (Case No. 29-CD-203385) against Local 1010 on July 26, 2017 pursuant to §8(b)(4)(D) of the Act, alleging Local 1010 threatened NY Paving in connection with the assignment of the work disputed by Local 175 to the members of Local 175. (Section 10(k) Decision, p. 2). After a four (4) day

hearing at Region 29 and submission of post-hearing briefs, on August 24, 2018, the Board issued its decision awarding excavation (also known as dig-out work), sawcutting, and seed and sod installation work to Local 1010, and cleanup work to both Local 1010 and Local 175. (Section 10(k) Decision, p. 5). The Board's Section 10(k) Decision effectively affirmed NY Paving's position that the majority of the disputed work, including excavation work, was properly assigned to Local 1010, and therefore solidified NY Paving's decision to hire several hundred new employees into the Local 1010 unit rather than the Local 175 unit. This further exacerbated Local 175's already precarious position in New York City's asphalt paving industry.

The Board's conclusions in the Section 10(k) Decision affected NY Paving's decision to assign work known as "Code 49," along with excavation and sawcutting work, to the members of Local 1010 in the fall of 2018. (Tr. 873). Code 49 is the first step of excavation work involving excavation of few inches of dirt and putting down some type of temporary material (including temporary asphalt). (Tr. 509, 534-35, 873-78). The reason NY Paving started performing Code 49s in 2018 was because National Grid failed to properly backfill the holes it dug in the streets, which resulted in NY Paving's inability to perform road restoration work. (Tr. 874-75). Due to improper backfill, NY Paving's saws (which are up to five (5) feet tall and weigh approximately 1,500 pounds), were sinking in the holes made by National Grid creating unsafe conditions for both the workers and public, and otherwise damaging the expensive equipment. (Tr. 874-75). After NY Paving's consultation with National Grid, a decision was made to start using the Code 49 from National Grid's contract with NY Paving to specifically designate the process of installing temporary material on the backfilled holes solely for the purpose of running a saw on top. (Tr. 879-80). After Code 49 is completed, Local 1010 crews sawcut the hole and dig-out by digging down twelve (12) to fourteen (14) inches, excavating the dirt, and pouring nine (9) to twelve (12)

inches of concrete. (Tr. 577, 623, 878; Section 10(k) Decision, p. 4). At NY Paving, Code 49s are always followed by sawcutting and excavation, and the entire process is completed in five (5) to six (6) days at most. (Tr. 878-79). Because Code 49s are the first step and an integral part of an excavation, this process in its entirety was assigned to the members of Local 1010. (Tr. 873-78).

NY Paving performed work identical to street excavations on sidewalks for Hallen. (Tr. 882). Sidewalks are entirely made from concrete. (Tr. 882-83). The first step of the sidewalk excavation is Code 92, which is similar to Code 49 and involves putting down temporary material (including temporary asphalt) in the hole so that NY Paving can thereafter sawcut, excavate and restore the sidewalk. (Tr. 881-84). While Code 92s were previously performed by Local 175, as a result of the Section 10(k) Decision, which affirmed any and all concrete work was within Local 1010's jurisdiction, and because sidewalks are made from concrete, NY Paving started assigning Code 92s to the Local 1010 members. (Tr. 881-84). Miceli further testified his decision to start assigning Code 92s to the members of Local 1010 was also significantly influenced by the statement made by Local 175's counsel, Eric Chaikin, Esq., during the Section 10(k) hearing when he stated he (Mr. Chaikin) thought anything going on concrete, including temporary asphalt in the streets and sidewalks, was assigned to Local 1010, or words of similar effect. (Tr. 604-05).

**D. Local 175's Position in the Asphalt Paving Industry Was Further Weakened As a Result of ConEd's Enforcement of its Standard Terms and Conditions.**

In addition to "losing" approximately 200-250 positions to Local 1010 as a result of the new New York City regulations requiring concrete rather than asphalt in all street cuts, Local 175's foothold in the New York City asphalt paving industry was further weakened by ConEd's decision to start enforcing the Labor Clause ("Labor Clause") contained in its "Standard Terms and Conditions for Construction Contracts" ("Standard Terms"). (Judge Gollin's Decision, p. 6-7). Pursuant to this clause, only labor from the Building & Construction Trades Council of Greater

New York (“BCTC”) could be used to perform any ConEd work. (GC Ex. 19). Because Local 175 was not a member of the BCTC, it was effectively precluded from performing any ConEd work. (Judge Gollin’s Decision, p. 7).

The only asphalt work NY Paving performed for ConEd was pursuant to NY Paving’s contract with Hallen involving keyhole work. (Tr. 425-26, 481, 883-84). Eighty percent (80%) of keyhole work is located on sidewalks and involves no asphalt. (Tr. 613-15, 888). The remaining keyhole work is performed in the street and is essentially dig-out work, involving excavation, installation of concrete and two (2) inches of asphalt top. (Tr. 613-15, 623, 888). According to Miceli, only ten percent (10%) of the keyhole work performed in the streets involved asphalt work (*i.e.*, only two percent (2%) of the total keyhole work). (Tr. 613-15, 888).

NY Paving’s prior keyhole contract with Hallen (effective 2008 through 2016) did not include ConEd’s Standard Terms. (Tr. 889-90). Essentially, because NY Paving was a subcontractor to ConEd’s subcontractor, Hallen, ConEd did not enforce the Standard Terms against NY Paving, including the Labor Clause. (Tr. 890-91). Accordingly, NY Paving assigned the asphalt portion of keyhole work to Local 175 members. (Tr. 568). After the expiration of the prior keyhole contract, NY Paving placed its bid on the new keyhole contract with Hallen with the expectation that it would be able to continue assigning concrete portion to Local 1010 and asphalt portion of keyhole work to Local 175. (Tr. 890). However, the new keyhole contract with Hallen, which became effective January 9, 2018, contained ConEd’s Standard Terms, including the Labor Clause. (GC Ex. 19). NY Paving was contractually prohibited from assigning any work to the members of Local 175. (GC. Ex. 19; Tr. 888). Even though NY Paving played absolutely no role in ConEd’s decision to enforce the Labor Clause against a subcontractor of a subcontractor (such as NY Paving), NY Paving was contractually bound to follow the Standard Terms and assign

keyhole work solely to the members of Local 1010 commencing at the beginning of 2018. (GC. Ex. 19; Tr. 888).

As a result of ConEd's prohibition of Local 175 from performing its work coupled with NY Paving's contractual obligation to Hallen to perform keyhole work, on May 18, 2018, NY Paving filed a federal lawsuit against the various Local 175 benefit funds ("Local 175 Funds"). (Resp. Ex. 20). In this litigation, NY Paving sought declaratory judgment relieving NY Paving from its obligation of making contributions to both Local 175 and Local 1010 respective benefit funds for any asphalt work NY Paving performed for ConEd. (Resp. Ex. 20; Tr. 884). According to Miceli, this also included keyhole work. (Tr. 884). Subsequently, NY Paving and Local 175 met four (4) times to negotiate, among other issues, NY Paving's performance of keyhole work with Local 1010 members. (Tr. 910-13). As part of the negotiations, NY Paving made several offers to Local 175, including paying Two Dollars (\$2) per hour for every hour Local 1010 members performed any ConEd asphalt work. (Tr. 910-13). No agreement was reached. (Tr. 910-13).

**E. Local 175's Precarious Position Was Exacerbated by the Decision in the Prior Unfair Labor Practice Trial.**

In 2017 and 2018, Local 175 filed numerous unfair labor practice charges against NY Paving. Subsequently, a complaint was issued by Region 29 and after a hearing, Judge Andrew S. Gollin issued a decision on April 5, 2019 ("Judge Gollin's Decision") dismissing the overwhelming majority of allegations against NY Paving. Importantly, Judge Gollin dismissed all allegations of discriminatory discharge, failure to hire, and failure to recall from layoff seven (7) individuals, including: (i) several long-term Local 175 members, (ii) members of Local 175's Executive Board, (iii) Local 175's Business Manager, and (iv) the son of Local 175 Funds' Administrator. (Judge Gollin's Decision, p. 32). This was a major loss for Local 175, which led to Local 175's renewed campaign to re-assert its control over NY Paving's operations.

**F. NY Paving Employed Steven Sbarra as a Working Foreman and Local 1010's Shop Steward.**

During the relevant period of Sbarra's employment with NY paving, his primary task was to clean up the various job sites after concrete work was completed, including removing cones, tape and forms, and sweeping the area. (Tr. 932-33). Sbarra was also Local 1010's Shop Steward. (Tr. 932-33). Sbarra's Shop Steward duties and powers were established by Local 1010 and NY Paving played absolutely no role in the selection of Local 1010's Shop Stewards or designation of their specific duties. (Tr. 933). Apart from Sbarra's responsibilities as Local 1010's Shop Steward, Sbarra was a regular rank-and-file NY Paving employee who wore regular work clothes and shared a space in NY Paving's foremen room with almost forty (40) other individuals. (Tr. 792-02, 933-38). Sbarra did not have the power to hire, fire, discipline, or assign work or employees to the various crews (concrete and asphalt). (Tr. 792-02, 933-38). Nor did NY Paving convey any apparent authority to Sbarra to perform any of those tasks. (Tr. 792-02, 933-38). ALJ Esposito determined NY Paving did not violate Section (8)(a)(1) and (3) of the Act by discharging Elijah Jordan ("Jordan"), who was a concrete employee at NY Paving, either through Sbarra or otherwise. (ALJ Decision, p. 32). Rather, NY Paving's decision to discharge Jordan was solely based on the fact that Jordan was "incapable of adequately performing concrete or asphalt paving work." (ALJ Decision, p. 30).

