

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**NEW YORK PAVING, INC.**

**and**

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

**Cases 29-CA-197798  
29-CA-209803  
29-CA-213828  
29-CA-213847**

**and**

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

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*for the General Counsel*

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*for the Respondent*

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*for the Charging Party*

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*for the Party of Interest*

**DECISION**

**I. INTRODUCTION<sup>1</sup>**

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These cases were tried on September 20 and 21, October 16, 17, 18, 19 and 31, and November 1, 2018, in Brooklyn, New York, based on a complaint alleging that New York Paving, Inc. (“Respondent”) violated Section 8(a)(1), (2), (3), and (4) of the National Labor Relations Act (“the Act”) between April and December 2017.<sup>2</sup> Respondent is a construction contractor primarily engaged in repairing damage to roads and sidewalks caused by utility companies performing underground equipment installation and maintenance work within the five boroughs of New York City. Respondent has bargaining relationships with several unions, including Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175”), which represents Respondent’s asphalt employees, and Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, Laborers International Union of North America, AFL-CIO (“Local 1010”), which represents Respondent’s concrete employees.

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<sup>1</sup> Abbreviations in this decision are as follows: “Tr.” for transcript; “Jt Exh.” for Joint Exhibits; “GC Exh.” for General Counsel’s Exhibits; “R Exh.” for Respondent’s Exhibits; “CP Exh.” for Charging Party’s Exhibits; “POI Exh.” for Party of Interest Exhibits; “GC Br.” for General Counsel’s Brief; “R Br.” for Respondent’s Brief; “CP Br.” for Charging Party’s Brief; “POI Br.” for Party of Interest’s Brief.

<sup>2</sup> All dates will be to 2017, unless otherwise stated.

On April 28, Local 1010 filed a petition to replace Local 175 as the collective-bargaining representative of Respondent's asphalt employees. The General Counsel contends Respondent committed unfair labor practices before and after the petition, which were part of an elaborate scheme to end Respondent's bargaining obligation to Local 175. Specifically, Respondent is alleged to have violated Section 8(a)(2) and (1) of the Act in April when its alleged agent Joseph Bartone Jr. solicited employees represented by Local 175 to sign authorization cards for Local 1010, and violated Section 8(a)(1) of the Act in April when its alleged supervisor/agent Pasqual "Paddy" Labate threatened employees with discharge if they did not sign a Local 1010 authorization cards. In addition, Respondent is alleged to have violated Section 8(a)(4), (3) and (1) of the Act in November when it discharged Constantino "Gus" Seminatore and Glenn Patrick, and violated Section 8(a)(3) and (1) of the Act in November when it discharged Greg Schmaltz. Also, Respondent is alleged to have violated Section 8(a)(3) and (1) of the Act in October and November when it refused to recall Donald Mescetti from layoff, refused to hire Michael Bedwell and Anthony Franco, Jr., and caused the termination of Shomari Patrick. Finally, Respondent is alleged to have violated Section 8(a)(1) of the Act between October and December when its admitted supervisors/agents Robert Zaremski and Bob Coletti, and alleged agent Steven Sbarra and alleged supervisor/agent Labate, made statements that had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their statutorily rights.

For the reasons stated below, I find Respondent violated Section 8(a)(1) and (2) of the Act in April, prior to the filing of the petition, but I recommend dismissing the remaining allegations.

## II. STATEMENT OF THE CASE

On April 27, Local 175 filed an unfair labor practice charge against Respondent in Case 29-CA-197798, and later amended that charge on April 27, June 14, and July 6. On November 14, Local 175 filed an unfair labor practice charge against Respondent in Case 29-CA-209803, and later amended that charge on February 26 and March 27, 2018. On January 29, 2018, Local 175 filed an unfair labor practice charge against Respondent in Case 29-CA-213828, and later amended that charge on February 26, 2018. On January 29, 2018, Local 175 filed an unfair labor practice charge against Respondent in Case 29-CA-213847, and later amended that charge on February 26 and March 28, 2018.

