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Crisdel Group, Inc. and Ramon Joseph Morales.
Case 22–CA–077469

April 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On August 26, 2013, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering brief. The Charging Party filed a letter stating that he adopts and joins in the General Counsel's answering 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions,

¹ 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.

In addition, some of the Respondent's exceptions allege 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.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by laying off Ramon Joseph Morales, we find that the Respondent's layoff decision was motivated by Morales' expulsion from International Union of Operating Engineers, Local 825 (Union), rather than by animus toward his internal union activity. In addition, we agree with the judge, for the reasons stated in her decision, that the Respondent offered only pretextual reasons (i.e., lack of work that he was capable of performing at the Florham Park jobsite or other jobsites and low seniority) for Morales' layoff. Thus, as the reasons given by the Respondent for laying off Morales were not supported by the evidence, the Respondent failed "by definition to show that it would have taken the same action for those reasons," absent Morales' expulsion from the Union. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

We further note that the Morales' layoff cannot be justified under the final proviso to Sec. 8(a)(3), which states in relevant part that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization" if the employer "has reasonable grounds for believing that such membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]" The judge found that the Respondent laid off Morales after Morales read the Union's expulsion letter to the Respondent's lead engineer, William Vaccaro, and de-

and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Crisdel Group, Inc., South Plainfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their expulsion from International Union of Operating Engineers, Local 825, or any other labor organization, when it has reasonable grounds for believing they were expelled for reasons other than their failure to tender periodic dues.

(b) 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 Ramon Joseph Morales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ramon Joseph Morales whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Ramon Joseph Morales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify Ramon Joseph Morales in

scribed it to the Respondent's Vice-President of Construction William Weaver. That letter, dated February 22, 2012, states:

Please be advised that it is the decision of the Local 825 Examining Committee to inform you that you are no longer a member of Operating Engineers Local 825. Shortly you will receive a check in the amount of \$36.00 to reimburse you for your dues that are paid through 6/30/12.

Thus, notified that Morales was current on his dues payments, the Respondent had reasonable grounds for believing that Morales' union membership was terminated for a reason other than his failure to pay dues or initiation fees. Accordingly, even if the Respondent's collective-bargaining agreement with the Union required it to employ an operator in good standing with the Union, Morales' expulsion from the Union was not a permissible justification for his layoff.

² We shall modify the judge's recommended Order to correct the location of the Respondent's facility, and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB No. 85 (2014).

writing that this has been done and that the layoff will not be used against him in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its South Plainfield, New Jersey facility, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 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 March 1, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 22 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., April 30, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

³ 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."

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
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 discharge or otherwise discriminate against you because you have been expelled from International Union of Operating Engineers, Local 825, or any other labor organization, when we have reasonable grounds for believing you were expelled for reasons other than your failure to tender periodic dues.

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 Ramon Joseph Morales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ramon Joseph Morales whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL compensate Ramon Joseph Morales for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Ramon Joseph Morales, and WE WILL, within 3 days thereafter, notify him in writing that this has

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been done and that the layoff will not be used against him in any way.

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The Board's decision can be found at www.nlr.gov/case/22-CA-077469 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Saulo Santiago, Esq., for the Acting General Counsel.
Ronald L. Tobia, Esq. (Tobia & Sorger, LLC), of Harrison, New Jersey, for the Respondent.
Donald L. Sapir, Esq. (Sapir/Schragin LLP), of White Plains, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 22-CA-077649, filed on March 27, 2012 and amended on June 18, 2012, by Ramon Joseph Morales ("Morales" or "Charging Party"), a complaint and notice of hearing issued on July 31, 2012. The complaint alleges that Crisdel Group, Inc. ("Crisdel" or "Respondent"), violated Section 8(a)(1) and (3) of the Act by laying off Morales because he was no longer a member of International Union of Operating Engineers, Local 825 ("Local 825" or "the Union"). Respondent filed an answer denying the complaint's material allegations. This case was tried before me on September 25, 2012 and February 4, 2013, in Newark, New Jersey.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation and maintains an office and place of business in South Plainfield, New Jersey, where it is engaged in heavy and highway construction and paving. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent admits and I find that at all material times Local 825 has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent has performed heavy and highway paving work for approximately 45 years at locations such as the Newark Airport, the Brooklyn Bridge, and the George Washington

Bridge, and on roads such as the New Jersey Turnpike. According to Frank Criscola, Respondent's Chairman, during the last 8 years Respondent has also performed earthwork such as excavation and drainage for these projects. Respondent currently employs approximately 80 employees, about 20 of which are operators. For approximately 35 years, Respondent has had a collective-bargaining relationship with Local 825 covering the operators' employment.

William Weaver has been Respondent's vice president of construction for approximately 15 years. Weaver is responsible for overseeing all Respondent's current projects and construction activities, and its project managers and superintendents report to him. William Vaccaro is Respondent's lead engineer, and is responsible for interacting with Local 825 to obtain operators through the Union's hiring hall, and ensuring that Respondent complies with the Local 825 collective-bargaining agreement.¹ Each day, Weaver prepares a spreadsheet or schedule describing the complete staffing necessary for the following day's work on every job, including the operators. The spreadsheet also identifies which operators are assigned to which jobsite, whether additional operators will be necessary, and which, if any, operators will be laid off. Using this spreadsheet, Vaccaro communicates the job assignments to operators, calls the Local 825 referral hall for additional operators if necessary, and, if required, informs operators that they are being laid off. Weaver and Vaccaro also communicate by phone, email, and text message regarding staffing and equipment for the jobsites on a daily basis, sometimes three or four times per day. Vaccaro testified that he and Weaver sometimes discuss the work performance of the operators, typically when there is some performance-related problem.²

As discussed above, Vaccaro contacts the Local 825 referral hall when additional operators are needed for a jobsite. Vaccaro testified that when contacting the referral hall, he asks for an operator competent to operate a specific piece of equipment, and sometimes identifies specific experience, such as demolition work, that Respondent would prefer. He also discusses whether the operator needs a TWIC or SWAC card, which is issued by the Port Authority of New York and New Jersey after a background check to permit access to the docks and the airport, respectively. The Local 825 contract permits operators to run more than one piece of equipment per day, and Criscola, Weaver, and Vaccaro all testified that operators who could run equipment necessary for both paving work and "dirt" or earth work were particularly desirable.

