

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24**

BETTERROADS ASPHALT CORP.,
a/k/a BETTERROADS ASPHALT, LLC.

and

Cases: 12-CA-183927,
12-CA-187042

VIRGIN ISLAND WORKERS UNION

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1-2
II. STATEMENT OF FACTS	2
A. Background	2-3
B. Respondent's Operations	3-4
C. Respondent Failed to Pay Unit Employees' Salaries and Benefits without Notifying and Bargaining with the Union	4-5
D. Respondent Notified the Union that it Intended to Cease its Operations in an Uncertain Date	5-7
E. Respondent Closed its Operations Without Affording the Union an Opportunity to Bargain	7-8
F. Respondent Failed to Comply with the Prior Notice To Close its Operations Required by USVI Law	8-9
G. Respondent Owes Salaries and Benefits to the Unit Employees	9-10
H. Respondent's Anticipated Defenses	10- 11
III. ARGUMENT	11
A. RESPONDENT VIOLATED SECTION 8 (a) (1) AND (5) OF THE ACT BY UNILATERALLY FAILING AND REFUSING TO PAY WAGES AND BENEFITS EARNED BY EMPLOYEES IN THE UNIT	11
1. Legal Standard	11-13
2. Respondent Failed and Refused to Pay Unit Employees' Wages And Benefits Without Notice and Bargaining with the Union	13-15

B. RESPONDENT FAILED AND REFUSED TO BARGAIN OVER THE EFFECTS OF ITS DECISION TO CLOSE ITS ST. THOMAS FACILITY IN VIOLATION OF SECTION 8 (a) (1) AND (5) OF THE ACT	15-17
C. RESPONDENT’S ECONOMIC REASONS DID NOT EXCUSE IT FROM PROVIDING NOTICE AND AN OPPORTUNITY TO BARGAIN TO THE UNION	17-20
IV. CONCLUSION	20-21
CERTIFICATE OF SERVICE	22
APPENDIX A	23

TABLE OF AUTHORITIES

	Page
1. <i>AG Communication Systems Corp.</i> , 350 NLRB 168, 172 (2007)	15
2. <i>Angelica Healthcare Services</i> , 284 NLRB 844, 852-853 (1987)	12
3. <i>Bottom Line Enterprises</i> , 302 NLRB 373, 374 (1991)	12
4. <i>Celotex Corp.</i> , 259 NLRB 1186, 1193 (1982)	12
5. <i>Champion International Corp.</i> , 330 NLRB 672 (2003)	15
6. <i>Ciba Geigy Pharmaceutical Division</i> , 264 NLRB 1013 (1982), enf., 722 F.2d 1120 (3d Cir.1983).	13
7. <i>Compact Video Services</i> , 319 NLRB 131 fn. 1 (1995)	18
8. <i>Cyclone Fence, Inc.</i> , 330 NLRB 1354 (2000)	17
9. <i>Daily News of Los Angeles</i> , 315 NLRB 1236, 1238 (1994).	12
10. <i>E.I Dupont de Nemours</i> , 335 NLRB No. 176, (2010)	12
11. <i>Emhart Industries</i> , 297 NLRB 215, 216 (1987)	13
12. <i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666, 681-682 7 fn. 15 (1981)	15, 16
13. <i>Gannett Co.</i> , 333 NLRB 355, 359 (2001).	13
14. <i>Goya Foods of Florida</i> , 356 NLRB 1461 (2011)	20
15. <i>Gulf States Mfg. Inc. v. NLRB</i> , 704 F2d 1390 (5 th Cir. 1983)	13
16. <i>Indiana Hospital</i> , 315 NLRB 647 (1994)	11
17. <i>Intersystems Design & Technology Corp.</i> , 278 NLRB 759 (1986)	13
18. <i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190, 198 (1991)	12
19. <i>Los Angeles Soap Co.</i> , 300 NLRB 289 (1990)	15-16

20. <i>Melody San Bruno, Inc.</i> , 325 NLRB 846 (1998)	21
21. <i>Metropolitan Teletronics, Corp.</i> , 279 NLRB 957 (1986) enfd. mem., 819 F.2d 1130 (2d Cir. 1987)	15
22. <i>M & M Transportation Co.</i> , 239 NLRB 73 (1978)	17
23. <i>Mike_O'Connor Chevrolet</i> , 209 NLRB 701, 704 (1974)	11
24. <i>National Terminal Bakery Co.</i> , 190 NLRB 465 (1971)	17
25. <i>NLRB v. Katz</i> , 369 U.S. 736, 743 (1962)	11, 12
26. <i>Pontiac Osteopathic Hospital</i> , 336 NLRB 1021, 1023-1024 (2001)	13
27. <i>Ramada Plaza Hotel</i> , 341 NLRB.310, 315-316 (2004)	11
28. <i>Raskin Packing Co.</i> , 246 NLRB 78 (1979)	17
29. <i>RBE Electronics of S.D.</i> 320 NLRB 80, 81 (1995)	12, 18
30. <i>Register-Guard</i> , 339 NLRB 353, 354 (2003)	12
31. <i>Transmarine Navigation Corp.</i> , 170 NLRB 389 (1968)	20, 21
32. <i>Toledo Blade Co.</i> , 343 NLRB 385, 388 (2004).	11
33. <i>UPS Supply Chain Solutions, Inc.</i> 364 NLRB No. 8 (2016)	20
34. <i>Venture Packaging</i> , 294 NLRB 544, 547, 548 fn. 4 (1989) enfd. mem. 923 F.2d 855 (6 th Cir. 1991)	12
35. <i>Willamette Tug & Barge Co.</i> , 300 NLRB 282 (1990)	15,16
36. <i>Woodland Clinic</i> , 331 NLRB 735, 738 (2000)	16

