

**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 REPLY TO COUNSEL FOR  
THE GENERAL COUNSEL'S ANSWERING BRIEF**

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## PRELIMINARY STATEMENT

New York Paving, Inc. (“Respondent” or “NY Paving”) respectfully submits this Reply Brief to the Counsel for the General Counsel’s (“GC”) Answering Brief<sup>1</sup> and in further support of NY Paving’s Exceptions to the Decision and Order (“Decision”) of the Administrative Law Judge (“ALJ”) (“Exceptions Brief”) pursuant to Section 102.46(e) of the Rules and Regulations. Attempting to justify the ALJ’s conclusions, the GC misstated key facts and misapplied legal precedent. The GC admitted she made a strategic decision to not introduce 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”) into the evidence while recognizing its importance and thereby depriving Respondent the right to fully develop its defenses. Prejudice to NY Paving was compounded by the ALJ’s admission of the same document after post-trial briefing was complete. For this reason and others discussed below, Respondent’s requested relief should be granted.

## STATEMENT OF FACTS

The Board is respectfully referred to the Statement of Facts set forth in Respondent’s Exceptions Brief for a full statement of relevant facts.

## ARGUMENT

### **A. The Admission of the 2014-2017 CBA Prejudiced Respondent**

The GC unsuccessfully attempted to undermine Respondent’s position in connection with

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<sup>1</sup> Construction Council Local 175, Utility Workers Union of America, AFL-CIO’s (“Charging Party” or “Local 175”) has not filed an Answering Brief to Respondent’s Exceptions. Because Local 175 and its members stand to benefit the most from the Board affirming the disputed findings in the ALJ’s Decision, Local 175’s failure is indicative of the merits of NY Paving’s Exceptions.

The GC’s Answering Brief violates Section 102.5(a) of the Board’s Rules and Regulations because the footnote text is smaller than the required 12 point.

the admission of the 2014-2017 CBA. Notably absent from the GC's argument is the fact that the ALJ supplemented the record **after** the submission of post-hearing briefs, thus depriving NY Paving the opportunity to make certain potentially exculpatory arguments. The ALJ may not limit either party in the full development of its case. *See* the NLRB Div. of Judges Bench Book, §2-300. Here, Respondent's ability to fully develop its case was curtailed by the admission of the 2014-2017 CBA **after** the submission of its post-hearing brief. The GC's gratuitous inclusion of footnote 4 in the Answering Brief is remarkable. First, the statements contained therein are not in evidence. Two, the GC apparently takes issue with the undersigned zealously representing its client. Three, the GC confirmed what has been NY Paving's position from the inception of this litigation, to wit, there exists significant dispute between NY Paving and Local 175 regarding the applicability of the 2014-2017 CBA to the events underlying this action, which is precisely why the admission of said CBA after briefing was complete prejudiced Respondent and deprived it of due process. Finally, the GC essentially admitted it was her litigation strategy<sup>2</sup> to not introduce the 2014-2017 CBA to prevent Respondent from objecting to the relevance of the document (including the fact that it terminated on June 30, 2018 and therefore did not cover the relevant period for the disputed transfer of work allegations). As admitted by the GC, any applicable agreement purportedly applying to the Local 175 members subsequent to June 30, 2018 was within Local 175's custody and control during the hearing and could have been easily testified to by Local 175's Business

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<sup>2</sup> The GC's admission in footnote 4 further supports NY Paving's argument that the ALJ erred when she refused to draw adverse inference against the GC. Respondent's adverse inference argument is supported by the recent decision *Circus Circus Casinos, Inc. v. NLRB*, No. 18-1201, 2020 WL 3108276, at \*11-\*12 (D.C. Cir. June 12, 2020) (holding the ALJ erred by failing to draw adverse inference against an impeached witness and instead introduced reasons unsupported by record evidence to credit the witness testimony). The ALJ's error in this case is far more egregious because not only did the ALJ fail to draw adverse inference against the GC, she (the ALJ) essentially assisted the GC in establishing her *prima facie* case.