**G. Despite Its Loss, Local 175 Continued Filing Unfair Labor Practice Charges Against NY Paving, Leading to the Underlying Hearing.**

On or about January 29, 2019, Local 175 filed an unfair labor practice charge against NY Paving (case no.: 29-CA-234894) alleging, *inter alia*, NY paving violated Section 8(a)(1) and (5) of the Act by virtue of its transfer of unit work to non-unit employees without bargaining with Local 175. (ALJ Decision, pp. 1-2). On April 30, 2019, Region 29 issued an Order Consolidating Cases, and Amended Consolidated Complaint and Notice of Hearing ("Complaint") alleging

various violations of Sections 8(a)(1), (3) and (5) of the Act. (ALJ Decision, pp. 1-2). NY Paving filed an Answer on May 8, 2019 denying all allegations of unlawful conduct, and asserting various Affirmative Defenses, including but not limited to, certain Complaint allegations being barred by the applicable statute of limitations. (ALJ Decision, p. 2).

The Hearing in this case was held before ALJ Esposito on July 15 through 18, 2019; and August 14, 2019. (ALJ Decision, p. 1). The parties filed their respective post-hearing briefs on October 18, 2019. (ALJ Decision, Appendix B). On November 13, 2019, NY Paving filed a Motion to Reopen the Record requesting admission into the record of certain Local 175 emails as newly discovered evidence. (ALJ Decision, Appendix B). The GC and Local 175 filed their respective Oppositions on November 20, 2019 and NY Paving filed a Reply on November 26, 2019. (ALJ Decision, Appendix B). On December 10, 2019, ALJ Esposito granted NY Paving's motion and admitted the relevant emails into the record as Respondent's Exhibit 24. (ALJ Decision, Appendix B).

In its post-hearing brief, NY Paving argued negative inference should be drawn against the GC and the Charging Party due to their failure to introduce *any* collective bargaining agreement governing the relationship between NY Paving and Local 175 during the relevant period to the Complaint allegations. (ALJ Decision, p. 34). On November 21, 2019, more than one (1) month after the submission of the post-hearing briefs and several months *after* the record closed, ALJ Esposito, emailed the parties to inform she intended to supplement the record *sua sponte* with the 2014-2017 CBA. (ALJ Decision, Appendix B). ALJ Esposito did so despite NY Paving's argument that adverse inference should be drawn against the GC and the Union due to their failure to introduce a key piece of evidence during the Hearing. On December 6, 2019, NY Paving objected to ALJ's *sua sponte* decision to supplement the record as extremely prejudicial after the

record closed and the parties had submitted their post-hearing briefs. (ALJ Decision, Appendix B). Admitting the 2014-2017 CBA into the evidence would be not only tantamount to excusing the GC's failure to satisfy its *prima facie* burden by omitting evidence from the record, but also deprive NY Paving of the opportunity to cross-examine the GC and/or Charging Party's witness regarding same. (ALJ Decision, Appendix B). Notably, the GC and Charging Party did not file any replies to address the arguments contained in NY Paving's December 6<sup>th</sup> submission to ALJ Esposito. (ALJ Decision, Appendix B).

On December 10, 2019, merely two (2) business days after NY Paving submitted its detailed objections to ALJ Esposito's *sua sponte* decision to supplement the record, ALJ Esposito Ordered the record to be supplemented with the 2014-2017 CBA, determining:

[T]he record in this case is simply not complete without the [CBA], the last contract to which NY Paving and Local 175 both accede that they were bound. The [CBA] constitutes evidence regarding the contours of the alleged bargaining obligation by describing the scope of the bargaining unit out of which the work was allegedly unlawfully transferred.

(ALJ Decision, Appendix B). Subsequently, on January 27, 2020, the ALJ issued the Decision, which is the subject of NY Paving's Exceptions. In the Decision, the ALJ dismissed the allegation NY Paving violated Section 8(a)(1) and (3) of the Act, while finding NY Paving violated Section 8(a)(1) and (5) of the Act by virtue of the alleged unlawful transfer of work. (ALJ Decision, pp. 32, 46). For reasons discussed below, ALJ Esposito's Decision finding (i) NY Paving violated Section 8(a)(1) and (5) of the Act, and (ii) Sbarra's agency status should be reversed in its entirety.

## ARGUMENT

### POINT I

#### THE ALJ ABUSED HER DISCRETION BY DENYING RESPONDENT'S REQUEST TO DRAW AN ADVERSE INFERENCE AGAINST THE GENERAL COUNSEL DUE TO THE FAILURE TO INTRODUCE A KEY PIECE OF EVIDENCE AND INSTEAD *SUA SPONTE* SUPPLEMENTING THE RECORD WITH PRECISELY THE SAME EVIDENCE AFTER THE RECORD CLOSED AND AFTER THE PARTIES SUBMITTED THEIR POST-HEARING BRIEFS.

The ALJ abused her discretion when she denied the Respondent's request to draw an adverse inference against the GC and/or Local 175 due to their failure to introduce into the evidence the 2014-2017 CBA, which purportedly governed the relationship between NY Paving and Local 175 during the relevant period. The ALJ's abuse of discretion was further compounded by the fact that the ALJ, without an application from the GC or Local 175, *sua sponte* supplemented the record with precisely that same document after reviewing the parties' post-trial briefs and determining "the record in this case simply is not complete without this collective bargaining agreement." (ALJ Decision, Appendix B). It defies logic that on the one hand, the ALJ denied NY Paving's request to draw adverse inference against the GC due to the failure to introduce the 2014-2017 CBA into the evidence given the importance of the document in establishing the parties' bargaining obligations, and conversely, *sua sponte* supplemented the record after the submission of the briefs with precisely the same document because the record was incomplete without it. Compounding the error, after the 2014-2017 CBA became part of the evidence by virtue of ALJ Esposito's decision, NY Paving was not given any opportunity to explain why this document did not support the GC's *prima facie* case.<sup>4</sup> In any event, ALJ Esposito's actions are sufficient to warrant reversal.

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<sup>4</sup> NY Paving is not suggesting that being given this "post-hearing and post-brief" opportunity excused ALJ Esposito's initial fatal error of not drawing an adverse inference against the GC and Local 175 when they intentionally chose not to introduce the 2014-2017 CBA into evidence at the

The ALJ abused her discretion by denying Respondent's request to draw an adverse inference against the GC and Local 175 due to their failure to introduce into the evidence the 2014-2017 CBA or any agreement governing the collective bargaining relationship between Respondent and Local 175, which document, by the ALJ's own admission, was necessary to complete the record in this matter. It is well-settled law when a party fails to introduce documents that are within its control, an adverse inference may be drawn regarding any factual questions the documents may prove. *Int'l Automated Machs., Inc.*, 285 NLRB 1122, 1123, *enfd.* 861 F.2d 720 (6th Cir. 1988); *Martin Luther King, Sr. Nursing Ctr.*, 231 NLRB 15 (1977); *Earle Industries, Inc.*, 260 NLRB 1128 (1982). As stated in *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1338, 1341(D.C. Cir. 1972):

The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it. Of course, if a party has good reason to believe his opponent has failed to meet his burden of proof, he may find no need to introduce his strong evidence ... in most cases a party will introduce his most favorable evidence without being compelled by legal process to do so.

Where, as here, the Board's refusal to consider the evidentiary inference flowing from the company's nonproduction of its hiring records has the effect of denying a fair hearing to one of the parties, the argument for judicial intervention becomes overpowering.

*See also Metro-West Ambulance Services, Inc.*, 360 NLRB 1029, 1030 (2014)<sup>5</sup> (affirming adverse inference where the employer failed to produce the records); *RCC Fabricators, Inc.*, 352 NLRB

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Hearing. Rather, NY Paving argues that the ALJ compounded this error with her decision to proceed without any input from the parties once this document was admitted into evidence long after the Hearing and briefing had concluded.

<sup>5</sup> Notably, the ALJ's Decision contains citation to this case for the proposition that "[a]dverse inferences may also be drawn based upon party's failure to introduce into evidence documents

701 (2008); *S&F Market Street Healthcare LLC*, 351 NLRB 975 (2007). Finally, adverse inference rule is typically applied against the party that has the burden of persuasion on the particular issue. *KBMS, Inc.*, 278 NLRB 826, 848-49 (1986).<sup>6</sup>

Here, the GC and Charging Party did not introduce into evidence either the 2014-2017 CBA or any other collective bargaining agreement that would have covered the period subsequent to June 30, 2018,<sup>7</sup> which is particularly suspicious because a collective bargaining agreement would presumably establish, among others, the covered unit work which was the subject of the unlawful transfer of work allegation in the instant case. Stated differently, a collective bargaining agreement would presumably be the best and strongest evidence to support the GC's allegation that NY Paving unlawfully transferred Local 175's unit work without bargaining. If, however, the collective bargaining agreement undermined the GC's *prima facie* case (especially after NY Paving had the opportunity to cross examine witnesses with respect to the meaning of its terms), it is understandable why she would not introduce same at the Hearing. Under applicable Board precedent, the GC's decision to not introduce such evidence warrants an adverse inference.

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containing information directly bearing on a material issue.” (ALJ Decision, p. 18). It is remarkable the ALJ referenced the correct legal standard for drawing an adverse inference due to a party's failure to introduce evidence of a material issue and yet failed to draw such an adverse inference against the GC despite the abundance of compelling legal precedent warranting same.