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I. STATEMENT OF THE CASE¹

On January 31, 2017, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) issued in the above-mentioned cases. [GCX 1(g)]. The Complaint, inter alia, alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to pay wages and benefits to employees in the Unit, by ceasing its operations in its St. Thomas facility and by terminating the employment of all employees in the Unit without prior notice and without affording the Virgin Islands Workers Union (the Union) an opportunity to bargain with respect to this conduct or the effects of this conduct, and without first bargaining with the Union to an overall good-faith impasse for an initial collective-bargaining agreement. On February 21, 2017, Respondent filed an answer admitting, in part, and denying in part, the allegations of the Complaint. [GCX 1 (l)] In essence, Respondent denied that it had violated the Act in any way.

The essential facts, undisputed and submitted to the Administrative Law Judge (ALJ) as a complete stipulated record, are set forth below. Pursuant to § 102.42 of the Board's Rules and Regulations, Counsel for the General Counsel submits this brief in support of the Complaint,

¹ General Counsel's Exhibits are referenced as GCX; Joint Exhibits are referenced as JX. References to the Joint Stipulations, signed by the parties and admitted as Joint Exhibit 1, are referenced herein as JX 1 [page and paragraph number].

arguing that Respondent was not entitled to withhold Unit employees' wages and benefits without first giving the Union notice and the opportunity to bargain over said decision. Counsel for the General Counsel further argues that Respondent was not entitled to close its operations in St. Thomas and terminate the employment of all of its Unit employees without prior notice to the Union and without affording the Union an opportunity to bargain over the effects of this decision. For the reasons set forth below, Counsel for the General Counsel urges the Administrative Law Judge to find that Respondent's conduct violates Section 8(a)(5) and (1) of the Act in all respects as alleged in the Complaint. The General Counsel is seeking an order requiring Respondent to make whole employees in the Unit for the loss of benefits and wages they suffered because of Respondent's unilateral actions. The General Counsel also seeks an order requiring Respondent to make whole all employees in the unit in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) for its failure to engage in effects bargaining with the Union prior to closing its St. Thomas facility.

II. STATEMENT OF FACTS

A. Background

Respondent is a Puerto Rico corporation duly authorized to do business in the United States Virgin Islands (USVI) engaged in the production and sale of asphalt, and the paving of roads. During the 12 months period preceding October 6, 2016, Respondent purchased and received at its facility in St. Thomas, USVI, goods valued in excess of \$50,000 directly from points located outside of the United States Virgin Islands. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [JX 1 page 3 paragraphs 5 and 6]

On June 9, 2016, the Union was certified by the Board as the exclusive bargaining representative of all production and maintenance employees of Respondent employed in the manufacture of asphalt in its plant located in St. Thomas USVI, including road crews (the Unit). [JX 1 pages 5 -6 paragraphs 12, 13 and 14; JX 2 and JX 3]. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act and has been recognized by Respondent as the exclusive collective-bargaining representative of the Unit. [JX 1 page 5 paragraphs 11, 12; page 6 paragraphs 13, 14]. After the Union was certified, no collective-bargaining agreement was reached between the parties.

B. Respondent's Operations

At all material times, until October 2016, Respondent operated several manufacturing plants and/or facilities in Puerto Rico, and operated a paving plant and facility in St. Thomas, USVI. The only facility at issue in this proceeding is Respondent's St. Thomas paving plant, which is located at 3G Estate Bovoni, Turnpentine Run Road, St. Thomas USVI (the St. Thomas facility).

The USVI Government has been one of Respondent's main clients. During the period from October 2015 to October 2016, Respondent was contracted by the USVI Federal Highway Administration to perform road asphalt paving services in St. Thomas, USVI, including the work performed for Island Wide Pavement Rehabilitation in St. Thomas, under contract number VI-9999(122). [JX.1 page 4 paragraph 7 and JX 14].