Vaccaro testified that he typically informs operators when they are being laid off. The Local 825 contract does not require that layoffs be implemented in reverse seniority order. Vaccaro testified that when informing an operator that they are being laid off, he typically tells them to put their name on the Union's referral list. Vaccaro testified that when an operator employed

¹ Vaccaro has also been a member of Local 825 for 28 years. He testified that he is familiar with the Union's officers, and attends union meetings.

² Criscola, Weaver, and Vaccaro testified for Respondent at the hearing, as did Lorraine Lenard, Respondent's controller and assistant EEO officer. Criscola is Respondent's designated EEO officer.

by Respondent has a problem with their continued membership in Local 825, he suggests that the operator seek legal advice and tries to resolve the matter “before it goes any further,” in that the majority of such situations involve nonpayment of union dues.

B. Morales’ Dealings with Local 825

Morales testified that he first became involved with Local 825 while working for a company called Lancaster Development in 2006. When he began working for Lancaster, Morales was performing emergency service work near Binghamton, New York, including pipe work, water drainage, sewer work, and creating slopes and grading for roads, for which he operated a bulldozer.³ He was then transferred to a Lancaster jobsite at Drury Lane in Newburgh, New York, where he ran an excavator (with metal tracks), a rubber tire excavator, a front-end loader, and a bulldozer.⁴ Morales testified that while working at Lancaster, he was approached by Local 825 Business Agent Andrew Storno, who told him that he was a good operator, and asked whether he would be willing to walk off the job for the benefit of the Union. Morales responded that he was willing to leave the job if he would receive a union book, and if he would be put to work the next day on a job where the operators were union-represented. Storno said that he would call Morales later that day, and when he called he instructed Morales to walk off the job. Morales walked off the job, and began working the next day for Jett Industries, which had a collective-bargaining agreement with Local 825, on a jobsite at Port Jervis, New York.

Although Morales worked for firms under Local 825 contracts fairly steadily for the next few years, he did not receive a union book. Morales testified that he spoke to several lead engineers to attempt to obtain a union book, as well as to Storno and Local 825 Business Agent John Woods. Morales testified that he repeatedly asked Storno and Woods about how and when he would obtain his union book, but they told him that it was over their heads, and that he should keep working. Finally, in 2008, the International Union of Operating Engineers appointed a supervisor, named Dan DeGraw, to oversee Local 825. Morales complained to DeGraw that he had been working under the Local 825 collective-bargaining agreement for years, but had not yet received his union book. DeGraw told Morales that Local 825 had been accepting members but withholding registrant cards and union books, in order to retain certain fund contributions that are remitted to the International Union of Operating Engineers once the members receive their registrant cards or union books. Morales subsequently received a registrant card after appearing before a meeting of the Union’s upgrade committee. However, Morales testified that when he went to the Local 825 office in Middletown, New York, to pick up the paperwork necessary to join the Union, Storno and Woods were present, and a heated argument ensued.

³ Grading work involves preparing a subbase for roadways by grading the ground, and then grading the subbase to prepare for the application of blacktop.

⁴ Prior to working for Lancaster, Morales had done excavation work for several companies using the same equipment.

After obtaining his registrant card, Morales began questioning Woods and Storno about upgrading to obtain a union book. Eventually, Morales spoke to Dave Bojack, the lead engineer with Local 825 signatory Conti Enterprises and a member of the Local 825 upgrade committee. Bojack told Morales that every 18 months a member became eligible for an upgrade. Morales then pressed the matter repeatedly with Woods and Storno, emphasizing that he had done his part by walking off the Lancaster job, and wanted his union book. Morales testified that Woods and Storno told him on multiple occasions that he was not going to get his union book.⁵

The Local 825 referral system maintains records which describe the specific licenses, permits, and pieces of equipment each operator has obtained or is competent to use. Employees eligible to be referred by Local 825 first complete a workcard listing the equipment they are qualified to use, and are then tested on that equipment by the Union. If a particular contractor feels that a referred employee is not in fact capable of using a particular piece of equipment, they may complain to the Union, and the Union then tests the individual on the equipment in question again. Morales has a CDL class A certification, forklift and hazmat certifications, OSHA 10 and 30 certifications, and a Port Authority underground utility certification. Morales also has SWAC and TWIC cards, obtained at the direction of Respondent for work at the Teterboro Airport and a jobsite at Global. Morales is qualified to run a paver (used to lay down asphalt at a certain depth), a breakdown roller (which seals up the blacktop after the paver), a finish roller (the last roller to smooth the blacktop), and a sweeper (for clean-up). Morales is also qualified to run a backhoe and equipment associated with demolition, such as attachments to an excavator and a skid steer. Morales is qualified to operate bulldozers and related equipment such as a fine shaver used to grade subbase or slopes within under an inch, some of the most difficult work that he performs. He is also qualified to operate excavators and graders which set the subbase for a road before the paver lays down asphalt. Finally, Morales is qualified to operate a dirt roller, used in road work, which compresses and seals up dirt so that it is not affected by rain. These various certifications and capabilities are all described in Local 825 referral hall records pertaining to Morales.