<sup>6</sup> Likewise, the same adverse rule exists when a party fails to present a witness in its control who possess information pertaining to the allegations of unlawful conduct. See *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019), *Martin Luther King Sr. Nursing Ctr.*, 231 NLRB 15 (1977) and *Earle Industries*, 260 NLRB 1128 (1982).

<sup>7</sup> In the prior unfair labor practice trial, the GC introduced the 2014-2017 CBA and NY Paving stipulated it adopted the terms of this agreement by conduct even though NY Paving was not a member of NYICA and the terms of the agreement continued through June 30, 2018, at which time it was terminated. (Judge Gollin's Decision, p. 5).

Additionally, any applicable collective bargaining agreement(s) would be in the custody and control of Local 175 and could have been testified to by Local 175's current Business Manager (Priolo), who was GC's witness. Undoubtedly, Priolo would have been able to testify not only as the custodian of Local 175's records (including collective bargaining agreements), but also concerning the substantive terms of any alleged collective bargaining agreement(s) applicable to NY Paving's asphalt employees during the relevant period of time.<sup>8</sup>

The GC's failure to introduce any collective bargaining agreement is particularly suspicious given that the underlying allegations of transfer of unit work concern the period from July 2018 through 2019. Any applicable collective bargaining agreement probably would have stated and defined the scope of asphalt work within Local 175's jurisdiction, including whether it covers working with the temporary materials (such as temporary asphalt) involved in Codes 49 and 92, and NY Paving's obligations, if any, to bargain with Local 175 prior to the alleged transfer of unit work.

The failure to introduce the 2014-2017 CBA into the evidence is particularly egregious in this case because it was identified by the ALJ as the best evidence available to support the GC's *prima facie* case that NY Paving allegedly violated Section 8(a)(5) of the Act by transferring the unit work without bargaining with Local 175. In fact, ALJ Esposito recognized the evidentiary significance of the CBA:

NY Paving requests, however, that I draw an adverse inference based upon General Counsel's failure to introduce the July 1, 2014 through June 30, 2017 collective bargaining agreement between Local 175 and NY Paving into evidence. R.S. Post-Hearing Brief at 19-21. I do find General Counsel's failure to introduce the contract between Local 175 and NY Paving perplexing. I ultimately determined that **the collective bargaining agreement's unit description constituted significant evidence regarding**

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<sup>8</sup> According to Priolo, as Local 175's Business Manager, he "reinforces" the collective bargaining agreements with contractors. (Tr. 353-54).

**the scope of NY Paving's bargaining obligation, and admitted the contract on that basis as an exhibit in an order dated December 10, 2019, which is attached to this Decision.** ALJ Ex. 1. In addition, General Counsel's Post-Hearing Brief contains specific representations regarding the contract that were impossible to evaluate without reviewing the language of the contract itself.

ALJ Decision, p. 34 (emphasis added). Stated differently, ALJ Esposito recognized the information contained in the 2014-2017 CBA was crucial in not only fully understanding the GC's references to the document in her post-hearing brief, but also crucial in determining NY Paving's bargaining obligations with Local 175. Given the admitted evidentiary importance of the 2014-2017 CBA, the ALJ's refusal to draw adverse inference against the GC can only be explained by inherent bias against the Respondent or lack of understanding (or appreciation) of long-standing evidentiary rules. Without the collective bargaining agreement, the GC failed to present sufficient evidence demonstrating that the work performed by NY Paving known as Code 49 and Code 92 was Local 175's unit work, triggering NY Paving's obligation to bargain when assigning same to the members of Local 1010. Because of the GC's intentional litigation strategy, there was no documentary evidence in the record demonstrating the type of work involved in performing Codes 49 and 92 falls within Local 175 jurisdiction (*i.e.*, Local 175's unit work).

*Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB, supra* requires an adverse inference be drawn in this case because NY Paving was deprived a fair hearing regarding the 2014-217 CBA and in particular, its effect, if any, on NY Paving's obligation to bargain with Local 175 prior to assigning certain disputed work to the employees who were not members of Local 175. The ALJ's position that NY Paving could have introduced the 2014-2017 CBA into the evidence and questioned Priolo regarding same is erroneous in light of the well-established law. Indeed, the ALJ's conclusion in this regard completely disregards the fact that the GC had the burden of proof in establishing NY Paving's alleged violation of Section 8(a)(5)

of the Act. Imposing the burden on NY Paving to introduce the 2014-2017 CBA is therefore patently erroneous. NY Paving was undoubtedly deprived of its due process rights when ALJ Esposito supplemented the record with the 2014-2017 CBA after (i) the GC made a strategic litigation decision not to introduce that same document into the evidence during the Hearing and (ii) the post-trial briefing was completed, without providing NY Paving the opportunity of cross-examination in connection with same.

Simply stated, the burden was on the GC to introduce the best evidence supporting the allegations in the Complaint, a burden which she failed to satisfy when she deliberately chose to exclude the collective bargaining agreement from her case. ALJ Esposito's characterization of the GC's decision in this regard as "perplexing" is presumptuous (*i.e.*, NY Paving submits it was an intentional litigation strategy given GC's (and Local 175's attorney) prior experience at the Board hearings and familiarity with the terms of the 2014-2017 CBA). In any event, expressions of "perplexity" are not evidentiary standards. Instead, ALJ Esposito should have been guided by unambiguous Board evidentiary rules she chose to disregard when she failed to draw an adverse inference against GC and Local 175.

NY Paving was also deprived the opportunity to question Priolo regarding the provisions of any collective bargaining agreement as they pertained to the unlawful transfer of work allegations. Any anticipated argument that the 2014-2017 CBA was introduced in the prior two (2) proceedings involving NY Paving and Local 175 (the Section 10(k) proceeding and the unfair labor practice trial in front of Judge Gollin) should not be countenanced because none of those prior proceedings involved the instant unlawful transfer of work allegations. Therefore, NY Paving was deprived of a fair hearing on the provisions of the 2014-2017 CBA in this case, which would have arguably established NY Paving unlawfully transferred Local 175's unit work without

bargaining with Local 175. Based on the foregoing overwhelming legal authority and facts, the ALJ clearly abused her discretion by refusing to draw an adverse inference against the GC and Local 175 relative to the factual issues essential to the GC's *prima facie* case of Section 8(a)(5) violation, including inferring that the work in dispute (Codes 49 and 92) are not Local 175's unit work and therefore, NY Paving had no obligation to bargain with Local 175 regarding the assignment of such work to the members of Local 1010.

ALJ Esposito's abuse of discretion and demonstrated bias is further compounded by the fact she supplemented the record *sua sponte* with the 2014-2017 CBA more than three (3) months after the record closed and almost two (2) months after the parties filed their post-hearing briefs, despite NY Paving's adverse inference argument. ALJ's decision significantly prejudiced NY Paving by depriving NY Paving of the right to not only cross-examine Priolo regarding the provisions relevant to the allegations related to the violation of Section 8(a)(5), but also an opportunity to advance certain substantive and potentially exculpatory arguments in its (NY Paving's) post trial-brief. The admission of the 2014-2017 CBA into the record was particularly prejudicial given NY Paving's argument in its post-trial submission to the ALJ to draw adverse inference against the GC due to the failure to introduce key evidence as part of the GC's *prima facie* burden. Therefore, the ALJ abused discretion by supplementing the record at the "eleventh hour" and refusing to draw adverse inference against the GC and Local 175.

It is well-settled the ALJ's decision regarding the admission of evidence and drawing adverse inference are reviewed for abuse of discretion. *Quicken Loans, Inc.*, 367 NLRB No. 112, at 4 (2019), *Parkside Grp.*, 354 NLRB 801, 804 (2009). Here, the ALJ not only abused her discretion when she *sua sponte* and without the application of the GC or the Charging Party supplemented the record after the submission of the post-hearing briefs, she effectively filled any

evidentiary gap in favor of the GC's *prima facie* case. ALJ's decision was therefore biased and undoubtedly prejudiced NY Paving.

*Quicken Loans, Inc., supra* involved facts similar to the instant matter. In that case, the Board determined the ALJ impermissibly filled the evidentiary "hole" in the GC's case by drawing an adverse inference against the Respondent for failing to call a witness to testify at the hearing, thereby inferring the alleged discriminatee engaged in a protected activity:

Woods was an alleged *discriminatee* in this very case. As such he would be reasonably disposed to testify *against* the Respondent and favorably to the General Counsel. Further, as the judge effectively acknowledged, Woods' testimony would be essential to filling a hole in the General Counsel's case. Standing alone, the credited testimony of Laff--the General Counsel's witness--is insufficient to meet the General Counsel's burden of proving that Woods and Laff were engaged in protected concerted activity during their bathroom conversation. The Respondent had no need to present Woods as a witness in its own defense, and there is no basis for reasonably inferring that Woods would ordinarily be disposed to testify in support of any defense. The purpose for having Woods testify would be to provide evidence missing from Laff's credited version of events that is critical to the General Counsel's case. In this circumstance, "the judge's use of the adverse inference to fill this evidentiary gap sweeps too broadly." *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (reversing judge's reliance on adverse inference to prove General Counsel's joint employer allegation); see also *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 652 (1989) (rejecting judge's reliance on adverse inference to prove General Counsel's hiring hall discrimination allegation), *enfd.* 70 F.3d 1256 (3d Cir. 1995).

