

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**NEW YORK PAVING, INC.**

and

**Case No. 29-CA-254799**

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

**ORDER GRANTING AND DENYING IN PART PETITIONS TO  
REVOKE NEW YORK PAVING, INC.'S SUBPOENAS *DUCES TECUM***

The Complaint and Notice of Hearing in this matter, issued on April 20, 2020, alleges that New York Paving, Inc. (NY Paving or Respondent) violated Sections 8(a)(1) and (3) of the Act by shutting down its asphalt operations and laying off thirty-five employees on or about December 20, 2019, because Construction Council Local 175, Utility Workers Union of America, AFL-CIO (Local 175 or the Union) pursued a grievance alleging that NY Paving failed to maintain minimum crew sizes required pursuant to the parties' collective bargaining agreement. The Complaint further alleges that NY Paving violated Sections 8(a)(1) and (5) by shutting down its asphalt operations and laying off the employees without providing the Union with notice and an opportunity to engage in effects bargaining. On May 8, 2020, NY Paving filed an Answer denying the Complaint's material allegations.

On August 12, 2020, NY Paving served Subpoenas *Duces Tecum* on Local 175 and the Construction Council Local 175 Pension Fund, Welfare Fund, Annuity Fund, and Training Fund (the Funds). On August 18, 2020, Local 175 and the Funds filed Petitions to Revoke the Subpoenas, and Counsel for the General Counsel (General Counsel) filed Petitions to Revoke the next day. On August 26, 2020, NY Paving filed Oppositions. In its Oppositions, NY Paving withdrew Request Nos. 2, 6, 14, 15, 16, 18 through 23, 25, and 26 contained in the Rider to its Subpoena served on Local 175, and withdrew Request Nos. 2, 3, 5, 6, 7, and 10 contained in the Rider to its Subpoena served on the Funds.

**Introduction**

NY Paving and Local 175 have a history of litigation before the agency. In 2018, the Board adjudicated a jurisdictional dispute pursuant to Section 10(k) of the Act, involving work claimed by both Local 175 and Highway Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO (Local 1010). See *Highway Road and street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 (2018). On

April 5, 2019, Administrative Law Judge Andrew S. Gollin issued a Decision in Case Nos. 29-CA-197798, et al., dismissing unlawful discharge allegations, but finding that NY Paving violated Sections 8(a)(1) and (2) by urging employees represented by Local 175 to sign union membership cards for Local 1010, and violated Section 8(a)(1) by threatening Local 175-represented employees with discharge if they did not do so. See generally *New York Paving*, JD-33-19. Finally, on January 27, 2020, I issued a Decision in Case Nos. 29-CA-234894, et al., dismissing an unlawful discharge allegation and related allegations that NY Paving violated Section 8(a)(1), but finding that NY Paving violated Sections 8(a)(1) and (5) by assigning work covered by its collective bargaining agreement with Local 175 to non-bargaining unit employees. See *New York Paving*, JD(NY)-01-20. No Exceptions were filed to Judge Gollin's April 5, 2019 Decision, but Exceptions to my January 27, 2020 Decision are currently pending before the Board.

In its Oppositions to the Petitions to Revoke now at issue, NY Paving contends that the layoff of asphalt paving workers described in the Complaint was not retaliatory in nature, but was a typical "seasonal" layoff which occurs from December to March each year due to the impact of colder weather on the asphalt paving process. NY Paving states that its decision to lay off asphalt paving workers in December 2019 "was further affected by the unexpected retirement of its Operations Manager, Robert Zaremski," at the end of that month, in that Zaremski "was in charge of the day-to-day management of NY Paving's asphalt paving operations." NY Paving also contends that the layoffs were affected by the ramifications of an April 29, 2019 arbitration award finding that the company failed to comply with the collective bargaining agreement's<sup>1</sup> requirements regarding crew sizes. Finally, NY Paving claims that it attempted to engage in effects bargaining with respect to the layoffs and the impact of the arbitration award, but agreement was thwarted by "bad faith bargaining" on the part of Local 175.

