

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

NEW YORK PAVING, INC.

Respondent

and

CONSTRUCTION COUNCIL LOCAL 175,
UTILITY WORKERS UNION OF
AMERICA, AFL-CIO

Charging Party

and

HIGHWAY, ROAD AND STREET
CONSTRUCTION LABORERS LOCAL
UNION 1010 OF THE DISTRICT COUNCIL OF
PAVERS AND ROAD BUILDERS, LABORERS
INTERNATIONAL UNION OF NORTH
AMERICA, AFL-CIO

Party of Interest

Case Nos.: 29-CA-197798
29-CA-209803
29-CA-213828
29-CA-213847

POST-HEARING BRIEF ON BEHALF OF NEW YORK PAVING INC.

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I. PRELIMINARY STATEMENT

Region 29 of the National Labor Relations Board filed a Complaint and Notice of Hearing in the instant matter on May 30, 2018. In response, Respondent New York Paving, Inc. (“NY Paving” or “Respondent”) filed its Answer on June 28, 2018 denying all allegations of unlawful conduct. Region 29 issued an Amended Consolidated Complaint (the “Complaint”) on August 31, 2018 alleging various violations of §§8(a)(1), (2), (3) and (4) of the National Labor Relations Act (the “Act”). NY Paving filed an Answer on September 11, 2018 denying all allegations of unlawful conduct. A hearing was held on September 20 and 21, 2018; October 16, 17, 18, 19 and 31, 2018; and November 1, 2018.¹ NY Paving submits this brief in opposition to the charges alleged in the Complaint and in support of its request that the Complaint be dismissed in its entirety.

II. FACTS

A. **Background Information Regarding NY Paving’s Relationship with Local 175**

NY Paving provides, among others, asphalt paving and repaving, construction, seal coating and related services to its customers in New York City, including various utility companies, such as Consolidated Edison (“ConEd”) and National Grid. (Tr. 55, 72). In connection with providing these services, NY Paving employs individuals who are represented by various unions, including Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “Charging Party”), Local 282, IBT; Local 1298, LIUNA; Local 14-15, IUOE; Local 138, IUOE; and Highway Road and Street Construction Laborers

¹ All citations to the official transcript for this proceeding are identified as “Tr.” followed by the page number. Joint exhibits shall be referred to as “Joint Ex.” followed by the exhibit number. References to the General Counsel’s (“GC”) exhibits shall be noted as “GC Ex.” followed by the exhibit number. References to New York Paving, Inc.’s (“NY Paving”) exhibits shall be noted as “Resp. Ex.” followed by the respective exhibit numbers. Finally, the Highway, Road and Street Construction Laborers Local 1010 of the District Council of Pavers and Road Builders, Laborers International Union of North America, AFL-CIO’s (“Local 1010”) exhibits shall be noted as “PI Ex.” followed by the exhibit number.

Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO (“Local 1010” or “Interested Party”). (Tr. 1361-69). NY Paving performs concrete work for ConEd and asphalt work for National Grid. (Tr. 72). NY Paving also performs some work for Hallen Construction Inc. (“Hallen”), which is a subcontractor to ConEd. (Tr. 91-92). NY Paving has not performed any asphalt work for ConEd in the last ten (10) to twelve (12) years, nor does NY Paving intend to obtain that work. (Tr. 85-91).

The two (2) unions at issue in this matter, Local 175 and Local 1010 have both been certified to represent certain employees of NY Paving. Local 1010’s Certification of Representative certified Local 1010 as the exclusive collective bargaining representative of NY Paving employees engaged primarily in concrete and related work (“Concrete Unit”).² Local 175’s Certification of Representative certified Local 175 as the exclusive collective bargaining representative of NY Paving employees primarily engaged in asphalt paving and related work (“Asphalt Unit”).³ According to Peter Miceli (“Miceli”), NY Paving’s Director of Operations, NY Paving’s relationship with Local 175 was good since its (Local 175’s) inception until a few years ago. (Tr. 1353).

Di-Jo Construction Corp. (“Di-Jo”) is located at the same address as NY Paving. (Tr. 113-14). In addition to its permanent employees, Di-Jo employed individuals who were trained to perform concrete work and subsequently become members of Local 1010. Di-Jo places these employees on various NY Paving concrete projects for training purposes only. (Tr. 1406-16). Di-

² Joint Ex. 1. Local 1010” and NY Paving entered into a Collective Bargaining Agreement in connection with this representation. Joint Ex. 2(i)-(iii).

³ Joint Ex. 3. During the hearing in this matter, NY Paving stipulated it adopted the terms of the Collective Bargaining Agreement between New York Independent Contractors Alliance, Inc. (“NYICA”) and United Plant and Production Workers Local Union 175 (effective July 1, 2014 through June 30, 2017) (“Local 175 Agreement”) by conduct even though NY Paving is not a member of NYICA, and the terms of this agreement continued through June 30, 2018, at which time it was terminated (Tr. 982-83, 1350-51; GC Ex. 4).

Jo performs no “asphalt” work whatsoever. (Tr. 1406-16). Significantly, all Di-Jo employees who were subsequently hired by NY Paving became members of Local 1010 rather than Local 175 with the exception of a “handful” of employees. (Tr. 1406-16). Finally, during the relevant period, Di-Jo did not have a collective bargaining agreement with Local 175 and therefore, it did not employ any Local 175 unit employees. (Tr. 1406-16).

B. Local 175 Starts to Cycle Its Members Through NY Paving, Thereby Causing Tensions

The relationship between NY Paving and Local 175 soured approximately two (2) years ago due to Local 175’s incessant campaign to cycle as many members through NY Paving as possible. (Tr. 1353). Miceli testified commencing at the beginning of 2016, Local 175 started sending twenty (20) to twenty-five (25) new members to work at NY Paving every week. (Tr. 1354, 1510). Prior to that period, Local 175 crews working at NY Paving were quite steady. (Tr. 1510). Things changed when Roland Bedwell, who was Local 175’s Business Manager at the time (and who is now a convicted felon and currently in federal prison), told Miceli he needed to cycle the members through NY Paving because Local 175 could no longer send them to Local 175’s other two (2) large contractors (Tri-Messine Construction Company, Inc. (“Tri-Messine”) and Nico Asphalt Paving, Inc. (“Nico”) due to the issues Local 175 was having with them. (Tr. 1355). In other words, Local 175 members who used to work at these other construction companies were now sent to work at NY Paving by Local 175. According to Miceli, during that period, even though NY Paving needed only a core group of twenty-five (25) Local 175 members to work every week, NY Paving would end up with one hundred and twenty-five (125) Local 175 members working every month. (Tr. 1457).

This incessant influx of the new Local 175 members every week created significant operational problems for NY Paving:

They were sending us guys that were landscapers. They weren't asphalt men. And they were filtering them -- I call them filtering, you could say cycle. We were just filtering them through like crazy, and crews were and the foremen were complaining. You know, and we heard the -- the guys up here testifying, you know, who didn't like this guy, who didn't want that guy because they didn't know them. They want guys that they worked with. And it seemed like every week they were just getting another dozen new guys.

It was chaos. It was chaos in the yard. The guys didn't know who they were even working with. The shop steward didn't even know who they were. They knew the names, they didn't know who they were.

(Tr. 1354, 55) (emphasis added). Local 175 continuously sent dozens of new members to work at NY Paving every week without advising NY Paving of their qualifications or even their identities. (Tr. 232). As a result, NY Paving found itself in a situation where it did not even know if these individuals possessed the requisite OSHA cards or the authorization to work in the United States. (Tr. 1352-61). In fact, in 2017, Local 175 sent two (2) members to work at NY Paving, who were apparently not authorized to work in the United States. (Tr. 1357-59). NY Paving's Operations Manager, Robert Zaremski ("Zaremski"), who was in charge of assigning asphalt work to the asphalt crews, also testified that before NY Paving implemented the badging system, he frequently saw many Local 175 members who he had not seen before and who were not qualified to perform NY Paving's work. (Tr. 1181-82).

Unsurprisingly, NY Paving wished to put an end to Local 175's practice of cycling hundreds of strangers, some unqualified, through NY Paving because NY Paving wished to maintain the stability of its business operations. Indeed, it was important for NY Paving to have stable and reliable workforce Miceli testified, in pertinent part:

Well, every company works differently. Everybody has their own way of doing things. Our foremen had their own way of doing things. And, you know, when you get new guys, you're -- you're constantly teaching them, especially when, you know, guys have no experience at all in asphalt. It's just gets to be very frustrating.

(Tr. 1357). Miceli attempted to resolve the issue of Local 175 cycling individuals through NY Paving amicably by speaking with Roland Bedwell several times. (Tr. 1353-54). Miceli told Roland Bedwell not to make Local 175's problems into NY Paving's problems. (Tr. 1355). However, Miceli's attempts were not fruitful. Local 175, rather than work with NY Paving to arrive at a mutually agreeable resolution, contacted Joseph Bartone, NY Paving's founder and former owner, to attempt to pressure NY Paving's current management into acquiescing to Local 175's plan for NY Paving – to completely control and dominate NY Paving's asphalt operations. (Tr. 1359-60). However and unfortunately for Local 175, Roland Bedwell's plan did not work. When Miceli told Roland Bedwell he (Miceli) was taking orders from NY Paving's current owner, Anthony Bartone, rather than the retired Joe Bartone, Roland Bedwell became "pissed" and "furious." (Tr. 1361).

C. NY Paving Regains the Control of Its Operations After Implementing the Badging System

NY Paving's clients, including National Grid, required NY Paving employees working on their jobsites to have company-issued identifications. (Tr. 232-33, 1280-81). As a result of this client directive, in or about April 2016, during a meeting with its employees (and attended by Local 175's counsel), NY Paving advised all employees regarding its anticipated badging procedure and discussed the guidelines for obtaining identification badges. (Tr. 734-36, 1311-15). NY Paving started to issue badges in July 2017. (Tr. 232, 1280-83, 1363, 1443-49).

According to NY Paving's badging policy, any NY Paving employee who worked in the field was required to obtain a NY Paving badge, which had to be worn around their shoulders at all times. This neutral policy applied to all employees working in the field regardless of their union affiliation. (Tr. 268, 273, 1364). The process of receiving the identification badges was simple and applied to all existing and new employees. Employees who wished to be employed

(or continued to be employed) by NY Paving had to be approved to work by NY Paving, complete the necessary paperwork, including producing sufficient documents demonstrating he/she is authorized to work in the United States, and have their picture taken. (Tr. 233, 268). After the applicant's social security number and work authorization was processed and cleared the E-Verify system, NY Paving hired the applicant and issued him/her a NY Paving badge. (Tr. 233, 1281-86). The process instituted by NY Paving was completely straightforward, reasonable and rational. NY Paving did not want individuals who had not been hired, processed, and approved by NY Paving working on its premises. (Tr. 1361-69). Understandably, NY Paving's desire was to process the applicants through its hiring system by collecting the necessary new-hire information and documents, E-Verify as permitted by federal law, and issue badges before they begin working for NY Paving. (Tr. 1281-86).

In light of Local 175 continuing to cycle dozens of its members through NY Paving, and in an attempt to establish a stable workforce for its Asphalt Unit, NY Paving decided to limit the number of Local 175 members who were approved to work at NY Paving. (Tr. 1466). NY Paving limited the number of available badges for Local 175 members because Local 175 was the only union that disregarded NY Paving's desire to have a stable workforce and continued to send hundreds of new members to work at NY Paving. (Tr. 1509). Despite Miceli's attempts to amicably resolve the issue with Roland Bedwell, Local 175 continued to view (and use) NY Paving as the sole employing entity for all its members to accumulate sufficient work hours.⁴ (Tr. 1513). Stated differently, Local 175's unilateral decision to use NY Paving as the employment ground for its members led to NY Paving's decision to limit Local 175 member badges.

⁴ "Q: Is there a reason why you limit the list to 55 people? A: Yeah. Because Roland was cycling 200 people." (Tr. 1452).

Indeed, based on its business needs and available asphalt equipment, NY Paving made a business determination that fifty-five (55)⁵ badged Local 175 members would be sufficient to ensure NY Paving completed all its available asphalt work and have additional workers in case any one of the core workers were unable to report to work. (Tr. 1466, 1510-11, 1513). Further, by limiting the number of approved Local 175 members, NY Paving could ensure a stable workforce of qualified asphalt employees, thereby avoiding the “chaos” caused by Local 175 cycling individuals, which proved detrimental for NY Paving’s operations.

D. Local 175 Escalates Tensions by Filing a Grievance Against NY Paving In Connection with the Performance of Certain Work

In addition to the incessant cycling of its members through NY Paving, Local 175 also claimed the dig-out work (also known as excavation work), saw cutting, seed and sod installation, and cleanup work. (Resp. Ex. 14). Briefly, in 2016, New York City changed its regulations requiring that the open holes in the roads be filled with concrete rather than asphalt. (Tr. 1369). Even though this change was scheduled to become effective in September 2016, New York City did not in fact start enforcing it until April 1, 2017. (Tr. 1370). Miceli had dozens of conversation with Roland Bedwell in 2016 and 2017 regarding these rule changes and its implications for the Asphalt Unit. (Tr. 1370-71). According to Miceli, starting in April 2017, the excavation work would be performed by members of Local 1010 because it was concrete work as concrete was going back into the hole. (Tr. 1371). Further, due to this new type of excavation work, NY Paving also hired at least 200-250 new Local 1010 members to perform the work. (Tr. 1370). Roland Bedwell, however, in Local 175’s usual fashion, would not accept

⁵ “We have a set amount of guys we really need and 55’s a number we came up with that would satisfy our needs and still have some guys available to take over if guys go on vacation, something like that, yeah. If -- you know, if we had the list at 100 you guys would cycle in 100 guys every few weeks. Nobody would frequently get any kind of continuity working together. It would be impossible to do the job.” (Tr. 1453) (emphasis added).

Miceli's logical explanation as to why the excavation work was properly within Local 1010's jurisdiction. Instead, Roland Bedwell told Miceli "that's not going to work." (Tr. 1371). Apparently, Roland Bedwell objected to NY Paving adding so many new employees to the Local 1010 unit, while Local 175 was struggling to keep their existing members busy. (Tr. 1371).

Roland Bedwell wanted the new 200-250 excavation positions to go to Local 175 rather than Local 1010. (Tr. 1373). Even though Miceli explained to Roland Bedwell that because concrete was going in the holes, excavation work would properly be assigned to Local 1010 members; Local 175 nevertheless proceeded to file a grievance against NY Paving. In the grievance, Local 175 alleged NY Paving wrongfully assigned excavation, seed and sod installation, cleanup, saw cutting and binder work to the members of Local 1010. (Resp. Ex. 14).

After receiving Local 175's grievance, Miceli spoke with Roland Bedwell again:

Q: Can you describe the content, tone and subject matter of that conversation?

A: Well, pretty heated on my end. I didn't understand how [Roland Bedwell] could be doing this when he knew that the work was concrete work.

Q: Okay. What did he say?

A: He said, listen, we're going to fight for the work, we think it's ours. I said, you know it's not yours. He said, this is what everybody wants, this is what we're going to do, so that's what we did.

(Tr. 1373). Clearly, in its usual fashion, regardless of whether Local 175 believed its position pertaining to excavation work was correct, NY Paving had to accept Local 175's desires, otherwise NY Paving would have to face adverse consequences.

E. Local 175's Precarious Position is Exacerbated by Local 1010's Representation Petition

In addition to "losing" approximately 200-250 positions to Local 1010 as a result of the new New York City regulations requiring concrete rather than asphalt in certain street cuts, Local 175's foothold over NY Paving was further weakened by Local 1010's Representation Petition. On April 28, 2017, Local 1010 filed a petition with the Region seeking to represent NY

Paving's asphalt employees, *i.e.*, the employees who were at the time represented by Local 175.⁶ (Joint Ex. 4). Local 175 members, of course, discussed Local 1010's petition in NY Paving's yard and while working at the various job sites.

In light of Local 1010 seeking to represent NY Paving's asphalt employees, Joseph Bartone, Jr. ("Bartone"), who at the time was a Local 175 member and a rank-and-file laborer on an asphalt crew (Tr. 1210-11), in or about April 2017, distributed Local 1010's authorization cards to his fellow crew members. (Tr. 1214-15). Apparently, Bartone was unhappy with Local 175. He believed by choosing Local 1010 instead of Local 175, he would be able to have a longer and more stable career in the industry. (Tr. 1215, 1244). Bartone denied ever telling his fellow Local 175 members that he was distributing the cards because that is what the "office" wanted him to do. (Tr. 1214-16, 1218, 1239).

As a Local 175 laborer, Bartone was a regular unit employee, receiving the same compensation and benefits as the other Local 175 laborers, working the same long hours and performing the same asphalt work. (Tr. 1210-11). Further, Bartone did not receive any special perks from NY Paving that were known to the Local 175 members by virtue of his familial relationship with the current owners of NY Paving. At the time Bartone distributed the cards, he was 25 years old living in an apartment with two (2) roommates. (Tr. 1212-14, 1231). Prior to leasing the apartment, Bartone lived with his aunt, Diane-Bartone-Sarro for less than a year.⁷ (Tr.

⁶ Construction Council Local 175, Utility Workers Union of America, AFL-CIO ("Local 175") intervened and the case was held in abeyance by the Region. (Joint Ex. 5).

⁷ Diane Bartone-Sarro along with her brother, Anthony Bartone is one of the Owners of NY Paving. (Tr. 52-53). Diane Bartone-Sarro is married to Joe Sarro, Local 1010's President. (Tr. 119). Joe Sarro is permanently banned from NY Paving. (Tr. 183-84).

1211, 1223-25, 1235-36, 1238, 1241-43). Neither Bartone, nor his mother and siblings had any ownership interest in NY Paving.⁸ (Tr. 1212-13).

Unsurprisingly, the discussions in April 2017 regarding Local 1010's Representation Petition involved many Local 175 members, including Pasquale Labate ("Labate"). Labate testified he discussed Local 1010's organizing drive with the other Local 175 members but denied ever saying NY Paving wanted them to sign Local 1010 cards. (Tr. 317-19, 1119-21, 1321-24, 1326-27, 1331-33, 1336-39). During the relevant period, Labate had the dual role of being a working foreman at NY Paving, as well as Local 175's Shop Steward. (Tr. 296-97). Labate's Shop Steward duties and powers were established by Local 175. (Tr. 341-42). In fact, NY Paving played absolutely no role in the selection of Local 175's Shop Stewards or designation of their specific duties. (Tr. 1266-67, 1419-20). Local 175 Shop Stewards were tasked by Local 175 to ensure that only Local 175 members were assigned to perform asphalt work at NY Paving, and to coordinate with Local 175 to make sure that Local 175 members assigned to perform various tasks on NY Paving's asphalt crews were indeed qualified and capable of performing those assigned duties. (Tr. 340-44). Other than Labate's role as the Shop Steward, his duties and responsibilities as the working foreman were the same as other Local 175 foremen. (Tr. 1880-94, 320-24, 406-07). Furthermore, Labate was a unit employee covered by the Local 175 Agreement and received benefits and compensation in accordance with same like other Local 175 foremen. (Tr. 187-88, 311). Finally, in his role as the foreman, Labate worked long hours in the field along with the other Local 175 members. (Tr. 186-94, 432-36, 720-21, 816-18, 918-21, 1119-21, 1174-77).

⁸ Bartone's father passed away in 2000. (Tr. 1213).