*Id.* at 5. Here, similar to *Quicken Loans, Inc., supra*, ALJ Esposito's reliance on the 2014-2017 CBA, which she admitted into the record after the submission of the post-hearing briefs, in order to fill the gap in the GC's *prima facie* case also "sweeps too broadly," particularly given the extreme prejudice suffered by NY Paving as a result of same.

NY Paving was undoubtedly prejudiced by ALJ Esposito's decision. Most importantly, because the ALJ supplemented the record several months after the record closed and the parties filed their post-hearing briefs, NY Paving was not provided an opportunity to make any substantive

arguments in its post-hearing brief related to the 2014-2017 CBA and particularly its effect on the allegation that NY Paving unlawfully transferred the asphalt work to non-unit employees. In *Offset Paperback Mfrs., Inc.*, 359 NLRB 265, 266 (2012), the ALJ did not permit the General Counsel to amend the complaint to add additional allegations after the record closed and the parties submitted their post-hearing briefs because of the inherent prejudice to the other parties:

In his brief, for the first time, counsel for the General Counsel raises the motion to amend and briefs the issue. He offers no explanation as to why he did not raise the motion before the record closed. As a result, there was no notice to union counsel that he would need to address such an issue in his brief. Since it is the longstanding practice of the Board's Division of Judges to prohibit reply briefs, the Union is prejudiced by its inability to oppose the government's motion and related legal arguments. The Board has denied similar post evidentiary amendments under similar circumstances. See *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006) (General Counsel's offer to allow respondent to put on more evidence did not cure the problem and the reasons for the delay were unacceptable); *Consolidated Printers*, 305 NLRB 1061, 1064 (1992) (delay not explained, delay was "of consequence" as respondent had presented its defense, and giving respondent time to submit further evidence would not cure the prejudice); *New York Post Corp.*, *id.* (no explanation why counsel for the General Counsel waited until the last minute to add this allegation to the complaints).

See also *Scufari Construction Co., Inc.*, 368 NLRB No. 40, at 1, fn. 2 (2019). Similar to *Offset Paperback Mfrs., Inc.*, *supra*, in this case, the ALJ's decision was particularly prejudicial because in the Decision, the ALJ relied exclusively on the 2014-2017 CBA to define "asphalt paving work" and "bargaining unit work" that must be assigned to Local 175, including "temporary and permanent asphalt work," thereby concluding NY Paving violated the Act by transferring the disputed work to the members of Local 1010. (ALJ Decision, pp. 4, 33-34, 43). The ALJ even stated in her Decision: "Respondent does not contend that it had no obligation to bargain regarding the work described in the collective bargaining agreement." (ALJ Decision, p. 34). However, NY Paving could not have addressed its alleged bargaining obligation regarding the unit work because at the time NY Paving filed its post-hearing brief, the 2014-2017 CBA or any other document

demonstrating the contours of Local 175's unit work was not in evidence. The utmost prejudice to NY Paving as a result of the ALJ's decision cannot be ignored – NY Paving was deprived of the opportunity to advance numerous arguments to the ALJ because at the time of the filing of its post-hearing brief, the 2014-2017 CBA was not in evidence.

NY Paving was further prejudiced because the 2014-2017 CBA terminated on June 30, 2018. Therefore, the 2014-2017 CBA does not cover the relevant period for the alleged transfer of work in the Complaint (*i.e.*, July 2018 through January 2019). Because the 2014-2017 CBA did not apply during the relevant Section 10(b) limitations period, its probative value, if any, is, at best, questionable. Additionally, any applicable collective bargaining agreement purportedly applying to the asphalt employees working at NY Paving subsequent to June 30, 2018 was presumably within Local 175's custody and control during the Hearing and could have been easily testified to by Local 175's Business Manager and GC witness, Priolo, who testified as part of the GC's case-in-chief. Despite having the most authoritative witness to authenticate and testify regarding any applicable collective bargaining agreement(s), the GC and Charging Party failed to introduce any such agreement into the evidence before the record closed. The ALJ excusing their failure more than three (3) months after the record closed and briefing was completed was highly prejudicial for NY Paving.

## POINT II

### THE ALJ'S CONCLUSION NY PAVING WAS OBLIGATED TO BARGAIN WITH LOCAL 175 REGARDING THE ASSIGNMENT OF CERTAIN WORK IS ERRONEOUS FOR NUMEROUS REASONS.

#### **A. The Underlying Unfair Labor Practice Charge Filed on January 29, 2019 Was Barred by the Section 10(b) Statute of Limitations As It Pertains to the Transfer of Keyhole Work Allegation.**

The ALJ erred in determining Local 175 did not have an actual or constructive notice of NY Paving's transfer of the asphalt portion of the emergency keyhole work to the members of

Local 1010 more than six (6) months prior to the filing of the underlying unfair labor practice charge on January 29, 2019. The evidence unequivocally establishes Local 175's knowledge as early as April 2018, which is outside the six (6) month statute of limitations period and therefore time-barred.

There is no dispute as to the applicable law in this area. Thus, Section 10(b) of the Act is a statute of limitations, is not jurisdictional in nature, and is an affirmative defense, which must be pleaded and which, if not timely filed, is waived. *R. G. Burns Electric*, 326 NLRB 440, 446 (1998). The "10(b) period" commences— or, put another way, the statute of limitations is tolled—only at the time when a party has clear and unequivocal notice of a violation of the Act or where a party, in the exercise of reasonable diligence, should have become aware that the Act has been violated. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1145 (1999); *R. G. Burns*, *supra* at 440-441; *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Duke University*, 315 NLRB 1291, 1295 (1995); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The Board also has expressed this point of law in other words—. "the Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice." *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). However stated, it is clear that the burden of proving actual or constructive knowledge "rests squarely" on the party asserting it. *R. G. Burns*, *supra* at 446.

*Phoenix Transit System*, 335 NLRB 1263, 1271-72 (2001); *see also St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1129 (2004). Here, Local 175 had actual knowledge of the transfer of keyhole work as early as April 2018. During the Hearing, Local 175's Business Manager, Priolo testified regarding the alleged transfer of work from the members of Local 175 to the members of Local 1010. (Tr. 358-61). Priolo also testified regarding Local 175's knowledge of the specific instances of the alleged transfer of work by NY Paving from Local 175 to Local 1010. According to Priolo, the first time he saw Local 1010 members performing asphalt work was in late 2018. (Tr. 358-59). The work was located in the Bronx. (Tr. 358-59). On cross-examination, Priolo also stated in or about December 2018, he heard "rumors" from approximately ten (10) Local 175 members that Local 1010 was performing asphalt work at NY Paving. (Tr. 380-82). Priolo named two (2) Local

175 members, Genero Rocko and Anthony Dedentra, who told Priolo they believed Local 1010 was “doing asphalt.” (Tr. 382-83). Priolo stressed these were merely “rumors” among Local 175 members working at NY Paving, which he (Priolo) heard before December 2018. (Tr. 380-81). Further, according to Priolo, he had conversations with Local 175’s Shop Steward, Terry Holder, regarding the alleged transfer of work. (Tr. 383-84). Priolo stated the first conversation with Holder regarding Local 1010 performing asphalt work was in early 2019. (Tr. 383-84). Based on Priolo’s incredible testimony, he (Priolo) and Local 175 did not have knowledge of the alleged transfer of work to Local 1010 until late 2018 or early 2019. The dates testified to by Priolo fall conveniently within the six (6) month statute of limitations period of the underlying unfair labor practice charge.

NY Paving submitted documentary evidence demonstrating Priolo’s testimony was false. The statements contained in the emails sent by Holder to the Local 175 email address contradict Priolo’s testimony regarding the date when he (Priolo) had knowledge of Local 1010 members allegedly performing asphalt work at NY Paving. Specifically, 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 demonstrates Priolo and Local 175’s knowledge of the alleged transfer of work in Spring 2018 was significantly more than merely “rumors.” Notably, this documentary evidence is consistent with Holder’s affidavit provided 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. (Tr. 327-38).

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). Local 175 was not only aware that NY Paving assigned the asphalt portion of the keyhole work to the members of Local 1010, Local 175 possessed photographs demonstrating same. (Resp. Ex. 24). Because the statements contained in the April 21, 2018; May 4, 2018; and May 7, 2018 emails demonstrate Local 175 had clear and unequivocal notice that NY Paving was assigning the asphalt portion of the keyhole work in the Bronx and Manhattan to the members of Local 1010 as early as April 21, 2018, the transfer of keyhole work allegations contained in the underlying unfair labor practice charge are outside the applicable six (6) month statute of limitations period, rendering them untimely.

Despite the foregoing undisputed documentary evidence, the ALJ erroneously determined the emails submitted by NY Paving were insufficient to establish that Local 175 had clear and unequivocal notice of the transfer of emergency keyhole work to the members of Local 1010. Contrary to the ALJ's conclusions in this regard, there is sufficient evidence on the record to establish 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 said emergency keyhole work. Not only did 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 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). The foregoing testimony from Local 175's Shop Steward and Business Manager, along with the emails admitted as Resp. Ex. 24, establish Local 175 had clear and unequivocal notice that NY Paving assigned the asphalt-portion of the keyhole work to the members of Local 1010 (*i.e.*, the asphalt work in the Bronx) as early as April 2018, and therefore, is barred by Section 10(b).

