

20-0077-ag(L), 20-0361-ag(XAP)

United States Court of Appeals
for the
Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

– v. –

NICO ASPHALT PAVING, INC., and it's Successor in Interest, Alter Ego,
CITY WIDE PAVING, INC.,

Respondents-Cross-Petitioners.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD, CASE NO. 29-CA-186692

**BRIEF AND SPECIAL APPENDIX ON BEHALF OF
RESPONDENTS-CROSS-PETITIONERS
(Pages SPA-1 to SPA-10)**

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS
BOARD

Case Nos. 20-77 & 20-361

Petitioner/Cross-Respondent

**CORPORATE DISCLOSURE
STATEMENT**

NICO ASPHALT PAVING, INC.
and
CITY WIDE PAVING, INC.

Respondent/ Cross -Petitioner

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Nico Asphalt Paving, Inc. (“Nico”) hereby states that it is a limited liability company engaged in the business of asphalt paving. Nico has no parent company and no publicly traded entity owns 10% or more of Nico’s stock. Nico was formed in the State of New York and is qualified to do business in the State of New York. The sole owner of Nico’s limited liability company is Michael Pietranico.

Dated: July 27, 2020

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner City Wide Paving, Inc. (“City Wide”) hereby states that it is a limited liability company engaged in the business of asphalt paving. City Wide has no parent company and no publicly traded entity owns 10% or more of City Wide’s stock. City Wide was formed in the State of New York and is qualified to do business in the State of New York. The sole owner of City Wide’s limited liability company is Dana Pietranico.

Dated: July 27, 2020

Respectfully submitted,

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STATEMENT OF JURISIDICITION

This case is before the Court on the applications of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Employers on November 6, 2019 and the petition for review filed by Respondents/Cross Petitioners proceeding below pursuant to Section 10(a) of the National Labor Relations Act. 29 U.S.C. §§ 151, *et seq.*, as amended (“the Act”). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10 (e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petitions and applications are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

Did the Employers violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by failure to apply the Collective Bargaining Agreement between the Union and Nico and whether City Wide violated Section 8(a)(2) and (1) of the Act by recognizing Local 1010 and whether the Complaint was time-barred by § 10(b) of the Act.

STATEMENT OF THE CASE

I. The Board’s Finding of Fact

A. Jurisdiction

The Respondents and Cross-Petitioners have been engaged in operating concrete and masonry businesses within the jurisdiction of the State of New York.

Both entities have stipulated to the Board's jurisdiction and concede that they both are engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

B. Alleged Unfair Labor Practice

The two entities Nico and City Wide are operated by members of the Pietranico family. Michael Pietranico, Sr., his son Michael Pietranico, Jr., and daughter Dana Pietranico.

(D&O¹) John Denegall who testified at the hearing has been Superintendent, Office Manager and Vice-President for Nico and performed same services for City Wide.

Denegall was also Custodian of the Records for both Nico and City Wide (A,p. 16, 23-25; A, p. 17, 1-4).

C. Nico Asphalt Paving, Inc.

Nico was formed by Pietranico Sr. in 1996 and he is the sole owner and President. Pietranico, Jr., was Nico's manager/superintendent and managed workers in the field. Dana Pietranico worked exclusively in the office and at times held the title of Vice-President and Secretary/Treasurer.

¹ D&O references are to the Decision and Order
Tr. references are to the Transcript
GC Exh for General Counsel's exhibits
CP Exh for Charging Party Exhibits
R Exh for Respondents Exhibits

Denegall began employment with Nico in 1999 and handled day-to-day operations.

Both Nico and City Wide are in the business of asphalt restoration in Manhattan and their primary customer was Consolidated Edison (“ConEd”). Nico did also perform similar services for several smaller companies until February of 2016 when it ceased such services.

City Wide began performing work for some of the small companies around February of 2016 in place of Nico.

Nico over its existence obtained the asphalt it used from Willets Point Asphalt Corp. on a credit line which remained open after Nico ceased its asphalt work. (A, p.1133, 15-16).

D. Nico’s Relationship with Local 175

In May of 2000, Nico applied for membership in the New York Independent Contractors Association (“NYICA”) and at the time it had a collective bargaining agreement with Local 175 which has been continually renewed (A, p. 1133, 21-26).

Pietranico, Sr. served as a member of the NYICA Board and during this time around 2004, Nico became signatory to successive assumption agreements recognizing Local 175 under Section 9(a) of the Act. (A, p.1133, 28-32).

In 2007, Local 175 petitioned for an election and was certified by the Board under Section 8(f) of the Act. (A, p.1133, 34-39).

The ALJ found that Nico acknowledged the Union's representation and stated in his findings that Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 CBA (A, p.1133, 41-45). Further finding that under the evergreen clause the CBA automatically renewed (A, p.1133, 44-46).

E. The ConEd Contract

For many years Nico performed asphalt work for its main customer ConEd using 175 members without incident under a 3 year contract which was extended for 1 year periods until December of 2017. (A, p.1134, 3-7).

In October of 2014, ConEd amended its contract to require, "unless otherwise agreed" that contractors performing work for them have a CBA with a Union that belonged to the Building & Construction Trades Council of Greater New York ("BCTC"). Local 175 was not a member but Nico continued to use Local 175 members. (A, p. 1134, 22-25).

In early 2015 during negotiations for a renewal of the ConEd contract, Pietranico, Sr. was advised that ConEd was going to enforce the BCTC provision. Nico informed the Union Local 175 of this but the union was unsuccessful in becoming a member of the BCTC (A, p. 1134, 16-20).

The foregoing notwithstanding Nico continued to perform ConEd work with Local 175 labor for the remainder of 2015 and into 2016. Even as late as October 2015, Nico successfully negotiated another bid to extend the ConEd contract while using Local 175 labor (A, p. 1134, 22-25).

F. City Wide Is Formed

On December 15, 2015 City Wide was founded while Nico was ready to begin another year of work for ConEd. Although Dana was nominally the sole owner of City Wide, the certificate of incorporation names Pietranico, Sr. as the sole director of the new corporation. Local 175 was neither informed or not bargained with over the creation of City Wide (A, p. 1134, 32-37).

The address for City Wide was the same as Nico, the same telephone number was used, the same office equipment was used (A, p. 1134, 39-41).

Dana testified she used one room in Nico's office for her new business although this was contradicted by Denegall who stated he used the same office as Vice President of City Wide (A p. 1134, 47; p. 1135, 1-4).

Dana testified she found City Wide as a woman-owned business although she had no experience in the asphalt industry, except for office work performed for Nico. She testified she had the title of President of City Wide and used her own savings to capitalize the new business which she estimated at one million dollars (A, p. 1135, 5-11).

For the first quarter of 2016, City Wide paid Dana the amount of \$5000, Pietranico Jr. was paid \$12,400, Pietranico Sr. was paid \$20,000 even though he performed no work. City Wide continues to pay Pietranico Sr. \$20,000 per month. (A, p. 1135, 13-18).

Pietranico Sr. signed as a “principal” on behalf of City Wide on a Form of Labor and Material Payment Bond that enabled City Wide to commence work (A, p.1135, 22-23). He also signed as “President” on a Notice to Proceed agreement with ConEd (A, p. 1135, 22-25).

Denegall’s duties continued with City Wide as they were with Nico, and Pietranico Jr. had some duties with City Wide as he had with Nico (A, p. 1135, 29-33).

City Wide moved its operations across the street to a building owned by a Pietranico, Sr. entity RoSal Realty. There is no evidence of a written lease.

In the last week of February 2016, 19 or 20 Nico employees became City Wide employees and changed their union books from Local 175 to Local 1010 and kept working as if nothing changed (A, p.1135, 41-45).

City Wide owned no trucks but purports to rent trucks from Pietranico Sr.’s Nico Equipment Co. but there is no written agreement nor is there any written agreement that City Wide paid Nico for asphalt used to perform on Nico jobs. Dana also acknowledges that City Wide used Nico’s credit line to obtain asphalt

needed to conduct its work but was unaware as to whether City Wide paid Nico (A, p. 1135, 47-49; p. 1136, 1-4).

City Wide never applied for or negotiated a contract to perform ConEd work and just began performing the Nico contract. In February 2016, Pietranico Sr. signed a Form of Labor and Material Payment Bond worth \$32,750,000 on behalf of City Wide (A, p. 1136, 8-13).

Dana did not know whether City Wide had ever provided financial statements to ConEd, she also was unaware whether City Wide had ever provided information at all to ConEd other than a purchase order signed by her father. (A, p. 1136. 15-19).

G. City Wide Takes Over For Nico and Refuses to Reorganize Local 175

On January 18, 2016 City Wide entered into a collective bargaining agreement with Local 1010, but at that time had not yet commenced operations or hired employees.

On February 12, 2016, Nico held a meeting with its employees during which Pietranico Jr. informed employees as follows:

“if you belong to Local 175, that you can’t work here no more because they don’t allow 175 to do the work for Con Edison, because you have to belong to the building trades. And so if you want to continue working here, you have to join Local 1010.”

Those employees who agreed to join Local 1010 were permitted to continue working for City Wide. Those who remained in Local 175 were no longer permitted to work. (A, p. 1136, 29-39).

By letter dated February 22, 2016, Nico entered into a General Service Agreement with City Wide, subcontracting all of Nico's remaining non ConEd asphalt paving work. Local 175 was not informed or bargained with over the decision to subcontract work.

By letter dated August 17, 2016, Local 175 requested City Wide to bargain with the Union with regard to its asphalt paving employees performing unit work that had previously been performed by Nico. By letter dated August 23, 2016, City Wide indicated it would not discuss the Union's demands until the Union could demonstrate it met the requirements of the ConEd contract, including membership in the BCTC.

Although aware of the creation of City Wide, the Union's attorney, Eric Chaikin, testified that the Union was unaware of the existence of the General Service Agreement and the fact that City Wide was performing work for which Nico was still the contracted party. Chaikin testified that it was not until October 2016 during settlement negotiations of an earlier charge that this information was discovered (D&O p. 8, l. 10-11). Prior to that the Union had not been advised by Respondent that Nico was no longer in business (A, p. 1137, 12-13).

STANDARD OF REVIEW

It is understood the Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Reviewing courts may not “displace the Board’s choice between two fairly conflicting views,” even if the court would justifiably have made a different choice in the first instance. *Universal Camera*, 340 U.S. at 488. While the Board has the authority to interpret parties’ collective bargaining agreements in order to adjudicate unfair labor practices, *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court gives “no special deference” to the Board’s contract interpretations, and the Court will interpret such contracts de novo, *Local Union No. 47, Int’l Bhd. Of Elec Workers v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991). However, the Court’s normal deference to the Board’s findings of fact “extends to findings related to the contract, including evidence of intent from ‘bargaining history,’ and other ‘factual findings on matters bearing on the intent of the parties,’” *StaffCo of Brooklyn, LLC v. NLRB*, 888 F.3d 1297, 1302 (D.C. Cir. 2018) (citations omitted).