Respondent's General Manager Eason Jeffers (Jeffers) was responsible for the assignment of work and supervision of Respondent's work force employed at the St. Thomas facility. Jeffers reported to Operations Vice-president Luis Perez-Duran (Perez-Duran), who was in charge of the negotiation and administration of work projects performed by Respondent in the

USVI. Human Resources Director Linette Orta (Orta) was responsible for the implementation and administration of company rules, employee benefits and personnel matters for all of Respondent's work force, including those employees employed at the St. Thomas facility. Perez-Duran and Orta reported directly to Respondent's President, Jorge L. Diaz and although assigned to work at Respondent's administrative offices in San Juan, Puerto Rico, they traveled regularly to the St. Thomas facility. Admittedly Jeffers, Perez-Duran and Orta have been supervisors of Respondent within the meaning of Section 2(11) and agents of Respondent within the meaning of Section 2(13) of the Act. [JX.1 pages 4 -5 paragraphs 8, 9 and 10]

C. Respondent Failed to Pay Unit Employees' Salaries and Benefits without Notifying and Bargaining with the Union

The day after the Union was certified, on June 10, 2016, the Union, through its President Charles Nicholas (Nicholas), requested Respondent to provide certain information concerning employees in the Unit in preparation for the parties' collective-bargaining process. [JX 1 page 7 paragraph 19; and JX 4]. On June 20, 2016, Respondent replied to the Union's June 10, 2016, letter, instructing the Union to direct all matters related to the Unit at the St. Thomas facility to Perez-Duran and/or Orta, as Respondent's Operations Vice-president and Human Resources Director, respectively. [JX 1 pages 7 -8 paragraph 20; and JX 5].

That same date, June 20, 2016, the Union sent a letter to Orta and Jeffers reiterating its request for information dated June 10, asking to meet with Respondent to discuss outstanding issues concerning the terms and conditions of employment of the Unit and requesting to commence bargaining for the initial contract. In this letter, the Union further protested Respondent's failure to pay the Unit a benefit that was due in May 2016, which was identified in this letter by the Union as the "Mother's Day Bonus." [JX 1 page 8 paragraph 21; and JX 6]

By letter dated June 22, 2016, Respondent through Orta replied to the Union indicating that Respondent was still gathering the information the Union had requested concerning the Unit. With regard to Respondent's failure to pay the "Mother's Day Bonus," Respondent stated that unit employees were already notified that for financial reasons the payment of the benefit due in May, which Respondent referred to as the "liquidation of sick leave," was going to be paid in two installments. Through this letter, Respondent for the first time notified the Union that it did not pay the benefit that was due in May and that it was going to pay it in two installments; the first installment due on July 24, 2016, and the second one on October 14, 2016. Finally, with regard to the bargaining process for an initial contract, Orta instructed Nicholas to contact Respondent's legal counsel. [JX 1, pages 8-9 paragraph 22; and JX7]. On about July 24, 2016, Respondent made the first installment payment to the Unit for the benefit that was due in May 2016. [JX1 page 9 paragraphs 23 - 24]

On July 12, 2016, Union President Nicholas met with Attorney William Geigel (W. Geigel) as counsel for Respondent. During this meeting, the parties only introduced themselves and exchanged general information. No bargaining was conducted during this meeting. [JX 1 page 9 paragraphs 25 and 26].

D. Respondent Notified the Union that it Intended to Cease its Operations in an Uncertain Date

After exchanging several electronic communications concerning the scheduling of the bargaining sessions, the parties met on August 22, 2016. Present for the Union during this meeting was President Nicholas and the Union Secretary, Sharon Gilberts. For Respondent, Attorney W. Geigel and Human Resources Director Orta. After a brief discussion concerning the Union's proposal for an initial collective-bargaining agreement, Respondent, through Attorney W. Geigel, informed the Union that Respondent was planning to cease its operations in

St. Thomas, in an unspecified and undetermined date. Respondent explained that it was working three projects and its plans to cease operations were subject to the completion of those projects. Respondent further added that it intended to provide proper notices to the USVI Department of Labor of its plant closure in accordance with the USVI Law. During this meeting, the Union, through Nicholas, requested to bargain over the closure of Respondent's operations and the effects of Respondent's closure. In addition, the Union asked to bargain over the payments of benefits and salaries that Respondent owed to the Unit. Specifically, the Union brought to Respondent's attention the fact that Unit employees were unable to cash their paychecks due to Respondent's insufficiency of funds. To which Respondent's Human Resources Director, Linette Orta, replied that Respondent was having some problems with the bank, but that it intended to pay the employees once the bank released its funds. [JX1, pages 9-10 paragraphs 27 and 28] It should be noted that, before this meeting, Respondent at no time notified the Union about its fund problems, or that it was not going to be able to comply with its payroll obligation.