Even if the foregoing does not establish Local 175's clear and unequivocal knowledge of transfer – which it does – the top Local 175 management, such as Priolo, had sufficient knowledge to trigger Local 175's obligation to exercise due diligence to investigate the “rumors” of Local 1010 performing asphalt work. Constructive knowledge of an unlawful act may be imputed if a party failed to exercise due diligence after becoming suspicious of an unlawful act. *See Phoenix Transit System*, 335 NLRB 1263, 1272-73 (2001) (finding “due diligence” required the alleged discriminatee “something more than merely waiting for divine revelation of clear and unequivocal notice” of the employer's culpability in his discharge); *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191, 193 (1992) (“While a union is not required to aggressively police its contracts in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit ... and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes. This is not a case where information regarding misconduct is only in the hands of the employer, where an employer has concealed its misconduct, or where the size of an employer's operation prevents ready discovery of the misconduct.”); *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990) (“The fact that Respondent did not daily proclaim that fact from the rooftops of Sitka does not change the fact that as of March 2, at the latest, both Sisson and the Union possessed sufficient knowledge to be, in a position to file an unfair labor practice charge

and [had to] do so within 6 months of that time rather than wait until the consequences of the act [became] most painful.”).

Here, it is undisputed Local 175 has aggressively pursued unit work issues (regardless of the underlying merits of its claims) vis-à-vis its hated rival Local 1010 with the Board in numerous cases against NY Paving (see above) and other companies. *See, e.g., Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 (November 6, 2019) and *Tri-Messine Construction Company, Inc.*, 368 NLRB No. 149 (December 16, 2019). Above everything else, unit work is paramount to Local 175. As such, Priolo did engage in surveilling NY Paving’s trucks and crews to determine if Local 1010 was performing asphalt work, albeit his surveillance conveniently supposedly occurred within the six (6) month statute of limitations period. Indeed, according to Priolo, not only did he “drive around” in the Bronx in 2018 to observe Local 1010 members performing asphalt work (Tr. 361), commencing in 2019, he followed NY Paving’s asphalt trucks to the job locations to discover Local 1010 working with asphalt. (Tr. 364-68). Clearly, Priolo knew how to investigate the transfer of unit work “rumors.”<sup>9</sup> However, Priolo and Local 175’s duty to exercise due diligence in investigating said allegations was triggered not in late 2018 or 2019, but rather in or about April 2018 when Local 175 received confirmation from its own members that Local 1010 was working with asphalt, location of said work, and pictures. (Resp. Ex. 24). Therefore, had Priolo and Local 175 exercised due diligence in April 2018 after receiving the reports and pictures from their members, they would have discovered that Local 1010 was performing certain limited amount of asphalt work for NY Paving. Because Local 175 failed to exercise such diligence, it should not be

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<sup>9</sup> Interestingly, the ALJ even noted Local 175 previously “pursued investigations and claims regarding the assignment of asphalt paving work” to Local 1010. (ALJ Decision, p.39). Because Local 175 had previously pursued investigations into the alleged transfer of work, there is simply no reason why it would not have done the same in April 2018 when it received compelling evidence of the alleged transfer from many of its own members. (Resp. Ex. 24).

excused from failing to comply with the Section 10(b) statute of limitations in filing the underlying unfair labor practice charge.<sup>10</sup>

In excusing Local 175's failure to exercise due diligence in pursuing the transfer of unit work allegations, the ALJ concluded "monitoring the shop" would be difficult by Local 175 given the different job sites and the asphalt and concrete work being assigned by different supervisors. (ALJ Decision, p. 39). In support of the foregoing, the ALJ cited to *Comcraft, Inc.*, 317 NLRB 550, 550, fn. 3 (1995). However, that case is distinguishable from the instant matter for several reasons. First, unlike the employees in *Comcraft, Inc.*, NY Paving employees voluntarily report to a single centralized location in Long Island City, NY every morning prior to being dispatched to the various job sites. (Judge Gollin's Decision, p. 5). Holder, who was Local 175's Shop Steward, reports to the same location as the other employees prior to going out in the field. (Judge Gollin's Decision, p. 5). Unless he intentionally chose not to do so, there is absolutely no reason why he could not monitor the vehicles leaving NY Paving's yard in the morning, particularly given Holder's testimony that he can recognize asphalt vehicles based on the tools located in the vehicles. (Tr. 248-51). Furthermore, by the ALJ's own conclusion, Local 175 has a history of investigating claims against NY Paving, including allegations of transfer of work. (ALJ Decision, p.39). In fact, Priolo did engage in such an investigation by following the various vehicles leaving NY Paving. (Tr. 364-68). Accordingly, Local 175 should not be excused from its obligation to exercise due

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<sup>10</sup> Such deliberate indifference to whether the alleged Local 175's unit work was being performed by Local 1010 members at NY Paving is particularly egregious given Local 175 had stalked/surveilled other companies for the very same issue prior to the Section 10(b) period. *See, e.g., Nico Asphalt Paving, Inc., supra and Tri-Messine Construction Company, Inc., supra.* It is nonsensical to believe a large company such as NY Paving would fall outside of Local 175's incessant scrutiny.

diligence in investigating the credible reports received from its members regarding the transfer of emergency keyhole work as early as April 2018.

In conclusion, Respondent has demonstrated by a preponderance of evidence that Local 175 had a clear and unequivocal notice of NY Paving transferring certain asphalt work to the members of Local 1010, or, alternatively, had Local 175 exercised timely due diligence, it would have discovered the transfer as early as April 2018. For the foregoing reasons, the ALJ erred in determining the transfer of keyhole work allegation in the unfair labor practice charge filed on January 29, 2019 was timely. Thus, and because Local 175 waited far longer than six (6) months to file the underlying charge, the transfer of work allegations as they pertain to keyhole work must be dismissed as untimely.

**B. Contrary to ALJ Esposito’s Opinion, the Applicable Law Establishes NY Paving Had No Duty to Bargain With Local 175 About a Change Over Which NY Paving Had No Control.**

Even if the unlawful transfer of work allegation pertaining to the keyhole work is not time-barred as set forth in Point II, Section “A” *supra*, – which it is – NY Paving nevertheless was not obligated to bargain with Local 175 regarding same. When determining an employer’s obligation to engage in collective bargaining negotiations with the union as required by Section 8(a)(5) of the Act, the Board has issued a distinct line of decisions which specifically address the bargaining obligation over the changes implemented by the employers due to the requirements of third-parties. It is well established 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. *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996). In *Exxon Research & Engineering Co.*, Exxon Thrift Plan trustees made changes to the number and amounts of loans that could be taken from the plan. Exxon subsidiaries notified union representatives of the change who demanded

bargaining. The Court refused to enforce the Board's order finding an §8(a)(5) violation because the subsidiaries had no duty to bargain over a decision they did not make:

Stated another way, the NLRB contends that the Exxon subsidiaries violated §8(a)(5) by refusing to bargain over changes that they did not make but that affected their employees' terms and conditions of employment. We disagree. The NLRB's position would mark an unprecedented expansion of *NLRB v. Katz*. *Katz* held that an employer that unilaterally changed its employees' conditions of employment violated §158(a)(5); it did not hold that an employer violates §158(a)(5) by refusing to bargain over changes made by a separate legal entity over whom the employer possesses no power.

*Exxon Research & Engineering Co.*, 89 F.3d at 232. The Court noted "[t]he difficulty in developing a remedial order to rescind the plan changes confirms the NLRB's error ... Stated bluntly, the Exxon subsidiaries could not rescind the changes because they never made them in the first place. The NLRB ignored this fundamental fact in ordering rescission of the plan changes."

*Id.*

Similarly, in *Southern Mail, Inc.*, the Board determined the employer was not obligated to bargain with the union regarding the change required by its contractor:

In adopting the judge's finding, we note that the Respondent was required by the USPS to change the schedule for the Nuevo Laredo run and remove two stops. However, the Respondent was not required by the USPS to add an additional 100 miles to the run. Instead, the decision to add the miles to the run was made solely by the Respondent without bargaining with the Union. Our finding of a violation of Sec. 8(a)(5) is limited to this discretionary change.

345 NLRB 644, 645 n. 8 (2005). *See also* GC Advice Memorandum in *ABC, Inc., Academy of Motion Picture Arts and Sciences*, 1998 WL 1759017 (1998) (No §8(a)(5) violation for refusal to bargain where work was lost as a result of the project owner reclaiming the work from subcontractor.).

The instant case is undoubtedly governed by the Board decisions holding employers need not bargain with the union over the changes required by third parties over which the employers have no control. Indeed, the record here is clear on this point. As a result of ConEd's enforcement of the labor requirements in its Standard Terms, NY Paving was contractually prohibited from assigning the small portion of asphalt keyhole work to the members of Local 175. At some juncture, ConEd began enforcing a provision in its Standard Terms regarding which employees could work on ConEd projects. (Judge Gollin's Decision, p. 6). ConEd specifically limited its work only to the union labor affiliated with the BCTC. (Judge Gollin's Decision, p. 7). Because Local 175 was not a member of BCTC, its members were effectively precluded from performing any work on ConEd projects. (Judge Gollin's Decision, p. 7). NY Paving played absolutely no role whatsoever in ConEd's decision to start enforcing the BCTC labor requirement in the Standard Terms – the decision was exclusively ConEd's. (Tr. 888).