C. Respondent’s Employment and Lay Off of Morales

Morales began working for Respondent on March 28, 2011, after being referred by a dispatcher at Local 825’s Springfield, New Jersey referral hall. The dispatcher told Morales that Respondent was looking for a minority operator capable of running an excavator, a rubber tire excavator, and a front-end loader, with experience in demolition.⁶ Morales was initially

⁵ At the time of the hearing in this matter, Woods was acting president of Local 825, and Storno was still employed by the Union. Neither Woods nor Storno testified at the hearing.

⁶ This is consistent with Vaccaro’s account of the specific work qualifications he communicated to the Local 825 referral hall at the time that Morales was hired. Certain contracts for work funded by the Federal and New Jersey State Governments require that the contractor employ minorities as a certain percentage of the work force on the project. Morales is Hispanic.

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sent to a jobsite at Route 80, and worked there from March until May of 2011, operating an excavator, a rubber tire excavator, a front-end loader, and a backhoe. While working at this jobsite, Vaccaro introduced himself, and told Morales that he was the contact person for all of the operators. Morales testified that Vaccaro asked what other equipment he could operate, and Morales said that he also did paving work. Vaccaro stated that Crisdel liked operators who could do paving and blacktop, because they were more versatile.⁷ Morales testified that while at the Route 80 jobsite the supervisor, Jeff, told him he was a good operator, and Joe Lombardi, a 20-year employee, informed Morales that he had told Weaver and Vaccaro that it would be a good idea for the company to keep Morales on.

Morales testified that some time after he began working for Respondent, in the spring of 2011, he asked Vaccaro to look into the situation with Local 825, and see whether he could help obtain his union book. According to Morales, Vaccaro told him a few weeks later that there was something going on in the Local 825 office, and that Morales would have to take it up directly with the Union, because it was over Vaccaro's head. Several months later, Morales spoke to Vaccaro about the upgrade to a union book again, and Vaccaro said that he would have to speak with Bojack. Vaccaro later reported to Morales that a member was eligible for an upgrade every 18 months, but that Morales would not receive one. Vaccaro confirmed that Morales had spoken to him several times about upgrading from a registrant card to a full union book. Vaccaro testified that he suggested that Morales speak to Bojack about the matter, because Bojack was on the Union's upgrade committee.

After the Route 80 job ended, Morales called Vaccaro to let him know that he had been laid off, and Vaccaro immediately sent him to a jobsite widening the road at Exit 8 on the New Jersey Turnpike. Morales was assigned to lay pipe for a sewer line off the exit between residences and a pump station. Morales worked at this jobsite from May to late July 2011, operating an excavator, a bulldozer, a loader, and a backhoe. Morales testified that Superintendent Bob Dee and Foreman Bruce Kennel both told him that he was a good operator. Subsequently Morales received assignments to different jobsites directly from Weaver or Vaccaro, without going back on the Local 825 out of work list. After the Exit 8 job, Morales was put on a night paving crew, where he operated the breakdown, finish, or second roller until the end of August 2011. The night paving crew worked on sections of Route 80 and Route 287, and the New Jersey Turnpike. Morales testified that Superintendent Juan and Foreman Jerry told him that he was a good roller operator during his work on the paving crew.

Morales was next sent to a road widening job at Florham Park, New Jersey, cutting back the slopes at the side of the road and doing drainage, curbs, and fine grading. Morales was the only operator on this project at the time, and ran a rubber tire excavator. Morales testified that Foreman Juan said that he operated the equipment well. Morales worked on the job for about a month, when it was shut down to obtain necessary per-

⁷ Vaccaro testified that he met Morales at the Route 80 jobsite, but did not provide any specific description of their conversation.

mits. He was next sent to a jobsite at Giant Stadium, repairing a water line, and operated a backhoe and a rubber tire excavator at that project for a couple of days. He was laid off of the Giant Stadium project after a couple of days, and returned to the Local 825 out of work list. However, he informed the union dispatcher that he would rather wait for another job with Respondent than be sent out to a different contractor, because Vaccaro had told him that Respondent would have more work coming up.

At the end of September 2011, Morales was sent to a job at the Teterboro Airport, where he did pipe work until late November. On the weekends, he worked as part of a group milling and paving the runways and taxiways; Morales operated the breakdown roller, compaction or numbers roller, and the finish roller on this job. Morales was subsequently sent to a jobsite at Exit 8 on the New Jersey Turnpike, where he ran a paver until December 2011. Morales was then part of a paving crew at a job on the highway in Bayonne, and was sent in mid-December 2011 to a jobsite at PSE&G, where he ran a roller. He next went to a jobsite in Trenton for a few days to do fine grading.

At that point, Respondent shut down its operations for the period from Christmas to New Year's. However, Morales attended Respondent's Christmas party at a location in South Plainfield. Morales testified that he had heard at the jobsites that Crisdel was bidding on a road project on Route 78, so at the Christmas party he asked Weaver whether Crisdel had won the bid. Weaver told Morales that Crisdel had gotten the Route 78 job, and that he expected to send Morales there soon. Morales testified that he also asked Vaccaro about the Route 78 job at the Christmas party. According to Morales, Vaccaro said that Crisdel had won the bid for the job, and that Morales was the first person that he thought about to send there because of his versatility. Vaccaro said that the Route 78 job would be beginning soon, but did not have an exact date.⁸

In January 2012, Morales was sent back to the Florham Park job, where Respondent was finishing up a sewer line and continuing the road widening. During this period, Morales operated a backhoe, did fine grading, and operated a dirt roller. Morales was the sole operator on the job during this period.

On Friday, February 24, 2012,⁹ while still employed on the Florham Park job, Morales received a letter dated February 22 from Local 825's examining committee, stating that the committee had decided that Morales was no longer a member of the Union, and that Morales would receive a reimbursement for dues paid through June 30.¹⁰ Morales testified that after he

⁸ Weaver testified that Respondent put in a bid for the Route 78 work in December 2011, and that around the time of the Christmas party there was an indication that Crisdel would be awarded the contract for the Route 78 job. However, Weaver could not recall speaking to Morales at the Christmas party. Vaccaro also testified that he learned that Respondent had been awarded the contract for the Route 78 job around Christmas in 2011. Vaccaro testified that at some point Morales asked about the Route 78 job, and Vaccaro told him that the lead engineer from Ferreira Construction was handling operators on the job.