On May 30, 2018, the Regional Director for Region 29, on behalf of the General Counsel, issued a consolidated complaint and notice of hearing in Cases 29-CA-209802, 29-CA-213828, and 29-CA-213847. Respondent filed its answer to on June 21, 2018. On August 31, 2018, the Regional Director for Region 29, on behalf of the General Counsel, issued an amended consolidated complaint and notice of hearing ("the Amended Consolidated Complaint") adding allegations from Case 29-CA-197798, and adding Local 1010 as a Party of Interest. Although the unfair labor practice charges contained numerous allegations, the Amended Consolidated Complaint is limited to the allegations identified above.<sup>3</sup> On September 11, 2018, Respondent filed its answer to the Amended Consolidated Complaint, denying the alleged violations and raising various defenses.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally.<sup>4</sup> Respondent, Local 175, Local 1010, and the General Counsel filed timely post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs

<sup>3</sup> The record does not reflect if the other allegations were dismissed, withdrawn, settled, or otherwise adjudicated.

<sup>4</sup> At the hearing, Counsel for General Counsel orally amended paragraph 14 of the Amended Consolidated Complaint, which alleged that on or about October 15, Respondent, by Pasqual Labate "over the telephone" threatened employees with unspecified reprisals, to replace the phrase "over the telephone" with "at the employer's facility." Respondent did not oppose the amendment and denied of the amended allegation. (Tr. 9-10).

and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommended order and remedy:

**III. FINDINGS OF FACT<sup>5</sup>**

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**A. Jurisdiction & Labor Organization Status**

Respondent has been a domestic corporation with an office and a place of business located at 3817 Railroad Avenue, Long Island City, New York and has been engaged in the business of asphalt and concrete paving construction. During the past year, which is representative of its annual operations generally, Respondent, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to the City of New York, which is directly engaged in interstate commerce. At all material times, Respondent admits, and I find, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As such, I find this dispute affects commerce and the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

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Respondent further admits, and I find, that Local 175 and Local 1010 are labor organizations within the meaning of Section 2(5) of the Act.

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**B. Background**

*Corporate Ownership and Management*

Respondent is a family-owned business founded by Joseph Bartone. About 17 years ago, Bartone sold his shares in the company and retired. Respondent’s current principal owners and officers are Bartone’s children, Anthony Bartone, Michael Bartone, Diane Bartone-Saro, and their cousin Walter Condрачи. Martha Bartone was Respondent’s corporate secretary before she passed away in 2018. Diane Bartone-Saro is married to Joseph Saro, President of Local 1010. Joseph Bartone Jr. is the great nephew of Respondent’s founder, and the nephew of Anthony Bartone, Michael Bartone, and Diane Bartone-Saro. Bartone Jr. has no ownership interest in Respondent.

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Respondent’s managers are Bob Coletti (General Counsel), Peter Miceli (Director of Operations), and Robert Zaremski (Operations Manager). Miceli oversees the work Respondent performs for utility companies and their various subcontractors. (Tr. 53). Zaremski is primarily responsible for determining jobs, setting routes for crews, and distributing work. Coletti, Miceli, and Zaremski are admitted agents or supervisors of Respondent. (GC Exh. 1)(Tr. 509-510).

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<sup>5</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also have considered factors such as: the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008)(citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)). Specific credibility determinations are addressed below.

Respondent has approximately 500 employees and 30 working foremen. At all material times, Pasqual “Paddy” Labate was a working foreman for Respondent. He also was Local 175’s shop steward. There is a dispute as to whether Labate, in his role as a working foreman, was a statutory supervisor and/or agent of Respondent. There also is a dispute as to whether Steven Sbarra and Joseph Bartone Jr. are statutory agents of Respondent. Those matters are addressed below.

