

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

**NEW YORK PAVING, INC.**

**Respondent**

**and**

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

**Charging Party Union**

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

**MOTION TO STRIKE PORTIONS OF COUNSEL FOR THE GENERAL COUNSEL’S  
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

On February 16, 2021, Counsel for the General Counsel (“GC”) filed its Post-Hearing Brief to the Administrative Law Judge (“GC Brief”). Respondent New York Paving, Inc. (“NY Paving” or “Respondent”) hereby moves pursuant to Section 102.24 of the National Labor Relations Board (“Rules and Regulations”) to strike portions of the GC Brief because they include factual assertions which are not grounded upon any record evidence as defined in Section 102.45 (b) (“the transcript of the hearing, ... exhibits, documentary evidence”).

It is well settled the administrative law judge (“ALJ”), in rendering the decision, should rely only on the documents and testimony that comprise the official record. *See* Rules and Regulations, Section 102.45(a), (b). The ALJ may strike portions of the post-hearing brief containing statements of fact not supported by record evidence. *See, e.g., Sunrise Operations, LLC*, JD(SF)-11-20, 2020 WL 2374477, at \*2 (May 11, 2020), exceptions to the Board pending (granting the GC’s Motion to Strike and concluding Respondent could not rely on facts in its

post-hearing brief which were never introduced into evidence); *Utility Workers Union of Am., AFL-CIO*, 356 NLRB 1265, 1274 (2011) (ALJ granted motion to strike documents and factual assertions not included in record from post-hearing brief); *Cintas Corp.*, 353 NLRB 752, 756 (2009) (ALJ granted motion to strike documents not in evidence); *S & F Alla. St. Healthcare LLC*, 351 NLRB 975, 992 fn. 2 (2007) (ALJ granted motion to strike documents attached to employer's post-hearing brief that were not admitted into evidence), enf. denied on other grounds, 570 F.3d 354 (D.C. Cir. 2009).

Here, NY Paving moves to strike the following factual assertions in the GC Brief because they were not introduced into evidence and thus, are not part of the official record in this matter:

- **“However, Respondent also asserts that the management rights language in the very same collective bargaining agreement permitted Respondent to shut down its asphalt paving operations and conduct the layoffs at issue here without bargaining with Local 175. GC Exh. 1(I).”** (GC Brief, p. 5, 2<sup>nd</sup> full paragraph, 2<sup>nd</sup> sentence). Even though the GC cites to GC Ex. 1(I), which is Respondent’s Answer filed on May 8, 2020, there is nothing contained in the Answer, the hearing transcript or exhibits supporting the foregoing statement. Respondent has, in fact, repeatedly stated it is not bound by the 2017-2022 collective bargaining agreement between the New York Independent Contractors Alliance, Inc. (“NYICA”) and Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175”), which was introduced as GC Exhibit 9.

- **“First, in about May 2017, Respondent asserted that it was not bound by the collective bargaining agreement covering the asphalt paving employees. Tr. 97. Then, in January 2018, Respondent assigned three types of emergency and temporary paving work previously completed by employees who are represented by Local 175 to employees that are represented by rival Local 1010. *New York Paving, Inc.*, 370 NLRB No. 44 at \*1 (Nov. 9, 2020).”** (GC Brief, p. 6, 1<sup>st</sup> full paragraph, 2<sup>nd</sup> and 3<sup>rd</sup> sentences). There is no record evidence (on page 97 of the transcript or elsewhere) demonstrating NY Paving asserted it was not bound by the collective bargaining agreement “in or about May 2017.” The statement regarding the transfer of “emergency and temporary paving work” in January 2018 is similarly inaccurate. Indeed and as set forth in *New York Paving, Inc.*, 370 NLRB No. 44, at p. 1 (Nov. 9, 2020), only one (1) type of work was transferred in January 2018 (emergency keyhole work). As for the remaining two (2) types of work, Code 92 work was transferred in “fall 2018” and Code 49 work was assigned to non-Local 175 members in summer 2018. *New York Paving, Inc.*, 370 NLRB, at p. 2.
- **“This time, Farrell explicitly threatened Rocco and Chaikin that Respondent would lay off most of the Local 175 members to help rival Local 1010’s takeover of the Local 175 Unit.” and “a not-so-subtle subtle threat that Respondent would try to get rid of Local 175 by assisting Local 1010 to file a representation petition. Tr. 110.”** (GC Brief, p. 12, 2<sup>nd</sup> full paragraph, 3<sup>rd</sup> sentence and portion of the last sentence). Notably, the first sentence contains no record citation; no such citation exists because Respondent’s attorney, Jonathan

Farrell, did not testify that he “explicitly threatened” Local 175 and more importantly, did not admit, at any juncture, that his and/or NY Paving’s alleged actions were taken to “to help” Local 1010. Similarly, page 110 of the transcript does not support the GC’s factual assertion that Farrell told Local 175 NY Paving would allegedly assist “Local 1010 to file a representation petition.” At no point did Farrell testify he or NY Paving would “assist” or “help” Local 1010. The GC’s inclusion of these unsubstantiated and inflammatory statements in the GC Brief are remarkably prejudicial for NY Paving.