Several days after, the Union via e-mail dated August 29, 2016, requested that Respondent pay the second installment of the benefit owed to Unit employees by no later than September 9, 2016, (Labor Day). Later that same date, Respondent, through attorney W. Geigel, replied to the Union by e-mail stating that it was working hard to resolve the matter. [JX1 page 11 paragraphs 29 and 30 and JX 8]

By letter dated September 2, 2016, Respondent notified the Union that it was closing its operations due to its financial situation. According to Respondent, it was ceasing operations within 90 days, or when it completed its pending projects, whichever occurred first. Attached to the letter, was a Notice to Employees dated September 1, 2016, where Respondent informed the Unit about its closing decision. [JX1 paragraph 30, JX 10] Again, Respondent failed to provide

the Union with a certain closing date. On that same date, September 2, 2016, the Union requested, in writing, to meet and bargain with Respondent over the plant closure. The Union further requested the payment of the second installment of the benefit owed since May 2016, by no later than September 9, 2017.

On September 19, 2016, after learning through the employees that on September 14, 2016, Respondent asked certain employees not to report to work on September 15 and September 16, 2016, the Union sent a letter to Respondent protesting its failure to notify and bargain with the Union beforehand. In the September 19 letter, the Union also complained again about Respondent's failure to pay the Unit its wages for the previous three weeks period and Respondent's failure to pay the second installment of the benefit owed since May 2016. The Union further complained about Respondent's failure to reply to the Union's request to bargain concerning Respondent's plant closure. As admitted, Respondent did not respond to the Union's letters dated September 2, 2016, and September 19, 2016. [JX 1 pages 11-12 paragraphs 32, 33 and 34; JX 11 and JX 12.]

E. Respondent Closed its Operations Without Affording the Union an Opportunity to Bargain

Despite the fact that Respondent had ignored the Union's request to bargain, on Friday, September 30, 2016, Respondent, through its Operations Vice-President Perez-Duran, verbally notified Unit employees in the St. Thomas facility that Respondent was ceasing operations and that their employment was terminated effective immediately. There is no evidence that Respondent gave any prior notification to the Union about its decision to close its facility on September 30, 2016. After unilaterally terminating their employment, Respondent failed to liquidate employees' sick leave and annual leave.

By letter dated October 6, 2016, Respondent formally notified, in writing, all of its employees at the St. Thomas facility, including the Unit, about the conclusion of all of its operations in the U.S. Virgin Islands and their termination of employment. In that communication, Respondent admitted having failed to comply with its payroll obligations. [JX 1 page 13, paragraph 36; JX 13]

As stipulated, the only meetings conducted between the parties prior to Respondent's closure of its St. Thomas facility on September 30, 2016, were held on July 12 and August 22, 2016. About three months after the plant closure, Attorney Eugenio Geigel (E. Geigel) as the new counsel for Respondent, met with the Union and informed that Respondent could not do anything else about the closing of its St. Thomas facility. Subsequently, in about February and March 2017, Attorney E. Geigel engaged in several communications with the Union related to the mailing and/or distribution of the W-2 Forms to the employees in the Unit. The only meetings or communications exchanged between the parties that are relevant to this case are those described above, which reflect that Respondent did not meet its obligation to meet and bargain with the Union over the implemented changes to the terms and conditions of employment of the Unit.

F. Respondent Failed to Comply with the Prior Notice to Close its Operations Required by USVI Law

The records further reflect that Respondent failed to comply with the proper notification to the Virgin Islands Commissioner of the Department of Labor and the payment of the severance required pursuant to the Virgin Islands Plant Closing Act, Title 24 V.I. Code Ann. Sections 417-476, prior to closing its operations. In essence, the USVI Plant Closing Act requires advance notification of at least 90-days prior to closing, to the Commissioner of Labor,

to any affected employee, and, if the employees are represented by a Labor Union, to such Union. In addition, within one pay period after termination, it request Respondent to pay each affected employee a severance payment equal to one week's pay for every year of service. Severance pay for employees who have worked less than one year has to be prorated over a one-year period. The USVI Plant Closing Act further recognizes the rights of labor organizations to represent employees since it provides that the Union has the right to negotiate additional benefits for its membership.

The Government of the Virgin Islands on behalf of the Virgin Islands Commissioner of the Department of Labor filed a claim in Case ST-16-CV-610 before the Virgin Islands Superior Court (herein referred to as the Claim), concerning Respondent's closure of its plant in St. Thomas in violation of the Plant Closing Act. The claim is still pending, and the Unit employees have not yet received their severance payment, or the payment for their wages and/or benefits, or the liquidation of their accrued sick and annual leave, which is owed by Respondent. [JX 1 pages 16-17, paragraph 45].

