

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

NEW YORK PAVING, INC.

and

Case No. 29-CA-254799

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

**COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO RESPONDENT NEW
YORK PAVING’S SPECIAL APPEAL RELATING TO HEARING BY
VIDEOCONFERENCE**

On July 27, 2020, Administrative Law Judge (“ALJ”) Lauren Esposito issued an Order Granting General Counsel’s Motion to Conduct the hearing in the above-captioned case entirely by videoconference. On August 11, 2020, Respondent New York Paving, Inc. (“Respondent”) filed a Request for Permission to File a Special Appeal and Special Appeal of the Order. Pursuant to Section 102.26 of the NLRB’s Rules and Regulations, Counsel for the General Counsel (General Counsel) hereby opposes Respondent’s Request and Special Appeal.

I. Introduction and Background

On April 20, 2020, the Regional Director issued the Complaint¹ in this case, alleging that Respondent violated Sections 8(a)(3) and (5) of the Act by laying off employees who are members of Construction Council Local 175 Utility Workers Union of America, AFL-CIO (“the Union”) in January 2020. The hearing was originally scheduled to begin on July 27, 2020. On June 29, 2020,

¹ The Complaint is attached as Exhibit 1.

the Regional Director postponed the hearing to September 1, 2020.² On July 10, 2020, the General Counsel filed a Motion for Videoconference Hearing. The same day, Respondent filed an opposition to GC's Motion, arguing that a videoconference hearing is inappropriate and that the hearing should open in-person on September 1, 2020.³ On August 14, 2020, the Regional Director issued an Order which postponed the hearing scheduled for September 1, 2020 to October 13, 2020.⁴

On July 27, 2020, ALJ Esposito granted the General Counsel's Motion for Videoconference Hearing, ordering that the hearing begin on September 1, 2020 using the videoconference platform Zoom for Government. Relying on the Board's decision in *Morrison Healthcare*, 369 NLRB No. 76 (2020), ALJ Esposito held that the current COVID-19 pandemic constitutes "compelling circumstances" which justify a remote hearing using videoconference technology." Ord. at 2. Further, she reasoned that a hearing by videoconference is appropriate because the only safe alternative would be to wait possibly years until the pandemic ends: an alternative "contrary to the Board's policy favoring expeditious resolution of disputes." Ord. at 3. Under the Board's recent precedent, ALJ Esposito acted reasonably and within her discretion when she ordered the hearing to move forward via Zoom. Respondent failed to demonstrate that the ALJ abused her discretion in ordering that the hearing be conducted by Zoom. Accordingly, Respondent's Special Appeal should be denied.

² This Rescheduling Order is attached as Exhibit 2(a). The Order was reissued on July 20, 2020 to cure a service error. The Corrected Order is attached as Exhibit 2(b).

³ The General Counsel's Motion and Respondent's position statement were attached to Respondent's Special Appeal.

⁴ This Order Rescheduling Hearing is attached as Exhibit 3.

II. Respondent Failed to Show the ALJ Abused Her Discretion

Respondent's Special Appeal fails to show that the Administrative Law Judge abused her discretion. The Board analyzes procedural determinations by administrative law judge decisions about the timing, manner, and method of hearings under an abuse of discretion standard. *See McDonalds USA, LLC*, 363 NLRB No. 91, 2016 WL 97421 (Slip Op. Jan. 8, 2016) (analyzing consolidation of cases under abuse of discretion standard); *See also Franks Flower Express*, 219 NLRB 149, 149 (1975) ("the granting or denial of a continuance is a matter committed to the discretion of the Administrative Law Judge and such decision will not be reversed in the absence of a showing of abuse.").

