OFFICE OF
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ASIM REHMAN
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

KEVIN F. CASEY
ADMINISTRATIVE LAW JUDGE
212-933-3010

November 18, 2024

Sent via email

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Re: *Office of the Comptroller v. LN Pro Services, LLC & Fleetwash, Inc.,*
OATH Index No. 2376/24 & 2377/24

Dear Counsel:

Enclosed please find my Memorandum Decision in the above-referenced matter.

Sincerely,

Kevin F. Casey
Administrative Law Judge

KFC: jb

Encl.

Office of the Comptroller v. LN Pro Services, LLC & Fleetwash, Inc.

OATH Index Nos. 2376/24 & 2377/24, mem. dec. (Nov. 18, 2024)

Cleaning and disinfecting subway cars inside terminal stations during COVID-19 pandemic was building service work under the Labor Law because the work was performed in connection with the care and maintenance of train stations. Motions to dismiss Comptroller's prevailing wage claims are denied and Comptroller's motion for partial summary judgment is granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
LN PRO SERVICES, LLC & NAYELY DE LA ROSA
Respondents

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
FLEETWASH, INC. & ANTHONY DIGIOVANNI
Respondents

MEMORANDUM DECISION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Office of the Comptroller, brought this action alleging that respondents, LN Pro Services, LLC and Nayely De La Rosa ("LN Pro") and Fleetwash, Inc. and Anthony DiGiovanni ("Fleetwash") failed to pay prevailing wages and supplements to employees who

conducted deep cleaning and disinfecting work of subway cars in three terminal stations in 2020 and 2021 (OATH Index No. 2376/24, Pet. at ¶13; OATH Index No. 2377/24, Pet. at ¶11). *See* Labor Law §§ 231(1), (2) (Lexis 2024) (requiring prevailing wages and supplements to be paid for building service work).

Respondents and intervenor, the New York City Transit Authority ("NYCTA"), move for dismissal of the petitions and contend that cleaning and disinfecting the interiors of subway cars is not "building service work" under Article 9 of the Labor Law (LN Pro Mem., Sept. 6, 2024; NYCTA Mem., Sept. 6, 2024). Opposing dismissal, petitioner moves for partial summary judgment and seeks findings that respondents' workers performed building service work when they cleaned subway cars in terminal stations during the COVID-19 pandemic (Pet. Mem., Sept. 6, 2024; Pet. Mem. in Opposition, Sept. 24, 2024).

For the reasons stated below, respondents' and intervenor's motions for dismissal are denied and petitioner's motion for partial summary judgment is granted.

BACKGROUND

In response to the COVID-19 pandemic, NYCTA contracted with LN Pro in May 2020 to clean and disinfect the interiors of subway cars at the 179th Street Terminal Station - F line in Queens and the Flatbush Avenue Terminal Station - 2/5 lines in Brooklyn (Pet. Mem. at 4; McCann Aff., Ex. C at 19, 21, 42).[1] In June 2020, NYCTA contracted with Fleetwash to clean and disinfect the interiors of subway cars at the 8th Avenue Terminal Station - L line in Manhattan (Donawa Aff., Ex. C at 11, 14, 16). NYCTA separately contracted with respondents to clean and disinfect five subway stations, including a detailed cleaning of the 8th Avenue Terminal Station on the L line (McCann Aff., Ex. E, at 4, 10; Donawa Aff., Ex. E at 2).

On May 18, 2020, the Comptroller wrote to the CEO and Chair of the Metropolitan Transit Authority ("MTA"), of which NYCTA is a subsidiary (Chang Affirmation, Ex. A). The Comptroller wrote that he had determined that Article 9's prevailing wage requirements apply to all of NYCTA's COVID-19 subway cleaning contracts (*Id.*). In March 2021, the Comptroller sent a second letter to the MTA again stating that Article 9's prevailing wage and benefits requirements apply to cleaning and disinfecting subway cars and subway stations (Chang Affirmation, Ex. B). The Comptroller noted the workers who clean subway cars did that work

[1] Page numbers refer to the corresponding PDF pages.

while the cars were in train stations, it was the same type of work as cleaning building interiors, and that "[c]lean, safe, reliable subways are essential to New York City's long-term recovery" (*Id.*).

In May 2021, MTA's general counsel wrote to the Comptroller and stated that the MTA disagreed with the Comptroller's finding that Article 9 of the Labor Law applies to subway car cleaning (Chang Affirmation, Ex. C). In the MTA's view, subway car cleaning does "not pertain to a building" even though "the cars are being cleaned when in station locations" (*Id.*).