NY Paving had a prior keyhole contract with Hallen (which is ConEd's subcontractor) to perform certain emergency work for ConEd, the end user, from approximately 2008 to 2017. (Tr. 586-88, 889). During that period of time, NY Paving assigned the asphalt portion of keyhole work to Local 175 members because ConEd was not yet enforcing the BCTC labor requirement on the subcontractors of its (ConEd's) subcontractors – in this case, NY Paving because it (NY Paving) was Hallen's subcontractor. (Tr. 587, 890-91). Notably, NY Paving's prior keyhole contract with Hallen did not even include ConEd's Standard Terms. (Tr. 889-90). After the prior keyhole contract expired in 2017, NY Paving sought a new contract with Hallen with the expectation that it could continue to use both Local 1010 and Local 175 members to perform the concrete and asphalt portions of keyhole work respectively. (Tr. 890). However, when NY Paving received the new keyhole contract from Hallen (GC Ex. 19) in or about January 2018, NY Paving realized that

the contract included ConEd's Standard Terms. As a result, and in required compliance with its contractual obligations with Hallen, NY Paving could no longer assign the asphalt portion of keyhole work to Local 175 members commencing January 2018. (Tr. 885).

Despite the clear legal standard applicable to NY Paving's decision in connection with the assignment of the asphalt portion of the keyhole work, ALJ Esposito committed numerous errors when she disregarded such precedent. First, the ALJ applied an incorrect legal standard. According to the ALJ, NY Paving's failure to bargain with Local 175 could only be excused "if extraordinary and unforeseen events having a major economic effect demand[ed] that a business take immediate action." (ALJ Decision, p. 40) (internal quotations and citations omitted). Not only did the ALJ fail to indicate the reasoning as to why the foregoing (erroneous) standard is applicable to the facts of this case, she also cited to the Board decisions, which are clearly distinguishable from the instant matter. For example, *RBE Electronics of S.D.*, 320 NLRB 80 (1995) involved a violation of Section 8(a)(5) of the Act because the employer refused to bargain with the union regarding employee layoffs and transfer of work citing downturn in business. Unlike the instant case, *RBE Electronics of S.D.*, *supra*, did not involve an employer who was contractually bound to make certain changes which were not in its control. Similarly, in *Ardit Co.*, 364 NLRB No. 130 (2016), the Board found the employer was obligated to bargain with the union regarding the employee layoffs despite the employer losing a major contract with one of its contractors. However and similar to the other decisions cited by the ALJ, the facts in *Ardit Co.* are clearly distinguishable from the instant matter because it did not involve the contractual obligation imposed by an outside entity and beyond the employer's control. Finally, the cases cited by the ALJ appear to cite to each other, creating a somewhat circular reasoning. In any event, they are inapposite to the instant matter. In conclusion, in analyzing whether NY Paving was

obligated to bargain with Local 175 over the changes contractually mandated by its customers, ConEd and Hallen, the ALJ applied an erroneous legal standard grounded upon Board decisions, which are clearly distinguishable from this case.

Not only did the ALJ apply the wrong legal standard in arriving at the conclusion that NY Paving was obligated to bargain with Local 175 in connection with its decision to transfer certain aspects of the keyhole work, ALJ Esposito also ignored the correct legal precedent cited by the Respondent, which should have been applied in this case. For example, in refusing to apply the standard set forth by the Board in *Southern Mail, Inc.*, *supra*, the ALJ noted: “[g]iven the countervailing authority, the Board’s decision in *Southern Mail, Inc.*, 345 NLRB 644, 645 n. 8 (2005), cited by NY Paving is not persuasive.” (ALJ Decision, p. 40, fn. 37). The ALJ’s refusal to apply *Southern Mail, Inc.* is inexplicable. As an initial matter, *Southern Mail, Inc.*, *supra* remains good law and has not been reversed. Furthermore and to the extent the “countervailing authority” refers to the few Board decisions cited by the ALJ, as discussed above, those decisions are factually distinguishable and apply a different legal standard, which is inapposite in this case. Indeed, the ALJ inexplicably refused to apply the standard set forth in *Southern Mail, Inc.* and instead elected to rely on the decisions, which simply do not apply here particularly because NY Paving never argued that it had no obligation to bargain with Local 175 due to economic reasons.

Finally, the ALJ erroneously declined to follow the precedent established in *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996). The ALJ concluded because *Exxon Research & Engineering Co.*, *supra*, involved changes made to an employee benefit plan subject to the Employee Retirement Income Security Act (“ERISA”), it was inapposite. (ALJ Decision, pp.40-41, fn. 37). Interestingly, the ALJ distinguished *Exxon Research & Engineering Co.*, *supra*, which, similar to the instant case, involved an employer faced with a change imposed

by a third party, and yet relied on *RBE Electronics of S.D.*, *supra* and *Ardit Co.*, *supra*, which bear no factual similarity whatsoever with this case. ALJ Esposito's analysis is therefore flawed. ALJ Esposito also declined to follow *Exxon Research & Engineering Co.*, *supra* stating "the Board generally adheres to 'nonacquiescence policy' with respect to appellate court decisions that conflict with Board law, unless the Board precedent is reversed by the Supreme Court." (ALJ Decision, p 41, fn. 37). As discussed above, *Exxon Research & Engineering Co.*, *supra* is in fact consistent with the Board's decision in *Southern Mail, Inc.*, *supra* and therefore the Board's "nonacquiescence policy" is inapplicable. See *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (2016).

Unlike the ALJ's conclusions applying the wrong standard, the instant case is no different than the well-established precedents holding that where the company had no role in a decision made by its customer affecting terms and conditions of the unit employees, the company had no duty to bargain with the union and therefore did not violate Section 8(a)(5) of the Act. Similar to those cases, here, NY Paving played no role in ConEd's decision to start enforcing the BCTC requirement on the subcontractors of ConEd's own subcontractor - Hallen. In fact, the first time NY Paving realized it would have to comply with the BCTC requirement was in January 2018 when it received the new keyhole contract from ConEd. (Tr. 888). Because: (i) NY Paving's client, 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 work at issue before it knew regarding ConEd's prohibition, NY Paving had no obligation to bargain with Local 175 regarding same. Notwithstanding the foregoing, NY Paving did engage in the effects bargaining with Local 175 regarding the assignment of the asphalt portion of the keyhole work to Local 1010 members. (Tr.

910-13). NY Paving and Local 175 met at least four (4) times, however, no agreement was reached. (Tr. 910-13). For the foregoing reasons, the ALJ erred in concluding NY Paving was obligated to bargain with Local 175 regarding the transfer of the keyhole work as mandated by ConEd and Hallen, and her decision should therefore be reversed.

**C. Contrary to the ALJ's Conclusion, Documentary Evidence Demonstrates NY Paving's Assignment of Keyhole Work Outside the Local 175 Unit Was An Insubstantial Change and Did Not Require NY Paving to Engage in Bargaining.**

The Employer's bargaining obligation under Section 8(a)(5) of the Act is triggered only if the transfer of work is material, substantial and significant. The GC bears the burden of establishing that the change was material, substantial and significant. *See North Star Steel Co.*, 347 NLRB 1364, 1365 (2006). Contrary to the ALJ's finding, here, the GC has woefully failed to satisfy the foregoing burden.

In her decision, the ALJ declined to apply *North Star Steel Co.*, *supra* and further determined the testimony regarding the number of monthly hours required to perform the asphalt-portion of keyhole work was a "more accurate assessment of the actual asphalt work traditionally assigned to Local 175" rather than the percentages testified by Miceli. (ALJ Decision, p. 42). Specifically, the ALJ credited Miceli's testimony establishing that the performance of the asphalt-portion of the keyhole work involved approximately fifteen (15) hours of paving. (ALJ decision, p. 42). Regardless of whether *North Star Steel Co.* should apply to the instant mater, the ALJ's conclusion is erroneous because the GC did not satisfy her burden of proof.

Specifically, Miceli credibly testified eighty percent (80%) of the work NY Paving performed pursuant to the keyhole contract with Hallen was on concrete sidewalks and involved no asphalt work whatsoever. (Tr. 613-15, 888). Of the remaining twenty percent (20%) of the keyhole work that NY Paving performed in the streets, only ten percent (10%) involved asphalt (two (2) inches of asphalt top) (*i.e.*, only two percent (2%) of the total keyhole work performed by

NY Paving involves asphalt). (Tr. 613-15, 888). According to Miceli, NY Paving performed the foregoing two percent (2%) of keyhole work involving asphalt with a crew of four (4) to five (5) Local 1010 members approximately four (4) times per month. (Tr. 583-84). According to the ALJ, the foregoing two percent (2%) of keyhole work involved approximately fifteen (15) hours of paving work per month. (ALJ decision, p. 42). Based on the total number of hours worked by Local 175 members at NY Paving from July 2018 through July 2019, the foregoing fifteen (15) hours of keyhole work ranged from approximately 0.14% of the total work performed by Local 175 members (for example in September 2018) to approximately 0.26% of Local 175's work (for example, in January 2019). (Resp. Ex. 21).<sup>11</sup>

Considering the foregoing low percentages, the ALJ's application of *Ruprecht Co.*, 366 NLRB No. 179 (2018) to this matter is inapposite because the Board's analysis in *Ruprecht Co.* focused on the number of non-unit employees who performed the unit work. Rather, *North Star Steel Co.*, *supra* is more factually similar because that case also involved the analysis of the

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<sup>11</sup> The following are the monthly percentages of the fifteen (15) keyhole paving work hours compared to the total monthly hours worked by Local 175 members during the relevant period of time:

- July 2018 – 0.17%
- August 2018 – 0.15%
- September 2018 – 0.14%
- October 2018 – 0.17%
- November 2018 – 0.18%
- December 2018 – 0.16%
- January 2019 – 0.26%
- February 2019 – 0.24%
- March 2019 – 0.14%
- April 2019 – 0.15%
- May 2019 – 0.14%
- June 2019 – 0.16%
- July 2019 – 0.22%

Resp. Ex. 21

percentage of total monthly work that was transferred. Similar to *North Star Steel Co., supra*, it is factually undisputed in this case that the total percentage of the asphalt paving portion of keyhole work was *de minimis* in comparison to both – the total amount of keyhole work and the total monthly hours worked by Local 175 members at NY Paving during the relevant period of time.