Furthermore, the Board recently upheld an administrative law judge's order to conduct an unfair labor practice hearing by videoconference in *William Beaumont Hospital*, 370 NLRB No. 09 (Slip Op. Aug. 13, 2020). In that case, the Board held that the ALJ did not err or abuse his discretion when he applied the Board's rationale in *Morrison Healthcare* to an unfair labor practice case and determined that the COVID-19 pandemic necessitated conducting the hearing virtually. *William Beaumont* at *1. Further, the Board held that the respondent's concerns about problems that might occur with the video technology at the hearing are speculative – if poor video quality or technological issues inhibit the parties' due process rights, those complaints should be raised to the trial judge in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, if respondent receives an adverse ruling. *Id* at *2.

The *William Beaumont* decision squarely addresses and resolves the issue raised by Respondent's special appeal and under that standard ALJ Esposito appropriately exercised her discretion in deciding that this case is suitable for a videoconference hearing. Respondent has presented no basis for finding that ALJ Esposito abused her discretion in any way that distinguishes

her handling of this case from the ALJ in *William Beaumont*. As such, Respondent's Special Appeal should be denied.

III. Respondent's Due Process Argument is Speculative and Should Be Rejected

In its Special Appeal, Respondent asserts that the ALJ failed to provide minimum due process safeguards for conducting the trial by videoconference. Respondent's contention is without merit. The ALJ's Order explicitly states that the possibility of any undue influence occurring with witnesses and parties in different locations "will be dealt with by explicit instructions to the witnesses and attorneys to provide clear direction regarding their obligations and restrictions on interaction with others." ALJ Ord. at 5. In a conference call with the parties on August 7, 2020, ALJ Esposito announced again that she would circulate "ministerial and practical" ground rules for conducting the hearing over Zoom *after* the Board ruled on Respondent's Special Appeal. ALJ Esposito stated that, if the Board denied the Special Appeal and ordered a hearing by videoconference, she expected the Board to announce its own safeguards and she did not want to contradict or preempt those protections. As such, Respondent's assertions that the ALJ failed to ensure due process safeguards are wholly speculative and should be rejected.

IV. A Hearing By Zoom Is Feasible And Appropriate

This trial can proceed safely, expeditiously, and fairly via Zoom technology. The Complaint involves a straightforward and common allegation in Board proceedings: Respondent conducted a single, discrete layoff in retaliation for employees' union sympathies and without bargaining with the Union. When the ALJ receives evidence about the layoff via videoconference, she will be able to see the witnesses up close, which would not be possible during an in-person

hearing mid-pandemic where witnesses would be far away, possibly wearing masks. Further, as the ALJ stated in her Order, to the extent she is required to assess the witnesses' credibility, she will have the benefit of having met most of the same witnesses during the recent in-person hearing she conducted in Case No. 29-CA-233990.

Respondent further asserts that the ALJ erred when ordering a hearing by videoconference without considering an alternate location instead of the hearing rooms available at Region 29. Respondent's insistence that an in-person hearing could be conducted at an alternate location disregards health risks associated with requiring many individuals to attend an in-person hearing lasting many days. An Order requiring the parties to travel to and participate in the hearing at a nearby hotel or banquet center would not only endanger the ALJ, attorneys, court reporter, party representatives, and witnesses, but would also risk the health of any employees working at that location or members of the public who happen to be present. Further, as the ALJ stated in her Order, conducting the hearing safely in-person – at any location – presents the nearly impossible logistical challenge of analyzing each participant's personal and family health situation, along with finding, financing, and furnishing an entirely new location that contains sufficient spacing and ventilation. For these reasons, the ALJ appropriately determined that the only way to ensure prompt resolution of this matter and avoid a possible years-long delay is to conduct the hearing via Zoom.

V. Conclusion

Accordingly, it is respectfully requested that the Board reject Respondent's Request for Special Permission to Appeal the ALJ's Order and its Special Appeal, and that the Board instead affirm ALJ Esposito's Order requiring the hearing in this matter to proceed via videoconference.

Dated August 17, 2020 at Brooklyn, New York

_____/s/_____
John Mickley
Erin Schaefer
Counsel for the General Counsel
National Labor Relations Board, Region 29
2 MetroTech Center, Suite 5100
Brooklyn, New York
John.mickley@nlrb.gov

Exhibit 1

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

NEW YORK PAVING INC.