### **General Standards**

Under Section 102.31(b) of the Board's Rules and Regulations, a subpoena will be revoked where it requires the production of materials which do "not relate to any matter...in question in the proceedings," where "the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." See also *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd.* in relevant part, 144 F.3d 830, 833-834 (D.C. Cir. 1998) (information sought via subpoena need only be "reasonably relevant"); *RPT*

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<sup>1</sup> NY Paving stipulated during the case before Judge Gollin that it had adopted the terms of the collective bargaining agreement between the New York Independent Contractors Alliance, Inc. (NYICA) and Local 175 effective July 1, 2014 through June 30, 2017, by conduct, through June 30, 2018. NY Paving contends in its Opposition that it terminated the agreement and withdrew from NYICA, such that any successor agreement between Local 175 and the Alliance would not be applicable. NY Paving further contends that it never entered into a successor agreement with Local 175 directly. Thus, NY Paving asserts that it had no collective bargaining agreement with Local 175 subsequent to June 30, 2018. The parties entered into a series of stipulations in connection with the arbitration proceeding to the effect that the arbitration would have no precedential or immediate practical effect with respect to the existence of any collective bargaining relationship between NY Paving and Local 175 subsequent to June 30, 2018.

*Communications, LLC*, 29-CA-182088, unpub. Board order issued Mar. 15, 2017 (2017 WL 1279544), at fn. 3 (scope of subpoenaed materials not confined to the charge’s “substantive allegations”). It is well-settled that although the Federal Rules of Civil Procedure and Federal Rules of Evidence do not apply in proceedings before the Board, the Board looks to such materials for guidance when evaluating evidentiary and certain procedural issues. *Brinks, Inc.*, 281 NLRB 468, 468-469 (1986). Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, a party may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Furthermore, information properly subject to discovery “need not be admissible in evidence” pursuant to this standard. FRCP 26(b)(1).

Paragraph 8 of the Definitions contained in the Rider attached to NY Paving’s Subpoenas defines the term “Document” as encompassing electronically stored information (ESI). In addressing issues and resolving disputes involving the production of ESI, the Board has approved ALJs’ reliance on *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, as have the federal courts. See *UPMC*, 366 NLRB No. 185 at p. 1, fn. 3 (2018); see, e.g., *Automated Solutions Corp. v. Paragon Data Systems, Inc.*, 756 F.3d 504, 514-515 (6<sup>th</sup> Cir. 2014); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649, fn. 5 (10<sup>th</sup> Cir. 2008). The Sedona Principles incorporate the concept of “proportionality” in discovery set forth in FRCP 26(b)(1), stating that an analysis of proportionality

requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>2</sup>

*The Sedona Principles, Third Edition*, 19 Sedona Conf. J. 1, 51, 65 et seq. (2018).

In addition to addressing discovery standards, the Sedona Principles also describe preferred practices and methods for conducting the production of ESI, emphasizing good faith cooperation between the requesting and producing parties during the discovery process. Specifically, the third of the Sedona Principles states that “Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party’s rights and responsibilities.” *The Sedona Principles, Third Edition*, 19 Sedona Conf. J. 51, 71. As a result, NY Paving, Local 175, and the Funds are ordered to meet and confer in good faith to discuss the following topics in order to focus the scope and increase the efficiency of ESI production: (i)

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<sup>2</sup> FRCP 26(b)(2)(B), which addresses the production of ESI, states that a party need not provide discovery of ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” On a motion to compel discovery or for a protective order in the federal courts, “the party from whom discovery is sought” must satisfy this standard. FRCP 26(b)(2)(B). Such discovery may nevertheless be ordered “if the requesting party shows good cause.” *Id.*

custodians of ESI; (ii) identification of data sources, including sources not reasonably accessible; (iii) search terms and other methods of reducing volume; (iv) methods used by NY Paving to identify responsive ESI; (v) other essential details regarding search methodology; (vi) types and production of metadata; and (vi) form for the production of information. Disputes which subsequently arise in connection with issues involving ESI will be addressed as necessary.