⁹ All subsequent dates are in 2012, unless otherwise indicated.

¹⁰ There is no evidence that Morales was brought up on internal union charges, or that a hearing was conducted by Local 825 prior to his

received this letter on February 24, he called Vaccaro on Vaccaro's cell phone at 4:30 p.m., because he was scheduled to work on Monday, February 26. According to Morales, he read the letter to Vaccaro and asked him what he should do. Vaccaro said that he didn't want to get involved in the situation. Morales said he was scheduled to work the following Monday, and Vaccaro directed him to come in to work, because he had not been informed by Local 825 of Morales' expulsion. Morales testified that on Sunday he sent Vaccaro a text message, asking Vaccaro whether he had heard anything, and Vaccaro replied that he had not.¹¹

Vaccaro confirmed that Morales called him a week or so prior to being laid off. Vaccaro testified that Morales said he had received a letter from Local 825 stating that "his book had been revoked or however they worded it," and asked what he should do. Vaccaro testified that he told Morales that he should seek legal assistance, because many times members received letters regarding unpaid dues. Vaccaro told Morales that he did not intend to say anything about the matter until he heard something further.

On Monday, February 27, Morales reported for work at the Florham Park jobsite, where he was doing fine grading and generally preparing the project for blacktop. Morales testified that early that week Vaccaro called him, and asked him whether he had heard anything about his situation with the Union. Morales told Vaccaro that he was looking into it, because there was no reason for the Union to expel him. Morales contacted friends who had been Local 825 members for some time, but was unable to obtain information as to why he was expelled. Finally, Morales testified that on Thursday, March 1, he called Weaver to let him know that Local 825 had expelled him and see whether there was anything Weaver could do. According to Morales, he described the letter from Local 825 expelling him, and asked Weaver if he could do anything. Weaver said there was nothing he could do. Weaver then said that under Respondent's contract with Local 825 Morales had to be in good standing with the Union in order to continue to work for the company. Weaver said that as a result, he would have to lay Morales off. Weaver told Morales that Friday would be his last day on the job.

Vaccaro and Weaver testified that they did not discuss Morales' expulsion from Local 825 prior to his layoff. Vaccaro and Weaver testified that they first discussed the matter during the week after Morales' layoff. Vaccaro testified that Weaver called him and asked him what was going on with Morales, whether Morales was having some trouble, because Morales had asked Weaver about becoming a superintendent. According to Vaccaro, he responded that Morales had told him about a problem with Local 825, but that Morales was working on it. Weaver testified that Vaccaro called him the week after Morales' layoff, and told him that Morales was "having some issues" with Local 825. Weaver testified that he did not inquire as to the specific nature of the issues between Morales and the

Union. Weaver testified that this conversation with Vaccaro took place prior to Morales' inquiry about a superintendent position.

Morales testified that on Friday, March 2, while working at the Florham Park jobsite, Vaccaro called him and told him that that would be his last day of work. Vaccaro told Morales that he had done a good job, but because of the Union's letter expelling him he could not continue to work for the company. Vaccaro told Morales that if he straightened out the problem with Local 825, he could return to work. Vaccaro testified that at some point in March, Weaver told him that there was no more pipe or grading work at the Florham Park jobsite, and that the job was slowing down. According to Vaccaro, Weaver asked whether he had any room for additional operators on the New Jersey Turnpike job, and Vaccaro said that the job was down to skeleton crews. Consequently, Vaccaro called Morales and told him that the Florham Park job would be ending and there was no additional work for him. Vaccaro said that if something came up, he would let Morales know.

D. Events After Morales' Discharge

After his lay off, Morales remained in contact with the company, and had several conversations with Vaccaro and Weaver. Morales testified that about 2 weeks after being laid off he called Vaccaro and asked whether Vaccaro had heard anything from Local 825. Vaccaro asked Morales how things were going, and Morales said that he had spoken to the NLRB and was going to obtain legal counsel. Vaccaro told Morales to let him know if the situation with Local 825 was resolved, and Vaccaro would then try to get him back to work. Morales testified that a couple of weeks later he called Vaccaro again to see whether Vaccaro had heard anything. Vaccaro said that he had not, and asked Morales what was going on. Morales said that he had retained an attorney, Donald Sapir, Esq., and would hopefully be reinstated to the Union soon. Vaccaro said that he wanted Morales to stay in touch, so that he could bring Morales back when the situation with Local 825 was resolved. In addition, 2 or 3 weeks after being laid off Morales called Weaver, and asked whether Respondent had any assistant superintendent positions open, because Morales had experience in that job as well. Weaver said that Crisdel didn't have anything at that time, but that he would keep Morales in mind. He asked Morales what was going on, and Morales said that he had contacted the NLRB and retained counsel. Weaver told Morales to keep him informed, because he would like to have Morales return to work at the company. Weaver generally confirmed Morales' account of this conversation.

In May 2012, Morales received his union book pursuant to a settlement reached between Local 825 and the NLRB, Region 22, with the participation of Morales' private attorney. Morales subsequently placed his name on the Local 825 out of work list, and asked that his name be held for Respondent for a couple of weeks. Under the Local 825 collective-bargaining agreement, a contractor has the right to recall a specific operator through the referral hall for up to 2 years after that operator's last employment with the contractor. Morales, however, was not recalled to work with Respondent, even though Respondent asked for nonrecall referrals from the Local 825 referral hall during that

expulsion. There is no evidence that Morales was delinquent in his payment of dues to the Union.