Manager and GC witness, Charlie Priolo (“Priolo”). For the reasons admitted by the GC, NY Paving was prejudiced and deprived of due process.

Despite the GC’s attempt to factually distinguish *Quicken Loans, Inc.*, 367 NLRB No. 112 (Apr. 20, 2019), it is clear based on the admissions contained in footnote 4, while the GC made a strategic litigation decision regarding the 2014-2017 CBA, the ALJ nevertheless supplemented the record with said CBA more than a month after the parties submitted post-hearing briefs. This is a clear example of the ALJ inappropriately filling the “evidentiary hole” in favor of the GC’s *prima facie* case, which is precisely what the Board in *Quicken Loans, Inc.*, *supra* prohibited.

Finally, the review of the prior two (2) decisions demonstrates the falsity of the GC’s claim that said decisions allegedly “contained relevant excerpts of the 2014-2017 CBA defining asphalt paving work belonging to Local 175.” (Answering Brief, p. 25). Neither the Section 10(k) Decision nor Judge Gollin’s Decision<sup>3</sup> include references to the 2014-2017 CBA with sufficient specificity to fully define Local 175’s unit work, particularly as it pertains to Codes 49 and 92.<sup>4</sup> Because of the GC’s admitted intentional litigation strategy, there was no documentary evidence in the record demonstrating the type of work involved in performing Codes 49 and 92 was within Local 175

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<sup>3</sup> *Highway Road and Street Construction Laborers Local 1010*, 366 NLRB No. 174 (Aug. 24, 2018) (“Section 10(k) Decision”); and *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”).

<sup>4</sup> Contrary to the GC’s claim, the Section 10(k) Decision includes **only two (2)** relevant references: (i) “The Board Certification of the unit represented by Local 175 includes ‘[a]ll full-time and regular part-time workers who primarily perform asphalt paving;’” and (ii) the 2014-2017 CBA, which covers “prepar[ing] for and perform[ing] all types of asphalt paving ... and all other preparation work, operat[ing] small power tools, any laboring work related to the preparation of cleanup of all Turf and ... all landscaping, and maintenance and protection of traffic safety for all work sites.” See Section 10(k) Decision, p. 3. Judge Gollin’s Decision contains **no citations from the 2014-2017 CBA** and only defines the “Asphalt Unit” as “full-time and regular part-time workers who primarily perform asphalt paving, including [listing employee titles] who work primarily in the five boroughs of New York City.” See Judge Gollin’s Decision, pp. 4-5, 32.

jurisdiction (*i.e.*, Local 175's unit work). The ALJ's decision was particularly prejudicial because she largely relied on the 2014-2017 CBA to define "asphalt paving work" and "bargaining unit work" that must be assigned to Local 175 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). Therefore, NY Paving was prejudiced and deprived due process.

#### **B. The Transfer of Keyhole Work Allegation Is Time-Barred**

In attempting to (unsuccessfully) demonstrate the transfer of Keyhole work allegation was not time-barred, the GC patently misrepresents facts and misapplies legal precedent. The GC's statement that Respondent did not cite to the record to demonstrate the only asphalt work it performed for Consolidated Edison, Inc. ("ConEd") in the Bronx was Keyhole work is demonstrably false. In its Exceptions Brief, NY Paving cited to the testimonies of Peter Miceli (NY Paving's Director of Operations), Terry Holder (Local 175 Shop Steward) and Priolo (Tr. 348-49, 352, 358-59, 431), as well as the documentary evidence (Resp. Ex. 24), which, when considered as a whole, demonstrate Local 175's actual knowledge that Local 1010 was performing Keyhole asphalt work in the Bronx as early as April 2018. Indeed, it is remarkable throughout the Answering Brief, the GC completely failed to discuss Holder's emails (Resp. Ex. 24), which demonstrate Local 175's actual knowledge of the transfer of Keyhole work. 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).