G. Respondent Owes Salaries and Benefits to Unit Employees

It is undisputed that Respondent failed to make the second installment payment to its Unit employees for the benefit owed since May 2016, which Respondent unilaterally decided to divide in two payments, the last of which was scheduled for October 14, 2016. It is also undisputed that Respondent failed to pay Unit employees for the wages earned for the work they performed during the period from August 22, 2016, through September 30, 2016. It is further undisputed that Respondent failed to liquidate the accrued sick leave and annual leave owed to employees in the Unit. To that effect, Respondent, through the Joint Stipulation, admitted owing

Unit employees the wages they earned for the work that was performed during this period. Respondent further admitted owing employees in the Unit the second installment mentioned above and their liquidation of sick leave and annual leave that was accrued as of their last day of employment with Respondent in September 2016. [JX 1 pages 14-15 paragraphs 41, 41 and 43]

As stipulated by the parties, the recount of what transpired during the July 12 and August 22, 2016 meetings and the documents in the stipulated records constitute the only communications exchanged between the parties concerning discussion or bargaining over the terms and conditions of employment of the Unit. The record in this proceeding is devoid of any evidence showing that, Respondent notified the Union and afforded it a meaningful opportunity to bargain prior to failing to pay employees' earned wages, refusing to liquidate their accrued sick and annual leave, or failing to pay them the remaining portion of the May 2016 benefit. To the contrary, the record shows that Respondent acted unilaterally with respect to the above-mentioned actions, failing to bargain both, over the conduct and its effects.

H. Respondent's Anticipated Defenses

Respondent contends that it was forced to cease operations due to its financial situation and was unable to meet payroll obligations because the bank closed its line of credit and/or froze all access to Respondent's accounts and funds. Respondent also claims that another contributing factor was that the Department of Public Works of the US Virgin Islands failed to make certain payments to Respondent for project phases allegedly completed. Finally, Respondent contends that as part of the proceedings in Case ST-16-CV-610, Respondent's President Jorge Diaz executed an authorization for the transfer and disbursement of contract Funds. Pursuant to said document, Respondent authorized the Federal Highway Administration (FHA) to transfer to the

U.S Department of Labor funds in the amount of \$113,386.34 from contract payments to be disbursed to satisfy the payment of wages to Respondent's employees, including Unit employees. However there is no evidence that Respondent or the U.S. Department of Labor has made any payment to Unit employees on behalf of Respondent.

IV. ARGUMENT

A. RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY UNILATERALLY FAILING AND REFUSING TO PAY WAGES AND BENEFITS EARNED BY EMPLOYEES IN THE UNIT

1. Legal Standard

Section 8 (a) (5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory subject of bargaining. It is longstanding Board law that an employer violates Section 8 (a) (5) of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain regarding said change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). To be found unlawful, the unilaterally imposed change must be "material, substantial, and significant" and impact employees or their working conditions. *Toledo Blade Co.*, 343 NLRB 385, 388 (2004).

An employer's duty to avoid unilateral changes in wages, hours and working conditions attaches when the Union wins the election. An employer's "obligation to bargain before making changes commences not on the date of certification, but on the date of the election." *Mike O'Connor Chevrolet*, 209 NLRB 701, 704 (1974) enf. denied on other grounds, 512 F2d. 684 (8th Cir. 1975); *Ramada Plaza Hotel*, 341 NLRB.310, 315-316 (2004). See also, *Indiana Hospital*, 315 NLRB 647, 656 (1994). The Board has found that the certification date is when the

employer's duty to bargain, following the Union's election victory, ripens into the employer's plenary statutory obligation. *Celotx Corp.*, 259 NLRB 1186, 1194 fn.45 (1982). Therefore, an employer is not free during the time between the election and the certification to make material changes, and it acts at its peril when it does so absent compelling economic considerations. *Venture Packaging*, 294 NLRB 544, 547, 549-50 fn. 4 (1989) enfd. mem. 923 F.2d 855 (6th Cir. 1991); *Celotex Corp.*, at 1193 (1982). In this regard, the Board has recognized as "compelling economic consideration" only those extraordinary events which are of "unforeseen occurrence, [that have] a major economic effect requiring the company to take immediate action." *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987).

Furthermore, during negotiations for a collective-bargaining agreement, more specifically, an employer may not unilaterally change any term or condition of employment without having bargained to impasse for the agreement as a whole. *E.I Dupont de Nemours*, 355 NLRB 1984, (2010); *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.* 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). To that effect, the Board has stated that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). The implementation of unilateral changes constitutes a violation of the employer's duty to bargain, absent the agreement of the bargaining representative, an impasse in negotiations, or a waiver by the bargaining representative. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994).

The Board has long recognized that "where a union has received timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance

of actual implementation of the change to allow a reasonable opportunity to bargain. However, what constitutes sufficient notice depends on all the circumstances of the case” *Emhart Industries*, 297 NLRB 215, 216 (1987) If the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*. *Ciba Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) enf. 722 F.2d 1120 (3d Cir.1983). However, a union cannot be held to have waived bargaining over a change that has been presented as a *fait accompli*. An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity to counter arguments or proposals. Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated: *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986) quoting *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1392 (5th Cir. 1983). Thus, an employer may not avail itself of a waiver defense where it presents the union with a *fait accompli*; a finding that a union was presented with *fait accompli* will prevent a finding that a failure to request bargaining is a waiver. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001); *Gannett Co.*, 333 NLRB 355, 359 (2001).

