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**New York Paving, Inc. *and* Construction Council Local 175, Utility Workers Union of America, AFL–CIO.** Case 29–CA–254799

September 26, 2022

DECISION AND ORDER

BY MEMBERS RING, WILCOX, AND PROUTY

On July 8, 2021, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the attached Order as modified and set forth in full below.[3]

We adopt the judge's well-reasoned finding that New York Paving, Inc. (Respondent) violated Section 8(a)(3) and (1) of the Act by laying off bargaining unit employees in retaliation for the Union's filing of a contractual grievance regarding the Respondent's failure to maintain minimum crew sizes as required by the parties' collective-bargaining agreement. Contrary to arguments of the Respondent and our dissenting colleague, we agree with the judge for the reasons in her decision, as discussed below, that the Respondent's layoff notice provided direct evidence of its unlawful motivation and that the record contains ample circumstantial evidence of animus to support the General Counsel's initial burden. We further agree that the Respondent did not meet its burden of showing that it would have laid off the bargaining unit employees in the absence of their protected conduct.

I. FACTS

The Respondent provides asphalt and concrete paving repair services to utility companies in New York City. The Respondent employs workers represented by Local 175 (asphalt pavers) and Local 1010, District Council of Pavers and Builders, LIUNA, AFL–CIO (concrete pavers). Since 2007, Local 175 has been the 9(a) representative for the Respondent's asphalt paving employees' unit. The Respondent was a member of the New York Independent Contractors Alliance, Inc. (NYICA), and bound by NYICA's collective-bargaining agreement with Local 175 in effect from July 1, 2014 through June 30, 2017. The NYICA agreement was extended by mutual agreement through June 30, 2018, at which point the Respondent withdrew from NYICA. Since that time, Local 175 and the Respondent have been in ongoing negotiations to reach a successor collective-bargaining agreement.

A brief recitation of the parties' prior litigation provides necessary background for this dispute. In April 2017, Local 1010 filed a petition to represent the Respondent's asphalt employees, challenging the representational status of Local 175. Local 175 filed unfair labor practice charges against the Respondent blocking Local 1010's petition, and the General Counsel issued a consolidated complaint. Following a hearing, Administrative Law Judge Andrew S. Gollin found that the Respondent unlawfully urged employees to support Local 1010 and threatened employees with job loss if they did not sign authorization cards. See *New York Paving, Inc.*, 2019 WL 2208710 (May 20, 2019) (adopting judge's decision in absence of exceptions; hereinafter *NYP 1*). Local 175 filed additional unfair labor practice charges against the Respondent in early 2019, resulting in the issuance of another consolidated complaint. Administrative Law Judge Lauren Esposito found the Respondent unlawfully transferred emergency and

[1] The Respondent has excepted to some of the judge's evidentiary rulings. After a review of the record, we affirm the judge's rulings, as the Respondent has not met its burden of showing that the judge abused her discretion. See, e.g., *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008).

The Respondent also argues that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As discussed herein, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by laying off unit employees in retaliation for Local 175's crew size grievance. We also adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to give Local 175 notice and an opportunity to bargain over the effects of the layoff. To the extent the judge's Conclusions of Law suggest that the Respondent's announcement of the layoffs separately violated the Act, we find it unnecessary to pass on this additional conclusion because it would not materially affect the remedy.

[3] We have modified the judge's recommended Order to conform to her unfair labor practice findings, our standard remedial language, and in accordance with our decisions in *Cascades Containerboard Packaging--Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), and *Paragon Systems Inc.*, 371 NLRB No. 104, slip op. at 3 (2022). We shall also substitute a new notice to conform to the Order as modified.

temporary paving work from Local 175 to Local 1010 without giving Local 175 notice and opportunity to bargain in violation of Section 8(a)(5) and (1) of the Act, and the Board affirmed that finding. *New York Paving, Inc*., 370 NLRB No. 44 (2020), enfd. per curiam 2021 WL 6102199 (D.C. Cir. 2021) (*NYP 2*).[4]

### *A. Arbitrator Nadelbach's Award and Subsequent Negotiations*

On March 28, 2018, Local 175 filed a grievance alleging that the Respondent failed to comply with contractual crew size requirements that mandated a crew of 10 employees—7 "top-coat" asphalt workers and 3 employees on the "binder crew" (hereinafter "7/3")—to perform its sidewalk repair work.[5] It is undisputed that for 15–20 years prior the Respondent had been using a 4/2 crew. The Respondent argued before the arbitrator that the past practice overrode the contractual terms. On April 29, 2019, Arbitrator Jay Nadelbach issued an award and opinion sustaining Local 175's grievance. Thereafter, Nadelbach gave the parties 90 days to discuss an appropriate remedy and damages. The parties were to return to Nadelbach if they were unable to reach agreement. After meeting several times, the parties failed to reach agreement, and the arbitrator scheduled a damages hearing for October 25, 2019.

During the damages hearing, Local 175's attorney, Matthew Rocco, presented his calculations of damages owed to the Union because of the Respondent's failure to use a 7/3 crew. The Respondent's director of operations, Peter Miceli, testified that there was a "100 percent" chance that employees and foremen would be laid off and overtime would be reduced with the implementation of the 7/3 crew sizes. Miceli also testified about the possible implementation of a "bundling" system devised to implement the larger crew size efficiently by holding work until it could be grouped together to justify the larger crew size. Miceli acknowledged that he had spoken to Operations Manager Robert Zaremski and the Respondent's General Counsel Bob Coletti about implementation. Following the hearing, the parties continued to have informal settlement discussions but did not reach a resolution.

### *B. The Respondent's Announcement of Asphalt Operations Shutdown; Prior Seasonal Layoffs; and the Respondent's Implementation of the 7/3 Crew*

On December 20, 2019, the Respondent held a foremen's meeting with approximately 30 foremen and supervisors from both Local 175 and Local 1010. During this meeting, Director of Operations Miceli announced the retirement of Zaremski. General Counsel Coletti informed the group that because of the arbitration ruling, the Respondent would let work build up and perform it in "clusters" (also known as "bundling") instead of performing the work as it came in. Without explaining why, Coletti predicted that the bundling would result in temporary and permanent layoffs as well as demotion for some foremen. The Respondent regularly had seasonal layoffs every winter. However, it had never announced those layoffs at a foremen's meeting.

On the same day, the Respondent distributed the following written notice to its asphalt paving workers, including a copy in the envelope with their last paychecks:

> Questions and Answers about
>
> New York Paving's
>
> Shutdown of Asphalt Operations
>
> New York Paving has decided to shutdown asphalt operations and *lay off nearly all asphalt paving workers* until March 2020 and possibly longer. We know you have questions and we want you to know *the truth* about the future of asphalt paving at New York Paving.
>
> Q. Why is New York Paving suspending asphalt paving operations?
>
> A. For two reasons. First, New York Paving's asphalt supervisor, Rob Zaremski, is retiring as of December 20, 2019. We wish Rob well! With Rob gone, we lack a supervisor to run the asphalt paving division. Also, and *more importantly*, Local 175 forced New York Paving to make *major changes* to our asphalt paving operations, even though our operations have been the same for decades and are accepted industry standards.
>
> Q. How did Local 175 force New York Paving to change its asphalt paving operations?
>
> A. Local 175 filed many grievances and arbitrations against New York Paving. In one of those arbitrations, Local 175 obtained a decision which will force New York Paving to completely change the way

[4] Additionally, Local 175 and the Respondent were tangentially involved in two federal lawsuits before at the time of the hearing in the instant case: (1) a Fair Labor Standards Act lawsuit filed by a group of individual employees to recoup unpaid wages resulting from the Respondent's failure to pay employees for travel time to and from jobsites; and (2) an ERISA lawsuit filed by the Local 175 retirement/benefit fund administrators seeking unpaid contributions from the Respondent.

[5] The binder crew's duties include placing binder or rough asphalt inside the holes left by the utility company as a base or temporary surface. The "top" crew then pours asphalt on the top of the filled hole to create a finished surface on the sidewalk or street. The Respondent ordinarily employs between 50–55 employees in its asphalt paving division.

we assign asphalt paving work and how we assign asphalt paving work crews.

Q. What happens if New York Paving hires a new asphalt paving supervisor? Does that mean we all go back to work like normal?

A. Unfortunately, no. Until the arbitration decision is reversed, we can't return to "business as usual" because Local 175 won't allow us to follow industry standard practices anymore. Even worse, if and when we restart asphalt paving operations, we *still aren't going to be able to bring back all of our workers!* Because of the changes Local 175 has forced on us, we expect to employ fewer supervisors and asphalt paving workers than we currently employ.

Q. Did New York Paving tell Local 175 its actions would cause layoffs? What was their reaction? Did Local 175 object?

A. We *repeatedly warned* Local 175 that its efforts to force us to change our industry-standard asphalt paving practices would cause temporary and permanent layoffs. It appeared to New York Paving Local 175 did not care that its actions would lead to the lay-off of its own members.

New York Paving is sorry many of you and your families will be harmed by Local 175's *deliberate efforts* to interfere with our industry-standard asphalt paving operations. Unfortunately, it seems New York Paving is the *only one* that cares. We wish you and your families well in the holiday season, and hope Local 175 will stop trying to hurt your jobs at New York Paving and start putting its members first in 2020. (Emphasis in original.)

The Respondent had never before issued a written layoff announcement in connection with the annual seasonal slowdowns of work. Miceli testified that the announcement was issued because "there was going to be extreme changes to the operation." Because operations would be totally different, he believed asphalt workers should know "this wasn't going to be a just a normal layoff for the wintertime."

By January 2020, the Respondent had laid off 35 of 50 asphalt employees. Dues remittance reports show that, in the 3 years preceding the 2019 layoffs, the Respondent's layoffs from December to January had averaged only five to eight employees. Included within the 2019 layoffs were the majority of the foremen—a position that had previously been spared during layoffs. While the Respondent, later (and in litigation) attributed the December 20 layoff in part to a routine "seasonal" decline in work due to the colder weather, the meteorological evidence showed that the January/February winter of 2020 in New York City was far milder than prior years.

The Respondent started sending out binder crews comprised of three asphalt paving workers during the first week of January 2020. Miceli testified that the crew sizes required pursuant to the arbitration award were fully implemented as of January 1, 2020. The Respondent began sending out top crews consisting of seven asphalt paving workers during the second or third week of February.

## II. ANALYSIS

We agree with the judge for the reasons she set forth, as discussed below, that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off 35 of 50 bargaining unit employees in retaliation for Local 175's contractual grievance regarding crew size.

To sustain a finding of discrimination, the General Counsel must make an initial showing that the employees' protected activity was a motivating factor in the employer's adverse employment decision. The General Counsel meets this burden by showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); see also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019).[6] Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

We find, consistent with the judge and contrary to the Respondent and our dissenting colleague, that the *Wright Line* element of animus is established. The Board in *Tschiggfrie Properties* confirmed that evidence of animus may be established by direct or circumstantial evidence. 368 NLRB No. 120, slip op. at 8 ("We continue to adhere to the Board's longstanding principle that proof of

[6] In finding that the Respondent violated Sec. 8(a)(3) and (1), the judge applied *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), in which the Board held that there must be a causal relationship between the employee's protected activity and the employer's adverse action. Member Wilcox notes her agreement with Chairman McFerran's concurring opinion in *Tschiggfrie*, wherein she found the majority's "clarification" of *Wright Line* principles was unnecessary as the "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." Id., slip op. at 10.

Member Prouty agrees with his colleagues that, applying well-established Board precedent, the Respondent violated the Act as alleged. Because *Tschiggfrie*'s "clarification" of *Wright Line*'s principles does not alter that conclusion, Member Prouty expresses no view on *Tschiggfrie*, in which he did not participate.

discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.")(internal quotation omitted).

To begin, the Respondent does not except to the judge's finding that the Union, on behalf of its member employees, was engaged in Section 7 activity by filing a grievance on behalf of its members. [7] Similarly, the judge's finding that the Respondent had knowledge of such activity was not disputed.

Turning to the issue of animus, we find that the Respondent's December 20 layoff notice amounts to direct evidence of animus.[8] In three separate portions of the layoff notice, the Respondent blamed Local 175's grievance for the shutdown of its asphalt operations. First, the notice blamed Local 175 for "forc[ing] New York Paving to make *major changes* to our asphalt paving operations, even though our operations have been the same for decades and are accepted industry standards." The Respondent further linked the implementation of the arbitration award (i.e., the 7/3 crew size) to the suspension of its asphalt operations and predicted that it would "employ fewer supervisors and asphalt paving workers than we currently employ." Finally, the Respondent simultaneously expressed regret for the layoffs, while also blaming "Local 175's *deliberate efforts* to interfere with our industry-standard asphalt paving operations." (Emphasis in original.) The statements leave no doubt that the Respondent undertook the layoff in retaliation for the Local 175's lawful pursuit of a grievance to enforce language in the collective-bargaining agreement.[9]

Contrary to our dissenting colleague, we find that the Respondent's threats to lay off employees in response to Local 175's grievance are not protected by Section 8(c) of the Act. Section 8(c) provides that expressing views, arguments or opinions "shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); see also *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008). Thus, while Section 8(c) protects an employer's noncoercive statements of opposition to unions or unionization, it does not protect an employer's explicit or implicit threats of reprisal or predictions of future consequences resulting from protected union conduct. This is particularly true where the employer's implicit threat concerns a matter within the employer's control. See *NLRB v. Gissel Packing Co*., 395 U.S. 575, 589, 618 (1969) (statements regarding benefits would not count as threats where such statements are "carefully phrased on the basis of objective fact to convey an employer's belief as to *demonstrably probable consequences beyond his control.*") (emphasis added).

Here, the shutdown notice predicted potentially permanent layoffs for bargaining unit employees—an action solely within the Respondent's control. In the layoff notice, the Respondent wrote: "[b]ecause of the changes Local 175 has forced on us, we expect to employ fewer supervisors and asphalt paving workers than we currently employ." In the absence of an explanation, based on objective fact, of how the staffing changes would lead to the need for permanent layoffs, the Respondent's statements crossed the line from "merely predicting economic consequences of unionization" to threats of reprisal.[10] *Poly-America, Inc*., 328 NLRB 667, 669 (1999) (employer's statements that the union would cause the employer to lower wages and other benefits "crossed the line" into unlawful threat), enfd in rel. part, 260 F.3d 465 (5th Cir. 2001). Accordingly, Section 8(c) does not preclude reliance on the shutdown notice as evidence of animus.

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[7] Our dissenting colleague attempts to bring into dispute the issue of whether employees were engaged in protected concerted activity and argues that "neither the judge nor the majority points to any protected activity *by employees*." First, the Respondent does not except to the judge's clear findings on this element, so the issue is not before us. Second, as the judge found, the General Counsel need not demonstrate that the employees supported the Union's pursuit of a grievance on their behalf, or even that they were aware of the grievance. See *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003) (finding that a union agent was engaged in protected concerted activity on behalf of employees when he "initiated grievances and complaints on their behalf while he was attempting to enforce what he believed . . . were the applicable collective-bargaining agreements.") It is black-letter law that a union's pursuit of a grievance is protected concerted conduct on behalf of its membership. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984) ("No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7."). Indeed, "[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Id. at 831–832.

[8] See, e.g., *Glades Electric Cooperative, Inc.*, 366 NLRB No. 112, slip op. at 15 (2018) ("[t]he Board repeatedly has held that an employer violates [the Act], when it asserts that an employee's or union's protected activity is the cause of a layoff."); see also *Joseph Stallone Electrical Contractors*, 337 NLRB 1139, 1139 (2002) (employer unlawfully linked an employee's layoff to union pursuit of grievances); *Aero Metal Forms*, 310 NLRB 397, 400 (1993) (supervisor's comment unlawfully linked employee's layoff to union activity of a relative and was proof of animus).

[9] Additionally, the manner in which the mass layoff was announced—at a meeting including all foremen and in a letter attached to every employee's final paycheck—undercuts its assertions that the layoff were consistent with past years. In prior years, foremen had not been included in the seasonal layoffs, nor had employees been notified of layoffs with a letter indicating the possibility that the layoffs would be permanent.

[10] This threatening prediction may well have constituted a separate 8(a)(1) violation; however, this was not alleged in the complaint, so we decline to find an independent violation.

Independent of the direct evidence in the shutdown notice, we also agree with the judge's finding that there was sufficient circumstantial evidence of the Respondent's animus to meet the General Counsel's initial burden. First, contrary to the dissent, we find that the judge properly relied on the Respondent's unlawful conduct in two prior cases (see *NYP 1* and *2*, above) involving identical actors and similar allegations. The prior litigation, which occurred from 2017–2019, involved the Respondent's unlawful assistance of rival union Local 1010 in its representation efforts in violation of Section 8(a)(2) and (1) of the Act (*NYP 1*),[11] and the unlawful transfer of work from Local 175 to employees represented by Local 1010, in violation of Section 8(a)(5) and (1) of the Act (*NYP 2*).[12] Collectively, these cases show the Respondent has a history of animus toward the employees' support of Local 175. We disagree with our dissenting colleague that prior cases are only relevant if the Respondent's violations are directed at union activity substantially similar to the case at hand. Here, although the protected activity is not the same as in the prior cases, those cases nevertheless show a pattern of the Respondent's attempts to weaken the bargaining unit by assigning unit work to employees outside the unit and actively organizing for a rival union. This is plainly relevant here, where the Respondent again tried to weaken support of Local 175 by laying off employees and blaming the Union. We find that the Respondent's years-long unlawful campaign to rid itself of Local 175 is evidence of animus.[13]

Further, the Respondent's shifting justifications for the mass layoff provide additional compelling evidence of animus. The December 20 layoff notification originally attributed the layoffs to the implementation of the arbitration award and Zaremski's retirement, with no mention of seasonal layoffs. On January 30, over a month later, and after Local 175 had filed unfair labor practice charges, the Respondent attributed the layoffs to a seasonal slowdown consistent with its past practice. The January letter did not mention the arbitration award. In its February 18, 2020, position statement to Region 29, the Respondent again argued that the layoffs were "unrelated to" the April 29 award and were instead attributable to "the usual 'slow down' in business associated with the winter months," a slowdown "which was compounded" by Zaremski's retirement. The Respondent's inability to settle on a consistent reason for the shutdown of the asphalt operations further bolsters the judge's finding of animus.[14]

Accordingly, we find that the General Counsel met her initial burden to show that animus was a motiving factor in the Respondent's decision to lay off employees in response to Local 175's successful grievance regarding crew size. The burden therefore shifts to the Respondent to show that the layoffs would have occurred even absent the protected conduct. The Respondent asserted three nondiscriminatory reasons for the layoffs: (1) the retirement of Zaremski; (2) the seasonal slowdown; and (3) the implementation of the arbitration award requiring changes in its operations. However, even a cursory investigation into these justifications reveals their pretextual nature.

First, the Respondent failed to connect Zaremski's retirement to the need for such a large-scale layoff. The Respondent asserted that additional training would be required for Patrick Figarole to officially fill Zaremski's position, but the evidence shows that Figarole had been serving as Zaremski's assistant for 24 years and had

[11] In the absence of exceptions, the Board adopted the judge's decision in *NYP 1;* accordingly, we do not rely on the decision as precedential legal authority. Nevertheless, it is well established that the Board can rely on prior decisions which involve the same parties and similar issues to establish animus. *See Moulton Mfg. Co*., 152 NLRB 196, 207–209 (1965) (rejecting the argument that judge's decisions adopted by the Board in the absence of exceptions should be given no more effect than a settlement agreement); *Professional Medical Transport, Inc*., 362 NLRB 144, 149, 151, fn. 16, 21 (2015) (relying on prior judge's decision for evidence of animus despite the Board's adoption of that decision in the absence of exceptions).

[12] As noted by the judge, this prior litigation became directly relevant to this case during the course of settlement negotiations. On October 25, 2019, Farrell suggested that the Respondent would return the unlawfully transferred work to the Local 175 bargaining unit as part of an overall "deal."

[13] See *Roemer Industries*, 367 NLRB No. 133, slip op. at 16 (2019) (referencing prior Board decision as providing "background evidence of animus for this case."), enfd. 824 Fed.Appx. 396 (6th Cir. 2020); *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 393, 395 (1998) (finding prior unfair labor practices relevant where "Respondent's conduct was directed at the very same union activity that was involved in the prior case"), enfd. 215 F.3d 1327 (6th Cir. 2000).

[14] We disagree with our dissenting colleague's characterization of our "shifting reason" rationale. As noted by the Board in *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 16 (2020), the Board may infer discriminatory motive from circumstantial factors including whether the asserted reasons for the adverse action are a pretext and that pretext may be demonstrated by "asserting a reason that is false or providing shifting explanations for an adverse action." In this case, the Respondent's initial failure to mention the seasonal slowdowns as a justification for the layoff, followed by its later reliance on that factor, coupled with its change of position regarding the arbitration award as a cause of the layoff, provide precisely the type of evidence required to demonstrate shifting reasons. Accordingly, the dissent's reliance *on Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 4 (2020), where the Board found that the employer did not shift its reasons but merely characterized the same misconduct by the employee in two different ways, is misplaced. We have not applied a "rigid and formalistic invocation of the shifting-reasons rationale" as our colleague asserts. Instead, we have found that the Respondent first blamed the Union for the layoffs and only after the Union filed an unfair labor practice charge did the Respondent attempt to portray the layoffs as typical seasonal layoffs—eschewing mention of the arbitration award as grounds for the layoffs.

functioned for years as an operations manager in Zaremski's absence.

Second, the Respondent failed to show that such a large-scale layoff was necessitated by the seasonal slowdown in work. In each of the 4 years prior to the 2019 layoffs, the Respondent had laid off only five to eight employees in the asphalt unit because of the seasonal slowdowns. By contrast, the Respondent laid off 35 employees during the winter of 2019–2020. Further, prior to 2019, the Respondent distributed the work more broadly so as to avoid large-scale layoffs. By contrast, here, the Respondent, without explanation, deviated from this practice by retaining a far smaller number of employees. Also, cutting against the Respondent's seasonal slowdown defense is evidence showing that the weather was warmer in the winter of 2019–2020 than it had been in past 2 years. Such deviations from past practice with respect to the size, scope and permanency of the layoffs fail to show that the Respondent would have taken the same action even absent Local 175's grievance.[15]

Moreover, and contrary to the dissent's suggestion, the Respondent has not shown that the implementation of the crew size award necessitated the layoffs for economic reasons. The Respondent argued that it was required to save up work so that it could assign the larger 7/3 crew to a cluster of work at once (so-called "bundling"), resulting in a need for fewer employees. However, the Respondent failed to produce evidence corroborating its defense, such as financial information demonstrating that the implementation of this new system created financial hardship justifying the layoffs. This evidentiary void, as the judge noted, must result in the Board's rejection of the Respondent's financial hardship defense. See, e.g., *Valley Slurry Seal Co.*, 343 NLRB 233, 250 (2004) (requiring employers to offer "some independent corroborating proof" of "extraordinary conditions in its business that would necessitate layoffs") (quoting *Power Equipment Co.*, supra)).

In sum, we find that the Respondent has not shown by a preponderance of the evidence that it would have laid off nearly the entire bargaining unit for legitimate, nondiscriminatory reasons. Accordingly, we find that the Respondent's December 2019/January 2020 layoff of bargaining unit employees violated Section 8(a)(3) and (1) of the Act.

## ORDER

The National Labor Relations Board orders that the Respondent, New York Paving, Inc., Long Island City, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Laying off employees because of their support for and activities on behalf of Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175).

(b) Laying off employees in the following appropriate unit without providing Local 175 with notice and the opportunity to bargain regarding the effects of its decision:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi,

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[15] See *Power Equipment Co.*, 330 NLRB 70, 75 (1999), enfd. 242 F.3d 371 (3rd Cir. 2000) (table) (layoff suspect where employer had traditionally found ways to avoid layoff by redistributing work); *Gurabo Lace Mills, Inc.*, 265 NLRB 355, 363 (1982) (layoff defense contravened by evidence that in the past the employer "would reduce the total hours worked by employees when production was slow" rather than laying employees off).

The dissent attempts to distinguish the above-cited cases on the grounds that in those cases the Board considered deviation from past practice as part of the analysis of the respondent's *Wright Line* defense, whereas here, the judge considered this evidence as part of the General Counsel's initial *Wright Line* case. But because the Board can consider deviation from prior practice as circumstantial evidence of discriminatory intent, it can be weighed as part of the initial case. See *Amerinox Processing, Inc*., 371 NLRB No. 105, slip op. at 19 (2022) (circumstantial evidence of discriminatory motivation may include evidence of "departures from past practices"). Alternatively, the Board can consider deviation from past practice in evaluating a respondent's *Wright Line* defense assertions that it would have taken the adverse action even in the absence of protected activity because of proffered nondiscriminatory reasons for the adverse action. Here, we use this evidence only to evaluate the Respondent's *Wright Line* defense.

Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong.

(b) Make John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date that the amount of backpay is fixed, by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong, and within 3 days thereafter, notify these employees in writing that this has been done and that the layoffs will not be used against them in any way.

(f) On request, bargain with Local 175 regarding the effects of its decision to shut down asphalt paving operations and lay off unit employees.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees

[16] If the facility involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 26, 2022

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting in part.

I join my colleagues in affirming the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off its asphalt-paving employees without affording Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175 or the Union) a meaningful opportunity to bargain with respect to the effects of the layoff. However, for the reasons explained below, I would reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by laying off the asphalt-paving employees. In my view, the General Counsel failed to sustain his[1] burden of proving that animus against union activity was a motivating factor in the Respondent's decision to implement the layoff.

Facts

The Respondent provides asphalt- and concrete-paving services for utility companies in New York City. Since 2007, the Union has represented the Respondent's employees who perform asphalt-paving work.[2] On March 28, 2018, the Union filed a contractual grievance alleging that the Respondent had been failing to comply with a minimum crew-size requirement for certain asphalt-paving work. The parties' collective-bargaining agreement required the Respondent to use 10-man crews—7 "top-coat" and 3 "binder crew" employees—to perform that work. It is undisputed that in practice, this contractual provision was ignored. For 15 to 20 years prior, the Respondent, like its competitors, had been using 6-man crews, 4 "top-coat" employees and 2 on the binder crew. During all those years, the Union had never claimed that the Respondent was breaching their agreement by using 6-man crews.

The crew-size grievance proceeded to arbitration before Arbitrator Jay Nadelbach, and on April 29, 2019, Arbitrator Nadelbach issued an award and opinion sustaining the Union's grievance. Thereafter, Arbitrator Nadelbach gave the parties time to discuss an appropriate remedy and damages. The parties subsequently discussed the crew-size grievance and the arbitrator's award in the context of a global settlement of all labor issues between them,[3] but they were unable to reach an agreement. Arbitrator Nadelbach held a hearing on damages on October 25, 2019, but the parties asked him to reserve decision while they continued to discuss a global settlement.[4] However, the Union decided against further delay in the arbitral proceeding,[5] and on December 20, 2019, the Union requested Arbitrator Nadelbach to issue a decision on damages.[6]

On December 20, 2019, the Respondent held a meeting with about 30 foremen and supervisors from Local 175 and Local 1010. During this meeting, Miceli announced the retirement of Operations Manager Robert Zaremski, who was in charge of asphalt-paving work. General Counsel Bob Coletti informed the group that because of the arbitration ruling, the Respondent would let the work

[1] Complaint issued and the hearing was held when Peter Robb was General Counsel, and the case was briefed to the judge by counsel for former Acting General Counsel Peter Sung Ohr.