ARGUMENT

Respondent Nico is an asphalt paving contractor which has a collective bargaining agreement with the Charging Party Local 175. Nico for at least ten (10) years has had a contract with the Consolidated Edison Company of New York, Inc.

(“Con Ed”) to perform asphalt paving work within the borough of Manhattan for Con Ed.

In October of 2014, Mike Pietranico, the principal of Nico, informed a representative of Local 175, Roland Bedwell, that he had been informed by Con Ed that it would not allow Nico to rebid Con Ed contracts unless the labor union Nico used to perform Con Ed work was a member of the Building & Construction Trades Council of Greater New York (“BCTC”). Local 175 was not a member whereas Local 1010 was a member. Nico was informed it needed to be in compliance before a recently obtained agreement with Con Ed would be finalized by Con Ed or the agreement would be rebid to other contractors. At all relevant times herein Roland Bedwell was the business manager of Local 175 and authorized representative of the local union.

The factual record indicates that on December 15, 2015, Respondent City Wide was established as a New York corporation and a corporate entity by Danamarie Pietranico (Dana) separate from Nico with its own EIN number. City Wide entered into the area-wide paving contract with Con Ed that had previously been signed by Nico. About March 23, 2016 City Wide entered into a collective bargaining agreement with Local 1010 which was a member of the BCTC in compliance with Con Ed’s contract requirement.

It is apparent that City Wide was established not for the purpose of evading the provisions of the Local 175 agreement but for the purpose of complying with the provisions of the Con Ed contract requiring union membership in the BCTC and doing business as a woman-owned business (WBE). Notwithstanding the allegations contained in the Complaint, City Wide as stated was not established for the purpose of evading its responsibilities under the Act and does not conveniently fit the cookie cutter label of “alter ego” as alleged in the Board’s Complaint.

Local 175’s Effort to Challenge the Con Ed Contract Requirement of
BCTC Membership

Local 175 together with the New York Independent Contractors Alliance Inc. (“NYICA”), an employer association which negotiated the Local 175 collective bargaining agreement, mounted a legal challenge to the BCTC membership requirement of Con Ed in February of 2016. A Complaint was filed by both parties against Con Ed essentially alleging violation of federal antitrust laws.

It was alleged in the Complaint that Con Ed insisted in its revised contract terms that contractors only employ workers who belong to a union affiliated with the BCTC. The contract provision states:

“With respect to work ordered for Con Edison, unless otherwise agreed to by Con Edison, contractors shall employ on work at the contractors rate and only union labor from building trades locals

(affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the work to the extent such labor is available.”

The underscored clause is the revision to Con Ed’s contract provisions of previous years.

It is abundantly clear that any contractor including Nico which had a collective bargaining agreement with Local 175 would have been prohibited from obtaining and performing Con Ed work. The Con Ed provision regarding BCTC membership was not discriminatory toward Nico because it applied to any and every employer who utilized labor from a non BCTC union. The Con Ed provision regarding BCTC membership was not discriminatory toward Local 175 as a labor union but because it applied to any and every labor union which was not a member of the BCTC.

The Complaint which was filed jointly by Local 175 and NYICA was dismissed by United States District Court Judge Kimba M. Wood in February of 2017. Within Judge Wood’s Opinion it is noteworthy to refer to the following passage which appears at page 3:

Faced with the alleged prospect of losing many members, Local 175 first filed an unfair labor practice complaint with the National Labor Relations Board (“NLRB”) Region 29 Office in Brooklyn, in November 2004, claiming that Con Ed, LIUNA and Local 1010 had agreed to block contractors who used Local 175 workers from bidding

for Con Ed work. Region 29 of the NLRB dismissed Local 175's charge, finding that there was no "agreement between Con Ed and Local 1010 regarding the use of subcontractors." Feb. 24, 2015 NLRB Region 29 Decision, available at <https://www.nlr.gov/case/29-CE-143863>. After Local 175 appealed, the decision was affirmed by the NLRB's General Counsel, who concluded that Con Ed lawfully altered the language in the Agreement concerning the use of subcontractors, and that the evidence did not support Local 175's contention that the change was the result of an agreement between Con Ed and Local 1010. April 27, 2015 NLRB Office of General Counsel's Appeal Decision, available at <https://www.nlr.gov/case/29-CE-143863>.

It is also noteworthy that at footnote number 3 in her Opinion, Judge Wood took no position on the likelihood of labor strife but did take judicial notice that Local 175's Business Manager, Roland Bedwell, was indicted for conspiring to extort money from the owner of a construction company. Indictment, *United States v. Bedwell*, 16-608 (E.D.N.Y. December, 2016). Bedwell subsequent to these proceedings entered a guilty plea and was sentenced to a term of confinement.

The Board has thru the actions of Local 175 as the charging party and its complaint presented the respondents in this case with a Hobson's choice "take what is available or nothing at all." Indeed, at the hearing this Court addressed the same question (A p. 53, 5-9).

Verizon Sourcing, LLC and Welsbach Electric Corp.

Verizon Sourcing, LLC (“Verizon”) and Welsbach Electric Corp. (“Welsbach”) are other customers of Nico and City Wide although not representing the majority of work performed.

Both Verizon and Welsbach work which is performed for them are subject to Labor Law § 220 Prevailing Wage Schedule from the Office of the Comptroller, City of New York which provides as follows: (Exhibit R-1; A, p.479. 22-25; p. 479, 15-16).

Workers, Laborers and Mechanics employed on a public work project must receive not less than the prevailing rate of wage and benefits for the classification of work performed by each upon such public work. Pursuant to Labor Law § 220 the Comptroller of the City of New York has promulgated this schedule solely for workers, laborers and mechanics engaged by private contractors on New York City public work contracts.

This schedule is a compilation of separate determinations of the prevailing rate of wage and supplements made by the Comptroller for each trade classification listed herein pursuant to the New York State Labor Law § 220(5).

Pursuant to § 220 of the Prevailing Wage Schedule when examining and comparing the List of Amended Classifications the following is disclosed:

Landscaping is the jurisdiction of Local 175

Paver and Roadbuilder is the jurisdiction of Local 1010

The subcontract documents with both Verizon and Welsbach (GC-10) (A-689)& (GC-11)(A-759) contain similar language which requires compliance with all applicable laws, rules, regulations, statutes, orders and other lawful requirements.

Timeline of Relevant Events

The charge was filed by Local 175 on October 20, 2016.

Respondent City Wide was incorporated under the laws of New York December 15, 2015.

Nico entered into a general services agreement with City Wide on or about February 22, 2016 and it is alleged that Nico subcontracted all of its bargaining unit work to City Wide.

City Wide entered into a collective bargaining agreement with Local 1010 on or about March 23, 2016.

Since on or about February 27, 2016, Respondent Nico subcontracted unit work regularly performed by Local 175 unit employees for Verizon Sourcing, LLC and Welsbach Electric Corp. to Respondent City Wide.

It is submitted that based upon the foregoing timeline of relevant events the initial charge was not filed in a timely manner with respect to Section 10(b) of the Act. Section 10 (b) provides that no complaint may issue on matters occurring

over 6 months prior to the filing of a charge. The ALJ found to the contrary.

(A, p.1137, 45-48).

The 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes their alleged unfair practice, unless the aggrieved party has failed to exercise “reasonable diligence” which would have discovered the unfair labor practice. See *Concourse Nursing Home*, 328 NLRB 692, 693-696 (1999); *R.G. Burns Electric* 326 NLRB 440, 441 (1998). Any closely related amendments to charges will relate back to the initial 10(b) period. *Ross Stores*, 329 NLRB 573 (1999), *Redd-I, Inc.* 290 NLRB 1115, 1118 (1988).

Point I

City Wide Is Not The Alter Ego of Nico

Typically, a union employer who is obligated by the higher costs associated with a union collective bargaining agreement and associated labor costs will consider setting up “double-breasted” or “dual shop” entity in order to win more bids on a competitive basis.

A double-breasted firm maintains two separate and distinct entities. One entity will be signatory to a CBA while the other entity is not signatory to a CBA. Such is not the case with Nico and City Wide. Nico is signatory to the 175 CBA and City Wide is signatory to the 1010 CBA. City Wide was not established to

evade the obligation of a CBA albeit Local 175 or any other union.

The Act does not expressly prohibit double-breasted operations but does prohibit an employer from interfering with employees' collective bargaining rights and/or refusing to collectively bargain.

Generally, two theories are applied by the NLRB and the courts make a determination as to whether a contractor has established a valid double-breasted operation - the "single employer" or the "alter ego" theory.

The single employer theory applies in circumstances where two entities concurrently perform the same function and one entity recognizes the union while the other does not. *Stardyne Inc. v. NLRB*, 41 F.2d 141 (3rd Cir. 1994).

Again referencing the facts of the within matter, Nico had a signed CBA with Local 175 which it sought to terminate and City Wide was not established to evade the obligations of the Local 175 CBA. It is clear that City Wide was established in order to comply with the requirements of Con Ed requiring BCTC membership of the union supplying manpower at Con Ed work sites. Therefore, the purpose behind the creation of City Wide was legitimate and not to evade any of its responsibilities under the Act. There was no evidence of anti-union (175) animus. There was no evidence of malice in connection with the establishment of City Wide.

It is understood that the Board uses four basis criteria to determine whether

entities are legitimately separate or whether they are actually a single employer as follows: (a) inter-relations of operations; (b) centralized control of labor relations; (c) common management and (d) common ownership or financial control. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965).

While no one of the foregoing four factors is considered controlling the Board has stressed the first three factors, which tend to show operation integration and in particular centralized control of labor relations. *NLRB v. Al Bryant Inc.*, 711 F.2d 543 (3rd Cir. 1983).

Turning to the case under consideration the facts and testimony confirm that Nico effectively ceased operations and went out of business in the February/March period of 2016 and City Wide began operations in and around March of 2016 thus refuting any allegations of interrelation of operations. See audit of Nico's Respondent's Exhibit R-3. In addition, the record and testimony of John Denegall confirm there was no centralized control of labor relations (A p. 66 , 24-25; A p.67, 9-10).

Notwithstanding any efforts by the charging party, Local 175, alleging common ownership such assertions will not carry the burden because both the Board and Courts have held that common ownership alone is not dispositive of whether a single employer exists. Even if the single employer test's factors are satisfied this Board must determine whether the employees of both entities

constitute a single bargaining unit. A common bargaining unit exists where the employees of both entities share common skills, duties and working conditions. *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir. 1979). With respect to the instant matter the single material motivating factor which negates this condition is the provision contained in the Con Ed agreement requiring BCTC membership which Local 175 could not under any circumstances satisfy.

Repeated Attempts by Nico to Have Local 175 Gain Admission to the BCTC for the Benefit of Its Members.

The Board has alleged a violation of Section 8 (a)(2) of the Act which outlaws an employer domination or interference with the formation or administration of any labor organization. 29 U.S.C. § 15 P (a)(2).

The record and testimony in the matter under consideration indicate repeated efforts by Nico and its representatives to have Local 175 address the problem presented by Con Ed's contract requirement of BCTC membership and at the same time continue their efforts to protect Local 175 work jurisdiction.