More importantly, however, and similar to *North Star Steel Co., supra*, the GC has not presented any evidence that NY Paving's assignment of the foregoing minimal asphalt work involved in the keyhole contract to Local 1010 members has adversely affected any Local 175 employee, and therefore failed to satisfy her burden of demonstrating the transfer was material, substantial, and significant. Based on the foregoing, because the asphalt work involved in the performance of the keyhole assignments was immaterial, insubstantial and insignificant, and did not adversely affect any Local 175 member, NY Paving had no obligation to bargain with Local 175. The ALJ's determination should therefore be reversed and NY Paving's alleged violation of Section 8(a)(5) and (1) in this regard must be dismissed.

**D. The ALJ Committed Manifest Errors In Her Factual Findings When She Erroneously Determined Code 49 and Code 92 Constituted Local 175's Unit Work Triggering NY Paving's Obligation To Bargain Prior to Assigning Same Outside the Local 175 Unit.**

ALJ Esposito's finding that Codes 49 and 92 constituted Local 175's unit work was erroneous because in the absence of the 2014-2017 CBA, the GC did not present sufficient evidence to satisfy her burden of proof. It is telling in the Decision, the ALJ repeatedly referred and cited the 2014-2017 CBA to justify the conclusion that the disputed tasks constituted Local 175's unit work. In fact and as is apparent from the Decision, the 2014-2017 CBA appears to be the sole documentary evidence purportedly establishing the work involved in performing Codes 49 and 92 falls within Local 175's unit. However and for the reasons stated in Point I, *supra*, the ALJ erred in not only refusing to draw an adverse inference against the GC due to the failure to

introduce the 2014-2017 CBA into evidence, but also prejudicing NY Paving by *sua sponte* admitting said CBA into the record after the submission of NY Paving's post-hearing brief. For those reasons alone, any reliance by the ALJ on the 2014-2017 CBA in the Decision to conclude that Codes 49 and 92 were Local 175's unit work should be disregarded.

The utmost prejudice to NY Paving by the "eleventh hour admission" of the 2014-2017 CBA is apparent in the ALJ's conclusions throughout the Decision. For example, in the section discussing the assignment on Code 49s (ALJ Decision, pp. 44-45), ALJ Esposito drew an analogy between the Section 10(k) Decision and the instant matter to justify her conclusion as to why all temporary asphalt is Local 175's unit work covered by the 2014-2017 CBA. Specifically, the ALJ used the Board's reasoning in the Section 10(k) Decision to incorrectly conclude that because the 2014-2017 CBA specifically includes reference to "temporary asphalt," any work involving temporary asphalt constitutes Local 175's unit work. However, the ALJ's conclusions are erroneous because NY Paving's collective bargaining agreement with Local 1010 ("Local 1010 CBA") is not in evidence. Had the 2014-2017 CBA been admitted into the evidence while the record was open, NY Paving could have made a tactical legal decision to possibly introduce the Local 1010 CBA to demonstrate certain types of asphalt work, including temporary asphalt work, could also be covered by same. However, the Local 1010 CBA was never admitted into the evidence even though the ALJ appears to draw conclusions regarding the work (not) included therein. NY Paving was undoubtedly prejudiced and deprived of its due process rights by being denied the opportunity to not only introduce documentary evidence but also to make potentially exculpatory arguments in connection with same by virtue of the last-minute inclusion of the 2014-2017 CBA into the evidence.

Without the 2014-2017 CBA, the GC has failed to present sufficient evidence demonstrating that the work performed by NY Paving known as Code 49 and Code 92 was Local 175's unit work, triggering NY Paving's obligation to bargain when assigning same to the members of Local 1010. Because of the GC's failure, there is no documentary evidence in the record demonstrating the type of work involved in performing Codes 49 and 92 falls within Local 175 jurisdiction (*i.e.*, Local 175's unit work). Therefore and due to the GC's failure to introduce key evidence in this case, the GC has not established NY Paving was obligated to bargain regarding assigning that work to members of Local 1010.<sup>12</sup>

ALJ Esposito also erred in determining that NY Paving did not perform Code 49s solely in the context of sawcutting and excavation process. (ALJ Decision, p. 44). Undisputed record evidence demonstrates the ALJ's conclusion is patently wrong. Indeed, Miceli repeatedly testified (without contradiction) NY Paving did not perform Code 49s prior to 2018. (ALJ Decision, pp. 16-17; Tr. 608, 880). Rather, it is undisputed NY Paving started performing the work known as Code 49 specifically and exclusively for the purpose of enabling NY Paving to perform sawcutting and eventual excavation. NY Paving started performing Code 49s in 2018 because of the poor quality of National Grid's backfill after completing its (National Grid's) service work. (Tr. 874-75). Indeed, due to improper backfill, NY Paving's saws (which are up to five (5) feet tall and weigh approximately 1,500 pounds), were sinking in the holes made by National Grid creating unsafe conditions for both the employees and general public, and damaging its expensive

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<sup>12</sup> Assuming *arguendo* the 2014-2017 CBA was properly admitted into the evidence – which it was not – and it demonstrated Codes 49 and 92 constituted Local 175's unit work – which they were not – NY Paving nevertheless did not violate Section 8(a)(1) and (5) of the Act when it assigned Codes 49 and 92 to the members of Local 1010 because the 2014-2017 CBA expired before the relevant period to the Complaint allegation(s). See *Nexstar Broadcasting, Inc.*, 369 NLRB No. 61 (2020).

equipment. (Tr. 874-75). After NY Paving's consultation with National Grid, a decision was made to start using a Code 49 from National Grid's contract with NY Paving to designate the process of installing temporary material on the backfilled holes solely for the purpose of running a saw on top. (Tr. 879-80). Miceli's foregoing testimony was corroborated by NY Paving's Operations Manager, Robert Zaremski ("Zaremski") who testified NY Paving did not perform Code 49s until seven (7) or eight (8) months ago and from the inception, they were assigned to the members of Local 1010. (Tr. 523).

ALJ Esposito appears to erroneously focus on the material being used in performing Code 49s. According to the ALJ, because temporary material, including but not limited to binder, is used in Code 49s, all types of work involving binder (or temporary asphalt) should be assigned to Local 175. (ALJ Decision, p. 44). NY Paving has never argued that either the Local 1010 CBA or the Section 10(k) Decision permit the assignment of all binder work or temporary asphalt work to the members of Local 1010. The work in dispute in this case is Code 49s specifically rather than temporary asphalt or binder. In the Section 10(k) proceeding, the parties specifically stipulated that binder work was Local 175's unit work.

Rather, it is obvious the reason why NY Paving properly assigned Code 49s (rather than all work involving temporary asphalt or binder work) to the members of Local 1010 is because performing Code 49s is the essential and integral first step in accomplishing sawcutting and eventual excavation. It is undisputed after Code 49 is completed, Local 1010 crews sawcut the hole and dig-out by digging down twelve (12) to fourteen (14) inches, excavating the dirt, and pouring nine (9) to twelve (12) inches of concrete. (Tr. 577, 623, 878; Section 10(k) Decision). At NY Paving, Code 49s are always followed by a dig-out and the entire process is completed in five (5) to six (6) days at most. (Tr. 878-79). Because Code 49s are the first step and an integral part

of an excavation, this process in its entirety was assigned to members of Local 1010 in accordance with and subsequent to the Section 10(k) Decision. (Tr. 873-78).

The ALJ further erroneously concluded the evidence contradicted NY Paving's assertion that "sawcutting and dig-out follow a Code 49 in so rapid and integral a manner that the entire project constitutes one coherent work process." (ALJ Decision, p. 44). The only evidence cited in support of the foregoing conclusion by the ALJ was Miceli and Zaremski's testimony that sawcutting typically follows Code 49s within one (1) week to ten (10) days. *Id.* As an initial matter, Zaremski clarified his earlier statement and stated sawcutting and dig-outs necessarily follow Code 49s within a "couple of days." (Tr. 536). Similarly, the ALJ misconstrued Miceli's testimony regarding NY Paving's average time to complete any assignment. Indeed, Miceli testified sawcutting could follow Code 49s on the same day, the next day, or a "few" days. (Tr. 620). Miceli then proceeded to testify the average time it takes NY Paving to complete a job for National Grid is seven (7) calendar days, which is inclusive of the time it takes for the special service (unrelated to NY Paving) to first mark the jobsites with appropriate and color-coded markings before NY Paving actually starts digging. (Tr. 620-21). Simply because the entire process may take seven (7) days does not necessarily mean that the period between Code 49s and sawcutting is necessarily several days long. More importantly however, the GC and/or Local 175 did not present any rebuttal evidence to NY Paving's position that Code 49s are an integral part of the excavation process, which was awarded to Local 1010 by the Board in the Section 10(k) Decision.

The ALJ further erred in basing her conclusion that Code 49s were not integral to the excavation process by relying solely on the period between Code 49s and sawcutting. Indeed, ALJ Esposito completely disregarded the fact that NY Paving commenced performing Code 49s in

2018 exclusively for the purpose of preparing the worksite for sawcutting and eventual excavation.