[2] On April 28, 2017, Local 1010, District Council of Pavers and Builders, LIUNA, AFL–CIO (Local 1010) filed a petition to represent the Respondent's asphalt-paving employees. Shortly thereafter, the Region held the petition in abeyance pending investigation of the Union's unfair labor practice charge under then-extant policy.

[3] The issues included the parties' ongoing negotiations over a successor collective-bargaining agreement, their dispute over whether the Respondent had breached a multiemployer collective-bargaining agreement (to which the Respondent claimed it was not bound) by failing to increase the unit employees' wage and benefit rate, and the Respondent's transfer of certain asphalt-paving work to Local 1010.

[4] At the hearing, Union Attorney Matthew Rocco argued for damages in the millions. Respondent's attorney, Jonathan Farrell, argued that the use of six-man crews had increased employment for the unit employees. Director of Operations Peter Miceli testified that if 10-man crews had to be used, there was a 100 percent chance that employees and foremen would be laid off.

[5] On December 5, 2019, Local 175 benefit funds filed an ERISA complaint seeking unpaid contributions relating to the Respondent's assignment of bargaining unit work to non-unit employees and its failure to use 10-man crews.

[6] On June 4, 2020, the arbitrator awarded the Union approximately $2.7 million.

build up and perform it in clusters instead of sending out crews to do the work as it came in. Coletti further stated that as a result, some employees would be laid off temporarily, some would be laid off permanently, and some foremen would be demoted.

On the same day, December 20, the Respondent distributed to its asphalt-paving workers a written notice stating that it was suspending asphalt-paving operations for two reasons. First, with Zaremski's retirement, the Respondent "lack[ed] a supervisor to run the asphalt paving division." Second, and "*more importantly*," an arbitration decision the Union had obtained "forced [the Respondent] to make *major changes* to [its] asphalt paving operations, even though [its] operations ha[d] been the same for decades and [were] accepted industry standards." The notice further stated that because the Union would not "allow [the Respondent] to follow industry standard practices anymore," it couldn't "return to 'business as usual'" even if it hired a new supervisor, and it "expect[ed] to employ fewer supervisors and asphalt paving workers than [it] currently employ[ed]." The notice added that the Respondent "was sorry many of you and your families will be harmed by [the Union]'s *deliberate efforts* to interfere with [Respondent's] industry-standard asphalt paving operations."

Following the layoff notice, the Respondent laid off about 35 asphalt-paving employees, including almost all foremen.[7] It also implemented the arbitrator's award. During the first week of January 2020, the Respondent started sending out three-man binder crews, and in the second or third week of February 2020, it began sending out seven-man top crews. Many of the laid-off unit employees were recalled in February and March 2020.

Applying *Wright Line*,[8] the judge found that the General Counsel met his burden of establishing a prima facie case that the Respondent violated Section 8(a)(3) and (1) when it laid off its asphalt-paving workers. The judge first found that the Union's filing of the crew-size grievance and its prosecution of the grievance through arbitration constituted protected activity, and that the Respondent was aware of this activity. The judge also found that animus against this protected activity was a motivating factor in the Respondent's decision to lay off unit employees. The judge further found that the Respondent's proffered explanations for the layoffs did not satisfy its *Wright Line* defense burden. My colleagues adopt and expand on the judge's findings. In particular, the majority bases their finding of animus on (1) the language of the December 20 layoff notice, (2) prior unfair labor practice cases involving the Respondent, and (3) purported shifting justifications for the layoff.[9]

Discussion

To establish that the layoffs violated Section 8(a)(3) under *Wright Line*, the General Counsel must initially show that employees' union activity was a motivating factor in the Respondent's layoff decision. Contrary to the judge and my colleagues, I believe the General Counsel failed to sustain this burden.

In *Wright Line*, the Board formulated a standard for determining "whether an employee's employment conditions were adversely affected by *his or her* engaging in union or other protected activities and, if so, whether the employer's action was motivated by such *employee* activities." 251 NLRB at 1083 (emphasis added). But neither the judge nor the majority points to any protected activity *by employees* that motivated the Respondent's layoff decision. My colleagues cite no evidence that any unit employee took issue with the Respondent's decades-long use of six-man crews, that one or more unit employees asked Local 175 to file the grievance, that Local 175 put whether to file the grievance to a vote by unit employees, or that unit employees manifested that they supported the grievance in any other way. Indeed, my colleagues cite no evidence that the unit employees were even *aware* of the crew-size grievance, and the December 20 layoff notice—quoted in full in the majority opinion—indicates that the Respondent took it for granted that they were not aware of it. That notice *informed* employees of Local 175's grievance. Accordingly, and contrary to the majority, the December 20 notice is not evidence of animus against unit employees' protected activity.[10]

[7] Prior to 2019, the Respondent generally laid off five to eight employees during the seasonal slowdown in the winter months. It also avoided laying off foremen by sending out crews comprised of foremen or offering the available work to foremen first. Miceli testified that he decided against doing so in 2020 because the foremen received higher wages.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[9] Unlike the judge, the majority does not rely on the Respondent's departure from its usual seasonal-layoff practice as evidence supporting the General Counsel's initial *Wright Line* burden.

[10] *Glades Electric Cooperative, Inc.*, 366 NLRB No. 112 (2018); *Joseph Stallone Electrical Contractors*, 337 NLRB 1139 (2002); and *Aero Metal Forms*, 310 NLRB 397 (1993), cited by the majority, are distinguishable. In those cases, the employer either blamed the union for its decision to lay off two employees after it unlawfully eliminated the unit classification in which they formerly worked, *Glades Electric Cooperative*, 366 NLRB No. 112, slip op. at 14–18, made clear that the layoff of an employee was linked to protected activity by other employees, *Joseph Stallone Electrical Contractors*, 337 NLRB at 1139, or essentially admitted to an employee that another employee was laid off due to his family relation to "a big shot in the [u]nion," *Aero Metal Forms*, 310 NLRB at 400. No such circumstances are presented here.

To be sure, nobody can reasonably dispute that the December 20 notice expressed the Respondent's negative opinion of Local 175's decision to weaponize crew-size contract language long rendered obsolete by industry practice—but the Act protects the Respondent's right to express that opinion. "Section 8(c) of the Act gives employers the right to express their views about . . . a particular union as long as those communications do not threaten reprisals or promise benefits." *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), enfd. in relevant part 260 F.3d 465 (5th Cir. 2001).[11] Thus, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with [their] Section 7 rights." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). Section 8(c) also "precludes reliance on statements of opinion that neither threaten nor promise as evidence in support of any unfair labor practice finding." *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 14 fn. 68 (2020); see also *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002); *Holo–Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990).

In my view, the statements in the layoff notice were the expression of "views, argument, or opinion" privileged under Section 8(c) of the Act. The judge did not find that the notice contained any threats of reprisal or promises of benefits, and contrary to my colleagues' view, it does not. The notice truthfully informed employees that an arbitral decision was forcing the Respondent to change "how we assign asphalt paving work crews." Communicating facts, however unpleasant, is lawful. The notice also conveyed the Respondent's unfavorable view of the Union and its actions in pressing the grievance that resulted in the arbitral decision. For example, the notice criticized the Union for ignoring the negative consequences of its actions, i.e., layoffs, and it asserted that the Union's crew-size grievance hurt the employees rather than helped them. But these and similar statements in the layoff notice were all statements of opinion, and nothing in the notice constituted either a threat of reprisal or force or a promise of benefits. Therefore, as expressions of opinion protected under Section 8(c), they were not unlawful in themselves,[12] nor can they be relied on as evidence of an unfair labor practice.[13]

Moreover, they were justified. The fact of the matter is, Local 175's grievance resulted in an arbitral decision that did force the Respondent to abandon its "industry-standard asphalt paving practices." The industry standard, which the Respondent had been following for the past 15 to 20 years, was to use six-man asphalt-paving crews. As a result of Local 175's grievance, the Respondent now had to use 10-man crews instead. That this would have economic consequences for the Respondent cannot be reasonably doubted. Using 10-man crews to do jobs that can be done, and for many years had been done, by six-man crews would surely put the Respondent at a competitive disadvantage vis-à-vis other paving contractors, all of which continued using six-man crews. In addition, although the arbitrator had yet to issue his decision on damages, the Respondent had reason to be concerned that the award on the Union's crew-size grievance would be substantial, as it ultimately proved to be.[14] In these circumstances, it was reasonable for the Respondent to conclude that it had to cut costs sharply in the short term while it transitioned to operating its asphalt-paving division under new and unfavorable conditions. Moreover, the parties' collective-bargaining relationship dated back to 2007, and the record is devoid of evidence of any retaliatory action the Respondent ever undertook based on a grievance brought by the Union. These considerations militate against an inference that the Respondent sought to punish employees for the Union's pursuit of the crew-size grievance on their behalf, and they bolster my conclusion that the 8(c)-protected layoff notice cannot be relied on as evidence of animus.[15]

I disagree with my colleagues that the December 20 layoff notice lost the protection of Section 8(c) under

[11] Sec. 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute *or be evidence of* an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[12] See, e.g., *Trinity Services Group, Inc. v. NLRB*, 998 F.3d 978, 980 (D.C. Cir. 2021) ("Absent threats or promises, [Section] 8(c) unambiguously protects 'any views, argument, or opinion'—even those that the agency finds misguided, flimsy, or daft."); *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979) (finding that the employer's statements about the union, "however false or unsubstantiated," were "privileged expressions of opinion" that "did not rise to the level of interference, restraint, or coercion prohibited by Section 8(a)(1) of the Act").

[13] *United Site Services of California*, supra; *Sasol North America v. NLRB*, supra; *Holo–Krome v. NLRB*, supra.

[14] Indeed, the Respondent got off comparatively easy at $2.7 million. Arbitrator Nadelbach arrived at that sum by limiting contract damages to 2018.

[15] It is not the case that Sec. 8(a)(3) is violated simply because protected union activity results in an adverse employment action. See *Cheshire Lodge*, 193 NLRB 839, 842 (1971) (dismissing 8(a)(3) allegation that employee was laid off in retaliation for invoking grievance procedure where "the layoff was occasioned by the [union's] demand" that the employer stop assigning certain duties to the employee, which led to a reduction of work hours); *Currin-Greene Shoe Manufacturing*, 190 NLRB 600, 605–606 (1971) (dismissing 8(a)(3) allegation that part-time employee was discharged for filing a grievance, where employer did not need a full-time employee, and the union persisted in grievance demanding that employer provide a 40-hour week).

*NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). *Gissel Packing* is inapposite. There, the Court was addressing employer statements predicting the effects that *unionization* would have. That has nothing to do with this case. And even if it did, the Respondent's statements did not fall afoul of the *Gissel* standard requiring that statements be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." Id. at 618. The December 20 memo was based on objective facts: the arbitral decision and the fact that it compelled the Respondent to abandon industry-standard asphalt paving practices—specifically, to use 10-man crews to do jobs that can be done and *had* been done with 6-man crews for at least 15 years and probably more. The consequences this would have for the Respondent's labor costs, and therefore for employees' employment, were *at least* probable, and demonstrably so, for reasons already stated.

I further disagree with my colleagues that animus may be inferred from two prior Board cases involving the Respondent, *New York Paving, Inc.*, 370 NLRB No. 44 (2020) (*New York Paving I*), enfd. 2021 WL 6102199 (D.C. Cir. 2021), and *New York Paving, Inc.*, 2019 WL 1514220, 29–CA–197798 (2019) (*New York Paving II*).[16] Although unfair labor practices found in a prior case may be considered background evidence probative of animus in a subsequent case, the Board has done so where the allegations in the later case are similar to the violations found in the earlier case, especially where the same individuals are involved in both cases.[17] Such circumstances are not present here because, as the majority acknowledges, none of the Respondent's prior violations were directed at union activity substantially similar to that in this case. Moreover, background evidence of animus based on prior cases is not sufficient by itself to sustain the General Counsel's burden of proof under *Wright Line* in the latter case,[18] and as explained herein, the other grounds my colleagues rely on to infer animus do not withstand scrutiny. At most, therefore, the prior cases show that the Respondent had general animus toward the Union, insufficient without more to sustain the General Counsel's burden of proof. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019) ("[T]he General Counsel does not invariably sustain his burden by producing--in addition to evidence of . . . protected activity and the employer's knowledge thereof—any evidence of the employer's animus or hostility toward union or other protected activity.").

Finally, I disagree with my colleagues that a finding of animus can be based on purported "shifting reasons" given for the layoff. The Board recently corrected a similarly rigid and formalistic invocation of the shifting-reasons rationale,[19] yet here we are again.

A proper application of "shifting reasons" to support an inference of animus is illustrated by *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007). There, the employer's stated reason for discharging employee Lindgren was rudeness to a customer. However, several days elapsed between the incident and the discharge, and in the interim, the employer learned that Lindgren was prounion. With appearances against it, the employer subsequently "gilded the lily by invoking additional and transparently pretextual reasons for the discharge; and it threw in yet another reason at the hearing." Id. at 659. Under those circumstances, the Board reasonably found that the employer "itself did not believe that rudeness to customers adequately explained the discharge," and it inferred that "the true reason was an unlawful one the [employer] wished to conceal." Id. at 660.

Here, in contrast, the "more important[]" reason for the layoff, stated in the layoff notice itself—i.e., the adverse arbitral decision and its deleterious impact on the Respondent's asphalt-paving operations—was anything but suspect.[20] The Respondent later emphasized instead its

[16] In *New York Paving I*, the Board found that the Respondent unilaterally transferred bargaining unit work outside the unit in January 2018 in violation of Sec. 8(a)(5). In *New York Paving II*, the Board auto-adopted in the absence of exceptions the judge's findings that between April and December 2018, the Respondent violated Sec. 8(a)(2) by telling employees to sign union membership cards for Local 1010 and Sec. 8(a)(1) by threatening employees with discharge if they did not sign the cards.

[17] See, e.g., *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007) (relying on prior Board decision that "included the same types of violations at issue" in the present case "and involved one of the same managers" as background evidence of animus); *Mid-Mountain Foods*, 332 NLRB 251, 251 fn. 2 (2000) (relying on prior Board decision involving similar 8(a)(1) violations as in the present case, and where "the same people were involved in several violations found in both cases" as background evidence of animus), enfd. mem. 11 Fed.Appx. 372 (4th Cir. 2001); *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 371, 373 (1998) (relying on prior Board decision as background evidence of animus where employer's conduct in present case "was directed at the very same union activity that was involved in the prior case"), enfd. 215 F.3d 1327 (6th Cir. 2000); cf. *Sunland Construction Co.*, 307 NLRB 1036, 1037 (1992) (declining to rely on violations found in prior administrative law judge decisions as evidence of animus because they "failed to establish animus among the supervisors" in the present case).

[18] See *St. George Warehouse*, 349 NLRB at 878 (relying on violations in prior case *plus* pretext and disparate treatment in present case to infer animus); *Mid-Mountain Foods*, 332 NLRB at 251 fn. 2, 260, 263, 266, 267 (relying on violations in prior case *plus* 8(a)(1) threats in present case to infer animus).

[19] See *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 4 (2020).

[20] A secondary reason was Zaremski's retirement, as the Respondent also said in its notice.

seasonal slowdown (which does result in layoffs every winter, as unit employees were well aware). But Respondent's conduct here does not support an inference of animus where the most important reason for the layoff was stunningly obvious and stated right up front: the arbitral decision and its far-reaching adverse effects on the Respondent's asphalt-paving operations.[21]

In sum, I find that the General Counsel has failed to establish by a preponderance of the evidence that animus toward employees' protected activity motivated the layoffs of the unit employees.[22] Accordingly, in relevant part, I respectfully dissent from my colleagues' decision.

Dated, Washington, D.C. September 26, 2022

John F. Ring Member

NATIONAL LABOR RELATIONS BOAR

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay you off because of your support for and activities on behalf of Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175).

WE WILL NOT lay off our employees in the following appropriate unit without providing Local 175 with notice and the opportunity to bargain regarding the effects of our decision:

All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority of any other rights or privileges previously enjoyed: John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong.

WE WILL make John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

[21] Moreover, "[a] finding of pretext, *standing alone,* does not support a conclusion that [an adverse employment action] was improperly motivated." *Union-Tribune Publishing Co. v. NLRB,* 1 F.3d 486, 491 (7th Cir. 1993); see also *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3–5 (2019) (finding that the General Counsel failed to show that a discharge was unlawfully motivated because, although the respondent offered a pretextual reason for the discharge, no other evidence supported an inference of animus toward the employee's union activities).

[22] Because the General Counsel failed to meet his initial *Wright Line* burden, the burden of proof never shifted to the Respondent. Accordingly, I need not address my colleagues' finding that the Respondent did not sustain a defense burden it never had.

WE WILL compensate John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date that the amount of backpay is fixed, by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

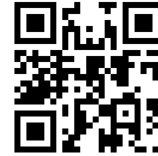
WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of John M. Arango Taborda, Michael Bartilucci, Norris D. Benjamin, Oscar C. Bueno, Hugo J. Castro, Edgar Y. Cortes, Louis Dadabo, Anthony Dedentro, Eister A. Delgado, Ciro Deluca, Giuseppe Dicaro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason P. Haldane, Jason M. Hoffman, Dallas G. Kilroy, Curtney S. King, John C. Lester, Nicholas M. Locastro, Christopher Lombardi, Alexander Morrea-Gonzalez, Miguel A. Nieves, Jonathan J. Oliver, Nelson D. Palacio, Jayson Ramirez, German Restrepo, Gennaro P. Rocco, Louis V. Ruggiero, Salvatore J. Sciove, William Smith Jr., Jonathan D. Suarez Pacheco, Eric Taborda, Frank E. Wolfe, and Hong Hao Zhong, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request, bargain with Local 175 regarding the effects of our decision to shut down asphalt-paving operations and lay off unit employees.

NEW YORK PAVING, INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-254799 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*John Mickley, Esq.* and *Erin Schaefer, Esq.,* for the General Counsel.

*Jonathan D. Farrell, Esq., Ana Getiashvili, Esq.,* and *Andrew DiCioccio, Esq. (Meltzer, Lippe, Goldstein & Breitstone, LLP),* of Mineola, New York, for the Respondent.

*Eric B. Chaikin, Esq. (Chaikin & Chaikin),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge**.** Based upon a charge filed on January 17, 2020, and amended on January 30, 2020, by Construction Council Local 175, Utility Workers Union of America, AFL–CIO (Local 175 or the Union), on April 20, 2020, the Regional Director for Region 29, issued a complaint and notice of hearing against New York Paving, Inc. (NY Paving or Respondent). The complaint alleges that NY Paving violated Sections 8(a)(1) and (3) of the Act by announcing a shut-down of its asphalt operations and layoff of bargaining unit employees, and by laying off bargaining unit employees, on December 20, 2019, in retaliation for the employees' Union support and because the Union pursued a grievance regarding NY Paving's failure to maintain minimum crew sizes required by the parties' collective-bargaining agreement. (GC Exh. 1(E); Tr. 448–450.) The complaint further alleges that NY Paving violated Section 8(a)(1) and (5) of the Act by announcing the shutdown of its asphalt operations and laying off the bargaining unit employees without providing the Union with notice and an opportunity to bargain regarding the effects of its decision. NY Paving filed an answer on May 8, 2020, denying the Consolidated complaint's material allegations.

This case was tried before me by videoconference, on November 2, 9, 10, and 12, 2020, and on November 16 through 19, 2020.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the Acting General Counsel (General Counsel) and

[1] On July 10, 2020, counsel for the General Counsel filed a motion for a videoconference hearing, which was opposed by Respondent. See GC Exh. 1(J, L). I granted the motion by Order dated July 27, 2020. Respondent filed a request for special permission to appeal my Order, which the Board granted and denied on the merits pursuant to its decision in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), in an unpublished Order dated October 8, 2020. (GC Exh. 1(N, O, P, T).) NY Paving has not raised any objections regarding conducting the hearing by videoconference in its posthearing brief.

NY Paving,[2] I make the following

## FINDINGS OF FACT

### I. JURISDICTION

NY Paving, a corporation with an office and place of business in Long Island City, New York, provides asphalt and concrete paving services. NY Paving admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. New York Paving also admits, and I find, that Local 175 is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Parties*

NY Paving provides asphalt and concrete paving services for utilities in the five boroughs of New York City, repairing streets and sidewalks after a utility has performed work underground. New York Paving's clients include the utility company National Grid and The Hallen Construction Co., Inc. (Hallen), a company which contracts with National Grid and Con Edison to provide construction and paving services. Tr. 57. NY Paving operates a yard in Long Island City, Queens, from which employees, equipment, and materials are dispatched to work locations in New York City. (Tr. 895.)

Local 175 and NY Paving have a long-standing collective bargaining relationship covering the company's asphalt paving workers. In addition to its collective bargaining relationship with Local 175, NY Paving has a long-standing collective bargaining relationship with Local 1010, District Council of Pavers and Builders, LIUNA, AFL–CIO (Local 1010), which represents NY Paving's concrete workers. NY Paving also has collective bargaining relationships with International Union of Operating Engineers, Local 14–15, International Brotherhood of Teamsters, Local 282, and several other New York City area building trades unions. (Tr. 895.)

Peter Miceli is NY Paving's Director of Operations, and oversees all work performed by the company in New York City and at the Long Island City yard. (Tr. 57–58, 894–896.) Miceli has been Director of Operations for 22 years, and reports to NY Paving's General Counsel Bob Coletti, who in turn reports to Anthony Bartone, Jr., one of NY Paving's owners.[3] Tr. 84-85, 895, 947; see also *New York Paving, inc.*, JD-33–19, at p. 3. Robert Zaremski is NY Paving's Operations Manager, and has primary responsibility for overseeing asphalt paving work. (Tr. 75.) In addition to directly supervising the asphalt paving workers, Zaremski formulates routes and assembles asphalt paving crews, making route and crew assignments. Tr. 677-679. Zaremski retired from the Operations Manager position at NY Paving on December 20, 2019, and returned to NY Paving in that same capacity on or about March 9, 2020.[4] (Tr. 77, 694–695, 733.)

Miceli, Zaremski, and NY Paving's attorneys Jonathan Farrell, Esq. and Ana Getiashvili, Esq. testified at the hearing in this case. (Tr. 535, 1043–1044.) NY Paving also called Local 175 Business Manager Charlie Priolo as an adverse witness. General Counsel called Miceli as an adverse witness, and called as witnesses Matthew Rocco, Esq., who has represented Local 175 for approximately four years, Terry Holder, an employee of NY Paving and the current Local 175 shop steward, and former asphalt paving foreman and assistant shop steward Frank Wolfe. (Tr. 91–92, 277–278, 359, 464–465.)

#### *B. Background, the Parties' Collective Bargaining Relationship, and Previous Cases Before the Board*

During the last decade, regulatory and business developments in the New York City area utility construction industry have significantly affected the relationship between NY Paving and Local 175. In the spring of 2017, the New York City Department of Transportation (NYCDOT) implemented new regulations requiring that every repair on a New York City street have a concrete base, which resulted in a dramatic increase in concrete work. See *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 7 (2020). In addition, in 2014, Con Edison amended its Standard Terms and Conditions for Construction Contracts to require that its subcontractors employ only workers represented by local building trades unions affiliated with the Building & Construction Trades Council of Greater New York (NYCBTC). See *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 7–8 (2021); see also *Nico Asphalt Paving, Inc.*, 368 NLRB No. 111 slip op. at 3 (2019); *Tri-Messine Construction Company, Inc.*, 368 NLRB No. 149 at p. 5–6 (2019). In 2017, Hallen and Con Edison renegotiated their contract for repair and paving. When Hallen subsequently renegotiated its subcontract with NY Paving, effective January 1, 2018, Con Edison's amended Standard Terms and Conditions for Construction Contracts were included for the first time. *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 7–8. As a result, because Local 175 is not a member of the NYCBTC, paving businesses contracting with Con Edison were not permitted to use Local 175 members to perform work on Con Edison projects.[5] Id.; see also Tr. 96.

The exact parameters of NY Paving's collective bargaining

[2] On March 9, 2021, NY Paving filed what it described as a Motion to Strike Portions of General Counsel's Post-Hearing Brief. On March 12, 2021, General Counsel filed a Response, contending that NY Paving's Motion to Strike was actually a Reply Brief not permitted pursuant to the Board's Rules and Regulations, Section 102.42. See also *NACCO Materials Handling Group*, 331 NLRB 1245, 1246, fn. 2 (2000); *Lumbee Farms Cooperative*, 285 NLRB 497, 501, fn. 2 (1987). On March 18, 2021, NY Paving filed a reply to General Counsel's response. I concur with General Counsel that NY Paving's motion to strike, which consists of argument regarding the parties' contentions and the evidence presented at the hearing, is an attempt to file a Reply Brief without my explicit permission. The Motion to Strike is therefore rejected, and these submissions have not otherwise been considered in connection with my decision herein.

[3] According to Farrell, Bartone "has delegated complete authority" to Coletti and Miceli, who are "the decision makers" in terms of NY Paving's labor relations matters. Tr. 884.

[4] Zaremski had been a member of Local 282 for many years during his employment with NY Paving. Tr. 678. His retirement and return to NY Paving were engendered by a dispute with the Local 282 Pension Trust Fund regarding whether his employment as Operations Manager constituted disqualifying employment pursuant to the Fund's Rules and Regulations. See generally, Tr. 689–692, 647–659; R.S. Exhs. 26–30.

[5] Recently Local 175 has contended in its discussions with NY Paving that Con Edison is permitting other companies to perform work on its contracts using Local 175-represented asphalt workers, and NY Paving has apparently raised the issue itself with Con Edison. See Exh. 16, p. NYP180, NYP182; R.S. Exh. 34, p. NYP8058-NYP8059.

relationship with respect to Local 175 are currently the subject of considerable controversy. There is no dispute that NY Paving was a member of the New York Independent Contractors Alliance, Inc. (NICA), and bound by NICA's collective bargaining agreement with Local 175 in effect from July 1, 2014 through June 30, 2017. There is also no dispute that the NICA agreement was extended with respect to NY Paving by mutual agreement through June 30, 2018, when NY Paving withdrew from NICA. (Tr. 93–94.) However, Local 175 contends that NY Paving is also bound by its successor collective-bargaining agreement with NICA. (Tr. 97.) Specifically, Local 175 asserts that because NICA and Local 175 entered into a successor agreement in May 2017, effective July 1, 2017, through June 30, 2022, the termination language of the predecessor agreement was not operative, and the contract automatically renewed for four years. (Tr. 94, 183, 191–192, 261; see, e.g., GC Exh. 9, p. 8.) NY Paving claims that its contract with Local 175 ended as of June 30, 2018, and that the company is not bound by the 2017-2022 collective bargaining agreement between Local 175 and NICA, but merely operates under its terms. (Tr. 93, 261–262.) Local 175 and NY Paving have been in ongoing negotiations to reach a successor collective bargaining agreement, which are continuing. See, e.g., Tr. 632–638, 641–645; R.S. Exhs. 24, 25.

