

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Case No. 20-1469 and Consolidated Case No. 21-1003

NEW YORK PAVING, INC.,

Petitioner/Cross-Respondent,

-against -

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

**On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board**

**PAGE-PROOF BRIEF FOR THE PETITIONER/CROSS-RESPONDENT
NEW YORK PAVING, INC.**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici:

The only parties in these consolidated “cross-appeals” (*i.e.*, Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board) are New York Paving, Inc., (“NY Paving”) and the National Labor Relations Board (“the NLRB” or “the Board”).

NY Paving is the Petitioner in Case No. 20-1469 and Cross-Respondent in Case No. 21-1003. The NLRB is the Respondent in Case No. 20-1469 and the Cross-Petitioner in Case No. 21-1003.

Construction Council Local 175, Utility Workers Union of America, AFL–CIO is the Charging Party in the underlying National Labor Relations Board proceeding but has not intervened in this appeal. There are no *amici curiae* in this appeal.

B. Rulings Under Review:

The ruling under review is a “Decision and 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 (A__ - A__).^{1/}

C. Related Cases:

There are no related cases. This matter has not been before any other court prior to the filing of this Petition for Review with this Court on November 25, 2020.

^{1/} As used herein, “A__” refers to the pages of the Appendix. For purposes of this page proof brief, “Tr.__” refers to the Transcript of the Official Proceeding Before The National Labor Relations Board. Moreover, New York Paving submitted a number of documents that were made part of the record as “Respondent Exhibits” (herein noted as “NYP Ex.”). The National Labor Relations Board’s General Counsel’s exhibits are identified as “GC Ex.”. Also, for purposes of this page proof brief, the underlying record document used to support a purported fact shall be explicitly mentioned. If the underlying document is already mentioned in the particular sentence however, only the “A__” will appear (*e.g.*, “The Decision and Order makes reference to (and reproduces) an underlying administrative law judge proceeding (issued by Administrative Law Judge Lauren Esposito) which was affirmed, as modified, by the National Labor Relations Board (A__ - A__)”). When the “final briefs” are prepared, only Appendix cites shall appear (*i.e.*, “A__”).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, to enable judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Petitioner/Cross-Respondent New York Paving, Inc. certifies that it has no parent corporations or publicly held companies that own ten percent (10%) or more of its stock and Petitioner/Cross-Respondent is not a publicly held company. Petitioner/Cross-Respondent's "general nature and purpose" is not relevant to the issues in this litigation.

Respectfully submitted,

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GLOSSARY

- (1) **“A__”** Pages of the Appendix.
- (2) **“Act”** National Labor Relations Act.
- (3) **“ALJ”** Administrative Law Judge Lauren Esposito.
- (4) **“ALJ Esposito”** Administrative Law Judge Lauren Esposito.
- (5) **“ALJ Gollin”** Administrative Law Judge Andrew S. Gollin.
- (6) **“ALJ Gollin’s Decision”** National Labor Relations Board Administrative Law Judge’s Decision, (JD-33-19, Case Nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847 (Apr. 5, 2019).
- (7) **“Board”** National Labor Relations Board.
- (8) **“CBA”** Collective Bargaining Agreement, dated July 1, 2014 through June 30, 2017.
- (9) **“Charging Party”** Construction Council Local 175, Utility Workers Union of America, AFL–CIO.
- (10) **“ConEd”** Consolidated Edison, Inc.
- (11) **“Counsel”** General Counsel to the National Labor Relations Board.
- (12) **“Court”** United States Court of Appeals for the District of Columbia Circuit.
- (13) **“Decision”** Decision and Order of the National Labor Relations Board in Case Nos. 29-CA-233990 and 29-CA-234894 reported at 370 NLRB No. 44 (November 9, 2020) and titled *New York Paving, Inc. and Construction Council Local 175, Utility Workers Union of America, AFL–CIO and Elijah Jordan* (A__ - A__).

- (14) **“GC Ex.”** Exhibits of the General Counsel to the National Labor Relations Board.
- (15) **“Hallen”** Hallen Construction Inc.
- (16) **“Local 175”** Construction Council Local 175, Utility Workers Union of America, AFL-CIO.
- (17) **“Local 1010”** Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO.
- (18) **“National Grid”** National Grid, PLC.
- (19) **“NLRA”** National Labor Relations Act.
- (20) **“NLRB”** Respondent/Cross-Petitioner, National Labor Relations Board.
- (21) **“NY Paving”** New York Paving, Inc.
- (22) **“NYP Ex.”** Exhibits of the Petitioner/Cross-Respondent, New York Paving, Inc.
- (23) **“Petitioner/
Cross- Respondent”** New York Paving, Inc.
- (24) **“Respondent/
Cross-Petitioner”** National Labor Relations Board.
- (25) **“Section 10(k)
Decision”** *Highway Road and Street Construction Laborers Local 1010*, 366 NLRB No. 174 (Aug. 24, 2018).
- (26) **“Tr. __”** Transcript of the Official Proceedings.
- (27) **“Trades-Council”** Building Construction Trades Council of Greater New York.

- (28) **“ULP Charges”** Unfair Labor Practice Charges (Case Nos. 29-CA-233990 and 29-CA-234894).
- (29) **“Union”** Construction Council Local 175, Utility Workers Union of America, AFL-CIO

STATEMENT OF JURISDICTION

This case is before the Court upon the petition of New York Paving, Inc. (“NY Paving”) for review of a Decision and Order of the National Labor Relations Board (“Board” or “NLRB”), pursuant to 29 U.S.C. § 160(f) (A__). The Decision and Order, reported at 370 NLRB No. 44, was a final agency action that affirmed in large part the Administrative Law Judge Decision issued on January 27, 2020, holding NY Paving violated 29 U.S.C. § 158 (*i.e.*, Sections 8(a)(1) and 8(a)(5) of the Act) (A_____).

The Board has filed a cross-application for enforcement of its Decision and Order pursuant to 29 U.S.C. § 160(e) (A_____). The aforementioned Decision and Order of the Board (issued by the Board on November 9, 2020) is a final order which disposes of all claims in this matter concerning Petitioner NY Paving and Respondent Board (A_____). The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to review the final Order of the Board in this matter pursuant to 29 U.S.C. § 160(f) and Rule 15(a) of the Federal Appellate Rules of Procedure. The petition for review and cross-application for enforcement are timely before this Court (A__ and A_____).

STATEMENT OF THE ISSUES

1. Whether the rulings, findings and conclusions in the “Decision and Order” of the National Labor Relations Board (“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* (“the Decision”) are contrary to Board law, Court precedent or are an abuse of discretion?

For reasons discussed herein, the rulings, findings and conclusions of the Decision are contrary to Board law, Court precedent or are an abuse of discretion.

2. Whether the rulings, findings and conclusions in the Decision are supported by substantial evidence on the record considered as a whole?

For reasons discussed herein, the rulings, findings and conclusions of the Decision are not supported by substantial evidence on the record considered as a whole.

3. Whether the rulings, findings and conclusions in the Decision 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 Charging Party Local 175’s knowledge of the practices in question existed more than six (6) months prior to the filing of ULP Charges?

For reasons discussed herein, the National Labor Relations Act’s six (6) month statute of limitations for the filing of the underlying ULP Charges was applicable and the Board’s holding finding otherwise is contrary to Board law, Court precedent or are an abuse of discretion.

4. Whether the rulings, findings and conclusions in the Decision finding NY Paving 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 allegedly providing Local 175 with notice and the

opportunity to bargain are contrary to Board law, Court precedent or are an abuse of discretion?

For reasons discussed herein, the rulings, findings and conclusions of the Decision finding NY Paving violated Section 8(a)(5) and (1) of the National Labor Relations Act are contrary to Board law, Court precedent or are an abuse of discretion.

5. Whether the Board abused its discretion or violated Board or Court precedent in the Decision 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 NY Paving, even though: (a) the underlying Board hearing record had closed; (b) the Board's General Counsel (the "Counsel") specifically acknowledged that it was its (Counsel's) knowing strategic decision to refrain from introducing the CBA; and (c) NY Paving was given no opportunity to inquire concerning the CBA at the hearing?

For reasons discussed herein, the Board's Administrative Law Judge (and subsequently, the Board itself for affirming her decision) abused her discretion and/or violated Board or Court precedent when she *sua sponte* admitted the CBA into evidence.

6. Whether the Board abused its discretion or violated Board or Court precedent in the Decision when it failed to take an adverse inference against Counsel's case after Counsel knowingly refrained from introducing the CBA into evidence at the Board hearing?

For reasons discussed herein, the Board's Administrative Law Judge (and subsequently, the Board itself for affirming her decision) abused her discretion and/or violated Board or Court precedent when she failed to take an adverse inference against Counsel's case after Counsel knowingly refrained from introducing the CBA into evidence at the Board hearing.

7. Whether the Board abused its discretion or violated Board or Court precedent in the Decision when the Board's Administrative Law Judge reopened the record after the Board hearing had closed and the parties had filed their respective briefs?