Local 175 and the Funds argue that a number of Requests contained in the Rider to NY Paving's Subpoenas *Duces Tecum* should be revoked because at least some of the documents they seek have already been provided by the Union and/or the Funds to NY Paving. Local 175 and the Funds further argue that certain information sought by the Subpoenas would be in NY Paving's possession. Speculation regarding materials already in the possession of NY Paving does not constitute a valid basis for revoking specific Requests. However, during the past few years Local 175, NY Paving, and the Funds have been parties to proceedings before the Board, before a contract arbitrator, and in the federal courts, which have involved the production and exchange of documents and information. Thus, Local 175 and the Funds need not produce documents that they have already provided to NY Paving in some other context. Instead, the Union and the Funds are ordered to review the documents and ESI in their possession which are responsive to the Subpoenas as modified by NY Paving and in the instant Order, and to confer with NY Paving to determine what materials have already been provided, in order to maximize the efficiency of document production and for the convenience of all parties.

Finally, to the extent that Local 175 and/or the Funds withhold certain materials from production based upon claims of attorney-client or attorney work product privilege, they are ordered to prepare and provide to NY Paving a privilege log in the appropriate format, as set forth in Paragraph 19 of the Definitions contained in the Rider to NY Paving's Subpoenas. See *CNN America, Inc.*, 353 NLRB 891, 899 (2009), final decision and order issued 361 NLRB 439 (2014), reconsideration denied 362 NLRB No. 38 (2015), rev. granted in part and denied in part 865 F.3d 740 (D.C. Cir. 2017); see also *Benedictine Health Center*, 18-CA-196456, unpub. Board order issued Dec. 27, 2017 (2017 WL 6728886), at fn. 1. The status of allegedly privileged documents will then be addressed in further detail if necessary.

## **The Subpoena *Duces Tecum* served on Local 175**

### **Request No. 1**

Request No. 1 requires the production of "All documents related to any allegation in the Complaint." Local 175 and General Counsel object to this request as impermissibly vague and overly broad, with General Counsel further contending that it lacks an appropriate temporal limitation. In its Opposition, NY Paving has modified this Request to seek documents pertaining to the following:

- (i) NY Paving's announcement to shutdown its asphalt operations and layoff certain Local 175 members in December 2019;
- (ii) NY Paving's layoff of certain Local 175 members in January 2020;
- (iii) NY Paving's implementation of the crew sizes mandated by the [April 29, 2019) Award;
- (iv) Any communications between NY Paving and Local 175 regarding the anticipated shutdown of asphalt operations and layoff of Local 175 members, including communications demonstrating Local 175 had the notice and opportunity to bargain regarding same.

Opposition at 9. NY Paving further states in its Opposition that any additional documents pertinent to the events described above should also be produced. *Id.*

NY Paving's modified Request No. 1 is reasonably tailored to the shutdown of asphalt operations and layoff of Local 175-represented employees, and any consequent bargaining which may or may not have taken place, which are the subject of the Complaint's allegations. As a result, Local 175 and General Counsel's Petitions to Revoke this Request are denied, and Local 175 is ordered to respond to the Request as modified.

### **Request No. 3**

Request No. 3 requires the production of "All documents provided by the Union" to Region 29 and/or General Counsel "in support of the Union's unfair labor practice charge underlying the Complaint, other than any affidavits provided in connection with said unfair labor practice charge." Local 175 and General Counsel contend that this Request constitutes an attempt to circumvent the general prohibition against pre-trial discovery described in the Board's Rules and Regulations, Board decisions, and decisions of the federal courts. NY Paving contends that such materials are relevant, and that affidavits were specifically omitted from this Request.