On April 28, 2017, Local 1010, which represents NY Paving's concrete workers, filed a petition for a representation election in Case 29–RC–197886, effectively seeking to replace Local 175 as the collective bargaining representative of NY Paving's asphalt workers. (GC Exh. 21.) The previous day, Local 175 had filed the first of a series of unfair labor practice charges, alleging that NY Paving violated Sections 8(a)(1) and (2) of the Act by soliciting employees represented by Local 175 to sign authorization cards for Local 1010, and violated Section 8(a)(1) by threatening employees with discharge if they did not sign Local 1010 authorization cards. *New York Paving, Inc.*, JD-33–19, at p. 2. Local 175 also filed charges alleging that NY Paving discharged various employees, refused to recall employees from layoff, refused to hire employees, and caused employee discharges, in violation of Sections 8(a)(1), (3), and (4). Id. These charges were consolidated for a hearing before Administrative Law Judge Andrew S. Gollin, which took place in September, October, and November 2018. *New York Paving*, JD-33–19, at 1–2. On April 5, 2019, Judge Gollin issued a Decision finding that NY Paving provided unlawful assistance and support to Local 1010 in violation of Section 8(a)(1) and (2) when Joseph Bartone, Jr.[6] urged employees represented by Local 175 to sign authorization cards for Local 1010 in mid to late April 2017. *New York Paving, Inc.*, JD-33–19, at p. 22–23, 32. Judge Gollin also found that NY Paving threatened employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010 on or about April 27, 2017. *New York Paving, Inc.*, JD-33-19, at p. 24, 32. However, Judge Gollin recommended that the allegations regarding violations of Sections 8(a)(3) and (4) be dismissed. *New York Paving, Inc.*, JD-33-19, at p. 32. There were no Exceptions filed to Judge Gollin's Decision.

On April 28, 2017, Local 175 also filed a grievance with NICA alleging that NY Paving had violated the collective bargaining agreement by assigning bargaining unit work to members of Local 1010. *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 1. In July 2017, Local 1010 threatened NY Paving with various actions, including "picketing and work stoppages," precipitating a charge alleging that Local 1010 violated Section 8(b)(4)(D) and a jurisdictional dispute proceeding pursuant to Section 10(k) of the Act. *Id.* On August 24, 2018, the Board issued a Decision and Determination of Dispute, awarding "sawcutting, excavation, seed and sod installation, and cleanup arising from work performed by Local 1010 to employees represented by Local 1010." *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174 at p. 5 (2018). The Board further awarded "cleanup arising out of work performed by Local 175 to employees represented by Local 175." Id.

Based upon charges filed by Local 175 in early 2019, a Consolidated Complaint in Case 29–CA–233990, et al., issued on April 30, 2019, alleging that NY Paving violated Section 8(a)(1) and (5) by transferring work which had been performed by Local 175-represented asphalt workers to non-bargaining unit employees without providing Local 175 with notice and the opportunity to bargain. That Complaint further alleged that NY Paving violated Section 8(a)(1) and (3) by discharging Elijah Jordan in retaliation for his support for and/or affiliation with Local 175 and violated Section 8(a)(1) by interrogating employees and threatening employees with discharge. In a Decision dated January 27, 2020, I found that NY Paving violated Section 8(a)(1) and (5) by transferring emergency keyhole work, "Code 49" work, and "Code 92" work to non-bargaining unit employees without providing Local 175 with notice and the opportunity to bargain, but dismissed the remainder of the allegations. *New York Paving, Inc.*, 370 NLRB No. 44 at p. 13-27 (2020). NY Paving filed Exceptions, and in a Decision and Order issued on November 9, 2020, the Board found that NY Paving unlawfully unilaterally transferred bargaining unit emergency keyhole work, Code 49 work, and Code 92 work to non-bargaining unit employees. *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 13.

### *C. The Crew Size Grievance, Litigation and Bargaining in 2019*

On March 28, 2018, Local 175 initiated a grievance alleging that NY Paving was violating Article 6(c) of the NICA agreement, which contains minimum crew sizes for asphalt paving work. Asphalt paving workers are dispatched in crews performing two different types of job—a "binder" crew, which places binder or rougher asphalt inside the hole left by the utility company for a base or a temporary surface, and a "top" crew, which places finer asphalt on top of the filled hole to create the final finished surface on a street or sidewalk. (Tr. 95–96, 896–897.) Local 175 alleged that Article 6(c) of the contract required that Respondent use ten employees for "Utility Work"—three employees on binder work, and seven employees "on the

[6] Joseph Bartone, Jr. is the nephew of NY Paving owners Anthony Bartone, Michael Bartone, and Diane Bartone-Saro. *New York Paving, Inc.*, JD-33–19, at p. 3, 22. Judge Gollin determined that Joseph Bartone, Jr. was an agent of NY Paving pursuant to Section 2(13) of the Act based in part upon these family relationships. *New York Paving, Inc.*, JD-33–19, at p. 22.

application of a top or final surface course." (GC Exh. 10; Tr. 95.) Matthew Rocco, Esq. initiated the grievance by writing to Robert Coletti, quoting the pertinent provision of article 6(c) and contending that "for the last three (3) months, and likely continuing back further, New York Paving has repeatedly violated Article 6(c) by dispatching less than the required minimum number of employees" for utility work such as jobs for National Grid. (GC Exh. 10; Tr. 95–96.)

It is undisputed that despite the language of article 6(c), for 15 to 20 years NY Paving had been assigning two asphalt workers to crews performing binder work and four asphalt workers to crews performing top work.[7] (Tr. 682–682, 897; see also GC Exh. 11, p. 5, 13.) The evidence also establishes that prior to the March 28, 2018 grievance, Local 175 had never claimed that NY Paving's asphalt paving crew sizes violated the collective bargaining agreement. (Tr. 899–900; GC Exh. 11, p. 13.)

On August 2, 2018, Local 175 and NY Paving met with Steve Elliott, President of the International Union of Journeymen and Allied Trades, at his office in order to discuss a number of outstanding issues, including the crew size grievance, a pending class action lawsuit alleging violations of the Fair Labor Standards Act and New York State Labor Law,[8] and the parties' collective bargaining relationship and a successor agreement. Tr. 97-98. Rocco attended for the Union, as did Eric B. Chaikin, Esq., Charlie Priolo, and Anthony Franco, Administrator of the Local 175 benefit funds. Tr. 98-99. Jonathan Farrell, Esq. and an associate attended for NY Paving, along with Coletti and Miceli. Tr. 99. Although in Rocco's opinion the parties made some progress, no global agreement was reached at the meeting. (Tr. 100.)

Through the American Arbitration Association, Arbitrator Jay Nadelbach, Esq., was selected to adjudicate Local 175's grievance regarding crew sizes, and heard the parties' evidence and contentions regarding NY Paving's alleged contract violations at a hearing on January 11, 2019. (Tr. 100, 174, 538–539; GC Exh. 11, p. 4; R.S. Exh. 2.) Rocco represented Local 175 along with Chaikin, with Salvatore Franco, a union representative, and Terry Holder also attending for the Union. (Tr. 100; GC Exh. 11, p. 2. Farrell represented NY Paving with Ana Getiashvili, Esq., and Miceli attended as well. (GC Exh. 11, p. 2.) Local 175 argued that the clear contract language required the assignment of seven asphalt paving workers to top crews and three asphalt paving workers to binder crews, regardless of NY Paving's actual crew assignments in the past. (GC Exh. 11, p. 5.) NY Paving argued that it had maintained a long-standing practice of assigning fewer workers than required pursuant to the contract, without any objection, grievance, or unfair labor practice charge on the part of Local 175. (GC Exh. 11, p. 5.) NY Paving contended that the contractual crew size requirements had been modified by this past practice and pursuant to a "Most Favored Nation" provision contained in the collective bargaining agreement. (Tr. 157–158, 537–538; GC Exh. 11, p. 5–6.)

Miceli testified on behalf of NY Paving at the arbitration hearing on January 11, 2019. During his testimony Miceli did not address any specific ramifications regarding the possible implementation of the contractually required crew sizes, other than to say that the entire contractual complement of crew members was not needed in order to complete all of the work involved. (R.S. Ex. 2, p. 98–99.) While Miceli stated that the 7-worker top crew and 3-worker binder crew sizes were "not feasible," he did not mention the possibility of layoffs during his testimony at the January 11, 2019 hearing. (R.S. Exh. 2, p. 98, p. 76–123.)

On April 29, 2019, Arbitrator Nadelbach issued an Award and Opinion sustaining Local 175's grievance and finding that NY Paving violated the collective bargaining agreement's crew size requirements. (GC Exh. 11.) Arbitrator Nadelbach found that any past practice with respect to NY Paving's asphalt crew sizes could not be enforced given the clear contract language specifically requiring seven workers on a top crew and three workers on a binder crew.[19] (GC Exh. 11, p. 13.) Arbitrator Nadelbach remanded the proceeding to Local 175 and NY Paving for ninety days, or until July 31, 2019, for the parties to consider and discuss an appropriate remedy and damages, directing the parties to return to him for "further disposition" if they were unable to reach agreement. (GC Exh. 11, p. 14.) The crew sizes required pursuant to the collective bargaining agreement and Arbitrator Nadelbach's April 29, 2019 Award subsequently will be referred to as the "7–3 crew sizes." The Award itself will be referred to as the "April 29 Award," without a calendar year.

Arbitrator Nadelbach's April 29 Award renewed the parties' interest in pursuing a negotiated resolution of their issues, and a meeting was arranged for June 26, 2019. (Tr. 101–102, 541.) Rocco and Chaikin attended the meeting for Local 175, and Farrell and Getiashvili attended for NY Paving. (Tr. 102–103, 541–543.) Rocco testified that this meeting addressed the parties' global issues regarding a successor contract, and that any mention of crew sizes was raised in that context.[20] (Tr. 176–177.) Rocco testified that the discussions at this meeting did not involve the implementation of the Award. (Tr. 175.) In particular, Rocco testified without contradiction that Farrell and Getiashvili did not state that the Award would be implemented, or that the parties needed to bargain regarding the effects of the Award's implementation. (Tr. 103–104.) Instead, Farrell and Getiashvili stated that NY Paving intended to file a proceeding to vacate the Award. (Tr. 103.) Rocco had recently handled another case involving an arbitration award with bifurcated liability and remedy components and provided legal authority to Farrell and Getiashvili holding that in such circumstances the court would lack

[7] Miceli testified without contradiction that competitor paving companies also assigned four asphalt workers to their top crews and two to their binder crews during this period. (Tr. 897.)

[8] On June 2, 2018, a class action lawsuit was filed on behalf of asphalt workers represented by Local 175 against NY Paving, seeking compensation for the workers' yardwork and travel time to and from job sites pursuant to the FLSA and the New York State Labor Law. (Tr. 78–80, 96-97; GC Exh. 8.)

[19] Arbitrator Nadelbach also rejected NY Paving's argument based upon the contract's "Most Favored Nation" language. (GC Exh. 11, p. 13–14.)

[20] Farrell testified that crew sizes were discussed at this meeting, but provided no further details regarding the parties' statements on the topic. Tr. 543-544. Farrell only stated that the crew size issue was discussed "Because it would've been" given that "we had the award," so "it would be crazy not to talk about it." Tr. 543-544. Thus, Farrell's assertion in this regard is based solely on supposition, and I do not find it probative.

jurisdiction to vacate the Award, because the liability portion of the award was not final in nature. Tr. 103. Subsequently, on July 10, 2019, Rocco e-mailed Arbitrator Nadelbach requesting an extension of the ninety-day remand period, through August 31, 2019. (R.S. Exh. 3; Tr. 177–178.) Rocco stated in his e-mail that "The parties have met in-person to discuss this Award as part of a global resolution involving this case and several other matters," and "need more time to complete these discussions." (R.S. Exh. 3.) Rocco testified that he sent this e-mail to ensure that Arbitrator Nadelbach retained jurisdiction over the matter under arbitral law, in case a damages inquest became necessary. (Tr. 178.)

In July 2019, an issue arose between NY Paving and Local 175 regarding wage and benefit rate increases required pursuant to the 2017–2022 collective bargaining agreement with NICA. The NICA agreement provided for wage increases for the Local 175 bargaining unit members as of July 1, 2019. (GC Exh. 9, p. 14–16.) Because Local 175 contended that NY Paving was bound by the 2017–2022 NICA agreement, the Union took the position that NY Paving's asphalt employees were entitled to receive the contractual wage and benefit rate increases. (Tr. 64-65, 106–107. Rocco testified that he raised this issue with Farrell, who responded that the wage increases were being held in escrow because "we have to do a deal." (Tr. 107–108.) Farrell testified that the increases were being held in escrow to obviate an argument that NY Paving was adopting the 2017–2022 NICA agreement by increasing the wages of the Local 175 workers in the manner that the contract required. (Tr. 859, 860–861); see also (Tr. 152–153.) At some point, several asphalt workers represented by Local 175 filed complaints with the New York City Comptroller's Office, alleging that NY Paving had violated New York State prevailing wage laws by failing to provide the July 1, 2019 wage and benefit rate increases contained in the 2017–2022 NICA Agreement. (Tr. 108, 156; R.S. Exh. 17.)

On July 26, 2019, NY Paving filed a Petition to Vacate Arbitrator Nadelbach's April 29 Award. (Tr. 104; GC Exh. 12.) Rocco subsequently sent Richard M. Howard, Esq., the attorney who signed the Petition, a "safe harbor" letter pursuant to Rule 11 of the Federal Rules of Civil Procedure.[21] On August 26, 2019 the parties entered into a Stipulation of Discontinuance withdrawing the Petition without prejudice, and agreeing that a Petition to Vacate filed within ninety days of a final award would not be time-barred.[22] (Tr. 104–106; GC Exh. 13.) Two days later, Rocco wrote to Arbitrator Nadelbach, stating that Local 175 and NY Paving had been unable to "agree on the appropriate remedy and applicable damages," and requesting that an inquest be scheduled.[23] (Tr. 179–181; R.S. Exh. 4, p. NYP160.) Rocco testified that NY Paving's counsel had informed him when discussing the stipulation of discontinuance that they intended to move to vacate the April 29 Award after the inquest or damages phase of the proceeding. (r. 254–255.) As a result, according to Rocco, Local 175 decided to forego additional discussions and simply schedule the inquest, and in an ensuing exchange of e-mails the inquest or damages hearing was scheduled for October 25, 2019. (Tr. 254-255; R.S. Exh. 4.)

While the parties did not meet between July 26, 2019 and the damages hearing, they remained in contact. In particular, on August 13, 2019, Farrell and Rocco exchanged text messages regarding the Board's proposed modification of its rules involving the processing of representation petitions, and the possible ramifications for Local 175, Local 1010, and NY Paving. As discussed above, on April 28, 2017, Local 1010 had filed a petition for an election in the bargaining unit of Local 175-represented asphalt paving workers employed by NY Paving, which was being held in abeyance pending the processing of Local 175's unfair labor practice charges. During the summer of 2019, the Board issued proposed rules which would modify the agency's approach to representation elections where unfair labor practice charges were pending. (Tr. 812–813.) Pursuant to these proposed rules, pending unfair labor practice charges would no longer preclude the processing of a petition for a representation election. Instead, the election in question would take place, and the ballots would be impounded either prior to or after being counted and tallied, depending upon the nature of the unfair labor practice charges involved. A certification of the results would not issue until a final disposition of the charge and an assessment of any violation's effect on the election proceeding.[24]

Farrell was aware that Local 1010's representation petition remained pending in the summer of 2019, and on August 13, 2019, he and Rocco had the following exchange of text messages:

> Farrell: So don't have him execute until I fill in the bare stamped numbers.
> Also no deal with Franco. 9:18 AM
> Farrell: See the new proposed election rules. Blocking charges are gone.
> So it will be published in the federal register on Monday. That election is coming. 9:19 AM
>
> Rocco: I saw that.
> Didn't hear from AF [Anthony Franco]. 9:37 AM
>
> Farrell: Let me ask you. 90 days from Monday I am sure Barbara [Barbara Mehlsack, Esq., attorney for Local 1010] w[i]ll file a Request to Proceed. 9:38 AM

[21] Federal Rule of Civil Procedure 11(c)(2) provides that a motion for sanctions may be served on the opposing party but not presented to the court if the opposing party withdraws the contested pleading, motion, defense, or contention within 21 days of receipt. See generally, *Star Mark Management, Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170 (2d Cir. 2012).

[22] Farrell testified that his firm filed the Petition to Vacate because he "believed that Nadelbach expressly stated that he was going to have two separate decisions." Tr. 661-662. Farrell stated that he withdrew the Petition to Vacate after Arbitrator Nadelbach stated during a phone conversation, with Rocco present, that he envisioned his ultimate ruling as one decision bifurcated into liability and damages components. (Tr. 661–662.)

[23] Rocco testified that after the June 26, 2019 meeting the parties continued to discuss a number of outstanding issues, including crew sizes, but had not addressed a monetary remedy for the crew size grievance. (Tr. 181–182.)

[24] These proposed rules went into effect on July 31, 2020, as amendments to the NLRB Rules and Regulations, Sec.103.20. See also GC Memoranda GC 20–07, GC 20–11.

> Farrell: Again please call him. Maybe the new rules will shake his complacency. 9:39 AM

(GC Exh. 26 (spelling and punctuation edited for clarity); Tr. 813, 818–822.)

The damages or inquest hearing took place on October 25, 2019, in Mineola, New York, at the offices of NY Paving's counsel. (Tr. 108109; GC Exh. 14.) Rocco represented Local 175, with Chaikin also attending, while Farrell and Getiashvili represented NY Paving. (Tr. 108–109, 539; GC Exh. 14.) With all parties present for the hearing, Rocco asked the representatives of both Local 175 and NY Paving to meet to discuss an overall resolution of their outstanding issues, and all representatives except for Priolo went into a separate room.[25] Tr. 109. Rocco testified that Miceli began by stating that National Grid had contacted him because it was being asked to provide information in connection with Section 8(a)(3) charges Local 175 had filed against NY Paving regarding the discharge of two asphalt paving workers.[26] (Tr. 109–110.) Miceli stated that National Grid was unhappy with the situation, which affected its relationship with NY Paving. (Tr. 109–110.)

According to Rocco, the parties then began discussing a comprehensive resolution of the issues between them, with Farrell primarily speaking for NY Paving. Tr. 110. According to Rocco, Farrell stated that NY Paving would return the Code 92 work to Local 175,[27] which was "a good deal for the Union," and asked, "why is the Union so stupid," given that Local 175 "needs to do a deal." (Tr. 110.) Rocco testified that Local 175 conveyed its concern with Local 1010's attempts to represent NY Paving's asphalt paving workers and its consequent interest in finalizing a successor collective bargaining agreement, which would obviate an open period during which Local 1010 could file a petition for an election. (Tr. 110.) Rocco testified that Farrell "acknowledged" in response that "there very well could be an open period and that Local 1010 very well could file a petition." (Tr. 110.) Farrell claimed that "seven and three," the crew sizes mandated by the April 29 Award, would result in "a lot of Local 175 employees out of work." (Tr. 111.) Farrell further asserted that NY Paving would "make" the asphalt employees "aware," so that they "would know to blame Local 175 for being out of work."[28] (Tr. 111.)

Rocco testified that he believed it was in Local 175's interest to attempt to "work something out," particularly in light of the potential "threat of Local 1010." (Tr. 111.) Rocco therefore suggested a mediation with a certified, licensed mediator which would address and hopefully resolve all outstanding issues between the parties.[29] (Tr. 111, 559–560.) Farrell stated that NY Paving was amenable to participating in a mediation, and suggested Elliott Shriftman as a possible mediator.[30] Rocco agreed, and Farrell called Shriftman, who offered the parties potential dates in December 2019. (Tr. 111–112, 560–561.) Rocco testified that he then suggested that the parties go on the record, because they had already prepared their presentations for the damages hearing, but request that Arbitrator Nadelbach refrain from issuing a decision pending the mediation to which they had just agreed. (Tr. 112.)

At 10:30 a.m., the damages hearing opened with a brief statement by Rocco that "The parties have agreed in advance that we'll be putting in proofs today and some testimony" – Local 175 intended to briefly question Priolo and NY Paving would call Miceli. (GC Exh. 14, p. 3.) Rocco then stated that "the parties are still discussing global matters between them. And we'll ask the arbitrator to, after submission of the proofs, reserve any decision." (GC Exh. 14, p. 3; Tr. 112–113. Farrell immediately concurred that "New York Paving is in agreement. And should our attempts to resolve all matters fail, similarly we would then proceed to post-hearing briefs with page limitations at some later date, correct." GC Exh. 14, p. 3–4. Rocco then presented his calculations with respect to the damages owed to Local 175.[31] G.C. Ex. 14, p. 4-5, 6-11, 13-14. Farrell argued that assigning four workers to a top crew and two workers to a binder crew had in fact resulted in increased employment and earnings for the Local 175-represented asphalt workers. G.C. Ex. 14, p. 26-28. Farrell contended that an award of damages would therefore not only be speculative, but inequitable. G.C. Ex. 14, p. 28-29.

Miceli was called as a witness at the damages hearing, and testified at length. During his testimony, Miceli described the potential impact of the implementation of 7-3 crew sizes in the following manner:

[25] Rocco recalls that this meeting between the parties took place before the damages hearing began. (Tr. 109.) Rocco testified that the parties arrived at counsel's office quite early in the day because it was a Friday and Farrell needed to leave in the afternoon for religious observances. (Tr. 109, 770.) Farrell recalls the meeting occurring immediately after the hearing closed, and testified that his call to Elliott Shriftman, discussed *infra*, followed. (Tr. 558–561, 768–769.) Respondent introduced telephone records establishing that Farrell called Shriftman at 12:43 and 12:50 p.m. (Tr. 561–570; R.S. Exhs. 15, 16.) The transcript of the October 25, 2019 hearing indicates that the hearing began at 10:30 a.m. and ended at 12:33 p.m. (GC Exh. 14.)

[26] The charge in question was filed by a Local 175 member who was removed from a job at National Grid after an incident involving derogatory remarks regarding LGBTQ individuals at a job site outside the Queens Community House. (R.S. Exh. 1.) Although the charge was ultimately dismissed by the Regional Director, Region 29, the incident was reported to a Member of the New York City Council, who apparently contacted National Grid. R.S. Ex. 1.

[27] See *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 2.

[28] Farrell and Miceli did not address these remarks during their testimony regarding the parties' discussions at the damages hearing. (Tr. 558–561, 824–827, 925–926.) However, Farrell and Miceli both testified that on the day of the damages hearing, Farrell told Chaikin not to file an unfair labor practice charge when asphalt paving workers were laid off after the implementation of the 7-3 crew sizes. (Tr. 549, 801, 879, 922–923.)

[29] Farrell offered the conclusory testimony that it was "clear" that the mediation would only address the crew size grievance, but admitted that he did not know whether Local 175 ever agreed to that limitation. Tr. (824–827.) Miceli testified that as far as NY Paving was concerned the "purpose" of the mediation was "trying to convince 175 that going to seven-and-three would…not be good for their men and to have them reconsider forcing us to do this." (Tr. 976–977.)

[30] Farrell testified that Rocco mentioned during this discussion that he would be obligated to bring a supplemental proceeding for additional damages pursuant to the April 29 Award. Tr. 559.

[31] Rocco had sent a calculation of damages owed to Local 175 pursuant to the April 29 Award to Farrell and Getiashvili the afternoon before the inquest hearing. (Tr. 554–556; R.S. Exh. 13.)

Q: Have they received more overtime under the four and two than the seven and three?

A: Seven and three system that could possibly be put in effect, because I'm not going by anything. The seven and three was from the 1940s when they did everything by hand.

We've—I've never operated under a seven and three system. We certainly are planning if we have to go to seven and three that the men will be cut significantly, the work will be bunched together in a much more consolidated area, and we will hit the work totally different than we're doing it now.

Q: And will overtime increase or decrease with the seven and three system?

A: It will be nonexistent.

(GC Exh. 14, p. 65.)

Q: . . . So when you were testifying before about things like overtime will be lost and hours will decrease, that actually hasn't happened yet?

A: That's correct. That's what we're contemplating. That's what we think we're going to have to do. That's correct.

. . .

A: I'm saying 'cause we don't see any other way with seven-man top gang. We're not going to give seven men what four men could do, we're not going to do that.

So obviously we need to go back inhouse, think about how we're going to do this work now with seven men on top that somehow we can make money, 'cause obviously three extra men every day to go do work that four men can do, somehow that work's got to be made up.

(GC Exh. 14, p. 85–86.)

Miceli testified that based upon his conversations with Coletti and Zaremski, there was a "100 percent" chance that employees and foremen would be laid off and overtime would be reduced with the implementation of the 7–3 crew sizes. (GC Exh. 14, p. 86–87.) However, Miceli testified that implementing the 7–3 crew sizes would require a "whole lot of game planning" with respect to physically transporting a seven-person crew to the work location, arranging seven workers around a five-foot by five-foot opening in the street, and maintaining profitability with a seven person crew on work that, according to Miceli, did not even require four workers.[32] (GC Exh. 14, p. 87–88.) Miceli proceeded to testify that:

A: . . . So the only way we found – and in a very short period of time we've only discussed it maybe two or three times since the ruling – the only way we've thought we could possibly do it is get all the work back inhouse, group it, hold on to it, sit on it, wait until you have enough work to hit an area and then go there with maybe three or four dig-out crews and have one seven-man top gang come behind the four or five dig-out crews in a particular area at one time. That way you have enough volume of work where you can put the seven guys out there to go do the work.

Now I'm not saying the seven guys aren't going to have a little overtime because they may not be able to get to them in time, so maybe those seven guys are going to get overtime. But I'm not going to have 50 guys getting overtime, I'm going to have maybe two seven-man gangs doing that work.

And will go with the work – instead of going as the work comes in, we'll hold the work and do it before the expiration of the permit; not getting it done quickly 'cause that's not going to help us anymore. Now getting the work done within the time frame of the permit at the most volume to take advantage of seven men topping the work.

That's going to be the case. That's going to be the key and how that's going to work. And we still don't even know how to do it. Again, now you're talking about the cost of an extra pick up truck to get the guys there. That's what we're going to have to do to get seven men to go do the job.

Again, it's another time bomb into the work. Yeah, it's more work; yeah, it's more volume. But now it's more headaches, it's more money spent. It's just – we don't see any way to do it other than that way.

Again, maybe we can come up with something as we keep going forward, but I don't see any other way.

(GC Exh. 14, p. 88–90.)