Roland Bedwell as the Business Manager of Local 175 was contacted as early as January of 2015 and informed of the Con Ed contract requirement of a labor union to be a member of the BCTC. Bedwell said he would look into the issue and report back to Nico but never did (A p.528, 18-24).

Then again in August of 2015 both Denegall and Michael Pietranico, Sr., raised the same issue of BCTC membership with Roland Bedwell

(A p. 529, 10-22) with the same response from Bedwell about looking into the issue.

Again in October of 2015, Con Ed informed Nico that in order to have a contract there was a BCTC requirement. Bedwell was again contacted in October of 2015 and informed of this continuing requirement (A p.530, 1-18). All during this period between October 2015 and December 2015 respondent Nico continued to use Local 175 employees (A p.531, 7-14) and protect its jurisdiction.

Chronologically, the issue again was raised in or about the second week of February 2016 which resulted in another conversation between Pietranico, Sr. and Bedwell (A p.532 , 20-25; A p.532, 1-11). Up to and continuing through February of 2016 Nico employed members of Local 175 thereby attempting to protect its jurisdiction while being faced with the impending dilemma with Con Ed and the lack of action by Bedwell on behalf of Local 175.

Alter Ego Liability Theory

The alter ego doctrine is “designed to defeat attempts to avoid a company’s union obligations through a sham transaction or technical change in operations.” *Local One, Amalgamated Lithographers of Am. V. Stearns & Beale, Inc.*, 812F. 2d 763,772 (2nd Cir. 1987). If entities are determined to be alter egos of each other, “then each is bound by the collective bargaining agreements signed by the other, ‘and ‘thereby obligated to honor the pension [and welfare benefit]

contributions terms’ of the agreement.” *Plumbers, Pipefitters and Apprentices Local Union No. 112 Pension, Health and Educational and Apprenticeship Plans v. Mauro’s Plumbing, Heating and Fire Suppression, Inc.* (“*Mauro’s Plumbing*”), 84 F. Supp. 2d 344, 349 (N.D.N.Y. 2000) (quoting *Lihli Fashions Corp., Inc. v. NLRB* 80 F. 3d 743, 748 (2d Cir. 1996)). To determine whether two companies are alter egos, courts “focus[] on commonality of (i) management, (ii) business purpose, (iii) operations, (iv) equipment,(v) customers, and (vi) supervision and ownership” between the subject entities. *NY State Teamsters Conference Pens. & Ret Fund v. Express Servs., Inc.*, 426 F. 3d 640, 649 (2d Cir. 2005), (quoting *Newspaper Guild of NY v. NLRB*, 261 F. 3d 291, 294 (2d Cir. 2001)); *see also Local One Amalgamated Lithographers of Am.*, 812 F. 2d at 772. It is clear from the testimony and facts of the Nico matter that there were no attempts to avoid Nico’s union obligations to Local 175 through sham transaction or technical change in operations.

The NLRB has also developed the single employer doctrine, “which treats two nominally independent enterprises as a single employer, in order to protect the collective bargaining rights of employees.” *Murray v. Miner*, 4 F 3d 402, 404 (2d Cir. 1996). An entity that has signed a CBA and one that has not will be held jointly and several liable for the signatory’s obligation under the CBA if the single employer test is satisfied and the two entities “together [] represent an appropriate

employee bargaining unit.” *Lihli Fashions Corp.* 80 F. 3d at 747.

The alter ego and single employer doctrines “are ‘conceptually distinct.’ The focus of the alter ego doctrine, unlike that of the single employer doctrine, is on ‘the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.’” *Lihli Fashions Corp.*, 80 F. 3d at 748. The single employer doctrine, in contrast, focuses on determining if the entities “are part of a single integrated enterprise.” And is “characterized by absence of an arm’s length relationship found among unintegrated companies.” *Id.* At 747 (internal quotation marks omitted).

Whether two entities constitute a “single employer” is determined by four factors enumerated by the Supreme Court: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *United Union of Roofers, Waterproofers, Allied Workers, Local No. 210, AFL-CIO v. A.W. Farrell & Son, Inc.* (“*United Union of Roofers*”), 2012 WL 4092598, at *9 (WDNY Sept. 10, 2012) (citing *Radio & Television Broad. Technicians Local Union 1264 v. Broad Serv. of Mobile, Inc.*, 380 US 255, 256 (1965) (per curiam)). See also *South Prairie Constr. V. Local No. 627, Intern. Union of Operating Eng’rs, AFL-CIO*, 425 US 800, 802-803 (1976) (per curiam)). The Second Circuit has held that two additional factors are properly considered as

well: (5) use of common office facilities and equipment and (6) family connections between or among the various enterprises. *United Union of Roofers, Waterproofers, and Allied Workers Local No. 210, ALF-CIO v. A.W. Farrell & Son, Inc.* (“A.W. Farrell & Son, Inc.”), 547 Fed Appx. 17, 19 (2d Cir. 2013) (quoting *Lihli Fashions Corp.*, 80 F3d at 747.

It is important to mention at this juncture in the analysis of alter ego and single employer theories that in the cases cited both entities whether union or non-union operated concurrently whereas with respect to the Nico matter, Nico went out of business at the end of March 2016. (A p.67, 11-25, A p. 68, 1-3).

“Ultimately, single employer status depends on all the circumstances of the case;” no one factor is dispositive and not all factors must be present. *Lihli Fashions Corp.*, 80 F3d at 747 (quoting *NLRB v. Al Bryant, Inc.*, 711 F 2d 543, 551 (3d Cir. 1983)). Control of labor relations, however, is “central.” *A.W. Farrell & Son, Inc.*, 547 Fed. Appx. at 19 (quoting *Murray*, 74 F.3d at 404). *See also Trs. Of Empire State Carpenters v. Dykeman Carpentry, Inc.*, 2014 WL 976822, at 3* (EDNY Mar. 12, 2014). Again it is important to note that there was no Nico at the end of March 2016, therefore, no joint control of labor relations among Nico and City Wide.

A finding that two entities constitute a single employer is a necessary but not a sufficient condition for imposing joint and several liability. In addition, the

employees of the two entities must constitute a single bargaining unit. *See Brown v. Sandimo Materials*, 250 F. 3d 120, 128 n. 2 (2d Cir. 2001); *Lihli Fashions Corp.*, 80 F3d at 747-748; *Local One Amalgamated Lithographers of Am.*, 812 F. 2d at 769.

When analyzing whether the employees of two different entities constitute a single bargaining unit, consideration “shifts from the control, structure and ownership of the employers to the community of interests of the employees.” *Ferrara v. Oakfield Leasing Inc.*, 904 F. Supp. 2d. 249, 264 (EDNY 2012) (quoting *Cuyahoga Wrecking Corp. v. Laborers Int’l Union of North Am., Local Union #210*, 644 F. Supp. 878, 882 (WDNY 1986)). Courts “look for a ‘community of interests’ among the relevant employees, and ‘factors such as bargaining history, operational integration, geographic proximity, common supervision, similarity in job function and degree of employee interchange.’” *Sandimo Materials*, 250 F. 3d at 128 n.2 (citation omitted).

It would be impossible for there to be a single bargaining unit here because Local 175 members were prohibited from jobsites based upon the ConEd contract requirement of BCTC membership.

Analysis and Discussion of Alter Ego and Single Employer Status of Respondents

When the General Counsel alleges that an entity is the alter ego of another company and subject to the latter’s legal and contractual obligations under a

collective bargaining agreement, the General Counsel has the burden of establishing that status *US Reinforcing, Inc.* 35 NLRB 104, 404 (2007). The determination of alter ego status is a question of fact for the Board to be resolved by an examination of all relevant and attendant circumstances.

The Board generally will find an alter ego relationship when two entities have substantially identical ownership, management, business purpose, operations, equipment, customers and supervision. Not all of these indicators need be present, and no one of them is a prerequisite to a finding of alter ego relationship. Unlawful motivation is not a necessary element of alter ego finding, but the Board will also consider whether the purpose behind the creation of the alleged alter ego entity was to evade responsibilities under the Act. *McCarthy Construction Co.*, 355 NLRB 50, 52 (2010), adapted in 355 NLRB (2010); *US Reinforcing, Inc. supra.*

The Respondents herein deny they have had substantially identical management, business purpose, operations, equipment, and ownership. There are similar customers in ConEd, Verizon and Welsbach (A, p. 78, 3-13) and similar supervision (A, p.82, 12-18) but as argued Respondents were prohibited by what could be considered a common customer ConEd from using union labor from Local 175. Verizon and Welsbach's work was governed by Section 220 of Prevailing Wage Schedule, Office of Comptroller, City of New York.

The Respondents deny that City Wide was established for the purpose of evading its responsibilities under the Act. Nico effectively ceased all business operations as of the end of February 2016. City Wide did not come into existence until December 15, 2015.

It is clear that City Wide was not formed for the purpose of evading its responsibilities under the Act. There is no hint of evidence or testimony that Respondents either Nico or City Wide believed that operating as a union company adversely affected their ability to be competitive in the market place. There was no complaint about high cost of union wages and benefits.

Point II

The Alter Ego Theory Fails

The Board has alleged in its Complaint and Notice of Hearing (Exhibit GC-1) (A-570) at paragraph no. 10 as follows:

Respondent Nico established Respondent City Wide, as described above in paragraph 8 and 9, for the purpose of evading its responsibilities under the Act

and at paragraph no. 11 as follows:

Based on the operation and conduct described above in paragraphs 8 and 9, at all material times, Respondent City Wide has been the alter ego of Respondent Nico.

It did not appear from the pleadings or record below that both alter ego and single employer theories were being argued by the Board. However, the focus of the alter ego doctrine unlike that of the single employer theory is on the existence of an attempt to avoid or evade the obligations of a collective bargaining agreement through a sham or disguised type of transaction. In addition, while the single employer doctrine inquiry requires a finding that the employees of the two firms held to be a single employer constitute an appropriate bargaining unit, a finding that a non-signatory employer is the alter ego of a signatory employer does not require an evaluation of the appropriateness of the bargaining unit under the commonality of interest test but instead requires a far more limited inquiry to determine only whether the unit is repugnant to any policy in the Act. See *Carpenters Local 690 F2d. at 507-509.*

Clearly in this case at bar there was no attempt to conceal or disguise the creation of City Wide. It is evident that City Wide was established to enable compliance with the Con Ed language requiring BCTC membership and Local 175 was fully aware of this fact. Otherwise, it would have been impossible to perform under the Con Ed contract. It is submitted that since the Board chose to argue the alter ego theory and having failed to prove the element of a sham transaction to evade the requirements of the Local 175 collective bargaining agreement, its Complaint fails. When these circumstances are coupled with the fact that 175 was

denied admission to the BCTC, challenged the Con Ed contractual provision as being in restraint of trade and having lost its challenge the issue of a common bargaining unit fails.