For reasons discussed herein, the Board's Administrative Law Judge (and subsequently, the Board itself for affirming her decision) abused her discretion and/or violated Board or Court precedent when she reopened the record after the Board hearing had closed and the parties had filed their respective briefs.

8. Whether the Board abused its discretion or violated Board or Court precedent in the Decision 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?

For reasons discussed herein, the rulings, findings and conclusions of the Decision regarding the work in question which 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 are contrary to Board law, Court precedent or are an abuse of discretion.

9. Whether the Board abused its discretion or violated Board or Court precedent in the Decision 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?

For reasons discussed herein, the rulings, findings and conclusions of the Decision regarding the allocation of an insignificant portion of the project work to Local 175 alongside its rival union are contrary to Board law, Court precedent or are an abuse of discretion.

10. Whether the Board abused its discretion or violated Board or Court precedent the Decision given that it erroneously concluded NY Paving committed ULP Charges and consequently issued an Order improperly directing NY Paving 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 Building Construction Trades Council of Greater New York ("Trades-Council") receive said work (and it is undisputed Charging Party Local 175 is not affiliated with Trades-Council)?

For reasons discussed herein, the rulings, findings and conclusions of the Decision improperly directed NY Paving to utilize Charging Party Local 175's members for certain alleged asphalt-related work even though said assignment could only be performed by union members affiliated with the Trades-Council and it is undisputed Charging Party Local 175 is not affiliated with Trades-Council.

11. Whether the Board abused its discretion or violated Board or Court precedent in the Decision given that it erroneously concluded NY Paving committed ULP Charges even though: (1) NY Paving was contractually committed to performing the work at issue before it became aware of Consolidated Edison, Inc.'s prohibition and/or (2) while NY Paving had no obligation to bargain with Charging Party Local 175 regarding same, it nonetheless did bargain with Charging Party Local 175 on multiple occasions regarding the assignment of the asphalt portion of the keyhole work to rival union members?

For reasons discussed herein, the rulings, findings and conclusions of the Decision which failed to acknowledge NY Paving bargained with Charging Party Local 175 on multiple occasions regarding the assignment of the asphalt portion of the keyhole work to rival union members is an abuse of discretion and/or violation of Board or Court precedent

None of the above issues concern the unfair labor practice charge which erroneously asserted NY Paving violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging Elijah Jordan given the Board properly dismissed said unfair labor practice charge.

PERTINENT STATUTES

Section 8(a)(1) and (5) and Section 10(b) of the National Labor Relations Act (29 U.S.C. § 158(a)(1) and (5)), Unfair labor practices by employer, and Section 10(b) (29 U.S.C. § 160(b), Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable

I. Section 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

II. Section 160

(b) Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, 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, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the

place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

STATEMENT OF THE CASE

On or about January 29, 2019, Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “Union”) filed an unfair labor practice charge with Region 29 of the National Labor Relations Board (“Board” or “NLRB”) alleging, *inter alia*, NY Paving engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (“NLRA”) by failing and refusing to bargain collectively with the Union. (GC Ex. 1; Decision, p. 5). NY Paving asserted it had not violated the NLRA and was not otherwise obligated to bargain with the Union. (GC Ex. 1, Decision, p. 5).

On April 30, 2019, an Order Consolidating Cases, and Amended Consolidated Complaint and Notice of Hearing (“Complaint”) was issued by the Regional Director for Region 29. (GC Ex. 1). NY Paving filed an Answer on May 8, 2019 denying all allegations of unlawful conduct, and asserting various Affirmative Defenses, including but not limited to, certain Complaint allegations being barred by the applicable statute of limitations. (GC Ex. 1).

The hearing in this case was held before Administrative Law Judge Lauren Esposito (“ALJ Esposito”) on July 15 through 18, 2019 and August 14, 2019. (Decision, p. 5). The parties filed their respective post-hearing briefs on October 18, 2019. (Decision, p. 29). On November 13, 2019, NY Paving filed a Motion to Reopen the Record requesting admission into the record of certain Local 175

emails as newly discovered evidence. (Decision, p. 29). The Counsel for the General Counsel (“Counsel”) and Local 175 filed their respective Oppositions on November 20, 2019, and NY Paving filed a Reply on November 26, 2019. (Decision, p. 29). On December 10, 2019, ALJ Esposito granted NY Paving’s motion and admitted the relevant emails into the record. (Decision, pp. 29-30).

In its post-hearing brief, NY Paving argued a negative inference should have been drawn against the Counsel and the Union due to their failure to introduce *any* collective bargaining agreement (“CBA”) governing the relationship between NY Paving and Local 175 during the relevant period to the Complaint allegations. (Decision, p. 21). On November 21, 2019, more than one (1) month after the submission of the post-hearing briefs and several months *after* the record closed, ALJ Esposito, emailed the parties to inform she intended to supplement the record *sua sponte* with the purported CBA. (Decision, p. 29). ALJ Esposito did so despite NY Paving’s argument in its post-hearing brief that an adverse inference should be drawn against the Counsel and the Union due to their failure to introduce a key piece of evidence during the hearing in this matter. (Decision, p. 21). Further, ALJ Esposito did so despite the Counsel’s failure to introduce the CBA while it simultaneously relied on the CBA’s provisions to argue its *prima facie* case in the Post-Hearing Brief to the ALJ. (Decision, pp. 21, 30).

NY Paving objected to ALJ's *sua sponte* decision to supplement the record, after the record closed and the parties had submitted their post-hearing briefs. (Decision, pp. 29-30). NY Paving argued that admitting the CBA into the evidence would be extremely prejudicial to it. (Decision, pp. 29-30). It would be both excusing the Counsel's failure to satisfy its *prima facie* burden by omitting evidence from the record, and depriving NY Paving of the opportunity to cross-examine the Counsel and/or Charging Party's witness regarding same. (Decision, pp. 29-30). Notably, the Counsel and Charging Party did not file any replies to address the arguments contained in NY Paving's submission to ALJ Esposito. (Decision, pp. 29-30).

On December 10, 2019, merely two (2) business days after NY Paving submitted its detailed objections to ALJ Esposito's *sua sponte* decision to supplement the record, ALJ Esposito Ordered the record to be supplemented with the CBA because:

the record in this case is simply not completed without the [CBA], the last contract to which NY Paving and Local 175 both accede that they were bound. The [CBA] constitutes evidence regarding the contours of the alleged bargaining obligation by describing the scope of the bargaining unit out of which the work was allegedly unlawfully transferred.

(Decision, p. 30). Saying the record is incomplete without the CBA is simply another way of saying the NLRB Counsel failed to meet its *prima facie* burden. Instead, on January 27, 2020, ALJ Esposito issued a decision holding NY Paving

violated Sections 8(a)(1) and (5) of the NLRA, and dismissing the Section 8(a)(3) violation(s). (Decision, p. 27). In response, NY Paving filed exceptions and a supporting brief. (Decision, p. 1). The NLRB Counsel filed an answering brief and NY Paving subsequently filed a reply brief. (Decision, p. 1).

In a “Decision and Order” issued on November 9, 2020 and reported at 370 NLRB No. 44, the NLRB affirmed, as modified, ALJ Esposito’s decision. (Decision, pp. 1-4). While the Decision correctly held NY Paving did not violate Section 8(a)(1) and (3) of the Act by discharging Elijah Jordan, it nonetheless erroneously found NY Paving violated Section 8(a)(1) and (5) of the Act when it supposedly failed to bargain with Local 175 pertaining to an alleged mandatory subject of bargaining. The Decision in this regard is replete with errors as discussed herein at length. Accordingly, that portion of the Decision is patently erroneous and should not be enforced.

STATEMENT OF THE FACTS

A. Background Information Regarding New York Paving

Petitioner NY Paving provides, among other services, asphalt paving and repaving, construction, seal coating and related services to its customers in New York City, including various utility companies, such as Consolidated Edison, Inc. (“ConEd”) and National Grid, PLC (“National Grid”). (Tr. 421-22; *see also New York Paving, Inc.*, JD-33-19, p. 4 (case nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847) (Apr. 5, 2019), adopted by the NLRB on May 20, 2019 (hereinafter referred to as “ALJ Gollin’s Decision”)). NY Paving also performs some work for Hallen Construction Inc. (“Hallen”), which is a subcontractor to ConEd and National Grid. (Tr. 421-22). In connection with providing these services, NY Paving employs individuals who are represented by various unions, including the Charging Party (*i.e.*, Local 175); Local 282, IBT; Local 1298, LIUNA; Local 14-15, IUOE; Local 138, IUOE; and Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO (“Local 1010”). (Tr. 543, 837-38). Members of Local 175 performed asphalt paving work at NY Paving, while members of Local 1010 performed concrete and related work. (Tr. 838; ALJ Gollin’s Decision, pp. 4-5). However, as a result of certain changes in ConEd’s contractual labor requirement, and applicable New York City regulations regarding

street paving, NY Paving commenced assigning certain asphalt paving work to the members of Local 1010. (Tr. 872-73; 885; 889-91).