The GC did not address this uncontroverted documentary evidence and instead shifted focus to other alleged deficiencies in Respondent's argument in a desperate attempt to detract attention away from Holder's emails. For example, the GC relied on *Taylor Ridge Paving & Constr., Co.*, 365 NLRB No. 168 (Dec., 16, 2017), which, unlike this case, involved a contract

repudiation, and is irrelevant in any event because Local 175 did have clear and unequivocal notice as demonstrated by Holder's emails and photographs received from the Local 175 members. (Resp. Ex. 24). The GC also attempted to distinguish the decisions relied on by NY Paving because they allegedly involved notice of the purported unfair labor practice. However, the GC's argument fails for two reasons. One, Respondent need not provide actual notice to Local 175 to trigger the Section 10(b) period; and two, Local 175 did have actual notice (including photographs) as confirmed by Holder. Finally, the GC's argument in connection with Local 175 exercising due diligence is not persuasive given Local 175's ongoing rivalry with Local 1010 and Priolo's testimony regarding his investigative efforts, which conveniently occurred during the Section 10(b) period. For these reasons, the transfer of Keyhole work allegations are time-barred.

### **C. NY Paving's Assignment of Keyhole Work to Local 1010 Was Insubstantial**

In arguing that the transfer of the extremely limited asphalt-portion of Keyhole work to the members of Local 1010 was material, substantial and significant change, the GC ignored the documentary evidence supporting NY Paving's position. The GC failed to address the fact that based on the total number of hours worked by Local 175 members at NY Paving from July 2018 through July 2019, the monthly 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). This makes this case more similar to *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) than *Ruprecht Co.*, 366 NLRB No. 179 (2018). 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.

Finally, the GC cited to several Board decisions purportedly holding that the GC need not

prove any Local 175 member was adversely affected. Unlike the instant matter, the Board decisions cited by the GC involved **some** evidence of change in the terms and conditions of employment of the affected employees. Here, the GC has presented no evidence demonstrating **any** Local 175 member was affected **in any way whatsoever** by the transfer of the Keyhole work.

#### **D. NY Paving Had No Duty to Bargain Over a Transfer Mandated by Its Customer**

As with her other arguments, the GC's assertions are erroneous both as a matter of law and fact. First, the GC insists the ALJ correctly applied the "economic exigency" standard set forth in *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) while at the same time stating, without much explanation, *Southern Mail, Inc.*, 345 NLRB 644, 645 n. 8 (2005) is inapplicable. Neither the ALJ nor the GC have propounded valid reasons as to why *Southern Mail, Inc.*, *supra*, should not apply here, particularly because it remains good law. The GC's assertion the employer in that case violated Section 8(a)(5) by making additional changes to the schedule is irrelevant. In arguing that *Southern Mail, Inc.*, *supra* is somehow not controlling, the GC cited to three (3) Board decisions, two (2) of which were issued at least a dozen years **before** *Southern Mail, Inc.* It is simply illogical for the GC to insist that the Board must follow the precedents from 1987, 1993 and 1995 rather than *Southern Mail, Inc.*, which is a more recent decision, is on-point and has not been overruled.<sup>5</sup> As for *The Ardit Co.*, 364 NLRB No. 130 (Oct. 27, 2016), as stated in the Exceptions Brief, it is

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<sup>5</sup> The GC also cites to *Tri-Messine Constr., Co., Inc.*, 368 NLRB No. 149 (Dec. 16, 2019) and *Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 (Nov. 6, 2019) for the proposition that the financial challenges faced by the company do not justify ignoring the existing collective bargaining relationships or agreements. (Answering Brief, fn. 5). First, both decisions are distinguishable because they involved the creation of *alter ego* companies and repudiation of the existing collective bargaining agreements. Second, the Board in *Tri-Messine Constr., Co., Inc.* specifically stated: "The judge also stated that 'the Board does not recognize a company's financial challenges as justification for ignoring existing collective bargaining relationships or agreements and forming a new entity.' **To the extent this statement suggests that an employer's financial challenges are wholly irrelevant when determining whether a decision is subject to bargaining, we disagree.**" 368 NLRB No. 149, fn. 2 (Dec. 16, 2019) (emphasis added).

distinguishable from this matter because it did not involve the contractual obligation imposed by an outside entity and beyond employer's control.