¹¹ Vaccaro testified that he had communicated with Morales by text message, but could not recall this particular exchange.

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period. Specifically, records from the Local 825 referral hall indicate that Respondent received two referred operators on May 30 (for black top, dozers, excavators, and loaders), June 11 (for dozers and loaders), and June 15 (for dozers and loaders).

III. ANALYSIS AND CONCLUSION

A. *Applicable Legal Standards and the Parties' Contentions*

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The Board has held that the *Wright Line* analysis is generally appropriate in cases where the employer's motivation is at issue, including cases alleging that an employee was discharged in retaliation for internal union activity. *Nationsway Transport Service*, 327 NLRB 1033, 1034 (1999).

To establish an unlawful discharge or lay off under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Willamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 *fn.* 12 (1996).

The complaint in this case alleges that Respondent laid off Morales in retaliation for his expulsion from Local 825. However, at the hearing the General Counsel adduced significant evidence during its direct case regarding Morales' internal union activities, and argues in his posthearing brief that Morales was laid off in retaliation for his activities, which culminated in

his expulsion.¹² Thus, the General Counsel argues that the evidence establishes a *prima facie* case that Morales was laid off in retaliation for his internal union activities, ultimately resulting in his expulsion. The General Counsel further argues that the preponderance of the evidence does not substantiate Respondent's assertion that it laid off Morales for legitimate, nondiscriminatory reasons.

Respondent does not argue that Morales' internal union activity was not protected or that the *Wright Line* analysis is otherwise inappropriate. Respondent contends that the General Counsel has not established a *prima facie* case under the *Wright Line* standard, because there is no evidence that its personnel were aware of Morales' expulsion from the Union at the time of the layoff, and no evidence of animus.¹³ Respondent further contends that the preponderance of the credible evidence establishes that it legitimately laid Morales off because work at the Florham Park jobsite where he was employed was ending, and Crisdel had no other work that he was competent to perform.

B. *General Counsel Has Established a Prima Facie Case*

I find that the record evidence establishes a *prima facie* case that Morales was laid off because of his expulsion following internal union activity. The evidence establishes that Morales engaged in internal union activity, and that Respondent had knowledge of this activity and Morales' expulsion from Local 825 at the time that Morales was laid off. In addition, there is evidence sufficient to generate an inference that Respondent laid off Morales because Morales had been expelled from the Union.

The evidence establishes that Morales engaged in a lengthy course of internal union activity in order to obtain a union registrant card and full union book. It is well-settled that although activity such as Morales' does not constitute "classic union activities," internal union member activities opposing the union's policies and practices constitute protected activity under Section 7. *Nationsway Transport Service*, 327 NLRB at 1034; *see also Wenner Ford Tractor Rentals*, 315 NLRB 964 (1994) (discriminatee opposed incumbent union officials in earlier internal union election); *Combustion Engineering*, 272 NLRB 957, 960-961, 963-966 (1984) (discriminatee disputed union business manager's position regarding application of contractu-

¹² While General Counsel argues in his posthearing brief that Respondent laid off Morales in order to "appease the Union," Local 825 is not a party to this case, there are no allegations against the Union, and, as discussed below, Respondent does not contend that it laid Morales off at the Union's behest.

¹³ Proviso B to Sec. 8(a)(3) prohibits an employer from "justify[ing] any discrimination against an employee for non-membership in a labor organization" if the employer has "reasonable grounds" to believe that an employee's union membership was denied or terminated for reasons other than the employee's failure to remit required dues and initiation fees. *See, e.g., Palmer House Hilton*, 353 NLRB 851, 852 (2009) (2 member Board), 356 NLRB No. 2 (2010). Respondent contends here that Weaver, who made the determination to lay off Morales, was not aware of Morales' expulsion from Local 825 at that time. Respondent does not argue that it discharged Morales at Local 825's request, or had reasonable grounds to believe that the Union had expelled him for nonpayment of dues.

al overtime and expense reimbursement provisions). The Board's Decision in *Nationsway Transport Service* is instructive in this regard. In that case, the Board applied the *Wright Line* analysis and concluded that the employer unlawfully discharged the discriminatee pursuant to the union's request. *Nationsway Transport Service*, 327 NLRB at 1033–1034. The parties had established a practice under the collective-bargaining agreement that the first employee arriving at a newly opened terminal was entitled to the first position on the seniority list, and would perform shop steward duties as the union's "spokesman" at the jobsite. *Id.* at 1034. The Board found that the discriminatee arrived at the job and signed in first, despite an agreement made by the union to have its president's son-in-law sign in first and act as spokesman; as a result, the discriminatee's conduct was vehemently opposed by the union. *Id.* at 1034, 1038. The Board thus determined that when it discharged the discriminatee, the employer violated Section 8(a)(1) and (3) by discriminating regarding the hire, tenure, or terms and conditions of its employees' employment, in order to encourage union membership. *Id.* at 1034.

In this context, Morales' expulsion and internal union activities are sufficient to warrant the application of the *Wright Line* standard, which is appropriate when employer motivation and possible retaliation for protected activity is in question. Morales testified without contradiction that beginning in 2006, when he walked off a job at the behest of Local 825 Business Agent Andrew Storno, he had been struggling with the Union to obtain his union book. I credit Morales' account of his subsequent exchanges with Storno and Business Agent John Woods regarding the issue, at least one of which became quite heated, while working jobs covered by the Local 825 collective-bargaining agreement. I further credit Morales' testimony that he spoke with the supervisor eventually appointed by the International Union of Operating Engineers to oversee the Local, and was informed that Local 825 had been withholding member registrant cards and union books in order to retain for itself fund contributions which would otherwise have been remitted to the International. Likewise, I credit Morales' description of his ensuing efforts to obtain an upgrade from a registrant card to a full union book, including his testimony regarding discussions with Storno, Woods, and Dave Bojack of the Local 825 upgrade committee. Finally, I credit Morales' uncontradicted testimony that Storno and Woods repeatedly told him that he was not going to receive a union book. Pursuant to the Board's decision in *Nationsway Transport Service* and the cases cited therein, I find that Morales' lengthy series of efforts in this regard constituted protected internal union activity, and that the application of the *Wright Line* analysis is appropriate.