F. Local 175 Intentionally Defies the Badging System and Attempts to Continue to Cycle Its Members Through NY Paving

After badging fifty-five (55) Local 175 members starting in July 2017, NY Paving did not issue any additional Local 175 badges between October and November of 2017. (Tr. 1493-94). As of November 2017, NY Paving had absolutely no problem performing its asphalt work with the number of Local 175 employees who had already been approved.⁹ (Tr. 1510-11). Local 175 continued to send many Local 175 members to attempt to obtain a badge and/or work at NY Paving knowing NY Paving was not issuing any additional badges to the Local 175 members. Given Local 175's weakening position, this was done so that Local 175 could subsequently file unfair labor practice charges against NY Paving, since Local 175 knew perfectly well NY Paving had hired the number of Local 175 members it required for its asphalt operations and would not be hiring any additional workers. As part of this plan, Local 175 directed Shomari Patrick, Donald Mascetti ("Mascetti"), Anthony Franco, Jr. ("Franco") and Michael Bedwell ("Bedwell") to report to NY Paving to either obtain a badge or to seek work at NY Paving.

i. Shomari Patrick

Shomari Patrick, who was the nephew of another alleged discriminatee, Glenn Patrick ("Patrick"), was initially hired by Di-Jo at the end of August 2017. (Tr. 562, 1408). As a Di-Jo employee, Shomari Patrick did not have a NY Paving badge. (Tr. 1412). At Di-Jo, Shomari Patrick was training as an extra employee on a clean-up crew working with "Anthony." (Tr. 563-64, 1408). Clean-up crews, which were comprised of only one (1) employee, drove company

⁹ Local 175 refused to abide by NY Paving's legitimate policy to limit the number of approved Local 175 members, thereby engaging in certain actions aimed at derailing NY Paving's operations. For example, in December 2017, Local 175 engaged in an unlawful job action when practically every Local 175 member on the list of badged employees refused to report to work to NY Paving the next day. (Tr. 236-39, 1450-62). It was only as a result of this unlawful job action that NY Paving assigned Local 1010 members to perform asphalt work for no longer than one (1) week. (GC Ex. 8). Except for this one (1) week (which was caused by Local 175's own actions) and the extremely limited emergency keyhole work for Hallen, all asphalt work at NY Paving was, and continues to be, performed by Local 175 members. (Tr. 276-78).

vehicles to various job sites and removed any existing barricades, tape, etc. (Tr. 1409-10, 1504-05). Clean-up crews were also expected to assist Local 1010 crews if they finished clean-up work early. (Tr. 1411-1506). After successfully completing his training at Di-Jo, Shomari Patrick anticipated to become a member of Local 1010. (Tr. 596). Shomari Patrick's work performance was not satisfactory, in that he did not assist concrete crews with their work if he finished his clean-up responsibilities early. (Tr. 1411,1506). Further, after almost two (2) months of training for the clean-up crew, Shomari Patrick still had not obtained a valid driver's license. (Tr. 568, 1409-10). Based on the foregoing, Miceli decided to end Shomari Patrick's training at Di-Jo on October 20, 2017. (Tr. 1406-16). During his employment at Di-Jo, Shomari Patrick was not a member of Local 175. (Tr. 601-02).

Subsequently, on November 1, 2017, Bedwell, who at the time was Local 175's Business Manager, directed Shomari Patrick to report to work on a NY Paving asphalt crew. (Tr. 498-501, 529-32, 555-58). Shomari Patrick, who apparently had become a member of Local 175 after having failed to become a member of Local 1010, worked on a NY Paving asphalt crew on November 2, 2017 without NY Paving's knowledge and authorization. (Tr. 1411-21, 1505). This was an egregious infraction of NY Paving's rules given that Shomari Patrick had not performed any asphalt work at NY Paving prior to November 2nd, and NY Paving had no knowledge whatsoever regarding Shomari Patrick's skills and abilities to properly perform NY Paving's asphalt work. (Tr. 1412, 1505). This was the final terminating event for Shomari Patrick. (Tr. 1412, 1508). He did not seek re-employment with NY Paving or Di-Jo after his ultimate termination on November 2, 2018. (Tr. 578).

ii. Anthony Franco, Jr.

Franco's intermittent employment at NY Paving commenced as a Summer job in 2014. (Tr. 984-88). In 2016, Franco only worked 80 regular and 9.5 overtime hours. (Tr. 1396; Resp. Ex. 8). In 2017, he only worked 184 regular and 59 overtime hours and did not work at NY Paving at all in May, June, July, August, September and October, except for 1 day in August. (Tr. 1386; Resp. Ex. 8). In the Summer of 2017, Franco apparently reported to NY Paving to have his picture taken for a badge along with two (2) other Local 175 members - his brother, Salvatore Franco, and Louis Ruggiero. (Tr. 1001-21, 1023). NY Paving issued Salvatore Franco and Louis Ruggiero badges but not Franco. (Tr. 1001-02, 1023). Subsequently, in October 2017, Local 175 directed Franco report to NY Paving to receive a badge even though NY Paving was not issuing badges at that time. (Tr. 992-1000). Ultimately NY Paving did not issue Franco a badge because he was not a full-time employee, nor was he willing to work full-time at NY Paving. (Tr. 1397-98).

iii. Michael Bedwell

Bedwell worked as Local 175's Business Manager from May 2017 through November 2017 and possibly mid-December 2017. (Tr. 477-78, 480-83, 522-23). It is undisputed Bedwell's position as the Business Manager of Local 175 was a full-time position. (Tr. 520-21). Bedwell described his duties as Local 175's Business Manager, which included having numerous meetings and telephone conversations with various contractors and Local 175 members. (Tr. 478). In his role as the Business Manager, Bedwell spoke with NY Paving's General Counsel, Robert J. Coletti, Esq. ("Coletti") twice from August 2017 through December 2017. (Tr. 1271-79). During these conversations, Coletti explained to Bedwell NY Paving's requirement regarding employee badging, including the requirement that a Local 175 member be badged or

approved to be badged before they can work at NY Paving. (Tr. 1271-79). Coletti and Bedwell further discussed the issue of certain Local 175 members not receiving paychecks because they were not badged and/or were not legally authorized to work in the United States. (Tr. 1271-79).

Despite his conversations with Coletti, after more than seven (7) months of not working even a single hour at NY Paving, Bedwell unilaterally decided to send himself to work at NY Paving for one (1) day in November 2017 even though he did not have a badge. (Tr. 499-500; Resp. Ex. 16). NY Paving did not issue Bedwell a badge because NY Paving requires full-time commitment from its employees. (Tr. 1397-1402). Because Bedwell's Business Manager position was a full-time employment, he could not have worked a full-time schedule at NY Paving. (Tr. 1397-1402).

iv. Donald Mascetti

NY Paving issued Mascetti a badge and he worked at NY Paving throughout 2017. (Tr. 1403-06). In or about September 2017, Mascetti was laid off from an asphalt crew. (Tr. 1503-04). Mascetti had been laid off previously by NY Paving on many occasions while other NY Paving employees, who were members of Local 175, remained employed by NY Paving. (Tr. 1036, 1067, 1079, 1404, 1504). In or about October 2017, NY Paving did not recall Mascetti from layoff. (Tr. 1503-04). As a result of Mascetti's layoff, Bedwell apparently directed Mascetti to go to NY Paving and find out why he had not been recalled. (Tr. 1035-40). At NY Paving, Mascetti spoke with Coletti and Zaremski. (Tr. 1035-40). Coletti confirmed to Mascetti that NY Paving had not received any unfair labor practice charge allegedly filed by Mascetti against NY Paving. Miceli made the decision not to recall Mascetti from layoff because NY Paving had received complaints from other employees regarding Mascetti's work performance,

which had apparently become too slow. (Tr. 1503-04) Miceli preferred other, more effective Local 175 members to work in Mascetti's position. (Tr. 1403-06, 1503-04).

G. Section 10(k) Hearing

As a result of Local 175's grievance filed against NY Paving on April 28, 2017 and Local 1010's responsive threat issued to NY Paving, NY Paving filed an unfair labor practice charge (Case No. 29-CD-203385) against Local 1010 on July 26, 2017 pursuant to §8(b)(4)(D) of the Act, alleging Local 1010 threatened NY Paving in connection with the assignment of the work disputed by Local 175 to the members of Local 175. (Joint Ex. 6). The Board scheduled the Section 10(k) hearing in connection with NY Paving's charge filed against Local 1010, which took place on September 5 and 6, 2017 and October 2 and 10, 2017.¹⁰ (Joint Ex. 7(i)-(iv)).

Numerous witnesses testified during the Section 10(k) hearing, including three (3) Local 175 members: Patrick, (Tr. 661-65, 670-74). Labate (who at the time was Local 175's shop steward), (Tr. 314) and Louis Dadabo ("Dadabo"). (Tr. 1117-19). Dadabo was, in fact, called by Local 175 as its final rebuttal witness to strengthen its case. (Tr. 1117-19). Labate and Dadabo, to date, remain employed at NY Paving and have not suffered any adverse employment actions. (Tr. 314, 1117-19). Local 175's "corporate" representative throughout the Section 10(k) hearing was Costantino Seminatore ("Seminatore") but he did not testify. (Tr. 779-80).

¹⁰ On August 24, 2018, the Board rendered a decision on the merits of NY Paving's charge filed against Local 1010 awarding three (3) of the four (4) types of work in dispute to Local 1010 (saw cutting, excavation, and seed and sod installation), while awarding the final type of disputed work, cleanup work, to both Local 1010 and Local 175. (Joint Ex. 8).

H. Theft of Time by Glenn Patrick and Costantino Seminatore, and Falsification of Time Sheets by Gregory Schmaltz

The discharges of Patrick and Seminatore were unrelated to their participation in the Section 10(k) hearing. Rather, both individuals were terminated for theft of time from NY Paving.

Patrick testified for Local 175 on September 6, 2017. (Tr. 661). He also came to the hearing on October 2, 2017 to replace Seminatore as Local 175's representative. (Tr. 661-62). However, after the hearing commenced at approximately 9:40 a.m., (Resp. Ex. 6). Patrick was ordered by the Hearing Officer to leave the hearing room. (Tr. 661-62). It appears Patrick returned to his car and drove to meet up with one of NY Paving's asphalt crews whose foreman was Gregory Schmaltz ("Schmaltz") (also a Local 175 member). (Tr. 661-65). After meeting with the crew, Patrick replaced Seminatore, who reported to the Section 10(k) hearing as Local 175's representative. (Tr. 779-84).

Given the rush hour and congested traffic in downtown Brooklyn, Patrick could not have joined the crew and commenced working before 10:30 a.m. on October 2nd. (Tr. 685-702). Even though Patrick did not commence working until at least 10:30 a.m. (if not later), Schmaltz, as the foreman, reported on the Payroll Time Sheet that Patrick had worked the full day (*i.e.*, 10.5 hours). (GC Ex. 16(i)) To make things worse, Schmaltz did not report that Seminatore worked at all on October 2nd, even though Seminatore in fact worked approximately three (3) hours that day. (Tr. 909-12). Relying on the time sheet completed by Schmaltz, on October 11, 2017, NY Paving compensated Patrick for 10.5 hours. (Resp. Ex. 4). Patrick deposited his paycheck on October 11, 2017. (Resp. Ex. 4). Accordingly, Patrick and Schmaltz over-reported Patrick's hours of work thereby engaging in theft of time. Patrick did not deny he received compensation for hours he did not work, thereby effectively admitting his theft of time:

Q: I said is that three and a half hours of pay that you received that you didn't work?
A: That—yes. Yes... (Tr. 701).

Q: Okay. So that means you also got overtime pay at least 120 Dollars an hour that you didn't earn, correct?

A: Yeah. (Tr. 702).

Schmaltz similarly admitted if his time sheet for October 2nd had been accurate, he would have reported Patrick to have worked only seven (7) hours and Seminatore three (3) hours. (Tr. 911). Finally, at no point did Patrick or Schmaltz advise NY Paving regarding the overpayment to Patrick or the falsified time record. (Tr. 112-13). Even though both Patrick and Seminatore saw Miceli at the Section 10(k) hearing on October 2nd, neither of them bothered to ask Miceli how to report their hours worked for the day. (Tr. 702-09, 1374-78). Patrick, in fact brazenly stated in retrospect, he believed his conduct on October 2nd was proper. (Tr. 724). Similar to Patrick and Seminatore, Schmaltz demonstrated absolutely no remorse for his actions. In fact, he even stated, "I work for a Union so who's working that shouldn't matter to [NY Paving]." (Tr. 902).¹¹ Later in his testimony, when asked if there was anyone at NY Paving that Schmaltz would have been obligated to discuss the issue of reporting time such as the one on October 2nd, Schmaltz responded without hesitation, "[a]bsolutely not." (Tr. 908).

Miceli testified he noticed Patrick's theft of time when reviewing the weekly payroll because he (Miceli) remembered Patrick did not work on October 2nd because he was at the Section 10(k) hearing. (Tr. 1475-78). As a result, Miceli contacted Labate, who at the time was Local 175's Shop Steward, to find out what was going on. (Tr. 1480-83). Miceli assumed as the Shop Steward who participated in staffing asphalt crews, Labate would have more information

¹¹ This is typical of the conduct of the alleged discriminatees (*i.e.*, they will do what they desire to do regardless of what is proper, correct, or necessary for NY Paving to conduct its legitimate business operations).

regarding Patrick and Seminatore's hours worked on October 2, 2017. (Tr. 1480-83). Labate told Miceli Patrick was not working with him that day. (Tr. 1335-36).

Seminatore engaged in similar gross misconduct and violation of NY Paving's rules. Similar to Patrick, on October 16, 2017, Seminatore joined Schmaltz' crew between 10:00 a.m. and 11:00 a.m. (*i.e.*, 4-5 hours later than the asphalt crew's start of its regular workday). (Tr. 1380-86). Relying on the foreman's (Schmaltz) time sheet, NY Paving compensated Seminatore on October 25th for the reported twelve (12) hours. (Resp. Ex. 7(i) & 15). Subsequently, Bartone, who worked as a Local 175 laborer on the same crew as Seminatore on October 16, 2017, told Miceli that Seminatore had joined the crew late. (Tr. 1380-86). After speaking with Bartone, Miceli investigated Seminatore's theft of time by checking NY Paving's GPS tracking system. Miceli's investigation corroborated Bartone's statements. (Tr. 1380-86). As a result of his investigation, Miceli discovered that even though Seminatore did not work the full workday, Schmaltz reported that Seminatore had worked twelve (12) hours on October 16th. (Tr. 1380-86). Schmaltz and Seminatore engaged in theft of time. To make things worse, both employees failed to advise NY Paving of the overpayment after Seminatore received his paycheck on October 25, 2017 and deposited same the following day. (Resp. Ex. 15).

Based on the results of its investigation, on November 6, 2017, NY Paving terminated Patrick, Seminatore and Schmaltz' employment due to the theft of time, falsification of time records, and gross misconduct.

III. ARGUMENT

A. NY PAVING DID NOT VIOLATE §§8(a)(1), (3) AND/OR (4) OF THE ACT IN CONNECTION WITH THE ALLEGED SEVEN (7) DISCRIMINATEES.

To establish a violation of §§8(a)(1) or (3) of the Act, the General Counsel ("GC") must establish that: (1) the employee was engaged in protected concerted activity; (2) the employer

was aware of that activity; (3) the protected activity of the employee was a substantial motivating factor in the employer's decision; and (4) there was a causal connection between the employer's *animus* and its discharge decision. If the GC makes such a showing, the burden of persuasion then shifts to the employer to show that it would have made the same decision absent the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *See also, Amelio's*, 301 NLRB 182 (1991) (to establish a §8(a)(1) violation, the Respondent must know of the protected activity, the activity must be protected, and the adverse employment action must be motivated by the employee's protected activity). To determine if §8(a)(4) was violated, the Board and courts also apply this *Wright Line* analysis.¹²

In this case, the GC failed to establish a single element of a *prima facie* case and NY Paving proved beyond question that it would have taken the same action in connection with all seven (7) alleged discriminatees in the absence of any alleged protected or union activity.

1. NY Paving Had No Anti-Union Animus

The GC's theory of the case is that during the relevant period in 2017, NY Paving took various actions against Local 175, including terminating the seven (7) alleged discriminatees and limiting the list of Local 175 members who could work at NY Paving, with the ultimate goal to "flip" asphalt work to Local 1010 in order to be able to perform ConEd's asphalt work. The GC's theory of the case is just that, merely a theory, which the GC was unable to prove in this case. What the GC surmised to be NY Paving's actions against Local 175, were, in reality, NY Paving's understandable re-actions to Local 175's systematic efforts to deprive NY Paving of its ability to autonomously run its business in a manner that NY Paving deemed fit. NY Paving's

¹² *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923 (5th Cir. 1993); *NLRB v. Advance Transp. Co.*, 979 F.2d 569 (7th Cir. 1992); *American Gardens Mgmt. Co.*, 338 NLRB 644 (2002); *Caterpillar, Inc.*, 322 NLRB 674 (1996); *General Elec. Co.*, 321 NLRB 662 (1996), *modified on other grounds*, 117 F.3d 627, (D.C. Cir. 1997).

actions that the GC alleged were motivated by anti-union animus were in fact NY Paving's legitimate business decisions made in an effort to prevent the company from being debilitated by Local 175's selfish and unilateral demands generated by its (Local 175's) problems with other contractors.

The GC completely failed to address Local 175's internal turmoil caused by Local 175 losing two (2) of its largest contractors Tri-Messine and Nico Construction, in 2016. However, Local 175 losing Tri-Messine and Nico cannot and should not be ignored because, as demonstrated by Miceli's numerous conversations with Roland Bedwell, Local 175 indisputably had problems placing its members to work commencing in 2016. (Tr. 1353-55, 1359-60). Perhaps, if the GC had called Roland Bedwell as a witness, he would have testified regarding Local 175's problems as a result of losing Tri-Messine and Nico. However, and because Roland Bedwell did not testify, Miceli's credible testimony must suffice. Indeed, NY Paving submits the GC and Charging Party's failure in this regard raises an adverse inference under *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977) and *Earle Industries, Inc.*, 260 NLRB 1128 (1982). Stated another way, the Administrative Law Judge should credit NY Paving's witnesses on any facts/issues, wherein Roland Bedwell supposedly has any firsthand knowledge of same.

According to Miceli, the relationship between NY Paving and Local 175 started to deteriorate in the summer 2016, when, after losing its shops with the two (2) large companies, Local 175 started to simply cycle members through NY Paving in order to provide them sufficient work hours for the benefits coverage. (Tr. 1353). In other words, Local 175 started to use NY Paving as its hiring hall by sending dozens of new Local 175 members to work at NY Paving every month. (Tr. 1457). NY Paving, understandably, had an issue with the cycling of

the individuals for several reasons, including the necessity to have steady crews comprised of asphalt workers who were experienced, familiar with NY Paving's asphalt work and knowledgeable on how to perform same. (Tr. 1357).

Despite the foregoing, Roland Bedwell would not listen to Miceli, as he continued to cycle members through NY Paving. (Tr. 1359-61). This wreaked havoc on NY Paving's operations because NY Paving effectively lost control over its asphalt workforce. (Tr. 1354-55). Even the GC witnesses testified that prior to the badging policy, the foremen, the Shop Stewards, and even regular laborers, used to call asphalt workers in to work at NY Paving whenever additional manpower was needed. (Tr. 851-53, 922-31, 1051-55, 1058-59). It appears Local 175 wished to have total control as to which Local 175 member worked at NY Paving, when, and for how long his/her employment would last. (Tr. 1359-60). Local 175 had no concern whether its members were qualified to work at NY Paving, including whether they had the mandatory OSHA training and were legally authorized to work in the United States. (Tr. 1352-61).

While this was going on, Local 175 suffered yet another setback when, commencing on April 1, 2017, New York City started to enforce new regulations requiring concrete rather than asphalt to go into certain holes in New York City roads.¹³ (Tr. 1369). Roland Bedwell realized this change meant NY Paving would start assigning the work that used to be within Local 175's jurisdiction to Local 1010 members. (Tr. 1371-73). Indeed, since April 1, 2017, NY Paving had to hire approximately 250 additional Local 1010 members to perform what became concrete work as a result of the change in the regulations.¹⁴ (Tr. 1370). Local 175, that had already lost close to a hundred of unit positions at Nico Construction and Tri-Messine, also lost many

¹³ This dispute eventually led to the Section 10(k) hearing.

¹⁴ The Board ruled NY Paving properly assigned the disputed work to 1010. (Joint Ex. 8).

positions at NY Paving, which now (lawfully) were going to Local 1010 members. At that point, Local 175 was already desperate and would do anything to prevent losing any additional influence over NY Paving – after all, Local 175 desperately needed NY Paving to keep its members working.

By April 2017, NY Paving had already informed all its employees and the unions representing them that NY Paving would be implementing a badging requirement for its employees. (Tr. 232, 1280-83, 1443-49). The implementation of the badging requirement had absolutely nothing to do with Local 175, but rather related to NY Paving's client utility companies requiring same. (Tr. 232, 33, 1280-81). Indeed, it is undisputed that the badging requirement applied to every field employee and every union member across the board, regardless of their union affiliation. (Tr. 268, 273, 1364). Unlike other unions however, NY Paving was forced to limit the number of approved Local 175 employees to fifty-five (55). (Tr. 1466, 1510-11, 1513). Despite what the GC may argue, NY Paving's decision to limit badges does not demonstrate the alleged animus; rather, it was brought on by Local 175's own actions and NY Paving's desire to operate the company in an orderly manner.

Miceli testified *ad nauseam* how much Local 175 cycling its members through NY Paving affected NY Paving's operations. It was not discriminatory for NY Paving to want to bring back a semblance of order and continuity to its Asphalt Unit, which, as a result of Local 175's own actions, had become chaotic. (Tr. 1354-55). The GC attempted to establish NY Paving's supposed anti-union animus by painting a picture of a company that unreasonably limited the number of badges available to the Local 175 members. However, given Local 175's refusal to stop sending new individuals to NY Paving, NY Paving's decision to limit the badges was neither unreasonable nor discriminatory. Both Miceli and Zaremski testified after the

implementation of the badging policy, the problem of Local 175 cycling its members through NY Paving basically ended. (Tr. 1361-69, 1180-83).