Miceli's testimony in this regard was singular and uncontradicted:

I'm saying it's part of the dig-out because it's part of the dig-out. I'm saying that the only reason why the 49 is going back is because the saw can't pass over the hole. So without us doing the asphalt for the saw to go over it, it's all connected to the dig-out. I don't know what you're -- I can't explain it any simpler. It's not a standalone thing. You got to -- the 49 has to get done before you can saw-cut it, before you can -- and after that comes the excavation.

(Tr. 982). Stated differently, unrebutted testimony in this case established Code 49s are an integral part of the excavation process because NY Paving started performing them in 2018 for the purpose of making the street openings safe for sawcutting and excavation. ALJ Esposito inexplicably ignored the foregoing instead focusing on the time lapsed between Code 49s and sawcutting.

The ALJ similarly erred in determining NY Paving was obligated to bargain with Local 175 prior to assigning Code 92s to Local 1010 members. Code 92s are identical to Code 49s but they are located on sidewalks, which are entirely made from concrete. (Tr. 882-83). Code 92, like Code 49, involves putting down temporary material in the hole so that NY Paving can thereafter sawcut, excavate and restore the sidewalk. (Tr. 881-84). While Code 92s were previously performed by Local 175, as a result of the Section 10(k) Decision, which affirmed any and all concrete work was within Local 1010's jurisdiction, and because sidewalks are made from concrete, NY Paving started assigning Code 92s to Local 1010 members in the fall 2018. (Tr. 881-84). Miceli's testimony regarding the assignment of Code 92s was corroborated by Zaremski. (Tr. 506-08, 520-23). In sum and substance, 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).

Finally, the ALJ erred in determining Codes 49 and 92 were not encompassed by the Board's award of sawcutting and excavation work to the members of Local 1010 in the Section

10(k) Decision. The ALJ appears to have completely disregarded the decision in *NLRB v. Seedorf Masonry, Inc.*, 812 F.3d 1158 (8th Cir. 2016), which supports NY Paving's position in connection with the assignment of Code 49 and 92. In *Seedorf Masonry, Inc.*, the General Counsel alleged the employer violated Sections 8(a)(1) and (5) of the Act by repudiating the collective bargaining agreement and transferring work out of the unit and assigning it to a different union. *Seedorf Masonry, Inc.*, 812 F.3d at 1163. The Board affirmed the decision that the employer had violated the Act by assigning work to the wrong union. The Court, however, declined to enforce the NLRB's Order because it did not consider the §10(k) factors when deciding whether the employer violated the Act when assigning the work at issue. *Seedorf Masonry, Inc.*, 812 F.3d at 1169. The Court refused to uphold the finding of repudiation under the circumstances and that Seedorf violated the collective bargaining agreement by assigning work covered by the agreement to the other union.

The Court noted the Board's ruling was contrary to the well-recognized principle that, when an employer enters into two (2) contracts with competing unions, the NLRB and courts go beyond the four corners of the agreement and look to the parties' practice, usage, and custom in determining whether the employer violated the Act in assigning the work at issue. *Seedorf Masonry, Inc.*, 812 F.3d at 1168-69. In *Seedorf Masonry, Inc.*, because the General Counsel did not introduce evidence addressing the question, the record could not support finding that Seedorf violated the agreement by continuing to assign the work to the competing union. *Id.* The Court further noted the Board entered an order that may enrich the charging party union's members for work they were not entitled to perform and would force Seedorf to pay for work it already properly paid the other union's members to perform. *Seedorf Masonry, Inc.*, 812 F.3d at 1169. Here, the Board has already rendered a decision in the Section 10(k) proceeding awarding certain work,

including excavation and sawcutting work, to Local 1010. The work known as Codes 49 and 92 fall “squarely” within the Board’s Section 10(k) Decision awarding work to Local 1010 because they unquestionably are the first step in the excavation work. In conclusion, NY Paving had no obligation to bargain with Local 175 regarding the assignment of Codes 49 and 92 to the members of Local 1010 because the work in dispute was awarded to Local 1010 by the Board in its Section 10(k) Decision.

Finally, the ALJ determined there was “meager” evidence of NY Paving’s animus against Local 175. (ALJ Decision, p. 28, 30). The sole evidence relied upon 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. (ALJ Decision, p. 28, 30). Given NY Paving’s argument that for the reasons stated in its Exceptions and the foregoing brief, the 8(a)(5) violation is without merit, the ALJ’s finding of animus must similarly be reversed.

### **POINT III**

#### **THE ALJ’S CONCLUSION SBARRA WAS AN AGENT OF NY PAVING PURSUANT TO SECTION 2(13) OF THE ACT IS ERRONEOUS.**

The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. *See, e.g., Pan-Oston Co.*, 336 NLRB 305, 305-06 (2001). “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp.*, 315 NLRB 725 (1994). Accordingly, “[t]o create apparent authority, the principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief.” *See Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); Restatement

2d Agency § 27 & cmt. a. The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *See, e.g., Pan-Oston Co., supra*, citing *Waterbed World*, 286 NLRB 425, 426-27 (1987), *enfd.* 974 F.2d 1329 (1st Cir. 1992).

Here, the Respondent does not except to ALJ Esposito's dismissal of the Section 8(a)(1) and (3) allegations pertaining to the purported unlawful discharge of Jordan, and Sbarra's alleged unlawful interrogation of Local 175 members and threats of discharge; however, NY Paving does except to the ALJ's determination Sbarra was NY Paving's agent pursuant to Section 2(13) of the Act. ALJ Esposito's finding of Sbarra's agency status is based solely on the fact that Sbarra allegedly acted as a "conduit of information" between NY Paving and the Local 1010 members. (ALJ Decision, p. 24). The ALJ's conclusion is erroneous for two (2) reasons.

One, even if Sbarra acted as a conduit of information, there is no evidence on the record demonstrating Jordan would reasonably conclude Sbarra was acting on behalf of NY Paving when he (Sbarra) allegedly interrogated Jordan and/or threatened him with discharge. At no point did Jordan testify he perceived Sbarra's statements and/or actions to come from NY Paving's management. In fact, on cross-examination, Jordan admitted he did not know who assigned the work at NY Paving and who provided Sbarra the list of "shape up" workers who were needed for the day. (Tr. 169-70).

Unlike Jordan, three (3) current Local 1010 members and concrete foremen testified regarding their reasonable perceptions of Sbarra's role in assigning to or removing individuals from the crews. William Cuff, for example, testified Louis Sarro ("Sarro"), a Concrete Supervisor at NY Paving, assigns the "shape up" employees to the concrete crews when necessary. (Tr. 711-12). Similarly, Michael Whelan ("Whelan") testified while he does not know who at NY Paving

makes the decision to assign “shape up” employees to the crews, he did complain to NY Paving “management” regarding Jordan’s performance (notably, Whelan said “management” rather than “Sbarra”). (Tr. 740-41, 743). Joseph Stine also testified that even though he spoke with Sbarra, as Local 1010 Shop Steward, about having Jordan removed from his crew, Sbarra spoke with “someone” in NY Paving management about it. (Tr. 759, 762, 764, 766). These three (3) individuals collectively testified while they did speak with Sbarra about Jordan’s issues, they did so in Sbarra’s role as Local 1010 Shop Steward. They also realized that removing Jordan from a crew was not Sbarra’s decision, but rather someone in NY Paving’s “management.” The testimony of these three (3) witnesses represented a reasonable perception of Sbarra’s role as Local 1010’s Shop Steward and the absence of any role he may play as NY Paving’s alleged agent. As further evidence that it would not be reasonable for Jordan to perceive Sbarra as acting on NY Paving’s behalf, at the time Sbarra made the alleged threats (which were dismissed by ALJ Esposito), Jordan had already signed a Local 175 membership card and perceived himself as a Local 175 member. (Tr. 206; Resp. Ex. 4).

Two, even if Sbarra acted as a conduit of information between NY Paving and Local 1010 members, there is no evidence that any alleged apparent authority he may have had covered the behavior at issue in this case, to wit, the alleged interrogation of Jordan regarding his membership in Local 175 in November 2018, and the purported threat to terminate Jordan in January 2019. The testimony in this regard was unambiguous: to the extent Sbarra conveyed any information to the members of Local 1010, any such information was limited to the crew and work assignments, and the replacement employees. (ALJ Decision, p. 24). Given that Sbarra’s purported conveyance of information was extremely circumscribed, no reasonable employee would have believed Sbarra had apparent authority to make adverse decisions, including terminate employees. For the

foregoing reasons, the ALJ's finding of Sbarra's agency status should be reversed, while her dismissal of the Section 8(a)(1) and (3) allegations should be affirmed.

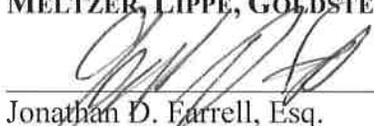
### CONCLUSION

For all of the reasons stated in NY Paving's exceptions and discussed above, NY Paving respectfully requests ALJ Esposito's Decision finding (i) NY Paving unlawfully transferred or assigned out of Local 175 bargaining unit the asphalt-portion of the emergency keyhole work, and Code 49 and Code 92 work in violation of Sections 8(a)(1) and (5) of the Act be reversed; (ii) Sbarra was NY Paving's agent within the meaning of Section 2(13) of the Act be reversed; (iii) NY Paving possessed anti-Local 175 animus be reversed; (iv) and the Complaint be dismissed in its entirety.

Dated: April 29, 2020  
Mineola, New York

Respectfully submitted,

**MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP**



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum of Law In Support of Respondent New York Paving, Inc.'s Exceptions to the Decision and Order of the Administrative Law Judge (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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