B. NY Paving's Relationship With Local 175 Deteriorated Due to Local 175's Own Actions, as well as Related to the Changes Mandated by New York City and Consolidated Edison, Inc.

NY Paving's relationship with Local 175 was generally amicable since its (Local 175's) inception. (Tr. 838; NYP Ex. 23). The relationship started to deteriorate in or about 2016 due to Local 175's persistent campaign to cycle as many members through NY Paving as possible. (Tr. 838-43; NYP Ex. 23). This incessant influx of new Local 175 members every week created significant operational problems for NY Paving. (Tr. 839-43, 845-48; NYP Ex. 23).

i. New York City Rule Changes and Section 10(k) Decision

In addition to the continuous cycling of its members through NY Paving, Local 175 also asserted the dig-out work (also known as excavation work), saw cutting, seed and sod installation, and cleanup work should be performed by its members. *See Highway Road and Street Construction Laborers Local 1010*, 366 NLRB No. 174, p. 1 (Aug. 24, 2018) (hereinafter referred to as "Section 10(k) Decision")

By way of background, in 2016, New York City changed its regulations requiring that the street openings be filled with concrete rather than asphalt. (Tr. 948; ALJ Gollin's Decision, p. 6). Even though this change was scheduled to

become effective in September 2016, New York City did not start enforcing its regulation until April 1, 2017. (ALJ Gollin's Decision, p. 6). NY Paving's Director of Operations Peter Miceli ("Miceli") had multiple conversations with Local 175's former Business Manager, Roland Bedwell ("Bedwell") in 2016 and 2017 regarding these rule changes and its implications for Local 175 members. (ALJ Gollin's Decision, p. 6). According to Miceli, starting in April 2017, the excavation work would be performed by members of Local 1010 because it was concrete work as concrete was going back into the hole. (ALJ Gollin's Decision, pp. 6, 12). Further, due to this new type of excavation work, NY Paving also hired at least 200-250 new Local 1010 members to perform same. (ALJ Gollin's Decision, p. 6). Bedwell, however, summarily rejected Miceli's logical explanation as to why the excavation work was properly within Local 1010's jurisdiction. (ALJ Gollin's Decision, p. 6). Apparently, Bedwell objected to NY Paving adding so many new employees to the Local 1010 unit, while Local 175 was struggling to keep their existing members busy. (ALJ Gollin's Decision, p. 6).

Bedwell wanted the new 200-250 excavation positions to be assigned to Local 175 rather than Local 1010. (ALJ Gollin's Decision, p. 6). Even though Miceli explained to Bedwell that because concrete was going in the holes, excavation work would properly be assigned to Local 1010 members, Local 175 nevertheless proceeded to file a grievance against NY Paving. (ALJ Gollin's

Decision, p. 6; Section 10(k) Decision, p. 1). In the grievance, Local 175 alleged NY Paving wrongfully assigned excavation, seed and sod installation, cleanup, and saw cutting work to the members of Local 1010. (Section 10(k) Decision, p. 1).

As a result of Local 175's grievance filed against NY Paving on April 28, 2017 and Local 1010's responsive threat issued to NY Paving, NY Paving filed an unfair labor practice charge (Case No. 29-CD-203385) against Local 1010 on July 26, 2017 pursuant to §8(b)(4)(D) of the Act, alleging Local 1010 threatened NY Paving in connection with the assignment of the work disputed by Local 175 to the members of Local 175. (Section 10(k) Decision, pp. 1-3; ALJ Gollin's Decision, p. 12). After a four (4) day hearing at Region 29 and submission of post-hearing briefs, on August 24, 2018, the Board issued its decision awarding excavation (also known as dig-out work), saw cutting, and seed and sod installation work to Local 1010, and cleanup work to both Local 1010 and Local 175. (Section 10(k) Decision, pp. 1, 6). The Board's Section 10(k) Decision effectively affirmed NY Paving's position that the majority of the disputed work, including excavation work, was properly assigned to Local 1010, and therefore solidified NY Paving's decision to hire several hundred new employees into the Local 1010 unit rather than the Local 175 unit. (Section 10(k) Decision, p. 6).

The Board's conclusions in the Section 10(k) Decision affected NY Paving's decision to assign work known as "Code 49," along with excavation and saw

cutting work, to members of Local 1010 in the fall of 2018. (Tr. 873, 981-82). Code 49 is the first step of excavation work involving excavation of a few inches of dirt and replacing it with some type of temporary material (including temporary asphalt). (Tr. 509-10, 534-35, 873-79). The reason NY Paving started performing Code 49s in 2018 was because National Grid failed to properly backfill the holes it dug in the streets, which resulted in NY Paving's inability to perform road restoration work. (Tr. 874-75; 879-81). Indeed, due to improper backfill, NY Paving's saws (which are up to five (5) feet tall and weigh approximately 1,500 pounds), were sinking in the holes made by National Grid creating unsafe conditions for both the workers and public, and otherwise damaging the expensive equipment. (Tr. 874-80). After NY Paving's consultation with National Grid, a decision was made to start using the Code 49 from National Grid's contract with NY Paving to designate the process of installing temporary material on the backfilled holes solely for the purpose of running a saw on top. (Tr. 879-80). After Code 49 was completed, Local 1010 crews saw cut the area, dug down twelve (12) to fourteen (14) inches, excavated the dirt, and poured nine (9) to twelve (12) inches of concrete. (Tr. 577, 623, 874-79; Section 10(k) Decision, p. 4). At NY Paving, Code 49s were always followed by a dig-out; the entire process was completed in five (5) to six (6) days at most. (Tr. 878-79). Because Code 49s were the first step and an integral part of a dig-out, this process in its entirety was

assigned to members of Local 1010. (Tr. 873-78). Code 49 work, as it was performed commencing in 2018, was never previously assigned to the members of Local 175. (Tr. 881).

NY Paving performed work identical to street dig-outs on sidewalks for Hallen. (Tr. 881-82). Sidewalks are entirely made from concrete. (Tr. 882-83). Code 92 was the first step of the sidewalk dig-out, which similar to Code 49, involved pouring temporary material (including temporary asphalt) in the opening so that NY Paving could thereafter saw cut, excavate and restore the sidewalk. (Tr. 881-84). While Code 92s were previously performed by Local 175, as a result of the Section 10(k) Decision, which affirmed any and all concrete work was within Local 1010's jurisdiction, and because sidewalks are made from concrete, NY Paving started assigning Code 92s to the Local 1010 members. (Tr. 881-84). Miceli further testified his decision to start assigning Code 92s to the members of Local 1010 in the fall of 2018 (Tr. 603) was also significantly influenced by the statement made by Local 175's counsel, Eric Chaikin, Esq., during the Section 10(k) hearing when he stated he (Mr. Chaikin) thought anything going on concrete, including temporary asphalt in the streets and sidewalks, was assigned to Local 1010, or words of similar effect. (Tr. 603-05).

ii. ConEd's Contractual Changes

In addition to “losing” approximately 200-250 positions to Local 1010 as a result of the new New York City regulations requiring concrete rather than asphalt in all street cuts, Local 175's foothold in the New York City asphalt paving industry was further weakened by ConEd's decision to start enforcing the Labor Clause (“Labor Clause”) contained in its “Standard Terms and Conditions for Construction Contracts” (“Standard Terms”). (ALJ Gollin's Decision, pp. 6-7). Pursuant to this clause, only labor from the Building & Construction Trades Council of Greater New York (“Trades-Council”) could be used to perform any ConEd work. (GC Ex. 19; ALJ Gollin's Decision, pp. 6-7). Because Local 175 was not a member of the Trades-Council, it was effectively precluded from performing any ConEd work, including any work NY Paving was contractually bound to perform for ConEd. (Tr. 887; ALJ Gollin's Decision, p. 7).

The only asphalt work NY Paving performed for ConEd was pursuant to NY Paving's contract with Hallen involving keyhole work. (Tr. 424-27, 481, 883-84; GC Ex. 19). Eighty percent (80%) of keyhole work was located on sidewalks and involved no asphalt work whatsoever. (Tr. 613-15, 888). The remaining keyhole work was performed in the streets and was essentially excavation work, involving excavation, installation of concrete and two (2) inches of asphalt top. (Tr. 613-15, 623, 888). According to Miceli, only ten percent (10%) of the keyhole work

performed in the streets involved asphalt material (which in practice amounted to less than one percent (1%) of the total work performed by Local 175 members). (Tr. 613-15, 888; NYP Ex. 21).

NY Paving's prior keyhole contract with Hallen (effective 2008 through 2016) did not include ConEd's Standard Terms. (Tr. 889-90). Essentially, because NY Paving was a subcontractor to ConEd's contractor, Hallen, ConEd did not previously enforce the Standard Terms against NY Paving, including the Labor Clause. (Tr. 890-91). Accordingly, NY Paving previously assigned the asphalt portion of keyhole work to Local 175 members. (Tr. 568). After the expiration of the prior keyhole contract, NY Paving placed its bid on the new keyhole contract with Hallen with the expectation that it would be able to continue assigning concrete portion to Local 1010 and asphalt portion of keyhole work to Local 175. (Tr. 890). However, the new keyhole contract with Hallen, which became effective January 9, 2018, contained ConEd's Standard Terms, including the Labor Clause. (Tr. 889-91; GC Ex. 19). The first time NY Paving realized it would have to comply with the Trades-Council requirement was in January 2018 *after* it received the new keyhole contract from ConEd. (Tr. 888, 890). Indeed, Miceli testified:

Q: Okay. When New York Paving was bidding on the work for the new [keyhole] contract was it aware that [Labor] [C]lause would be included in the new contract?