After receiving worker complaints, the Comptroller investigated respondents for alleged failure to pay prevailing wages for cleaning and disinfecting subway cars (Chang Affirmation at ¶¶ 6, 7). On November 28, 2023, the Comptroller issued a notice that its investigation concluded that Fleetwash violated Article 9 (NYCTA Mem. at 4). In response, NYCTA and Fleetwash filed an action against the Comptroller in Supreme Court, New York County, for a declaratory judgment on the prevailing wage issue (*Id.* at 4-5). That action is pending, and LN Pro has moved to intervene as a plaintiff (*Id.* at 5).

In February 2024, the Comptroller filed petitions with this tribunal alleging that respondents violated section 230 of the Labor Law by failing to pay prevailing wages to subway car cleaners (OATH Index No. 2376/24, Pet. at ¶17; OATH Index No. 2377/24, Pet. at ¶15). Respondents filed answers and NYCTA received permission to intervene (LN Pro Ans.; Fleetwash Ans.; NYCTA Mem. at 5). This tribunal granted respondents' and intervenor's request to consolidate but denied their request to postpone this proceeding pending the outcome of the state court action (NYCTA Mem. at 5). *See Office of the Comptroller v. LN Pro Services*, OATH Index Nos. 2376/24 & 2377/24, mem. dec. (July 11, 2024). In July 2024, the parties agreed to address, via motions, the threshold question of whether the prevailing wage requirement of Article 9 of the Labor Law applies to workers who cleaned and disinfected subway cars during the pandemic (NYCTA Mem. at 5).

ANALYSIS

New York's Constitution provides that contractors or sub-contractors "engaged in the performance of any public work" must pay prevailing wages to their laborers, workers, or mechanics. N.Y. Const., art. I, § 17. Article 8 of the Labor Law implements the constitutional mandate to pay prevailing wages to laborers, workers, or mechanics who perform construction-

like labor in connection with public works projects. *See* Labor Law § 220(3)(a); *see De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 N.Y.3d 530, 538-39 (2013) (finding company that operates floating dry docks was required to pay prevailing wages to workers who repair, refurbish, and maintain municipal vessels, including the Staten Island Ferry, Fire Department fireboats, and Department of Sanitation garbage barges).

Article 9 of the Labor Law extends the prevailing wage requirement to building service contracts. *See* Labor Law § 231(1). Contractors must pay prevailing wages to service employees for "building service work." *Id.* Building service work is "work performed by a building service employee," including "any person performing work *in connection with* the care or maintenance of an existing building." Labor Law §§ 230(1),(2) (emphasis added). The statute specifies that the term "building service employee" includes, but is not limited to, a "watchman, guard, doorman, building cleaner, porter, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and occupations relating to the collection of garbage or refuse . . . but does not include clerical, sales, professional, technician and related occupations." *Id.*

There is no dispute that a terminal station is a building and a subway car is not (NYCTA Mem. at 9; Pet. Mem. at 9, 11). *See* NYC Zoning Resolution at 12-10 (eff. Dec. 15, 1961) (defining a building as a structure "permanently affixed to the land"); *People v. Chapman*, 611 N.Y.S.2d 991 (Sup. Ct. Bronx Co. 1994) (a boxcar is not a building). The contested issue is whether cleaning and disinfecting subway cars in a terminal station is work performed "in connection with" the care and maintenance of a building (NYCTA Mem. at 9-10; Pet. Mem. at 9). Based on Article 9's text and history, the answer is yes.

It is a "fundamental" precept that, when interpreting a statute, a tribunal "should attempt to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577, 583 (1998). Because the "clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Id.*

"In connection with" is synonymous with "related to" (NYCTA Mem. at 10). *See* https://www.merriam-webster.com/dictionary/in%20connection%20with (last visited Nov. 8, 2024); https://www.oed.com/dictionary/connection_n?tab=meaning_and_use#8559772 (last visited Nov. 8, 2024) (defining "connection" as "The condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in, another"). Courts have repeatedly

held that the phrase "in connection with" should be broadly construed. *See Ramcor Services Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999) (noting that "in connection with" is "very sweeping in scope"); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 84-87 (2006) (giving "broad interpretation" to the phrase "in connection with the purchase or sale of securities" to include fraud that is alleged to "coincide" with a securities transaction based on principles of statutory construction and legislative intent); *Coregis Insurance Co. v. American Health Foundation, Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (finding "in connection with" to be unambiguous and equivalent to "relating to" or "associated with"); *United States v. Rodriguez*, 2015 U.S. Dist. LEXIS 30431, at *17-18 (W.D.N.Y. Mar. 12, 2015) (interpreting "in connection with" more broadly than "arising out of," finding the phrase synonymous with "relating to" or "having something to do with," and noting that contrary reading would render the language superfluous).