Establishment of City Wide

It appears that while not expressly addressed by the courts as an element to consider in connection with the theory of alter ego which was alleged in the Complaint or the single employer theory the circumstances are relevant. In this matter it is evident that City Wide was established by Dana Pietranico specifically, to qualify as a woman owned business and to comply with the contract requirement of Con Ed regarding BCTC membership. City Wide was not designed to proceed along the path of a double breasted operation to evade the provisions of the Local 175 collective bargaining agreement. As stated above there was no attempt to disguise its creation or existence.

City Wide was founded by Dana Pietranico. There was no attempt to hide the family relationship between Pietranico, Sr. and his daughter. Again, this would be an element to show a possible sham transaction or even an anti-union animus if there was such an attempt. There were none.

Pietranico, Sr. holds no official position with City Wide. He is not an officer, stockholder or directly involved in active operations of the company (A p. 169, 16-24).

Business Purpose

Two entities such as Nico and City Wide may be found to have a common business purpose when the principal type of work they perform is the same and also performed in the same geographic area. See *Bd. of Trs. of the Heat & Frost Insulators Local 33 Pension Fund v. D&N Insulation Co.*, 2015 WL5121458 at *3 (D. Conn. August 31, 2015); *Castaldi v. River Ave. Contracting Corp.*, 2015 WL 3929 691, at *5 (S.D.N.Y. June 20, 2015).

There is little doubt that both Nico and City Wide had a common business purpose in connection with the asphalt paving business except for (1) the fact that Nico ceased its business operations as of the end of February 2016 (Ex. R-3, Audit) and (2) Nico could not satisfy the contract requirement of Con Ed regarding BCTC membership. It was impossible for Nico to comply with the Con Ed contract.

Management, Supervision and Ownership

Two companies may be found to be alter egos or single employer under the Act when the same individuals are involved in the ownership, management and supervision of the entities. See *Castaldi*, 2015 WL 3929691, at *3.

Pietranico Sr. is not involved in the ownership, management or supervision of City Wide operations. (A p. 272 , 4-18). Pietranico Sr. is on the payroll of City Wide but candidly admits he performs little or no services and visits the offices of

City Wide infrequently (A. p.272, 4-16). The amount of compensation he receives is not related in any way to services he provides but to what is considered by both Pietranico Sr. and his daughter Dana Pietranico a family obligation based on tradition.

City Wide does not operate out of the same building location as Nico. Both property locations are owned by a separate and independent corporation (A, p.65, 11-25).

City Wide is as stated a separate corporation with its own federal employer identification number distinct from Nico (A, p. 512, 9-15). City Wide was founded by Dana Pietranico (A p.392, 4-6; A, p.511, 1-5; A, p.512, 9-15). City Wide maintains its own separate payroll (A p.264, 18-25; A p.265, 1-9).

Operations

In connection with business operations banking records may prove to be relevant. Here there is no evidence that the entities of Nico and City Wide have made payments to each other or one on behalf of the other (A p.512, 9-15). See *Mauro's Plumbing*, 84 F. Supp. 2nd at 348. City Wide provided to Con Ed and independently paid for a separate labor and material payment bond which was accepted by Con Ed. (A p. 360, 9-12, GC EX 34)(A-1054). City Wide operated out of 330 Nassau Avenue, Brooklyn, whereas Nico operated from 341 Nassau Avenue, Brooklyn. The buildings do not adjoin or share any common space.

(A, p. 380, 13-25; A, p. 381, 1-4).

Pietranico Sr. has exclusively operated Nico as president. Dana Pietranico runs City Wide. Pietranico Sr., does not, nor is he a stockholder. (A p. 406,17-25; A, p. 407, 1-7). Pietranico Sr. was not present nor did he direct his daughter to sign the Local 1010 collective bargaining agreement (A, p. 407, 17-24).

Dana Pietranico started the City Wide bank account with her own personal funds (A, p. 412, 15-20). She opened the City Wide bank accounts and is the only signatory (A, p. 414, 6-12).

Pietranico, Sr. did execute the Con Ed contract or what is identified as P.O. No. 497060 dated February 12, 2016 on behalf of City Wide as authorized by his daughter, Dana Pietranico (G.C. Exhibit 16(a), 16(b) (A-836, A-837) This transaction was done at the direction of Pietranico, Sr. because there was a problem of labor unrest including picketing activity requiring police presence and in order to protect the physical safety of his daughter (A, p. 255. 1-10; A, p. 280, 21-25; A, p. 281, 1-10).

Equipment and Tools

It is possible that separate companies may be found to be alter egos when they share equipment, tools, supplies, vehicles or other resources in conducting their operations. See *D&N Industries Co.*, 2015 WL 5121458, at *3, *9 (finding alter ego status because both companies used the same vehicles in their

operations).

Nico Equipment, Inc. (“Nico Equipment”) is a separate company apart from Nico Asphalt. Pietranico, Sr., is the president of Nico Equipment (A, p. 84,21-23). City Wide and Nico Equipment have a rental agreement which is not in written form but which requires City Wide to make monthly payments to Nico Equipment for equipment rented (A, p.85, 17-22). This was an arm’s length transaction between City Wide and Nico Equipment. Nico Asphalt which has not been in business since the end of February 2016 does not use any equipment or vehicles in connection with the asphalt business conducted by City Wide.

The actual tools, shovels and rakes which are used by City Wide were not the same as used by Nico. New tools were purchased by City Wide when it commenced work (A, p. 209, 10-25; A, p. 210, 1-8).

Point III

**ERRORS IN THE RECORD OF THE
ADMINISTRATIVE LAW JUDGE (ALJ)**

The ALJ in the proceedings before the Board did not address the actions taken by Nico to terminate its collective bargaining relationship with Local 175. Respondent introduced exhibits which included letters to Local 175 providing timely notice of its intent to terminate the 175 CBA (Ex. R-4)(A-566-569). The ALJ did not address the issue of termination of the 175 CBA and even though it

could be argued that termination of the contract would fail because Nico had a 9(a) relationship with the Union, thus it was obligated to recognize Local 175 even after the contract expired.

Appellant filed Exceptions to the decision of the ALJ with respect to failing to address the issue of termination of the CBA. The exceptions were as follows:

1. Exception No. 1

The ALJ at page 4, lines 40-45 of the record transcript under the heading “Nico’s Relationship with Local 175” stated as follows:

“It is also undisputed that Nico has acknowledged the Union’s representation of its employees, and had been honoring the terms of the parties’ CBA until the events at issue in this case. It is also undisputed that Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 CBA. And, under the evergreen clause in the applicable bargaining agreements with the Union, unless terminated in writing at appropriate times, those agreements automatically renew themselves.”

At page 39, Volume 1 of the hearing transcript beginning at line 16, (A, p.44, 16-19) respondent counsel stated that Michael Pietranico, Sr. had provided notification to NYICA [employer association] that it no longer had the authority to negotiate any further collective bargaining agreements.

At page 43-44, Volume 1, of the hearing transcript beginning at line 22, (A, p. 48, 22-25; A, p.49, 1-2) counsel for the Local Lodge CC 175, IAM & Aerospace Workers, AFL-CIO (hereafter Local 175) stated as follows:

“In January 2016—oh, excuse me, in December of 2015, Mr. Pietranico himself resigned as a board member of the New York Independent Contractors Association and at the same time wrote a letter saying NYICA no longer represented them for collective bargaining purposes...”

At (A, p. 490) of the hearing transcript beginning at line 4 regarding respondent exhibit R-4 (A-566-569) which comprised a packet of documents (lines 5-6) including the following:

- A. A resignation letter from Michael Pietranico, Sr. dated November 30, 2015 effectively resigning his Board seat from NYICA effective December 2, 2015. (A-566)
- B. A letter dated December 2, 2015 from Oransky, Scaraggi & Borg, P.C. on behalf of Nico withdrawing the collective bargaining rights of NYICA with United Plant and Production Worker Local 175. (A, p. 491, 7-16). (A-567)
- C. Respondents’ Exhibit R-4 was admitted into evidence (A, p. 496, 22-23).

As previously stated Exhibit R-4 which comprised a packet of documents including:

1. Letter of Michael Pietranico resigning his Board Seat; (Exhibit A); (A-566)
2. Letter dated December 2, 2015 withdrawing collective bargaining rights of NYICA; (Exhibit B));(A-567)
3. Letter dated December 29, 2015 to NYICA; (Exhibit C);(A568)
4. Letter dated January 18, 2017 to United Plant and Production Workers Local 175 terminating collective bargaining agreement. (Exhibit D)(A-569).

RESPONSE: It is evident from the record that Nico and Pietranico did in fact resign from and terminate the authority of NYICA to further negotiate with Local 175 on behalf of Nico. It is also evident from the record that Nico did terminate its collective bargaining agreement in a timely fashion with Local 175. The ALJ gave absolutely no consideration to the letters contained in Exhibit R-4.(A-566-569).

2. Exception No. 2

The ALJ at page 13, beginning at line 5 of the record transcript under the heading:

“City Wide Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Collective Bargaining Agreement in Existence Between the Union and Nico”

Stated as follows:

“It also cannot be disputed that Nico never timely terminated the agreement it had with NYICA, which by its terms renewed itself unless

written notice of termination was given. Thus that agreement and Nico's agreement with the Union continued in effect, and is binding on City Wide. City wide's refusal to recognize and bargain with Local 175 violates the Act."

As stated and provided above Exhibits A through D (R-4) (A 566-569) attached provide documentation contrary to the findings of the ALJ indicating that timely notifications was provided.

RESPONSE: As stated above evidentiary Exhibits A through D (R-4) attached provide documentation contrary to the findings of the ALJ. Again, the ALJ made no reference to Respondents' Exhibit R-4.(A566-569).

3. Exception No. 3

The ALJ under the heading "Intent to Evade the Act" (page 11 of the record) stated at page 12, lines 10-15 of the record as follows:

"Moreover, to whatever extent Respondents' motivation was instead of seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union over that in advance. The Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers."

At (A, p. 152 , 3-5) Mr. Pietranico, the Principal of Nico, went to Roland Bedwell, Business Agent for Union No. 175, expressing the need to join the BTC,

see also lines 12-13 and 20-21 regarding additional conversations with Mr. Bedwell named as Business Manager for Local 175.

RESPONSE: The record at the hearing provided testimony from the corporate president and principal of Nico that there were indeed conversations with Roland Bedwell as Business Agent for Local 175 regarding the fundamental issues of the case, namely, Local 175's inability to join the BTC.

4. Exception No. 4

Again at page 522, Volume 4 (A, p. 532, 7-25) additional reference to multiple conversations with Roland Bedwell, Business Agent for Local 175 regarding joining the BTC.

Again beginning at page 522 Volume 4 of the Hearing Transcript, line 25 continuing to page 523 lines 1-5, regarding conversation with Mr. Bedwell by Mr. Pietranico indicating that his family would start City Wide to keep their jobs to do ConEd's work.

Again at page 529 lines 10-19,(A, p. 539, 10-19) conversation with Mr. Pietranico and Mr. Bedwell regarding starting another company with a different name to perform ConEd work. See also lines 20-24.