A: No. We did not think it would be.

Q: Why not?

A: Because it never was before, and we thought, as a sub to a sub, that wouldn't apply to us.

(Tr. 890). Thus, NY Paving was contractually prohibited from assigning asphalt-portion of keyhole work to members of Local 175 *after* it submitted the bid for the keyhole contract and was awarded same. (GC Ex. 19; Tr. 888, 890). Even though NY Paving played absolutely no role in ConEd's decision to enforce the Labor Clause against a subcontractor of its contractor (*i.e.*, NY Paving) (Tr. 888), NY Paving was contractually bound to follow the Standard Terms and assign keyhole work solely to the members of Local 1010 commencing at the beginning of 2018. (GC Ex. 19; Tr. 888-91).

As a result of ConEd's prohibition of Local 175 members performing its work coupled with NY Paving's contractual obligation to Hallen to perform keyhole work, on May 18, 2018, NY Paving filed a federal lawsuit against the various Local 175 benefit funds ("Local 175 Funds"). (NYP Ex. 20). In this litigation, NY Paving sought declaratory judgement relieving NY Paving from its obligation of making contributions to both Local 175 and Local 1010 respective benefit funds for any asphalt work NY Paving performed for ConEd. (NYP Ex. 20; Tr. 884). This also included keyhole work. (Tr. 884). Subsequently, NY Paving and Local 175 met four (4) times to negotiate, among other issues, NY Paving's

performance of keyhole work with Local 1010 members. (Tr. 912-13). No agreement was reached between the parties. (Tr. 912-13).

C. Local 175's Precarious Position Was Further Exacerbated by the Decision in the Prior Unfair Labor Practice Trial.

In 2017 and 2018, Local 175 filed numerous unfair labor practice charges against NY Paving. Subsequently, a complaint was issued by Region 29 and after a hearing before Administrative Law Judge Andrew S. Gollin ("ALJ Gollin") who issued a decision on April 5, 2019 dismissing the overwhelming majority of allegations against NY Paving. *New York Paving, Inc.*, JD-33-19 (case nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847) (Apr. 5, 2019), adopted by the NLRB on May 20, 2019 ("ALJ Gollin's Decision"). Importantly, ALJ Gollin dismissed all allegations of discriminatory discharge, failure to hire, and failure to recall from layoff a total of seven (7) individuals, including: (i) several long-term Local 175 members, (ii) members of Local 175's Executive Board, (iii) Local 175's Business Manager, and (iv) the son of Local 175 Benefit Funds' Administrator. (Judge Gollin's Decision, p. 32). This was a major loss for Local 175, which led to Local 175's renewed campaign to re-assert its control over NY Paving's operations, including its hiring practices.

SUMMARY OF ARGUMENT

As an abuse of discretion, the NLRB considered evidence that should not have been included in the record, while ignoring well-settled law and the very purpose of the NLRA. In this regard, the NLRB permitted ALJ Esposito's belated *sua sponte* admission into evidence of the CBA after the record had been closed without basis in law or fact. This severely prejudiced NYP who had no opportunity to elicit any evidence concerning same. Essentially, ALJ Esposito recognized the NLRB had made a fatal mistake in failing to introduce the CBA (the NLRB did not prove that an unfair labor practice occurred, regardless of the CBA, but without it, the NLRB did not even make out a *prima facie* case) and in a wholly biased fashion, corrected the NLRB's error for it. Its actions were an abuse of discretion and otherwise unreasonable (arbitrary and capricious). *See, e.g., National Hot Rod Association v. NLRB*, Case No. 20-1152, 2021 WL 683551 (D.C. Cir. Feb. 23, 2021).

Additionally, the NLRB ignored the undisputed documentary evidence proving the Charging Party had clear and unequivocal notice of the transfer of the asphalt-portion of keyhole work to the members of Local 1010 more than six (6) months before filing the subject ULP Charge, rendering the ULP Charge barred by the Act's Statute of Limitations as set forth in 29 U.S.C. § 160(b).

Additionally, the asphalt work in question, upon which the NLRB premised its decision, was no more than two percent (2%) of the total keyhole work NY Paving performed and less than one percent (1%) of NY Paving's total asphalt work performed by the members of Local 175. If such a small percentage was performed by non-union labor, let alone merely a rival union's labor, it would not be deemed a violation of the Act. Despite the *de minimis* nature of said work, the NLRB nevertheless affirmed ALJ Esposito's finding that NY Paving violated the Act, thereby abusing its discretion and ignoring clear Board law.

The NLRB similarly abused its discretion and ignored well-established Board law in affirming the ALJ's conclusion that NY Paving violated 29 U.S.C. § 158(a)(1) and (5) when it assigned Code 49 and 92 work to the members of Local 1010. The nature of the Code 49 and Code 92 work involves one party placing a thin layer of asphalt over a hole so that the hole could be dug out, buttressed and filled with concrete. If one party is delayed in placing the asphalt, the concrete laborers are unable to work. Where the asphalt workers are from a competing union, the concrete laborers will likely believe the delay was intentional. The potential for strife or violence vis-à-vis such limited work was erroneously ignored by the Board and thus, contrary to the very purpose of the NLRA, to wit: the promotion of labor/industrial peace. Furthermore, because the work involved in Codes 49 and 92 was an integrated process with and essential for NY Paving's

completion of the excavation work (which was awarded to the members of Local 1010 by the NLRB in the Section 10(k) Decision), NY Paving was not obligated to bargain with Local 175 regarding its (NY Paving's) decision to assign same.

Finally, NY Paving (as a subcontractor) cannot have committed an unfair labor practice by assigning work that ConEd (the contractor) prohibited the workers affiliated with the Charging Party from performing. NY Paving's choices were to refuse to do the work, eliminating said work from any of their employees, or due to the impossibility of performance per the CBA, permitting Local 1010 employees to perform the work. Absent an intention to harm NY Paving and Local 1010, there would be no reason for the Charging Party to even seek to enforce the CBA for ConEd work.

As the NLRB's Decision is not supported by substantial evidence, is arbitrary and violates well established Board and Court precedent, NY Paving's Petition to Review should be granted and the Decision should not be enforced.

STANDING

Pursuant to Local Circuit Rule 28(a)(7), NY Paving has standing to file this appeal by virtue of the fact that it was named as the Respondent in an unfair labor practice charge filed by Construction Council Local 175, Utility Workers Union of America, AFL-CIO (A__). The Union's charge alleged NY Paving violated Sections 8(a)(1) and 8(a)(5) of the NLRA (A__). On November 9, 2020, the National Labor Relations Board issued a Decision and Order reported at 370 NLRB No. 44 in Board Case Nos. 29-CA-233990 and 29-CA-234894, upholding the ALJ Decision issued on January 27, 2020 holding NY Paving violated the National Labor Relations Act (A__ - A__). NY Paving is directly and adversely affected by the Board's Decision and Order. Accordingly, NY Paving has standing to seek review of the Order.

STANDARD OF REVIEW

As this Court stated in *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 651 (D.C. Cir. 1994), the NLRB's decision and order will not be disturbed unless, reviewing the record as a whole, it appears that the Board's factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue. *See Int'l Longshore & Warehouse Union v. NLRB*, 890 F.3d 1100, 1107 (D.C. Cir. 2018) ("We will uphold a decision of the Board unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so."). *See also, TruServ Corp. v. NLRB*, 254 F.3d 1105, 1115 (D.C. Cir. 2001). The Court's review "must take into account whatever in the record fairly detracts from [the] weight" of the evidence cited by the Board to support its conclusions. *Univ. Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Indeed, this Court will not "merely rubber stamp NLRB decisions." *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993) (internal quotation omitted). Under this Court's precedent, a decision of the Board will be reversed if it misapplies established law to the facts at issue. *See S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 362, 386 (D.C. Cir. 2009); and

Northeast Beverage Corp. v. NLRB, 554 F.3d 133, 138 (D.C. Cir. 2009) or is unreasonable (arbitrary and capricious). *See, e.g., National Hot Rod Association v. NLRB*, Case No. 20-1152, 2021 WL 683551 (D.C. Cir. Feb. 23, 2021).

As more fully explained below, taking into account the record as a whole, the NLRB's conclusions should be rejected as they are contrary to Board law, Court precedent, and are an abuse of discretion.