Section 102.118(a) of the NLRB Rules and Regulations provides that the Agency will not "produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a *subpoena duces tecum* or otherwise."<sup>3</sup> This provision is consonant with the general omission of a discovery process from Board proceedings, to achieve the policy objectives of efficient enforcement of the Act and preventing the intimidation of discriminatees and witnesses. See See, e.g., *David R. Webb Co.*, 311 NLRB 1135, 1135-1136 (1993) (pre-trial discovery not "routinely available" in Board cases because "it can be productive of delay, offering, as it does, abundant opportunities for collateral disputes"); *Emhart Industries, Hartford Div. v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990) ("importance of promptly resolving unfair labor charges" evident, given that "[p]re-trial discovery,

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<sup>3</sup> Section 102.118 contains an exception for requests made pursuant to the Freedom of Information Act.

perhaps the primary source of delay in civil actions, is almost never allowed by the Board”); *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 239 (1978) (pre-hearing discovery process could result in employee coercion and intimidation). In keeping with the overall policy of precluding discovery, the Board has traditionally been alert to party tactics potentially designed to evade the strictures on pre-hearing discovery established by regulation and in the caselaw. In particular, the Board has revoked subpoenas served upon parties other than General Counsel that seek materials which would otherwise be prohibited from disclosure pursuant to Section 102.118(a). See *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 369 (2000), enfd. 297 F.3d 468 (6<sup>th</sup> Cir. 2002) (ALJ granted union petition to revoke given that “the effort to obtain” some of the documents sought “was an improper attempt to circumvent Section 102.118 of the Board’s Rules”); *H. B. Zachary Co.*, 310 NLRB 1037 (1993) (quashing subpoenas directed to Charging Party union which could encompass affidavits of witnesses not called to testify). The Board has also consistently held that an employer need not respond to otherwise legitimate union information requests designed to obtain materials for use in an unfair labor practice proceeding. See, *Fremont Medical Center*, 357 NLRB 1899, 1905-1906 (2011) (employer’s refusal to provide information “that relates to pending 8(a)(3) charges...generally will not violate Section 8(a)(5)”; *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994), enfd. in part and remanded, 96 F.3d 1439 (10<sup>th</sup> Cir. 1996); *WXON-TV*, 289 NLRB 615, 617-618 (1988), enfd. 876 F.2d 105 (6<sup>th</sup> Cir. 1989) (employer not required to respond to information request which “was akin to a discovery device pertinent to its pursuit of [an] unfair labor practice charge”).

I find that NY Paving’s Request No. 3 runs afoul of these principles. Request No. 3 does not simply require the production of materials relevant to the Complaint’s allegations, as does Request No. 1. Instead, Request No. 3 seeks documents, “other than affidavits” and privileged materials, which would otherwise be part of the Region’s and General Counsel’s files. As a result, Request No. 3 effectively attempts to circumvent Section 102.118’s prohibition on the production of such materials. Local 175 and General Counsel’s Petitions to Revoke Request No. 3 are therefore granted.

#### **Request No. 4**

Request No. 4 requires the production of “all documents related to each of” the Local 175-represented asphalt employees allegedly laid off and named in the Complaint, “including but not limited to Union membership files, grievance documents, and disciplinary documents.” Local 175 and General Counsel contend that this Request is overbroad. NY Paving states that it has limited this request to any documents, such as complaints or grievances, received from the employees named in the Complaint regarding asphalt paving crew sizes during the period April 2019 to April 2020. Opposition at 10. Local 175 contends that this modification is insufficient, in that the crew size issue was addressed during the arbitration which culminated in the April 29, 2019 award.

I find that this Request as modified by NY Paving is not overbroad, and is restricted to a time frame and subject matter reasonably relevant to the December 20,

2019 layoff which is the subject of the Complaint's allegations. The material is also relevant to NY Paving's defense that the December 20, 2019 layoff was engendered in part by the ramifications of the April 29, 2019 arbitration award, and has been modified to a time period pertinent to that issue. As a result, Local 175 and General Counsel's Petitions to Revoke Request No. 4, as modified, are denied.

### **Request No. 5**

Request No. 5 requires the production of "Any and all documents supporting the allegations contained in paragraph 9 of the Complaint." Paragraph 9 of the Complaint alleges that the December 20, 2019 layoff and shutdown of NY Paving's asphalt paving operations was implemented for unlawful reasons. Local 175 and General Counsel contend that this Request is overly broad in that it does not specifically identify any documents and lacks any discrete time frame. NY Paving states that it discussed this Request with Local 175's counsel, clarifying that it was seeking documents and ESI received from NY Paving by the Local 175-represented employees named in the complaint "threatening [them] with layoffs or retaliation related to Local 175's crew size arbitration." Opposition at 11. Such materials are relevant to the Complaint's allegations. Local 175 and General Counsel's Petitions to Revoke Request No. 5, as modified, are therefore denied.