RESPONSE: Additional references in the Hearing Transcript which refer to multiple conversations with Roland Bedwell, Business Agent for Local 175 to join

the BTC including specific references to warnings that a new entity (City Wide) would be established to comply with the ConEd contract requirement.

The Scope of Nico's Obligation to Bargain with Local 175

It is well settled that where employees are represented by a union, an employer violates Section 8 (a)(1) and (5) of the Act by making unilateral changes with respect to mandatory subjects of bargaining absent bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). The duty to bargain attached only where the unilateral change is “material, substantial and significant” and affects the terms and conditions of employment for the bargaining unit employees. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2001). The transfer of bargaining unit work to non-bargaining unit employees constitutes a mandatory subject of bargaining. *Matson Terminals, Inc.*, 367 NLRB No. 20 at p. 4 (2018), citing *Regal Cinemas, Inc.*, 334 NLRB 304, 312-313 (2001), enf'd 317 F.3d 300 (D.C. Cir. 2003); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 at p. 11 (2017). Thus, an employer may not transfer or assign bargaining unit work to non-bargaining unit employees without providing the union with notice and the opportunity to bargain.

The record here as stated above indicates that there were numerous albeit informal efforts to negotiate a change to the Local 175 CBA which would have

addressed the central problem of its non-membership in BCTC which prevented Nico from performing ConEd work. Those informal negotiation efforts were in the form of conversations with Roland Bedwell the Business Agent of Local 175 and an authorized representative of the local union.

Point IV

**THE DOCTRINE OF IMPOSSIBILITY AS A DEFENSE TO A BREACH
OF THE COLLECTIVE BARGAINING AGREEMENT
BETWEEN NICO AND LOCAL UNION 175**

The impossibility of the situation with respect to the ConEd contract language that any labor union utilized by Nico had to be a member of the BCTC or risk losing its main customer was quickly identified by the ALJ after opening statements were made by all counsel. (A, p. 53, 5-9)

Judge Gardner: “In other words what was the ---- I can’t say this word either. What was the Pietranico family that you alleging owns these two entities well, what were they supposed to do when ConEd said that Nico can’t do this work anymore?”

Contract impossibility or “impossibility of performance” is a commonly cited ground for contract termination. Impossibility is when the duties and contractual obligation of one or more parties cannot be fulfilled under normal circumstances. Certainly the circumstances which confronted Nico could not be

considered “normal.” Either comply with the BCTC requirement of ConEd or lose your main customer.

Impossibility of performance is often raised as a defense in breach of contract actions. If the party that is accused of the breach can prove it would have been impossible to perform the contract they may be excused. The specific language which placed Nico in the impossible situation was not caused by the company or foreseeable the company.

It is further interesting and probative to note that Nico did not just leave it at that. Pietranico, Sr. on numerous occasions had discussions with Roland Bedwell, the Business Manager of Local 175.

Roland Bedwell was contacted as early as January 2015 before City Wide was established and informed of the ConEd contract requirement of a labor union (Local 175) to be a member of the BCTC. Bedwell said he would look into the issue and report back to Nico but never did. (A, p. 528,12-23).

Again in August of 2015 both Denegall and Pietrancio, Sr. raised the same issue of BCTC membership with Bedwell (A, p. 529, 10-22) with the same response from Bedwell about looking into the issue.

Yet again, in October of 2015, ConEd informed Nico that in order to have a contract there was a BCTC requirement. (A, p. 530, 1-18). All during this period

between October 2015 and December 2015 Respondent continued to use Local 175 members (A, p. 531, 7-14) and continued to protect its jurisdiction.

Finally, the issue was raised again in or about the second week of February 2016 which resulted in another conversation between Pietranico, Sr. and Bedwell (A, p.532, 20-25) but with no action by Bedwell and no resolution.

All of the above indicate the willingness of Pietranico, Sr. on behalf of Nico to bargain with Local 175 over the dilemma which confronted Nico. It is apparent that Bedwell did little or nothing to propose a resolution leaving Nico with no choice.

This obligation to bargain collectively is not limited to just the negotiation of a full collective bargaining agreement. In some cases bargaining must be carried out during the term of an existing agreement as Pietranico attempted to do with Bedwell, who as Business Manager was the authorized representative of Local 175.

In the words of the Supreme Court: “Collective bargaining is a continuing process. Among other things it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by the existing agreements and the protection of employee rights already secured by the contract. *Conley v. Gibson*, 355 U.S. 41, 46.

It is submitted that it cannot be argued that Pietranico Sr., did not attempt to conduct ongoing negotiations over a lengthy period of time to address a problem which if not addressed in some reasonable manner by Local 175 made contract compliance impossible. The continuous efforts of Pietranico, Sr. are consistent with the Board policy that it continues to hold that an employer may not modify the terms of an existing agreement without first providing the union with notice and an opportunity to bargain. *DesMoines Cold Storage, Inc.* 358 NLRB No. 52, 193 LRRM1105 (2012). The events of this case and actions of Pietranico Sr. support this Board policy.

As further support for the theory of impossibility is demonstrated by the efforts of Local 175 to challenge the ConEd contract requirement of BCTC membership. As stated above Local 175 together with the NYICA the employer association which negotiated the Local 175 agreement filed a complaint in federal court alleging a violation of federal antitrust laws and cited the ConEd BCTC membership clause. The complaint was dismissed by U.S. District Court Judge Kimba Wood in February of 2017.

CONCLUSION

Based upon the foregoing facts and applicable law it is requested that the Decision and Order of the Administrative Law Judge be set aside.

Respectfully submitted,

/s/ Michael T. Scaraggi

Dated: July 27, 2020

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief contains 9,325 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

Dated: West Caldwell, New Jersey
July 27, 2020

/s/ Michael T. Scaraggi
Michael T. Scaraggi, Esq.

Special Appendix

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Nico Asphalt Paving, Inc., and its Successor in Interest and Alter Ego, City Wide Paving, Inc. and United Plant & Production Workers, CC Local Union 175, IAM and Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO. Case 29-CA-186692

November 6, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On November 2, 2018, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the judge's recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Nico Asphalt Paving, Inc., and its Successor in Interest and Alter Ego, City Wide Paving, Inc., Brooklyn, New York, their officers, agents,

¹ Chairman Ring took no part in the consideration of this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Respondents Nico and City Wide were and are alter egos, Members Kaplan and Emanuel find it unnecessary to rely on the judge's statement that intent to evade the Act is not an essential component to an alter ego finding.

³ As found by the judge, several of the Respondent's employees were effectively discharged when they refused to change their union affiliation from Construction Council 175, Utility Workers Union of America, AFL-CIO, to Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO, in order to continue working on the ConEd contract, which Nico had transferred to City Wide. Given that uncontested finding, we modify the judge's recommended remedy to specify that backpay for those affected employees shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. November 6, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Francisco Guzman, Esq., for the General Counsel.
Michael Scaraggi, Esq., for Nico Asphalt Paving, Inc. and City Wide Paving, Inc.
Eric Chaiken, Esq., for the Charging Party.
Andrew Gorlick, Esq., et al. for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. This case was tried in Brooklyn, New York, on consecutive days beginning on December 11, 2017, and ending on December 14, 2017. The complaint alleges that the Respondents (Nico and City Wide)¹ are alter egos of each other and that these entities violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Charging Party Union, Local 175 (hereafter "the Union"), on and after February 12, 2016, as the collective bargaining representative of its employees engaged in bargaining unit work; and repudiating and refusing to apply the applicable Nico collective-bargaining agreement ("CBA") to the bargaining unit employees.

Alternatively, the General Counsel argues that City Wide is a successor to Nico, and violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Local 175 as the collective bargaining representative of its employees, when it entered into a General Service Agreement with Nico to perform all of Nico's asphalt paving work and hired a majority of its employees from the Nico bargaining unit.

The complaint further alleges that City Wide violated Section 8(a)(2) of the Act by recognizing and signing a contract with the Party in Interest (hereinafter "Local 1010") while it was still obligated to recognize and bargain with the Union.

In its answer, Respondent denied the essential allegations of the complaint, and raised an affirmative defense that the charge

¹ Hereinafter, Respondents will be separately identified as Nico and City Wide, except I will sometimes collectively refer to them in the singular as Respondent, where appropriate.

is time-barred under Section 10(b) of the Act.² After the trial, the parties filed briefs, all of which I have read and considered.³ Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent and both of its individual entities have been engaged in operating concrete and masonry businesses with locations in the State of New York. They admit and stipulate to the Board's jurisdiction, including that they are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although initially admitting that the Union is a labor organization within the meaning of Section 2(5) of the Act, Respondent withdrew that admission during the trial when the Union offered a technical amendment of its name to reflect that it had affiliated with a new national union. (See GC Exh. 1.)⁴ Neither Respondent nor any other party objected at the outset of trial when the General Counsel first moved to amend the Complaint to correct the name of the Charging Party, which I granted. (Tr. 25.) Notwithstanding this technical amendment, there was no evidence offered by any party to contradict the record evidence demonstrating that the Union was and remains a labor organization, and I hereby so find.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

The two entities in this case, Nico and City Wide, are primarily operated by members of the Pietranico family: Michael Pietranico, Sr., his son, Michael Pietranico, Jr. and his daughter, Dana Marie Pietranico. To avoid confusion, father and son will be referred to as Senior and Junior, and Ms. Pietranico will be referred to by her given name. Senior and Dana Marie testified at the hearing, as did John Denegall, who testified he had been the Superintendent, Office Manager and Vice President for Nico, and now did the same for City Wide. Denegall was stipulated to be the custodian of records for both Nico and City Wide and also testified in that capacity. (Tr. 25.) Respondents were represented by the same counsel.

² In its answer, Respondent also included affirmative defenses relating to the Union's "unclean hands" and other unspecified acts and omissions by the Charging Party which allegedly bar relief. As I found no credible evidence of such conduct on the part of the Union here, I dismiss those defenses.

³ Respondent's brief was filed one day late due to an internal administrative problem. When it was unable to obtain the consent of all parties for its late submission, Respondent filed a Request to Accept Post-Hearing Brief with a supporting Affidavit of Counsel, and by Order dated February 7, 2018, finding no prejudice to any of the other parties, I granted its request.

⁴ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "CP Exh." for the Charging Party's exhibits, and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review and are not necessarily exclusive or exhaustive.

Nico Asphalt Paving, Inc.

Ownership, Control, Management, Supervision, Business Purpose, Customers and Equipment

Nico was formed by Senior in 1996 as a concrete and masonry business. Senior is its sole owner and at all relevant times served as Nico's President. Nico was located at 341 Nassau Ave. in Brooklyn, a property owned by Rosal Realty, an entity which in turn is also solely owned by Senior.

Junior served as Nico's manager/superintendent and was in charge of managing the workers in the field, where he spent most of his time. Dana Marie never worked out in the field in any capacity. She worked exclusively in the office, and at different times held the titles of Vice President, Secretary-Treasurer and Bookkeeper. She earned \$1000 per week in this role.