The evidence also establishes that, contrary to Respondent's contention, Weaver and Vaccaro, the managers directly involved in Morales' layoff, were aware of his expulsion from Local 825 by letter of February 22, and of his internal union activities. Vaccaro basically corroborated Morales' testimony that they had discussed Morales' ongoing attempts to obtain an upgrade to a union book, and that Morales informed him on February 24 that he had been expelled from the Union. However, I also credit Morales' testimony that he called Weaver on

March 1 and informed him that he had been expelled from Local 825. I further credit Morales' testimony that Weaver told him during this conversation that Respondent's contract with Local 825 required that Morales remain in good standing with the Union in order to continue to work, and that Weaver would have to lay Morales off as a result.

In doing so, I find that Morales was a more credible witness regarding these events, whose testimony overall was more reliable than that of Weaver or Vaccaro. Morales' testimony regarding his conversations with Vaccaro and Weaver on March 1 was straightforward and consistent. Weaver's testimony, by contrast, was vague and contradicted both his previous affidavit and telephone records in the most significant respects. Weaver initially testified on direct examination that he had two conversations with Morales regarding his employment status. Weaver claimed that the first took place in the days before Morales' layoff, after Vaccaro had informed Morales that he would no longer be working for Respondent but before Morales' employment actually ended. (Tr. 241.) Weaver said that during this conversation, initiated by Morales, Morales said that Vaccaro had laid him off, and asked if there was a chance of his returning to work. Weaver claimed that he told Morales that the Florham Park job was coming to an end, but Morales might be called back if Respondent had sufficient work and needed additional employees. (Tr. 241.) Weaver contended that during the second conversation, a few weeks later, Morales raised the possibility of becoming a superintendent, and only then revealed that he "had some issues with Local 825 that he was trying to rectify." (Tr. 242.) Weaver repeatedly maintained that he was never aware that Morales had been expelled by Local 825. (Tr. 242, 245–246.)

Weaver's affidavit and pertinent telephone records, however, establish that his testimony regarding his conversations with Morales was utterly unreliable. For example, in Weaver's affidavit, sworn to about a month after Morales' layoff, he contended that both of his conversations with Morales took place *after* Morales stopped working, and not before, thus flatly contradicting his testimony on direct examination. (Tr. 262–264.) Furthermore, in his affidavit, Weaver admitted that during the first of these conversations, Morales said that he had been expelled from Local 825, again baldly contradicting his direct testimony. (Tr. 264–266.) Weaver's contention in his affidavit that his conversations with Morales took place only after Morales' layoff was also contravened by Weaver and Morales' telephone records, which indicate that Weaver and Morales spoke on March 1, before Morales' layoff, and then again on March 16, 2 weeks later. (Tr. 268–271; GC Exh. 10, 16.) It would not be unreasonable to conclude that Weaver deliberately attempted to tailor the account he provided in his direct testimony to ameliorate the admissions contained in his affidavit. Regardless, the completely contradictory testimony and documentary evidence involving the critical events and issues of fact in the case compels the conclusion that Weaver cannot be credited as a witness, and that his testimony is not probative.

Vaccaro's testimony was similarly unenlightening. Vaccaro initially contended that he could not recall when Weaver directed him to lay Morales off, only to remember that their conversation took place on March 1 after being confronted with his

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affidavit to that effect. (Tr. 325, 346–348.) Vaccaro was also less than forthcoming with details regarding his conversation informing Morales of the layoff, such that the specifics had to be extracted gradually during the course of his cross-examination. (Tr. 346, 347–350, 362.) Vaccaro repeatedly disparaged his own recollection of these events, asserting that he was “bad with timeline,” and eventually attempted to cast doubt upon the veracity of the statements in his affidavit by contending that “things got late and I was getting a little confused.” (Tr. 327, 374–375.) It should also be noted that Weaver and Vaccaro presented conflicting accounts of their first discussion of Morales’ “union issues” after his layoff; while Weaver claimed that this conversation took place “probably the beginning” of the week following the layoff, Vaccaro contended that it occurred after Morales had inquired as to a superintendent position, at least 2 weeks later. (Tr. 243, 327–328.) For all of the foregoing reasons, I do not credit Vaccaro’s testimony that he did not discuss Morales’ expulsion from Local 825 with Weaver until after Morales had been laid off.

Finally, Weaver and Vaccaro’s assertion that Weaver was unaware of Morales’ expulsion from Local 825 prior to his layoff is improbable given their own accounts of their work responsibilities and interactions. The evidence establishes that each day Weaver prepares a schedule, consisting of a spreadsheet, setting out the complete staff, including the operators, necessary for the following day’s work. This schedule identifies the operators assigned to each jobsite, indicating whether additional operators will be necessary and which operators, if any, will be laid off. Vaccaro uses this schedule to communicate job assignments and layoffs to the operators, and contacts the Local 825 referral hall for additional operators as needed. Weaver and Vaccaro both testified that they communicate every day, as often as 3–4 times per day, and both stated that they discussed issues involving operators with one another, including issues involving an operator’s continued membership in Local 825. (Tr. 24, 248–249, 272, 328–330.) Given this evidentiary context, it is simply not plausible that Vaccaro would have neglected to tell Weaver that an operator who had worked steadily for Respondent until that point had been expelled from Local 825.