A broad reading of "in connection with" comports with the entire text of Article 9. The statute is expansive. It is not limited to building cleaners. Instead, it includes an array of service workers, such as groundskeepers, security guards, window cleaners, janitors, and gardeners.

Article 9's history further supports a broad reading of "in connection with." *See Riley v. County of Broome*, 95 NY2d 455, 463 (2000) (noting that "it is appropriate to examine the legislative history even though the language of [the statute] is clear"). The prevailing wage requirement is rooted in article I, section 17 of the state's constitution. In *Austin v. New York*, 258 N.Y. 113, 117 (1932), Chief Judge Cardozo observed that section 220 of the Labor Law "is an attempt by the state to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view." Section 230 extends those protections to service workers. *See Feher Rubbish Removal, Inc. v. NYS Dep't of Labor*, 28 A.D.3d 1, 6 (4th Dep't 2005) (reviewing legislative history of Article 9 of the Labor Law and noting that "fundamental policy embodied in the bill is that service employees employed by a contractor or subcontractor in the performance of a service contract with a public agency should not be paid sub-standard wages" and it was intended to extend the prevailing wage requirement to service employees "similar to those . . . existing for public work").

In light of the statute's broad wording and history, the cleaning and disinfecting of the interiors of subway cars in terminal stations qualifies as work performed in connection with the

care and maintenance of a building. To begin with, the work was performed while the subway cars were inside buildings. The contracts' "Scope of Work" provisions required adequate staff at terminal stations 24 hours per day, seven days a week, to clean and disinfect the car interiors while the cars were "temporarily staged awaiting their next trip" (Donawa Aff., Ex. C at 16; McCann Aff., Ex. C at 42). Workers were required to "perform cleaning and disinfecting activities" inside the subway cars to prepare them for immediate return to service (Donawa Aff., Ex. C at 18; McCann Aff., Ex. C at 44). The work included cleaning biohazards, such as blood, vomit, urine, and fecal matter, followed by wiping the surfaces with disinfectant solution (Donawa Aff., Ex. C at 19; McCann Aff., Ex. C at 45). Workers were also required to remove refuse and trash from inside the subway cars and remove that material from the "Subway Station Environment" (Donawa Aff., Ex. C at 20; McCann Aff., Ex. C at 46).

Although NYCTA had separate contracts to clean subway stations, that does not mean that cleaning and disinfecting subway cars in the terminal stations was unrelated or unconnected to the care and maintenance of stations. The work was performed in subway cars during a pandemic. As the Comptroller stated in a letter to the MTA, "Clean, safe, reliable subways are essential to New York City's long-term recovery" (Chang Affirmation, Ex. B). To protect its employees and the public, and operate the subway system safely, NYCTA found it necessary to clean the cars and the stations. It is reasonable to infer that cleaning and disinfecting one without the other would be less effective. Cleaner subway cars helped ensure that stations could be used safely, and vice versa. Thus, the cleaning and disinfecting of subway cars was performed in connection with the care and maintenance of the terminal stations.[2]

LN Pro argues that "performing cleaning services within a building is not cleaning of the building itself" and courts have held that security guards who work inside a building are not building services employees under Article 9 (LN Pro Mem. at 3, *citing Pinkwater v. Joseph*, 300 N.Y. 729 (1950); *see also Ansah v. A.W.I. Security & Investigation, Inc.*, 2022 N.Y. Misc. LEXIS 10094 (Sup. Ct. N.Y. Co., Oct. 7, 2022). Those claims are unpersuasive. In *Pinkwater*, decided decades before the enactment of Article 9, the Court held that laundry workers, whose duties included "operating laundry machines, checking, washing, ironing and packing laundry of patients and personnel," did not qualify for prevailing wages under the Labor Law at the time,

[2] Because the plain wording of the statute is unambiguous, there is no need to address the parties' competing claims as to whether the Comptroller's findings are entitled to deference (NYCTA Mem. at 12-14; Comptroller Mem. at 19-20).