Denegall began working for Nico in 1999, and was responsible for the day-to-day operations of Nico, including overseeing the workers, trucks and maintenance, and speaking with clients. He did not deal with labor relations, however, which he testified was handled exclusively by Senior and Junior.

It is undisputed that both Nico and City Wide are in the business of permanent restoration of asphalt, primarily in Manhattan. It is also undisputed that Nico's and City Wide's largest customer by far was Consolidated Edison ("Con Ed"), though over its many years in business, Nico had contracted with various other large companies to provide asphalt paving services, and also performed mill and paving services from time to time to smaller entities who called needing that service until approximately February 2016 when Nico ceased actually performing such work.

Besides Con Ed, other significant contracts which Nico had included one with another electric company, Welsbech, and one with Verizon. Unlike the ConEd contract, which is discussed in more detail below, Nico's contracts with Welsbech and Verizon continued in effect after Nico ceased performing any asphalt work. The Welsbech contract to perform asphalt paving work ran from September 1, 2015, to August 30, 2017. The Verizon contract to perform outside plant asphalt paving services ran from January 1, 2013, to December 31, 2016, and was later extended for a year through December 31, 2017.

For both these contracts, City Wide began performing the work in or about February 2016 in place of Nico under a General Services Agreement signed between Nico and City Wide. Neither entity notified or bargained with the Union over the signing of this General Services Agreement.

In addition to these large contracts, Nico performed asphalt paving work for several other smaller contractors, including Safeway, Denella, Triumph, Westmoreland, Network Infrastructure and others. As with the Welsbech and Verizon contracts, even after ceasing to perform any work in its own name in February 2016, Nico continued to be the named contractor for the work being done by City Wide on these contracts pursuant to the General Service Agreement between them.

Nico owns a fleet of at least seventeen trucks and vehicles,⁵

⁵ Some of these trucks/vehicles are owned personally by Senior and/or Nico Equipment, Inc. of which Senior is, again, the sole owner.

NICO ASPHALT PAVING, INC.

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which continue to be maintained at its 341 Nassau Ave. property, though Nico has not performed any asphalt work since City Wide took over performing the work Nico had previously performed. Nico historically obtained the asphalt it used for its business from Willets Point Asphalt Corp. The asphalt was provided on a credit line to Nico, which remained open after Nico ceased performing any asphalt work.

Nico's Relationship with Local 175

In or about May 2000, Nico applied to join the New York Independent Contractors Association ("NYICA") and became a member of that organization, which represents members and administers collective bargaining agreements. At that time, NYICA had a collective bargaining agreement with the predecessor union of Local 175, and that CBA has since been continuously renewed.

Indeed, Senior began serving as a member of NYICA's Board in or about 2004, and was actively involved with the organization, including in its contract negotiations with Local 175. During that period, Nico became a signatory to successive assumption agreements, voluntarily recognizing Local 175 as the representative of its employees under Section 8(f) of the Act and binding it to the terms of the NYICA/Local 175 CBAs.

Thereafter, in 2007, Local 175 petitioned for, and the NLRB conducted, an election among the employees of Nico to determine whether they wished to be represented for purposes of collective bargaining by Local 175. The Union won the election and was certified as the collective bargaining representative of Nico's employees under Section 9(a) of the Act. Nico signed successive CBAs with Local 175, the most recent of which running from July 15, 2014, to June 30, 2017.

It is undisputed that Nico had acknowledged the Union's representation of its employees and had been honoring the terms of the parties' CBA until the events at issue in this case. It is also undisputed that Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 CBA. And, under the evergreen clause in the applicable bargaining agreements with the Union, unless terminated in writing at appropriate times, those agreements automatically renew themselves.

The Con Ed Contract

Nico had been performing work for Con Ed for many years without any apparent incident, with Local 175 members performing the work. Typically, Con Ed's construction contracts lasted three years, and its most recent contract with Con Ed had been scheduled to expire on December 31, 2013. However, Con Ed repeatedly extended that contract in one-year increments until at least December 31, 2017.⁶

In October 2014, Con Ed amended a portion of its construction contract to require, "unless otherwise agreed," that contractors performing work for them have a collective bargaining agreement with a union that belonged to the Building & Construction Trades Council of Greater New York ("BCTC"). Local 175 was not a member of the BCTC, but nevertheless, Nico was able to continue performing Con Ed work unabated

with its Local 175 represented workforce.

In early 2015, during negotiations with Con Ed for another renewal of Nico's contract, Senior was advised that Con Ed was ready to enforce this provision and would not continue giving Nico the work unless it had an agreement with a BCTC union. Nico shared this information with the Union, and the Union made some efforts to become a BCTC union but was unsuccessful.

Nevertheless, Nico continued performing the Con Ed work with Local 175 labor throughout the remainder of 2015 and continuing into 2016. Indeed, at least as late as October 2015, Nico was successfully negotiating another bid to extend its contract with Con Ed while its employees were still represented by Local 175.

City Wide is Formed

Ownership, Control, Management, Supervision, Business Purpose, Customers, Operation, and Equipment.

Meanwhile, on December 15, 2015, around the time Nico was set to begin work on another year under its ConEd contract, City Wide was formed as a New York corporation. Although Dana Marie nominally was and remained its sole owner, City Wide's Certificate of Incorporation lists Senior as the sole director of the new corporation at its inception. Both Dana Marie and Senior were still working for Nico at this time. The Union was neither informed of nor bargained with over the creation of City Wide.

The address for process for City Wide was listed as 341 Nassau Ave., the same Senior-owned building where Nico was located. Indeed, City Wide's operations were initially located at 341 Nassau Ave., and it used the same phone number and other office equipment as Nico. Denegall explained that Dana Marie "was given access to the [Nico] phone number that has been around for so long throughout these two huge organizations so that there would be no disconnect" for the clients when City Wide began providing the services Nico had previously provided for them. (Tr. 73.)

Dana Marie testified that she used one room in Nico's office for her new business, City Wide, although that was contradicted by Denegall, who acknowledged that he used the same office, desk and computer as Vice President of City Wide that he had used at Nico. City Wide also hired the same office employee who had supported Denegall at Nico to be his administrative assistant at City Wide.

Dana Marie testified that she formed City Wide with the intention of creating a woman-owned business, though she had no experience in the asphalt industry aside from her office role with Nico. She holds the title of President of City Wide, but also serves as its Secretary-Treasurer, as she had done with Nico. She testified that she used her own savings to capitalize the new business, which she estimated to be around \$1 million, though she struggled to explain where she obtained that money and was evasive upon questioning about the subject.

For the first quarter of 2016, City Wide paid Dana Marie, its owner and president, the sum of \$5000. It is unclear whether that period accounts for 4 weeks or 5 weeks. In that same quarter, City Wide paid Junior, its superintendent/engineer, the sum of \$12,480. City Wide paid Senior, who purportedly did not

⁶ It is not known whether an additional renewal took place after the close of the hearing in this matter.

work there or have any ownership interest in the company, the sum of \$20,000. Dana Marie testified that City Wide continues to pay Senior \$20,000 per month.

Respondent maintains that Senior was not employed by City Wide and had no official role with the new entity. However, it is not disputed that Senior is paid \$20,000 per month by City Wide, and it is not disputed that Senior signed as “Principal” on behalf of City Wide a Form of Labor and Material Payment Bond that permitted City Wide to commence working (GC Exh. 34) and signed as “President” a Notice to Proceed agreement with Con Ed to begin performing what would become City Wide’s largest contract. (GC Exh. 16). It is also not disputed that it was Senior, and not Dana Marie, who responded to reports of potential labor unrest that initially ensued at the yard after it was announced that City Wide was taking over for Nico.

As Superintendent/Office Manager of City Wide, Denegall’s duties were essentially unchanged from what they were at Nico, overseeing the workers and communicating with the same clients as he had when he was employed by Nico. Junior was identified by Denegall as a superintendent/engineer at City Wide but having the same duties he had when he was a manager/superintendent at Nico.

City Wide subsequently moved its operations across the street to 330 Nassau Ave., a building owned by another Senior-owned entity, RoSal Realty. This location historically had also been used by Nico to store equipment, and to this day Nico trucks are still parked in the yard at 330 Nassau Ave. There is no evidence of any leasing arrangement between the two entities relating to the use or storage of these Nico trucks.

A sizeable majority of the former Nico employees—at least 19 of 28—became City Wide employees in the last week of February 2016, which was City Wide’s first week of payroll. As employee and Union President Gus Seminatore testified, and as Dana Marie acknowledged, those employees simply changed their union books from Local 175 to Local 1010 and kept working as if nothing had changed.

City Wide does not own any trucks. It purports to rent the trucks which Nico had previously used from the Senior-owned Nico Equipment, Inc., though there is also no written agreement between those two entities evidencing a formal business arrangement to do so.

Nor is there any written agreement evidencing that City Wide ever paid Nico for the asphalt it used to perform work on Nico jobs. Dana Marie acknowledged that City Wide uses Nico’s credit line to obtain the asphalt needed to conduct its work but was unaware how or whether City Wide paid Nico for the asphalt. There is similarly no record of payment by City Wide to Nico for the office furniture and equipment it took over from Nico, or the business referral of the Con Ed contract that passed all but seamlessly from Nico to City Wide.

In that regard, City Wide never applied for or negotiated a contract to perform the ConEd work. Instead, upon its creation, City Wide just began performing on what was essentially Nico’s contract, but now pursuant to a new purchase order in City Wide’s name, signed by Senior on February 15, 2016 as its “President.” Earlier, on February 8, 2016, Senior had signed a Form of Labor and Material Payment Bond worth \$32,750,000 on behalf of City Wide as its “Principle.”

Dana Marie did not know whether City Wide had ever provided any financial statement to ConEd, or why the insurance bonding company would give a bond to City Wide, a company with no prior work history. She also was unaware whether City Wide had ever provided any information at all to ConEd, other than the purchase order signed by her father, to secure the multi-million-dollar bid (formerly Nico’s) that it began servicing in February 2016.

City Wide Takes Over for Nico and Refuses to Recognize Local 175

On January 18, 2016, City Wide entered into a collective bargaining agreement with Local 1010. At that time, City Wide had not yet commenced operations, and had not yet hired any employees. Significantly, Denegall, who accompanied Dana Marie to the meeting at which this CBA was signed, was also not yet employed by City Wide. Rather, he was at that time still employed by Nico.

On February 12, 2016, Nico held a meeting with its employees at 341 Nassau Ave. in which Junior informed the employees:

“if you belong to Local 175, that you can’t work here no more because they don’t allow 175 to do the work for Con Edison, because you have to belong to the building trades. And so if you want to continue working here, you have to join Local 1010.”

(Tr. 286.)

Those employees who agreed to join Local 1010 were permitted to continue working for City Wide. Those who remained in Local 175 were no longer permitted to work.⁷

On February 22, 2016, Nico entered into a General Service Agreement with City Wide, subcontracting all of Nico’s remaining non-ConEd asphalt paving work. City Wide proceeded to perform the work on these other contracts, for which Nico remained the contracted party. It is undisputed that the Union was neither informed of nor bargained with over the decision to subcontract that work.