2. Respondent Failed and Refused to Pay Unit Employees’ Wages and Benefits Without Notice and Bargaining with the Union

Here, the representation election in which the majority of the employees selected the Union as its exclusive collective-bargaining representative was held on May 5, 2016, date Respondent’s bargaining obligation with the Union ripened. During that same month, May 2016, employees in the newly certified unit were supposed to receive the payment of a benefit referred by the employees as the Mother’s Day Bonus, and, as the “liquidation of sick leave” by Respondent. Regardless of the name of said benefit, it is undisputed that its payment was due in May 2016 and that Respondent failed to pay it. In this case, the Union learned about

Respondent's failure to pay this benefit through Unit employees instead than through Respondent.

Furthermore, Respondent did not give the Union prior notice or an opportunity to bargain before deciding to divide the payment of the above benefit in two installments. Rather, the Union learned on June 22, that Respondent intended to make the two payments in June 24 and in October 14, 2016. Even after Respondent failed to pay the May 2016 benefit and after it unilaterally informed the Union that it was going to pay said benefit on two installments, Respondent still failed to make the second payment that was due on October 14, as it had represented to the Union. Again, Respondent failed to notify and bargain with the Union over the non-payment of the portion that was due to the Unit on October 14, 2016. The change implemented by Respondent concerning the payment of this benefit, originally due in May, clearly constitutes a material, substantial and significant change in the terms and condition of employment of the Unit. Respondent not only unilaterally divided the payment in two installments, but delayed the payment for several months and, subsequently defaulted in the second installment without prior notice to the Union and/or affording the Union an opportunity to bargain.

Similarly, Respondent failed to provide prior notice to the Union and an opportunity to bargain before ceasing to pay employees' salaries on or about August 22, 2016. Again, the Union learned about the non-payment of employees' salaries after the fact, when employees complained that they were unable to cash their checks. Here, the undisputed evidence reflects that Respondent failed to provide prior notice to the Union and an opportunity to bargain over the intended changes before implementing them. Rather, the Union, in the above-mentioned instances, was presented with a "*fait accompli*." The evidence in the record also demonstrates

that Respondent further failed and refused to bargain with the Union even after the implementation of said changes, despite the fact that the Union protested the changes and requested to bargain in several occasions. As mentioned above, during the meeting on August 22, the Union verbally requested Respondent to bargain, it also requested to bargain in writing by letters dated June 20, September 2 and September 19, 2016. Nonetheless, Respondent ignored the Union's requests and failed to meet and bargain with the Union over the changes it had implemented or intended to implement.

B. RESPONDENT FAILED AND REFUSED TO BARGAIN OVER THE EFFECTS OF ITS DECISION TO CLOSE ITS ST. THOMAS FACILITY IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT

It is settled law that an employer must bargain with its employees' statutory bargaining representative regarding the effects of entrepreneurial decisions which had been found to be not suitable for decisional bargaining. The Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 7 fn. 15 (1981), stated that "there is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by Section 8(a)(5). Thus, it is settled Board precedent that an employer's refusal to engage in effects bargaining over the decision to close part or all of its business violates Section 8(a)(5) of the Act. *Champion International Corp.*, 330 NLRB 672 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986) enfd. mem. 819 F.2d 1130 (2d Cir. 1987). In order to satisfy this duty to bargain, an employer must provide the union with timely notice and an opportunity to bargain "in a meaningful manner and at a meaningful time." 452 U.S. at 681-682; *Metropolitan Teletronics Corp.*, at 959 fn. 14; *AG Communication Systems Corp.*, 350 NLRB 168, 172 (2007); *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990); *Los Angeles Soap Co.*, 300 NLRB

289 (1990). Timely notice in these circumstances generally means that a Union must be notified sufficiently in advance of the closure to allow for the exchange of information and proposals, and review of those proposals at a time when the Union still has leverage to bargain. This timely notice to the union is required so that the union is not presented with a “*fait accompli*” at the bargaining table. *Woodland Clinic*, 331 NLRB 735, 738 (2000).

For example, in *Willamette Tug & Barge Co.*, the Board found that an employer had violated Section 8(a)(5) of the Act by closing its business and discharging its employees without giving the union adequate notice and an opportunity to bargain over the effects of the employer’s sales of its business. The Board relying on *First National Maintenance Corp.*, determined that the Union had a right to discuss with the employer how an impending sale would affect the employees and how any potential issue could be ameliorated. *Id.* at 283 citing *First National Maintenance Corp.*, at 681, 682. The Board further found that in order for the union to have any actual bargaining power, the employer was obligated to bargain with the union before implementing its decision to sell the business. *Willamette Tug & Barge.*, at 283.