### **Request No. 7 and 12**

Request No. 7 requires the production of documents "demonstrating that Respondent did not provide 'prior notice to the Union'" of the layoff of Local 175-represented asphalt workers. Request No. 12 seeks documents "demonstrating that NY Paving did not afford 'the Union an opportunity to bargain...with respect to the effects'" of the December 20, 2019 layoff. While Local 175 claims that it cannot produce documents that "prove a negative," the Union also states that it will provide any documents that might demonstrate that NY Paving failed to provide notice of the layoff as alleged in the Complaint. Furthermore, NY Paving has modified Request No. 7 to apply solely to the time period from April 2019 to April 2020. Opposition at 11-12. As a result, Local 175's Petition to Revoke Request Nos. 7 (as modified) and 12 is denied.

### **Request No. 8**

Request No. 8 requires the production of documents "between the Union and NY Paving concerning the union's request to engage in effects bargaining" regarding employee layoffs during the period January 1, 2017 to the present. Local 175 contends that this Request is overbroad and burdensome. However, documents pertaining to previous seasonal layoffs of asphalt workers are relevant to the Complaint's allegation that the December 20, 2019 layoff was unlawfully motivated. For example, in my June 23, 2020 Order, I denied NY Paving's Petition to Revoke Request Nos. 1(a), 9, and 10 contained in the Rider to General Counsel's Subpoena *Duces Tecum*, which sought materials pertaining to layoffs for a more extensive time period, on a similar basis.

Local 175's Petition to Revoke Request No. 8 is therefore denied, although I will restrict the production of materials to those pertaining to seasonal layoffs only.

### **Request Nos. 9 and 10**

Request Nos. 9 and 10 seek documents between Local 175 and NY Paving regarding either party's request to engage in effects bargaining with respect to NY Paving's December 2019 and/or January 2020 layoffs of asphalt workers. Local 175 objects on the grounds that these documents are already in NY Paving's possession, and as discussed above while Local 175 need not produce documents which have already been provided, I will not revoke these Requests on this basis. Thus, Local 175's Petition to Revoke Request Nos. 9 and 10 is denied.

### **Request No. 11**

Request No. 11 requires the production of documents between Local 175 and NY Paving regarding the implementation of the crew sizes mandated by the April 29, 2019 arbitration award. Local 175 contends that such documents are "uniquely" in NY Paving's possession, and that NY Paving is attempting to re-litigate the arbitration or obtain information pertinent to the damages associated with the award. However, NY Paving asserts that the layoff which is the subject of the Complaint's allegations was engendered in part by implementation of the April 29, 2019 award regarding crew sizes, and Request No. 11 is specifically directed to that issue. Thus, information in Local 175's possession which is responsive to Request No. 11 is relevant to the Complaint's allegations, and Local 175's Petition to Revoke this Request is denied.

### **Request No. 13**

Request No. 13 requires the production of documents, "including emails, sent by the Union's Shop Steward, Terry Holder, from the email address [watersjazz@gmail.com](mailto:watersjazz@gmail.com) to the following email address [stew175dailyinfo@gmail.com](mailto:stew175dailyinfo@gmail.com) regarding NY Paving...from January 1, 2018 through the present." Local 175 contends that this Request is overbroad, and that some of the information sought has already been provided to NY Paving. General Counsel also contends that Request No. 13 is overbroad and seeks irrelevant information. General Counsel further contends that to the production of "any and all" such documents could result in the production of materials which disclose the identities and protected union activities of employees, and will discourage employees from communicating freely with Holder as their shop steward in the future and "chill" their right to engage in protected activity.

