

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
CASE NO. 20-1469

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NEW YORK PAVING, INC.,

Petitioner,

NLRB Case Nos.
29-CA-234894 and
29-CA-233990

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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Consolidated with 21-1003

**ANSWER TO CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

New York Paving, Inc., (hereinafter “Petitioner”), by its attorneys, Meltzer, Lippe, Goldstein & Breitstone, LLP, respectfully answers Respondent’s Cross-Application for Enforcement of an Order of the National Labor Relations Board in Case Nos. 29-CA-233990 and 29-CA-234894 reported at 370 NLRB No. 44, dated November 9, 2020 and titled *New York Paving, Inc. and Construction Council Local 175, Utility Workers Union of America, AFL–CIO and Elijah Jordan* (“370 NLRB No.: 44 (November 9, 2020)”) as follows:

1. Petitioner denies that it committed any unfair labor practices.

2. The Petitioner alleges that the rulings, findings and conclusions of the National Labor Relations Board in 370 NLRB No.: 44 (November 9, 2020) are not supported by substantial evidence in the record considered as a whole.

3. The Petitioner alleges that the rulings, findings and conclusions of the National Labor Relations Board in 370 NLRB No.: 44 (November 9, 2020) are contrary to Board and/or Court precedent or are an abuse of discretion.

4. The Petitioner alleges that the rulings, findings and conclusions of the National Labor Relations Board in 370 NLRB No.: 44 (November 9, 2020) finding the six (6) month statute of limitations for the filing of the underlying unfair labor practice charges (“ULP Charges”) was inapplicable herein are contrary to Board law, Court precedent or are an abuse of discretion given Construction Council Local 175, Utility Workers Union of America, AFL–CIO’s (“Charging Party Local 175”) knowledge of the practices in question existed more than six (6) months prior to the filing of ULP Charges.

5. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) when the Board’s Administrative Law Judge *sua sponte* admitted the Collective Bargaining Agreement, dated July 1, 2014 through June 30, 2017 (the “CBA”) into evidence, severely prejudicing Petitioner even though: (a) the underlying Board hearing record had closed; (b) the Board’s General Counsel (the “GC”) specifically acknowledged

that it was its (GC's) knowing strategic decision to refrain from introducing the CBA; and (c) Petitioner was given no opportunity to inquire concerning the CBA at the hearing.

6. The Petitioner alleges that the rulings, findings and conclusions of the National Labor Relations Board in 370 NLRB No.: 44 (November 9, 2020) finding Petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act when it assigned emergency keyhole work, Code 92 work, and Code 49 work, to union employees who are not Charging Party Local 175 unit employees without providing Local 175 with notice and the opportunity to bargain are contrary to Board law, Court precedent and/or are an abuse of discretion.

7. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) when it failed to take an adverse inference against GC's case after GC knowingly refrained from introducing the CBA into evidence at the Board hearing.

8. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) when the Board's Administrative Law Judge reopened the record after the Board hearing had closed and the parties had filed their respective briefs.

9. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) given that the work

in question comprised less than one percent (1%) of the total work and thus, was of a *de minimis* nature and could not form the basis for the ULP Charges.

10. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) given its Order improperly puts members of two competing unions (*i.e.*, Charging Party Local 175 and its bitter rival) adjacent to each other at the same job site and at the same time on a remarkably insignificant portion of the project needlessly creating tremendous potential strife, rather than promoting industrial and labor peace; thus undermining the intent of the National Labor Relations Act.

11. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) given that it erroneously concluded Petitioner committed ULP Charges and consequently issued an Order improperly directing Petitioner to utilize Charging Party Local 175's members for certain alleged asphalt-related work even though said assignment originated directly from Consolidated Edison, Inc. (or indirectly through Consolidated Edison, Inc.'s subcontractor) which changed its practices to require that only members of a union affiliated with the New York City Building Construction Trades Council ("BCTC") receive said work (and it is undisputed Charging Party Local 175 is not affiliated with BCTC).

12. The Petitioner alleges the Board abused its discretion or violated Board or Court precedent in 370 NLRB No.: 44 (November 9, 2020) given that it erroneously concluded Petitioner committed ULP Charges even though: (1) Petitioner was contractually committed to performing the work at issue before it became aware of Consolidated Edison, Inc.'s prohibition and/or (2) while Petitioner had no obligation to bargain with Charging Party Local 175 regarding same, it nonetheless did engage in effects bargaining with Charging Party Local 175 on multiple occasions regarding the assignment of the asphalt portion of the keyhole work to rival union members.

13. The Petitioner alleges the rulings, findings and conclusions in 370 NLRB No.: 44 (November 9, 2020) regarding: (1) the Code 49 work involved temporary asphalt and/or (2) the Code 49 work was an integrated process with performing sawcutting and eventual excavation thereby properly being assigned to the members of Charging Party Local 175's rival union are not supported by substantial evidence on the record considered as a whole.

14. The Petitioner alleges the rulings, findings and conclusions in 370 NLRB No.: 44 (November 9, 2020) that the emergency keyhole work is allegedly temporary asphalt work is not supported by substantial evidence on the record considered as a whole.

15. Petitioner asserts that the Board's finding that Petitioner violated the National Labor Relations Act in 370 NLRB No.: 44 (November 9, 2020) by, *inter alia*, its alleged refusal to bargain with Charging Party Local 175 was erroneous for all the reasons set forth in Petitioner's Exceptions to the Administrative Law Judge's Decision and its supporting brief.

WHEREFORE, Petitioner prays that this Honorable Court will deny Respondent's Cross-Application (and any other application or cross-application for enforcement which may be filed in this action by interested parties) and grant Petitioner the relief prayed for in its Petition.

Respectfully submitted,

Meltzer, Lippe, Goldstein
& Breitstone, LLP



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