ARGUMENT

POINT I

THE EXPIRATION OF THE STATUTE OF LIMITATIONS BARRED THE PROSECUTION OF THE UNFAIR LABOR PRACTICE ALLEGATIONS AND THUS, THE BOARD'S DECISION AND ORDER SHOULD NOT BE ENFORCED

Under the NLRA, an employer commits an unfair labor practice if it “refuse[s] to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). In this regard, “[t]he obligation to ‘bargain collectively’ requires an employer to ‘confer in good faith with respect to wages, hours, and other terms and conditions of employment.’” *Bob's Tire Co., Inc. v. NLRB*, 980 F.3d 147 (D.C. Cir. 2020), *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003) (quoting 29 U.S.C. § 158(d)). “An employer thus violates [the Act] by unilaterally changing an existing term or condition of employment without first bargaining to impasse.” *Id.* (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991)). However, the Board’s General Counsel must show that “there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining.” *Bath Iron Works Corp.*, 345 NLRB 499, 501–03 (2005), *enforced sub nom. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007) cited with approval in *Pacific Maritime Association v. NLRB*, 967 F.3d 878 (D.C. Cir. 2020).

Contrary to the position of the NLRB, the Charging Party, Local 175, had actual, let alone constructive notice of NY Paving's transfer of the asphalt portion of the emergency keyhole work to the members of Local 1010 more than six (6) months prior to the filing of the underlying unfair labor practice charge on January 29, 2019. (GC Ex. 1; Decision, p. 5). The evidence unequivocally establishes Local 175's knowledge as early as April 2018 (NYP Ex. 24), which is outside the six (6) month statute of limitations period and therefore is time-barred.

There is no dispute as to the applicable law in this area. Thus, Section 10(b) of the Act is a statute of limitations, ... *R. G. Burns Electric*, 326 NLRB 440, 446 (1998). The "10(b) period" commences— or, put another way, the statute of limitations is tolled—only at the time when a party has clear and unequivocal notice of a violation of the Act or where a party, in the exercise of reasonable diligence, should have become aware that the Act has been violated. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1145 (1999); *R. G. Burns, supra* at 440-441; *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Duke University*, 315 NLRB 1291, 1295 (1995); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The Board also has expressed this point of law in other words— the Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice." *Concourse Nursing Home*, 328 NLRB 692, 694 (1999).

Phoenix Transit System, 335 NLRB 1263, 1271-72 (2001); *see also St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1129 (2004). *Accord, Ricci v. Teamsters Union Local 456*, 781 F3d 25, 26 (2d Cir. 2015).

Here, Local 175 had actual knowledge of the transfer of the asphalt-portion of keyhole work as early as April 2018. While Local 175's Business Manager,

Charlie Priolo (“Priolo”), testified that he only became aware of the transfer of such work within the six (6) month period (Tr. 358-61), the documentary evidence reveals otherwise.

Specifically, the April 21, 2018 email sent by Local 175’s Shop Steward, Terry Holder (“Holder”), to Local 175 stated “Local 1010 went out with three crews today. One in Manhattan, the Bronx and one in B[rooklyn]. Let Charlie Priolo and Anthony Franco know. Sent pictures of one of the crews working to both Charlie and Anthony.” (NYP Ex. 24). The April 21, 2018 email demonstrates Priolo and Local 175’s knowledge of the alleged transfer of work well more than six (6) months before a charge was filed. Further, Holder, a Local 175 shop steward, testified he (Holder) called Priolo and Local 175’s Fund Administrator, Anthony Franco, in April 2018 to discuss the incident with Local 1010 using the asphalt vehicle. (Tr. 333-38). Holder sent Local 175 additional emails on May 4, 2018 (“Miguel Nieves called to say he saw 1010 working in the Bronx at 233 st.” (NYP Ex. 24)) and May 7, 2018 (“1010 went out on Sunday night ... concrete and asphalt.” (NYP Ex. 24)) further demonstrating Local 175’s knowledge of Local 1010 members performing the asphalt-portion of keyhole work. Thus, Local 175 had actual and/or constructive knowledge of NY Paving’s transfer of the asphalt portion of keyhole work to the members of Local 1010 significantly before the applicable six (6) month statute of limitations.

Priolo and Local 175 in fact possessed pictures of Local 1010 purportedly performing work using asphalt material as early as April 21, 2018. (Resp. Ex. 24). Local 175 was not only aware that NY Paving assigned the asphalt portion of the keyhole work to the members of Local 1010, Local 175 possessed photographs demonstrating same. Because the statements contained in the April 21, 2018; May 4, 2018; and May 7, 2018 emails demonstrate Local 175 had clear and unequivocal notice that NY Paving was assigning the asphalt portion of the keyhole work in the Bronx and Manhattan to the members of Local 1010 as early as April 21, 2018, the transfer of keyhole work allegations contained in the underlying unfair labor practice charge are outside the applicable six (6) month statute of limitations period, rendering them untimely under Section 10(b) of the Act.

Further, Holder testified he knew Local 1010 was going to use the asphalt truck in April 2018 to perform asphalt work in Manhattan. (Tr. 348). He further confirmed the work usually starts in the Bronx and continues to Manhattan. (Tr. 349). Additionally, and by Holder's own admission, the work NY Paving performed in the Bronx was asphalt work for ConEd. (Tr. 352). Because it is undisputed the only asphalt work NY Paving performed for ConEd during the relevant period was the emergency keyhole work (Tr. 422, 425, 431), Holder knew as early as April 2018 that Local 1010 was performing emergency keyhole work in

the Bronx. (Tr. 352; NYP Ex. 24). Priolo also admitted he observed Local 1010 performing asphalt work for ConEd in the Bronx. (Tr. 358-59).

The foregoing testimony from Local 175's Shop Steward and Business Manager, along with the emails admitted as NYP Ex. 24, establish Local 175 had clear and unequivocal notice that NY Paving assigned the asphalt-portion of the keyhole work to the members of Local 1010 (*i.e.*, the asphalt work in the Bronx) as early as April 2018, and therefore, its claim was barred by the statute of limitations set forth in Section 10(b) of the Act.

POINT II

THE BOARD'S DECISION AND ORDER SHOULD NOT BE ENFORCED GIVEN THE *SUA SPONTE* ADMISSION OF THE COLLECTIVE BARGAINING AGREEMENT INTO EVIDENCE AFTER THE RECORD CLOSED AND OVER NEW YORK PAVING'S OBJECTION

The Counsel (and Charging Party) made a calculated decision to refrain from introducing into evidence the collective bargaining agreement ("CBA") covering the asphalt employees working at NY Paving during the relevant period of the underlying unfair labor practice charge (likely to avoid cross-examination concerning same). The Counsel suffered no adverse consequences by this strategic decision given the ALJ corrected Counsel's mistake while permitting it the benefit of avoiding such cross-examination. Simply stated, the ALJ took on an adversarial

role, prejudicing NY Paving. The Board's affirmance of the ALJ's actions in this regard, warrants the granting of NY Paving's Petition and the non-enforcement of the Board's Decision and Order.

The NLRB has established a procedure for reopening the record to permit the admission of previously unadmitted evidence:

After the close of the trial but before issuance of the judge's decision, a party may file a motion with the judge to reopen the record. The judge is authorized to rule on such a procedural motion under Section 102.35(a)(8) of the Board's Rules.

Section 102.35(a)(8) does not set forth any standards for ruling on such contested motions. However, the standards applied by the Board in ruling on motions to reopen after the ALJ decision has issued may provide guidance. *See, e.g., Apex Investigation & Security Co.*, 302 NLRB 815 n. 1, 816 n. 1 (1991). Those standards are set out in Section 102.48(c)(1) of the Board's Rules, which states:

A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.....

See also Circus Circus Las Vegas, above (denying the respondent's motion to reopen to introduce certain work-order records, as they were routinely created and maintained electronically and respondent was certainly aware of their existence); and *Walden Security, Inc.*, 366 NLRB No. 44, slip op. at 1 n. 2 (2018) (denying the respondent's motion to reopen as the evidence respondent sought to introduce was apparently in its possession at the time it agreed to submit the case to the judge on a stipulated record).

The NLRB Bench Book, Ch. 10, 2015 WL 6503842, at *3-4. Here, the Counsel did not assert it could not have introduced the CBA into evidence. Rather Counsel specifically referenced and relied on the portions of the CBA in its Post-Hearing Brief to the ALJ even though the CBA was not admitted into evidence. (Decision, p. 21, n. 33; p. 30). Even though the Counsel realized the significance of the CBA, particularly given the underlying allegations of unlawful transfer of work from Local 175's unit, it omitted to introduce same into evidence. Stated another way, Counsel deliberately did not wish the CBA to be part of the record evidence and relatedly, did not want its witnesses cross-examined regarding this document. Its decision was calculated.