According to the GC, NY Paving devised an elaborate plan “to get rid” of Local 175. The evidence demonstrates, however, that it was Local 175 that planned to intimidate NY Paving into complying with Local 175’s views on how NY Paving should manage its Asphalt Unit. By the summer 2017, Local 175 was desperate. As a result of NY Paving’s badging policy, it was no longer able to send dozens of its members to work at NY Paving. (Tr. 1361-09, 1180-83). Further, and due to the changes in New York City regulations, Local 175 lost many unit positions at NY Paving by virtue of Local 1010 performing excavation, saw cutting, seed and sod installation, and cleanup work. (Tr. 1370). As a result, Local 175 started to send more members to NY Paving under the guise of seeking badges, but in reality building its fabricated claims of discrimination so as to file unfair labor practice charges with the Board.

Indeed, it is telling that except for Patrick, Seminatore and Schmaltz, the remaining four (4) discriminatees were all instructed by Local 175 to report to NY Paving for work and/or to receive a badge. Specifically, Bedwell sent Shomari Patrick to work at NY Paving on November 2, 2017, and Charlie Priola, Local 175’s Business Manager, allegedly told Shomari Patrick in mid-March 2018 to report to NY Paving for a badge. (Tr. 574, 576, 597-602). Similarly, Local 175’s Shop Steward, possibly Terry Holder, called Franco to tell him to report to work at NY Paving in November 2017. (Tr. 992-1000). Finally, Bedwell directed Mascetti in October 2017 to speak with someone at NY Paving because he was not on the list. (Tr. 1035-40). Interestingly, Bedwell, while Local 175’s Business Manager, personally went to NY Paving numerous times whenever he believed there was an issue with a Local 175 member. However, this time, he sent Mascetti directly. It need be noted, at the time each of these three (3) individuals were told by a

Local 175 official to report to NY Paving for work or to receive a badge, NY Paving had already implemented a badging policy and specifically advised Local 175 which Local 175 members were authorized to work. (Tr. 1287-96). Therefore, there was absolutely no legitimate reason why Local 175 sent individuals to NY Paving who were not on the list. Finally, Miceli, Coletti and Zaremski consistently testified they did not inform Local 175 these individuals should report to work. (Tr. 1173-74, 1263, 1415-16). Based on the foregoing, it can only be concluded Local 175 sent members to NY Paving knowing they would be turned away because they were not on the list of approved employees. Under these circumstances, no anti-union animus can be imputed to NY Paving.

The GC's theory of the case is also flawed because she failed to show NY Paving intends to bid on ConEd's asphalt work with the intent to eventually perform said work. Because NY Paving is neither interested to perform said work, nor has it taken any steps to solicit ConEd's asphalt work, no anti-union animus can be imputed to NY Paving in that respect. It is undisputed pursuant to ConEd's "Standard Terms and Conditions for Construction Contracts," Local 175 is not permitted to perform any ConEd work because it is not part of the Building & Construction Trades Council of Greater New York ("BCTC"). (GC Ex. 5, Section 14(A)). Therefore, if NY Paving wished to perform ConEd's asphalt work, it could not utilize Local 175 members. The GC's entire argument regarding NY Paving's alleged animus against Local 175 hinges upon demonstrating that NY Paving intends to obtain ConEd's asphalt work. But, the GC has utterly failed establish either NY Paving's interest in said work or that it has taken any specific steps to actually obtain ConEd's asphalt work. This ends any argument regarding NY Paving's alleged animus against Local 175.

In this regard, Miceli's testimony was unequivocal. NY Paving has grown tremendously in the last several years and continues to grow even though NY Paving has not performed ConEd's asphalt work for at least the last ten (10) to twelve (12) years. (Tr. 85-91). Given NY Paving's recent growth, NY Paving had more than enough work even without ConEd's asphalt work. (Tr. 164-172). For example, in both of its divisions, NY Paving had approximately 375 laborers working daily, which amounted to approximately 8,200 men days every month. (Tr. 164-72). Based on this economic reality, absent an admission from NY Paving that it wished to obtain ConEd's asphalt work, the GC theory of animus must necessarily fail.

The GC cannot successfully claim NY Paving affirmatively sought ConEd's asphalt work because it bid on said work. Even though Miceli testified he, in fact bid on ConEd asphalt work approximately two (2) to three (3) years ago, he did so without any expectation of winning because he bid at a 35%-40% profit margin. (Tr. 172-73, 241,). Miceli had to appear at all ConEd pre-bid meetings and place bids regardless of whether NY Paving intended to obtain the work. Otherwise, NY Paving would become ineligible to bid on any ConEd work, including concrete work. (Tr. 172-73).

Similarly, the GC cannot establish NY Paving intended to perform ConEd's asphalt work based on the complaint filed by NY Paving in the federal court on May 18, 2018 ("Federal Complaint"). (GC Ex. 9). Paragraph 10 of the Federal Complaint stated: "Currently, [NY Paving] seeks to contract with [ConEd] to perform *certain* asphalt work." (GC Ex. 9) (emphasis added). Miceli explained that the emergency keyhole work formed the basis of the Federal Complaint. (Tr. 276-78). In other words, "certain" asphalt work mentioned in paragraph 10 of the Federal Complaint referred to NY Paving's desire to continue performing the emergency keyhole work without having to pay double benefits to both Local 175 and Local 1010 benefit

funds. (Tr. 276-78). Emergency keyhole work was extremely limited ConEd asphalt work NY Paving performed as a courtesy for its client, Hallen using Local 1010 members. (Tr. 91-92). Performance of any such emergency keyhole work was limited to three (3) days per month using one (1) crew comprised of three (3) Local 1010 members. (Tr. 164-72). Based on the foregoing, the filing of the Federal Complaint does not demonstrate NY Paving's desire and plan to obtain ConEd's asphalt work. Rather, it is abundantly clear, NY Paving wished to pay benefits only to the Local 1010 benefit funds while continuing to perform the emergency keyhole work for Hallen. (Tr. 185-86, 276-78).

According to Miceli and as further evidence of the nonexistence of anti-union animus, the asphalt work performed by Local 175 members at NY Paving has been increasing. (Tr. 179-80). This clearly contradicts the GC's argument that NY Paving wants to eliminate the Local 175 unit altogether. In fact, other than the emergency keyhole work and Local 175's unlawful job action in December 2017 (as a result of which NY Paving was forced to assign asphalt work to Local 1010 members for approximately one (1) week) (GC Ex. 8), all asphalt work at NY Paving was and continues to be performed by the members of Local 175. (Tr. 276-78, 1450-62; GC Ex. 8). There was some testimony that Local 1010 members have been performing asphalt work at NY Paving. However, the witnesses did not know if this involved the emergency keyhole work or the excavation work, which was lawfully assigned by NY Paving to Local 1010 members after April 1, 2017. (Tr. 379-80). Based on the foregoing, the GC has not established NY Paving's anti-union animus based on NY Paving's alleged plan to obtain specific ConEd asphalt work.

Finally and as further evidence of the non-existence of any animus, every Local 175 member who was allegedly solicited to sign a Local 1010 card by Bartone and/or Labate, except

for Patrick, Seminatore and Schmaltz, continues to be employed at NY Paving. (Tr. 372-74, 446-47, 711-14, 725-27, 1263-66).

As set forth below, there has been no showing of any anti-union animus with respect to any of the alleged discriminatees:

i. Glenn Patrick, Costantino Seminatore and Gregory Schmaltz

The unrefuted evidence reveals a complete absence of anti-union animus by NY Paving. All three (3) alleged discriminatees were replaced by Local 175 members who perform their job functions. (Tr. 1379-80) Further, two (2) other members of Local 175 also testified during the Section 10(k) hearing (Labate and Dadabo). Dadabo was in fact called by Local 175 as its rebuttal witness to strengthen Local 175's case. (Tr. 1117-19). Both Labate and Dadabo remain employed at NY Paving and have not suffered any adverse employment action. (Tr. 1376-78, 1117-19). Surely, if NY Paving was motivated by anti-union animus, as well as animus against Local 175 members who either testified at the Section 10(k) hearing or participated in same, NY Paving would have discharged Labate and Dadabo, as well, or subjected them to other adverse employment action(s).

Any argument that NY Paving did not properly investigate Patrick and Seminatore's theft of time and Schmaltz' falsification of time sheets is ludicrous because NY Paving did conduct a proper investigation. Miceli testified he noticed Patrick's theft of time when reviewing the weekly payroll because he (Miceli) remembered Patrick did not work on October 2nd because he (Miceli) was at the Section 10(k) hearing. (Tr. 1475-78). As a result, Miceli contacted Labate, who at the time was Local 175's Shop Steward, for an explanation. Miceli rightfully assumed as the Shop Steward, who participated in staffing asphalt crews, Labate would have more information regarding Patrick and Seminatore's hours worked on October 2, 2017. (Tr. 1480-83).

Miceli similarly investigated Seminatore's theft of time on October 16th by checking NY Paving's GPS tracking system after speaking with Bartone. (Tr. 1380-86). NY Paving conducted a valid investigation and based on the results of its investigation, made a determination to terminate Patrick, Seminatore and Schmaltz' employment.

NY Paving was not obligated to contact the three (3) individuals involved in the misconduct as part of its investigation, nor did NY Paving have to explain to Patrick, Seminatore, Schmaltz and/or Local 175 the reasons for terminating their employment given the absence of any such practice in the construction industry and at NY Paving. Miceli testified NY Paving had never issued either written discipline or written termination notices to any of its prior employees because that was not the practice in the construction industry. (Tr. 180-83). Similarly, the Local 175 Agreement does not include a "just cause" provision, meaning NY Paving had the unilateral, unfettered right to discharge any and all unit employees as it (NY Paving) saw fit.¹⁵ The clear and express language of the Local 175 Agreement provides NY Paving is the "sole judge" whether unit employees have performed their work in a satisfactory manner. Therefore, NY Paving had the unilateral, unreviewable right to terminate Patrick, Seminatore and Schmaltz in accordance with the Local 175 Agreement. Similarly, NY Paving was not required to explain the reasons for its actions, in writing or otherwise.

To the extent the GC argues NY Paving specifically targeted Patrick, Seminatore and Schmaltz and scrutinized their time sheets to ensure their discharges, such argument is without merit. The October 2nd time sheet stood out to Miceli because he himself was present at the Section 10(k) hearing on October 2nd and based on his own knowledge, it seemed odd to him

¹⁵ GC Ex. 4, Article I, Section – 2(f): "Employers are at liberty to employ and discharge whomsoever they see fit and the Employer shall at all times be the sole judge as to the work to be performed and whether such work performed by an Employee is or is not satisfactory".

Patrick was compensated for 10.5 hours when Miceli thought he (Patrick) did not work at all that day. (Tr. 1475-78). Similarly, Bartone's report of Seminatore's tardiness caused Miceli to check his time sheet for October 16th. (Tr. 1380-86). NY Paving had legitimate reasons to investigate the two (2) time sheets at issue, which had nothing to do with any purported anti-union animus. According to Miceli, he was unaware of any other instance in which either shifting of the hours between the crew members took place, or the foremen reported employees for a full workday when in fact they reported to work late. (Tr. 1388-89). Had NY Paving been aware of any such instance, other than the incidents involving the alleged three (3) discriminatees, NY Paving would have conducted an investigation and taken appropriate disciplinary measures regardless of the union-affiliation of the employees involved. Significantly, and most tellingly, despite NY Paving providing thousands of pages to the GC and the GC presumably having access to every badged Local 175 member (at least fifty (50) NY Paving employees) there was not a scintilla of evidence introduced at the unfair labor practice trial that the "shifting of hours" or theft of time committed by the alleged discriminatees, (Patrick, Seminatore and Schmaltz) occurred on a regular basis, or even occurred at all.

Finally, no anti-union animus should be imputed to NY Paving based on its failure to discharge Michael Coletti (Coletti's son) because the circumstances of Michael Coletti's tardiness are distinguishable from those of Patrick, Seminatore, and Schmaltz. As an initial matter, Michael Coletti is also a member of Local 175. (Tr. 1500). More importantly, Michael Coletti was late to report to the yard on several occasions, which resulted in NY Paving sending him home without pay and even suspending him. (Tr. 1500-02). Unlike Seminatore, Michael Coletti's absence was known to NY Paving and he did not falsify his time sheet to report hours not actually worked. (Tr. 1500-02). And Michael Coletti also never received and accepted

compensation in connection with same. (Tr. 1500-02). Stated differently, Michael Coletti's tardiness was known to NY Paving and he was not compensated for time he did not actually work. Unlike Michael Coletti, Seminatore's lateness on October 16th was not known to NY Paving, and as a result of Schmaltz' falsification of the time sheet, Seminatore was compensated for time he did not actually work¹⁶. Therefore, the GC's attempt at imputing animus to NY Paving fails.

ii. Shomari Patrick

The GC's *prima facie* case pertaining to Shomari Patrick also fails because the record reveals a complete absence of any anti-union animus on NY Paving's part as it pertains to him. The GC attempts (unsuccessfully) to salvage her frivolous case by introducing the testimony of Shomari Patrick, who stated that "Steve" told him (Shomari Patrick) he was being fired because of his last name. (Tr. 570, 573). As set forth below, Shomari Patrick's testimony is unreliable for several reasons. First, Shomari Patrick was not a credible witness. He did not remember the last name of his supervisor "Steve" and his co-worker "Anthony", even though he seemed to have no problem remembering and testifying about a clearly self-serving statement regarding the reasons for his termination. (Tr. 563-64). Second, GC failed to call "Steve" and "Anthony" as witnesses to corroborate Shomari Patrick's testimony, casting further doubt on the veracity of Shomari Patrick's testimony. Finally, because Shomari Patrick clearly lied about speaking with Miceli in mid-March 2018 regarding receiving a badge, it is highly likely that he also lied when testifying about other issues. (Tr. 1413-15; Resp. Ex. 17).

¹⁶ It must also be noted that Michael Coletti is Robert Coletti's *son*. (Tr. 1500-02). Even being the son of the "second ranking" NY Paving employee, Michael Coletti received significant disciplinary action for his conduct, which was less grievous than the conduct of Patrick, Seminatore and Schmaltz, who admittedly and apparently without regret engaged in multiple acts of severe gross misconduct. Finally, it must also be noted, NY Paving did not issue Michael Coletti any written warning related to his (Michael Coletti's) conduct. (Tr. 1500-03).

Further, several undisputed facts militate against imputing any anti-union animus to NY Paving. First, even if NY Paving knew Shomari Patrick's relationship with Glenn Patrick through his initial hire paperwork, NY Paving would have possessed such knowledge at the outset of Shomari Patrick's employment with Di-Jo. It is undisputed NY Paving and Di-Jo nevertheless hired Shomari Patrick, who remained employed for almost three (3) months. (Tr. 562, 1408). Second, Glenn Patrick admitted Terry Holder, who became Local 175's Shop Steward after Billy Smith, Jr., ("Smith") was Glenn Patrick's cousin. (Tr. 725-27). According to Patrick, Terry Holder continued to work at NY Paving even though Miceli knew his familial relationship with Patrick. (Tr. 715-17). Obviously, had NY Paving harbored animus against any and all individuals related to Glenn Patrick, it is likely NY Paving would have terminated Terry Holder's employment as well.

Third, Miceli testified the overwhelming majority of Di-Jo employees were being trained to perform concrete work and eventually become members of Local 1010. Only a "handful" of Di-Jo employees have become members of Local 175. (Tr. 1406-16). Shomari Patrick, like the majority of Di-Jo employees, was training to perform concrete work and become a member of Local 1010. (Tr. 596). Shomari Patrick even admitted he expected to become a member of Local 1010 and perform concrete work at NY Paving. (Tr. 596). It makes no logical sense to impute anti-Local 175 animus to NY Paving in connection with the discharge of a Di-Jo employee who expected to become a member of Local 175's "rival union" – Local 1010. Finally, it is also telling Shomari Patrick testified no one at NY Paving even addressed Glenn Patrick being his uncle. (Tr. 633-34). This is yet another blow to GC's *prima facie* case.

iii. Michael Bedwell and Anthony Franco, Jr.

Similarly, no anti-union animus can be imputed to NY Paving based on its alleged refusal to employ the “union hierarchy” when it is undisputed NY Paving, during the relevant period, actually employed members of Local 175’s Executive Board, including Michael Bartilucci (“Bartilucci”) and Joseph Cordano. (Tr. 1265-66). Furthermore, Franco also admitted NY Paving issued his brother, Salvatore Franco, a badge and that he worked at NY Paving. (Tr. 1001-02). Based on this unrefuted evidence, the fact that a Local 175 member was a member of “union hierarchy” (whatever that means), clearly played no role in NY Paving’s employment decisions. Franco’s own brother worked at NY Paving during the relevant period (GC Ex. 17, bates stamped document “New York Paving 000827”), and so did the members of Local 175’s Executive Board, Michael Bartilucci and Joseph Cordano.

iv. Donald Mascetti

Finally, no anti-union animus was demonstrated by the GC in connection with NY Paving’s decision not to recall Mascetti from layoff. As an initial matter, NY Paving issued Mascetti a badge. (Tr. 1403-06). Had NY Paving harbored any animus against Mascetti based on his membership in Local 175, NY Paving would likely never have issued him a badge. More importantly, the GC’s entire discrimination case for Mascetti hinges upon Mascetti’s alleged participation in a Local 175 meeting where the issue of Local 1010 performing asphalt work was discussed. (Tr. 1047-48). It is reasonable to believe that if NY Paving indeed harbored anti-union animus, it would have terminated other Local 175 members who attended the same meeting. However, it is undisputed the members of Local 175’s Executive Board who attended that same meeting, including Smith, Michael Bartilucci, and Joseph Caramano (except for Patrick and Seminatore), continued to be employed at NY Paving during the relevant period. (Tr.

1067-70). Further and according to Mascetti, the other Local 175 members (Vito Smith and Miguel Nieves), who worked with Mascetti during the two (2) days when Local 1010 allegedly performed asphalt work remained employed at NY Paving. (Tr. 1076-78). Had NY Paving possessed any discriminatory animus based on Mascetti's participation in the alleged Local 175 meeting, NY Paving would have also discharged the other Local 175 members who also attended.

Finally and as more fully discussed in Section III(A)(4)(iii), *infra* below, (1) NY Paving had absolutely no knowledge, until hearing Mascetti's testimony during the trial, regarding the alleged meeting of Local 175's Executive Board involving Mascetti. (Tr. 1264, 1405-06); (2) Local 175 did not file any grievance, unfair labor practice charge, or a federal complaint against NY Paving in connection with Local 1010's alleged assistance in laying binder. (Tr. 1069-70); and (3) there was absolutely no testimony indicating anyone (including from Local 175) informed NY Paving regarding this alleged meeting of Local 175's Executive Board as testified by Mascetti. (Tr. 1070).

2. NY Paving Would Have Taken the Same Action in the Absence of Any Alleged Union Activity

It is well-established Board Law that an employer has an absolute right to maintain the efficient and orderly operation of its business. Indeed, an employer may discipline an employee for insufficient cause or no cause, and there is no violation of §8(a)(3) so long as the employer's purpose is not to encourage or discourage union membership. *Borin Packing Co.*, 208 NLRB 280 (1974); *Neptune Waterbeds, Inc.*, 249 NLRB 1122 (1980), *McClatchy Newspapers, Inc. d/b/a The Fresno Bee*, 337 NLRB 1161 (2002), *NLRB v. McGahey*, 233 F.2d 406 (5th Cir. 1956); *Indiana Metal Prods. v. NLRB*, 202 F.2d 613 (7th Cir. 1953); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); and *NLRB v. Condenser Corp.*, 128 F.2d 67 (3d Cir. 1942).

Further, it is beyond peradventure that under Board and Court Law an employer may discharge an employee for a good reason, a bad reason, or no reason at all, without running afoul of the Act. *Clothing Workers v. NLRB (AMF, Inc.)*, 564 F.2d 434, 440, (D.C. Cir.1977); *accord Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *Syncro Corp. v. NLRB*, 597 F.2d 922 (5th Cir. 1979); *NLRB v. Knuth Bros.*, 537 F.2d 950, (7th Cir. 1976); *Bayliner Marine Corp.*, 215 NLRB 12 (1974), *petition for review dismissed sub nom*; and *Brook v. NLRB*, 538 F.2d 260 (9th Cir. 1976).