Respondent

And

Case No. 29-CA-254799

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

Charging Party Union

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Charging Party” or “Union”). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board’s Rules and Regulations, and alleges that New York Paving Inc. (“Respondent”) has violated the Act as described below.

1. (a) The charge in this proceeding was filed by the Charging Party on January 17, 2020, and a copy was served on Respondent by U.S. Mail on January 17, 2020.

(b) The first amended charge in this proceeding was filed by the Charging Party on January 30, 2020, and a copy was served on Respondent by U.S. Mail on February 4, 2020.

2. At all material times, Respondent has been a domestic corporation with an office and a place of business located at 38-17 Railroad Avenue, Long Island City, New York (“Railroad Ave. facility”) and has been engaged in the business of asphalt and concrete paving construction.

3. During the past year, which is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described in paragraph 2 above, provided services valued in excess of \$50,000 to the City of New York, which is directly engaged in interstate commerce.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. (a) On October 16, 2007, after conducting a representation election, the Board issued a Certification of Representative certifying the Union as the collective bargaining representative of a unit of Respondent's full-time and regular part-time employees who primarily perform asphalt paving in the five boroughs of New York City ("Unit").

(b) At all times since October 16, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. On or about December 20, 2019, Respondent announced to the Unit, in writing, that Respondent was:

- (a) shutting down its asphalt operations, and
- (b) laying off Unit employees until at least March 2020.

8. On or about January 1, 2020, Respondent laid off the following employees:

- (a) John M. Arango Taborda
- (b) Michael Bartilucci
- (c) Norris D. Benjamin
- (d) Oscar C. Bueno

- (e) Hugo J. Castro
- (f) Edgar Y. Cortes
- (g) Louis Dadabo
- (h) Anthony Dedentro
- (i) Eister A. Delgado
- (j) Ciro Deluca
- (k) Giuseppe Dicaro
- (l) Anthony Dimaio
- (m) Sebastian Donoso
- (n) Calogero Falzone
- (o) Jason P. Haldane
- (p) Jason M. Hoffman
- (q) Dallas G. Kilroy
- (r) Curtney S. King
- (s) John C. Lester
- (t) Nicholas M. Locastro
- (u) Christopher Lombardi
- (v) Alexander Morrea-Gonzalez
- (w) Miguel A. Nieves
- (x) Jonathan j. Oliver
- (y) Nelson D. Palacio
- (z) Jayson Ramirez
- (aa) German Restrepo

- (bb) Gennaro P. Rocco
- (cc) Louis V. Ruggiero
- (dd) Salvatore J. Sciove
- (ee) William Smith Jr.
- (ff) Jonathan D. Suarez Pacheco
- (gg) Eric Taborda
- (hh) Frank E. Wolfe
- (ii) Hong Hao Zhong

9. Respondent engaged in the conduct described above in Paragraphs 7 and 8 because the employees named in Paragraph 8 supported the Union, because the Union pursued a Unit-wide grievance regarding Respondent's failure to maintain minimum crew sizes required by the parties' collective bargaining agreement, and to discourage employees from supporting the Union.

10. The subjects set forth above in paragraphs 7 and 8 relate to wages, hours, and other terms and conditions of employment of the Asphalt Unit and are mandatory subjects for the purposes of collective bargaining.

11. Respondent engaged in the conduct described above in Paragraphs 7 and 8 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

12. By the conduct described above in Paragraphs 8 and 9, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

13. By the conduct described above in Paragraphs 7, 8, 10, and 11, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

14. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

15. As part of the remedy for the unfair labor practices alleged above in Paragraphs 7, 8, 10, and 11, the General Counsel seeks an order requiring that Respondent make whole the Unit employees in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an Answer to the Complaint. The Answer must be **received by this office on or before May 4, 2020**. Respondent must serve a copy of the Answer on each of the other parties.