*Respondent’s Railroad Avenue Facility*

Respondent’s Railroad Avenue location contains a yard, an office building, and a shop. The yard is approximately the size of two football fields and contains vehicles, equipment, and supplies. (Tr. 573). The office building is where Anthony Bartone, Miceli, Zaremski and Coletti are located, as well as the administrative/payroll personnel. (Tr. 1196). There also is a platform area outside of the office. About fifty feet from the office is the repair shop area, where a shop manager, Eric Perez, is located.

*Di-Jo Construction Corp.*

Respondent shares the Railroad Avenue property with Di-Jo Construction Corp. (“Di-Jo”). Di-Jo provides guards, mechanics, yardmen, and other services for Respondent. It also employs individuals that go out into the field to perform clean-up work. Some of these field employees work as extras with Respondent’s concrete paving crews for training purposes to determine if they should be hired by Respondent to perform concrete work. (Tr. 1421-1422). There is no evidence regarding Di-Jo’s ownership, but Diane Bartone-Saro’s signature appears on the Di-Jo employees’ paychecks. (Tr. 113). Eric Perez oversees the yard employees. (Tr. 120-121). Peter Miceli acts as Di-Jo’s Director of Operations, and he oversees the field employees. Respondent’s payroll manager, Maura Hernandez, handles Di-Jo’s payroll. (Tr. 1422-1424).<sup>6</sup>

*Collective Bargaining Relationships*

Respondent provides 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, as well as subcontractors, such as Hallen Construction. (Tr. 55, 72).

Since January 5, 2006, Local 1010 has been the certified bargaining representative of Respondent's full-time and regular part-time site and grounds improvement, utility, paving & road building workers who primarily perform the laying of concrete, concrete curb setting, or block work, including foremen, form setters, laborers, landscape planting and maintenance employees, fence installers and repairers, slurry/seal coaters, play equipment installers maintenance safety surfacers and small power tools and small equipment operators, who work primarily in the five boroughs of New York City (hereinafter referred to as the “Concrete Unit”). The most recent collective-bargaining agreement covering the Concrete Unit was dated July 1, 2014 through June 30, 2017.

Since October 16, 2007, Local 175 has been the certified bargaining representative of Respondent’s full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City (hereinafter referred to as the “Asphalt Unit”). The most recent collective-bargaining agreement

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<sup>6</sup> The original and amended charges in Case 29-CA-213828 allege Respondent and Di-Jo are a single/joint employer or alter ego, but there are no such allegations in the Amended Consolidated Complaint.

covering the Asphalt Unit was dated July 1, 2014 through June 30, 2017.<sup>7</sup>

#### *Work Assignments*

5 Respondent's Operations Manager Robert Zaremski determines and distributes Respondent's asphalt and concrete work. (Tr. 1163). He assigns work based on daily reports he receives from customers about projects they need performed. He determines the tonnage of asphalt needed, the routes or order of work, and the number of crews. (Tr. 1163-1164). The asphalt crews vary in size depending on the type of work being performed. For example, a bottom crew fills holes and puts down the base layer of asphalt, and it has two people. A top crew puts down the surface layer of asphalt, and it has four people (a foreman, a raker, a shoveler, and a wheelbarrow man). (Tr. 302). After determining the number and type of asphalt crews needed, Zaremski will notify the Local 175 shop steward to provide the requisite number of qualified Local 175 members to fill the crews. (Tr. 191, 1164-1165).

15 Paddy Labate was Local 175's shop steward until about October. In that role, he was responsible for contacting Local 175's business manager to obtain members to work for Respondent on the asphalt crews. Labate considered availability, skill and seniority in selecting members. If Respondent required additional people for a crew, Zaremski would notify Labate. (Tr. 1167-1168). Although Respondent does not have the right under the collective-bargaining agreement with Local 175 to request specific individuals, it can return a referral for any reason and request that Local 175 send a replacement.<sup>8</sup>

20 The asphalt workers typically arrive at Respondent's Railroad Avenue yard between 5:30 and 6:30 a.m., and the crews leave the yard and begin work around 7 a.m. The crews work until their asphalt truck(s) is empty, which may mean working 10 hours a day, or more.