It is also well-settled law the Board is not permitted to substitute its own business judgment for that of the employer in evaluating whether particular conduct was unlawfully motivated; the critical inquiry is not whether the employer's decision is good or bad, but whether it was honestly held and whether it was, in fact, the reason for the action. *Ryder Distrib. Resources, Inc.*, 311 NLRB 814 (1993), *citing NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964). *Tinney Rebar Services Inc.*, 354 NLRB (2009); *Lamar Advertising of Hartford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004). While the *Wright Line* tests entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports the employer's position, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

In this case, it is undisputed NY Paving would have taken the same action in connection with the seven (7) alleged discriminatees regardless of their engagement in any alleged protected or union activities.

i. Glenn Patrick, Costantino Seminatore and Gregory Schmaltz

It is undisputed Patrick and Seminatore engaged in theft of time, which formed legitimate non-discriminatory and non-retaliatory reason for their terminations regardless of any alleged participation in any protected activity. Patrick and Seminatore did not even deny they received compensation for hours they did not actually work. Even though on October 11, 2017, Patrick received compensation for, among others, 10.5 hours on October 2, 2017, he testified NY Paving compensated him for 3.5 hours he did not work, including overtime compensation he did not earn. (Tr. 701-02). Similarly, Seminatore testified that even though he was compensated for twelve (12) hours for October 16th, he may have actually worked only ten (10) hours that day. (Tr. 807-11, 835-37). As it pertains to Schmaltz, even if he engaged in any protected activity, which he did not, NY Paving had legitimate non-discriminatory and non-retaliatory reasons for terminating his employment. Indeed, as the asphalt foreman, it was Schmaltz' responsibility to accurately report all hours worked by the workers on his crew to NY Paving. (Tr. 260-64, 1507-09). Here, Schmaltz colluded with Patrick and Seminatore by over-reporting their hours worked. Specifically, on the respective payroll time sheets, Schmaltz reported Patrick actually worked 10.5 hours on October 2nd and Seminatore actually worked twelve (12) hours on October 16th. (Resp. Ex. 7(i); GC Ex. 16(i)). Schmaltz' actions were both dishonest and egregious.

Miceli testified NY Paving terminated Seminatore's employment due to his theft of time on October 16, 2018, when he received compensation for twelve (12) hours even though Seminatore did not actually work all those hours. (Tr. 1380-86). Even though there were certain inconsistencies in Miceli's testimony regarding the date and the events that precipitated Seminatore's termination, the witness credibly explained his prior testimony was wrong because he did not have a chance to review the relevant time sheet during his testimony. Indeed, Miceli

was called by the GC as her first witness. During Miceli's testimony for the GC, he was asked questions regarding the reasons for Seminatore's termination. Notably, on direct, the GC asked Miceli leading questions regarding the reasons for Patrick and Seminatore's termination in such a manner as to confuse the witness into believing that the termination of both employees related to the theft of time on October 2nd.¹⁷ Miceli's confusion as a result of the GC's leading questions was further compounded by the fact that the GC neither refreshed the witness' recollection with the relevant time sheet, nor did she seek to elicit Miceli's testimony while presenting him the relevant time sheet.¹⁸

Miceli's credibility and truthfulness is further enhanced by the fact that the witness, during the GC's cross examination, on his own initiated conversation regarding the inconsistency between his testimony and the witness Affidavit he previously provided to the Region. Miceli testified he had made a mistake in his witness Affidavit regarding the correct date of Seminatore's theft of time similar to his prior testimony. (Tr. 1437). Notably, Miceli repeated several times the statement in his Affidavit was erroneous because, similar to his prior testimony, he did not have the relevant time and payroll records in front of him.¹⁹ Given Miceli's

¹⁷ The GC asked Miceli the following leading question which was the first question relating to the reasons for Patrick and Seminatore's termination: "Now, the following week you noticed that both Glenn Patrick and Constantine Seminatore were paid 40 hours for that prior week of the hearing. Is that right?" (Tr. 104).

¹⁸ At the outset of the Region's investigation into the underlying unfair labor practice charges, as early as January 16, 2017, NY Paving advised the GC that Seminatore was terminated for theft of time on October 16, 2017; NY Paving also submitted the underlying time sheet to the Region at that time. (Resp. Ex. 18). As further evidence that the GC knew NY Paving's position regarding Seminatore's termination, the GC elicited testimony from Seminatore on his direct examination. (Tr. 786-87). The GC would not have asked Seminatore questions regarding his lateness on October 16, 2017 unless she was aware of NY Paving's position regarding Seminatore's termination. It is beyond peradventure, had the GC wished to elicit accurate testimony from Miceli, she would have presented him with the October 16th time sheet (which had been in her possession since January 2018). Instead, the GC presented Miceli with a portion of the transcript of the 10(k) hearing. Upon information and belief, the GC's actions in this regard were calculated to mislead Miceli into providing inaccurate testimony.

¹⁹ Miceli testified, in pertinent part: "But I didn't have the – the payroll records. If I had the timesheet in front of me, that would have sparked my memory ..." (Tr. 1438). "I didn't have a time sheet. Again, I see 500 guys working. I see 30 time sheets when I look at them." (Tr. 1440-41).

explanation as to why his prior testimony was erroneous, his willingness to initiate conversation regarding his witness Affidavit, coupled with the GC's failure to elicit Miceli's testimony based on the available documentary evidence, establishes Miceli's credibility and truthfulness. Therefore, Your Honor should credit his testimony regarding the facts underlying Seminatore's theft of time on October 16th. Further, Miceli's testimony in this regard was corroborated by Bartone, who stated on October 16th, Seminatore reported to work late half-way through the day, which Bartone told Miceli. (Tr. 1221-22).

The testimony of the alleged three (3) discriminatees was riddled with inconsistencies and self-serving statements, and therefore, their testimony was not credible. As an initial matter, Patrick and Seminatore admitted to theft of time and Schmaltz admitted to falsifying time sheets. (Tr. 701-02, 902, 908, 911). Given their admitted fabrications in connection with their time keeping, all three (3) individuals are not trustworthy. Further, given the numerous inconsistent statements in each of the three (3) discriminatees' testimony, their credibility is suspect on its face. For example, Patrick testified he left the Section 10(k) hearing on October 2, 2017 at 9:00 a.m. even though the record is clear the hearing did not commence until 9:40 a.m. (Tr. 661-62; Resp. Ex. 6). on October 2nd. Further, Patrick initially testified he arrived at the jobsite in Brooklyn at 10:00 a.m. (*i.e.*, it took him one (1) hour to get there straight from the Section 10(k) hearing). (Tr. 663). However, on cross examination, Patrick changed his testimony to state it took him 45 minutes to get to the jobsite and he did not arrive there until 10:30 a.m. (Tr. 694-99). Patrick's credibility is also suspect because in his December 11, 2017 Affidavit provided to the Region, Patrick stated prior to reporting to the job site on October 2nd, he first went home to change – this fact was omitted from his direct examination and when questioned about it, Patrick denied going home and stated that portion of the Affidavit was a lie. (Tr. 687-90). Finally, while

on direct examination Patrick testified he instructed Schmaltz to report him (Patrick) to have worked the entire day and not report any time for Seminatore on October 2nd, on his cross examination, Patrick changed his story to indicate the three (3) of them together (Patrick, Seminatore and Schmaltz) decided how to complete the time sheets. (Tr. 709). Such inconsistencies demonstrate Patrick is a patently unreliable witness who will advance any statement (regardless of its veracity) to support his position.

Seminatore's testimony also suffered from similar, if not more grievous, inconsistencies. For example, Seminatore testified Patrick called him at 9:00 a.m. on October 2, 2017 to inform him that Seminatore had to report to the 10(k) hearing in place of Patrick. (Tr. 779-84). When further questioned about it, Seminatore responded to the GC that he remembered the exact time because his phone displayed the time when it rang. (Tr. 824). However, on cross examination, when asked how could Patrick have called him at 9:00 a.m. if the hearing did not commence until 9:40 a.m., the witness "backtracked" and stated he did not remember the exact time. (Tr. 820-31). Further, Seminatore's witness Affidavit provided to the Region on November 30, 2017 stated Patrick called Seminatore on October 2nd at 9:00 a.m. or 9:30 a.m. (Tr. 820-31). Further, while Seminatore testified he told Schmaltz to report Patrick on the October 2nd time sheet in his place, when cross examined on the same issue, Seminatore claimed it was in fact Schmaltz' authority and decision as the foreman who to report on the time sheet. (Tr. 820-31).

Seminatore's testimony in connection with his hours worked on October 16, 2017 suffered from similar inconsistencies. For example, on the direct examination Seminatore testified on October 16th he worked from 8:30 a.m. to 7:30 p.m. or 7:45 p.m. (Tr. 786-87). However, when questioned about his February 15, 2018 witness Affidavit, where Seminatore stated he worked until 7:00 p.m. on October 16th, Seminatore changed his testimony to state he

worked any time between 7:00 p.m. and 8:00 p.m. (Tr. 835-37). Clearly, Seminatore attempted to manipulate his start and end times to enable him to falsely assert he worked twelve (12) hours on October 16th and was entitled to the compensation he received for same. To that effect, it is telling that on his cross examination, Seminatore admitted if he in fact stopped working at 7:00 p.m. on October 16th, his compensation at most, should have only been for ten (10) hours worked. (Tr. 835-37).

Unsurprisingly, Seminatore's testimony was also permeated with a plethora of self-serving statements, which cast further doubt on his credibility. By way of example, Seminatore testified when he was a foreman, he recorded the hours worked by his crew correctly. (Tr. 812). Despite the foregoing, Seminatore later responded to the Judge's question that when he was a foreman, he reported the start time as 7:00 a.m. regardless of when the crew members actually showed up. (Tr. 841). According to Seminatore, the usual start time is 7:00 a.m. If the crew arrives at the first jobsite before 7:00 a.m., then the start time is the crew's actual arrival time. If the crew arrives after 7:00 a.m. on the other hand, start time is 7:00 a.m. (Tr. 844-46). However, when questioned about his 8:30 a.m. start time on October 16th, Seminatore testified 8:30 a.m. was the start time for the entire crew because that is when they started performing actual work. (Tr. 807-11).

Similar to Patrick and Seminatore, Schmaltz' testimony also contradicted the credible documentary evidence and the prior witness testimony. Further, while the witness clearly remembered the events that benefitted Local 175's claims, he suffered from memory lapses on other facts, which were not so helpful to the alleged discriminatees' claims. For example, like Patrick and Seminatore, Schmaltz initially testified Patrick called him on October 2nd at about 8:30 a.m. or 9:00 a.m (even though Patrick could not have made the call prior to 9:40 a.m. if not

later²⁰). (Tr. 864-65). Thereafter, when questioned about when his crew finished working on October 2nd, Schmaltz claimed he did not remember the day specifically. (Tr. 872). Interestingly, however, when Schmaltz was testifying regarding the alleged falsification of the time Schmaltz stated, “I recall that morning specifically,” (Tr. 924) even though it was merely one (1) month after October 2nd, which Schmaltz conveniently did not recall. Further, on cross examination, Schmaltz testified October 2, 2017 was the first time he had to make the judgment call as to which employee to report on the time sheet, however, when questioned further, he stated his crew members have, in fact shown up late to work at least three (3) times in the past. (Tr. 898-908, 913-16). Interestingly, Schmaltz’ statement that October 2nd was the first time he dealt with the shifting of hours is not believable, given that in the course of less than three (3) weeks, he failed to accurately report hours worked at least twice (on October 2nd and again on October 16th). (Tr. GC Ex. 16(i); Resp. Ex. 7(i)). In conclusion, the testimony of the three (3) alleged discriminatees was contradictory, self-serving, and should not be credited.

Patrick and Seminatore’s theft of time and Schmaltz’ admitted falsification of time sheets is undisputed, and none of the reasons elicited by the GC justifies their gross misconduct. The first excuse was that the act of reporting 10.5 hours for Patrick on October 2nd should be disregarded because it did not cost NY Paving any additional money. This fact, even if true – which it is not – is an irrelevancy. However, Patrick himself recognized had the October 2nd time sheet been accurate, him and Seminatore would not have been entitled to receive any overtime pay. (Tr. 702). The second justification was that the over-reporting of hours was somehow appropriate because the employees were not compensated for the time when they reported to the yard until they arrive on their first job location. (Tr. 888-91). This is an absurd

²⁰ Resp. Ex. 6.

(and false) justification. A theft of time benefiting the alleged discriminatees cannot be excused by an alleged system-wide time recording practice affecting all employees. As testified by Miceli, NY Paving believes it is in compliance with all wage and hour laws.

The third excuse involved the “call-in” provision of the Local 175 Agreement.²¹ On this issue, Miceli credibly testified the “call-in pay” provision of the Local 175 Agreement only applies to situations where the employees report to work and NY Paving cancels work and sends them home. (Tr. 1389-91).²² Because NY Paving did not cancel work and send Patrick and Seminatore home early on October 2nd or October 16th, the “call-in” provision has nothing to do with this matter and clearly did not justify their theft of time.²³ (Tr. 1389-91). These purported explanations are contradicted by the documentary evidence and are nothing but a desperate attempt by the GC to somehow justify theft of time and falsification of time sheets. Indeed, it is telling the alleged discriminatees were not even remorseful for their actions. In fact, they uniformly stated they did not believe their actions were in any way erroneous or improper.²⁴ Interestingly, unlike the alleged three (3) discriminatees, the GC’s own witness and a fellow

²¹ Even this far-fetched justification does not fully explain Patrick’s theft of time on October 2nd. In fact, Patrick himself recognized even if the “call-in” clause applied, he would have received compensation for only 8 hours because he only worked 7 hours. (Tr. 765-66).

²² See also GC Ex. 4, Article IX, Section 1 – Hours of Work, Subsection (c) Reporting Conditions: “Employees who are employed for less than four (4) hours in one (1) day and are then laid off shall receive four (4) hours of wages. Employees who are employed for over four (4) hours one (1) day and are then laid off shall receive eight (8) hours of wages.” (emphasis added).

²³ As is amply evident from the testimony, these discriminatees believed they worked for Local 175 rather than NY Paving, and for that reason, they were not obligated to discuss with NY Paving the various workplace procedures, including how to properly report hours worked or whether certain Local 175 Agreement provisions, such as “call-in” pay, applied to a particular situation. The record in this case contains numerous instances demonstrating that such an entitled attitude was typical of many NY Paving employees who believed they were free to do as they wished and NY Paving’s position in connection with the various issues was an irrelevancy.

²⁴ See, e.g., Patrick testimony wherein he stated, in pertinent part: “Q: Do you think ... your course of conduct was proper? A: Yes.” (Tr. 724) (emphasis added).

“Q: Is there anyone, in your opinion, that you had an obligation at New York Paving to discuss issues of this stature? A: Absolutely not. I knew the company wasn’t losing any money. I wasn’t hurting them in any way.” (Tr. 908).

Local 175 member and foreman (and a former Local 175 Shop Steward), Smith recognized the necessity to inquire with NY Paving on how to properly report someone who was tardy. Smith testified:

Q: Somebody came in late one hour?

A: If they came in late one hour, I would check with my boss to find out what should I do.

Q: Okay. Fair enough. Who would that boss be?

A: Rob Zaremski.

Q: Okay. So --

A: Or Pete Miceli if he's in the office.

Q: Okay. The gentleman behind me?

A: Yes.

Q: So if somebody came in late one hour, you would call either Mr. Zaremski or Mr. Miceli and ask them?

A: Yes.

Q: Okay. Why would you call them? I'm just curious. What would you ask?

A: I'd say I don't want to be stealing any time. I --

Q: That --

A: -- what should I do?

Q: Thank you.

...

Q: Just to nail this down, you would not -- never take it upon yourself and you talked about not, you know, permitting theft of time, you would never take it on yourself to record more than the hours that somebody had worked without getting your boss' okay for that?

A: Correct.

(Tr. 444, 456-57) (emphasis added). Unlike Smith, who understood that reporting employees for hours they did not actually work constitutes theft of time, the concept of the necessity to accurately record hours worked seemed foreign to Patrick, Seminatore and Schmaltz. Finally, it is of no consequence that NY Paving may not have questioned the time sheets of the alleged three (3) discriminatees because: (1) no witness, not even the GC, denies such conduct occurred; (2) NY Paving had correctly determined said conduct occurred and therefore did not *need* to

speak to either Patrick, Seminatore or Schmaltz (why? for what end?); and (3) NY Paving, as clearly demonstrated at the trial, does not tolerate theft of any kind. (Tr. 198-204).²⁵

Even if the GC established the *prima facie* case of §8(a)(3) violation, which she has not, the record in this matter demonstrates NY Paving would have terminated Patrick, Seminatore and Schmaltz regardless of their engaging in the alleged protected activity. Indeed, NY Paving would have taken the same action with any other employee, regardless of his/her union affiliation and/or protected activity (which is absent for Schmaltz in this matter). Indeed, Miceli at length testified regarding the reasons why it is important for NY Paving to maintain accurate time records, and that NY Paving does not tolerate theft of any kind (including theft of time). (Tr. 1378-79, 1389, 1424-26). As an initial matter, federal and state laws require that NY Paving keep accurate time records.²⁶ It is also necessary for NY Paving to know when and where each employee worked in case there are any workplace accidents.

As further evidence that NY Paving would have discharged any employee, regardless of his/her union affiliation, for theft of time and/or other misconduct, Miceli testified regarding seven (7) prior instances when NY Paving discharged employees for theft or other misconduct.

²⁵ Miceli testified at length regarding the prior instances when the employees were terminated and banned from NY Paving for theft: (1) Ignatius Lascala (Local 1010 member) was terminated for stealing a seven Dollar (\$7) toll receipt; (2) Charlie Miceli (Local 175 member) was terminated for stealing a box of Vermeer teeth; (3) Al Savarasse was terminated for theft of materials and time; (4) Sanford Quillan (Local 1018) was terminated for theft. (Tr. 198-204). Further, many employees were also permanently banned from NY Paving due to misconduct: (1) Robert Diconzo (Local 282 member) was terminated because he was a horrible driver; (2) Chris Triviano (Local 1010 member) was banned because he was a “troublemaker;” (3) Gerry Constantino (Local 1018 or Local 175 member) was terminated because he wrecked NY Paving’s roller as well as 4-5 other cars in the street; (4) Jose Valet (Local 1010 member) was banned because he ignored a hand-dig ticket; (5) Adrian Pirra (Local 1010 member) was also banned for the same reason as Jose Valet; and (6) Joe Franco (Local 175 member) was also banned. (Tr. 198-204, 274-76). Essentially, it is undisputed NY Paving does not tolerate any theft whatsoever, even if it involved a \$7 toll receipt.

²⁶ Specifically, NY Paving must maintain an accurate record of all hours worked for its employees under: (a) the federal Fair Labor Standards Act. *See* 29 U.S.C. 211(c) and, 29 C.F.R. §516.2; and (b) the New York State Labor Law. *See* New York State Labor Law § 195(4) and 12 NYCRR § 142-2.6(a). Such a requirement is also commonplace in other New York wage orders affecting different industries such as (1) 12 NYCRR § 141-2.1(a), (2) 12 NYCRR § 143.6 and (3) 12 NYCRR § 142-2.6(a) .

(Tr. 198-204). NY Paving's policy with regard to theft was "[g]ot to go, no matter what it is." (Tr. 204). Similarly, Miceli testified regarding two (2) additional employees, who were Local 1010 members, who were also permanently banned from NY Paving due to their misconduct. (Tr. 274-76). It is obvious NY Paving does not tolerate theft or misconduct regardless of the employee's union affiliation.

Further, any attenuated causal connection established by the temporal proximity of Patrick and Seminatore participating in the Section 10(k) hearing and their terminations, is rendered irrelevant by their blatant misconduct and theft of time, which took place *after* the Section 10(k) hearing concluded (namely, Patrick and Seminatore depositing their paychecks on October 11, 2017 and October 26, 2017 respectively for time they did not actually work). (Resp. Ex. 4 and 15).

To the extent the GC contends NY Paving's basis for Patrick, Seminatore and Schmaltz' discharges are pretextual because they did not, in fact, steal time and falsify time sheets, the GC's assertion is illusory. Here, NY Paving was understandably motivated by nothing other than wanting its employees to be honest about their hours worked. Under the circumstances described above, whether Patrick, Seminatore and Schmaltz supported the union, or were neutral toward the union, their misconduct and attitude related to said misconduct were sufficiently abysmal that they actually self-terminated. Certainly, NY Paving was right to discharge them regardless of their union affiliation, activities or sympathies. There is nothing in the Act that requires an employer to tolerate rules infractions or substandard work performance from employees, irrespective of whether they are engaged in protected activities. *NAACO Materials Handling Group, Inc.*, 331 NLRB 1245 (2000); *McCullough Envtl. Servs., Inc.*, 306 NLRB 3451 (1992) ("An employer is not required to tolerate rules infractions from employees that support

the union, to any greater extent than it tolerates them from employees who do not support the union”). Thus, Patrick, Seminatore and Schmaltz would not be permitted to engage in theft of time and falsification of time sheets, whether or not they supported Local 175. Therefore, the Complaint allegations pertaining to Patrick, Seminatore and Schmaltz should be dismissed.