The Answer must be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the Answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that

the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

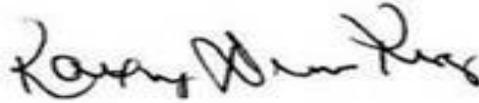
Pursuant to Section 102.111(b) of the Board's Rules and Regulations, any request for an extension of time to file an answer must be filed **by the close of business on May 4, 2020**. This request should be in writing and addressed to the Regional Director of Region 29.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT **on July 27, 2020, in a hearing room at Two MetroTech Center, 5th Floor, Brooklyn, New York**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be

followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: April 20, 2020



Kathy Drew King
Acting Regional Director
National Labor Relations Board
Region 29
Two Metro Tech Center, Suite 5100
Brooklyn, NY 11201-3838

Attachments

Exhibit 2(a)

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

NEW YORK PAVING, INC.

and

Case No. 29-CA-254799

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

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from July 27, 2020 at 9:30 AM to 9:30 AM on **September 1, 2020**.

The hearing will continue on consecutive days thereafter until concluded. The Administrative Law Judge will advise the parties of the method and location of the hearing at a later date.

Dated: June 30, 2020



KATHY DREW-KING
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

Exhibit 2(b)

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

NEW YORK PAVING, INC.

and

Case 29-CA-254799

CONSTRUCTION COUNCIL 175

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from July 27, 2020 at 9:30 AM to 9:30 AM on **September 1, 2020**. **The hearing will be conducted by video conferencing.** The hearing will continue on consecutive days until concluded.

Dated: July 20, 2020



KATHY DREW-KING
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

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

NEW YORK PAVING, INC.

and

Case 29-CA-254799

CONSTRUCTION COUNCIL 175

AFFIDAVIT OF SERVICE OF ORDER RESCHEDULING HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on _____, I served the above-entitled document(s) by **email** upon the following persons, addressed to them at the following addresses:

Anthony Bartone , President
New York Paving, Inc.
3718 Railroad Ave.
Long Island City, NY 11101-2042

JONATHAN D FARRELL , ESQ.
Meltzer, Lippe, Goldstein & Breitstone, LLP
190 WILLIS AVENUE
MINEOLA, NY 11501

Eric Bryon Chaikin , Attorney
Construction Council 175
99 Mineola Avenue
Roslyn Heights, NY 11577

ERIC B CHAIKIN
Chaikin & Chaikin
375 Park Avenue, Suite 2607
New York, NY 10152

July 20, 2020

Date

Tasha V. Fred, Designated Agent of NLRB

Name

/s/ Tasha V. Fred

Signature

Exhibit 3

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

NEW YORK PAVING, INC.

And

Case 29-CA-254799

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

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from September 1, 2020 to 9:30 AM on **October 13, 2020**. The hearing will continue on consecutive days until concluded.

Dated: August 14, 2020



KATHY DREW-KING
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

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

NEW YORK PAVING, INC.

and

Case 29-CA-254799

CONSTRUCTION COUNCIL 175

AFFIDAVIT OF SERVICE OF ORDER RESCHEDULING HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 14, 2020, I served the above-entitled document(s) by **email** upon the following persons, addressed to them at the following addresses:

Anthony Bartone , President
New York Paving, Inc.
3718 Railroad Ave.
Long Island City, NY 11101-2042

JONATHAN D FARRELL , ESQ.
Meltzer, Lippe, Goldstein & Breitstone, LLP
190 WILLIS AVENUE
MINEOLA, NY 11501

Construction Council 175
99 Mineola Avenue
Roslyn Heights, NY 11577-_____

ERIC B CHAIKIN
Chaikin & Chaikin
375 Park Avenue, Suite 2607
New York, NY 10152-_____

August 14, 2020

Date

FREDA DEVONSHIRE, Designated
Agent of NLRB

Name

FREDA DEVONSHIRE

Signature