Further compounding this reversible error, the ALJ deprived NY Paving the opportunity to challenge the evidence (*i.e.*, CBA) in question on the record. Here, the record was not re-opened; rather the ALJ, realizing the Counsel's mistake, just slipped the CBA in, giving NY Paving no opportunity to examine witnesses concerning same and to develop record evidence, including the scope and contours of Local 175's unit work. This remarkably prejudicial act flies in the face of the impartiality a judge must display. The Court in *W. States Regional Council No. 3, Intern. Woodworkers of Am., AFL-CIO v NLRB*, 365 F.2d 934, 936 (D.C. Cir 1966) states, in pertinent part:

And, of course, there is a serious question of fairness of procedure in relation to a litigant who has assembled and presented his evidence and conducted his cross-examination on a theory unlike the one introduced here for the first time by the Board more than a year after the record closed. It is not enough to say that, since there is evidence in the record supporting the Board's finding, there is no cause for complaint. If a different issue had been tried, the evidence might have been different.

Without the CBA, the Counsel failed to present sufficient evidence demonstrating that the work performed by NY Paving known as Code 49 and Code 92 was Local 175's unit work, triggering NY Paving's obligation to bargain when assigning same to the members of Local 1010. Because of the Counsel's failure, there was no documentary evidence in the record demonstrating the type of work involved in performing Codes 49 and 92 falls within Local 175 jurisdiction (*i.e.*, Local 175's unit work). Therefore and due to the Counsel's failure to introduce key evidence in this case, the Counsel did not establish NY Paving was obligated to bargain regarding assigning that work to members of Local 1010.

Inasmuch as the CBA was admitted into evidence: (1) after the record had closed; (2) over NY Paving's objection; (3) without giving NY Paving any opportunity to examine witnesses concerning the CBA and its interpretation and implementation; (4) contrary to the NLRB's own rules and regulations and Bench Book; and (5) this was all because the Counsel chose to refrain from doing so; the CBA was admitted in error and the NLRB's affirmance of same was wrong in

every way, mandating non-enforcement of its Decision. *See Manko v. United States*, 636 F. Supp. 1419, 1425 (W.D. Mo. 1986), *aff'd and remanded*, 830 F.2d 831 (8th Cir. 198), wherein the Court stated:

Plaintiff objected to the admission of additional evidence after the record closed and the Court suggested defendant file a written motion. On February 22, 1984, defendant filed a written motion to keep the record open. On April 16, 1984, defendant filed a renewed motion to keep the record open and attached a copy of Dr. Nathanson's revision of Defendant's Exhibit 273.

During presentation of defendant's case, Dr. Nathanson testified extensively on behalf of defendant. Later, Dr. Nathanson was recalled at the Court's request and testified concurrently with Dr. Goldfield in rebuttal. Dr. Nathanson has been given an adequate opportunity to present his expert opinion and its basis.

If the tendered revision of defendant's Exhibit 273 was admitted into evidence, it is fair to assume that plaintiff would request an evidentiary hearing to cross-examine Dr. Nathanson. Further delay in concluding this case is not justified. Defendant's request to introduce a revised defendant's Exhibit 273 is denied.

This is strikingly similar to the case at bar. The Counsel had more than “an adequate opportunity to present...” the CBA. It was aware of its existence (the CBA was part of the record in the Section 10(k) Decision and ALJ Gollin’s Decision), possessed a copy of same but specifically chose not to admit it into evidence. At hearing(s), attorneys make strategic decisions (*e.g.*, avoiding putting matters into evidence to avoid witnesses being cross-examined concerning same) and must accept the consequences of their decisions. They should not get both the

benefit of their decision (avoiding the possibility of such cross-examination) and the avoidance of any consequence of said decision.

Moreover, rather than admitting the CBA into evidence, the failure of the Counsel to even seek to introduce same should result in an adverse inference against the Counsel. Where a party fails to introduce a document in its control, which by the ALJ's own admission, was necessary to complete the record, an adverse inference may be drawn regarding any factual questions the documents may prove. *See Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1338, 1341 (D.C. Cir. 1972):

The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it. Of course, if a party has good reason to believe his opponent has failed to meet his burden of proof, he may find no need to introduce his strong evidence ... in most cases a party will introduce his most favorable evidence without being compelled by legal process to do so.

Where, as here, the Board's refusal to consider the evidentiary inference flowing from the company's nonproduction of its hiring records has the effect of denying a fair hearing to one of the parties, the argument for judicial intervention becomes overpowering.

Here, the Counsel and Charging Party did not introduce into evidence a collective bargaining agreement covering the asphalt employees working at NY

Paving during the relevant period. An adverse inference should have followed for said failure. It is not the function of the NLRB to be an additional adversary and assist the Counsel. It should act as an impartial body. The Counsel did not introduce the CBA. Had it done so, a very different trial would likely have resulted. Instead, the NLRB, acting as an adversary, rather than an impartial tribunal, corrupted the process impermissibly, mandating reversal.

POINT III

THE WORK IN QUESTION WAS *DE MINIMIS* IN NATURE AND INSUFFICIENT TO JUSTIFY AN UNFAIR LABOR PRACTICE CLAIM. AS SUCH, THE BOARD'S DECISION AND ORDER SHOULD NOT BE ENFORCED

As stated in *Ringgold v Black Entertainment Tel., Inc.*, 126 F.3d 70, 74 (2d Cir. 1997), “[t]he legal maxim ‘*de minimis non curat lex*’ (sometimes rendered, ‘the law does not concern itself with trifles’) insulates from liability those who cause insignificant violations of the rights of others.” Here, if any violation occurred, it is an insignificant violation involving less than one percent (1%) of the total work performed by the members of Local 175 at NY Paving. Less than one percent (1%) virtually defines *de minimis*. *Mitchell v. Helms*, 530 U.S. 793, 835 (2000).

The Employer’s bargaining obligation under Section 8(a)(5) of the NLRA is triggered only if the transfer of work is material, substantial and significant. The

Counsel bears the burden of establishing that the change was material, substantial and significant. *See, e.g., North Star Steel Co.*, 347 NLRB 1364, 1365 (2006). The Counsel has failed to satisfy the foregoing burden.

More specifically, eighty percent (80%) of the work NY Paving performed pursuant to the keyhole contract with Hallen was on concrete sidewalks and involved no asphalt work whatsoever. (Tr. 613-15, 888). Of the remaining twenty percent (20%) of the keyhole work that NY Paving performed in the streets, only ten percent (10%) involved asphalt (two (2) inches of asphalt top) (*i.e.*, only two percent (2%) of the total keyhole work performed by NY Paving may have involved asphalt material). (Tr. 613-15, 888). NY Paving performed the foregoing insignificant keyhole work involving asphalt with a crew of four (4) to five (5) Local 1010 members approximately four (4) times per month involving approximately fifteen (15) hours of asphalt paving work per month. (Tr. 567, 583-84). Based on the total number of hours worked by Local 175 members at NY Paving from July 2018 through July 2019, the foregoing fifteen (15) hours of keyhole work ranges from approximately 0.14% of the total work performed by Local 175 members (for example in September 2018) to approximately 0.26% of Local 175's work (for example, in January 2019). (NYP Ex. 21).²

² The following are the monthly percentages of the fifteen (15) keyhole paving work hours compared to the total monthly hours worked by Local 175 members during the relevant period of time:

This is precisely the sort of insignificant trifle about which the law should not be concerned and more importantly, does not support a violation of Section 8(a)(5) of the Act.

POINT IV

THE NLRB'S DECISION AND ORDER PUTS THE MEMBERS OF TWO RIVAL UNIONS IN CLOSE PROXIMITY, PROMOTING LABOR UNREST AND STRIFE INSTEAD OF INDUSTRIAL AND/OR LABOR PEACE

It is well settled the very purpose of the NLRA is to promote industrial/labor peace. *In re Northwest Airlines Corp.*, 349 BR 338, 344-45 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007). *See also Fibreboard Paper Products Corp. v. NLRB*, 379 US 203, 210-11 (1964). This is set forth more succinctly in *Fortuna Enterprises, LP v. NLRB*, 665 F.3d 1295, 1302 (D.C. Cir 2011) (Grievance

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- July 2018 – 0.17%
 - August 2018 – 0.15%
 - September 2018 – 0.14%
 - October 2018 – 0.17%
 - November 2018 – 0.18%
 - December 2018 – 0.16%
 - January 2019 – 0.26%
 - February 2019 – 0.24%
 - March 2019 – 0.14%
 - April 2019 – 0.15%
 - May 2019 – 0.14%
 - June 2019 – 0.16%
 - July 2019 – 0.22%

Resp. Ex. 21

procedures provide an orderly means for resolving employee concerns and thus promote the Act's goal of achieving "industrial peace and stability."); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996).

Here, the NLRB, as a result of its Decision, is essentially creating industrial strife by placing members of the two (2) competing unions (*i.e.*, Local 175 vs. Local 1010) to engage in the exact opposite of labor peace. The NLRB decision states:

We also agree with the judge that there is no evidence that the Code 92 application of temporary asphalt and the subsequent saw cutting occur so close together in time as to constitute a single integrated process.

Decision, p. 2. The NLRB failed to mention the absence of any evidence (other than basic logic) to think these two items do not occur "together in time." The absence of proof of one fact does not constitute proof of a converse fact. *In re Olympia Brewing Co. Sec. Litig.*, No. 77 C 1206, 1985 WL 2384, at *1 (N.D. Ill. Aug. 27, 1985), *accord*, *Shaw v. Secretary of Dept. of Health and Human Services*, 19 Cl. Ct. 334, 339 (Cl. Ct. 1990).