It is clear in the instant situation NY Paving has proffered compelling evidence demonstrating Patrick, Seminatore, and Schmaltz were discharged for reasons having nothing to do with any alleged protected activities.

ii. Shomari Patrick

Unlike the GC, the Respondent has put forth credible evidence to demonstrate that Shomari Patrick’s employment would have been terminated even in the absence of any alleged protected conduct (which here presumably was Shomari Patrick’s familial relationship with Glenn Patrick). Miceli testified Shomari Patrick was training as an extra employee on a clean-up crew. (Tr. 1408). Clean-up crews, which are comprised of only one (1) employee at NY Paving, are expected to drive the company vehicles to various job sites and remove any barricades, tape, etc. (Tr. 1409-10, 1504-05). According to Miceli, being able to drive a vehicle is an essential and indispensable requirement of an employee being on a clean-up crew. (Tr.1409-10). Because, after almost two (2) months of training for the clean-up crew, Shomari Patrick still had not obtained a valid driver’s license,²⁷ Miceli decided to end Shomari Patrick’s training at Di-Jo.

Further, in addition to not having a valid driver’s license, Miceli also testified Shomari Patrick’s work performance was not satisfactory in that he did not assist concrete crews with their work if he finished his clean-up responsibilities early. (Tr. 1411, 1506). The ultimate terminating event, however, occurred on November 2, 2017, when Shomari Patrick worked on

²⁷ Shomari Patrick testified that even “Steve” told him to get a driver’s license so that he (Shomari Patrick) could be assigned his own company vehicle. (Tr. 568)

NY Paving's asphalt crew without a badge and without NY Paving's prior authorization.²⁸ (Tr. 1411-12, 1505). This was an egregious infraction of NY Paving's rules given that Shomari Patrick had not performed any asphalt work at NY Paving prior to November 2nd, and NY Paving had no knowledge whatsoever regarding Shomari Patrick's skills and abilities to properly perform NY Paving's asphalt work. (Tr. 1412, 1505).

The GC would have Your Honor believe Miceli terminated Shomari Patrick because of his familial relationship with Glenn Patrick. The GC's only evidence to support her conjecture is Shomari Patrick's testimony, which was not credible because of his significant memory lapses and statements that contradicted the GC's other witness testimonies as well as the documentary evidence. As an initial matter, Shomari Patrick clearly lied about going to NY Paving sometime in mid-March 2018 to receive a badge. Unlike other events in his testimony, Shomari Patrick "remembered" speaking with Miceli in mid-March 2018 regarding receiving a NY Paving badge. (Tr.579-81, 585-87, 597-600). Shomari Patrick even pointed out Miceli in the hearing room to confirm he (Miceli) was the individual he spoke with about his badge. (Tr. 580). However, based on the documentary evidence introduced by NY Paving and Miceli's credible testimony, Shomari Patrick could not have spoken with Miceli in mid-March 2018 because Miceli was out of the office from March 6, 2018 through March 20, 2018. (Tr. 1413-15; Resp. Ex. 17).

As stated above, Shomari Patrick's credibility is also questionable given numerous contradictions and inaccuracies in his testimony. For example, he did not remember the last

²⁸ NY Paving's position statement, dated February 20, 2018 and submitted to the Region does not include statements inconsistent with Miceli's testimony regarding the reasons for Shomari Patrick's termination. *See* GC Ex. 23. In GC Ex. 23, NY Paving asserted the reason for Shomari Patrick's termination was that he performed asphalt work on November 2, 2017 without authorization. This is not inconsistent with Miceli's testimony who confirmed the final terminating event for Shomari Patrick occurred on November 2, 2017 as set forth in GC Ex. 23. Further, nowhere in GC Ex. 23 did NY Paving state that the November 2nd incident was the only reason for Shomari Patrick's discharge. Based on the foregoing, GC Ex. 23 does not contain any statement(s) inconsistent with Miceli's testimony and therefore, should not serve as the basis for finding Miceli not credible.

names of either his foreman “Steve” or his partner “Anthony,” with whom Shomari Patrick worked practically on daily basis. (Tr. 563-64). Similarly, he did not recall seeing Di-Jo’s name on the initial hire paperwork he completed, or indicating that Glenn Patrick was his uncle, or receiving copies of the initial hire paperwork. (Tr. 628-31, 604-06) because “[i]t was over a year ago.” (Tr. 631). While not remembering the last name of his co-worker, Shomari Patrick of course conveniently remembered that “Steve” once disciplined someone by sending him home.²⁹ (Tr. 568-69). Shomari Patrick’s testimony also contradicted his witness Affidavit previously provided to the Region wherein he stated “Steve” was not a foreman. (Tr. 612-13) even though when questioned by Local 175, Shomari Patrick testified other than “Steve” no supervisor, manager or foreman spoke with him. (Tr. 583). Finally, Shomari Patrick’s testimony also contradicted Bedwell’s testimony. Specifically, when questioned about his basis for sending Shomari Patrick to work on an asphalt crew at NY Paving, Bedwell responded he believed Shomari Patrick had previously worked on asphalt crews while working at Di-Jo. (Tr. 558). Shomari Patrick on the other hand testified he did not work on asphalt crews while working at Di-Jo. (Tr. 593). Based on the foregoing misrepresentations and inconsistencies, Your Honor should credit Miceli’s testimony while finding Shomari Patrick not credible.³⁰

²⁹ Shomari Patrick admitted he did not know who made the decision to supposedly send the alleged disciplined worker home. (Tr. 621).

³⁰ The GC attempted to elicit testimony from Glenn Patrick regarding the reasons for Shomari Patrick’s termination. Specifically, the GC attempted to question Glenn Patrick regarding a text message he received from “Anthony.” Any statements Glenn Patrick made regarding the contents of the message he received from “Anthony,” and the text message itself (GC Ex. 14, which was rejected by Your Honor) should be disregarded. Indeed, Your Honor determined any statements from “Anthony” to Glenn Patrick were double hearsay and therefore inadmissible. (Tr. 654). Similarly, Your Honor rejected GC Ex. 14 because it contained statements that were hearsay. (Tr. 659). To the extent the GC contends GC Ex. 14 (and the statements contained therein) should be admitted into evidence, any such argument should be rejected by Your Honor because NY Paving will be unduly prejudiced, since the record does not even contain “Anthony’s” last name. If the GC wished to have GC Ex. 14 in evidence, she should have called “Anthony” as a witness. Because “Anthony” was not a witness, GC Ex. 14 and the statements contained therein should remain rejected and should not be considered by Your Honor.

Similarly, the GC has presented absolutely no evidence demonstrating Shomari Patrick, subsequent to his termination, sought re-employment at Di-Jo. (Tr. 578). Even if he applied for a badge from NY Paving in mid-March 2018 (which Shomari Patrick lied about), that does not establish that he sought, at any point, reinstatement at Di-Jo.

Finally, to the extent the GC contends NY Paving's articulated reasons for terminating Shomari Patrick's employment are pretextual, any such contention is without merit. There is nothing in the Act that requires an employer to tolerate rules infractions or substandard work performance from employees, irrespective of whether they are engaged in protected activities. *See NAACO Materials, supra; McCullough, supra.* Here, Shomari Patrick would have been terminated regardless of any alleged union activity, including his familial relationship with Glenn Patrick, due to the absence of a driver's license, which is essential for being on the clean-up crew, and performing asphalt work without NY Paving's authorization.

iii. Michael Bedwell and Anthony Franco, Jr.

NY Paving did not issue Bedwell a badge because at the time Bedwell allegedly sought employment with NY Paving, he already had another full-time job. (Tr. 1397-1401). Miceli testified NY Paving expects its employees to prioritize their work at NY Paving over any other employment they may have. (Tr. 1401-02). In fact, the workload and work schedule at NY Paving was so demanding that an employee working at NY Paving would not be able to maintain another full-time position. (Tr. 1401-02). NY Paving expects that its employees will be available to work and actually work significant overtime. (Tr. 1401-02). It is undisputed that Bedwell's position as the Business Manager of Local 175 was a full-time position. (Tr. 520-21). Bedwell described his duties as Local 175's Business Manager, which included having numerous meetings and telephone conversations with various contractors and Local 175 members. (Tr.

478). Given Bedwell's admission that he had a full-time employment, NY Paving's refusal to issue Bedwell a badge did not violate the Act. Significantly, no other individual has worked at NY Paving while simultaneously being a Business Manager of any union and/or a full-time employee elsewhere. (Tr. 1400-02). For example, Local 175's current Business Manager, Charlie Priola, previously worked at NY Paving but ceased his employment as soon as he was elected to his full-time Business Manager position. (Tr. 1400).

The fact that Bedwell worked at Local 175 had no bearing on NY Paving's decision not to issue him a badge. Miceli testified even if any employee had any other full-time job (including working at Target or McDonalds), NY Paving would not have hired that individual. (Tr. 1401-02). Therefore, NY Paving's decision to not issue a badge to Bedwell had nothing to do with his affiliation with Local 175; rather, Miceli made the decision based on the fact that Bedwell already had a full-time commitment during the relevant period and therefore, could not commit to working at NY Paving on a full-time basis, including working overtime. (Tr. 1397-98, 1400-02). It is undisputed Bedwell was Local 175's Business Manager from May 2017 through at least mid-November 2017 and most likely through the beginning on December 2017.³¹ Bedwell even admitted in mid-November 2017 he started working at Restani, however, his employment was part-time (2-3 days per week). (Tr. 475-76, 483).

Bedwell's testimony was frequently inconsistent and contradictory. For example, Bedwell extensively testified regarding his Business Manager role in sending various Local 175 members to NY Paving. (Tr. 484-85, 498-501). He also testified about his conversations with Labate and Smith regarding the same issue. (Tr. 484-85, 498-501). Specifically, Bedwell's

³¹ When questioned by the GC, Bedwell stated twice that he stopped being Local 175's Business Manager in early December 2017. (Tr. 480-83). However, on cross examination, he conveniently changed that date to "around November 13th." (Tr. 522-23).

testimony contradicted the testimonies of both Smith and Schmaltz. Bedwell testified he had two (2) conversations with Smith, one in August 2017 and another one in November 2017 (which resulted in Bedwell sending himself to NY Paving), where they discussed sending various Local 175 members to work at NY Paving. (Tr. 484-85, 499-501). Smith, on the other hand, testified they only had one conversation, which took place in May 2017. (Tr. 428-30). Indeed, according to Smith, it was as a result of this conversation in May 2017 that Bedwell sent himself to work at NY Paving. (Tr. 429). Schmaltz, on the other hand, testified that it was him (Schmaltz) who spoke with Bedwell in November 2017 and asked that he (Bedwell) replace Bartone, who was supposedly unable to work as a result of a car accident. (Tr. 928, 933-34). Clearly, the narratives presented by the GC's three (3) witnesses are not only different but also contradictory.

Bedwell testified extensively regarding GC Ex. 12.³² When questioned by the GC regarding the events leading up to Bedwell sending himself to work at NY Paving in November 2017, Bedwell testified he reviewed and analyzed GC Ex. 12 with Smith to determine which Local 175 member was available to work. (Tr. 499-500, 553-54). According to Bedwell, as result

³² The GC engaged in significant misrepresentation on the record in connection with GC Ex. 12. On *voir dire*, Bedwell testified GC Ex. 12 was exactly the document he allegedly received from Coletti:

Q: Who blocked out the social security numbers? Was that blocked out by Mr. Coletti?

A: I – I would assume so.

Q: He actually blacked these out, where these black lines?

A: Yea. This is exactly how I got the document.

(Tr. 489). Subsequently, NY Paving's counsel elicited detailed testimony from Coletti on October 19th indicating GC Ex. 12 was not the list of approved Local 175 members Coletti allegedly gave to Bedwell in August 2017. (Tr. 1272-76). One of the reasons, according to Coletti was the manner in which the social security numbers were redacted on GC Ex. 12 – Coletti testified GC Ex. 12 could not have been a document generated by NY Paving because of the redactions. (Tr. 1273-76). It was not until half-way through Coletti's cross examination by the GC that she (the GC) clarified it was her office that had redacted GC Ex. 12. (Tr. 1291). The GC's significant delay was intentional considering she had three (3) days between Bedwell and Coletti's testimonies to clarify the record, which she did not do until after NY Paving had elicited Coletti's testimony regarding GC Ex. 12. Of course the GC's intentional failure to advise NY Paving's counsel of her actions or to even refresh Bedwell on redirect, prevented NY Paving's counsel from impeaching Bedwell. Given the GC's misrepresentation, she should not be permitted to argue against Coletti's credibility based on his testimony regarding GC Ex. 12.

of his review of GC Ex. 12 he determined there were no other Local 175 members who were available to work, and because he (Bedwell) was also on GC Ex. 12, he made a decision to send himself to work. (Tr. 499-500). Interestingly, however, when cross examined by NY Paving and Local 1010 regarding GC Ex. 12, Bedwell stated he did not notice GC Ex. 12 had two (2) separate lists and that the names on the two (2) lists were different. (Tr. 525, 535-39). Further, Bedwell could not answer how he knew whether the sixty-two (62) employees listed on GC Ex. 12 were unavailable to work. (Tr. 542-46). Obviously, if Bedwell had reviewed GC Ex. 12 in a detailed manner as he claimed he did, he would have noticed the foregoing inconsistencies. Clearly, he did not.

Given Bedwell's contradictory testimony and the fact that he engaged in communications with NY Paving as Local 175's Business Agent as late as December 2017 (Tr. 1276-77), it was reasonable for NY Paving to assume Bedwell remained Local 175's Business Manager at least until mid-December 2017. Because Bedwell had a full-time employment during the relevant period, NY Paving did not issue him a badge. (Tr. 1277, 1397-1401).

Similar to Bedwell, Franco also was not issued a badge because of his prior brief employment with NY Paving. Specifically, NY Paving believed Franco would not work the required full-time schedule. (Tr. 1397-98). To assist with orderly business operations, NY Paving also wished to have steady crews consisting of employees who knew how to perform NY Paving's work and who would commit to working a full-time schedule, including overtime work. (Tr. 1397). Franco's previous intermittent and brief employment with NY Paving was contrary to NY Paving's legitimate business expectation to have steady crews with full-time employees. Franco viewed NY Paving as Summer and seasonal employment. Indeed, Franco testified his employment at NY Paving started as a Summer job, which he subsequently continued on a part-

time basis for two (2) semesters. (Tr. 984-86). Undisputed documentary evidence shows in 2016, Franco only worked 80 regular and 9.5 overtime hours. (Tr. 1396; Resp. Ex. 8). In 2017, he worked 184 regular and 59 overtime hours and did not work at NY Paving at all in May, June, July, August, September and October, except for 1 day in August. (Tr. 1396-97; Resp. Ex. 8).

Even though Franco did not work full-time at NY Paving in 2016 and 2017, and allegedly was not a student, he could not explain what he did, if anything, during those two (2) years. (Tr. 1012-13, 1020). Franco also could not remember many important dates, including the date when NY Paving allegedly refused to consider him for hire and/or to hire even after the GC attempted to refresh his recollection using Franco's own Affidavit previously provided to the Region. (Tr. 995-97). Similarly, although on direct examination Franco remembered the name of Local 175's Shop Steward who called him in to work. (Tr. 997), on cross examination, Franco did not remember when he worked at NY Paving and who called him in to work. (Tr.1014-22).

Franco's blatant credibility issues were further compounded by his inability to recall events that took place during extended periods of time. For example, when questioned by the Respondent's counsel what Franco did from January 1, 2016 through December 31, 2016, he responded "I don't know what I was doing. I was young. Probably just hanging out around the house." (Tr. 1012). Similarly, on cross examination, Franco could not answer what he did in the Summer of 2017. (Tr. 1019-20). However, when subsequently questioned by the GC if Franco was available to work at NY Paving during that Summer, Franco miraculously remembered and answered that he was available. (Tr. 1029). Despite the foregoing response, Franco could not answer on cross examination if he had called Local 175's Shop Steward to inquire regarding work in the Summer of 2017. (Tr. 1014-22).

It is not surprising, given Franco's intermittent and brief episodes of past employment at NY Paving, that NY Paving did not issue him a badge. Franco epitomized the opposite of what NY Paving's business needed from an employee: steady full-time commitment. Based on the foregoing, he was not issued a badge. (Tr. 1397-98).

iv. Donald Mascetti

NY Paving laid off and did not recall Mascetti because NY Paving had received complaints from other employees regarding Mascetti's work performance, which had apparently become too slow. (Tr. 1503-04). NY Paving's decision was also based on the fact that Mascetti did not work a steady schedule at NY Paving; rather and by his own admission, Mascetti was laid off from various NY Paving asphalt crews frequently while other employees were not. (Tr. 1036, 1067, 1079, 1404, 1504). Based on the employee complaints regarding Mascetti's work performance and Mascetti's frequent history of getting laid off, Miceli made a business determination to replace Mascetti with another Local 175 member who would be a better and more productive employee on the asphalt crews. (Tr. 1503-04).

3. The Employees Were Not Engaged in Any Protected or Union Activity

It is well-settled law the Board will only find individual conduct to be concerted only when it is engaged with or on the authority of other employees and not solely by or on behalf of the employee himself. *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964) (if the only purpose of the activity is to advise an individual what he could or should do without involving others, then it is not concerted activity).³³

³³ To be protected under Section 7, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection." These statutory prerequisites have been construed by the Board and the courts to extend the reach of the Act. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In general, to find an employee's activity to be "concerted," the

i. Gregory Schmaltz

In the instant matter, NY Paving is completely unaware Schmaltz engaged in *any* protected activity, filed a charge or testified pursuant to the Act before November 6, 2017. Other than the fact that Schmaltz was a member of Local 175, which obviously was known to NY Paving from the outset of his employment at NY Paving, the GC has not presented any evidence of Schmaltz engaging in any protected concerted activities or any other union activities on behalf of Local 175. Schmaltz confirmed he was not an officer of Local 175 and he did not testify at the 10(k) hearing. (Tr. 895).

ii. Shomari Patrick

Here, the GC has presented no evidence demonstrating Shomari Patrick engaged in any union activity or any protected concerted activity at the time of his alleged termination on October 20, 2017. It is undisputed Shomari Patrick did not become a member of Local 175 until after his alleged termination on October 20, 2017. (Tr. 601-02). Further, GC has presented no evidence whatsoever demonstrating Shomari Patrick demonstrated his support for Local 175 in any manner. The sole evidence on the record of Shomari Patrick's affiliation with Local 175 is the fact that he was the nephew of Glenn Patrick. (Tr. 563). Given the absence of any evidence corroborating Shomari Patrick's union activities, mere familial relationship with a union supporter is insufficient to establish the union or concerted activity prong of a *prima facie* case.

iii. Donald Mascetti

Other than being a member of Local 175 (Mascetti admitted he was not and had never been a Local 175 Shop Steward and had never held a position with Local 175. (Tr. 1072)), which

Board considers whether it was engaged in with or on the authority of other employees, and not solely by and on behalf of the employee themselves. *Meyers Industries (II)*, *supra*. Activities taken by individual employees on their own behalf generally have not been found to be "concerted" activity. *See, e.g., Goodyear Tire & Rubber Co.*, 269 NLRB 881 (1984); *see also NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662 (1st Cir. 1998).

was known to NY Paving since the beginning of Mascetti's employment at NY Paving, the GC has presented no evidence of Mascetti engaging in any protected union activities, which were known to NY Paving.

Based on the Complaint allegations and Mascetti's testimony, it appears the GC contends Mascetti engaged in protected union activity by virtue of his filing a charge against NY Paving at the Board. But, fatal to this specious claim, the GC never introduced into evidence any charge filed by Mascetti. The GC's argument also fails because Mascetti admitted he did not file a charge against NY Paving. (Tr. 1038, 1072). Likewise, Miceli and Coletti confirmed Mascetti had not filed a charge against NY Paving, which, had it happened, they would have been aware of. (Tr. 1263-65, 1405-06). Zaremski also testified he was unaware of any charges filed against NY Paving by Mascetti. (Tr. 1173-74, 1197, 1206-07). In fact, Mascetti admitted in his conversation with Coletti, that Coletti said he (Coletti) "knew of no complaint. And he would know, because that was his job to know. He didn't know what [Zaremski] was talking about." (Tr. 1039). Based on the foregoing, Mascetti's alleged filing of an unfair labor practice charge against NY Paving should be summarily rejected and in any event cannot form a basis of his protected union activity given that Mascetti did not in fact file any such charge and Miceli, Coletti and Zaremski denied even having any belief that Mascetti had filed a charge.

Mascetti also testified regarding a Local 175 meeting he attended where Local 175 discussed the issue of NY Paving allegedly allowing Local 1010 members to perform certain asphalt work. (Tr. 1047-48). To the extent the GC argues that Mascetti's attendance at this meeting constitutes the necessary union activity, as discussed below, the GC's argument is without merit because NY Paving had no knowledge of this meeting and no credible evidence exists suggesting otherwise.