For all of the foregoing reasons, I find that Respondent was aware of Morales’ protected internal union activity, and of his expulsion from Local 825, at the time of his layoff. I further credit Morales’ testimony that when he called Weaver on March 1 and informed Weaver that he had been expelled from the Union, Weaver responded that Crisdel’s contract with Local 825 required that Morales remain in good standing with the Union in order to continue to work, and that Weaver would have to lay Morales off.¹⁴

¹⁴ Respondent argues that Morales should not be credited because he had filed and settled an unfair labor practice charge against Local 825 prior to filing the instant charge against Respondent. Morales’ exercising his right to file charges against the Union and Respondent is immaterial to his credibility. While Respondent further argues that Morales fatally undermined his credibility by informing Lorraine Lenard that he had no issue with Respondent after filing NLRB charges, the testimony indicates that Morales and Lenard were discussing issues of discrimina-

The record also contains indicia of animus sufficient to support a prima facie case. The evidence establishes that Morales was laid off within a week after his expulsion from the Union, and the day after his March 1 conversation informing Weaver that he had been expelled. Such timing has been considered suspicious by the Board in the context of the *Wright Line* analysis. See, e.g., *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1193 (2004) (timing of discharge which occurred 2 weeks after testimony in a Board proceeding suspect); *Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003) (discharge which occurred “within a few weeks of Respondent’s learning that he was a leading union organizer” suspect). I have also found that Weaver specifically attributed the layoff to Morales’ expulsion during their conversation on March 1. I credit as well Morales’ testimony that Vaccaro told him that he could not continue working for Crisdel because he had been expelled, but could return to work if he resolved the problem with Local 825. Such statements are highly probative of unlawful motivation. *Nationsway Transport Service*, 327 NLRB at 1040, 1045 (terminal manager’s statement that employee would not be returned to work until he “straightened out [his] problems with the union” evinces unlawful motivation); *Quality Mechanical*, 307 NLRB 64, 66 (1992).

For all of the foregoing reasons, I find that the General Counsel has established a prima facie case that Morales was laid off in retaliation for his expulsion from Local 825.

C. Respondent Has Not Established That It Laid Off Morales For Legitimate Reasons

Respondent contends that Morales was laid off because there was no additional work that he was capable of performing at the Florham Park jobsite, and because it had no work for him at any other job. I find that the preponderance of the credible evidence does not substantiate these assertions.

I find that the evidence overall establishes that Morales was a valuable employee by Respondent’s standards. Morales had experience in both “dirt” or earth work, such as excavation, and in paving work. During his employment with Respondent, in addition to performing dirt work, Morales worked on a paving crew at jobsites at Route 80, Route 287, and the New Jersey Turnpike (operating breakdown, finish, and second rollers), at the Teterboro Airport, at a highway in Bayonne (operating breakdown, compaction/numbers and finish rollers), and at PSE&G (operating a roller). Weaver and Vaccaro both testified that Morales was capable of performing both earth work and paving work, and that operators with that sort of versatility were particularly desirable. (Tr. 257–258, 309–310, 331–334).¹⁵ They also testified that Respondent makes an effort to retain good operators, like Morales. There is no evidence that

tion involving protected classifications under Title VII of the Civil Rights Act of 1964 and related statutes, as Lenard is Respondent’s assistant EEO officer. In addition, Morales cannot be expected to exhibit an attorney’s understanding of the substantive and procedural law involving labor and employment issues.

¹⁵ Weaver also testified that some of the employees on Respondent’s regular paving crews were not capable of operating dirt machines.

Morales was disciplined, or that there were any problems with his work whatsoever during his year of employment.

Furthermore, the evidence establishes that work at the Florham Park jobsite was not complete at the time of Morales' layoff, as Weaver and Vaccaro contended. Although Weaver and Vaccaro both testified that the Florham Park job was ending at the time of Vaccaro's layoff (Tr. 294–295, 351), in fact the job continued into April, according to Respondent's payroll records. (GC Exh. 11, pp. 348, 369, 386.¹⁶) Weaver also contended that there was only milling and paving work left on the Florham Park job at the time of Morales' layoff, and Vaccaro testified that Weaver communicated this to him as well. (Tr. 294–295, 367.) However, Respondent's payroll records indicate that dirt or earth work, such as storm drainage, excavation and resoiling, was performed at the Florham Park jobsite during the weeks after Morales' layoff. (GC Exh. 11, pp. 292–293, 308, 334.)

In fact, the documentary evidence establishes that on March 1 and 2, immediately prior to his layoff, Morales was performing paving, as opposed to dirt work. (Tr. 84–85; GC Exh. 11, p. 273.) Respondent's payroll records establish that the week after Morales' layoff operator Gino Trois began working at the Florham Park jobsite, performing the same paving work that Morales had performed immediately prior to his layoff. (Tr. 86; GC Exh. 11, pp. 273, 292.) Trois continued working at the Florham Park jobsite, performing paving, milling, and dirt work, until April 6 (GC Exh. 11, pp. 306, 348), and Respondent's payroll records establish that employees Mark Bennett, Richard Fazio, Eric Marple, Jeff McGorvin, Mark Simon, Robert Spirito, and Michael Terranova performed paving and dirt work which Morales was capable of handling during the month after Morales' layoff. (GC Exh. 11, pp. 292, 295, 300, 303, 306, 308, 318, 327, 331, 344.) Indeed, Weaver admitted that he transferred operators from other jobs to the Florham Park jobsite, even to run the specific machine Morales had been operating at the time of his layoff. (Tr. 295–296.) As a result, the evidence establishes that Morales was immediately replaced at Florham Park by another operator who performed exactly the same paving work, contravening Respondent's contention that there was no additional work for Morales at the Florham Park jobsite at the time of his layoff. The evidence that Morales was performing paving work at Florham Park during his last 2 days of work there also undermines Respondent's assertion that Morales was not capable of performing what was purportedly the only remaining work at the Florham Park jobsite at the time of his layoff.