Here, given the long-term rivalry between Local 175 and Local 1010 (*see generally*, ALJ Gollin's Decision), the likelihood of an altercation between the members of the two (2) unions while waiting for Local 175 to complete working on temporary material and Local 1010 to excavate and saw cut same is very high. Any such altercation could eventually lead to violence.

The purpose of the NLRA is to avoid such labor strife and confrontational situations. Here, the NLRB has abandoned its essential purpose, mandating reversal of its Decision.

POINT V

THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD NOT BE ENFORCED AS THE TRANSFER OF WORK LARGELY STEMMED FROM CONSOLIDATED EDISON, INC.'S MANDATE TO NEW YORK PAVING CREATING A SPECIFIC EXEMPTION FROM THE DICTATES OF SECTION 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT

NY Paving was not obligated to bargain with Local 175 regarding the work ConEd refused to permit Local 175 members to perform. An employer is not obligated to engage in collective bargaining negotiations by virtue of changes implemented by the requirements of third parties over which the employer had no control. *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996).

In *Exxon Research & Engineering Co.*, Exxon Thrift Plan trustees made modifications to the number and amounts of loans that could be taken from the plan. Exxon subsidiaries notified union representatives of the change who demanded bargaining. The Court refused to enforce the Board's order to bargain, because the subsidiaries had no duty to bargain over a decision they did not make:

Stated another way, the NLRB contends that the Exxon subsidiaries violated §8(a)(5) by refusing to bargain over changes that they did not make but that affected their employees' terms and conditions of

employment. We disagree. The NLRB's position would mark an unprecedented expansion of *NLRB v. Katz*. *Katz* held that an employer that unilaterally changed its employees' conditions of employment violated § 158(a)(5); it did not hold that an employer violates §158(a)(5) by refusing to bargain over changes made by a separate legal entity over whom the employer possesses no power.

Exxon Research & Engineering Co., 89 F.3d at 232. The Court noted “[t]he difficulty in developing a remedial order to rescind the plan changes confirms the NLRB's error ... Stated bluntly, the Exxon subsidiaries could not rescind the changes because they never made them in the first place. The NLRB ignored this fundamental fact in ordering rescission of the plan changes.” *Id.*

Similarly, in *Southern Mail, Inc.*, 45 NLRB 644 (2005), the Board determined the employer was not obligated to bargain with the union regarding the change required by its contractor:

In adopting the judge's finding, we note that the Respondent was required by the USPS to change the schedule for the Nuevo Laredo run and remove two stops.

45 NLRB at 645 n. 8 (2005). *See also*, the NLRB's General Counsel Advice Memorandum in *ABC, Inc., Academy of Motion Picture Arts and Sciences*, 1998 WL 1759017 (1998) (No §8(a)(5) violation for refusal to bargain where work was lost as a result of the project owner reclaiming the work from subcontractor). In this case, ConEd essentially reclaimed the work from Local 175 given Local 175 – for reasons known only to it – did not become a member of the Trades-Council.

(ALJ Gollin's Decision, p. 7). Unlike Local 175, Local 1010 was a member of the Trades-Council during the relevant period. (ALJ Gollin's Decision, p. 7).

Accordingly, the instant case is governed by well-settled law holding an employer need not bargain with a union over changes required by third parties over which the employer had no control. Indeed, the record here is clear on this point. As a result of ConEd's enforcement of the Labor Clause in its Standard Terms, NY Paving was contractually prohibited from assigning the small portion of asphalt keyhole work to Local 175 members. (GC Ex. 19; Tr. 888, 890). At some juncture, ConEd began enforcing a provision in its Standard Terms regarding which employees could work on ConEd projects. (ALJ Gollin's Decision, p. 6). ConEd specifically required that all of its work be performed by members of unions affiliated with the Trades-Council. (Judge Gollin's Decision, p. 7).

Because Local 175 was not a member of Trades-Council, its members were effectively precluded from performing any work on ConEd projects. (ALJ Gollin's Decision, p. 7). NY Paving played absolutely no role whatsoever in ConEd's decision to start enforcing the Trades-Council labor requirement in the Standard Terms - the decision was exclusively ConEd's. (Tr. 888).

NY Paving had a prior keyhole contract with Hallen (ConEd's subcontractor) to perform certain emergency work for ConEd, the end user, from approximately 2008 to 2017. (Tr. 586-88, 889). During that period of time, NY

Paving assigned the asphalt portion of keyhole work to Local 175 members because ConEd was not yet enforcing the Trades-Council labor requirement on the subcontractors of its (ConEd's) subcontractors - in this case, NY Paving (*i.e.*, NY Paving is Hallen's subcontractor). (Tr. 568, 587, 890-91).

Notably, NY Paving's prior keyhole contract with Hallen did not include ConEd's Standard Terms. (Tr. 889-90). After the prior keyhole contract expired in 2017, NY Paving sought and bid on a new contract with Hallen with the expectation that it could continue to use both Local 1010 and Local 175 members to perform the concrete and asphalt portions of keyhole work respectively. (Tr. 890). However, when NY Paving received the new keyhole contract from Hallen (GC Ex. 19) in or about January 2018, NY Paving realized the contract included ConEd's Standard Terms. (Tr. 888-91). As a result, and in required compliance with its contractual obligations with Hallen, NY Paving could no longer assign the asphalt portion of keyhole work to Local 175 members commencing January 2018. (Tr. 885). NY Paving became contractually prohibited from assigning asphalt-portion of keyhole work to members of Local 175 *after* it submitted the bid for the keyhole contract to Hallen and was awarded same. (GC Ex. 19; Tr. 888, 890).

Despite the clear legal standard applicable to NY Paving's decision in connection with the assignment of the asphalt portion of the keyhole work, the

NLRB disregarded such precedent. It failed to consider the effect of the decision being made, not by NY Paving, the employer in question, but rather by ConEd.

The NLRB also failed to consider a rather crucial fact. Under ConEd's Standard Terms, no Local 175 member was eligible to work on any ConEd work site, regardless of their employer. (GC Ex. 19). Even if NY Paving gave up the minimal ConEd work in question, said work would nevertheless have to be assigned to another contractor with Trades-Council affiliated labor and never Local 175.

To further compound its error, in affirming ALJ Esposito's decision, the NLRB relied on cases having nothing to do with the outside contracting entity dictating which employees could perform the work in question. Pursuant to 29 USC § 158(e), in the construction industry, ConEd had every right to mandate which union labor was permissible.

Not only did the NLRB rely on inapplicable legal precedent(s), in rejecting NY Paving's argument, it also considered purported facts that simply were not part of the record evidence. The NLRB essentially accused NY Paving of entering into a contract with Hallen knowing ConEd's Standard Terms:

the Respondent was fully aware of the revisions to ConEd's standard contract terms at the time that it voluntarily entered into its new contract with Hallen. Accordingly, the Respondent was aware that ConEd's [Trades-Council] requirement created a foreseeable issue regarding work assignment to Local 175–represented employees, and it could have addressed and resolved this issue when it renegotiated its

contract with Hallen in 2017. Because the Respondent apparently did not do so, however, it now finds itself unable to satisfy its obligations to both Hallen and Local 175. Again, because the Respondent chose to enter into the contract with Hallen, despite its knowledge of the [Trades-Council] requirement, it cannot now argue that it is excused from bargaining with Local 175 as a result of the terms of that agreement.

Decision, p. 2. In making the foregoing determination, the NLRB relied on facts that were not in evidence. Rather, it is undisputed at the time NY Paving negotiated and bid on the Hallen keyhole contract in the fall 2017, ConEd was not enforcing the Labor Clause against the subcontractors (NY Paving) of its (ConEd's) subcontractors (in this case, Hallen). (Tr. 890-91). Indeed, Miceli unequivocally testified at the time NY Paving submitted its bid to Hallen, it expected to continue using members of both Local 1010 and Local 175 to perform the concrete and asphalt portions on keyhole work. (Tr. 890). It was not until after NY Paving received the new keyhole contract from Hallen in or about January 2018 (GC Ex. 19) that it realized said contract included the Standard Terms, including the Labor Clause. (Tr. 888, 890). Because Miceli's testimony on this issue was undisputed, the NLRB's conclusion that NY Paving "chose to enter into a contract ... despite its knowledge of the [Trades-Council] requirement" is as erroneous as it is unsupported by substantial record evidence (or any evidence).

Unlike the NLRB's conclusions, which stemmed from applying the wrong standard, the instant case is no different than the well-established precedents

holding that where the company had no role in a decision made by its customer affecting terms and conditions of the unit employees, the company had no duty to bargain with the union and therefore did not violate Section 8(a)(5) of the Act.