The GC's account of the alleged facts is also patently inaccurate. For example, the GC's statement that NY Paving stopped using Local 175 members to perform asphalt-portion of Keyhole work before receiving the new Keyhole Contract in January 2018 is wrong. Miceli testified, and **the ALJ agreed**, NY Paving started assigning Keyhole work to the members of Local 1010 **no earlier than January 2018**. (Tr. 885; ALJ Decision, p. 36). Similarly and contrary to the GC's gratuitous statements, the record is replete with Miceli's uncontroverted testimony demonstrating NY did not choose to enter into a contract with Hallen Construction Inc. ("Hallen"), ConEd's subcontractor, knowing it could not use Local 175. NY Paving's prior Keyhole Contract with Hallen (effective 2008 through 2016) did not include ConEd's Standard Terms. (Tr. 889-90). After the expiration of the prior Keyhole Contract, NY Paving bid on the new Keyhole Contract with Hallen in 2017 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). When NY Paving received the new Keyhole Contract from Hallen (GC Ex. 19) in January 2018, despite NY Paving's expectation to the contrary, NY Paving realized the Contract included ConEd's Standard Terms. (Tr. 885-90). Thus Respondent had no other choice but to comply with the Contract.

**E. Section 10(k) Decision Permitted Respondent to Assign Codes 49 and 92 to Local 1010**

The GC's arguments justifying the ALJ finding NY Paving violated Section 8(a)(5) of the Act are both erroneous and disregard the undisputed record facts. Throughout the Answering Brief, the GC repeatedly attempted to characterize, in contradiction with Miceli's testimony, the work involved in Codes 49 and 92 as "placement of temporary asphalt," which was "historically done by Local 175." (Answering Brief, p. 38). Despite the GC's misleading characterization of the work

involving Code 49 and 92, Miceli's credited and uncontradicted<sup>6</sup> testimony established NY Paving did **not** perform Code 49s prior to 2018. (ALJ Decision, pp. 16-17; Tr. 608, 880), NY Paving started performing Code 49s exclusively for the purpose of enabling NY Paving to perform sawcutting and eventual excavation due to the poor quality of backfill causing the saws to sink. (Tr. 874-75, 879-80). Because Code 49 is an essential part of the excavation process, which was assigned to the members of Local 1010 in the Section 10(k) Decision,<sup>7</sup> NY Paving properly assigned it to Local 1010. (Tr. 873-78; Section 10(k) Decision). Similarly, because Section 10(k) Decision<sup>8</sup> 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).

*Midwest Terminals of Toledo Int'l, Inc.*, 365 No. 134 (Oct. 11, 2017) is distinguishable because the Section 10(k) decision at issue in that case was invalidated by the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Additionally, in that case, the employer unlawfully transferred the disputed work to the rival union even though the Board awarded that specific work to the challenging union. Here, unlike *Midwest Terminals of Toledo Int'l, Inc.*, the disputed work was **not** specifically awarded to the members of Local 175 by the Board in the Section 10(k) Decision. Thus, NY Paving did not violate Section 8(a)(5) of the Act.<sup>9</sup>

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<sup>6</sup> Robert Zaremski, NY Paving's Operations Manager, corroborated Miceli's testimony. (Tr. 523).

<sup>7</sup> Despite the GC's statements, almost every Section 10(k) factor favored the assignment of excavation and sawcutting work to Local 1010. *See* the Section 10(k) Decision, pp. 3-4.