Furthermore, Respondent's argument, articulated by Weaver, that Morales was replaced by other more senior operators is not supported by the evidence overall. (Tr. 296–297, 303.) Although the Local 825 collective-bargaining agreement apparently does not require that seniority order be taken into consideration in cases of layoff and recall, Weaver and Criscola testified that Respondent had a general practice of doing so. This contention, however, is belied in the case of Morales by documentary evidence. In particular, Respondent's seniority list estab-

¹⁶ Page numbers refer to Bates stamp numbers appearing in the upper right hand corner of GC Exh. 11.

lishes that three of the operators who worked at the Florham Park jobsite after Morales' layoff—Jeff McGorvin, Robert Spirito, and Michael Terranova—had the same or less seniority than did Morales, whose seniority date is April 18, 2011. (Tr. 303; GC Exh. 17.)¹⁷ Respondent provided no explanation as to why these employees were selected to work at the Florham park jobsite instead of Morales given his equal or greater seniority. As a result, Respondent's claim that it selected Morales for layoff due to his low seniority is not supported by the record, indicating that its asserted reasons for the layoff are pretextual.

I further find that the record does not substantiate Respondent's assertion that there was no work for Morales at any other Crisdel jobsite at the time of his layoff. The testimony of Respondent's witnesses regarding the Route 78 job, which began on March 15, was contradictory and unreliable. For example, Criscola testified that because the lead engineer on the Route 78 job was employed by Ferreira Construction, and not Crisdel, Weaver and Vaccaro were unable to place Crisdel employees on the job without Ferreira's consent. (Tr. 191, 198–199.) However, Weaver testified that Ferreira's lead engineer discussed with him, "what guys we were going to put on the job and if there was a need for outside help," indicating that Respondent had a more significant level of hiring authority. (Tr. 240.) Indeed, Vaccaro testified that the spreadsheets specifying the employees and job assignments for the Route 78 job were prepared by Weaver, not by the lead engineer for Ferreira. (Tr. 356–357.) In addition, Respondent's payroll records establish that other employees, at least four of whom had equal or less "seniority" than Morales, performed work at other jobsites which Morales was competent to perform during March and April. (GC Exh. 11, pp. 284, 298, 307, 349, 355, 366, 367, 373, 389, 390.)¹⁸ The evidence also establishes that during the period of time that Respondent contends that it had no work for Morales at any other jobsite, an operator named Antonio Afonso was rehired to perform both dirt and paving work. (Tr. 305–306; GC Exh. 11, pp. 349, 366; GC Exh. 18.) Subsequently, in late May and June after Morales had received his union book, Respondent obtained newly referred employees from the Local 825 hiring hall, instead of recalling Morales. (GC Exh. 13.) All of this evidence casts doubt upon Respondent's contention that it laid Morales off because there was no additional work available for him at its other jobsites.

For all of the foregoing reasons, the evidence does not substantiate Respondent's contention that it legitimately laid off Morales because work at the Florham Park jobsite was ending, and there was no other work available which Morales could perform. As a result, I find that Respondent's asserted reasons for Morales' layoff are pretextual, and that Morales was laid off because, as Weaver and Vaccaro stated, he was expelled from

¹⁷ According to Respondent's seniority list, McGorvin, Spirito, and Terranova's seniority dates are September 12, April 27, and April 18, 2011, respectively. (GC Exh. 17.)

¹⁸ These four employees are Tracey Anzano (hire date April 18, 2011), Kevin Franks (hire date March 10, 2012), Nikki Glabb (hire date May 4, 2011), and Howard Lynch (hire date April 18, 2011). (GC Exh. 17.)

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Local 825. By laying off Morales in retaliation for his expulsion, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Crisdel Group, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The International Union of Operating Engineers, Local 825 is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Ramon Joseph Morales on March 2, 2012, because of his expulsion from Local 825, Respondent violated Section 8(a)(1) and (3) of the Act.

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

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having found that Respondent violated the Act by discharging Ramon Joseph Morales, Respondent shall be ordered to reinstate Morales to his former or substantially equivalent position, dismissing, if necessary, any employees hired subsequently, without prejudice to Morales' seniority or other rights and privileges Morales previously enjoyed. Respondent shall further be ordered to make Morales whole for any loss of earnings he may have suffered as a result of its unlawful conduct, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate Morales for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). Finally, Respondent shall be ordered to post a notice informing its employees of its obligations herein.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended¹⁹

ORDER

Respondent Crisdel Group, Inc., Plainfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their expulsion from Local 825, International Union of Operating Engineers.

¹⁹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to 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 immediate and full reinstatement to Ramon Joseph Morales to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to Morales' seniority or to other rights and privileges Morales previously enjoyed.

(b) Make whole with interest Ramon Joseph Morales for any lost wages he may have suffered as a result of Respondent's unlawful discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the discharge of Ramon Joseph Morales on March 2, 2012, and within 3 days thereafter, notify Morales in writing that this has been done and that the discharge will not be used against him in any way.

(d) 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, if any, due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the facility at Plainfield, New Jersey, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by 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 Respondent customarily communicates with its employees 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. In the event that, during the pendency of these proceedings, 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 March 1, 2012.

²⁰ 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."

(f) Within 21 days after service by the Region, file with the Regional Director 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, DC August 26, 2013

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 discharge or otherwise discriminate against you because you have been expelled from Local 825, International Union of Operating Engineers, thereby encouraging membership in a labor organization.

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

WE WILL within 14 days of the date of the Board's Order, offer Ramon Joseph Morales full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Ramon Joseph Morales whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay due to Ramon Joseph Morales to the appropriate calendar quarters.

WE WILL compensate Ramon Joseph Morales for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ramon Joseph Morales, and within 3 days thereafter, notify Morales in writing that this has been done and that the discharge will not be used against him in any way.

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