Aside from the existing precedent and undisputed facts, such bargaining would be wholly futile (as the union would have to bargain with ConEd to effectuate a change, not with NY Paving). The law does not require a futile act. *Searfoss v Lehigh Val. R. Co.*, 76 F.2d 762, 763 (2d Cir. 1935). NY Paving played no role in ConEd's decision to start enforcing the Trades-Council requirement on the subcontractors of ConEd's own subcontractor - Hallen. (Tr. 888). In fact, the first time NY Paving realized it would have to comply with the Trades-Council requirement was in January 2018 *after* it received the new keyhole contract from ConEd. (Tr. 888, 890; GC Ex. 19). Because: (i) NY Paving's client, Hallen (and by extension, ConEd, which is the end user) prohibited Local 175 from performing any work on ConEd's projects (GC Ex. 19), (ii) NY Paving did not participate in making that decision (Tr. 888), and (iii) NY Paving contractually committed to perform the work at issue *before* it knew regarding ConEd's enforcement of the Labor Clause on NY Paving (*i.e.*, subcontractor of ConEd's subcontractor Hallen) (Tr. 890), NY Paving had no obligation to bargain with Local 175 regarding same.

Notwithstanding the foregoing, NY Paving did engage in bargaining with Local 175 regarding the assignment of the asphalt portion of the keyhole work to

Local 1010 members. (Tr. 910-13). NY Paving and Local 175 met at least four (4) times, however, no agreement was reached. (Tr. 910-13). For the foregoing reasons, NY Paving was not obligated to (further) bargain with Local 175 regarding the transfer of the keyhole work as mandated by ConEd and Hallen, and therefore, the NLRB's Decision and Order in this regard should not be enforced.

POINT VI

THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD SHOULD NOT BE ENFORCED AS THE WORK INVOLVED IN PERFORMING CODES 49 AND 92 DID NOT CONSTITUTE UNIT WORK AND THEREFORE NY PAVING WAS NOT OBLIGATED TO BARGAIN WITH THE UNION

NY Paving was not obligated to bargain with Local 175 regarding its decision to assign the work involved in performing Codes 49 and 92 to the members of Local 1010. The NLRB's Decision to the contrary is not based on substantial evidence, ignores the applicable Court precedent, and therefore should not be enforced.

Contrary to the NLRB's Decision, Codes 49 and 92 were encompassed by the Board's award of saw cutting and excavation work to the members of Local 1010 in the Section 10(k) Decision (A_-A__). The foregoing conclusion is supported by the Court's decision in *NLRB v. Seedorf Masonry, Inc.*, 812 F.3d 1158 (8th Cir. 2016). In that case, the Counsel alleged the employer violated

Section 8(a)(1) and (5) of the Act by repudiating the collective bargaining agreement and transferring work out of the unit and assigning it to a different union. *Seedorf Masonry, Inc.*, 812 F.3d at 1163. The NLRB affirmed the decision that the employer had violated the Act by assigning work to the wrong union. The Eighth Circuit however, declined to enforce the NLRB's Order because it did not consider the Section 10(k) factors when deciding whether the employer violated the Act when assigning the work at issue. *Id.* at 1169. The Court refused to uphold the finding of repudiation under the circumstances and that Seedorf violated the collective bargaining agreement by assigning work covered by the agreement to the other union. *Id.*

The Court noted the Board's ruling was contrary to the well-recognized principle that, when an employer enters into two (2) contracts with competing unions, the NLRB and courts go beyond the four corners of the agreement and look to the parties' practice, usage, and custom in determining whether the employer violated the Act in assigning the work at issue. *Id.* at 1168-69. In *Seedorf Masonry, Inc.*, because the Counsel did not introduce evidence addressing the question, the record could not support finding that Seedorf violated the agreement by continuing to assign the work to the competing union. *Id.* The Court further noted the Board entered an order that may enrich the charging party union's members for work they were not entitled to perform and would force Seedorf to

pay for work it already properly paid the other union's members to perform. *Id.* at 1169.

Similarly, in this case, the NLRB rendered the decision in the Section 10(k) proceeding awarding certain work, including excavation and saw cutting work, to Local 1010. (Section 10(k) Decision, p. 6). The Codes 49 and 92 fall “squarely” within the Section 10(k) Decision awarding work to Local 1010 because they are the first and essential step in the excavation work. NY Paving did not perform Code 49 work prior to 2018. (Tr. 608, 880-81). Rather, NY Paving started performing the work known as Code 49 *specifically and exclusively* for the purpose of enabling NY Paving to perform saw cutting and eventual excavation. (Tr. 523, 981-82). NY Paving started performing Code 49s in 2018 because of the poor quality of National Grid's backfill after completing its (National Grid's) service work. (Tr. 874-75). After NY Paving's consultation with National Grid, a decision was made to start using a Code 49 from National Grid's contract with NY Paving to designate the process of installing temporary material on the backfilled holes solely for the purpose of safely running a saw on top. (Tr. 879-80).

NY Paving commenced performing Code 49s in 2018 *exclusively* for the purpose of preparing the worksite for saw cutting and eventual excavation:

I'm saying it's part of the dig-out because it's part of the dig-out. I'm saying that the only reason why the 49 is going back is because the

saw can't pass over the hole. So without us doing the asphalt for the saw to go over it, it's all connected to the dig-out. I don't know what you're -- I can't explain it any simpler. It's not a standalone thing. You got to -- the 49 has to get done before you can saw-cut it, before you can -- and after that comes the excavation.

(Tr. 982). NY Paving properly assigned Code 49s (rather than all work involving temporary asphalt or binder work) to the members of Local 1010 because performing Code 49s was the essential and integral first step in accomplishing saw cutting and eventual excavation. After Code 49 was completed, Local 1010 crews saw cut the hole and excavated by digging down twelve (12) to fourteen (14) inches, excavating the dirt, and pouring nine (9) to twelve (12) inches of concrete. (Tr. 577, 623, 878; *see generally* the Section 10(k) Decision). At NY Paving, Code 49s were *always* followed by an excavation and the entire process is completed in five (5) to six (6) days at most. (Tr. 878-79). Because Code 49s were the first step and an integral part of an excavation, this process in its entirety was assigned to members of Local 1010 in accordance with and subsequent to the Section 10(k) Decision. (Tr. 873-78; Section 10(k) Decision, p. 6).

The Board's reliance exclusively on NY Paving's alleged past practice in concluding that Code 49 constituted Local 175's unit work (in the absence of the CBA) was erroneous. Here, no such past practice existed given the fact that NY Paving did not perform Code 49s before 2018 (Tr. 608, 880-81). When NY Paving commenced performing Code 49s in 2018, they were assigned to the

members of Local 1010. (Tr. 880-81). Thus, no alleged past practice warranted the NLRB's conclusion that NY Paving was obligated to assign Code 49s to Local 175.

The NLRB similarly erred in affirming that NY Paving was obligated to bargain with Local 175 prior to assigning Code 92s to Local 1010 members. Code 92s were identical to Code 49s but they are located on sidewalks, which are entirely made from concrete. (Tr. 882-83). Code 92, like Code 49, involved putting down temporary material in the hole so that NY Paving could thereafter saw cut, excavate and restore the sidewalk. (Tr. 881-84). While Code 92s were previously performed by Local 175 (unlike Code 49s), as a result of the Section 10(k) Decision, which affirmed any and all concrete work was within Local 1010's jurisdiction, and because sidewalks are made from concrete, NY Paving started assigning Code 92s to Local 1010 members in the fall 2018. (Tr. 615-16, 873, 881-84).

For the foregoing reasons, the Board's Section 10(k) Decision awarding saw cutting and excavation work to Local 1010 encompassed Codes 49 and 92 because they are the initial and essential steps of excavation work (which was awarded to Local 1010). Given the Board's Section 10(k) Decision, NY Paving had no obligation to bargain with Local 175 regarding the assignment of Codes 49 and 92 to the members of Local 1010 because the work in dispute was awarded to Local

1010 by the Board in its Section 10(k) Decision. Therefore, the NLRB's Decision herein to the contrary was not based on substantial evidence and disregarded its own prior precedent, and therefore should not be enforced.

CONCLUSION

Here, the NLRB acted in an adversarial capacity, excusing Counsel of its consciously made and intentional decision, to deny NY Paving its right to examine evidence. This is akin to the ALJ admitting a document into evidence, but refusing any *voir dire* of same, or for any questions to be asked about such evidence. This is blatant reversible error.

Similarly, the NLRB ignored documentary evidence that proved the Charging Party was fully aware of the alleged unlawful labor practice well more than six (6) months prior to filing its ULP Charge, and therefore well after the statute of limitations had expired under Section 10(b) of the Act.

Further, the NLRB acted in direct contravention of its primary purpose, elevating, at most, a *de minimis* violation to create potentially violent confrontations between rival unions.

Finally, the NLRB was only able to reach its conclusion by ignoring well-settled law, undisputed facts and straightforward logic involving the mandate from ConEd.

For all of the above reasons, NLRB's Decision and Order should not be enforced.

Wherefore, it is respectfully requested that the Petition To Review be granted in its entirety and that Petitioner be awarded such other and further relief as this Court deems just and proper.

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March 2, 2021

Respectfully Submitted,
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