In the case before me last year, *New York Paving*, JD(NY)-01-20, Holder's e-mails involving these addresses, which memorialized day-to-day asphalt crew assignments and the employment status of asphalt workers, were admitted into evidence and considered probative by the parties. As a result, it appears that Request No. 13 could very possibly reveal information pertinent to the Complaint's allegations regarding the layoff of asphalt workers on December 20, 2019. In its Opposition, NY

Paving modified this Request to limit the time period involved to January 1, 2019 through June 30, 2020. Opposition at 13-15. NY Paving further limited the Request to documents relating to the shutdown of asphalt operations and layoff of Local 175 members, and any advance notice and opportunity to bargain provided to Local 175 with respect to these issues. I agree that such information is pertinent to the Complaint's allegations, and as a result the Petitions to Revoke Request No. 13, as modified, are denied. However, Local 175 shall be permitted to redact documents produced pursuant to this Request to excise information pertaining to the identities and protected union activities of members other than Holder himself. See *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1995) (production of the names of employees who signed authorization cards and attended union meetings impermissibly contravened employees' privacy interests); see also *Veritas Health Services, Inc. v. NLRB*, 671 F.3d 1267, 1273-1274 (D.C. Cir. 2012) (ALJ did not abuse their discretion in redacting documents to remove the names of employees who contacted the union); *Trump Ruffin Commercial, LLC*, 28-RC-153650, unpub. Board order issued July 28, 2016 (2016 WL 4036983) (hearing officer properly revoked employer's subpoena requesting "any and all photographs or records" in the petitioning union's possession relating to the employer's election objections, which "could expose employee conduct protected by Section 7 of the Act that the Employer could not lawfully have photographed itself"). Any dispute between the parties regarding such redactions can be brought to my attention for an *in camera* review of the materials in question.

### **Request No. 17**

Request No. 17 requires the production of "the diary and/or a journal maintained by" Local 175 Business Manager Charlie Priolo, "or any other individual who maintains such a diary and/or journal" regarding the following: (i) NY Paving; (ii) "the asphalt paving crew sizes mandated by the Award;" (iii) "NY Paving's asphalt paving crew sizes;" (iv) "NY Paving's announcement regarding the shut-down of asphalt operations an layoff of asphalt paving employees in December 2019;" (v) "NY Paving's layoff of the asphalt paving employees in January 2020;" (vi) "Layoffs of Local 175 members by any asphalt paving company in New York City from January 1, 2017 to the present;" (vii) any of the Complaint's allegations; and (viii) any "effort, request or action related to NY Paving's and/or the Union's efforts to engage in effects bargaining" regarding the layoff. Local 175 states that subparagraph (vi) has been withdrawn, but objects to the remainder of this Request as overbroad in terms of time frame, and contends that subparagraphs (ii) and (iii) constitute an attempt to relitigate the crew size grievance which culminated in the April 29, 2019 arbitration award. Local 175 further contends that subparagraph (vii) is "vague and not specific." General Counsel contends that subparagraph (i) is overbroad as well, and would result in the disclosure of the identities and protected union activities of Local 175 members, thus discouraging conduct protected by the Act.

In its Opposition, NY Paving confirms that it has withdrawn subparagraph (vi) of Request No. 17. Opposition at 15-17. NY Paving has further limited Request No. 17 to the period from April 2019 to April 2020, and limited the documents sought to the diary

or journal which was the subject of Priolo's testimony during the hearing in *New York Paving*, JD(NY)-01-20. Furthermore, in its Opposition NY Paving appears to have narrowed the scope of Subparagraph (vii) to encompass the reasons for NY Paving's shutdown of its asphalt operations and layoff of Local 175 members, and whether NY Paving provided Local 175 with notice and an opportunity to bargain regarding the effects of its decision. Opposition at 16-17. Thus, it appears from the Petitions to Revoke and Oppositions that Subparagraphs (i), (ii), (iii), and (vii) (as modified) are the only contested components of Request No. 17 at this time.