When the parties spoke with him on October 25, 2019, Shriftman offered them several dates for a mediation in early December 2019, with what the parties had identified as a "fail-safe date" of December 16. (Tr. 211–213, 217; R.S. Exh. 5.) Rocco testified that Farrell told him that Coletti and Miceli were eager to meet and would make themselves available as necessary. (Tr. 213.) The day of the damages hearing, Farrell sent Rocco a text message, stating "Good seeing you again. The date is good for Bob [Coletti] and Pete [Miceli]." (R.S. Ex. 6; Tr. 219, 229.) Rocco responded several hours later, "You too. I'll confirm with [Anthony] Franco." (R.S. Exh. 6.) On October 28, 2019, Farrell sent Rocco a text message asking, "So do we have a date," and Rocco responded, "Waiting to hear back." (R.S. Exh). 6; Tr. 219–220. That evening, Farrell sent Rocco a text message stating, "Elliott asked me about the date. I told him to hold it for another day," and Rocco responded, "Yes, hopefully I'll hear back tomorrow." (R.S. Ex. 6; Tr. 220.) The next day, Farrell asked Rocco via text message, "Should I tell Elliott to release the day. It's not fair to him." (R.S. Exh. 6.)

On October 30, 2019, Shriftman informed Rocco and Farrell that parties in another matter were interested in taking the December 16, 2019 date, and Rocco responded, "Please give the date away. Everyone we need to have is not available on 12/16." (R.S. Exh. 5.) Rocco testified that Local 175 had decided against proceeding with the mediation before Shriftman, because the Union did not want to incur any additional delay in obtaining an award from Arbitrator Nadelbach regarding the appropriate damages in the crew size arbitration. (Tr. 113–114, 225, 256.) Rocco testified that Local 175 was concerned that additional delay

[32] Miceli testified that as of October 25, 2019, NY Paving had "only been brainstorming this for a little while." (GC Exh. 14, p. 59.)

would result in the Union's having failed to obtain monetary relief for its members at NY Paving during an open period when Local 1010 was permitted to file another petition for an election in the asphalt workers unit. (Tr. 113, 256–257.) In fact, Local 175 believed that this was precisely the situation that NY Paving was attempting to create. (Tr. 256–257.) As a result, Rocco testified that Local 175 withdrew from the proposed mediation. Tr. 114. However, Rocco did not write to Arbitrator Nadelbach asking him to proceed with a decision and award in the damages phase of the hearing until December 20, 2019. (R.S. Exh. 4.) Rocco stated that he did not contact Arbitrator Nadelbach until that time because the parties' representatives were still having informal discussions, and because he was "really an advocate for attempting to get a global resolution…before we went down the path of no return, i.e., to a final decision on inquest." (Tr. 227, 230.)

On December 5, 2019, the Local 175 benefit funds filed a complaint against NY Paving in the United States District Court seeking unpaid benefit funds contributions pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). R.S. Exh. 7. This complaint sought unpaid contributions attributable to NY Paving's assignment of bargaining unit work to non-bargaining unit employees, and based upon NY Paving's "routinely deploy[ing] asphalt paving crews with fewer than the contractually-required complement of employees." (R.S. Exh. 7, p. 3–4; Tr. 576–579.)

### *D. The December 20, 2019 Shutdown and Layoff Announcement, and the Subsequent Change in Asphalt Paving Operations*

It is generally undisputed that concrete and asphalt work at NY Paving slows down over the winter months. Miceli, Zaremski, Holder and former NY Paving foreman Frank Wolfe all testified that in colder weather the application of asphalt is more difficult because the material cools more quickly. Tr. 284, 370, 688-689, 941-942. Rain also affects the application of asphalt, and snow must melt or be cleared from the streets before crews can work. Tr. 371. Periodic suspension of alternate side of the street parking rules during inclement weather results in parked cars which impede access to job sites. Tr. 293-294, 942-943. Because the cold and inclement weather hamper the ability to perform asphalt work, only one or two asphalt plants continue to produce material over the winter, and the rest close for maintenance. Tr. 688, 942. Concrete work is also affected by cold and inclement weather, so work assignments from NY Paving's utility contractors tend to slow down over the winter as well. Tr. 688, 943-945.

Because of this seasonal slowdown, some portion of NY Paving's asphalt paving workers typically cease working over the winter. Miceli testified without contradiction that because of the general slowdown in work over the winter months, employees tend to take vacation during that time. Tr. 72-73, 942. Miceli, Zaremski, Holder, and Wolfe all testified that during the winter slowdown NY Paving attempts to keep foremen working by sending out crews comprised entirely of foremen, who are offered whatever work is available prior to other asphalt paving employees. (Tr. 286-287, 304–305, 372–374, 733, 761–762, 763, 923–924.) Dues remittance forms attaching reports of payroll for the Local 175-represented asphalt workers, provided to Local 175 by NY Paving on a monthly basis, illustrate that the number of asphalt workers declined by five to eight employees from December to January during the winters of 2016 to 2017, 2017 to 2018, and 2018 to 2019. (GC Exh. 3, pp. 142, 151, 227, 232, 320, 326.)

NY Paving conducts meetings for its foremen two to three times each year. Tr. 282. Wolfe testified that on December 20, 2019, he attended a foremen's meeting in the foremen's room at the Long Island City yard, with approximately 30 foremen and supervisors from both Local 175 and Local 1010. (Tr. 280–281, 283; see also Tr. 86–87, 734.) During this meeting, Miceli told the group that Zaremski would be retiring, as would the Local 1010 shop steward, Steve Sbarro. (Tr. 281.) Coletti then spoke, briefly mentioning the retirements before discussing the crew size arbitration. (Tr. 281, 307.) Coletti told the group that because of the arbitration ruling, NY Paving would now let the work build up and perform it "in clusters," instead of performing the work as it came in. (Tr. 281, 307.) Colletti said that as a result some employees would be laid off temporarily, some would be laid off permanently, and some foremen would be demoted. (Tr. 281–282.) Wolfe testified that Coletti did not tell the group that foremen would be laid off. Tr. 282. Wolfe testified that NY Paving had never previously announced a layoff at a foremen's meeting. (Tr. 282–283.)

On or about December 20, 2019, NY Paving distributed the following written notice to its asphalt paving workers, including a copy in the envelope with their last paychecks:

> Questions and Answers about
> New York Paving's
> Shutdown of Asphalt Operations
>
> New York Paving has decided to shutdown asphalt operations and *lay off nearly all asphalt paving workers* until March 2020 and possibly longer. We know you have questions and we want you to know <u>*the truth*</u> about the future of asphalt paving at New York Paving.
>
> Q. Why is New York Paving suspending asphalt paving operations?
>
> A. For two reasons. First, New York Paving's asphalt supervisor, Rob Zaremski, is retiring as of December 20, 2019. We wish Rob well! With Rob gone, we lack a supervisor to run the asphalt paving division. Also, and *more importantly*, Local 175 forced New York Paving to make *major changes* to our asphalt paving operations, even though our operations have been the same for decades and are accepted industry standards.
>
> Q. How did Local 175 force New York Paving to change its asphalt paving operations?
>
> A. Local 175 filed many grievances and arbitrations against New York Paving. In one of those arbitrations, Local 175 obtained a decision which will force New York Paving to completely change the way we assign asphalt paving work and how we assign asphalt paving work crews.
>
> Q. What happens if New York Paving hires a new asphalt paving supervisor? Does that mean we all go back to work like normal?

A. Unfortunately, no. Until the arbitration decision is reversed, we can't return to "business as usual" because Local 175 won't allow us to follow industry standard practices anymore. Even worse, if and when we restart asphalt paving operations, we *still aren't going to be able to bring back all of our workers!* Because of the changes Local 175 has forced on us, we expect to employ fewer supervisors and asphalt paving workers than we currently employ.

Q. Did New York Paving tell Local 175 its actions would cause layoffs? What was their reaction? Did Local 175 object?

A. We *repeatedly warned* Local 175 that its efforts to force us to change our industry-standard asphalt paving practices would cause temporary and permanent layoffs. It appeared to New York Paving Local 175 did not care that its actions would lead to the lay-off of its own members.

New York Paving is sorry many of you and your families will be harmed by Local 175's *deliberate efforts* to interfere with our industry-standard asphalt paving operations. Unfortunately, it seems New York Paving is the *only one* that cares. We wish you and your families well in the holiday season, and hope Local 175 will stop trying to hurt your jobs at New York Paving and start putting its members first in 2020.

(GC Exh. 2 (all emphasis in original); Tr. 86–87, 283–284, 295.) Future references to "December 20" shall denote December 20, 2019, the date of the foremen's meeting and written notice in evidence as General Counsel's Exhibit 2.

NY Paving had never previously issued a written layoff announcement in connection with a seasonal slowdown in work. (Tr. 72.0.) Miceli testified that the layoff announcement was issued "because there was going to be extreme changes to the operation" as a result of the April 29 Award. (Tr. 74.) Miceli stated that "we were going to implement the crew size changes in January and we thought it was prudent for the guys to know because they go away on vacation." (Tr. 82.) Because operations would be "totally different," he believed that the asphalt workers "should know that this wasn't going to be just a normal layoff for the wintertime." (Tr. 82–83; see also Tr. 950–951.)

Miceli testified that NY Paving started sending out binder crews comprised of three asphalt paving workers during the first week of January 2020.[33] Tr. 936, 944, 963, 1038. Miceli testified that he formulated these crews himself together with Patty Fogarile, who had replaced Zaremski as Operations Manager and supervisor of the asphalt paving workers. (Tr. 936, 947–948), (965–966.) Miceli testified that NY Paving began sending out top crews consisting of seven asphalt paving workers during the second or third week of February; prior to that time there was no asphalt paving top work to assign. (Tr. 945, 964, 1038–1039.) Thus, Miceli testified that the crew sizes required pursuant to the April 29 Award were fully implemented as of January 1, 2020. (Tr. 964–965.) NY Paving's remittance reports indicate that while fifty asphalt paving workers were employed in December 2019, only 18 worked in January 2020, a decline of 32 employees. (GC Ex. 3, p. 413, 416.)

Miceli testified that he personally selected the asphalt paving workers for the crews sent out in January and February 2020, and that he decided against sending out crews comprised of foremen, or offering the available work to foremen first, as had been done during winter months in the past. (Tr. 966–967.) Miceli testified that he decided to forego grouping foremen together on one crew because of the newly implemented seven worker top and three worker binder crew sizes. (Tr. 967.) Miceli testified that he did not formulate crews consisting solely of foremen given their higher wages, and that "this is just the way. . . we decided to implement it. And I brought the guys back who I felt were best to do the work." (Tr. 967–968.)

*E. Litigation and Bargaining in 2020*

On January 17, 2020, Local 175 filed the initial charge in the instant case, which alleged that NY Paving violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith and making unilateral changes in terms and conditions of employment, specifically by assigning bargaining unit work to non-bargaining unit employees on or about December 20. (GC Exh. 1(A).) On that same day, Jennifer Smith, Esq., an attorney representing a group of NY Paving's asphalt workers, wrote to National Grid describing the prevailing wage complaints that had been filed with the New York City Comptroller's Office, and stating that the workers were entitled to bring an action against NY Paving or National Grid regarding the alleged prevailing wage violations. (R.S. Exh. 17; Tr. 606–609.) Farrell testified that he responded to Smith's letter. Tr. 609. In addition, on March 13, 2020, Farrell wrote to National Grid setting forth NY Paving's position with respect to its collective bargaining relationship with Local 175, and stating that an inadvertent underpayment of the asphalt workers would be remedied shortly. R.S. Exh. 18; Tr. 609-612. Farrell and National Grid subsequently exchanged e-mails in early April 2020 regarding the exact amount of the compensation owed. (R.S. Exh. 19; Tr. 614–615.)

On January 21, 2020, the Regional Director, Region 29, issued an Order Approving Withdrawal Request and Withdrawing Notice of Representation Hearing in Case No. 29-RC-197886. G.C. Ex. 21. This Order approved Local 1010's January 12, 2020 request to withdraw its petition for a representation election in the Local 175 bargaining unit of asphalt paving workers at NY Paving, which was being held in abeyance pending the adjudication of the unfair labor practice charges before Judge Gollin. (GC Exh. 21; see *New York Paving, Inc.*, JD-33–19 at 1.)

On January 27, 2020, my Decision issued in *New York Paving, Inc.*, finding that NY Paving violated Sections 8(a)(1) and (5) of the Act by unilaterally transferring emergency keyhole work, Code 49 work, and Code 92 work to employees outside the Local 175 bargaining unit. without providing Local 175 with notice and the opportunity to bargain. See *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 5–0.

On January 30, 2020, Local 175 filed an amended charge in

[33] Miceli testified that the coronavirus (COVID-19) pandemic did not affect the workload during January and February 2020. (Tr. 963–964.) During January and February 2020 National Grid and Hallen were still operating, albeit more slowly as a result of the weather. Tr. 964. After the pandemic began to affect operations, National Grid and Hallen performed work only on an emergency basis. (Tr. 963–964.)

the instant case, alleging that NY Paving violated Section 8(a)(1), (3), and (5) of the Act by notifying Local 175 members on December 20 that it would shut down asphalt operations and layoff nearly all asphalt paving employees while assigning bargaining unit asphalt work to members of Local 1010, without bargaining with Local 175. (GC Exh. 1(C).) On that same day, Farrell wrote a lengthy letter to Chaikin and Rocco.[34] (GC Exh. 15; Tr. 114–116.) In his letter, Farrell stated that the December 20 layoff was engendered by the typical seasonal slowdown and the retirement of Zaremski. (GC Exh. 15, p. 2.) Farrell further contended that even if the layoff was related to implementation of the 7–3 crew sizes pursuant to the April 29 Award, NY Paving engaged in effects bargaining during the damages hearing on October 25, 2019, and Local 175 had declined to participate in the mediation with Shriftman. (GC Exh. 15, p. 2–3.) Farrell argued that Local 175's conduct therefore entailed "a clear and unmistakable waiver of its right" to engage in effects bargaining. (GC Exh. 15, p. 3.) Farrell further stated that NY Paving was nevertheless willing to meet during the weeks of February 3 or February 10, 2020, and requested that Anthony Franco attend for Local 175. Id. Farrell stated that if the parties did not meet, NY Paving would again conclude that Local 175 had "waived its right to 'effects bargaining.'" (GC Exh. 15, p. 3–4.)

Chaikin responded in writing to Farrell's January 30, 2020 letter by e-mail dated February 4, 2020. (GC Exh. 16, p. NYP182.) Chaikin stated that Local 175 was "happy to meet on the condition that NY Paving release the money NY Paving has allegedly been holding in escrow relating to the Prevailing Wage issue raised by Local 175 and by the men individually themselves with the Controller's [sic] office." Chaikin stated "Let me know if that condition can be met and we will set a date to meet to discuss the layoffs effectuated" since December 2019. The next day Farrell responded, stating that while "there will be no preconditions to meeting" to discuss the implementation of the April 29 Award, Local 175 was free to raise any issues it wished to in the context of their discussions.[35] (GC Exh. 16, p. NYP181.) Farrell stated that Coletti and Miceli were "willing to meet on extremely short notice," and requested again that Anthony Franco attend the meeting, as he "appears to be the ultimate 'Decision Maker' regarding Local 175." (GC Exh. 16, p. NYP181-NYP182.) Farrell requested that Chaikin provide him with multiple dates and times to meet through February 21, 2020. (GC Exh. 16, p. NYP182.)

On February 6, 2020, Chaikin spoke with Farrell and Getiashvili by phone. Farrell and Getiashvili testified regarding this conversation, and Respondent proffered Getiashvili's notes of the conversation as well. Farrell testified that during this conversation, Chaikin said that Local 175 was not "willing to meet, and for strategic reasons," without elaborating. (Tr. 596.) At the inception of her testimony, Getiashvili was asked to identify her notes of the conversation. (Tr. 1043–1046; R.S. Exh. 33.) The notes state, "Chaikin doesn't deny that Local 175 refused to meet for effects bargaining." (R.S. Exh. 33.) When the hearing resumed the next day, Getiashvili was questioned regarding her independent recollection of the conversation with Chaikin. (Tr. 1077, et seq.) Getiashvili testified that during the conversation "we were talking about the meeting that was supposed to take place in December," i.e., the mediation with Elliott Shriftman. (Tr. 1078–1080.) Getiashvili testified, "I believe your [Farrell's] position was to ask Mr. Chaikin why would Local 175 not come to the table. And that is when Mr. Chaikin stated that Local 175 had elected to not come to the negotiating table and that it was a strategic decision."[36] (Tr. 1079.)

The next week, Chaikin and Farrell resumed their e-mail correspondence regarding the parties' contentions and arrangements for further discussions. On February 12, 2020, Farrell wrote to Chaikin stating that Anthony Bartone would not participate in any meeting with Local 175, and that the company would be represented by Coletti and Miceli.[37] G.C. Ex. 16, p. NYP180. Farrell also stated that he did not anticipate that Anthony Franco would participate. Id. In this email, Farrell stated as follows:

> At this juncture, please accept this email as an official notification that due to unseasonably warm weather this winter, NY Paving anticipates to resume its asphalt paving operations earlier than usual thereby implementing Arbitrator Nadelbach's award. In fact, NY Paving is already using a binder crew comprised of three (3) Local 175 members. Similarly, NY Paving is anticipating to start using top crews comprised of seven (7) Local 175 members relatively soon. As you are aware from our numerous discussions, as well as Mr. Miceli's testimony on October 25, 2019, NY Paving's implementation of Arbitrator Nadelbach's award will result in the layoffs of Local 175 members, which will occur when NY Paving implements the crew sizes mandated by Arbitrator Nadelbach.

(GC Exh. 16, p. NYP180-NYP181.) Chaikin responded the next day, discussing Local 175 and NY Paving's contentious labor relations history and stating, "As for Arbitrator Nadelbach's

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[34] Earlier in January 2020, Farrell had discussed Local 175's most recent unfair labor practice charge with the Board Agent in Region 29 assigned to the investigation. (Tr. 797–798; GC Exh. 15, p. 2; GC Exh. 24.)

[35] This and other e-mails contained in (GC Exh. 16) were sent by Ann Diller, Farrell's Executive Assistant, on Farrell's behalf. (Tr. 791, 793.)

[36] Immediately after Getiashvili authenticated her notes, a colloquy ensued because Respondent had not produced the notes pursuant to General Counsel's Subpoena *Duces Tecum*, and the hearing then ended for the day. (Tr. 1046–1063.) After additional oral argument, the next day I ruled that the notes were encompassed by General Counsel's Subpoena *Duces Tecum*, but would nevertheless be admitted into evidence given that Respondent's failure to produce them did not rise to the level of contumacious conduct pursuant to *MacAllister Towing & Transportation Co.*, 341 NLRB 394 (2004), enfd. 156 Fed.Appx. 386 (2d Cir. 2005). (Tr. 1074–1076.) General Counsel also objected to Getiashvili's testimony regarding the phone call itself, which I also overruled. (Tr. 1077–1078.) At the conclusion of the hearing, I asked the parties to address the admissibility of and Getiashvili's notes and testimony regarding the February 6, 2020 phone call with Chaikin in their Post-Hearing briefs. (Tr. 1137–1138.) After careful reconsideration, I have revised my ruling and have determined that this evidence should be excluded from the record, but that it would not in any event alter my ultimate determination with respect to the violation alleged. My findings and conclusions regarding this issue are discussed infra at sec. C(3) of my Decision and Analysis.

[37] Chaikin had proposed during the February 6, 2020 phone conversation with Farrell and Getiashvili that if Anthony Franco attended the parties' next meeting, as Farrell had repeatedly requested, Bartone should attend the meeting as well. See R.S. Exh. 33.

decision, until we have resolution of the 'damages' issue regarding the crew size arbitration the parties are not in a position to fully explore its ramifications." (GC Exh. 16, p. NYP179.) Chaikin closed by asking that Farrell provide him with several dates in the coming weeks that NY Paving's representatives would be available to meet. (GC Exh. 16, p. NYP180.) Farrell did so, and the parties arranged to meet at Farrell's office on March 3, 2020. (GC Exh. 16, p. NYP177-NYP178.)

The March 3, 2020 meeting was unfortunately not productive. Chaikin, Rocco, Priolo, and Anthony and Salvatore Franco attended for Local 175, while Farrell, Getiashvili, Coletti, and Miceli attended for NY Paving. (Tr. 117–118, 245–246, 598–599; see also R.S. Exh. 34; Tr. 1081–1085.) Farrell began by offering that "the men will come back" if the Union agreed to return to 4 worker top crews and 2 person binder crews, withdrew the crew size grievance and arbitration, and withdrew the portion of the ERISA lawsuit seeking fund contributions premised upon the 7–3 crew sizes. (R.S. Exh. 34, p. 1.) Rocco stated that the Union was waiting for a decision on damages in the arbitration proceeding, and that the ERISA litigation sought contributions based upon the 7-3 crew sizes pursuant to the April 29 Award. Id. Anthony Franco asked about the dig-out work, and Farrell stated that the dig-out work had been awarded to Local 1010 in the 10(k) proceeding.[38] R.S. Ex. 34, p. 1, 3; see also Tr. 600, 940-941, 1033. Anthony Franco stated that NY Paving would never return to 4 worker top crews and 2 worker binder crews, although perhaps they could return to 5 worker top crews and 2 workers binder crews. R.S. Ex. 34, p. 2; Tr. 939. Anthony Franco then said that he would assign NY Paving's experienced asphalt workers to another asphalt paving company, and NY Paving would get unskilled asphalt workers instead. R.S. Ex. 34, p. 2; Tr. 601, 939. Anthony Franco also mentioned the prevailing wage claims which had been raised with National Grid. (R.S. Exh. 34, p. 2; Tr. 118, 601.) During Anthony Franco's remarks, Salvatore Franco was laughing and smirking, which upset Miceli. (R.S. Exh. 34, p. 2; Tr. 118, 247–248, 601, 939–940.) Farrell asked Anthony Franco what he wanted, and Franco again stated that he wanted the sidewalks and dig-out work assigned to Local 175-represented asphalt workers. (R.S. Exh. 34, p. 3, 1033–1034.) Farrell then asked whether Con Edison had awarded a contract to Tri-Messine, and Chaikin stated that both Tri-Messine and Nico had been awarded Con Edison sub-contracts and were using Local 175-represented asphalt workers. Id. At that point, Anthony Franco, Salvatore Franco, and Priolo left the meeting. Id. Chaikin, Rocco, Farrell, and Getiashvili remained behind and discussed the use of Local 175-represented employees on Con Edison sub-contracts. R.S. Ex. 34, p. 3-5; Tr. 118-119, 941. Farrell then proposed that NY Paving would provide Local 175 with "something on saw cut" and the Code 49 and Code 92 work, if Local 175 agreed to 4-worker top crews and 2-worker binder crews, and withdrew the charge in the instant case, my January 20, 2020 decision, the crew size grievance, and the portions of the ERISA litigation predicated on the 7-3 crew sizes contained in the April 29 Award. R.S. Ex. 34, p. 5. However, the parties did not resolve any of their outstanding issues.

In mid-April 2020, NY Paving provided a wage adjustment to the asphalt workers, together with a written statement including the following:

> We write to you in connection with certain work you previously performed for New York Paving, Inc. ("NY Paving"). Specifically, we write regarding the period of time you worked from about July 2019 through April 12, 2020. It has recently come to our attention that during the period described above, you may have been inadvertently not paid certain wages.
>
> NY Paving has examined and analyzed the relevant payroll records for the time period described above and determined you may be owed certain monies for said time period. Specifically, NY Paving has determined you should receive the attached prevailing wage adjustment, less all applicable federal, state and municipal withholding taxes, representing the pay which you may have been entitled to receive during the above-referenced period.
>
> You understand NY Paving, by making the aforesaid payments, does not admit it violated the wage and hour and/or prevailing wage law, or *any* law for that matter, and if NY Paving did fail to pay you any wages during the above-referenced period, said error was inadvertent, unintentional, and a non-willful mistake, and NY Paving immediately corrected its error once it learned of same.
>
> Finally, nothing contained in this document should be considered an admission of any kind, or a waiver of any procedural or substantive right, claim or defense, all of which are expressly reserved.

(GC Exh. 7; Tr. 80, 154–155, 368, 398, 408.) Holder testified that the asphalt workers had been upset that they did not receive the July 1, 2019 wage increase. Tr. 408-409. Holder stated that while the workers were therefore glad to have received the amount that they did in April 2020, they remain unsatisfied because as of the hearing in the instant case they still had not received all of the monies they believe they are owed. (Tr. 408–409, 444–445.)

Subsequently on April 17, 2020, Farrell wrote to National Grid stating that the wage adjustment had been paid to the asphalt workers and enclosing a copy of the written statement quoted above, but again disputing Smith's calculations. (R.S. Exh. 20; Tr. 615–617.) Smith stated that additional prevailing wage complaints would be filed with the New York City Comptroller's Office, as discussed by Farrell and National Grid in a series of e-mails. (R.S. Exh. 21; Tr. 620–624.) On May 21, 2020, Smith wrote to Farrell regarding the calculation of the wage adjustment, contending that additional monies were owed to the asphalt paving workers. (R.S. Exh. 22; Tr. 624–626.) On May 28, 2020, Farrell wrote to Smith, in effect demanding to know what specific employees or entities Smith represented. (R.S. 23; Tr. 627–629.) At the time of the hearing, the prevailing

[38] Chaikin describes Local 175's historical position with respect to dig-out and saw-cutting work, which informs its current posture in this respect, in a February 13, 2020 e-mail. See GC Exh. 16, p. NYP179.

wage complaints filed with the New York City Comptroller's Office regarding this issue were still under review. (Tr. 108, 154–156.)

On June 4, 2020, Arbitrator Nadelbach issued a Post-Award Calculation of Damages, awarding Local 175 $1,349,267.40 for the period January 1, 2018, through June 30, 2018, and the same amount for the period July 1, 2018, through December 31, 2018. (GC Exh. 17, p. 7.) Arbitrator Nadelbach declined to award the Union any relief for any period of time prior to January 1, 2018. Id. On June 19, 2020, Local 175 filed a Petition to Confirm Two Labor Arbitration Awards in the United States District Court, and on August 31, 2020, NY Paving filed an Answer and Cross-Petition to Vacate. (GC Exh. 18, 19; R.S. Exh. 35; Tr. 120–121, 125.)

Since June 4, 2020, the parties have exchanged continued to engage in discussions and exchange proposals for a successor collective bargaining agreement. See generally Tr. 632–638, 641–645; R.S. Exh. 24, 25. However, no overall agreement has been reached.

## Decision and Analysis

### *A. Credibility Resolutions*

#### 1. General principles governing credibility determinations

Evaluating certain issues of fact in this case requires an assessment of witness credibility. Credibility determinations involve consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In addition, the Board has developed general evidentiary principles for evaluating witness testimony and documentary evidence. For example, the Board has determined that the testimony of an employer Respondent's current employee which is contrary to the Respondent's contentions may be considered particularly reliable, in that it is potentially adverse to the employee's own pecuniary interests. *Covanta Bristol, Inc.*, 356 NRLB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), *aff'd*, 83 F.3d 419 (5th Cir. 1996). It is also well-settled that an administrative law judge may draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB 336, 336 fn. 1, 349 (2015), enfd. 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030, fn. 13 (2014).