4. NY Paving Did Not Have Any Knowledge of Any Protected or Union Activity

As stated above, to establish a violation of either §8(a)(3) or §8(a)(4), a charging party must establish that the respondent had knowledge of his/her protected concerted activity. *Wright Line, supra*; *Music Express East*, 340 NLRB 129 (2003); *Greenfield Die*, 327 NLRB 237 (1998); *Cardinal Hayes*, 315 NLRB 583 (1994); *Amelio's, supra*; *United Charter Service, Inc.*, 306 NLRB 150 (1992); *Hispanics United of Buffalo*, 359 NLRB 368, 375 (2012) (GC must establish that the employer knew of the concerted activity and has failed to do so).

i. Gregory Schmaltz

In this case there is absolutely no evidence -- direct or circumstantial -- to establish NY Paving had *any* knowledge of *any* alleged protected activity by Schmaltz.

ii. Shomari Patrick

Even if Shomari Patrick's familial relationship with Glenn Patrick is sufficient, the GC's *prima facie* case nevertheless fails because she has not established NY Paving's knowledge of any alleged union activity Shomari Patrick engaged in. As for Shomari Patrick's familial relationship with Glenn Patrick, even though Miceli testified he knew Shomari Patrick was Glenn Patrick's nephew. (Tr. 1408), the record is unclear whether Miceli (and NY Paving) had that knowledge at the time of Shomari Patrick's employment at Di-Jo. Indeed, Shomari Patrick testified even though he indicated Glenn Patrick was his uncle on his initial hire paperwork, no one at NY Paving ever asked Shomari Patrick if he was related to Glenn Patrick. (Tr. 633-34).

iii. Donald Mascetti

The GC has presented no evidence of Mascetti engaging in any union activity known to NY Paving. Even if Mascetti attended a Local 175 meeting where Local 1010's performance of asphalt work was allegedly discussed, this was not known to NY Paving. (Tr. 1197, 1206-07,

1264-65, 1405-06). According to Mascetti, for two (2) days in September 2017, Local 1010 members assisted the asphalt crew that Mascetti was working on to unload asphalt trucks and lay binder. (Tr. 1044-1047). Further, apparently after Mascetti reported this incident to another Local 175 member, “Jojo”), Local 175 held a private meeting to discuss the incident. (Tr. 1047). By Mascetti’s own admission, at this meeting, Local 175 decided not to take any action against NY Paving (“So, my Union felt that it was like a no-issue.” (Tr. 1048; 1069)).

It is undisputed NY Paving had absolutely no knowledge whatsoever regarding either the Local 175 meeting involving Mascetti or what was discussed at this meeting. (Tr. 1197, 1206-07, 1264-65, 1405-06). Further, Mascetti himself admitted he was not aware nor had he seen any grievance, unfair labor practice charge, or a federal complaint that Local 175 may have filed against NY Paving in connection with Local 1010’s alleged assistance with laying binder. (Tr. 1069; “Q: [D]o you have any knowledge that it was ever communicated – either orally or in writing – to New York Paving, that this was a discussions being held at an executive board meeting on 175? A: No.” Tr. 1070).

Interestingly, Mascetti was the GC’s sole witness who testified regarding this alleged meeting involving the Local 175 Executive Board. It is telling that even though four (4) other Local 175 members who testified for the GC in this case allegedly also attended the Local 175 meeting (including Patrick, Seminatore,³⁴ Smith and Bartilucci. (Tr. 1068)), none of them even mentioned this meeting taking place during their testimony. Stated differently, Mascetti’s testimony regarding the alleged Local 175 meeting was not corroborated by Patrick, Seminatore, Smith and/or Bartilucci during their testimonies in this matter.

³⁴ The GC asked Schmaltz specific questions regarding Mascetti and his conversation with Coletti. (Tr. 880-81). Conspicuously absent however were any questions regarding the alleged Local 175 Executive Board meeting involving Mascetti and Local 1010.

Finally and given Local 175's documented history of filing numerous grievances, arbitrations and unfair labor practice charges against NY Paving, it strains credulity that Local 175 would simply elect not to even address the issue of members of its rival union allegedly performing Local 175's unit work for two (2) days. Given Mascetti's uncorroborated testimony on the issue of Local 1010 members laying binder and the subsequent Local 175 meeting, it is doubtful if any of those events even actually occurred, let alone NY Paving having any knowledge of them.

5. NY Paving Did Not Violate the Act By Refusing to Consider or Refusing to Hire Michael Bedwell and Anthony Franco, Jr.

To establish a refusal to consider violation of the Act, the GC's *Wright Line* burden is to show that the respondent (1) excluded the applicants from hiring process, and (2) anti-union animus contributed to the decision not to consider the applicants for employment.³⁵ Once this burden is met by the GC, the burden shifts to the employer to demonstrate that it would not have considered the applicants even in the absence of union activity.³⁶ *FES, a Division of Thermo Power*, 331 NLRB 9 (2000), *supplemented*, 333 NLRB 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002).

Similarly, to establish a refusal to hire violation of the Act, the GC must demonstrate that (1) the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct, (2) the applicants had the training or experience relevant to the openings, and (3) anti-union animus contributed to the employer's refusal to hire the applicants.³⁷ *FES*, 331 NLRB at 12. In addition to the foregoing, as part of its *prima facie* case, the GC must also prove that the

³⁵ See Section III(A)(1), *supra* for the analysis demonstrating the absence of any anti-union animus by NY Paving.

³⁶ See Section III(A)(2)(iii) *supra* for the analysis demonstrating NY Paving would have taken the same action(s) in connection with Bedwell and Franco in the absence of any alleged union activity.

³⁷ See Section III(A)(1), *supra* for the analysis demonstrating the absence of any anti-union animus by NY Paving.

applicant was genuinely interested in seeking employment with the employer by demonstrating that (1) there was an application for employment, which can be satisfied through evidence that the individual applied for employment with the employer, and (2) the applicant reflected a genuine interest in becoming employed by the employer. *Toering Electric Co.*, 351 NLRB 225, 233 (2007) (remanding case for further consideration consistent with the new framework). Once these showings have been made, the employer must demonstrate it would not have hired the applicants even in the absence of their union activity or affiliation.³⁸ *FES*, 331 NLRB at 12.

i. NY Paving Did Not Exclude Bedwell and Franco From the Hiring Process

The GC's refusal to consider allegation fails because the evidence demonstrates Bedwell and Franco were not excluded from the hiring process. By his own admission, Franco reported to NY Paving sometime in summer 2017 and had his picture taken in NY Paving's office along with two (2) other Local 175 members (including his brother Salvatore Franco). Both Salvatore Franco and the other Local 175 member, Louis Ruggiero, were issued badges by NY Paving. (Tr. 1001-02, 1023). Franco did not have to complete any additional documents because he had already worked at NY Paving in the past and NY Paving would have any such documents on file.

In addition to taking Franco's picture, Coletti and Miceli's testimony was clear that NY Paving considered Franco and Bedwell for employment. After analyzing their past employment history and Bedwell's current full-time position, NY Paving ultimately decided not to issue them badges. (Tr. 1397-1401). Bedwell and Franco were not excluded from NY Paving's hiring process; rather, after careful consideration, they were denied badges due to legitimate business reasons.

³⁸ See Section II(A)(2)(iii), *supra* for the analysis demonstrating NY Paving would have taken the same action(s) in connection with Bedwell and Franco in the absence of any alleged union activity.

ii. NY Paving Was Not Hiring and Did Not Have Concrete Plans to Hire on October 15, 2017 and November 13, 2017

In an apparent attempt to establish NY Paving's purported animus against Local 175, the GC repeatedly asked questions regarding NY Paving's decision to implement the badging policy and to establish a set number of Local 175 members who would be on the list of approved employees. (Tr. 227-28). Both GC and Local 175 posed numerous questions to NY Paving's witnesses regarding the number of Local 175 members on the list and NY Paving's reasons for limiting the list. Given the foregoing testimony and the GC's theory of the case, she cannot now argue that just for the purpose of establishing the failure to hire claim, NY Paving was in fact hiring Local 175 members in October and November 2017.

In any event, the GC has failed to present an iota of evidence demonstrating NY Paving was hiring employees from October 15, 2017 through November 13, 2017, or that NY Paving had any concrete plans to hire. When questioned by Your Honor, Miceli testified NY Paving did not badge any new Local 175 members between October and November of 2017. (Tr. 1493-94). Further, as of November 2017, NY Paving had absolutely no problem performing its asphalt work with the number of Local 175 employees who had already been badged. (Tr. 1510-11). Therefore, NY Paving did not hire/badge any new employees between October and November 2017, and did not have any plans to do so since it had sufficient number of approved Local 175 members to fully perform its asphalt work.

iii. Anthony Franco, Jr. Did Not Have the Training and Experience Relevant for the Asphalt Worker

Even if NY Paving was hiring asphalt employees, which it was not, Franco would nevertheless not be hired because he did not have the relevant training and experience. The record regarding Franco's experience and qualifications to be an asphalt worker is scarce.

Franco claimed he worked at NY Paving in the Summer of 2014 five (5) days per week, and two (2) to three (3) days per week while he attended Nassau Community College. (Tr. 984-88). The GC did not introduce any payroll records or other documentary evidence to corroborate Franco's testimony. The only other evidence regarding Franco's asphalt work experience was established by NY Paving through his payroll records for 2016 and 2017 (in which period Franco worked remarkably few hours at NY Paving). (Tr. 1396-97; Resp. Ex. 8). Franco could not recall what he did (or did not do) for the remainder of 2015, 2016 and 2017. (Tr. 1012-13, 1020). Given the extremely limited evidence demonstrating Franco's experience and skills (or lack thereof) necessary to perform asphalt work at NY Paving, the GC has failed to meet her burden of proof.

iv. Michael Bedwell Did Not Apply for Employment With NY Paving on November 13, 2017

The GC has also failed to demonstrate Bedwell applied for employment at NY Paving. What Bedwell did do is, after more than seven (7) months of not working even a single hour at NY Paving, unilaterally decided to send himself to NY Paving allegedly because no other Local 175 member from GC Ex. 12 was available to work. (Tr. 499-500; Resp. Ex. 16). Bedwell also testified he sent himself to NY Paving because he believed he could work at NY Paving because his name appeared on GC Ex. 12. (Tr. 499). Bedwell could not have applied for employment at NY Paving given his belief that he was already approved to work.

After working one (1) day in November, Bedwell went to NY Paving and spoke with Coletti because Bedwell and the other Local 175 members had not received their paychecks for working that day. (Tr. 507-08). According to Bedwell, this conversation with Coletti was limited to Bedwell inquiring about the missing paychecks. (Tr. 507-08). Bedwell allegedly spoke with Coletti again on November 13, 2017. Coletti allegedly told Bedwell he was not allowed to work at NY Paving anymore and that Anthony Bartone had fired him (Bedwell). (Tr. 508). Even if

Bedwell's testimony is accurate, which it is not, at no point in November 2017 did Bedwell affirmatively apply for employment at NY Paving. Based on the failure to establish that Bedwell applied for employment at NY Paving on or before November 13, 2017, the failure to hire claim must necessarily fail.

v. Michael Bedwell and Anthony Franco, Jr. Did Not Reflect a Genuine Interest in Becoming Employed by NY Paving

Finally, the GC's claim that NY Paving failed to hire Bedwell and Franco must also be dismissed because there is absolutely no evidence on the record demonstrating either Bedwell or Franco were genuinely interested in becoming employed at NY Paving. In the seven (7) month period when Franco did not work at NY Paving in 2017 (except for 1 day in August), Franco did not even bother to call anyone at NY Paving to see if he could work. (Tr. 1016-20). Even after NY Paving allegedly failed to hire Franco, he did not contact anyone at NY Paving to inquire about potential employment. (Tr. 1016-20, 1506-07).

The facts for Bedwell are similar to Franco. It is undisputed Bedwell did not affirmatively seek employment with NY Paving after April 2017 even though he had many chances to do so, given the fact that he was constantly communicating with the Shop Stewards and even Coletti in his (Bedwell's) capacity as Local 175's Business Manager. Nor did the GC present any evidence that Bedwell was available and willing to work at NY Paving either when he was Local 175's Business Manager or after NY Paving allegedly refused to hire him.

Based on the foregoing, the refusal to consider and refusal to hire claims should be dismissed in their entirety given the GC has woefully failed to satisfy the required elements.

B. PASQUALE LABATE WAS NOT NY PAVING'S SUPERVISOR PURSUANT TO §2(11) OF THE ACT.

The statutory test for the “supervisory status is set forth in Section 2(11) of the Act, which defines “supervisor” as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Thus, as relevant here, the Act dictates that individuals are not supervisors unless (1) they have the authority to engage in at least one (1) of the twelve (12) specified supervisory functions, and (2) their exercise of that authority requires the use of independent judgment. *See, e.g., Kentucky River*, 532 U.S. 706, 713 (2001); and *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The burden of demonstrating supervisory status rests with the party asserting it. *See, e.g., Kentucky River*, 532 U.S. at 710-12; *Oakwood*, 348 NLRB at 687. To meet its burden, the asserting party must establish Section 2(11) status by a preponderance of the evidence. *See, e.g., Oakwood*, 348 NLRB at 694; and *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). It must support its claim with specific examples, based on record evidence; conclusory or generalized testimony does not suffice. *See, e.g., Avista Corp. v. NLRB*, 496 F. App'x 92, 93 (D.C. Cir. 2013); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305, 312 (6th Cir. 2012); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App'x 54, 57 (2d Cir. 2008); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006). Nor can a party satisfy its burden with inconclusive or conflicting evidence. *See, e.g., Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015) (citing *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989)) (“[W]henver the evidence is in conflict or

otherwise inconclusive on a particular indicia of supervisory authority, we will find that supervisory status has not been established.”); *Frenchtown*, 683 F.3d at 315.

Any lack of evidence is construed against the party asserting supervisory status. *See, e.g., Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1048 (2003); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999). Further, paper authority, such as job titles, position descriptions, and statements regarding merely theoretical power cannot establish supervisory status. *See, e.g., NLRB v. S. Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) ([a]n “employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated statutory functions.”), *cert. denied*, 359 U.S. 911 (1959); *Frenchtown*, 683 F.3d at 305 & 310; *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 589 and 596 (7th Cir. 2012); and *Beverly Enterprises-Minnesota, Inc.*, 348 NLRB 727, 731 (2006).

As set forth in detail below, in this case, the GC has failed to carry its heavy burden of demonstrating Labate was a supervisor within the meaning of Section 2(11) of the Act.

1. The General Counsel Failed to Demonstrate That Pasquale Labate Hired, Transferred, Laid Off and/or Recalled Employees in the Interest of NY Paving

The GC has presented absolutely no evidence whatsoever demonstrating Labate had the power to assign work, suspend, promote, discharge, reward, discipline or responsibly direct employees. Accordingly, Labate’s alleged supervisory status cannot hinge on these primary supervisory indicia. Therefore, it appears the GC’s argument regarding Labate’s supervisory status will be based on Labate’s alleged power to hire, transfer, layoff and recall employees at NY Paving. As set forth below, the GC has failed to demonstrate by preponderance of the evidence that Labate indeed (i) possessed the power to hire, transfer, layoff and recall employees at NY Paving, and (ii) even if he did, Labate did so in the interest of NY Paving. (Tr. 1270-71).

During the relevant period, Labate had the dual role of being a working foreman at NY Paving, as well as Local 175's Shop Steward. (Tr. 296-97). It is evident that any alleged power Labate may have had to hire, transfer, layoff and recall employees at NY Paving was solely due to his role as Local 175's Shop Steward. (Tr. 320-25, 340-42, 406-07). It is undisputed that the working foremen at NY Paving, including Labate, Schmaltz and Smith, did not have any of the supervisory powers mandated by Section 2(11) of the Act. (Tr. 188-94, 320-24, 436). Accordingly, Labate's alleged supervisory powers must be analyzed in the context of his role as Local 175's Shop Steward.

The pertinent duties of Local 175 Shop Stewards (including but not limited to Labate, Dadabo, Smith, and Holder) at NY Paving must necessarily be considered within the context of the type of construction work NY Paving performs (*i.e.*, asphalt paving). It need also be noted all Shop Steward duties and powers were established and conveyed by Local 175, not NY Paving. (Tr. 341-42). In fact, NY Paving played absolutely no role in the selection of Local 175's Shop Stewards or designation of their specific duties. (Tr. 1266-67, 1419-20). Based on the evidence in this matter, it appears Local 175's Shop Stewards are tasked by Local 175 to ensure that only Local 175 members are assigned to perform asphalt work at NY Paving, and to coordinate with Local 175 to make sure that Local 175 members assigned to perform various tasks on NY Paving's asphalt crews are indeed qualified and capable of performing those assigned duties. (Tr. 340-44). NY Paving determined the number of asphalt crews, and volume and order of asphalt work on daily basis, and the number of workers in each crew was pre-determined depending on the type of crew. (Tr. 1163-72).

In this regard, the composition of the asphalt crews at NY Paving largely remained the same unless there was a fluctuation in the amount of available asphalt work. (Tr. 306-07). If the

amount of work increased, Local 175 Shop Steward had to obtain additional workers to staff the asphalt crews. (Tr. 320-24, 1129-35). Local 175 Shop Stewards did this by consulting the existing list of Local 175 members approved to work at NY Paving, or alternatively calling Local 175's Business Manager. (Tr. 311-14, 340-42, 348). This was not a permanent hiring decision made by Local 175's Shop Steward on behalf of NY Paving because (1) many of these individuals were already hired and badged by Miceli; (2) even if they were not already hired, NY Paving, through Miceli, had to approve each Local 175 member to work at NY Paving. (Tr. 307, 432-36, 1168).

Similarly, if the available asphalt work at NY Paving decreased, Local 175 Shop Stewards called various Local 175 members to advise them there would be no work for them the next day. (Tr. 307-08). To the extent the work became available in the future, Local 175 Shop Stewards notified the members to come back to work at NY Paving. (Tr. 307-08). Similar to the alleged hiring power, Local 175 Shop Stewards did not have the power to layoff and recall other Local 175 members as contemplated by the Act. (Tr. 307-08, 1168-69). The witnesses testified that based on the nature of the construction industry and specifically the work performed by NY Paving, the available work frequently fluctuated. (Tr. 1169, 312: "[N]obody works every day."). Certain Local 175 members may not work one day and they may be called back the following day. (Tr. 1035). In other words, Local 175 Shop Stewards' role of informing Local 175 members there may not be work for them for a short period of time is not a power to layoff because it is common knowledge in the industry that the work may become available again very soon. (Tr. 1169). It also follows that when the work became available again, Local 175 Shop Steward calling Local 175 members to return to work was not a power to recall from layoff.

Finally, there was also testimony regarding Local 175 Shop Steward's ability to "transfer" employees. Any such purported ability to transfer was strictly limited to switching Local 175 members between various asphalt crews. (Tr. 296-303, 396, 434, 643-45, 817, 919-20, 1175). Further, there was no evidence presented demonstrating whether any such transfers were permanent or temporary. Accordingly, the GC failed to demonstrate, by preponderance of evidence, that Local 175 Shop Stewards, including Labate, possessed the power to transfer employees as contemplated by the Act.

It cannot be genuinely argued that NY Paving delegated the authority to make ultimate decisions to hire, layoff, recall and/or transfer asphalt workers to the Local 175's Shop Stewards. If Your Honor determines that Labate, in his role as Local 175's Shop Steward, was a supervisor under Section 2(11) of the Act, you will effectively rule that any Local 175 Shop Steward working at NY Paving must also necessarily be a supervisor. There was absolutely no evidence whatsoever that Labate possessed any of the alleged supervisory indicia outside of his role as Local 175's Shop Steward. Conversely, there was ample evidence demonstrating the roles of the various Local 175 Shop Stewards at NY Paving have not changed over the years; indeed, Dadabo (who was the Local 175 Shop Steward before Labate), Smith and Terry Holder (both of whom were Local 175 Shop Stewards after Labate) performed the same functions as Labate did when he was the Shop Steward. (Tr. 1177-78). It follows that if Labate was a supervisor, because the roles of the Local 175 Shop Stewards at NY Paving did not change, all Local 175 Shop Stewards at NY Paving must also be supervisors. This finding would be absurd given the fact that Local 175 Shop Stewards are members of Local 175, are covered by the Local 175 Agreement, receive wages and benefits determined by said Agreement, and are voting members of the Asphalt Unit. (Tr. 187-88, 311). Even though these are the secondary indicia of

supervisory authority, they nevertheless must be considered in making the determination of supervisory status or lack thereof.

Finally, the equitable considerations dictate Local 175 should not be permitted to confer specific duties and responsibilities on its Shop Stewards with regard to the staffing of the asphalt crews at NY Paving and later (when it suits its case) to argue that those same duties and responsibilities effectively made those Shop Stewards into statutory supervisors acting on behalf of NY Paving.