The Petitions to Revoke Subparagraphs (i), (ii) and (iii) of Request No. 17 are denied. The modifications NY Paving has made to these Subparagraphs in its Opposition have narrowly tailored them to a specific time period and type of documentary evidence, such that they are not overbroad. The information sought regarding crew sizes and the implementation of the April 29, 2019 arbitration award is relevant to NY Paving's defense that the ramifications of the award engendered, in part, the layoff which is the subject of the Complaint's allegations. I further find that Subparagraph (vii) of Request No. 17 is not overbroad as modified in NY Paving's Opposition. However, as with Request No. 13, I will permit Local 175 to redact otherwise responsive materials which may reveal the identities and protected union activities of its members. See *National Telephone Directory Corp.*, 319 NLRB at 421–422; *Veritas Health Services, Inc. v. NLRB*, 671 F.3d at 1273-1274. I will further permit Local 175 to redact materials which may reveal bargaining or other Union strategy with respect to these issues. See *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977); *Champ Corp.*, 291 NLRB 803, 817 (1988), *enf'd.* 933 F.2d 688 (9<sup>th</sup> Cir. 1990). Any dispute between the parties regarding redactions made by Local 175 may be brought to my attention for *in camera* review. *Veritas Health Services, Inc. v. NLRB*, 671 F.3d at 1273-1274.

### **Request Nos. 24 and 27**

These Requests call for the production of documents pertinent to the status of the contractual relationship between NY Paving and Local 175, and involving the New York Independent Contractors' Association (NYICA). Request No. 24 requires the production of documents "concerning NY Paving's membership in NYICA from January 1, 2017 to the present." Local 175 does not object to this Request on relevance grounds, and states in its Petition to Revoke that it will provide any responsive documents which have not already been provided to NY Paving. General Counsel argues that documents involving NY Paving's affiliation and "long-standing dispute" with NYICA are not relevant to the Complaint's allegations. NY Paving contends that all documents responsive to Request No. 24 should be produced. Having only the Complaint, Answer, and information I have gleaned from previous Motions in connection with the case at my disposal, I cannot determine that the status of the collective bargaining relationship between Local 175 and NY Paving, which apparently involves NYICA, is irrelevant to the Complaint's allegations. In particular, I note that in *New York Paving, Inc.*, JD(NY)-01-20, I found it necessary to supplement the record by admitting the July 1, 2014 through June 30, 2017 collective bargaining agreement between Local

175 and NYICA, which NY Paving stipulated that it had adopted by its conduct. As a result, Local 175 and General Counsel's Petitions to Revoke Request No. 24 are denied. As discussed previously, Local 175 need not produce documents previously provided to NY Paving; the parties shall confer to discuss the responsive documents in Local 175's possession and determine whether they have already been produced.

Request No. 27 requires the production of all documents "concerning the collective bargaining negotiations between the Union and NYICA for the alleged Successor Collective Bargaining Agreement, effective July 1, 2017, including... negotiation notes, attendance lists, sign-in sheets, letters, emails, and Memoranda of Agreement." Local 175 and General Counsel contend that this information is irrelevant to the Complaint's allegations. In its Opposition, NY Paving modified this Request to entail "any responsive documents demonstrating the date of Local 175's notice to NYICA requesting to commence negotiations for a successor collective bargaining agreement, the dates of the alleged negotiations between Local 175, and the identities of the individuals who attended these negotiations." Opposition at 20. As discussed above, I am unable to determine based upon the information available to me at this time that the parameters of NY Paving and Local 175's collective bargaining relationship are irrelevant to the Complaint's allegations. Thus, Local 175 and General Counsel's Petition to Revoke Request Nos. 24 and 27 are denied. However, Local 175 will be permitted to redact material pertaining to negotiating strategy and other internal union matters. See *Berbiglia, Inc.*, 233 NLRB at 1495; *Champ Corp.*, 291 NLRB at 817.