In making credibility resolutions here, I have considered the witness' demeanor, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are discussed and incorporated into my analysis herein.

#### 2. Credibility resolutions

Local 175 attorney Matthew Rocco, Esq., shop steward and current NY Paving employee Terry Holder, and Frank Wolfe, a former assistant shop steward and NY Paving foreman, testified for General Counsel. Rocco impressed me as a credible witness. He described the pertinent events, the parties' complicated history, and the complex legal issues involved in their relationship in a direct and unassuming manner, providing testimony which was predominantly grounded in fact and based on his own personal knowledge. His demeanor was calm and straightforward, particularly given the parties' contentious history and the magnitude and fraught nature of the issues, and sometimes personalities, involved. I credit his testimony that his own predilection was to strive toward an overall resolution of the parties' conflict and to encourage the development of a constructive working relationship.

I also find that Holder was a credible witness. Holder's extensive experience and knowledge regarding the work of the asphalt paving crews at NY Paving is beyond question. During his testimony, Holder contradicted NY Paving's contentions, particularly with respect to the prevailing wage issue, and therefore testified in a manner implicating his pecuniary interests such that his testimony may be considered particularly reliable. *Covanta Bristol, Inc.*, 356 NRLB at 253; *Flexsteel Industries*, 316 NLRB at 745. Holder also provided candid assessments of the job performance of two asphalt paving workers recently hired by NY Paving. (Tr. 418.) Furthermore, Holder clearly delineated the limits of his experience with respect to the asphalt paving crew assignment process, and generally did not attempt to speculate regarding information beyond his own personal knowledge. See, e.g., Tr. 389–390. Similarly, when Holder believed his memory could be inaccurate, specifically with respect to dates, he immediately indicated as much. See, e.g., Tr. 370. I generally found Holder's testimony to be reliable, except in those instances where Holder himself indicated that he lacked knowledge regarding a particular topic or that his memory could be faulty.

I similarly find that Frank Wolfe, formerly employed by NY Paving as an asphalt paving foreman and an assistant shop steward, was a predominantly credible witness. Wolfe's testimony addressed the December 20 foremen's meeting, the impact of winter temperatures and weather on asphalt paving work, and NY Paving's work assignments during the slower winter months. In the latter respect, Wolfe's account of continuing to work through the winter months on crews comprised entirely of foremen was roughly consistent with the testimony of Miceli and Zaremski. See Tr. 286–288, 304–305, 733, 761–763, 923–924. He impressed me as a straightforward witness who related the facts

to the best of his recollection, and I credit his testimony.

NY Paving called Charlie Priolo, Local 175's Business Manager, as an adverse witness. Priolo knew virtually nothing regarding the critical events at issue here.[39] See, e.g., Tr. 490-493, 498-499, 501-502, 516-521. Priolo also falsely claimed that a phone call he made to Chaikin during a break in his cross-examination testimony was an attempt to speak to an individual in response to a text message regarding an unrelated matter. See Tr. 521-522, 524-525. Given that incident and Priolo's lack of knowledge regarding the pertinent events, I have completely disregarded his testimony.

As discussed above, NY Paving also called as witnesses Director of Operations Peter Miceli, Operations Manager Robert Zaremski, attorney Jonathan Farrell, Esq., and attorney Ana Getiashvili, Esq. The general credibility of Peter Miceli's testimony fluctuated with the different topics that he addressed. Miceli was entirely credible and obviously knowledgeable with respect to NY Paving's asphalt paving operations overall and day-to-day asphalt paving work, including its history of work assignments and the composition of asphalt paving crews. I further find that Miceli provided reliable testimony regarding the date that NY Paving implemented the crew sizes contained in Arbitrator Nadelbach's April 29 Award – on January 1, 2020.[40] Tr. 964-965.

However, I find that Miceli's testimony regarding the evolution of the decision to implement the crew sizes required pursuant to the April 29 award and its ramifications was inconsistent and unreliable. For example, Miceli claimed during his testimony in the instant case that he predicted that the implementation of a seven-person top crew and a three-person binder crew would result in "massive layoffs and you'd blow up the whole system" "anytime there was any correspondence or anything to do with crew sizes," including "during the two arbitrations." (Tr. 968.) However, his testimony during the first of the hearings before Arbitrator Nadelbach contains no such prognostication. See generally, R.S. Exh. 2.

More importantly, I find that Miceli did not provide a complete or reliable account of the development and implementation of the "bundling" system and its impact on asphalt paving work. For example, Miceli claimed during his testimony in this case that he never discussed the impact of 7-3 crew sizes or "bundling" work on the Operations Manager position with Zaremski before Zaremski left the company on December 20. Tr. 977. Such a contention is extremely implausible. The credible evidence establishes that for years as Operations Manager, Zaremski has been a high-level manager reporting directly to Miceli, and the individual primarily responsible for day-to-day asphalt paving operations. Tr. 678. Zaremski formulates routes comprised of individual job sites for the asphalt crews, determines the tonnage of asphalt each crew needs, assigns asphalt employees to specific crews, and assigns crews and drivers to specific vehicles. Tr. 678-679, 710-711. The evidence further establishes that Zaremski's replacement, Patty Fogarile, had filled in for Zaremski for short periods while Zaremski was on vacation, but had never been the Operations Manager on an ongoing basis. Tr. 360-364, 947-950, 977-978.

Furthermore, in their testimony both Miceli and Zaremski emphasized the drastic nature of the unprecedented use of 7-person top crews and 3-person binder crews, and its momentous impact on NY Paving's operations. Miceli characterized the change in crew size as "titanic" and an "explosion," and Zaremski described the change in operations NY Paving had effected as a result as "astronomical." Tr. 762, 900-901. If that is in fact the case, it is simply inconceivable that the system of bundling work, including its impact on the Operations Manager position, was developed as a possible approach to implementing the 7-3 crew sizes without Zaremski's input. In fact, when questioned at the damages hearing on October 25, 2019, Miceli was asked with whom he had consulted to determine that layoffs and the reduction of overtime for asphalt paving workers would be extremely likely if the contractually required crew sizes were implemented. G.C. Ex. 14, p. 87. Miceli responded that his predictions were based upon discussions with Coletti and Zaremski. G.C. Ex. 14, p. 87. Miceli further testified that the three had been "only brainstorming this for a little while," indicating that additional discussions with Coletti and Zaremski regarding the implementation of the 7-3 crew sizes were forthcoming. G.C. Ex. 14, p. 59, see also p. 88-89. In light of this evidence, I find Miceli's testimony that he did not discuss such changes in the Operations Manager position with Zaremski prior to Zaremski's retirement because "[t]he job was changing" to be patently incredible. Tr. 977.

My conclusions with respect to Robert Zaremski's testimony follow a similar trajectory. I find Zaremski's testimony reliable with respect to NY Paving's day-to-day asphalt paving operations, and regarding the issues with the Local 282 Pension Trust Fund which precipitated his retirement and return to work.[41]

[39] Although NY Paving called Priolo as a witness, Farrell stated repeatedly, in several different contexts, that he regarded Anthony Franco, the manager of the Local 175 benefit funds, as the most knowledgeable and authoritative individual involved in the Union's affairs. See, e.g., Tr. 574–575, 822–823; GC Exh. 15, p. 3 (describing Franco as "the primary decision-maker for Local 175"), and GC Exh. 16, p. NYP181-182.

[40] As discussed *infra*, Miceli actually rebuffed an opportunity crafted by NY Paving's counsel to modify this testimony on redirect examination. See Tr. 1038–1039.

[41] General Counsel contends that Zaremski completely lacks credibility as a witness, arguing that Zaremski's testimony in the instant case directly contradicts assertions Farrell made in his correspondence with the Local 282 Funds on Zaremski's behalf. Specifically, Zaremski testified here that he stopped driving a truck for NY Paving and immediately became its Operations Manager without any hiatus in employment, and that he retired from his bargaining unit truck driver position with the understanding that he would immediately become Operations Manager. (Tr. 707–708, 713–714.) General Counsel contends that this testimony directly contradicts Farrell's assertions in his correspondence with the Local 282 Funds that Zaremski "maintains he separated from NY Paving before NY Paving created a new position for him in light of pressing and unforeseen business needs," and that "at the time of Mr. Zaremski's retirement, both he and NY Paving reasonably anticipated that the employee would not provide services in the future." (R.S. Exh. 29, p. NYP7889-NYP7890; GC Posthearing Br. at p. 31 (arguing that Zaremski should be discredited because he "lies and cheats" and "devised a scheme to perpetrate a fraud on the Teamsters Pension Fund"). However, Farrell's letter is not the equivalent of a sworn statement executed by Zaremski. In addition, evidence regarding past events in connection with a witness' employment has generally been excluded pursuant to Federal Rule of Evidence 608(b) as not bearing directly on the witness' propensity for truthfulness. See *Operating Engineers Local 17 (Hertz*

However, his contentions that he was unaware of and uninvolved in NY Paving's planning for the implementation of the crew sizes required pursuant to April 29 Award are not credible. For example, I do not credit his testimony denying that he was involved in discussions regarding the "bundling" of work and implementation of the seven-person top crew and 3-person binder crews, for the reasons discussed above with respect to Miceli's testimony addressing these issues. (Tr. 720, 722.) Zaremski's testimony that he first became aware at his retirement party that NY Paving had decided to shut down its asphalt paving operations and lay off asphalt paving workers is similarly not believable. Tr. 734. I further do not credit Zaremski's claim that his discussions with Miceli between December 20 and March 6, 2020, when Zaremski returned to the company, were limited to personal pleasantries. (Tr. 747–748.) Thus, I do not find that Miceli or Zaremski provided reliable testimony regarding NY Paving's preparation for and implementation of the 7–3 crew sizes, the new system of "bundling" work, or the decision to shut down asphalt operations and lay off asphalt paving workers in December 2019.

Jonathan Farrell, Esq., also testified on behalf of NY Paving. Unfortunately, I do not find that Farrell's testimony was useful overall in making a factual record. It is not uncommon for attorneys to offer a certain amount of opinion and argument when they appear as fact witnesses. However, in this case Farrell unleashed a torrent of supposition, argument, and self-serving badinage, instead of direct and straightforward testimony regarding facts within his personal knowledge. Overall, little probative fact could be gleaned from his testimony.

The problematic aspects of Farrell's testimony begin with his assertions regarding his own recollection and reliability. For example, Farrell claimed early in his testimony that, "I have a very, very good memory." Tr. 559. However, Farrell was later forced to admit that he was mistaken regarding his whereabouts in January 2020, the crucial period during which NY Paving implemented the new "bundling" system and 7-3 crew sizes.[42] Questioned further regarding his January 2020 conversations involving the implementation of the 7-3 crew sizes and the unfair labor practice charge in this case, Farrell offered the following:

> Q: BY MR. MICKLEY: Okay, Mr. Farrell, do you recall that – in that phone call I mentioned to you that Local 175 was – was raising an effects bargaining issue?
>
> A: I know that came up, I – I don't remember. I have – I get, like, 300 emails a day, all right? I'm not – that's really not – that's like you haven't – not that you won $10 million. Two hun – let's say 200 emails, to be more conservative. That's over a thousand, Monday through Friday. I got 17 attorneys. I'm not going to be able to remember what you told – I'm just being honest, and – and I didn't take notes on the conversation, so the answer is, I'm not going to be able to testify.
>
> * * *
>
> Q: Okay, so do you – you don't remember contents of the conversation from – from – you don't remember any conversations from January of 2020?
>
> A: No. No. Ob – obviously I saw the charge and I realized it was an effects bargaining charge, but I – I don't remember the contents of a singular conversation of a – of 11 months. And I – and I can – saying something just – just to put a little bit of texture, Eric files a lot of ULPs. Maybe if it was someone else, I would've paid more attention at the beginning, I'm just saying…

Tr. 799–800. Later in his testimony, Farrell stated that he resorted to text messages because he was so busy he was unable to recall specific conversations. Tr. 881-882 ("the reason I want people to text me is so when they say we spoke, I say I'm not going to remember it"). Farrell even contended with respect to his own activities in connection with the implementation of the April 29 Award that, "I blacked out a lot of it, okay." Tr. 586-587. Thus, Farrell provided contradictory testimony regarding the reliability of his own memory with respect to the critical events at issue in this case.[43]

Farrell's testimony was also marked by conjecture and speculation. For example, when testifying regarding the June 26, 2019 meeting, Farrell stated unequivocally that crew sizes were discussed, but his immediate explication revealed that this was complete conjecture:

> Q: Were crew sizes discussed during that meeting?
>
> A: Yes.
>
> Q: How can you remember so specifically?
>
> A: Because it would've been. I just do—it—we had discuss—we had the award—
>
> Q: Right.

*Equipment Rental)*, 335 NLRB 578, 583, fn. 11 (2001) (declining to allow questioning regarding whether witness had been accused of stealing from employer); *Erikson's, Inc.*, 366 NLRB No. 171 slip op. at 1 fn. 2 and at 5 (2018), enfd. 929 F.3d 393 (6th Cir. 2019) (ALJ appropriately prohibited questioning regarding witness' discharge from employment as a police officer). Ultimately, the circumstances of Zaremski's retirement in 2017 are less pertinent to his overall reliability than the extent to which his testimony regarding the events directly at issue here is contradicted by other testimony and documentary evidence, or contrary to simple logic.

[42] Farrell initially contended that he was away on a trip to Argentina to climb Aconcagua at the time, but in the face of clear evidence to the contrary was forced to recant this testimony. (Tr. 588–590, 795–798; GC Exh. 24.)

[43] Farrell's testimony regarding his review and knowledge of documents associated with his representation of NY Paving followed a similar course. Farrell initially claimed that within his firm, "I receive all of the correspondence. I mean, I'm New York Paving," and "I authorize everything concerning New York Paving." Tr. 667. Farrell later qualified that testimony, stating that "there's some documents I could tell you with absolute certainty I would review, some that I wouldn't." Tr. 785. Finally, Farrell testified that he did not review NY Paving's Petition to Revoke General Counsel's Subpoena *Duces Tecum* in this case because he did not consider the Petition to Revoke to be "truly significant substantive work." (Tr. 788–789; GC Exh. 25.)

> [A]: —so we have a—they have an arbitration decision—we have an arbitration in January. We have the award April 29th. I mean, Eric—you know, Eric is—Matt's an excellent name partner in an excellent law firm. Eric's a—a well-seasoned advocate. It'll come up. I—I mean, you have four attorneys. It's like—like it's the—I wouldn't—don't want to say it's the elephant in the room, but it would be crazy not to talk about it, so of course we discussed it.

(Tr. 541, 543–544.)

Also, as discussed above, much of Farrell's testimony consisted of conclusory assertions and argument, including contentions directly pertinent to the Complaint's allegations, advanced in spite of my own attempts to convey that such testimony was not probative. See Tr. 645, 803. Thus, for example, Farrell offered argument more appropriate to a Post-Hearing Brief during his testimony regarding the arrangements for the possible mediation with Shriftman[44] and the subjects the parties would address during the mediation itself.[45] Farrell also engaged in argument while testifying regarding the purpose of the March 3, 2020 meeting,[46] NY Paving's continued willingness to bargain after learning of the prevailing wage issue,[47] and the parties' resumed collective bargaining negotiations during the summer of 2020.[48] Farrell even responded with argument during his testimony regarding notice to Local 175 that NY Paving was implementing the 7–3 crew sizes, an issue critical to the effects bargaining allegation, as discussed infra. On direct examination, Farrell testified that as of December 2019, Local 175 "knew we were going to implement," "they knew; of course they knew," "No one is going to testify otherwise. Everyone knew it was coming," "it was clear as day that we wanted to meet to discuss this and to the extent there was any failure – any failing on it, right, I can state – if there was any failure to meet, it was recognized by all parties and it was 175." (Tr. 586–587.) Questioned on cross-examination regarding the issue, Farrell initially explicated a four-part argument when asked whether NY Paving ever informed Local 175 that the 7–3 crew sizes would be implemented on December 20:

> One, it's clear that they—we—we were trying to meet about the implementation of the award and to discuss it. Number 2, it's clear I couldn't get a date. I couldn't get any affirmative response. Number 3, it's clear that Local 175 was pushing for the implementation of the award by their own actions. And number 4, what happened on December 20th [2019] was the distribute—this memorandum was distributed.

Tr. 809–810; GC Exh. 2. Finally, in response to my repeated questions, Farrell simply admitted that NY Paving never informed Local 175 that the 7-3 crew sizes or the April 29 Award would be implemented prior to December 20. (Tr. 810.)

Finally, Farrell altered his testimony as the record developed regarding his own knowledge of Local 175's concern with Local 1010's petition for an election in the unit of asphalt workers at NY Paving, a critical component of General Counsel's theory regarding the company's animus against Local 175. See Tr. 34, 36–37; GC Posthearing Brief at p. 1-3, 34–38. In his direct testimony, Farrell asserted that Local 175's concern with a "raid" on its bargaining unit by Local 1010 was the impetus for what he contended was a refusal on Local 175's part to meet and bargain regarding the effects of NY Paving's implementation of the 7-3 crew sizes. (Tr. 579—582.) Farrell claimed, however, that he had only realized the previous week, based on Rocco's testimony, that Local 175 was concerned with Local 1010's attempts to represent the unit of asphalt workers at NY Paving. Farrell repeatedly contended that in the fall of 2019, "none of [Local 175's conduct] made sense to me," and "I couldn't understand why." (Tr. 582, 588, 603.) Farrell reiterated several times that "now I understand why from Matt Rocco's testimony what was going on. They're deathly afraid of how 1010 would react, and I get it. Now I understand." (Tr. 582; see also Tr. 588, 596, 603.) Furthermore, Farrell denied believing that the Board's proposed rule changes involving representation proceedings in 2019 would result in Local 1010's attempting to proceed with the processing of its petition. (Tr. 813.) Indeed, Farrell testified that when he initially learned of the proposed modifications to the Board's "blocking charge" policy, he believed that the change was "all a bunch of news about nothing because they impound the ballots . . . And what happens, it could take years and years before anyone opens it up," so that "this rule didn't amount to a whole lot as it pertains to the blocking charge." (Tr. 815–816.) Thus, Farrell testified that he did not believe the alterations to the blocking charge policy proposed during the summer of 2019 would result in Local 1010's pursuing its representation petition. (Tr. 813.)

However, Farrell's assertions in this regard were directly contradicted by his own text messages with Rocco on August 13, 2019, predicting that Local 1010's attorney would file a request to proceed with the processing of its petition for an election in the asphalt workers unit in response to the proposed rule changes.[49] (Tr. 818–820; GC Exh. 26.) In fact, in these text messages Farrell opined to Rocco that "Blocking charges are gone," and that Local 1010's attorney "will file a request to

[44] "As you know, from Mr. Rocco, they never confirmed the date, but we spoke with Elliott, we – we've seen the texts and the emails, and – and – and the testimony." (Tr. 770—771.)

[45] "It was clear that I wanted – that's what I wanted to discuss, the implementation of the – of the crew sizes. It was clear that that's what concerned Matt." (Tr. 825—827.)

[46] "The only reason we met at my office…is I boxed them in, forced – seriously, the e-mails show it," "Look, we were going to discuss the crew size, that's apparent from…the transcripts…" Tr. 590, 598.

[47] Q: Now, did New York Paving ever refuse to meet and negotiate with Local 175 after learning about the – this prevailing wage dispute? A: No. In fact, quite the opposite, which – which the Court and Mr. Mickley and everybody is well aware of." (Tr. 630.)

[48] "I know the GC's case is somehow to get rid of—get—get rid of 175 and then the open period and bring in 1010. This just proves the opposite. We were negotiating in extreme good faith." (Tr. 633–635.) "It's not to get rid—not to bring in 1010 and get rid of 175. It's to get a new CBA with 175 and solidify the relationship. And that's what this email, in part, shows." (Tr. 637–638.)

[49] Although he was testifying as a witness at the time, Farrell interjected an evidentiary argument in support of an objection made by Getiashvili, who was questioning him, and had to be rebuffed by me from pressing on in this regard. (Tr. 813–815.)

proceed," so "That election is coming." (GC Exh. 26.) Later in the same series of text messages, Farrell exhorted Rocco to call Anthony Franco in the hope that "the new rules will shake his complacency." (GC Exh. 26.) Thus, Farrell's assertion that he was unaware of Local 175's concern with Local 1010's designs on the asphalt workers unit until hearing Rocco's testimony in the instant case was patently false. His claim that he considered the proposed rule changes to be irrelevant to the processing of Local 1010's representation petition was also untruthful.

For all of the foregoing reasons, I do not find much of Farrell's testimony to be a reliable or probative addition to the record in this case.

Finally, NY Paving called Ana Getiashvili, Esq., Farrell's associate and also counsel for NY Paving, as a witness. Getiashvili's testimony focused on the February 6, 2020 telephone call where she and Farrell spoke to Chaikin, and regarding documentary evidence which she identified as notes of the phone conversation. General Counsel objected to the admission of Getiashvili's proffered notes of the February 6, 2020 call, and to the admission of her testimony regarding the conversation. I address General Counsel's evidentiary objections and the probative value of Getiashvili's testimony in further detail at Section C(3), infra.

*B. The Alleged Shutdown of Asphalt Operations and Layoff of Asphalt Paving Employees*

The complaint alleges that NY Paving violated Sections 8(a)(1) and (3) of the Act on December 20, 2019, by announcing a shut-down of its asphalt operations and the layoff of bargaining unit employees, and by laying off the asphalt paving employees, in retaliation for the employees' Union support and the Union's pursuit of the crew size grievance. The record evidence overall substantiates this allegation.

The Board analyzes cases involving employer motivation using the theoretical framework articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 US. 393, 395 (approving the *Wright Line* analysis); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019). Pursuant to *Wright Line*, General Counsel must satisfy their initial burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor in the employer's adverse employment action. In order to do so, General Counsel must adduce evidence to demonstrate that the employee or employees in question engaged in union or protected concerted activity, the employer's knowledge of that activity, and anti-union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 6 (2016), enfd. 871 F.3d 358 (5th Cir. 2017). Proof of unlawful employer motivation may be based upon direct evidence, or may be inferred from circumstantial evidence based on the record as a whole. *Brink's, Inc.*, 360 NLRB 1206, fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enf'd. 184 Fed.Appx. 476 (6th Cir. 2006). Indeed, the Board has stated that "More often than not, the focus in litigation…is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.'" *Tschiggfrie Properties*, 368 NLRB No. 120 at p. 1 (quoting *Wright Line*).

General Counsel's satisfaction of their initial burden pursuant to *Wright Line* establishes a violation of the Act, subject to the employer's demonstrating that "the same action would have taken place in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. In order to meet this standard, the employer must do more than assert a legitimate basis for the adverse employment action or show that legitimate reasons affected its decision. Instead, it must "persuade…by a preponderance of the evidence" that "the action would have taken place absent protected conduct." *Weldun International*, 321 NLRB 733 (internal quotations omitted), enf'd. in relevant part 165 F.3d 28 (6th Cir. 1998); see also *NLRB v. Transportation Management Corp.*, 462 U.S. at 401. If the evidence establishes that an employer's proffered reasons are pretextual, the employer fails by definition to meet its burden to show that it would have taken the same action absent protected activity. *Ground Zero Foundation*, 370 NLRB No. 22 at p. 7 (2020); *Hard Hat Services, LLC*, 366 NLRB No. 106 at p. 7 (2018).

There is no question here that the filing of the crew size grievance in March 2018 and the prosecution of the grievance through arbitration constitutes activity protected under the Act, as General Counsel contends. See *Brad Snodgrass, Inc.*, 338 NLRB 917, fn. 1, 923 (2003); *Miami Systems Corp.*, 320 NLRB 71, 77 (1995), rev'd. and remanded on other grounds 111 F.3d 1284 (6th Cir. 1997). Nor is there any dispute that NY Paving had knowledge of such activity. Thus, General Counsel has established these elements of the *Wright Line* analysis.

The record also establishes unlawful motivation in the form of animus against Local 175 for its filing and successful prosecution of the crew size grievance. Animus is evinced by the language of the December 20 layoff notice distributed to the asphalt workers, and the disparate manner with which NY Paving approached the December 20 layoffs compared with previous winter slow-downs in work. Furthermore, animus is demonstrated by NY Paving's previous unfair labor practices involving Local 175, some of which are directly related to the surrounding circumstances at issue in this case – namely Local 1010's then-pending petition for a representation election in the asphalt workers bargaining unit.

The language of the notice distributed by NY Paving to the asphalt workers on December 20, in evidence as General Counsel Exhibit 2, evinces animus against Local 175. First of all, the notice clearly informs the asphalt workers that they are not facing the typical seasonal slowdown of work with which they were familiar. Instead, the notice describes itself as articulating "*the truth*" about the future of asphalt paving at New York Paving."[50] The notice states that NY Paving is "suspending asphalt paving operations," and "has decided to shutdown asphalt operations and *lay off nearly all asphalt paving workers* until March 2020 and possibly longer." Later, the notice states that "if and when we restart asphalt paving operations, we *still aren't going to be able to bring back all of our workers!*" and that in the future "we

[50] All emphasis in the material quoted from General Counsel Exhibit 2 appears in the original December 20 notice.

expect to employ fewer supervisors and asphalt paving workers than we currently employ." Thus, the notice conveyed to the asphalt workers that what was occurring was not a routine seasonal slowdown in the work caused by cold and inclement weather during the winter months, but a potentially permanent loss of employment with the company.

The remainder of the notice places the onus for this drastic turn of events squarely onto Local 175 and its prosecution of the crew size grievance. For example, the notice states that Local 175 "forced New York Paving to make *major changes* to our asphalt paving operations" by obtaining a decision through arbitration "which will force New York Paving to completely change the way we assign asphalt paving work and how we assign asphalt paving work crews." Although the notice mentions Zaremski's retirement, it describes Local 175's prosecution of the crew size grievance as "*more important[]*," and states that even if a new asphalt paving supervisor is hired the asphalt workers will not "go back to work like normal." The notice attributes NY Paving's plan to "employ fewer supervisors and asphalt paving workers than we currently employ" to "the changes Local 175 has forced on us" through the crew size grievance and arbitration. It is well-settled that an employer's attempt to blame a union for adverse employment consequences constitutes evidence of animus, and may even constitute an independent violation of Section 8(a)(1) of the Act. See, e.g., *Glades Electric Cooperative, Inc.*, 366 NLRB No. 112, slip op. at 5, 14–15 (2018) (CEO's statement that "it's the Union's fault that [employee] got laid off" violated Section 8(a)(1)); see also *Horseshoe Bossier City Hotel & Casino*, 369 NLRB No. 80 at p. 1-2, fn. 13, and at p. 13-14 (2020) (employer violated Section 8(a)(1) via statements blaming union for lost job opportunities).