25 Each crew has a working foreman who is responsible for informing the crew members about the projects and the order of the work, as determined by Zaremski. The foreman also is responsible for completing and submitting weekly timesheets for their crew(s). (Tr. 1171-1172). The foremen handwrite the information on the timesheet and submit them to the office for processing and payment. Respondent's Director of Operations Peter Miceli periodically reviews timesheets and payroll. Respondent issues paychecks to employees on Wednesdays.

#### *Tension between Respondent and Local 175 and Changes Affecting Assignment of Work and Dispatch*

35 In around 2016, the relationship between Respondent and Local 175 began to deteriorate, and it continued to worsen into 2017. One reason was that Local 175 changed how it referred individuals to work for Respondent. Prior to 2016, Local 175 would send the same core group of individuals to work, allowing for Respondent to have stable, experienced asphalt crews in which the employees, stewards, foremen, and management were all familiar with one another. In around 2016, Local 175 began referring various members who had never before worked for the Respondent and/or who had little-to-no experience performing asphalt work, including landscapers. Local 175 went from referring the same 25 or so members each week, to cycling through dozens of different members, every week. (Tr. 1457). Also, it was unclear to Respondent whether those members had the necessary certifications, qualifications, or

<sup>7</sup> Di-Jo has no collective-bargaining relationships with any union. (Tr. 1408).

<sup>8</sup> The Local 175 collective-bargaining agreement states Respondent is at liberty to employ and discharge whomever [it sees] fit and ... "shall at all times be the sole judge as to the work to be performed and whether such work performed by an [e]mployee is or is not satisfactory." (GC Exh. 4, pg. 5). There is no paperwork generated when an individual is refused, returned, or no longer needed on a project. There also is no paperwork generated when Respondent bans an individual from working for it. (Tr. 1392-1395).

experience. Two of the individuals Local 175 sent to work for Respondent lacked the necessary immigration documentation to work in the country.

5 In 2016, Miceli spoke with Local 175's then-business manager Roland Bedwell about this new practice. Bedwell explained that Local 175 needed to refer those members through Respondent to get them their hours because of labor issues Local 175 was having with two of Respondent's competitors, Tri-Messine Construction Company, Inc. and Nico Asphalt Paving, Inc. Miceli told Bedwell not to make Local 175's problems Respondent's problems, and to cease this practice of cycling through members. Bedwell refused and attempted to side-step Miceli by contacting Respondent's founder and retired owner, 10 Joseph Bartone, to get him to agree to allow the referrals to continue. (Tr. 1359-60). Bedwell was unsuccessful, and Miceli made it clear to Bedwell that he reported to Anthony Bartone, not Joseph Bartone. (Tr. 1361). All of which angered Bedwell.

15 Another reason for the contentious relationship is the changes Respondent made after the New York Department of Transportation (NYDOT) implemented new regulations regarding the material used on city sidewalk and street repair work. The work at issue involves saw cutting, excavation, filling, and clean-up work. (Jt Exh. 8).<sup>9</sup> Prior to 2011, Respondent used crews composed of Local 1010 members and Local 175 members to perform this work, because it involved an equal amount of concrete and asphalt work. From 2011 until October 1, 2016, NYDOT permitted one-step paving in which Respondent was not 20 required to saw cut or excavate holes in asphalt streets, but merely had to fill the holes left by utility companies with asphalt and finish them to grade. This work was performed by members of Local 175. Local 1010 performed all saw cutting and excavation work on concrete sidewalks and bus stops. From October 1, 2016 through April 1, 2017, NYDOT banned one-step paving, and Respondent assigned saw cutting and excavation of streets to Local 175 because those holes were filled entirely with asphalt, and it 25 continued to assign saw cutting and excavation of concrete sidewalks and bus stops to Local 1010.