### **The Subpoena *Duces Tecum* Served on the Funds**

#### **Request No. 1**

Request No. 1 requires the production of "All documents related to any allegation in the Complaint." The Funds and General Counsel object to this request as impermissibly vague and overly broad, and General Counsel objects on the grounds that it lacks an appropriate temporal limitation. In its Opposition, NY Paving has modified this Request to seek documents pertaining to the following:

- (i) NY Paving's announcement to shutdown its asphalt operations and layoff certain Local 175 members in December 2019;
- (ii) NY Paving's layoff of certain Local 175 members in January 2020;
- (iii) NY Paving's implementation of the crew sizes mandated by the [April 29, 2019) Award;
- (iv) Any communications between NY Paving and Local 175 regarding the anticipated shutdown of asphalt operations and layoff of Local 175 members, including communications demonstrating Local 175 had the notice and opportunity to bargain regarding same.

Opposition at 20. NY Paving further states in its Opposition that any additional documents pertinent to the events described above should also be produced. *Id.*

NY Paving's modification of Request No. 1 directs it more specifically to the shutdown of asphalt operations and layoff of Local 175-represented employees, and any consequent bargaining which may or may not have taken place, all of which are relevant to the Complaint's allegations. As a result, the Funds' and General Counsel's Petitions to Revoke this Request are denied, and the Funds are ordered to respond to the Request as modified.

#### **Request No. 4**

Request No. 4 requires the production of "Any and all documents supporting the allegations contained in paragraph 9 of the Complaint," which alleges that the December 20, 2019 layoff and shutdown of NY Paving's asphalt paving operations was unlawfully motivated. The Funds and General Counsel contend that this Request is overly broad in that it does not specifically identify any documents and lacks any specific time frame. NY Paving states in its Opposition that it is seeking all documents pertaining to the December 20, 2019 layoff, or to threats of layoff or retaliation in connection with the crew size grievance and arbitration. Opposition at 22. With this modification, I will deny the Funds' and General Counsel's Petitions to Revoke this Request.

#### **Request Nos. 8 and 11**

Request No. 8 requires the production of documents "concerning NY Paving's membership in NYICA from January 1, 2017 to the present." The Funds state in their Petition to Revoke that they have been advised that Local 175 will provide any documents responsive to this request that have not previously been provided to NY Paving. The Funds' Petition to Revoke this Request is denied, but the Funds and NY Paving are ordered to confer regarding documents Local 175 produces.

Request No. 11 seeks information concerning the negotiations between Local 175 and NYICA culminating in the July 1, 2017 collective bargaining agreement. In its Opposition, NY Paving modified this request to "any responsive documents demonstrating the date of Local 175's notice to NYICA requesting to commence negotiations...the dates of the alleged negotiations...and the identities of the individuals who attended these negotiations." Opposition at 24-25. As discussed above, the Funds argue that documents regarding its negotiations with NYICA are not relevant to this proceeding. However, the information I have at this point is insufficient to determine that the status of the collective bargaining relationship between Local 175 and NY Paving is irrelevant to the Complaint's allegations. As a result, the Funds' Petition to Revoke Request No. 11 is denied. However, the NY Paving is ordered to confer with the Funds regarding documents responsive to Request No. 11 in order to increase the efficiency and convenience of the production.

## Request No. 9

Request No. 9 seeks documents “issued and/or filed by the Funds against any paving company alleging unpaid benefit contributions related to the violation of the mandatory utility asphalt paving crew sizes from January 1, 2017 to the present.” In its Opposition, NY Paving modified this Request to seek the production of documents related to NY Paving only. Opposition at 24. As discussed previously, the Funds’ contention that NY Paving would already have documents responsive to this request does not constitute a valid argument for revoking Request No. 9. However, the time period contained in Request No. 9 is overly broad given NY Paving’s defense that the layoff at issue here was engendered in part by the implementation of the crew sizes mandated by the arbitration award, which did not issue until April 29, 2019. I shall therefore require that the Funds produce all documents responsive to Request No. 9 solely with respect to NY Paving, and for the period April 29, 2019 through April 29, 2020 only.

For all of the foregoing reasons, the Petitions to Revoke NY Paving’s Subpoenas *Duces Tecum* filed by Local 175, the Funds, and General Counsel are granted and denied in part, and Local 175, the Funds, and NY Paving are ordered to confer with one another, in the manner described above.

Dated: New York, New York  
September 9, 2020



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Lauren Esposito  
Administrative Law Judge