By letter dated August 17, 2016, Local 175 requested that City Wide bargain with the Union with regard to its asphalt paving employees performing the unit work that had previously been performed by Nico. By letter dated August 23, 2016, City Wide indicated it would not discuss the Union’s demands until the Union could demonstrate it meet the requirements of the ConEd contract, including by having membership in the BCTC.

Although aware of the creation of City Wide at that time, the Union’s attorney, Eric Chaikin, testified that the Union was unaware of the existence of the General Services Agreement and the fact that City Wide was performing work for which Nico was still the contracted party. Chaikin testified that it was not until October 2016, during settlement negotiations involving an earlier charge, that the Union learned that information. Prior to that, according to Chaikin, the Union had been advised

⁷ In a handful of cases, employees who had membership in a Teamsters or Operating Engineers Union were permitted to work for City Wide.

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by Respondent that Nico was no longer in business. Respondent provided no evidence to the contrary. The within charge was filed shortly thereafter.

Credibility

Many of the above factual findings are based on uncontradicted testimony, authenticated documentary evidence and testimony against interest by Senior and Dana Marie, which amounted to admissions. To the extent that Senior and Dana Marie gave arguably exculpatory testimony for their actions, I reject their testimony. I found both to be unreliable witnesses. In particular, their mutual assertions about Senior's alleged non-involvement in the management of City Wide, in the face of contradictory documentary evidence, severely undermined their credibility.

Moreover, the explanations given for their allegedly separate business ventures are implausible considering what they each described as a close father-daughter relationship where one was always seeking to help the other, and in light of the family assistance they readily conceded to have given each other in their various roles with these entities. As such, I do not credit their testimony where it differs from my otherwise supported factual findings.

I found Denegall to be similarly not credible. He was often defensive, evasive, contradictory, and unable to recall important details in his testimony, including on significant matters. As one telling example, he testified that there was a gap in time between when Nico ceased its operations and City Wide commenced its own. This was an important fact that is not a matter of confusing dates, but rather, goes to what was happening substantively at this critical time, and what the witness must have known given his position with both companies.

Denegall's testimony was also specifically belied by the companies' own payroll records which demonstrated that there was no gap at all in what was essentially a seamless continuation from one entity to the other. It was further undermined by the revelation that Nico had not actually ceased operations, but rather, had merely "subcontracted" the entirety of its remaining work to City Wide.

I found Chaikin and Seminatore to be credible witnesses. Though their interests were obviously aligned with the charging party, I found both of their demeanors to be honest and straightforward. In particular, I found Chaikin's testimony regarding what he knew and when he knew about the relationship between Nico and City Wide to be both consistent and persuasive.

Analysis

The Supreme Court has long-recognized that the operation of a prior enterprise under a different name can, in certain circumstances, constitute a "disguised continuance" binding the new company to the old company's obligations under the Act. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining whether an enterprise is a "disguised continuance" or "alter ego" of another business, the Board examines whether the entities share substantially identical management, business purpose, operation, equipment, customers and supervision.

Other factors include common ownership or control, lack of arm's length dealings between the two entities and whether one

entity was formed or used to avoid union obligations under the Act. No one factor is controlling and not all the indicia need be present to find an alter ego relationship. *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2d Cir. 1989), and cases there cited. See also *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404-405 (2007).

Moreover, and significantly for this case, strict common ownership is not a necessary requirement if there is a family relationship that shows common control. *El Vocero de Puerto Rico, Inc.*, 357 NLRB 1585, 1585 fn. 3 (2011). Rather, the Board has found an alter ego relationship in the absence of common ownership where both companies were wholly owned by members of the same family.

The Board developed its alter-ego doctrine precisely in order "to prevent employers from evading obligations under the Act merely by changing or altering their corporate form." *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986). And because an alter ego is considered the same enterprise as the related employer for purposes of the Act, the alter ego is bound by the collective-bargaining agreement between the related entity and its union. *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005), and is responsible for the other entity's unfair labor practices. *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 fn. 5 (1974).

A. Nico and City Wide Were and Are Alter Egos

1. Common ownership, management, and supervision

Common ownership is a significant factor in alter-ego cases, and the Board has found substantially identical ownership and an alter ego relationship where the original entity and the newly formed entity are owned by members of the same family, including as here, parents and children. See *Kenmore Contracting Co.*, *supra.*; *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1985). The facts of this case overwhelmingly support that same finding.

As an initial matter, although Senior is undisputedly the sole owner of Nico, and Dana Marie is technically the sole owner of City Wide, I am not convinced that Dana Marie's separate "ownership" truly represents an arm's length business transaction. While she testified that she formed City Wide with the intention of creating a woman-owned business, even Respondent does not argue that to be the real reason City Wide was created.

Moreover, Dana Marie testified that she used her own savings to capitalize the new business, which she estimated to be around \$1 million, but struggled to explain where she obtained that money, and was evasive upon questioning about the subject. She also struggled to explain why Senior is paid \$20,000 per month by City Wide while she, the supposed owner, is paid no more than \$4000 to \$5000 per month, barely more than she earned at Nico, and even less than her brother earns as City Wide's superintendent.

And finally, it is undisputed that it was actually Senior who initially established City Wide in December 2015, incorporating the new business, and naming himself as its sole director. Taken together, these factors call into question whether the two entities really have two different owners. But, to whatever

extent they do technically have two different owners, the family rationale used in *Kenmore* and *Rogers* supports a finding that in fact, Nico and City Wide share substantially identical ownership.

There is also ample evidence that the Pietranico family exercised common control of both entities. While one entity is owned and controlled by Senior and the other nominally owned by his daughter Dana Marie, each worked in essentially the same capacity for the other's company—Senior initially handling the most important matters to impact City Wide involving contracting with Con Ed and dealing with labor relations for both entities, while Dana Marie remained in the office dealing with the finances and paperwork for both entities. Their level compensation from one entity to the other further bolsters this finding that their roles remained effectively unchanged.

Indeed, many of the facts that support a finding of alter ego are barely in dispute regarding Respondent's common management and supervision. The two entities admittedly shared substantially identical day-to-day management, with Senior's and Dana Marie's son/brother, Junior, providing the essential operational management and supervision of both companies, together with Denegall, and all three family members did at least some work for both companies at the same time in February 2016 when operations were switching over from Nico to City Wide.

Dana Marie was the bookkeeper/treasurer for Nico and performed those same duties for City Wide despite holding the title of President. Indeed, it was clear from the testimony that Dana Marie did not actually exercise the full authority of that position. Rather, her father continued to control important executive functions, not the least of which was to execute the company's most important contract with what had been Nico's and now is City Wide's largest customer, ConEd.

Thus, in these circumstances, it is not as significant that there is a technical difference in ownership of these two entities, one owned by a father and one by his daughter. Senior's dealings with City Wide's primary customer, and with Local 1010, at a time when he was still employed by Nico also support the finding that there was common management. It is also clear from remarks made by both Senior and Dana Marie that the family members consider themselves as part of one enterprise.

Based on these facts, it is clear that Nico and City Wide had substantially identical ownership, management and supervision, all of which strongly support a finding of alter ego.

2. Same business purpose, operations, and equipment

Moreover, the facts of this case conclusively show that Nico and City Wide share the same business purpose, operations and equipment. It is undisputed that both entities are primarily engaged in the business of providing asphalt paving services in Manhattan and perform that work for almost exclusively the same customers.

Senior had dealt with ConEd as the owner of Nico, and then continued to deal with ConEd on behalf of his daughter for City Wide. That relationship continued seamlessly from one entity to the other, with the one very significant difference being that Nico had actually bid for the work and gone through the necessary and extremely detailed process to secure the ConEd con-

tract. By contrast, City Wide essentially stepped in to replace Nico having undergone none of the ordinary and expected vetting that ConEd had clearly required of its contractors as indicated by the efforts Nico had to undergo to secure the contract work.

Nor was ConEd the only customer that the two entities shared. At its inception, City Wide had no other customers besides those which had previously been Nico's customers, all of which essentially became City Wide's own customers. They also use many of the same suppliers. And, from the outset and continuing to date, City Wide employed almost all of the former employees of Nico for the new company. As such, City Wide's operations were virtually unchanged from what had been Nico's.

With regard to their equipment, in addition to both entities performing the same type of work, both used not only the same type of equipment, but literally the same equipment, purportedly leased to City Wide from Nico or another Senior-owned entity. City Wide also obtained the asphalt needed to perform its business duties from Nico's longtime supplier, and apparently using Nico's account to do so. Thus, the operations, equipment and business purposes of these two entities are essentially identical.

3. Lack of an arm's length relationship

In addition to these entities sharing common management, ownership, supervision, business purpose, operations and equipment, there is substantial evidence of a lack of an arm's length relationship in the many transactions between the two companies, which is an additional factor to consider in making an alter ego determination.

For example, these two entities maintained adjacent offices at the same time and in the same building and City Wide enjoyed the benefit of Nico's phone line, furniture and computers. Yet, there is no credible evidence that it paid Nico for any of these benefits. There were also no records produced to support a finding that the purported equipment leasing arrangement or the acknowledged use by City Wide of Nico's asphalt credit line were the product of arm's length dealings. Nor was there any evidence that City Wide compensated Nico in any way for the assistance in securing the Con Ed contract.

Indeed, when City Wide began its operations, it would have needed a very considerable capital investment in order to begin work, including for equipment, materials and labor. Yet, there was no credible or documented explanation in the record for where that investment came from, or precisely how much it was, and I am left to conclude this was further evidence of a lack of arm's length dealings between the two entities.

4. Intent to evade the Act

Finally, I find there is substantial evidence that City Wide was formed as a way to avoid Nico's agreements with the Union and thus the Act's bargaining requirements. Though arguing against such a finding, Respondent essentially admits as much. It's primary argument is that City Wide was established only to enable compliance with the Con Ed language by chang-

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ing the union that represented its employees.⁸

Even accepting as true Respondent's contention that City Wide was formed only after Con Ed announced once and for all that it was no longer going to permit contractors to perform its work unless its employees were represented by a BCTC-affiliated union, I find that by definition means City Wide was formed to avoid dealing with the Union and to avoid bargaining obligations under the Act.⁹

Moreover, to whatever extent Respondent's motivation was instead seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union over that in advance. The Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers.¹⁰

Taking all these facts together, it is clear that Nico and City Wide share substantially identical management, business purpose, operation, equipment, customers and supervision—essentially every indicia of an alter ego. Moreover, these two entities also exhibit other factors including common control, lack of arm's length dealings between the two entities and what amounts to an admission that one entity was formed or used to replace the duly elected collective bargaining representative with a different union in violation of the Act.