<sup>8</sup> The Section 10(k) Decision states in relevant part: "the removal of old pavement' squarely covers excavation, and since saw cutting is required prior to excavation, this provision can be read to cover saw cutting as well." *See* Section 10(k) Decision, p. 3.

<sup>9</sup> The GC's statement regarding NY Paving being able to introduce into the evidence its collective bargaining agreement with Local 1010 is disingenuous. The GC failed to establish the disputed

## **F. NY Paving Did Not Possess Anti-Local 175 Animus**

The GC failed to oppose Respondent's Exception (Exception 27) and argument to reverse the ALJ's finding that NY Paving possessed animus against Local 175. Therefore, for the reasons stated in Respondent's Exceptions and Brief, the ALJ's finding of animus must be reversed.

## **G. Sbarra Was Not NY Paving's Agent**

The GC's arguments demonstrate a fundamental misunderstanding of not only NY Paving's arguments regarding Sbarra's agency status but also the applicable legal standard. The GC did not satisfy her *prima facie* case of demonstrating Sbarra's agency status pursuant to Section 2(13) of the Act because there is no evidence in the record demonstrating NY Paving's employees would reasonably perceive Sbarra's statements and/or actions to come from NY Paving's management. Both the ALJ and GC appear to erroneously focus on Miceli and Louis Sarro's (Concrete Supervisor at NY Paving) testimonies, while completely disregarding the "reasonableness" element of the applicable standard. Jordan, as well as three (3) current Local 1010 foremen testified regarding their perceptions of Sbarra's role in assigning to or removing individuals from the crews. Because the ALJ found Jordan to not be a credible witness, the testimonies of the foregoing three (3) foremen are the sole evidence regarding the "reasonable perception" of Sbarra's role, and based on said testimony, it cannot be concluded that NY Paving employees reasonably perceived Sbarra to act on behalf of NY Paving's management.<sup>10</sup>

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work was within Local 175's jurisdiction by failing to introduce the 2014-2017 CBA into the evidence, and therefore, NY Paving had no reason to introduce any rebuttal documentary evidence.

<sup>10</sup> In the Answering Brief, the GC did not oppose NY Paving's argument that even if Sbarra acted as a "conduit of information," there was 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 in November 2018, and the purported threat to terminate Jordan in January 2019. For this reason alone, Sbarra's agency status determination should be reversed.

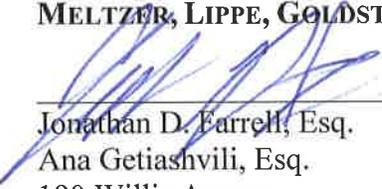
Furthermore, the Board decisions cited by the GC in support of her argument are all distinguishable in that in each of those decisions, the employer's agent had duties and responsibilities **in addition to** acting as a "conduit of information," which contributed to the finding of agency status. Finally, *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) is inapposite to the GC's position (and supports NY Paving's arguments) because the Board determined there was insufficient evidence to determine the employer communicated to its employees that the group leader was acting on behalf of the management at the time he made the alleged unlawful statements. Therefore, the ALJ's finding of Sbarra's agency status should be reversed.

### CONCLUSION

For the reasons stated in NY Paving's Exceptions and the supporting Brief, and discussed above, NY Paving respectfully requests the ALJ's Decision finding (i) NY Paving unlawfully transferred the asphalt-portion of the Keyhole work, and Code 49 and Code 92 work to Local 1010 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 underlying complaint be dismissed in its entirety.

Dated: June 23, 2020  
Mineola, New York

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



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## CERTIFICATE OF SERVICE

A copy of the foregoing Respondent New York Paving Inc.'s Reply to Counsel for the General Counsel's Answering Brief (29-CA-234894, 29-CA-233990) has been filed electronically and served via email this 23<sup>rd</sup> day of June, 2020 on the following:

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