Finally, the notice concludes by construing Local 175's pursuit of the crew size grievance as a deliberate attempt to put its own members out of work. The notice states that, "Local 175 did not care that its actions would lead to the lay-off of its own members," and states that Local 175 should "stop trying to hurt your jobs at New York Paving and start putting its members first in 2020." Thus, I find that the December 20 notice not only evinces significant evidence of animus against Local 175. The notice also constituted an attempt by NY Paving to denigrate and undermine Local 175 in the estimation of its members in the event that Local 1010 attempted to proceed with its then-pending representation petition in Case No. 29-RC-197886, or filed another representation petition during an upcoming open period in the spring of 2020. Indeed, Farrell had told Local 175 at the damages hearing on October 25, 2019 that this was precisely the course that NY Paving would pursue if Local 175 continued to prosecute the crew size grievance. Tr. 111. For all of the foregoing reasons, I find that the language of the December 20 notice constitutes significant evidence of animus on the part of NY Paving against Local 175.

Animus is also apparent from NY Paving's history of established violations of the Act involving Local 175. On November 9, 2020, the Board concurred with my findings in Case 29–CA–233990, et al., that NY Paving violated Section 8(a)(1) and (5) of the Act by unilaterally transferring three different categories of work covered by its collective bargaining agreement with Local 175—emergency keyhole work, Code 49 work, and Code 92 work – to non-bargaining unit employees, without providing Local 175 with notice or the opportunity to bargain. *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 1–3. Although NY Paving contends that these violations took place in 2018, Miceli testified at the hearing in this case that as of December 2019 and January 2020, Code 49 and Code 92 work were still being performed by employees outside of the Local 175 bargaining unit. Tr. 1036-1038. Furthermore, the record here establishes that the unilaterally transferred work was repeatedly held out by NY Paving as a "trade-off" for Local 175's foregoing implementation of the crew sizes mandated in Arbitrator Nadelbach's April 29 Award. For example, during discussions on October 25, 2019, Farrell suggested that NY Paving would return the Code 92 work to the Local 175 bargaining unit as part of an overall "deal." (Tr. 108–110.) At the March 3, 2020 meeting, Farrell proposed to Chaikin that Local 175 agree to 5-person top crews and 2-person binder crews, and withdraw my January 20, 2020 decision, the arbitration, and the portion of the ERISA litigation involving crew sizes, in exchange for NY Paving's returning the Code 49 and 92 work to the Local 175 bargaining unit. (Tr. 272; R.S. Exh. 34, p. 3-5. In these circumstances, the unlawful unilateral changes are sufficiently contemporaneous with and related to the parties and events at issue in the instant case to support a finding of animus against Local 175. *Mondelez Global, LLC*, 369 NLRB No. 46, at p. 3, fn. 6 (2020); *Roemer Industries*, 367 NLRB No. 133 at p. 16 (2019), enf'd. 824 Fed.Appx. 396 (6th Cir. 2020); *Galicks*, 354 NLRB 295, 298 (2009), aff'd. 355 NLRB 366 (2010), enf'd. 671 F.3d 602 (6th Cir. 2012).

The violations found by Judge Gollin in *New York Paving, Inc.*, JD-33-19, are also pertinent to a finding of animus against Local 175 in the instant case. As discussed above, Judge Gollin determined that NY Paving violated Sections 8(a)(1) and (2) by providing unlawful assistance and support to Local 1010 when Joseph Bartone, Jr. urged employees represented by Local 175 to sign authorization cards for Local 1010. *New York Paving, Inc.*, JD-33-19, at p. 22-24, 32. Judge Gollin also found that NY Paving threatened employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010. Id. These violations took place immediately preceding Local 1010's filing the petition for a representation election in Case No. 29-CA-197886 on April 28, 2017. G.C. Ex. 21. It is clear from the record that this petition, and Local 1010's overall effort to represent the asphalt workers in the Local 175 bargaining unit, loomed large over the sequence of events at issue here. In particular, Farrell repeatedly raised the specter of Local 1010's designs on the Local 175 bargaining unit in connection with Local 175's crew size grievance and Arbitrator Nadelbach's April 29 Award. From his July 2019 text messages with Rocco (G.C. Ex. 26) to the parties' discussions at the October 25, 2019 damages hearing (Tr. 110-111), Farrell injected this issue into his dealings with Local 175's representatives, knowing that it was a matter of significant concern to the Union. His statements on October 25, 2019 that "there could well be an open period" in 2020, Local 1010 "could very well file a petition," and that the April 29 Award would result in "a lot of men out of work" who "would know to blame Local 175" explicitly describe the strategy manifested by the December 20 layoff notice. (Tr. 110–111.) His far-fetched attempts to deny during his testimony that he was

aware of Local 175's trepidations in this regard merely accentuate the issue's importance. As a result, I find that NY Paving's previous unfair labor practices assisting Local 1010 in the context of a representation petition which remained pending during the critical events in this case are pertinent, and establish animus against Local 175.[51]

Despite NY Paving's contention that the December 20 layoff was merely a typical seasonal decline in work, the evidence also establishes that in the winter of 2019 to 2020, NY Paving deviated in significant respects from its typical layoff practices in such circumstances. It is well-settled that an employer's deviation from past practice may constitute evidence of unlawful motivation. *Roemer Industries*, 367 NLRB No. 133, at p. 16, citing *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enf'd. 184 Fed.Appx. 476 (6th Cir. 2006); and see *Schwartz Mfg. Co.*, 289 NLRB 874, 878 (1988), enf'd. 895 F.2d 415 (7th Cir. 1990) (deviation from past practices involving layoffs evidence of anti-union animus). In particular, the Board has found that an employer's departure from a previous practice of reducing work hours in response to declines in available work in order to lay off employees in an unprecedented manner constitutes evidence of unlawful motivation. See *Power Equipment Co.*, 330 NLRB 70, 75 (1999), enfd. 242 F.3d 371 (3d Cir. 2000) (layoff suspect where employer had "traditionally made allowances" for slowdowns comprising "a historical feature of its business cycle" by "assigning its skilled employees to various possible nontrade tasks until business picked up"); *Gurabo Lace Mills, Inc.*, 265 NLRB 355, 363 (1982) (layoff defense contravened by evidence that in the past the employer "would reduce the total hours worked by employees when production was slow" rather than laying employees off); *Thomas Cartage, Inc.*, 186 NLRB 157, 164 (1970).

Here, the evidence establishes that NY Paving had never before distributed a written notice such as General Counsel's Exhibit 2 to the asphalt workers in connection with past layoffs, whether engendered by seasonal fluctuations in work or otherwise. Indeed, Miceli explained that the written layoff announcement was issued because "there were going to be extreme changes to the operations," and "this wasn't going to be just a normal layoff for the wintertime." (Tr. 74, 82–83.) Furthermore, the December 20 layoff involved an unprecedented layoff of foreman, a marked deviation from NY Paving's past conduct. The record establishes, as Miceli testified, that in the past NY Paving would make a coordinated effort to keep all of its foremen working even when the work declined during the winter. Tr. 923–924; see also Tr. 286–288, 303–305 (Wolfe), 372–374 (Holder), 733, 761–763 (Zaremski). To that end, when there was less work due to inclement weather during the winter months, crews comprised solely of foremen were sent out to perform the work available, so that the foremen were the last to be laid off.[52] See Tr. 733, 761–763 (Zaremski), 923–924 (Miceli). However, Miceli testified that January and February 2020, for the first time, he did not send out crews comprised solely of foreman on the available work, as had been done during previous winters. (Tr. 965–968.)

Miceli's various explanations for the unprecedented departure from this well-established procedure were neither convincing nor substantiated by the record evidence. For example, Miceli testified that foremen Wolfe and Smith were not recalled in 2020 with the other NY Paving asphalt foremen because they were part-time, as opposed to full-time, foremen, but then immediately admitted that Smith was in fact a foreman on a full-time basis. (Tr. 924.) Miceli later testified that foremen were not grouped together to perform the work available during January and February 2020 because NY Paving implemented the 7–3 crew sizes, or at least the 3-worker binder crews, as of January 1, 2020. (Tr. 936, 944, 963, 967.) Thus, Miceli testified that "we were changing the way we were doing the whole operation." (Tr. 967.) However, if the change in asphalt paving operations was as drastic as Miceli and Zaremski contended, one would presume that the more experienced and proficient asphalt workers, whom the company had selected as foremen, would be assigned to implement it, particularly given NY Paving's history of continuing to assign crews solely comprised of foremen during the winter. Miceli also claimed that the foremen's higher pay rate engendered his departure from NY Paving's traditional practice, but never provided any specific information to substantiate this contention given the newly implemented "bundling" of work in connection with the 7–3 crew sizes. (Tr. 967–968.) Finally, Miceli testified, without elaboration, that "this is just the way…we decided to implement it. And I brought the guys back who I felt were best to do the work." (Tr. 967–968.) Such testimony does not constitute a compelling explanation for NY Paving's departure from its long-standing practice in this regard.

In addition, the documentary evidence establishes that the seasonal slowdown during the winter months had never resulted in drastic layoffs. Specifically, dues remittance forms submitted by NY Paving to Local 175 for the calendar years 2016 through September 2020, which include reports of payroll for the asphalt workers, establish that 32 fewer asphalt paving workers worked in January 2020 than in December 2019. However, seasonal slowdowns in previous Januarys had only resulted in a payroll differential of five to eight employees in comparison with the preceding December. See GC Exh. 3, pp. 142, 151, 227, 232, 320, 326. Furthermore, following the December 20 layoffs, in January and February 2020, NY Paving assigned fewer employees to perform the work which was available in comparison with previous winters, as General Counsel contends. The dues remittance forms and attached payroll demonstrate that during the slowest months of 2016 (February) and 2018 (January), NY Paving assigned work to twice the number of Local 175 members proportionally than it did in January and February 2020. See GC Exh. 3, p. 66–70, 228–232, 414–419; see Tr. 996–997. In

[51] NY Paving contends, based in part upon my conclusions regarding the discharge of Elijah Jordan in Case 29–CA–233990, et al., that the unfair labor practices established in the previous cases are remote in time and otherwise unrelated to a finding of animus in the instant case. R.S. Post-Hearing Brief at p. 86-89; see *New York Paving, Inc.*, 370 NLRB No. 44, slip op. at 17–19. For the reasons discussed above, I find that the earlier unfair labor practices are directly pertinent to the allegations of unlawful conduct at issue here.

[52] Indeed, Zaremski testified that this remained NY Paving's practice at the time of the hearing in the instant case. (Tr. 763.)

particular, in January 2018, NY Paving assigned approximately 3,421.5 hours of asphalt paving work to 42 employees, whereas in January 2020, NY Paving assigned approximately 2274 hours of work to 18 employees, and in February 2020, NY Paving assigned approximately 2733 hours of work to only 21 Local 175 members. (GC Exh. 3, p. 228-232, 414–419.) As discussed above, NY Paving's departure from its previous practice in the assignment of available work during slow periods and the unprecedented drop in the number of asphalt workers employed constitute additional evidence of unlawful motivation. *Power Equipment Co.*, 330 NLRB at 75; *Gurabo Lace Mills, Inc.*, 265 NLRB at 363.

While the record overall evinces sufficient animus to establish a *prima facie* case, several of General Counsel's assertions in this regard are not compelling. In particular, General Counsel argues that NY Paving's placement of the monies attributable to the July 1, 2019 wage increase pursuant to the NICA contract into escrow demonstrates unlawful motivation. (GC Posthearing Br. at 40.) Given the ongoing dispute between Local 175 and NY Paving regarding the applicability of the 2017–2022 NICA agreement, I disagree. Farrell's testimony that the prevailing wage claim was unrelated to the escrowed wage increase monies was incredible, and reflects poorly on his reliability as a witness.[53] (Tr. 861–862; see GC Exh. 16, p. NYP179, NYP181-NYP182, R.S. Exhs. 17–23.) However, his contention that Local 175 could use the payment of the contract wage increase as evidence that NY Paving had in fact adopted and was bound by the 2017–2022 NICA agreement is not implausible. (Tr. 860–861.) Indeed, Rocco testified to having made that very argument to Region 29. (Tr. 152–153.) The evidence also establishes that the Local 175-represented asphalt paving workers received at least some of the increase due in April 2020, around the inception of the period when Local 1010 would have been permitted to file a new petition for a representation election. (Tr. 80, 368, 397–398; GC Exh. 7.) Given all of this evidence, NY Paving's placement of the July 1, 2019 wage increase required pursuant to the NICA contract into escrow does not in my view tend to establish animus against Local 175.[54]

For all of the foregoing reasons, General Counsel has satisfied their burden pursuant to the *Wright Line* standard to establish a *prima facie* case that NY Paving announced the shutdown of its asphalt operations and laid off the asphalt paving workers on December 20 in retaliation for Local 175's successful prosecution of the crew size grievance.

General Counsel having satisfied their initial *Wright Line* burden, I turn now to the defenses asserted by NY Paving. For the following reasons, I find that NY Paving has not substantiated by a preponderance of the evidence its three purportedly legitimate, non-discriminatory reasons for the December 20 layoffs – the typical slowdown of work during the winter months, the retirement of Operations Manager Robert Zaremski, and the implementation of the 7-3 crew sizes required pursuant to the April 29 Award. In addition, NY Paving has repeatedly shuffled and recombined these rationales, as well as contradictory assertions regarding *when* the implementation of the 7-3 crew sizes actually took place. Both circumstances tend to establish that NY Paving's asserted rationales for the layoff are in fact pretextual. See, e.g., *Nestle USA, Inc.*, 370 NLRB No. 53 at p. 16 (2020) ("Pretext may be demonstrated by asserting a reason that is false or providing shifting explanations for an adverse action"). The evidence establishing that NY Paving's defenses are pretextual further supports a determination that that retribution for Local 175's prosecution of the crew size grievance was the actual, unlawful motivation for the December 20 shutdown and layoffs. *Ground Zero Foundation*, 370 NLRB No. 22 at p. 7; *Mondelez Global, LLC*, 369 NLRB No. 46, at p. 3, 24; see also *NLRB v. Transportation Management Management*, 462 U.S. at 397 ("If the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons [the employer] proffers are prextextual, the employer commits an unfair labor practice"). I will begin by addressing NY Paving's shifting defenses, and then address the evidence pertinent to each of its three proffered defenses in turn.

NY Paving's three asserted justifications for the December 20 layoffs have been repeatedly proffered, withdrawn, and reshuffled during the course its dealings with the asphalt workers, Local 175, and the agency. In its December 20 notice distributed to the asphalt paving workers, NY Paving attributed the layoffs to Zaremski's retirement and, "*more importantly*," to Local 175's having "forced" the company to make "*major changes* to our asphalt paving operations" via the crew size grievance and the April 29 Award. (GC Exh. 2 (emphasis in original).) The notice mentions nothing about a seasonal slowdown in work. However, in his January 30, 2020 letter to Chaikin, Farrell made precisely the opposite assertion, claiming that NY Paving "laid-off certain Local 175 members in December 2019 due to the seasonal 'slow down'" consistent with its past practice, and as a result of Zaremski's retirement. (GC Exh. 15, p. 2.) Similarly, in a February 18, 2020 position statement submitted to Region 29, NY Paving contended that the layoffs were "unrelated to" the April 29 Award, and were instead attributable to "the usual 'slow down' in business associated with the winter months," "further affected" by Zaremski's retirement. (GC Exh. 22, p. 2–3, 8.)

NY Paving's three asserted legitimate rationales for the

[53] Farrell's contentions that he did not know whether the wage increase monies placed in escrow were used to pay the prevailing wage claims, and did not know whether the wage increase monies were still in escrow at the time of the hearing, are equally improbable. Tr. 891–892.

[54] General Counsel also asserts that the timing of the layoff tends to establish unlawful motivation, in that NY Paving's announcement described the period of the layoff as "until March 2020 and possibly longer," in an attempt to create "shifting loyalties" among the asphalt workers in the event that Local 1010 pursued its pending petition, or filed a new petition during the open period beginning April 1, 2020. Post-Hearing Brief at 36-37. I find this theory to be inordinately speculative.

NY Paving contends that the record does not establish animus because it recalled a number of the asphalt workers in February and March 2020. R.S. Posthearing Br. at 108. The payroll materials attached to the dues remittance reports indicate that only 21 asphalt employees worked in February 2020, whereas 42 worked in March 2020. See GC Exh. 3, p. 419, 425. In any event, the Board has held that the recall of laid-off employees is "generally irrelevant" to a determination as to whether their initial discharge or layoff violated the Act. See *Leonardo Truck Lines, Inc.*, 237 NLRB 1221 (1978).

layoffs continued to circumvolve during the hearing. In its opening statement, NY Paving listed all three factors—the typical winter slowdown, Zaremski's retirement, and "reorganizing its entire asphalt operation as a result of the crew size decision"—as engendering the layoff. (Tr. 50–51.) Then, on the second day of the hearing, Miceli disavowed the typical seasonal slowdown justification, testifying that the December 20 written notice was distributed to let the asphalt workers "know that this wasn't going to be just a normal layoff for the wintertime," because the 7-3 crew sizes were being implemented. (Tr. 82–83.) Miceli went on to explain that the seasonal slowdown factor was only relevant in that it made the winter an opportune time to implement the 7–3 crew sizes. (Tr. 72–73.) Farrell, however, refused to jettison any of NY Paving's rationales for the layoff during his ensuing testimony, stating that "in no particular order, it's one of three things," which he claimed were "uncontroverted" as of the sixth day of the hearing—"One, the weather," "Two, you had Robert Zaremski retiring," "And three, you have the start of bundling the tickets for the implementation of the award." Tr. 781-782; see also Tr. 864. Such mutating and contradictory justifications for the layoff indicate that these purportedly non-discriminatory rationales are in fact pretextual.[55]

NY Paving has also offered shifting and conflicting assertions regarding the date that it implemented the 7–3 crew sizes required pursuant to the April 29 Award. In his e-mail exchange with Chaikin in February 2020, Farrell stated "due to unseasonably warm weather this winter, NY Paving anticipates to resume its asphalt paving operations earlier than usual thereby implementing Arbitrator Nadelbach's award." G.C. Ex. 16, p. NYP180. Farrell stated that NY Paving was "already using" a 3-person binder crew, and would begin using seven-person top crews "relatively soon." Id. Farrell went on to announce that "when NY Paving implements the crew sizes mandated" pursuant to the Award, "layoffs of Local 175 members" would result. (GC Exh. 16, p. NYP180-NYP181. In its position statement to Region 29 dated February 18, 2020, NY Paving took the position that it had sent out a seven-person top crew on February 13, 2020, implying that it had thereby implemented the Award on that date. (GC Exh. 22, p. 9.) And in its Petition to Revoke General Counsel's Subpoena *Duces Tecum* filed on June 4, 2020, NY Paving also claimed that "on or about February 12, 2020, NY Paving resumed performing certain asphalt work due to unseasonably warm weather earlier than anticipated . . . and to implement the Award." (GC Exh. 25, p. 6.) Similarly, in a Request for Special Permission to Appeal my July 27, 2020 Order granting General Counsel's Motion to conduct the hearing in this case by videoconference, NY Paving maintained that "commencing in or about February 2020, NY Paving resumed performing certain asphalt work and implemented the Award." (GC Exh. 1(o), p. 6.)

This position, however, was flatly contradicted by Miceli's own testimony at the hearing. Miceli consistently contended that NY Paving planned to and did in fact implement the 7-3 crew sizes in early January 2020, rebuffing an invitation by Farrell to alter his testimony in this regard. (Tr. 72–73, 82, 936, 963–965; see Tr. 1038–1039).[56] And NY Paving's contentions regarding the timing of the April 29 Award's implementation ultimately self-destructed in contradictory assertions during Farrell's subsequent testimony. Farrell initially contended that as of December 20 "the decision" to implement the award "had already been made," and that implementation occurred in late December 2019, "seven months" after the April 29 Award issued. Tr. 584–585. On cross-examination, however, Farrell contended that the award was not implemented until "late February, early March" of the following year. (Tr. 779–780.) Pressed on this point, Farrell contended that "there was a process and at each different time, something happened," before capitulating, "if you want to say that the implementation of the award happened…with the issuance of the [December 20] memorandum," or on "January 1st when everybody's Christmas vacations basically ended, that's fine." Tr. 780. While in the end Miceli ended up providing the most consistent and persuasive account of when the 7-3 crew sizes were actually implemented, the devolution of NY Paving's account and its shifting contentions with respect to this critical issue demonstrate that its assertions are prextextual in a manner that supports a finding of unlawful motivation.

As discussed above, NY Paving has also failed to substantiate its proffered non-discriminatory reasons for the December 20 layoff of the asphalt paving workers – the typical seasonal slowdown, the retirement of Robert Zaremski, and the implementation of the 7–3 crew sizes. An employer's failure to provide evidence adequate to substantiate its proffered legitimate reasons for an adverse employment action demonstrates that those reasons are pretextual, which further supports a finding of unlawful motivation. See *L.S.F. Transportation, Inc.*, 282 F.3d 972, 984 (7th Cir. 2002) ("an employer's proffering of a false explanation for its actions justifies an inference that its real motive for a discharge was unlawful"); *Ground Zero Foundation*, 370 NLRB

[55] In *Volvo Group North America, LLC*, and *National Hot Rod Association*, discussed by NY Paving in its Post-Hearing Brief, the Board determined that the employer had consistently offered one legitimate, non-discriminatory reason for the adverse employment action taken. R.S. Posthearing Br. at 108–111; see *Volvo Group of North America, LLC*, 370 NLRB No. 52 at p. 4 (2020), remanded on other grounds 2021 WL 829497 (2021); *National Hot Rod Association*, 368 NLRB No. 26 at p. 4, fn. 17 (2019), enf. denied on other grounds 988 F.3d 506 (D.C. Cir. 2021).

[56] Q: BY MR. FARRELL: Okay. Mr. Miceli, just several questions. First, you previously testified that you believed the arbitration award was fully implemented in —in January—the first week of January 2020. Let me ask you some questions. When did New York Paving begin using a three-man – a three-man binder crew?

A: First week of January.

Q: When did New York Paving begin using a—a seven-man top crew?

A: I believe it was either the second or third week of February.

Q: Does—so recognizing that New York Paving was using a seven-man top crew beginning the second or third week of January, and a binder crew in the first week of January, do you still think that New York Paving fully implemented—

MR. MICKLEY: Objection. Leading. A leading question.

Q: BY MR. FARRELL: Okay. Is your testimony, do you believe your testimony is still accurate?

A: Absolutely.

(Tr. 1038—1039.)

No. 22, slip op. at 7; *Nestle USA, Inc.*, 370 NLRB at No. 53, slip op. at 16.

NY Paving's contention that the layoff was engendered by the seasonal winter slowdown in work is conclusively contradicted by its own December 20 layoff notice. The layoff notice states that the layoff was necessitated solely by changes caused by the crew size grievance and the April 29 Award, and by Zaremski's retirement. Its description of "*the truth*" about the layoff and shutdown of NY Paving's asphalt operations mentions nothing about a typical winter slowdown in the work. Furthermore, as discussed above, Miceli testified that the seasonal slowdown was only pertinent in that it presented an opportune time to implement the 7–3 crew sizes. Other evidence also tends to undermine the contention that the December 20 layoffs were engendered by the typical seasonal slowdown in work. Weather data admitted into evidence demonstrates that January and February 2020 were somewhat warmer than those months had been in preceding years, with comparable or less precipitation, and Farrell's February 12, 2020 email explicitly states that NY Paving would begin deploying top crews as a result. (GC Ex. 20; GC Exh. 16, p. 4.) Finally, remittance reports submitted by NY Paving to Local 175 indicate that 32 fewer asphalt paving workers were employed in January 2020 than in December 2019, whereas slowdowns in previous Januarys had only resulted in a payroll differential of five to eight employees. See GC Exh. 3, pp. 142, 151, 227, 232, 320, 326. As a result, the evidence establishes that NY Paving's contention in its position statement and during Farrell's testimony that the December 20 layoff was caused by "the usual 'slow down' in business associated with the winter months" is simply false. (GC Exh. 22, pp. 2–3; Tr. 781–782.)

Nor does the evidence substantiate NY Paving's assertion that the December 20 layoff took place as a result of Robert Zaremski's retirement. First of all, the evidence establishes that Zaremski's retirement was not a sudden and unanticipated event. Although various NY Paving witnesses claimed that Zaremski only informed the company that he would be retiring one week before he actually did so, the record establishes that NY Paving was well aware of and had prepared for Zaremski's possible and then impending retirement. Miceli testified that Zaremski had been talking about retiring for approximately two years prior to December 2019. (Tr. 75–76, 978–979.) The dispute with the Local 282 benefit funds which engendered Zaremski's retirement began in late September 2019, and Zaremski testified that he made the decision to retire after the funds stated by letter of November 15, 2019 that he was engaged I,n disqualifying employment by working for NY Paving. (Tr. 690–693; R.S. Exhs. 26, 28.) Zaremski testified that he informed Miceli and Coletti regarding the dispute in late September after receiving the Funds' initial correspondence,[57] and that he told Miceli that he intended to retire as Operations Manager in early December 2019. (Tr. 717, 753.) Furthermore, as discussed above, I do not credit Miceli and Zaremski's testimony to the effect that they did not collaborate in order to develop and implement system of bundling work which was effected concomitantly with the 7–3 crew sizes. In particular, I find Miceli's claim that he did not consult with Zaremski regarding the impact of the implementation of the 7–3 crew sizes on the Operations Manager position before Zaremski retired to be patently incredible given his testimony during the October 25, 2019 damages hearing. (Tr. 977; GC Exh. 14, p. 87.)

The evidence similarly establishes that NY Paving had a specific strategy for replacing Zaremski as Operations Manager in place for several years. In particular, Miceli testified that NY Paving had long anticipated that Patrick Fogarile would assume Zaremski's Operations Manager position when Zaremski retired – as Miceli stated, "this was a foregone conclusion that Patty was going to take over that position for years." (Tr. 75, 77, 977–979.) Fogarile was not inexperienced with respect to asphalt paving operations; Miceli testified that Fogarile had reported directly to Zaremski for approximately 24 years, and had for years been scheduling and assigning employees to asphalt milling and paving crews. (Tr. 87–88.) Fogarile had also been filling in for Zaremski as Operations Manager when Zaremski was on vacation or out for some other reason. (Tr. 279–280, 360–361, 949.) The evidence further establishes that Fogarile immediately assumed the Operations Manager position after Zaremski's retirement, such that NY Paving's claim in the December 20 notice that without Zaremski "we lack a supervisor to run the asphalt paving division" is patently false. (GC Exh. 2.) For all of the foregoing reasons, the evidence does not demonstrate that Zaremski's retirement was a precipitous event that necessitated the December 20 layoffs.

Finally, the evidence is insufficient to substantiate NY Paving's contention that the implementation of the 7–3 crew sizes mandated by the April 29 Award resulted in the December 20 layoffs. NY Paving contends that in order to implement the 7–3 crew sizes and remain economically viable, it was required to develop a system of "bundling" the work which came in, so that the work could be performed by fewer asphalt crews. The sole evidence NY Paving provided to substantiate this contention was the testimony of Miceli. Miceli testified that competitor firms which bid for the same work as NY Paving were not performing the work with top and binder crews comprised of 7 and 3 workers, and that NY Paving could not renegotiate its arrangements with Hallen or National Grid in order to accommodate the change mandated by the April 29 Award. (Tr. 901–902.) Miceli explained that "the only way I saw seven and three becoming remotely possible was to bundle all the work and go out in particular areas when we have enough work in the area to do it." Tr. 903. Miceli stated that with the 7–3 crew sizes, as opposed to sending out a higher number of crews in "a steady stream of work" to "get it done and get it done quickly," "we hold on to the work for a few weeks at a time and wait until there's enough work in a particular area…to get in there an perform it efficiently." Tr. 903. Miceli testified that implementing the 7–3 crew sizes without bundling the tickets would have resulted in "burning money." Tr. 906.