- **“Respondent worked collaboratively with Local 175 throughout the summer of 2019 to secure other employment for Fusco and Snyder. See R. Exh. 1; Tr. 260; Tr. 980.”** (GC Brief, p. 19, 2<sup>nd</sup> paragraph, portion of the 1<sup>st</sup> sentence). **“In the earlier case, Respondent bargained with the Union in order to ensure that Fusco and Snyder – who tarnished the company’s reputation by making vile slurs at a jobsite – obtained new jobs as soon as possible after their layoffs.”** (GC Brief, p. 38, 1<sup>st</sup> full paragraph, 2<sup>nd</sup> sentence). The evidence cited by the GC and the record evidence does not support the GC’s proposition that NY Paving and Local 175 collaborated to “secure other employment for Fusco and Snyder.” Rather, it is undisputed NY Paving and Local 175 resolved the grievance by replacing Fusco and Snyder with two (2) Local 175 members proposed by the Local 175. (Tr. 979). NY Paving played no role in obtaining Fusco and Snyder any alternative employment and the foregoing is supported by record evidence.

- **“If that avenue failed, Respondent assumed Local 1010 would file a new petition during the contract’s open period, which would begin on April 1, 2021. Tr. 110, 812-13.”** (GC Brief, p. 36, 1<sup>st</sup> full paragraph, last sentence). The foregoing sentence is not grounded on record evidence because neither Farrell nor any other NY Paving witness admitted that Respondent “assumed” Local 1010 would file a petition during the “open period.” In fact, Farrell testified the opposite precisely on the pages cited by the GC:

Q: Okay. And isn't it true that you thought that those new rules would allow Local 1010 to pursue the petition that was pending as of the summer of 2019?

A: No. (Tr. 813).

- **“ ... even though Wolfe and Smith were available to work.”** (GC Brief, p. 39, 1<sup>st</sup> full paragraph, portion of the 4<sup>th</sup> sentence). **“As foremen, Wolfe and Smith were two of Respondent’s most trusted employees.”** (GC Brief, p. 39, 2<sup>nd</sup> full paragraph, 3<sup>rd</sup> sentence). There is absolutely no record evidence in this matter to support the GC’s unsubstantiated statements regarding Smith and Wolfe’s availability to work and/or whether they were NY Paving’s “most trusted employees.”
- **“Getiashvili admitted that Respondent provided no text messages from Farrell in its subpoena production, even though Farrell is a “big texter” and his text messages with Local 175 counsel Matt Rocco and others would have been responsive to multiple paragraphs of the Subpoena. Tr. 541-542.”** (GC Brief, p. 54, 2<sup>nd</sup> full paragraph, 2<sup>nd</sup> sentence). The foregoing sentence is not only

unsupported by the record evidence, Respondent's attorney, Ana Getiashvili, in fact testified the opposite:

Q: Okay. But you didn't provide any text messages that Mr. Farrell sent to anyone. You didn't provide any text messages that he sent to anyone pursuant to the subpoena, did you?

A: We did. We produced the -- his text messages with Mr. Rocco. I think we actually sent those texts. It's in evidence. You were provided those text messages in -- as part of the investigation, and again as part of the subpoena.

Q: His text messages with Mr. Rocco?

A: Yeah.

Q Okay. (Tr. 1108).

A: No, because I don't believe they're responsive to any subpoena request. (Tr. 1110).

- **“Getiashvili testified that it is her practice to disobey subpoenas and not create privilege logs ‘unless it becomes an issue somehow.’ Tr. 1106.”** (GC Brief, p. 55, 1<sup>st</sup> full sentence). At no point did Getiashvili ever state that it is “her practice to disobey subpoenas.”

The GC's attempt to make purportedly factual statements and assertions which are not supported by any record evidence in this proceeding (and, in certain instances, are contradicted by record evidence) and subsequently make legal arguments based on said assertions to bolster its position is both inappropriate and prejudicial to Respondent. *See Today's Man*, 263 NLRB 332, 333 (1982) (“[C]onsideration of [new evidence] would deny the parties the opportunity for *voir dire* and cross-examination, and would violate the Board's Rules”), citing *S. Freedman Electric, Inc.*, 256 NLRB 484, fn. 1 (1981); *Southern Florida Hotel & Motel Association, et al.*, 245 NLRB 561, fn. 6 (1979). GC should not be permitted to rely on alleged facts in its Brief which are not in the official record because it would unduly prejudice the Respondent, who

cannot anticipate and respond to arguments that are based on unsubstantiated assertions of fact rather than the completed administrative record.

For the foregoing reasons, Respondent respectfully requests Your Honor strike portions of the GC Brief, which contain purportedly factual assertions not supported by the record evidence in this proceeding.

Dated: March 9, 2021  
Mineola, New York

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



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**CERTIFICATE OF SERVICE**

A copy of the within Motion To Strike Portions Of Counsel For The General Counsel's Post-Hearing Brief To The Administrative Law Judge (29-CA-254799) has been electronically filed and served via email this 9<sup>th</sup> day of March, 2021 on the following:

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