2. The General Counsel Failed to Show That Pasquale Labate Hired, Transferred, Laid Off and/or Recalled Using Independent Judgment

Even if Labate possessed the power to hire, transfer, layoff and/or recall the asphalt employees within the meaning of Section 2(11) of the Act, which he did not, Labate nevertheless was not a statutory supervisor because he did not possess the requisite independent judgment when making the foregoing decisions. To exercise independent judgment, an individual must “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 692-93; *accord Diversified Enter., Inc.*, 355 NLRB 492 (2010), *incorporating by reference*, 353 NLRB 1174, 1180 (2009), *enforced*, 438 F. App'x 244 (4th Cir. 2011). Further, “[j]udgment is not independent under the Act if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood*, 348 NLRB at 693; *see also Kentucky River*, 532 U.S. at 713-14 (“[T]he degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.”). Further,

Consistent with the Court's view, we find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement. Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory.

Oakwood, 348 NLRB at 693. Judgment must also involve a degree of discretion that rises above the “routine or clerical.” *Id.* at 693 & n.42; *see also Kentucky River*, 532 U.S. at 713-14 (“Many nominally supervisory functions may be performed without the exercis[e of] such a degree of... judgment or discretion... as would warrant a finding of supervisory status under the Act.”).

Here, the GC failed to show Labate exercised independent judgment in the performance of any of his putatively supervisory duties. Rather, the evidence demonstrates Labate simply performed the routine functions of a Shop Steward based on long established practices and as set forth in the Local 175 Agreement, made decisions based on his work experience and based on self-evident skills, none of which involved the exercise of independent judgment.

The exercise of routine duties and decision-making power is insufficient to demonstrate the requisite exercise of independent judgment. *See, e.g., Shaw, Inc.*, 350 NLRB 354, 355 (2007) (the construction foremen were merely jobsite lead persons who oversaw routine functions and followed established prescribed practices), *Automated Waste Disposal*, 288 NLRB 914, 920-21 (1988) (the union shop steward’s duties were strictly routine and he served as a conduit for management instruction, and therefore did not exercise independent judgment); *North Jersey Newspapers Co.*, 322 NLRB 394, 395 (1996) (reassignment and rotation of employees between various assignments and locations was merely routine decision-making authority typical of a non-supervisory leadman).

No independent judgment is exercised were the alleged supervisory actions were based solely on experience and knowledge of the craft skills necessary to perform one's duties. *See, e.g., Shaw, Inc.*, 350 NLRB at 355 (no independent judgment exercised where the construction foremen's designation as to which crew member would perform a particular task was based in the employee's trade or known skill and was essentially evident); *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995) (“[T]he selection of the employee best capable of managing ink densities or the separating of two talkative employees, indicate no more than the press supervisors need only exercise routine judgment based on experience and ordinary craft skills.”).

Here, Labate testified his decisions in his role as Local 175's Shop Steward regarding which employee to call in to work and which employee to send back to the hiring hall was largely determined by the employee skills, which Labate observed throughout his thirty (30) years of working in the field with the asphalt workers. (Tr. 312, 323, 340, 344). Labate also testified that an employee's seniority also played a role in his decisions. (Tr. 327-28, 343). Based on Labate's testimony, it cannot be concluded that he exercised independent judgment in the performance of his putatively supervisory duties. Rather, Labate's decisions were routine in that all Local 175 Shop Stewards made similar decisions. Further, Labate's assessment of a particular employee's skill or ability did not involve exercise of independent judgment; rather, Labate exercised routine judgment to determine a particular employee's skills through his observation of the employee's work. (Tr. 312, 340). His decisions were also based on an employee's seniority, which does not involve the exercise of independent judgment. Labate's decision-making authority was also significantly circumscribed by Local 175 in that frequently, it was Local 175 that decided which member to send after Labate requested additional workers. (Tr. 340-42). Finally, NY Paving similarly circumscribed Labate's independent judgment

through pre-determined crew numbers, volume of work, and a list of Local 175 employees eligible to work. (Tr. 189-91, 348, 1163-72).

Based on the foregoing, the GC has failed to prove with preponderance of evidence that Labate was a supervisor pursuant to Section 2(11) of the Act, and therefore, said Complaint allegations must be dismissed in its entirety.

C. STEVEN SBARRA, JOSEPH BARTONE, JR. AND PASQUALE LABATE ARE NOT NY PAVING'S AGENTS PURSUANT TO §2(13) OF THE ACT.

The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. *See, e.g., Pan-Oston Co.*, 336 NLRB 305, 305-06 (2001). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994). Accordingly, "[t]o create apparent authority, the principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief." *See Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); Restatement 2d Agency § 27 & cmt. a. The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *See, e.g., Pan-Oston Co., supra*, citing *Waterbed World*, 286 NLRB 425, 426-27 (1987), *enfd.* 974 F.2d 1329 (1st Cir. 1992).

1. Steven Sbarra

The evidence on record pertaining to Steven Sbarra ("Sbarra") is scarce. As an initial matter, the GC has failed to establish that "Steve" who fired Shomari Patrick on October 20, 2017 was in fact Sbarra mentioned in paragraphs 11 and 16 of the Complaint. Neither Shomari

Patrick nor Glenn Patrick – the only two (2) individuals who testified regarding the alleged statements made to Shomari Patrick in connection with his termination – were able to recall “Steve’s” last name.³⁹ Because the GC has not presented sufficient evidence to establish “Steve” who fired Shomari Patrick is the same person as Sbarra mentioned in the Complaint, the foregoing Complaint allegations should be dismissed.

Assuming “Steve” was the same person as Sbarra, the allegation that Sbarra was NY Paving’s agent pursuant to Section 2(13) of the Act must nevertheless be dismissed because the GC has not satisfied her burden of proving the agency relationship between Sbarra and NY Paving. Indeed, the only evidence on record presented by the GC pertaining to Sbarra is derived from Shomari Patrick and Glenn Patrick’s testimonies. Shomari Patrick testified Steve assigned him work while working at Di-Jo by handing out the sheets containing the sites Shomari Patrick had to work on each day. (Tr. 567). Further, Shomari Patrick allegedly saw “Steve” send someone home. (Tr. 569). Finally, Shomari Patrick stated on October 20, 2017, “Steve” allegedly told him that he (Shomari Patrick) was being terminated because of his last name and because of his family, and that the “boss told him to fire.” (Tr. 570, 573). The only testimony from Glenn Patrick on this subject was that “Steve,” Local 1010’s Shop Steward told Glenn Patrick he (“Steve”) had nothing to do with Shomari Patrick getting fired. (Tr. 660). No other testimony or evidence was presented by the GC on this issue.

As set forth in Section III(A)(2)(ii) *supra*, Shomari Patrick’s testimony suffered from significant credibility issues; his statements were clearly self-serving, contradictory and uncorroborated. It is telling that the one person who could have corroborated Shomari Patrick’s

³⁹ Shomari Patrick testified he did not know “Steve’s” last name. (Tr. 563). When asked if Steve’s last name was “Sabero,” Shomari Patrick responded, “Probably. I’m not too sure.” (Tr. 589). Glenn Patrick similarly stated, “I don’t know his – I can’t remember his last name. He’s a shop steward for 1010.” (Tr. 653).

testimony, “Anthony,” did not testify at the hearing. Further, it is undisputed that Shomari Patrick lied under oath when he testified about speaking with Miceli at NY Paving in mid-March 2018 regarding his badge. (Tr. 1413-15; Resp. Ex. 17). Therefore, it is conceivable that Shomari Patrick also misrepresented what “Steve” allegedly told him.

In applying the agency principles, the GC, who bears the burden of proof, has failed to establish that NY Paving has taken any actions from which Shomari Patrick or NY Paving employees could reasonably conclude that Sbarra was acting on behalf of NY Paving when he allegedly terminated Shomari Patrick’s employment. While Shomari Patrick testified regarding what “Steve” told him on October 20, 2017 and that prior to that conversation, “Steve” came from the “office,” there is absolutely no evidence from which it can be determined whether any of the actions alleged to be unlawful were within the scope of or related to “Steve’s” duties as a foreman or as Local 1010’s Shop Steward. Additionally, there is no evidence that NY Paving communicated to employees and/or Shomari Patrick that Sbarra was acting on NY Paving’s behalf on October 20, 2017 when he allegedly made the purported unlawful statement.

Accordingly, the GC has failed to present sufficient credible evidence to support the finding of apparent authority and Sbarra’s agency status. Therefore, the allegation that Sbarra was NY Paving’s agent and the concomitant §8(a)(1) allegation in the Complaint must be dismissed.

2. Joseph Bartone, Jr.

In alleging that Joseph Bartone, Jr. (“Bartone”) was NY Paving’s agent pursuant to Section 2(13) of the Act in mid-to-late April 2017, the GC relies on testimonies of several Local 175 member witnesses who purport that Bartone, who is related to the current owners of NY

Paving made several statements⁴⁰ which demonstrate NY Paving rendered the alleged unlawful assistance and support to Local 1010. Specifically, the GC relies on three (3) separate alleged incidents. First, in March or April 2017, while doing a large paving job in Queens, Bartone gathered approximately a dozen Local 175 members, handed out Local 1010 cards and stated something to the effect of this was the direction NY Paving was going in and he (Bartone) did not want to do this. (Tr. 350-52, 645-50). Second, Bartone allegedly told Smith that he had Local 1010 cards and he (Bartone) was not going to do it unless his uncle told him to.” (Tr. 412-16). Third, it is alleged that sometime in 2017, Bartone told Mascetti when NY Paving switched to Local 1010, there would be no position for him. (Tr. 1057, 1084-85).

Bartone distributed Local 1010 cards to his fellow Local 175 members, which does not violate the Act since Bartone, just like any other individual, was free to choose which labor organization represented him. (Tr. 1214-15). Apparently, Bartone, who at the time was and still is a Local 175 member, was unhappy with Local 175. He believed by choosing Local 1010 instead of Local 175, he would be able to have a longer and more stable career in the industry. (Tr. 1215, 1244). By distributing Local 1010 cards, he was acting solely in his own interest, rather than following NY Paving’s alleged directives.⁴¹ (Tr. 1214-15, 1216). Bartone did not say

⁴⁰ As set forth in Section III(A)(2)(i), *supra* and Section III(D)(3), *infra*, Patrick and Mascetti were not credible witnesses and their testimonies in this regard should not be given any credence by Your Honor. Similarly, Bartilucci’s credibility is questionable given the fact that he did not mention Bartone distributing Local 1010 cards in his May 3, 2017 affidavit provided to the Region (IP Ex. 1) while mentioning it in the subsequent July 5, 2017 Affidavit (GC Ex. 11) given that his first Affidavit was given closer in time to the events that allegedly transpired with Bartone in April 2017. (Tr. 380-93; IP Ex. 1).

⁴¹ When testifying regarding the text message sent to Salvatore Franco on May 17, 2017 (GC Ex. 22), Bartone credibly testified that he did not really know what NY Paving wanted to do and his statement in the text message was therefore not truthful. (Tr. 1216). It is respectfully submitted this should not affect Bartone’s credibility because while he misrepresented to Salvatore Franco, Bartone truthfully admitted his misrepresentation. Further, it is not impossible that while texting with Salvatore Franco, whose father is involved with Local 175, Bartone misrepresented the statement so that he would not appear like a “complete bad guy.” (Tr. 1216-1217). Finally, Bartone’s untruthful statement was made in a text message to his co-worker and acquaintance, not during his testimony and while under oath. (Tr. 1217).

to the Local 175 members when he handed out Local 1010 cards that he was doing what the office wanted him to do. (Tr. 1218, 1239).

NY Paving, through its General Counsel Coletti denied having any involvement in Bartone allegedly soliciting cards for Local 1010. (Tr. 1262, 1300-02). Coletti also denied that Bartone's solicitation of Local 1010 cards was done through the course and conduct of his work for NY Paving, *i.e.*, Bartone was not acting as NY Paving's agent. (Tr. 1262, 1300-02).

In determining whether Bartone's solicitation of cards for Local 1010 was done in the course of Bartone acting as NY Paving's agent, Your Honor should consider *Sonicraft, Inc.*, 295 NLRB 766 (1989) which involved a remarkably similar set of facts. In *Sonicraft*, the company president's son, who was a regular rank-and-file employee, made certain statements to the employees. 295 NLRB, at 774-75. Like here, the president's son in *Sonicraft* was merely a clerical employee and the GC failed to present any evidence demonstrating that the son's statements:

reflect information to which he was privy during the normal course of his employment. Furthermore, there is no independent evidence that he was a party to, or informed of the nature of, the deliberations prior to the layoff, dealing with the union campaign or the layoff itself. Nor is there any indication that at any point Jerome Jones was taken into management's confidence.

Id., at 775. Based on the foregoing, the Court declined to find agency status because without more, merely the familial relationship was insufficient to impute the son's statements to the respondent company. *Id.*; see also *Leather Center, Inc.*, 308 NLRB 16, 28 (1992) (finding solely evidence of familial relationship of a rank-and-file employee with the respondent's principal was

As for GC Ex. 22 itself, Your Honor should not give much weight to it since it is not the complete conversation between Bartone and Salvatore Franco. (Tr. 1110-11). Furthermore, the text message was sent on May 17, 2017, which is after the time when Bartone distributed Local 1010 cards allegedly as NY Paving's agent. (Tr. 1107). Finally, Bartone testified he did not speak with anyone, including any Local 175 member, about the text message he sent to Salvatore Franco (GC Ex. 22), including the fact that his statement therein was untruthful. (Tr. 1240-1241). In conclusion, Bartone's testimony was credible, and in any event, GC Ex. 22 does not prove Bartone's agency status.

insufficient to establish that by the alleged remarks, the employee was “reflecting company policy and speaking for management.”).

Similar to *Sonicraft, Inc.* and *Leather Center, Inc.*, in this case, the only evidence allegedly demonstrating Bartone’s agency status is related to his familial relationship with the owners of NY Paving. The GC has absolutely no evidence whatsoever demonstrating Bartone held any management position at NY Paving or was privy to any NY Paving discussions regarding NY Paving’s labor relations. (Tr. 1210-13). Rather, the evidence presented by NY Paving demonstrates that during the relevant period, Bartone was nothing more than a rank-and-file employee of NY Paving. (Tr. 1210-11). Bartone was a regular laborer working on NY Paving’s asphalt crews alongside other Local 175 members, using the same tools and wearing the same clothes. (Tr. 1210-11). Further, Bartone was also a member of Local 175 and his terms and conditions of employment were governed by the Local 175 Agreement, similar to the other Local 175 members working at NY Paving. (Tr. 1210). At no point did Bartone ever state he was acting on behalf of NY Paving, or that he participated in any NY Paving management meetings or its decision-making process. In fact, the GC’s own witness, Bartilucci testified that Bartone had never stated to him that he (Bartone) was acting on behalf of NY Paving because his last name was Bartone. (Tr. 368-71). Similarly, another Local 175 member, Dadabo also testified that he never witnessed Bartone pass a message from the office to any Local 175 foreman. (Tr. 1149-50). In conclusion and based on the witness (both NY Paving and GC witnesses) testimony, other than Bartone’s last name, there were no acts or statements by Bartone or NY Paving that would lead a reasonable person to conclude Bartone was acting on NY Paving’s behalf in April 2017 when he distributed the Local 1010 cards. (Tr. 368-70, 437-39, 818-20, 920-21, 1122-23, 1176-77, 1210-11).

The GC has similarly failed to present any evidence demonstrating Bartone received any perks or favors from NY Paving because of his familial relationship with NY Paving's owners. Bartone lived in an apartment with two (2) roommates and did not have a car. (Tr.1212-14). Further, after his father passed away, neither him nor his mother or siblings had any actual ownership interest in NY Paving. (Tr. 1212-13). The fact that Bartone received compensation for days he did not work is not probative of his alleged agency status because only two (2) people at NY Paving were aware of this arrangement: Miceli and the Payroll Manager. (Tr. 1416-19). Bartone himself was not even aware of this arrangement. (Tr. 1218-20; IP Ex. 3 & 4). In any event, this is not probative of Bartone's agency status given the fact that no Local 175 member knew about it. (Tr. 1416-19). Further, Local 175 members did not learn that Bartone received compensation for the day he did not work until November 2017, which is six (6) months after Bartone allegedly acted as NY Paving's agent in distributing Local 1010 cards.⁴² (Tr. 922-27, 933).

The only evidence on record presented by the GC, which allegedly demonstrates Bartone's agency status is the fact that Bartone is related to NY Paving's owners, and that he lived, for a short period of time, with his aunt, Diane Bartone-Saro who is married to Local 1010's president. (Tr. 1211, 1223-25, 1235-36, 1238, 1241-43). The GC has failed to establish any other evidence indicating in April 2017 Bartone acted as NY Paving's agent in soliciting cards for Local 1010. There was no relevant evidence presented that rather being a regular rank-and-file employee, Bartone received any special perks from NY Paving or that he was privy to NY Paving's labor relations strategy. Therefore, as set forth in *Sonicraft, Inc.* and *Leather*

⁴² Similarly, the fact that NY Paving secured an attorney for Bartone is not probative of his alleged agency status because there is no evidence that this fact was known to the Local 175 members who were allegedly solicited by Bartone thereby forming a reasonable belief that Bartone was acting as NY Paving's agent. In any event, it is outside the period when Bartone allegedly acted as NY Paving's agent.

Center, Inc., Bartone's familial relationship with NY Paving's owners, without more, is insufficient to establish the agency relationship contemplated by Section 2(13) of the Act.⁴³ Because the GC has failed to meet her burden of proof, the foregoing allegation must be dismissed in its entirety.

3. Pasquale Labate

In alleging that Labate was NY Paving's agent pursuant to Section 2(13) of the Act in April 2017, the GC relies on the statements of several Local 175 members, who allege that Labate told them unless they signed Local 1010 cards, they may not have jobs at NY Paving, and that this is what the "office" wants them to do, or words of similar effect. (Tr. 353, 361, 417-18, 651, 756-59, 854-57, 1057-58). The burden is on the GC to establish that at the time Labate made these alleged statements, he (Labate) had actual or apparent authority to act for NY Paving. In this regard, the GC had failed to present sufficient evidence demonstrating under the circumstances, the Local 175 members reasonably believed that Labate was acting for NY Paving.

It is undisputed in April 2017 Labate had the dual role of a working foreman at NY Paving, as well as Local 175's Shop Steward. (Tr. 296-97). As the working foreman, Labate had the same duties as any other Local 175 foreman, including Schmaltz and Smith. (Tr. 432-33, 939). To the extent Labate had any authority in addition to his duties as the working foreman, any such duties were strictly related to his role as Local 175's Shop Steward and were conferred to Labate by Local 175 rather than NY Paving. (Tr. 341-42). In this regard, Labate did not have

⁴³ In the Section 10(k) hearing, Local 175 made a similar argument based on the alleged familial relationship between NY Paving's owners and Local 1010. Specifically, Local 175 argued that Local 1010's threat, which formed the basis for the Section 10(k) hearing, was not a genuine threat because Diane Bartone Sarro, whose brother is Anthony Bartone and one of the owners of NY Paving, was married to Local 1010's president, Joe Sarro. The Board rejected Local 175's argument finding that without more, mere familial relationship was not probative. (Joint Ex. 8, page 2, footnote 5).

any duties and/or responsibilities conferred to him by NY Paving that would lead a reasonable employee to conclude that Labate had apparent authority to speak or act on behalf of NY Paving.

To the contrary, the same Local 175 members who testified regarding Labate's alleged statements in April 2017, also practically unanimously stated that Labate was another rank-and-file unit employee who worked alongside the rest of the crew in the field on hot asphalt, wearing the same clothes and receiving the same pay and benefits as the other crew members. (Tr. 187-94, 432-35, 720-21, 816-18, 918-20, 1120-21, 1175-76). Further, they had never witnessed Labate issue any policies or memoranda on behalf of NY Paving. (Tr. 187-94, 432-35, 720-21, 816-18, 918-20, 1120-21, 1175-76). Bartilucci, in fact stated in his Affidavit provided to the Region that Labate worked the same hours and performed the same duties. (Tr. 365-368). There is not even an iota of evidence on the record demonstrating that the Local 175 members working at NY Paving viewed Labate as anything other than a working foreman and Local 175's Shop Steward.

Under the circumstances, it would be unreasonable for the Local 175 members to think that Labate was acting on behalf of NY Paving or that he had apparent authority to convey NY Paving's policies to them. *See Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 2 (2007) (finding the working construction foremen who performed routine clerical tasks were not agents of the employer); *compare SAILA Motor Freight*, 334 NLRB 979 (2001) (foreman was vested with apparent authority where he assigned and directed the employees' work, had authority to grant time off, took corrective disciplinary action, designated lunchbreak times, corrected time and attendance records, conducted employee meetings at which he discussed work-related matters, attended supervisory and management meetings, and terminal manager

told employees that foreman was in control of the dock workers and that if the employees had any job-related problems they should take them up with foreman).