The general proposition that larger crews are inherently more expensive, because more workers must be paid, is certainly rational. However, Miceli's testimony was devoid of specific

[57] Farrell testified that Coletti retained him shortly thereafter to represent Zaremski in his dealings with the Local 282 Funds. (Tr. 647–648.)

details necessary to substantiate NY Paving's defense that the "bundling" of tickets was financially imperative, and that the reorganization of labor the "bundling" system engendered required the layoffs of 32 asphalt paving workers. How were the labor costs necessary to remain profitable and continue to adequately service NY Paving's contracts with Hallen and National Grid determined? How was the threshold amount of work which would trigger the deployment of crews to a specific geographic area arrived at? What particular role did the asphalt paving crew play in the overall labor cost calculation, given Miceli's testimony that the "bundling" of tickets affected not only the asphalt paving workers, but also dig-out crews comprised of employees represented by Local 1010, as well as drivers represented by Local 282?[58] See Tr. 903. How specifically did the bundling of work result in the drastic reduction in asphalt workers – from 50 to 18 – between December 2019 and January 2020? See *Power Equipment Co.*, 330 NLRB at 75 (finding that employer failed to establish that downturn in business was "of such a magnitude" as to substantiate layoff defense with respect to specific employee). Miceli's testimony did not address any of these issues in detail, but was largely confined to conclusory depictions of the impact of the 7-3 crew sizes on NY Paving's workflow, such as "it blew it up," and "we had to change everything." Tr. 902. In addition, as discussed above, I have found Miceli and Zaremski's testimony regarding the measures NY Paving took to formulate the "bundling" of job tickets in connection with implementing the 7-3 crew sizes incredible. The ensuing evidentiary void in NY Paving's account of its development of the new bundling method of organizing work in order to maintain profitability in the face of the 7-3 crew sizes does not inspire confidence in the sweeping generalities offered by Miceli in this regard. Nor do NY Paving's shifting assertions, as discussed above, regarding the timing of its implementation of the April 29 Award.

It is important to note in this respect that NY Paving did not introduce a smidgen of documentary evidence to substantiate Miceli's testimony regarding the financial necessity of bundling NY Paving's work and the drastic decrease in the complement of asphalt paving crews which purportedly ensued. The Board has repeatedly held that an employer's failure to offer "some independent corroborating proof" of "extraordinary conditions in its business that would necessitate layoffs" undermines a defense that such layoffs or discharges were legitimately required by existing business conditions. See, e.g., *Valley Slurry Seal Co.*, 343 NLRB 233, 250 (2004), quoting *Power Equipment Co.*, 330 NLRB at 75. Indeed, the Board has stated that it is "incumbent" on an employer asserting an economic defense to substantiate its contentions with more than oral testimony, particularly where, as here, the oral testimony at issue is inconsistent or uncorroborated. *A.D. Conner, Inc.*, 357 NLRB 1770, 1784 (2011); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004); see also *Valley Slurry Seal Co.*, 343 NLRB at 250, quoting *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980). In addition, where the employer fails to provide corroborating evidence, in either testimonial or documentary form, from "neutral sources," such as "accountants, bankers, or creditors," an adverse inference regarding the reliability of assertions regarding the financial necessity of layoffs may be appropriate.[59] *A.D. Conner, Inc.*, 357 NLRB at 1784. NY Paving's failure to provide documentary evidence or testimony corroborating Miceli's broad assertions regarding the necessity of "bundling" the work when the 7–3 crew sizes were implemented, and its failure to provide specific detail supporting its contention that the bundling system required layoffs of the magnitude which took place on December 20, further supports a conclusion that its defense in this regard is pretextual.

Finally, in its Post-Hearing Brief NY Paving analogizes the instant case to the scenario addressed by the Board in *Upper Great Lakes Pilots*, 311 NLRB 131 (1993), where the Board found that an employer's layoff and discharge of employees were not unlawfully motivated. Post-Hearing Brief at 106-108. However, I find that case to be inapposite for several reasons. In *Upper Great Lakes Pilots*, the Board determined that the employer representatives' unlawful statements relied upon by General Counsel did not in fact establish unlawful motivation, in that they occurred after the layoffs, or were sufficiently vague to reflect merely personal animus. 311 NLRB at 136. Furthermore, in *Upper Great Lakes Pilots*, the employer provided specific evidence to substantiate its significant decline in business over a ten-year period, and the immediate financial circumstances it faced at the time of the layoffs. 311 NLRB at 133, 136–137. The record also established that the use of mandatory unpaid days off, which the employer had relied upon previously to reduce costs, had been foreclosed when the union membership voted to reject the employer's compensation proposal in collective bargaining negotiations. *Upper Great Lakes Pilots*, 311 NLRB at 134, 137. Thus, the Board concluded that the layoffs in that case were not motivated by the protected activities of a group of employees which voted against the compensation proposal. Id. at 139. Given the differences between the record here and the situation addressed by the Board in *Upper Great Lakes Pilots*, I do not find that case to be instructive.

For all of the foregoing reasons, NY Paving has not established based upon a preponderance of the evidence that it announced the shut-down of its asphalt paving operations and laid off the asphalt paving workers on December 20 for legitimate, non-discriminatory reasons. As a result, in light of the evidence establishing animus as a motivating factor as discussed above, the record overall demonstrates that NY Paving announced the shut-down of its asphalt paving operations and laid off the asphalt paving workers represented by Local 175 on December 20 in retaliation for their Union support and Local 175's successful prosecution of the crew size grievance, in violation of Section 8(a)(1) and (3) of the Act.

*C. The Alleged Refusal to Engage in Effects Bargaining*

The complaint alleges that NY Paving violated Sections

[58] Although Miceli and Zaremski testified that the "bundling" of tickets also affected the work performed by the concrete workers represented by Local 1010 and the truck drivers represented by Local 282, there is no evidence in the record that employees in either of those bargaining units were laid off when the "bundling" system was implemented.

[59] I note that at the inception of the case General Counsel indicated that they were willing to negotiate confidentiality provisions and/or a protective order to cover materials produced by NY Paving, such as the open order reports, which might reveal information regarding its business operations. See generally, Tr. 20–26.

8(a)(1) and (5) of the Act by announcing the shut-down of its asphalt operations and laying off the bargaining unit asphalt paving employees without providing Local 175 with notice and an opportunity to bargain regarding the effects of its decision. General Counsel argues that NY Paving did not notify Local 175 regarding the layoff of its asphalt paving employees or the shutdown of its asphalt paving operations until the foremen's meeting on December 20, the day the layoff occurred, thus presenting Local 175 with a *fait accompli* which precluded meaningful bargaining regarding the effects of these changes. NY Paving contends that it had no obligation to bargain regarding the effects of the shutdown and layoff, and also asserts that it provided Local 175 with sufficient notice and opportunity to engage in effects bargaining, but that Local 175 waived its right to do so.

For the following reasons, I find that the record evidence overall substantiates the allegation that NY Paving announced the shut-down of its asphalt operations and laid off the bargaining unit employees without providing Local 175 with notice and the opportunity to bargain regarding the effects of its decision, presenting the Union with a *fait accompli*, in violation of Section 8(a)(1) and (5) of the Act.

1. The bargaining obligation

The evidence establishes that NY Paving was obligated to bargain regarding the effects of its decision to shut down its asphalt paving operations and lay off the asphalt workers as of December 20. NY Paving asserts that it was not obligated to engage in effects bargaining because the December 20 layoffs were effectuated pursuant to a "past practice" of laying off employees in connection with the typical winter slowdown in work. R.S. Post-Hearing Brief at 56-59; see *Raytheon Network Centric Systems*, 365 NLRB No. 161 at p. 16 (2017). The party asserting the existence of such a past practice bears the burden of establishing that the contested action is "similar in kind and degree" and "occurred with such regularity and consistency that employees could reasonably expect the practice to reoccur on a consistent basis." *Bemis Co.,* 370 NLRB No. 7, slip op. at 1, fn. 3, and at 32 (2020); see also *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5 (2020). Here, NY Paving's assertion that the December 20 layoff was consistent with a past practice is definitively refuted by the company's own December 20 notice, which attributes the shutdown and layoffs to the implementation of the 7–3 crew sizes and Zaremski's retirement, without mentioning a seasonal slowdown in work. It is further contravened by Miceli's testimony at the hearing that the seasonal aspect of the layoffs was only relevant in that the winter slowdown created an opportune moment to implement the 7–3 crew sizes, and by documentary evidence demonstrating that past winter slowdowns had never engendered layoff of the magnitude which occurred during the winter of 2019–2020. As a result, NY Paving's argument that the December 20 shutdown and layoffs were simply a continuation of past practice not subject to bargaining is meritless.

Despite its "past practice" argument, NY Paving further contends that it was not obligated to bargain regarding the effects of the December 20 shutdown and layoffs because the decision to shutdown its asphalt paving operations and/or lay off the asphalt paving workers constituted a change in the scope and direction of its business, and was therefore an "entrepreneurial decision" pursuant to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). (R.S. Posthearing Br. at 59–62.) In *First National Maintenance Corp. v. NLRB*, the Supreme Court held that an employer has no obligation to bargain regarding decisions involving "a change in the scope and direction of the enterprise," "akin to the decision whether to be in business at all," unless "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 677, 679.

Here, however, there is no indication in the record whatsoever that NY Paving changed the scope or direction of its business in connection with the December 20 shutdown and layoffs. There is no evidence that NY Paving abandoned certain lines of its business, made capital investments, altered its customer or client relationships in any way, or otherwise changed its basic operations. NY Paving continued to perform the same services – concrete and asphalt repair of streets and sidewalks—for the same clients, utilizing the same work processes, equipment, materials, and employees proficient in the same trades. See *Mi Pueblo Foods*, 360 NLRB 1097, 1098–1099 (2014) (employer did not change the scope and direction of its enterprise where its changes involved no capital investments or alteration of its basic operations); *Holmes & Narver*, 309 NLRB 146, 146–147 (1992) (employer "did not abandon a line of business or cease a contractual relationship with a particular customer," or otherwise "significantly alter[] the scope and direction of its business"). NY Paving even recalled some of the laid-off employees in February and March. See *Taino Paper Co.*, 290 NLRB 975, 977 (1988) ("The fact that the Company recalled the laid off employees…refutes any contention on its part that the layoff was a change in the scope, nature, or direction of its business"). What NY Paving changed, according to Miceli and Zaremski, was the temporal organization of the work, so that instead of dispatching crews to individual job sites immediately after a work order was received, open work orders were allowed to accumulate, and crews were then dispatched to a larger group of jobsites within a particular geographic area. The Board has long held that such reorganizations of bargaining unit work are not changes in the scope or direction of a business enterprise which consequently exempt an employer from the obligation to bargain regarding the decision itself. *Mi Pueblo Foods*, 360 NLRB at 1097, 1098 (change from "hub-and-spoke" to "point-to-point" system for product delivery not a "core entrepreneurial decision" divesting employer of an obligation to bargain regarding to changes in routes and layoffs); *Centurylink*, 358 NLRB 1192, 1201 (2012) (elimination of retail cashier position not an entrepreneurial decision, where the cashiers' work was assigned to a different job classification); *Holmes & Narver*, 309 NLRB at 146–147 ("organizational changes" involving consolidation and changes in jobs combined with layoffs did not change the scope and direction of the business). An employer is certainly required to bargain regarding the effects of such changes on the bargaining unit employees. See, e.g., *Comau, Inc.*, 364 NLRB 523, 525 (2016), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Rigid Pak Corp.*, 366 NLRB No. 137, slip op. at 4, 15 (2018); *Tramont Manufacturing, LLC*, 365 NLRB No. 59, slip op. at 7 (2017), remanded on other grounds 890 F.3d 1114 (D.C. Cir. 2018).

For all of the foregoing reasons, the evidence establishes that NY Paving was obligated to bargain with Local 175 regarding the effects of its decision to shut down its asphalt paving operations and lay off its asphalt paving workers, as announced on December 20.

2. Notice and the opportunity to engage in effects bargaining

Where there is an obligation to bargain, bargaining, including bargaining regarding the effects of an "entrepreneurial" decision not subject to the obligation itself, must occur "in a meaningful manner and at a meaningful time." *First National Maintenance Corp.*, 452 NLRB at 681-682. "Meaningful" bargaining encompasses adequate notice to the union, "sufficiently before…actual implementation so that the union is not confronted at the bargaining table with . . . a fait accompli." *Comau, Inc.*, 364 NLRB No. 48 at p. 3, quoting *Williamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990) (applying *fait accompli* principle to alleged refusal to engage in effects bargaining); see also *Tramont Manufacturing, LLC*, 365 NLRB No. 59, slip op. at 7. Furthermore, the employer must "inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). In the context of layoffs, in order to provide adequate notice for effects bargaining purposes, the employer should inform the union at the time that it makes a definitive determination to lay off employees. *Tramont Manufacturing, LLC*, 365 NLRB No. 59, slip op. at 7, citing *Allison Corp.*, 330 NLRB 1363, 1366 (2000) ("once the [employer] had made the decision to lay off unit employees, the time was ripe for effects bargaining"). Failure to provide notice of layoffs to the union prior to their implementation precludes the union from a meaningful opportunity to bargain over their effects. *Tramont Manufacturing, LLC*, 365 NLRB No. 59, at p. 7, citing *Geiger Ready Mix*, 315 NLRB 1021 (1994); see also *Williamette Tug & Barge Co.*, 300 NLRB at 283.

The evidence here establishes that NY Paving did not notify Local 175 of the shutdown of its asphalt paving operations and layoff of the asphalt paving workers until December 20, the date that the layoffs were effectuated, thereby presenting the Union with a *fait accompli*. Coletti and Miceli's announcement of the layoffs during the foremen's meeting on December 20 was the first notification provided to either the employees or Local 175 that NY Paving's asphalt paving operations would be shut down and/or that the vast majority of its asphalt paving employees would be laid off. Thus, the record evidence demonstrates that NY Paving notified Local 175 that it was shutting down its asphalt paving operations and laying off the asphalt paving workers on December 20, the date that it did so, presenting Local 175 with a *fait accompli*.[60]

NY Paving argues that it provided notice of the layoffs and shutdown of asphalt paving operations on October 25, 2019, via Miceli's testimony at the damages hearing and Farrell's statement during the parties' discussions that day that "a lot of Local 175 employees" would end up "out of work" when the "unworkable" 7–3 crew sizes were implemented. (Tr. 111.) (R.S. Posthearing Br. at p. 64–66, 69–70. However, the record evidence does not substantiate this assertion. It is well-settled that a union's obligation to request effects bargaining "may only be triggered by a clear announcement that a decision . . . has been made and that the employer intends to implement this decision." *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996). An obligation to request effects bargaining is not engendered by "an inchoate and imprecise announcement of future plans about which the timing and circumstances are unclear." *Oklahoma Fixture Co.*, 314 NLRB at 961 (internal quotations omitted) (employer's statement that it was "considering" the possibility of subcontracting but had not made any decision insufficient to engender an obligation to request effects bargaining); see also *Centurylink*, 358 NLRB at 1193 (union not required to demand bargaining "at any point before the [employer] confirmed that the decision" to eliminate retail cashier position and discharge cashiers "would be implemented on a specific date").

Miceli and Farrell's statements on October 25, 2019, were exactly the sort of "inchoate and imprecise" assertions insufficient to trigger an obligation to request bargaining pursuant to the above caselaw. While Miceli predicted during his testimony at the damages hearing on October 25, 2019 that overtime and work hours would decrease and workers would be laid off if the 7-3 crew sizes were implemented, he repeatedly qualified his comments in a manner which ultimately rendered them hypothetical. For example, Miceli posited that "the men will be cut significantly" and overtime "will be nonexistent," as a function of what NY Paving was "*planning if* we have to go to seven and three." (GC Exh. 14, p. 65 (emphasis added). He later described a reduction in hours and overtime as "what we're contemplating," and "what we think we're going to have to do," and also temporized that "we need to go back inhouse, think about how we're going to do this work now," because "we've only been brainstorming this for a little while," and "we've only discussed it maybe two or three times since the [April 29] ruling." (GC Exh. 14, p. 59, 85–86, 88.) While Miceli claimed that there was a "100 percent" chance that employees and foremen would be laid off, he also stated with respect to implementation of the 7–3 crew sizes that "we still don't even know how to do it," and "maybe we can come up with something as we keep going forward." (G C Exh. 14, p. 86–87, 89–90. Similarly, according to Rocco, Farrell did not state that a definite decision to lay off asphalt workers had been made, did not identify the number or job titles of

[60] NY Paving contends that the layoffs did not become effective until January 1, 2020, when, according to Miceli's testimony, NY Paving actually implemented the 7–3 crew sizes mandated by the April 29 Award, thus providing Local 175 with adequate notice and an opportunity to bargain. (R.S. Posthearing Br. at p. 70–71.) This assertion is contrary to NY Paving's own December 20 notice to the asphalt workers. And even if it were the case, a 10-day period encompassing the Christmas, Hanukkah, and New Year's holidays would not permit sufficient bargaining to obviate a finding that Local 175 was presented with a *fait accompli*. See *Harley-Davidson Co.*, 366 NLRB No. 121, slip op. at 3 (2018) (collecting cases finding one week's notice insufficient for meaningful bargaining); *Pontiac Osteopathic Hospital*, 336 NLRB at 1022–1023 (finding that union exercised due diligence in requesting bargaining, noting that events occurred during "the disruption of the holiday season").

asphalt workers that would be laid off, and did not provide even an approximate time that any layoff would occur. Farrell only remarked that the 7–3 crew sizes were "unworkable," and would result in "a lot of Local 175 employees out of work." (Tr. 111.) Thus, Miceli and Farrell articulated general prognostications to the effect that layoffs of asphalt workers and reduction of overtime hours could ensue if the 7–3 crew sizes were implemented. Neither provided Local 175 with any specific statement as to how many asphalt workers would be laid off, what categories of asphalt workers would be affected,[61] or when any layoffs would take place. The Board has found that "general statements concerning future work force reductions" are "not sufficiently specific" to provide a union "with a reasonable opportunity to bargain" over the implementation of layoffs occurring on a specific subsequent date. *Pan American Grain Co.*, 343 NLRB 318, 318, 338 (2004), enf. denied on other grounds 448 F.3d 465 (1st Cir. 2006) (employer's general statements that it "planned to continue staff reductions in the future consistent with increased efficiency" insufficient to provide notice and a reasonable opportunity to bargain regarding specific layoffs subsequently effected). Miceli and Farrell's statements on October 25, 2019 therefore did not constitute notice to Local 175 of the December 20 shutdown and layoffs, and the Union was not obligated to request effects bargaining as a result.

Nor did any of the parties' other dealings prior to December 20 provide Local 175 with meaningful notice of the shutdown and layoffs or engender an obligation to request effects bargaining. NY Paving contends that after the April 29 Award issued, Local 175 should have been surmised that the company would implement the 7–3 crew sizes as soon as it possibly could, given the substantial and accruing monetary damages involved, and furthermore should have assumed that layoffs would ensue. (R.S. Posthearing Br. at 66–69.) This proposition is obviously completely speculative, and as such is not remotely persuasive. Indeed, its absurdity is illustrated by the fact that as of February 12, 2020, Farrell was contending in correspondence with Chaikin that the 7–)3 crew sizes had not yet been implemented. (GC Exh. 16, p. NYP180. In addition, Rocco testified without contradiction that NY Paving did not announce any intention to implement the Award or suggest that the parties engage in effects bargaining during the June 26, 2019 meeting, the parties' October 25, 2019 discussions, or at any other time prior to December 20. Tr. 103-104, 119, 259. Instead, NY Paving filed a Petition to Vacate the Award on July 26, 2019, and negotiated a provision in the subsequent Stipulation of Discontinuance specifically stating that any Petition to Vacate filed within ninety days of a final award would not be time-barred. (GC Exh. 12, 13.) Rocco also testified without contradiction that while discussing the Stipulation of Discontinuance, NY Paving's counsel stated that the company intended move to vacate the April 29 Award after the inquest or damages phase of the proceedings was complete.[62] (Tr. 254–255.) Finally, Farrell admitted in response to my questions at the hearing that NY Paving never informed Local 175 that the 7-3 crew sizes would be implemented prior to December 20. (Tr. 809–810.) As a result, the record does not establish that NY Paving provided Local 175 with notice that the 7–3 crew sizes, or any ensuing layoffs or restructuring, would be implemented on December 20, sufficient to engender an obligation to request bargaining.[63]

3. Waiver of the right to engage in effects bargaining, and issues involving evidentiary sanctions

NY Paving argues that Local 175 waived its right to bargain regarding the effects of the shutdown of asphalt paving operations and layoff of asphalt workers by failing to exercise due diligence in requesting and pursuing bargaining prior to December 20. (R.S. Posthearing Br. at 62–83. NY Paving principally claims that the Union waived its right to bargain when it did not proceed with the mediation before Elliott Shriftman, which the parties anticipated would take place in December 2019. (R.S. Posthearing Br. at 73–78.) This argument is not convincing. Most importantly, as discussed above, the evidence establishes that NY Paving did not provide Local 175 with notice of its intent to shut down its asphalt paving operations and lay off the asphalt workers until it actually did so on December 20. Thus, as of October 30, 2019, when Rocco told Shriftman to forego holding the December 16, 2019 date for the mediation, Local 175 had not been notified that NY Paving intended to implement the 7-3 crew sizes at any specific time, or that a shutdown of asphalt

[61] I note that even during the foremen's meeting on December 20, Coletti did not accurately describe the layoffs being effectuated. According to Wolfe's uncontradicted testimony, Coletti told the foremen during the meeting that some of them would be demoted, but did not state that foremen would be laid off. Tr. 281-282 However, the evidence establishes that Wolfe and one other foreman were in fact permanently laid off.

[62] When Local 175 filed a Petition to Confirm Two Labor Arbitration Awards on June 19, 2020, after Arbitrator Nadelbach issued his Post-Award Calculation of Damages, NY Paving filed a Cross-Petition to Vacate the Awards in response. See G.C. Ex. 18, 19.

[63] In the cases relied upon by NY Paving, the respondent employers provided the unions involved with a certain date when specifically described changes would be definitively implemented. See *The Emporium*, 221 NLRB 1211, 1214 (1975) (employer notified union on January 8, "that it intended to cease operating its tailor shops and terminate the employees effective February 1"); *Kentron of Hawaii, Ltd.*, 214 NLRB 834 (1974) (employer notified union by letter of April 9, that "as of May 1 [], it was excluding the represented employees from participation in certain specified benefit plans for unrepresented employees because of their union membership"); *Hartmann Luggage Co.*, 173 NLRB 1254, 1255–1256 (1968) (employer announced on January 18 that layoffs would take place on January 22, and posted notices, "indicating which employees were to be laid off and when" on its bulletin boards the next day). The cases relied upon by NY Paving to argue that a union cannot merely protest changes by filing unfair labor practice charges without requesting bargaining also involve legally effective notice of the impending change. See *Associated Milk Producers*, 300 NLRB 561, 563–564 (1990) (employer informed union by letter dated July 5 that it would not continue its contributions to the union-affiliated Pension Fund and did not make its contribution due on July 15); *Clarkwood Corp.*, 233 NLRB 1172 (1977), enfd. 586 F.2d 835 (3d Cir. 1978) (employer posted a notice July 9 stating that all pay telephones would "shortly" be removed from the premises, and posted a notice August 9 asking female employees to remove belongings from a restroom because it would no longer be available for their use as of August 14). I also find *Boeing Co.*, 337 NLRB 758 (2002), unpersuasive due to the specific factual scenario at issue in that case.

paving operations and layoff of asphalt workers would definitively result.

In addition, the record evidence establishes that the mediation with Shriftman was intended to encompass all of the numerous, and significant, pending issues between the parties, and was not focused solely on the crew size grievance and the April 29 Award. As of October 30, 2019, there were a number of outstanding issues involving NY Paving, Local 175, and the asphalt workers represented by the Union—including the emergency keyhole, Code 49, and Code 92 work addressed in my previous Decision, the prevailing wage claims predicated on NY Paving's failure to implement the July 1, 2019 wage increases pursuant to the 2017-2022 NICA agreement, the FLSA and New York State Labor Law litigation, and the parties' overall collective bargaining relationship and negotiations for a successor agreement. The parties' statements on the record at the October 25, 2019 damages hearing, asking that Arbitrator Nadelbach reserve issuing a decision on the remedy, explicitly referred to their overall relationship – Rocco stated that "the parties are still discussing global matters between them," and Farrell said that NY Paving and Local 175 were attempting "to resolve all matters." G.C. Ex. 14, p. 3-4. I therefore credit Rocco's testimony that the mediation with Shriftman was intended to address all outstanding issues between the parties, as opposed to Farrell's conclusory assertion that it was "clear" that only the crew size grievance would be discussed, particularly in light of Farrell's subsequent admission that he did not know whether Local 175 ever agreed to that limitation. Tr. 111, 824-827. Thus, declining to participate in the mediation was not the equivalent of a refusal to engage in effects bargaining or a waiver of Local 175's right to do so, as NY Paving contends.

NY Paving further argues that various statements made by Chaikin and Rocco regarding Local 175's approach to the proposed mediation constitute a retroactive "confession" of some sort that the Union was presented with meaningful notice and an opportunity to engage in effects bargaining and affirmatively declined to do so. This argument involves statements purportedly made by Chaikin during a phone conversation with Farrell and Getiashvili on February 6, 2020, and in a series of e-mails later in February 2020, as well as Rocco's testimony at the hearing. The evidence pertaining to the February 6, 2020 phone conversation is the subject of significant procedural and evidentiary dispute, which will be addressed at length first. Chaikin's February 2020 e-mails and Rocco's testimony at the hearing will be discussed thereafter.

At the hearing, NY Paving offered Getiashvili's notes of a February 6, 2020 telephone conversation involving Farrell, Chaikin, and herself, and Getiashvili's testimony regarding her recollection of the conversation, as evidence to establish that Local 175 waived its right to bargain over the effects of the shutdown of NY Paving's asphalt operations and layoff of the asphalt workers. See Tr. 1044–1045, 1078–1080; R.S. Exh. 33; R.S. Posthearing Br. at 43–50. General Counsel objected to the admission of the notes and to Getiashvili's testimony, on the grounds that the notes were encompassed by General Counsel's Subpoena *Duces Tecum* served upon NY Paving prior to the hearing, but had not previously been produced. (Tr. 1048–1049, 1073, 1077–1078.) At the hearing, I declined to exclude the notes and Getiashvili's testimony regarding the telephone conversation as an evidentiary sanction, in that NY Paving's failure to produce the notes did not rise to the level of a contumacious refusal to comply with a subpoena. (Tr. 1074–1076; see also Tr. 23–25, 1090–1091); see *McAllister Towing and Transportation Co.*, 341 NLRB 394, 394-398 (2004), enfd. 156 Fed.Appx. 386 (2d Cir. 2005) (affirming ALJ's imposition of evidentiary sanctions where employer had affected "virtually no compliance" with valid subpoenas). I stated in connection with my ruling, however, that General Counsel would be permitted substantial leeway with respect to the issue on cross-examination of Getiashvili and on rebuttal. (Tr.1075–1076.) Subsequently, before the hearing closed I asked the parties to address the admissibility of this evidence in further detail in their pos-hearing briefs. (Tr. 1137–1138.)