B. City Wide Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Collective Bargaining Agreement in Existence Between the Union and Nico

The Board has held that the collective bargaining agreement of an employer applies to its alter ego, as of the date of the alter ego's first use of bargaining unit employees. *E. G. Sprinkler Corp.*, 268 NLRB 1241, 1241 fn. 1 (1984). As such, because City Wide was and is the alter ego of Nico, it is subject not only to the bargaining obligations of Nico, but also to the continued application of the bargaining agreement binding Nico. See *E.G. Sprinkler*, cited above, 268 NLRB at 1244; *A.D. Connor, Inc.*, 357 NLRB 1770, 1785–1787 (2011); and *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 440 (2004), enf. 408 F.2d 450 (8th Cir. 2005).

It is undisputed that City Wide never recognized the Union as the representative of its employees and never applied the applicable Union agreement to the unit employees it employed, beginning with the commencement of its operations in February 2016. Indeed, when the Union wrote to City Wide demand-

ing recognition and requesting to bargain over wages, hours and working conditions of City Wide's asphalt paving employees, City Wide responded in writing that it would not do so.

It also cannot be disputed that Nico never timely terminated the agreement it had with NYICA, which by its terms renewed itself unless written notice of termination was given. Thus, that agreement, and Nico's agreement with the Union continued in effect, and is binding on City Wide. City Wide's refusal to recognize and bargain with Local 175 violates the Act.

C. City Wide Violated Section 8(a)(2) and (1) of the Act by Recognizing Local 1010.

An incumbent union is the exclusive collective bargaining representative of the unit of employees it represents, and an employer that is under an agreement with an incumbent union may not grant recognition to a different union without violating Section 8(a)(2). *Advance Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007). This prohibition also applies to the alter ego of the employer. *Citywide Service Corp.*, 317 NLRB 861 (1995).

Here, City Wide signed a collective bargaining agreement with Local 1010 as part of the establishment of its operations in January 2016, prior to even hiring any employees. Nico then advised its employees in February 2016 that in order to continue working, they would have to join Local 1010, and City Wide required those same employees to do so in order to work.

Because my findings show that Nico and City Wide were and are alter egos, the Union's prior bargaining agreement with Nico remains valid and continues to apply to City Wide's bargaining unit employees. It follows that City Wide, as the alter ego of Nico, was required to recognize Local 175, and Respondents violated the Act when City Wide instead recognized Local 1010 as the collective bargaining representative of its employees.

D. Respondents' arguments for why the Alter Ego Doctrine Should Not Apply to Nico and City Wide Fall Short.

Respondent has not successfully countered the findings and legal conclusions set forth above. Respondent argues that Nico and City Wide cannot be alter egos or single employers because they were never operating concurrently. As an initial matter, that factual assertion is simply not true. The payroll records produced at trial by Respondents unequivocally show that there was overlap in the duties being performed on City Wide's behalf by multiple Nico employees, including by Senior, Dana Marie and Denegall.

But, more importantly, it is irrelevant to the determination. The Board has found entities to be alter egos whether they were operating at the same time, or where one entity took over the operations of another which ceased to operate. It is just such a disguised continuance of a previously operating business that the alter ego analysis is designed to prevent.

Respondent further argues that there was no attempt to conceal or disguise the creation of City Wide, which is also not true in multiple respects.¹¹ Instead, Respondent maintains that

⁸ This is in direct conflict with Dana Marie's testimony at trial that she started the company for her own interests, "because I wanted to start a woman-owned business." (Tr 420).

⁹ Regardless, intent to evade the Act is not an essential component to an alter ego finding. See *Johnstown Corp.*, 313 NLRB 170, 171 (1993), remanded, sub. nom., *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3rd Cir. 1994), and reaffirmed in 322 NLRB 818 (1997). It is merely one additional factor to be considered.

¹⁰ The complaint alleges that Nico and City Wide are alter egos, or alternatively, that City Wide is a successor to Nico. Because I find that they are alter egos, I find it unnecessary to consider that alternative argument. In addition, the complaint does not allege, nor does General Counsel contend in its brief that the two entities are a single employer. I therefore consider any such allegation waived.

¹¹ Indeed, I find the very fact that City Wide was created near the end of 2015 by Senior as an entity to be wholly owned on paper by Dana Marie, with no notice to the Union that was happening until Feb-

Senior's hands were tied by the ConEd contract language, which the Union was aware of, and was left no choice but for City Wide to be created. While I can appreciate the challenge that ConEd's changing posture presented to Nico's business, the Board does not recognize a company's financial challenges as justification for ignoring its existing collective bargaining relationships or agreements and forming a new entity. See *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), *enfd.* 892 F.3d 362, 374 (2018). ConEd was not Nico's only customer, and Respondent was not privileged to unilaterally create an alter ego to address the challenges created by ConEd's position.

Respondent also argues essentially that there was no real harm done as a result of its actions because most of the Nico employees continued working for City Wide under what it maintains were substantially the same terms and conditions, and suggests that this outcome was actually more favorable to employees, who were able to continue working, than if City Wide had not been created.

As an initial matter, I can find no case where the Board has held that an alleged lack of harm is a valid defense to an alter-ego allegation, and Respondents do not cite to any such precedent. More importantly, there was unquestionably harm done here to the employees who were discharged when they declined to change their union affiliation, harm done to the Union funds that were deprived of their contracted-for contributions, and harm done to the collective bargaining process where the employees' duly-elected collective bargaining representative was summarily replaced at the demand of Respondents.

Finally, Respondents argue that the facts do not support a finding of alter ego, maintaining that the two entities are sufficiently separate. For the reasons described above, the facts here unmistakably show that Nico and City Wide were and are alter egos, that the Local 175 bargaining agreement is valid and that it continues to apply to City Wide's bargaining unit employees.

E. The Complaint is not Time-Barred by Section 10(b).

Respondent, joined by the Interested Party, raises the affirmative defense that this matter is time-barred by Section 10(b) because the instant charge was not filed until October 20, 2016, more than six months from the date the Union learned of City Wide's creation, and because a prior charge, timely filed, had been withdrawn.

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *United Kiser Services*, 355 NLRB 319 (2010). The Respondent bears the burden of proving this defense.

Significantly, a party may not rely on a 10(b) defense where there has been fraudulent concealment of material facts. That

ruary 2016 was clearly intended both to disguise and conceal it from the Union.

test requires that "(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without fault or want of due diligence on its part." *Morgan's Holiday Markets*, 333 NLRB 837, 838 (2001), citing *Fitzgerald v. Seaman*, 553 F.2d 220 (D.C. Cir. 1977).

Here, Respondent repeatedly concealed multiple facts from the Union, which the Union could not reasonably have known until they were revealed to it. And, each time the Union became aware of those facts, it filed new timely charges. This began as early as the creation, in secret, of City Wide in late 2015, which was not revealed to the Union until February 2016, whereupon the Union filed its initial charge objecting to the creation of an alter ego. It continued with Respondent's concealment of Senior's involvement with City Wide, which it has continued even to date in its denials regarding the extent of his participation in its creation and initial operations.

Most importantly, Respondent continued its concealment of Nico's ongoing business operations, performing asphalt paving work for Verizon and Welsbhech, all the way until October 6, 2016. Prior to then, Respondent had never disclosed to the Union that Nico was still conducting business through its General Services Agreement with City Wide. Indeed, it had at all times maintained to the Union that Nico had gone out of business. There was no evidence presented that the Union was formally notified of Nico's continued operations at any point prior to those October 6, 2016 settlement discussions.

Upon learning of this previously concealed information on October 6, 2016, the Union filed the within charge just two weeks later on October 20, 2016, well within the 10(b) period, which only begins to run upon the Union's learning of the unlawful conduct. The charge included, for the first time, the allegation that Nico was unlawfully subcontracting work to City Wide pursuant to the newly revealed General Services Agreement.

Moreover, I find that this timely-filed allegation is closely related to the other allegations of the Complaint, which had been the subject of previously-filed timely charges. The Board holds that an otherwise untimely allegation which was first raised timely-filed charge, including one which had been dismissed or withdrawn, will be considered timely if it is closely related to the timely-filed charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

The *Redd-I* test for whether untimely allegations are "closely related" to a timely filed charge is a three-part test which analyzes: (1) whether the untimely allegations involve the same legal theory as the allegations in the timely charge; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise the same or similar defenses to both allegations.

The circumstances here meet that test. The allegations of the Complaint all involve the same alter ego theory, they all arise out of the same sequence of events, and the respondent raises essentially the same defense to all of the allegations, namely that it was forced to take the actions it took because of the requirements of ConEd's contract.

As such, I find the Union's charge was timely filed, and accordingly, I conclude that the Complaint is not time-barred.

NICO ASPHALT PAVING, INC.

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CONCLUSIONS OF LAW

(1) Nico Asphalt Paving, Inc. and City Wide Paving, Inc. were and are alter egos of each other.

(2) By failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees, Nico Asphalt Paving, Inc., has violated Section 8(a)(5) and (1) of the Act.

(3) By failing and refusing to apply the Nico bargaining agreement of its alter ego, Nico Asphalt Paving, Inc. had and continues to have with the Union, City Wide Paving, Inc. violated Section 8(a)(5) and (1) of the Act.

(4) By recognizing Local 1010 as the collective bargaining representative of its unit employees, while still bound by the agreement with Local 175, City Wide Paving, Inc. violated Section 8(a)(2) and (1) of the Act.

(5) The above violations constitute unfair labor practices that affect commerce within the meaning of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall order them and their constituent entities to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act.

Since Respondents have unlawfully failed to apply the terms and conditions of employment under the applicable bargaining agreement to its bargaining unit employees, it must make those employees whole for any loss of earnings or benefits, including, *inter alia*, making all delinquent contributions to the Union's benefit funds as provided for in the collective-bargaining agreement, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7(1979). Respondents shall also reimburse affected employees for any expenses resulting from the failure to make contributions to the benefit funds, as set forth in *Kraft Heating & Plumbing*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981).¹²

Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹³

¹² In the event that lump sum payments are required to be made to employees under this remedy, those payments must be made in accordance with the requirements set forth in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

¹³ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, Nico Asphalt Paving, Inc. and City Wide Paving, Inc., and each of them, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to apply the terms of the collective-bargaining agreement that Respondents entered into with Construction Council 175, Utility Workers Union of America, AFL-CIO ("the Union") and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of their bargaining unit employees.

(b) Recognizing Local 1010 as the collective-bargaining representative of their bargaining unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of their collective-bargaining agreement with the Union and make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of the unfair labor practices found in this decision, in the manner set forth in the remedy section of this decision.

(b) Make whole their employees for any expenses ensuing from the Respondents' failure to make required contributions to the Union's benefit funds and make whole the Union's benefit funds for losses suffered, in the manner set forth in the remedy section of this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date such awards are fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of monies due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email,

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other material. If the Respondents have gone out of business, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all employees and former employees employed by Respondents at any time since December 15, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. November 2, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Construction Council 175, Utility Workers Union of America (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by refusing to apply the terms and conditions of our collective-bargaining

agreement, including wage rates and benefit fund contributions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union, and WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees, plus interest.

WE WILL make all delinquent payments to the Union's benefit funds and WE WILL make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

NICO ASPHALT PAVING, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-186692 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