Further, there is no evidence that NY Paving held Labate out to the employees as its agent. Coletti stated NY Paving never designated the Shop Stewards as its agents, and they did not perform any duties that would cloak them in any apparent agency authority. (Tr. 1268-71). Coletti also denied ever instructing Labate to solicit Local 1010 cards. (Tr. 1262). The testimony regarding Labate's perceived apparent authority was extremely limited. For example, Bartilucci stated when Labate "came from the office," he allegedly informed the employees regarding the changes in crews and/or assignments for the day. (Tr. 360). There was also testimony Labate sometimes told the employees the "office" wanted them to wear hard hats, use more cones, and keep the signs out. (Tr. 883-84). However, the same witness also stated over the years, this happened maybe a "handful of times" and in any event, he did not recall. (Tr. 884). Therefore, any testimony regarding Labate conveying messages from the "office" to the Local 175 members was scarce and concerned Labate's routine clerical tasks as a working foreman and/or the Shop Steward. (Tr. 883-84). The GC failed to present evidence sufficient to demonstrate Labate frequently engaged in communicating messages from NY Paving to Local 175 members, which could lead a reasonable employee to conclude that in April 2017, when Labate allegedly "came from the office," he was acting as a conduit between the employees and NY Paving. *See In re Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 802 (2003).

Finally, the GC failed to establish NY Paving took any actions from which unit employees could reasonably conclude Labate was acting on NY Paving's behalf when he made the alleged statements in April 2017. (Tr. 187-94, 1175-76). There is also no evidence indicating NY Paving communicated to the employees that Labate was acting on NY Paving's behalf. (Tr.

1262, 1268-71). NY Paving did not place Labate in such a position that it would have been reasonable for the Local 175 members to conclude that Labate was NY Paving's agent. Therefore, based on the available evidence, it cannot be concluded that during the relevant period Labate acted as NY Paving's agent pursuant to Section 2(13) of the Act.

In conclusion, because the GC did not meet her burden in demonstrating that Sbarra, Bartone and Labate were NY Paving's agents, these Complaint allegations in connection with the foregoing individuals must be dismissed in their entirety.

D. NY PAVING DID NOT INTERFERE WITH, RESTRAIN, AND/OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS IN VIOLATION OF §8(A)(1) OF THE ACT.

The Complaint alleges NY Paving violated §8(a)(1) of the Act on the following occasions: (1) on or about April 27, 2017, through Labate, threatened Asphalt Unit employees represented by Local 175 with discharge if they did not sign Local 1010 membership cards; (2) on or about October 15, 2017, by Labate, threatened employees with unspecified reprisals for participating in the Board proceedings; (3) on or about October 16, 2017, through Zarmeski, told employees they could not work for NY Paving because they filed charges with the Board; (4) on or about October 20, 2017, by Sbarra, told employees they could not work for NY Paving because of their support for and affiliation with Local 175; and (5) on or about December 13, 2017, by Coletti, threatened employees NY Paving would not hire them because of their support for and affiliation with Local 175. The GC has failed to establish any of these alleged violations.

1. NY Paving Did Not Violate §8(a)(1) of the Act on April 27, 2017.

As set forth in Sections III(B) and (C)(3), *supra*, the GC has failed to establish that Labate was NY Paving's supervisor and/or an agent within the meaning of §§2(11) and (13) of the Act and therefore, any statements and/or actions of Labate are not attributable to NY Paving.

Second, even if Labate's alleged statements on or about April 27, 2017 can be attributed to NY Paving, Labate's statement(s) were not threats and therefore did not violate §8(a)(1) of the Act.

Several GC witnesses testified regarding certain alleged statements made by Labate to the various Local 175 members in or around April 2017 regarding signing Local 1010 cards and the potential consequences of doing same. (Tr. 353, 361, 417-18, 651, 854-55, 1057-58). While Labate admitted he may have had discussions with the Local 175 members regarding Local 1010's petition and organizing drive, he vehemently denied ever threatening any employee and/or saying that unless the Local 175 members signed Local 1010 cards, they would not be working at NY Paving any more. (Tr. 317-19, 1119-21, 1321-24, 1326-27, 1331-33, 1336-39). Given the significant credibility issues of the GC's witnesses as discussed throughout this brief, including Bartilucci, Patrick, Schmaltz and Mascetti, Your Honor should not credit their testimony regarding Labate's alleged statements in April 2017.

Even if Labate had conversations with his fellow Local 175 members regarding Local 1010's organizing campaign, those conversations did not involve any threats whatsoever. (Tr. 317-19, 1326-27, 1331-33, 1339-40). Bartilucci even stated that he did not say that Labate threatened him: "It wasn't like [Labate] was personally trying to threaten us." (Tr. 382-83). Mascetti also stated he considered himself Labate's friend and Labate spoke to him like a friend. (Tr. 1086). It is clear Labate was merely expressing his personal opinions regarding Local 1010's organizing drive, which was not a threat and was not attributable to NY Paving. *See Reliable Disposal, Inc.*, 348 NLRB 1205, 1207 (2006); *Poly-America, Inc.*, 328 NLRB 667, 669 (1999).

Because the GC has failed to establish Labate was a supervisor or agent of NY Paving or that he threatened any Local 175 member on April 27, 2017, no actionable §8(a)(1) violation has occurred.

2. NY Paving Did Not Violate §8(a)(1) of the Act on October 15, 2017.

As set forth in Sections III(B) and (C)(3), *supra*, the GC has failed to establish that Labate was NY Paving's supervisor and/or an agent within the meaning of §§2(11) and (13) of the Act and therefore, any statements and/or actions of Labate are not attributable to NY Paving. Second, even if Labate's alleged statement on or about October 15, 2017 can be attributed to NY Paving, Labate's statement(s) were not threats and therefore did not violate §8(a)(1) of the Act.

The only evidence presented by the GC regarding Labate's purported "threat" on or about October 15, 2017, was through Glenn Patrick's testimony. Patrick's testimony in this regard was convoluted and confusing in that Patrick did not remember the dates when his alleged conversations with Labate took place. (Tr. 665-74, 717-32). What can be gleaned from Patrick's testimony is that he allegedly had two (2) conversations with Labate. In the first conversation, Labate purportedly told Patrick he (Labate) was called into a meeting by NY Paving where he was asked questions about his timesheet. (Tr. 664-65). The second conversation allegedly concerned Bartone being in an accident:

A: Okay. So I -- he said -- so I said to him, "Patty, so what -- well, what was the problem?" He said, "Well, there was an accident in the yard. They didn't stop. They kept going." Then I said, "So why -- if it was me, why was it such a big problem? I never had an accident before, so why would they want to question me about it? You know, an accident is an accident." So I said, "Now that it's Joe, Jr., is everything fine now? Nobody cares about it no more?" And he said, "I guess so."

Q: Did Mr. Labate offer any possible reason why they were concerned it was you?

A: He just like -- he think (sic) they after me. That's all he said. Why I -- you know, I testified, not against New York Paving, against 1010 trying to take all work .

...

Q: So Patty Labate told you he thought that they were going after you, because of your testimony?

A: Yes.

Q: How did -- do you remember the exact words, what he said to you at that time?

A: Well, he didn't say -- he said because I went to the labor board. And --

Q: And that was following -- what had you said that led up to that?

A: Why would they be after me.

(Tr. 668-69). Patrick's foregoing testimony (which was somewhat leading in nature) was not corroborated by any other witness. Labate denied both threatening anyone and even having the foregoing conversation with Patrick. (Tr. 319, 1321). Labate did testify that he was asked by Miceli and Zaremski regarding his time sheet and why he did not have Patrick on the time sheet at issue. (Tr. 1335-36). This testimony was corroborated by Miceli. (1379-80). Labate also admitted that he told Patrick about the fact that NY Paving had inquired about his (Labate's) timesheet and Patrick's time. (Tr. 1335-36).

Given Patrick's uncorroborated and clearly self-serving testimony and his demonstrated credibility issues, it is respectfully submitted Your Honor should not credit Patrick's testimony regarding Labate's alleged statement that NY Paving was "after" Patrick because of his Section 10(k) hearing testimony. In this regard, we briefly note it is telling that Patrick was able to recall the specific words Labate allegedly said to him sometime in October 2017 when Patrick's recollection of the events of October 2, 2017 were not so clear. (Tr. 685-702). For example, Patrick testified he left the Section 10(k) hearing on October 2, 2017 at 9:00 a.m. even though the record is clear the hearing did not commence until 9:40 a.m. on October 2nd. (Tr. 661-62; Resp. Ex. 6). Further, Patrick initially testified he arrived at the jobsite in Brooklyn at 10:00 a.m. (*i.e.*, it took him 1 hour to drive there directly from the Section 10(k) hearing). (Tr. 663). However, on cross examination, Patrick changed his testimony to state it took him 45 minutes to get to the jobsite and he did not arrive there until 10:30 a.m. (Tr. 694, 699). Patrick's credibility

is also suspect because in his December 11, 2017 Affidavit provided to the Region, Patrick stated prior to reporting to the job site on October 2nd, he first went home to change – this fact was omitted from his direct examination and when cross examined about it, Patrick denied going home and incredibly stated that portion of the Affidavit was a lie. (Tr. 687-90).

Finally, the GC has failed to establish a violation of §8(a)(1) because neither of the alleged two (2) conversations between Labate and Patrick involved any threats whatsoever. In the first conversation, Labate merely conveyed to Patrick that he was asked by NY Paving regarding his timesheet and why Patrick was not mentioned on same. (Tr. 1335-36). The record is clear – no threats were involved in this first conversation.

The second alleged conversation, even if it occurred, similarly did not involve any threats whatsoever. According to Patrick, Labate allegedly said, “they were after” Patrick. It appears in response Patrick asked why they would be after him, to which Labate purportedly responded, “because [you] went to the labor board.” (Tr. 668-69). In this particular alleged conversation, Labate did not threaten Patrick; rather, even if the conversation occurred, it is clear Labate was merely expressing his personal opinion, which was not a threat and was not attributable to NY Paving. *See Reliable Disposal*, 348 NLRB at 1207; *Poly-America*, 328 NLRB at 669.

As the GC has failed to prove Labate was NY Paving’s supervisor or agent or that he threatened Patrick on October 15, 2017, no actionable §8(a)(1) violation has occurred.

3. NY Paving Did Not Violate §8(a)(1) of the Act on October 16, 2017.

The GC alleges NY Paving violated §8(a)(1) on October 16, 2017 based on the following testimony of Mascetti:

Q: And which supervisor were you supposed to speak to?

A: I spoke to Robert Zaremski first.

Q: Okay. So you went the next day?

A: Yeah, I went the next day and I asked him what was going on. And he told me I wasn't able to work there anymore, because I had filed a grievance with the NLRB.

Q: Had you, in fact, filed a grievance with the NLRB?

A: No.

(Tr. 1038). When Zaremski was questioned regarding this alleged incident with Mascetti, he affirmatively denied making any statements to Mascetti during the relevant period regarding Mascetti filing an unfair labor practice charge, a complaint, or a grievance. (Tr. 1173-74, 1197, 1206-07). In fact, Zaremski did not even know what an "unfair labor practice charge" was. (Tr. 1173).

Because Mascetti's statements regarding the alleged threats are fabrications, there is no way to definitively prove or disprove they actually occurred, except through a finding of credibility. With regard to Mascetti's credibility, all one can do point out the following: (1) even though apparently there were individuals in the "earshot" of Mascetti's conversation with Zaremski, Mascetti conveniently did not "take note" who was around. (Tr. 1039). Obviously, if Mascetti had identified any specific persons, those individuals may have been called as witnesses to corroborate Mascetti's testimony; (2) while Schmaltz corroborated Mascetti's conversation with Coletti. (Tr. 880-81), there was absolutely no evidence presented by the GC to corroborate the other portions of Mascetti's testimony, including his alleged conversation with Zaremski; and (3) Mascetti's entire testimony is suspect given the fact that he testified about the Local 175 Executive Board meeting. (Tr. 1047-48) (which according to Mascetti was related to NY Paving's alleged reasons for not recalling Mascetti from layoff) while the four (4) members of the same Executive Board did not even mention this alleged meeting in their testimonies. Unlike

Mascetti, Zaremski's testimony was forthright and credible⁴⁴ and consistent with the testimony of both Coletti and Miceli.

Credibility issues aside, Zaremski's alleged statement simply makes no sense because (1) Zaremski did not even know what "unfair labor practice charge" was. (Tr. 1173); (2) Zaremski was not involved in the determination of who at NY Paving received a badge and/or which Local 175 member was assigned to work. (Tr. 1185); and (3) it is undisputed no unfair labor practice charge filed by Mascetti exists at the Board. (Tr. 1038, 1072, 1263-65, 1405-06). The only explanation, most charitably, is that Mascetti misrepresented what actually transpired between him and Zaremski as part of Local 175's larger scheme to concoct fictitious allegations against NY Paving aimed at re-asserting control over NY Paving's asphalt operations.

4. NY Paving Did Not Violate §8(a)(1) of the Act on October 20, 2017.

The only evidence on record pertaining to the Complaint allegation that NY Paving violated §8(a)(1) of the Act on October 20, 2017 is Shomari Patrick's and Glenn Patrick's testimony. Shomari Patrick stated in October 2017, "Steve" allegedly told him that he (Shomari Patrick) was being terminated because of his last name and because of his family. (Tr. 570, 573). The only testimony from Glenn Patrick on this subject was that "Steve," allegedly Local 1010's Shop Steward told Glenn Patrick he ("Steve") had nothing to do with Shomari Patrick getting fired. (Tr. 660). No other testimony or evidence was presented by the GC pertaining to the allegation of §8(a)(1) allegation.

⁴⁴ To the extent the GC attempts to challenge Zaremski's credibility based on his recollection of the hours worked by Mascetti, any such argument should be rejected by Your Honor. It is not unusual for Zaremski to not have remembered exactly when Mascetti worked at NY Paving in the past and how frequently he may have worked given the large number of employees who fall within Zaremski's purview. "We have about 400 employees ... it is hard to keep track of every single one." (Tr. 1190).

As set forth in Section III(C)(1) *supra*, the GC has failed to establish that Stephen Sbarra (“Sbarra”) was the “Steve” referenced by Shomari Patrick and Glenn Patrick or that he even was NY Paving’s agent within the meaning of §2(13) of the Act. Also, the GC has failed to establish that “Steve” who fired Shomari Patrick on October 20, 2017 was in fact Sbarra mentioned in paragraphs 11 and 16 of the Complaint. Therefore, any statements allegedly made by Sbarra to Shomari Patrick are not attributable to NY Paving and therefore insufficient to establish a violation of §8(a)(1) of the Act.

Even if “Steve” was the same person as Sbarra mentioned in paragraphs 11 and 16 of the Complaint, NY Paving’s alleged §8(a)(1) violation must nevertheless be dismissed because as set forth in Section III(A)(2)(ii), *supra*, Your Honor should not credit Shomari Patrick’s testimony regarding the alleged statements made by Sbarra given the contradictions in Shomari Patrick’s testimony as well as his documented misrepresentation concerning his conversation with Miceli in mid-March 2018. (Tr. 1413-15; Resp. Ex. 17). Because the GC has presented absolutely no evidence corroborating Shomari Patrick’s (untruthful) testimony, she has therefore failed to establish a violation of §8(a)(1) by NY Paving on October 20, 2017, and said allegation must be dismissed in its entirety.

5. NY Paving Did Not Violate §8(a)(1) of the Act on December 13, 2017.

The allegation that NY Paving violated §8(a)(1) of the Act on December 13, 2017 related to the testimony given by Bedwell is also without any merit. Specifically, in attempting to establish NY Paving’s violation of the Act, the GC relies on Bedwell’s testimony that on December 13, 2017, Coletti allegedly told Bedwell NY Paving would not hire him because he “was union hierarchy, that New York Paving will not be hiring [him] because of who [his] father was.” (Tr. 512). Allegedly, Coletti also told Bedwell that Franco would not be hired because of

the same reason. (Tr. 512). Coletti denied the allegation; rather Coletti testified that during his conversation with Bedwell on December 13th, he told Bedwell it was not his (Coletti's) decision who NY Paving would hire, and in any event he (Bedwell) already had a full-time job as Local 175's Business Manager. (Tr. 1277, 1279).

Given the fact that Bedwell's testimony regarding Coletti's statement(s) on December 13, 2017 is not corroborated in any way, the only way for Your Honor to determine that Coletti did or did not make the alleged statement is to determine Bedwell's credibility (or lack thereof). To that effect, NY Paving advances several compelling arguments grounded upon the record evidence.⁴⁵

One, when questioned by the GC, Bedwell stated twice that he stopped being Local 175's Business Manager in early December 2017. (Tr. 480, 483). However, on cross examination, he conveniently changed that date to "around November 13th." (Tr. 517-524). Two, Bedwell's testimony regarding his conversations with the various Local 175 Shop Stewards and foremen pertaining to sending the available members to work at NY Paving contradicted the testimonies of Smith and Schmaltz. (Tr. 428-30, 484-85, 499-501, 928, 933-34). Three, Bedwell's testimony regarding GC Ex. 12 was unconvincing in that he clearly had not reviewed the list because if he had, he would have noticed that GC Ex. 12 in fact contained two (2) separate lists of employees. (Tr. 499-500, 553-54, 525, 535-39). Four, Bedwell's testimony that he received a redacted list from Coletti was demonstrably false. (Tr. 489, 1273-76, 1291). Five, the three (3) alleged discriminatees (Bedwell, Franco and Shomari Patrick) used the phrase "union hierarchy" when referring to NY Paving's purported reasons for terminating their employment and/or allegedly refusing to hire them. None of these witnesses, however, bothered to ask any NY official what

⁴⁵ See Section III(A)(2)(iii), *supra* for a more fulsome recitation of the inconsistencies in Bedwell's testimony.

“union hierarchy” meant. Six, admittedly, Robert Coletti is a respected member of the New York State Bar with an unblemished disciplinary record whose testimony, also in connection with the disputed redacted list, was even admitted by the GC to be truthful. (Tr. 1291). Given the foregoing, the fact that all three (3) discriminatees had significant credibility issues, and “union hierarchy” is not a phrase frequently used, it is Respondent’s position these witnesses colluded to use that phrase as part of Local 175’s plan to fabricate meritless charges against NY Paving.

Given the obviously self-serving nature of Bedwell’s statements and clear contradictions with the testimonies of the GC’s other witnesses, Your Honor should credit Coletti’s testimony rather than Bedwell’s testimony. In conclusion, the GC has failed to establish any of the five (5) alleged violations of §(8)(a)(1) by NY Paving and the Complaint must therefore be dismissed in this regard.

E. NY PAVING DID NOT RENDER UNLAWFUL ASSISTANCE AND SUPPORT TO LOCAL 1010 IN VIOLATION OF §§8(A)(1) AND (2) OF THE ACT.

As set forth in Section III(C)(2), *supra*, the GC has failed to establish that Bartone was NY Paving’s agent within the meaning of §2(13) of the Act and therefore, any statements and/or actions of Bartone are not attributable to NY Paving. Accordingly, the GC has failed to establish NY Paving violated §§8(a)(1) and (2) of the Act *vis-à-vis* alleged support and assistance to Local 1010.

IV. CONCLUSION

For the foregoing reasons, NY Paving respectfully requests the Complaint be dismissed in its entirety.⁴⁶

Dated: December 20, 2018
Mineola, New York

Respectfully submitted,
MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP

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⁴⁶ In accordance with Your Honor's instruction, the proposed Order is included as an Appendix to NY Paving's Post-Trial Brief.

APPENDIX

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NEW YORK PAVING, INC.

Respondent

and

**CONSTRUCTION COUNCIL LOCAL 175,
UTILITY WORKERS UNION OF
AMERICA, AFL-CIO**

Charging Party

and

**HIGHWAY, ROAD AND STREET
CONSTRUCTION LABORERS LOCAL
UNION 1010 OF THE DISTRICT COUNCIL OF
PAVERS AND ROAD BUILDERS, LABORERS
INTERNATIONAL UNION OF NORTH
AMERICA, AFL-CIO**

Party of Interest

**Case Nos.: 29-CA-197798
29-CA-209803
29-CA-213828
29-CA-213847**

ORDER

The Complaint is dismissed in its entirety.

Dated: _____, 2019
Washington D.C.

Hon. Andrew Gollin
Administrative Law Judge
National Labor Relations Board
Division of Judges
1015 Half Street SE
Washington, DC 20570-0001

CERTIFICATE OF SERVICE

A copy of the foregoing Post-Hearing Brief on behalf of New York Paving, Inc. has been filed electronically and served via email this 20th day of December, 2018 on the following:

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A copy of the foregoing Post-Hearing Brief on behalf of New York Paving, Inc. has also been filed electronically this 20th day of December, 2018 on the following:

Hon. Andrew Gollin
Administrative Law Judge
National Labor Relations Board
Division of Judges
1015 Half Street SE
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