which only applied to "laborers, workmen and mechanics employed by the City of New York whose services are performed in connection with the construction, replacement, maintenance and repair of public works." *Pinkwater*, 300 N.Y. at 729. In *Ansah*, the court said that it is "uncertain" whether security guards employed under a construction contract qualified as "building service employees" under Article 9, which applies to work performed "in connection with the care or maintenance of an existing building . . *.for a contractor under a contract with a public agency . . . the principal purpose of which [was] to furnish services through the use of building service employees.*" *Ansah,* 2022 N.Y. Misc. LEXIS 10094 at 20 (emphasis in original). Here, in contrast, the workers were not employed under construction contracts; they performed cleaning work in connection with the care and maintenance of existing buildings.

NYCTA argues that Article 9's prevailing wage requirement does not apply because the cleaning and disinfecting of subway cars is "transient" work that occurs when the cars are temporarily "at rest within the station where they are cleaned;" the work could be performed outdoors or elsewhere in the subway system; and cleaning and disinfecting subway cars "during an ongoing public health emergency, while important to the essential function of the subway train car itself, is not integral to the station's essential access function" (NYCTA Reply at 4, 6, 10-11; NYCTA Mem. at 10-11, 13). In NYCTA's view, paying prevailing wages and benefits to subway car cleaners would lead to an "absurd result," such as requiring prevailing wages for "someone who cleans their bicycle in a train station" (NYCTA Mem. at 10-11). Those arguments are mistaken.

To accept NYCTA's arguments would require rewriting Article 9 to include restrictive terms that are not there. The statute does not exclude "transient" work on structures that are "temporarily" inside a building and a contractor cannot add those terms to avoid the prevailing wage requirement. *See Feher Rubbish Removal, Inc.*, 28 A.D.3d at 5-6 (finding that Article 9 applies to refuse collection from private buildings, noting that the statute does not distinguish between private and public buildings). If the legislature intended to exclude such work from the protections of Article 9, it could have used language to clarify the "in connection with" to narrow its scope or it could have used a different more restrictive phrase.

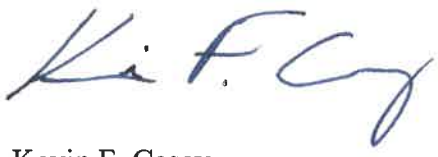
The statute is also not limited to work performed inside of a building. *See Matter of Murphy's Disposal Servs. v. Gardner*, 103 A.D.3d 1015, 1016 (3d Dep't 2013) (finding a willful violation of Article 9 where contractor failed to pay prevailing wages to workers who collected

leaves and yard waste for a public agency even though prevailing wage schedule was not attached to the contract). Contrary to NYCTA's argument, nothing in Article 9 excludes work performed inside a building because the work could have been performed elsewhere. Such a reading ignores the statute's plain wording, which specifically includes work performed "in connection with" building care and maintenance.

Similarly, the statute does not, as NYCTA suggests, only apply to work that is "integral" to a building's "essential" function. None of those terms are in Article 9. For the prevailing wage requirement to apply, the work only has to be related to the care and maintenance of a building. Even if the statute did include a requirement that work had to be integral to the essential function of a building, the cleaning and disinfecting of subway cars during the pandemic meets that test. As the Comptroller noted in his letter to the MTA, "[c]lean, safe, reliable subways are essential to New York City's long-term recovery" (Chang Affirmation, Ex. B). The purpose of a subway station is to enable riders to board trains. Cleaning and disinfecting subway cars encourages riders to use the trains, which, in turn, enables stations to serve their purpose.

Requiring contractors to pay prevailing wages to workers who clean and disinfect subway cars inside a terminal station does not, as NYCTA claims, lead to an absurd result. This case is not about a hypothetical worker cleaning a bicycle in a train station. It is about workers who performed an essential public service during a pandemic. Cleaning and disinfecting subway cars inside a terminal station related to the station's function because it enabled NYCTA passengers and employees to use the cars and stations safely. Other workers performed the same tasks on subway platforms. Under these circumstances, the text and history of Article 9 mandates that both sets of workers, performing similar tasks, should both receive prevailing wages.

Accordingly, respondents' and NYCTA's motion to dismiss is denied, and petitioner's motion for partial summary judgment is granted.



Kevin F. Casey
Administrative Law Judge

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