The analysis in this case is quite straightforward. The record clearly demonstrates that Respondent unlawfully failed and refused to bargain with the Union over the effects of its decision to close its operations. It is clear that Respondent failed to provide the Union with an opportunity to bargain over the effects of its decision to close its operations prior to implementing it; depriving the Union from a meaningful opportunity to exchange proposals when it still had leverage to do so. Here, Respondent only notified the Union that it intended to close its plant without providing a certain date, and it later simply ignored the Union’s requests to bargain, implementing its decision on September 30, 2016. Although the Union requested to bargain over the effects of Respondent’s decision to close its business at least on three separate

occasions, Respondent undisputedly disregarded its duty to bargain by failing to respond to any of the Union's requests.

Counsel for the General Counsel submits that Respondent had sufficient time to bargain with the Union over the effects of its decision to close its operations. In this regard it is specifically noted that, since August 22, 2016 (when Respondent first mentioned its intention to close its operations), until September 30, 2016 (when it in fact ceased its operations), more than 38 days had elapsed. During this period of time, Respondent had ample time to fulfill, or at least attempt to fulfill, its bargaining obligation with the Union. Furthermore, the time that elapsed belies any contention that Respondent was confronted with the impending exigent circumstances of the sort that excuse bargaining.

Based on the foregoing, it is submitted that Respondent's failure to engage in effects bargaining as requested by the Union violated Section 8(a) (1) and (5) of the Act as alleged in the Complaint.

C. RESPONDENT'S ECONOMIC REASONS DID NOT EXCUSE IT FROM PROVIDING NOTICE AND AN OPPORTUNITY TO BARGAIN TO THE UNION

The Board has excused an employer from giving advance notice of closure in emergency situations where such notice is unrealistic. *Raskin Packing Co.*, 246 NLRB 78 (1979); *M & M Transportation Co.*, 239 NLRB 73 (1978); *National Terminal Bakery Co.*, 190 NLRB 465 (1971). However, it has held that, even in those circumstances where advance notice of closure is excused, the duty to bargain over the effects still exists once the "emergency" has passed. *Cyclone Fence, Inc.*, 330 NLRB 1354 (2000); *National Terminal Bakery*, 190 NLRB at 466. In these cases, the burden is on the employer to demonstrate "particularly unusual or emergency circumstances" that would relieve it of the obligation to provide the Union with effective notice.

Compact Video Services, 319 NLRB 131 fn. 1 (1995). The Board has also held that “circumstances which require implementation at the time the actions is taken or an economic business emergency that requires prompt action,” are an exception to the general bar against unilateral changes. *RBE Elecs. of S.D. Inc.*, 320 NLRB 80, 81 (1995). The Board has, however, noted that there is a “heavy burden” upon an employer trying to establish application of this exception. Thus, the Board has limited its definition of these considerations to extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action. Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operations at competitive disadvantage or supply shortages do not justify unilateral action. *RBE Elecs.*, 320 NLRB at 81

In this case, it is submitted that Respondent’s anticipated economic defense is without merit. To that effect, Counsel for the General Counsel contends that Respondent has failed to establish that it was faced with the type of economic exigencies, contemplated under Board law which require immediate action. In this regard, after the Union won the election on May 5, 2016, Respondent continued its normal operations and failed to notify the Union about any financial difficulty nor communicated to the Union any concern about its incapacity to comply with its payroll obligations prior to the implementation of the above-mentioned changes. Although Counsel for the General Counsel is not contesting that Respondent closed its St. Thomas plant and facility due to its financial situation and that the reasons stated in the Joint Motion were not motivating factors, Respondent was still not faced with the sort of compelling economic exigencies, out of Respondent’s control, which excuses an employer from providing prior notification and/or bargaining with its employees’ exclusive representative before taking certain actions. To that effect, it is noted that no bank or financial institution would cancel its

client's commercial credit line nor freeze its accounts as the first resort and without advanced notice. Rather, common sense dictates that, at a minimum, a bank would have provided proper anticipated notice to Respondent before freezing its accounts. In this regard, it is respectfully submitted that Respondent knew or should have known about its deteriorated financial situation and potential consequences before it implemented the unilateral changes to employees' wages and benefits. Thus, Respondent was not free to unilaterally implement these changes and ignore the fact that its employees had an exclusive collective-bargaining representative.

It is respectfully submitted that Respondent did not meet the "heavy burden" imposed by Board law to be exempted from bargaining. Nothing on the record demonstrates that Respondent was confronted with an unforeseen event, out of its control, which prevented it from providing prior notice and opportunity to bargain to the Union before implementing any of the unilateral changes alleged in the Complaint and admitted by Respondent. Rather, Respondent's financial situation appears to be the result of the continuing erosion of its financial well-being for some period of time prior to the events at issue in this case.