General Counsel argues in their posthearing brief that both the notes and Getiashvili's testimony regarding the February 6, 2020 conversation should be excluded from the record as an evidentiary sanction. (GC PostHearing Br. at 53–57. General Counsel contends that NY Paving did not substantially comply with the Subpoena *Duces Tecum* and my June 23, 2020 order denying its Petition to Revoke. NY Paving asserts that the notes and testimony were properly admitted, and in addition contends that I should draw an adverse inference based upon Chaikin's failure to testify regarding the February 6, 2020 conversation. (R.S. Posthearing Br.at 43–50, 50–55.) After careful consideration of the issues, I have reevaluated and will reverse my earlier rulings admitting the notes of the February 6, 2020 meeting and Getiashvili's testimony. However, for the reasons discussed below, I find that even if this evidence were admitted, Getiashvili's notes have no probative value. In addition, even if Chaikin did make the remarks attributed to him by Getiashvili and Farrell, the evidence overall does not establish that Local 175 waived its right to demand effects bargaining.

I find, as I ruled during the hearing, that the notes of the February 6, 2020 meeting were encompassed by General Counsel's Subpoena *Duces Tecum*, and by my June 23, 2020 Order Granting and Denying NY Paving's Petition to Revoke and requiring production of responsive documents. The notes are responsive to Request No. 11 contained in the Attachment to General Counsel's Subpoena *Duces Tecum*, which requires the production of documents "showing or pertaining to bargaining between [NY Paving] and Local 175 relating to layoffs of asphalt paving employees represented by Local 175, from April 29 to the present." (GC Exh. 25, p. 28.) I denied NY Paving's Petition to Revoke Request No. 11 in my June 23, 2020 Order. (GC Exh. 25, p. 21. Furthermore, NY Paving contended in its position statement submitted during the investigation, and asserts in its Post-Hearing Brief, that Local 175 admitted during the February 6, 2020 conversation that it had waived its right to engage in effects bargaining regarding the shutdown and layoffs. See GC Exh. 22, p. 8; R.S. Posthearing Br. at 73–78. As a result, it is apparent that the notes of the February 6, 2020 conversation are responsive to a request for documents "showing or pertaining to bargaining…relating to layoffs of asphalt paving employees."

As stated above, General Counsel argues that NY Paving's failure to produce the notes of the February 6, 2020 conversation warrants the exclusion of the notes and Getiashvili's testimony

regarding the conversation itself from the record as an evidentiary sanction. It is well-settled that an ALJ may preclude a party from presenting evidence regarding a specific issue where the party has not made a good faith effort to comply with a subpoena encompassing relevant materials. See, e.g., *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1, fn. 1, and at 15, fn. 29 (2018), enfd. 779 Fed.Appx. 752 (D.C. Cir. 2019) (barring testimony and documentary evidence); *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, fn. 1, 1228–1229 (2014), enf'd. 778 Fed.Appx. 2 (D.C. Cir. 2018) (barring all evidence regarding employer practices involving medical documentation for absences). In particular, General Counsel relies upon *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 NLRB 830, 833–834 (D.C. Cir. 1998), enfg. *Perdue Farms*, 323 NLRB 345 (1997). In *Perdue Farms*, the subpoena *duces tecum* in question required the production of all documents reflecting the content of employee meetings with a particular supervisor. 323 NLRB at 348. Although the employer conceded that a series of such meetings occurred, and that notes of several meetings existed, it produced notes for only one of the meetings involved. *Perdue Farms*, 323 NLRB at 348. The ALJ determined that the notes the employer failed to produce were relevant, and as a result precluded the employer from adducing evidence regarding the meetings in question. Id. The District of Columbia Circuit subsequently dismissed the employer's objection to the ALJ's ruling, stating that "Once a party's challenge to a subpoena has been rejected…the party cannot pick and choose which parts…it will obey and which parts it can ignore," and finding the evidentiary sanction imposed appropriate. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d at 834 (internal quotations and citations omitted).

General Counsel argues that NY Paving did not substantially comply in good faith with the Subpoena *Duces Tecum*, contrary to my ruling on the record regarding this issue. (Tr. 1074–1075.) General Counsel acknowledged, as I mentioned on the record, that NY Paving had made a substantial effort to accommodate General Counsel with respect to the copious volume of open order reports initially sought pursuant to the Subpoena. See also (Tr. 20–25, 1090–1091.) However, General Counsel contends that NY Paving failed to make a good faith attempt to comply with the Subpoena in other significant respects, specifically with respect to its failure to produce electronically stored information (ESI), and adequately address privileged documents. After careful consideration, I find these arguments persuasive.

General Counsel's Subpoena *Duces Tecum* required the production of ESI in addition to traditional documentary evidence. Paragraph (a) of the Attachment includes as subject to production "material of whatever character, records stored on computer or electronically," and "E-mail communications." (GC Exh. 25, p. 26.) Paragraph (j) states, "Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." (GC Exh. 25, p. 26.) Several of the specific requests contained in the Attachment explicitly refer to "electronic communications," "including but not limited to emails and text messages." (GC Exh. 25, p. 27–28 (Paragraphs 3(d-f), 4, 6-10, 12(b), 13(c)). NY Paving's Petition to Revoke objected to all of the Paragraphs seeking the production of ESI, and claimed generally that the production of ESI was unduly burdensome. In my June 23, 2020 Order Granting and Denying the Petition to Revoke, I rejected these arguments, and also ordered the parties to meet and confer regarding a number of issues involving the production of ESI. Order Granting and Denying Petition to Revoke at 4–5.

The record establishes that NY Paving did not fully comply with the Subpoena and my Order with respect to the production of ESI, particularly with respect to text messages. Farrell testified on redirect examination that, "I'm a good texter," and that "the reason I want people to text me is so when they say we spoke, I say I'm not going to remember it…if you text me, I always have the ability to refer back to it, so that's the reason I tell people to text me." (Tr. 882.) Farrell thus clearly conveyed that he used text messaging as a means to retain the numerous pieces of information he received in the course of his demanding workload. Tr. 881-883. Despite Farrell's reliance on text messaging for this purpose, however, NY Paving produced only one text message, between Farrell and Rocco, pursuant to General Counsel's Subpoena. Tr. 1109-1110; R.S. Ex. 6. NY Paving did not produce the text messages between Farrell and Rocco regarding proposed changes in the Board's blocking charge policy, in evidence as General Counsel Exhibit 26. Tr. 1111-1112. Nor did NY Paving produce any text messages or e-mail communications between its management and officers and Farrell or Getiashvili. See Tr. 1106. Although Farrell contended that the Subpoena was directed to NY Paving's Custodian of the Records and not to his firm, there is no dispute that the Subpoena encompassed communications involving NY Paving's managers. Furthermore, Paragraph (l) specifies that the Subpoena encompasses NY Paving's "present or former…attorneys." (GC Exh. 25, p. 26.) Indeed, Farrell stated on the record "It was clear to all involved . . . that this firm was going to be an integral part of this process, and probably the sound and seminal witness," and Farrell himself often acted as NY Paving's lead negotiator and was NY Paving's primary witness at the hearing.[63] Tr. 1049. Thus, NY Paving did not make a good faith effort to produce the ESI required pursuant to the Subpoena, but provided only the one series of text messages between Farrell and Rocco which it believed would advance its own contentions.

In addition, the record does not establish that NY Paving made a good faith effort to address privileged materials potentially encompassed by General Counsel's Subpoena *Duces Tecum*. In its Petition to Revoke, NY Paving contended that Paragraphs 3, 4, 6, 7, 12 and 13 of the Attachment to the Subpoena required the production of materials subject to attorney-client privilege or to the attorney work product doctrine. In my Order Granting and Denying the Petition to Revoke, I stated that privileged material was not subject to production but ordered NY Paving to prepare and provide to General Counsel a privilege log pursuant to the Instructions contained in Paragraph (m) of the Attachment to the

[63] In addition, Getiashvili testified that she routinely prepared notes of negotiations between NY Paving and Local 175, such as her notes of the March 3, 2020 meeting in evidence as R Exh. 34. (Tr. 1080–1085.)

Subpoena. Order Granting and Denying Petition to Revoke at 4; (GC. Exh. 25, p. 27.) Given Farrell and Getiashvili's status as attorneys and involvement in bargaining and other labor relations matters as *de facto* company representatives, and the complicated law involving attorney-client privilege and attorney work product in such circumstances, a privilege log would have been particularly critical in connection with NY Paving's production of documents in this case. For example, the Board has stated that it "will not readily and broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present" in the context of collective bargaining negotiations. *Patrick Cudahy*, 288 NLRB 968, 971 (1988); see also *Taylor Lumber & Treating, Inc.*, 326 NLRB 1298, fn. 2 (1998). However, in cases alleging retaliation against employees for engaging in union activity in violation of Section 8(a)(3), the Board has admitted communications which primarily address labor relations issues, as opposed to legal advice, in order to make determinations regarding unlawful motivation. See, e.g., *Adams & Associates, Inc.*, 363 NLRB at p. 1, fn. 5, and at p. 6, fn. 15; see also *Adams & Associates, Inc. v. NLRB*, 871 F.2d at 370–371, fn. 3 (5th Cir. 2017) (communications involving managers, including licensed attorneys and senior HR executive/General Counsel, not subject to attorney-client privilege, as they "pertained principally to human resources or labor relations, and not to legal advice"); *National Football League*, 309 NLRB 78, 97 (1992) (notes of Management Counsel Executive Committee meetings taken by general counsel and assistant executive director not subject to attorney-client privilege, as such meetings were not called to consult with general counsel as an attorney or to obtain legal advice, and the notes "primarily reflected discussions of purely business matters").[64] Given Farrell and Getiashvili's multiple roles in connection with the events at issue here, a privilege log would have been critical to arriving at a meaningful determination with respect to the materials legitimately subject to production, and those subject to attorney-client privilege or the attorney work product doctrine.

As discussed above, Farrell stated on the record that "It was clear to all involved…that this firm was going to be an integral part of this process, and probably the sound and seminal witness," in this case. In addition, NY Paving claimed in its Petition to Revoke that there were materials responsive to the Subpoena *Duces Tecum* that it considered to be privileged, and Getiashvili testified that certain materials were not produced on this basis. (Tr. 1105–1106, 1132.) Yet despite these considerations and my June 23, 2020 Order, NY Paving did not prepare a privilege log. Furthermore, NY Paving provided no rationale whatsoever for its failure to prepare a privilege log, other than Getiashvili's testimony that "I don't do it in every litigation…Unless it becomes an issue somehow." (Tr. 1106.) If Farrell and Getiashvili's multiple roles as attorneys and party spokespersons and NY Paving's assertion that it possessed privileged documents did not make preparation of a privilege log "an issue" in this case, my June 23, 2020 Order requiring that NY Paving provide one surely should have done so. Furthermore, pursuant to the Subpoena *Duces Tecum* and my June 23, 2020 Order, General Counsel was not required to identify a privilege "issue" with respect to any specific responsive material in order to receive a privilege log from NY Paving. As a result, NY Paving's asserted rationale for failing to prepare a privilege log is an utterly inadequate justification with respect to a well-established procedure required pursuant to the Subpoena and my June 23, 2020 Order, and part of the fundamental contemporary protocols of disclosure and evidence. Thus, I find that NY Paving did not make a good faith effort to comply with the Subpoena *Duces Tecum* in this respect.

NY Paving argues that Getiashvili's notes and testimony regarding the February 6, 2020 telephone conversation with Chaikin should nevertheless be admitted, because the company disclosed the conversation, and its contentions regarding Chaikin's remarks, to the agency soon after the conversation occurred. (R.S. PostHearing Br. at 46.) The record establishes that NY Paving informed the Region regarding the February 6, 2020 conversation later that month during the investigation of the instant charges. Specifically, in a position statement dated February 18, 2020 and submitted to Region 29 during the investigation, Getiashvili stated that "Attorney Farrell and the undersigned had a telephone conference with Attorney Chaikin on February 5, 2020 at approximately 6:18 p.m. during which conversation Attorney Chaikin admitted Local 175 made a 'strategic decision' not to meet with NY Paving in December, and to delay any such meeting until April 2020 (or words of similar effect)." (GC Exh. 22, p. 8.) Getiashvili further stated in a footnote to this sentence that she and Farrell were "willing to provide the Region affidavits regarding our numerous conversations with the Attorneys of Local 175 regarding the attempts to meet and conduct negotiations." (GC Exh. 22, p. 8.) As a result, the Region had not only been apprised of the specific evidence NY Paving presented via Getiashvili's testimony approximately eight months prior to the opening of the hearing in this case but was also provided with an opportunity to obtain more information regarding the specific incident involved. The Region apparently declined to do so. (Tr. 1125.)

NY Paving's disclosure to the Region and offer during the investigation to provide additional evidence do not, however, excuse its significant non-compliance with the Subpoena *Duces Tecum*, as discussed above, such that the exclusion of Getiashvili's notes and testimony regarding the February 6, 2020 meeting is unjustified. It is not appropriate for me to opine regarding the mechanics of a Regional investigation, let alone incorporate such issues into an evidentiary ruling at trial, as such matters are specifically within the purview of the Regional Director. See generally, NLRB Rules and Regulations, Section 101.4. Furthermore, NY Paving did not produce Getiashvili's notes of the February 6, 2020 meeting during the investigation, and would have been obligated to produce them again pursuant to the Subpoena *Duces Tecum* even had it done so. But most importantly, the actions taken by a Region during the investigation are simply not a pertinent counterweight to the considerations which inform evidentiary sanctions in the hearing context. As discussed

[64] As is evident from these cases, the fact that Bob Coletti is also an attorney would not necessarily render his communications privileged. (Tr. 1133.)

above, given Farrell and Getiashvili's multiple roles and substantial involvement in many of the significant events which form the basis for the Complaint's allegations, the unexplained failure to produce ESI and adequately address privilege issues constituted an egregious failure to comply with the Subpoena. Pursuant to the agency's regulations and Board caselaw, evidentiary sanctions are the sole vehicle for meaningfully ensuring compliance with the agency's extremely limited disclosure procedures. Thus, as the District of Columbia Circuit stated, "Without adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and ofttimes has every incentive to refuse to comply." *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F.3d at 834, quoting *Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 795 (D.C. Cir. 1984). As a result, and for all of the foregoing reasons, I reverse my previous ruling, and grant General Counsel's motion to exclude Getiashvili's notes of the February 6, 2020 phone conversation with Chaikin, and her testimony regarding the conversation based upon her independent recollection, from the record.

Furthermore, even were I to admit the notes and Getiashvili's testimony, the evidence does not substantiate NY Paving's contention that Chaikin admitted to waiving Local 175's right to effects bargaining. Getiashvili's notes offered as Respondent Exhibit 33 state only "Chaikin doesn't deny that Local 175 refused to meet for effects bargaining," a conclusory statement which does not describe Chaikin's actual remarks, if any, and devoid of context in terms of the discussion immediately preceding what, if anything, Chaikin said. Indeed, Getiashvili admitted during her testimony that her notes of the February 6, 2020 conversation consisted of a "summary," as opposed to a word-for-word transcription of the parties' discussion. (Tr. 118, 1121–1122, 1134.) Thus, the notes do not describe any precise statement on Chaikin's part regarding the topic but constitute Getiashvili's characterization of the discussion. The notes are therefore not probative in terms of establishing Chaikin's specific remarks during the February 6, 2020 phone conversation.

On the next day of the hearing, when Getiashvili was questioned regarding her independent recollection of the conversation, she testified that during a discussion regarding "the meeting that was supposed to take place in December . . . [Farrell] ask[ed] Mr. Chaikin why would Local 175 not come to the table," and Chaikin "stated that Local 175 had elected not to come to the negotiating table and that it was a strategic decision." Tr. 1078-1079. This account of the conversation is significantly more certain than the description Getiashvili included in the February 18, 2020 position statement she provided to Region 29 during the investigation. In the position statement, submitted not two weeks after the phone conversation itself, Getiashvili asserts that during the conversation Chaikin "admitted Local 175 made a 'strategic decision' not to meet with NY Paving in December, and to delay any such meeting until April 2020 (or words of similar effect)." (GC Exh. 22, p. 8.) The word "admitted" is conclusory, and Chaikin's purported locution "strategic decision" is qualified with "or words of similar effect." In addition, Getiashvili's testimony regarding her independent recollection of Chaikin's remarks would have been more compelling had it not followed her substantial testimony regarding her notes – and their conclusory summary of the conversation—the previous hearing day. However, I find it appropriate in this case to draw an adverse inference from Chaikin's failure to testify regarding the conversation, as NY Paving suggests. (R.S. Posthearing Br. at p. 50–55. Specifically, while Chaikin was present during the entire hearing in this case as counsel for Local 175, he was not called as a witness and did not testify regarding the February 6, 2020 conversation with Getiashvili and Farrell, even though I specifically provided General Counsel with substantial leeway to present evidence pertinent to the issue on rebuttal. I therefore find it appropriate to draw an inference that Chaikin stated during the February 6, 2020 conversation that the Union made a "strategic decision" to forego conducting the mediation with Shriftman, "or words to that effect." See *Rochester Telephone Corp.*, 333 NLRB 30, 54 (2001).

Chaikin's statement during the February 6, 2020 conversation, however, does not in my view constitute some sort of admission that Local 175 waived its prerogative to bargain regarding the effects of the shutdown and layoffs. It is clear from Getiashvili's testimony that whatever remarks Chaikin made concerned the mediation with Shriftman, and not effects bargaining specifically. I note in this regard that despite prodding by Farrell on direct examination,[65] Getiashvili testified that Chaikin and Farrell were discussing the meeting with Shriftman, and not effects bargaining, when Chaikin purportedly stated that Local 175 had made a "strategic decision" to forego participating. (Tr. 1078—1079.) Because as discussed above there were any number of topics encompassed in the overall collective bargaining relationship which would have been addressed at the mediation, Local 175's declining to participate did not in my view constitute a refusal to engage in effects bargaining.[66]

Nor does Rocco's testimony regarding Local 175's declining to participate in the mediation with Shriftman constitute an admission that Local 175 waived its right to engage in effects bargaining regarding the shutdown and layoffs. Rocco testified that Local 175 elected to forego participating in the mediation

[65] Q: Okay. At some point, did the subject of meeting 175 come up?
A: Yes, it did.
Q: What was the subject? What was – did that subject concern effects bargaining for the crew – implementation of the crew size decision or the prior implementation of the crew size decision or the off-coming [sic] implementation? Did it concern the crew size arbitration?
A: Well, based on my independent recollection of that phone conversation, we were talking about the meeting that was supposed to take place in December between New York Paving and representatives of Local 175…
(Tr. 1078–1079.)

[66] NY Paving also points to Chaikin's statement in a February 13, 2020 e-mail to Farrell and Getiashvili that "As for Arbitrator Nadelbach's [April 29] decision, until we have resolution of the 'damages' issue regarding the crew size arbitration the parties are not in a position to fully explore its ramifications." (GC Exh. 16, p. 3.) Chaikin's statement refers to Local 175's position regarding an overall settlement of the crew size grievance as of February 2020, and does not constitute some retroactive waiver of the right to receive meaningful notice and engage in effects bargaining regarding the shutdown and layoffs.

because the Union "did not think that New York Paving was serious about resolving the issues and they thought the chance of delay" in obtaining a damages award from Arbitrator Nadelbach "was prejudicial," in that it would "make [the Union] look bad vis-à-vis Local 1010," in the context of a potential decertification petition. (Tr. 113–114, 256–257.) Both of these suppositions were in fact confirmed by NY Paving's representatives. For at the October 25, 2019 hearing, Farrell envisioned that the following spring "there very well could be an open period" and "Local 1010 very well could file a petition," in a context where NY Paving's implementation of the 7–3 crew sizes had resulted in "a lot of Local 175 employees out of work," who "would know to blame Local 175" for the loss of employment. (Tr. 111.) And Miceli testified in the instant case that, as far as NY Paving was concerned, the "purpose" of the mediation with Shriftman was "trying to convince [Local] 175 that going to seven-and-three would…not be good for their men and to have [the Union] reconsider forcing us to do this." (Tr. 976–977.) Thus, Miceli anticipated that any discussion of the crew size grievance at the mediation with Shriftman would involve NY Paving's attempting to persuade Local 175 to *abdicate* any implementation or enforcement of the April 29 Award entirely, as opposed to bargaining regarding the effects of implementation itself.

Most importantly, however, as discussed above, the evidence unequivocally establishes that NY Paving never provided Local 175 with legally significant notice regarding its shutdown of asphalt paving operations and layoff of the asphalt workers prior to doing so on December 20. Farrell admitted as much during his testimony, as discussed previously. Indeed, even in his first communication with Chaikin after the February 6, 2020 conversation, Farrell was contending that the 7-3 crew sizes had not yet been implemented, and that implementation "will result in the layoffs of Local 175 members" in the future. (GC Exh. 16, p. NYP180-NYP181.) Regardless of the position Local 175 took regarding participating in the mediation with Shriftman prior to December 20, the Union was never provided with notice of the shutdown and layoffs sufficient to engender a requirement that it demand bargaining. NY Paving's attempt to conflate declining to participate in the mediation with Shriftman with waiving the right to engage in effects bargaining is therefore meritless. Thus, and for the reasons discussed above, I find that Local 175 did not waive its right to demand bargaining by declining to participate in the mediation with Shriftman, or via Chaikin and Rocco's statements in connection with the mediation or the crew size grievance arbitration.

For all of the foregoing reasons, the evidence establishes that NY Paving announced the shutdown of its asphalt operations and laid off the bargaining unit asphalt employees without providing Local 175 with notice and an opportunity to bargain regarding the effects of its decision, as alleged in the complaint, thereby violating Sections 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

1. Respondent New York Paving, Inc. is an employer engaged in commerce at its Long Island City, New York facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. Construction Council Local 175, Utility Workers Union of America, AFL-CIO ("Local 175") is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 175 has been the certified collective bargaini ng representative of Respondent's full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

4. Respondent violated Sections 8(a)(1) and (3) of the Act by announcing a shut-down of its asphalt paving operations and layoff of bargaining unit employees, and by laying off its bargaining unit asphalt paving employees, on December 20, 2019, in retaliation for the employees' support for Local 175 and Local 175's pursuit of a grievance regarding Respondent's failure to maintain minimum crew sizes required pursuant to the parties' collective bargaining agreement.

5. Respondent violated Sections 8(a)(1) and (5) of the Act by announcing the shut-down of its asphalt operations and laying off the bargaining unit asphalt paving employees on December 20, 2019, without providing Local 175 with notice and the opportunity to bargain regarding the effects of its decision to do so.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and take certain affirmative action designed to effectuate the Act's policies.

Having found that Respondent unlawfully announced the shutdown of its asphalt paving operations and layoff of its bargaining unit asphalt paving employees, and laid off its bargaining unit asphalt paving employees, on December 20, 2019, I shall recommend that such employees be offered reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed. I shall further recommend that the asphalt paving employees laid off as a result of Respondent's unlawful conduct be made whole for any loss of earnings and other benefits they may have suffered. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Pursuant to *King Soopers, Inc.*, 364 NLRB 1153 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate the asphalt paving employees for any search-for-work and interim employment expenses, regardless of whether those expenses exceed their interim earnings. Respondent shall further compensate the asphalt paving employees for the adverse tax consequences, if any, of receiving a lump sum back pay award and file a report allocating backpay to appropriate years, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

Having found that Respondent violated Section 8(a)(5) and (1) by failing to provide Local 175 with notice and the opportunity bargain regarding the effects of its decision to shutdown its asphalt operations and lay off the asphalt paving employees

on December 20, 2019, I shall order Respondent to cease and desist doing so, to bargain with Local 175 regarding the effects such decision, and to post the appropriate notice.[67]

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[68]

ORDER

New York Paving, Inc., its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Announcing a shutdown of its asphalt paving operations and the layoff of its bargaining unit asphalt paving employees, and laying off its bargaining unit asphalt paving employees, in retaliation for the employees' support for Construction Council Local 175, Utility Workers Union of America, AFL-CIO (Local 175), and in retaliation for Local 175's filing and pursuit of its grievance regarding compliance with contractual crew size requirements.

(b) Announcing the shutdown of its asphalt paving operations and laying off its bargaining unit asphalt paving employees without providing Local 175 with notice and the opportunity to bargain regarding the effects of its decision to do so.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer all asphalt paving employees laid off on December 20, 2019 full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges enjoyed.

(b) Within 14 days from the date of the Board's Order, make whole all asphalt paving employees laid off on December 20, 2019 for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoff of the asphalt paving employees on December 20, 2019, and within 3 days thereafter, notify these employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Make the asphalt paving employees whole for their reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section

above.

(e) Compensate the asphalt paving employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

(g) Upon the request of Local 175, bargain in good faith with Local 175, the exclusive collective-bargaining representative of employees in the following bargaining unit, regarding the effects of the shutdown of asphalt paving operations announced on December 20, 2019 and the layoff of asphalt paving employees in the following unit:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

(h) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the Long Island City facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. July 8, 2021

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[67] Because I have found that Respondent violated Sec. 8(a)(3) of the Act in connection with its shutdown of asphalt paving operations and layoff of the asphalt paving employees and ordered the appropriate relief, a remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), is unnecessary. See GC Posthearing Br. at 53.

[68] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce the shutdown of our asphalt paving operations and the layoff of bargaining unit asphalt paving employees, and lay off bargaining unit asphalt paving employees in retaliation for their support for Construction Council Local 175, Utility Workers Union of America, AFL-CIO, or in retaliation for Local 175's pursuit of a grievance regarding compliance with its contractual crew size requirements.

WE WILL NOT announce the shutdown of our asphalt paving operations and lay off asphalt paving employees in the following bargaining unit, without providing Local 175 with notice and the opportunity to bargain regarding the effects of our decision to do so:

> All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer all asphalt paving employees laid off on December 20, 2019, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges enjoyed.

WE WILL make whole all asphalt paving employees laid off on December 20, 2019, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less interim earnings, plus interest.

WE WILL compensate all asphalt paving employees laid off on December 20, 2019, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of asphalt paving employees on December 20, 2019, and within 3 days thereafter, notify these employees in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request of Local 175, meet and bargain with Local 175, as the exclusive collective-bargaining representative of asphalt paving employees in the above bargaining unit, regarding the effects of the shutdown of asphalt paving operations and layoff of asphalt paving employees on December 20, 2019.

NEW YORK PAVING, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/29-CA-254799 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.