Finally, Counsel for the General Counsel anticipates that Respondent will raise as a defense that payment of the second installment of the benefit that was due in May 2016, and the salaries it owes to the Unit since August 2016, are already covered under the claim before the USVI Superior Court, Claim ST-16CV-610, and should not be part of the remedy in the instant matter. Nevertheless, Counsel for the General Counsel submits that Respondent's anticipated deference is without merit. As mentioned above, it is undisputed that Respondent violated Section 8 (a)(1) and (5) of the Act by, unilaterally implementing the changes concerning the payment of the benefit that was due in May and with regard to employees' salaries and wages. The proper remedy for these type of unilateral changes to employees' terms and conditions of

employment is, upon the request from the Union, the rescission of the unlawful change and the restoration of the benefits that existed before the unilateral action was taken. *UPS Supply Chain Solutions, Inc.* 364 NLRB No. 8 (2016). The traditional remedy further includes a provision to make whole unit employees for all losses they suffered as a result of the unlawful changes. *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011). Therefore, it is submitted that the remedy in this case should include a make whole remedy for Respondent's unilateral changes. Whether any portion of said backpay has been covered, or would be covered, through the resolution of other legal claim, is a matter to be resolved through a compliance proceeding.

V. CONCLUSION:

For the reasons set forth above, and based on the record as a whole, it is respectfully submitted that Respondent violated Section 8(a)(5) and (1) of the Act in all respects alleged in the Complaint. Accordingly, Counsel for the General Counsel respectfully requests that the Administrative Law Judge recommend that the Board order Respondent to cease and desist from engaging in the unfair labor practices alleged in the Complaint; to bargain in good faith with the Union with respect to wages, hours, and other terms and conditions of employment before implementing any changes thereto for unit employees; and make whole the unit employees for the losses they suffered as a result of Respondent's unlawful withholding of salaries and benefits, as described above, by the payment of backpay with interest and to further compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each such employee. The General Counsel further requests that a remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), be awarded. A *Transmarine* remedy is standard relief for effects-bargaining violations. In this case, where Respondent's conduct precluded meaningful effects bargaining, it is respectfully submitted that the Administrative Law

Judge should recommend that the Board order Respondent to engage in effects bargaining with the Union and to pay the affected employees their regular wages beginning five days after the date of the issuance of the Administrative Law Judge and/or Board decision until one of four conditions occurs; 1) the parties reach an agreement; 2) the parties reach a bona fide impasse in bargaining; 3) the Union fails to request bargaining; or 4) the Union fails to bargain in good faith. *Melody San Bruno, Inc.*, 325 NLRB 846 (1998), clarifying the *Transmarine* remedy.

Finally, Counsel for the General Counsel seeks a provision requiring the Respondent to mail at its own expenses a Notice to Employees, to all Unit employees that were employed by Respondent, at any time, after June 9, 2016. Counsel for the General Counsel further seeks all other relief deemed appropriate.²

Dated at San Juan, Puerto Rico, this 10th day of July, 2018.

Respectfully submitted,

s/ Ana B. Ramos – Fernandez

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² A proposed Notice to Employees is attached hereto as Appendix A.

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I served Counsel for the General Counsel's Brief to the Administrative Law Judge in the matter of Betteroads Asphalt Corp. a/k/a Betteroads Asphalt, LLC Cases 12-CA-183927 and 12-CA-187042, upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

By Electronic Filing to:

Hon. Christine A Dibble
Administrative Law Judge
NLRB, Division of Judges
1015 Half Street, SE
Suite 6034
Washington, D.C. 20570

By Electronic Mail to:

Charlesworth Nicholas
Virgin Island Workers Union
Email: viworkersunion@yahoo.com

By Electronic Mail to:

Eugenio Geigel-Simounet Esq.
Counsel for Respondent
E- Mail: egeigel@gs-lawoffices.com

s/ Ana B. Ramos-Fernández

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APPENDIX A

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with Virgin Islands Workers Union (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit with respect to their wages, hours of work, and other terms and conditions of employment:

All production and maintenance employees of Respondent employed in the manufacture of asphalt in its plants located in St. Thomas, including road crews, excluding all executive, administrative and professional personnel, office clericals and plant clerical employees, master mechanics, foremen, watchmen, time-keepers, buyers, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to pay your wages, your accrued sick leave pay (or Mother's Day bonus), to liquidate your sick and annual leave, or make other changes to the terms and conditions of employment of our employees in the above unit, without prior notice to the Union and without affording the Union an opportunity to bargain with us with respect to this conduct and the effects of this conduct.

WE WILL NOT close our operations and lay-off our bargaining unit employees without giving the Union notice and opportunity to bargain with us with respect to the effect of this conduct.

WE WILL NOT in any like or related manner interfere with your above stated rights under Section 7 of the National Labor Relations Act.

WE WILL make whole our employees in the above unit by payment to them of their unpaid wages, accrued sick leave pay (or Mother's Day bonus), and liquidation of sick and annual leave, earned in 2016, less statutory deductions, plus interest.

WE WILL compensate our employees in the above unit for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 12, a report allocating the backpay award to the appropriate calendar year.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit concerning wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

**BETTERROADS ASPHALT, CORP. a/k/a
BETTERROADS ASPHALT, LLC**

(Employer)

Dated:

By:

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board Subregion 24
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Telephone: (787) 766-5347

Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.