In 2016, the NYDOT announced new regulations that would require the use of concrete base to fill all holes, which meant Respondent was no longer allowed to use asphalt for that purpose. These new regulations were implemented on April 1, 2017. (Jt Exh. 8). Miceli spoke with Roland Bedwell multiple 30 times in 2016 and 2017 regarding the new regulations and their effects. (Tr. 1370-71). Miceli informed Bedwell that beginning in April, all the saw-cutting, excavation, and related work on city streets and sidewalks would be reassigned to Local 1010, because it now all involved concrete. Local 175, however, would continue to put on the top layer of asphalt once the other work was completed. Respondent eventually hired 200-250 additional Local 1010 members in order to perform this newly reassigned work. 35 (Tr. 1370-1371). Bedwell was upset about this change and the additional hiring of Local 1010 members, believing the work should remain with Local 175. Local 175 eventually filed a grievance and an unfair labor charge, alleging Respondent wrongfully assigned the work at issue to Local 1010. (R Ex. 14) (GC Exh. 1). Miceli and Bedwell had heated discussions about the grievance.

40 A third reason for their contentious relationship is Respondent's changes after ConEd began enforcing a provision in its Standard Terms and Conditions Agreement regarding which employees could work on ConEd projects. The provision at issue states:

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<sup>9</sup> Saw cutting involves cutting through street pavement around holes left in asphalt or concrete by utility companies when installing or performing work on underground equipment. This makes the holes into squares or rectangles, which NYDOT regulations require in preparation for excavation and filling. Excavation, or dig-out work, is the removal of the asphalt, concrete, dirt, and other materials from holes left by utility companies so that they can be filled and paved with asphalt or concrete. Seed and sod installation is laying grass seed or sod on lawns that have been damaged by utility companies. Cleanup consists of setting up and taking down cones and barricades, removing debris from work sites, and otherwise returning worksites to their normal conditions. (Jt. Exh. 8).

With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the construction site only union labor from building trades local (affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the Work to the extent such labor is available.

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(GC Exh. 5, p. 13-14).

Respondent performs limited emergency keyhole work for ConEd's subcontractor, Hallen Construction. (Tr. 91-92, 136-138). Respondent had used Local 175 members to perform this work, but it stopped when ConEd began enforcing this provision, because Local 175 is not a member of the Building & Construction Trades Council of Greater New York ("Council"). (Tr. 85-86). Respondent reassigned this emergency keyhole work to Local 1010, because Local 1010 is member of the Council.<sup>10</sup>

Although this emergency keyhole work amounts to a few hours every month, the broader implication of ConEd's decision to begin enforcing this provision is that it would preclude Respondent from bidding on future asphalt work for ConEd and/or its subcontractors, because, under its collective-bargaining agreement with Local 175, Respondent is required to use Local 175 members to perform asphalt work. There is a dispute as to whether Respondent is actively seeking to bid on additional asphalt work for ConEd, but there is a federal district court pleading seeking declaratory relief in which Respondent states it is interested in bidding on such work, using Local 175 members, but that it would be unable to do so because Local 175 is not a member of the Council. (GC Exh. 9).

### C. 2017 Events and Alleged Unfair Labor Practices

#### 25 *Authorization Cards, Alleged Threats, and Filing of Petition and Charges*

In the spring, Local 1010 sought to replace Local 175 as the bargaining representative of the Asphalt Unit. The evidence regarding this organizing effort is limited. The witnesses testified that it was a source of discussion among the Local 175 members in the yard and on the jobsites, and Joseph Bartone Jr., a Local 175 laborer and the nephew of Anthony Bartone, Michael Bartone, and Diane Bartone-Saro, and Paddy Labate, a working foreman and Local 175 shop steward, made certain statements and engaged in certain conduct in support of this effort.

#### 35 *Bartone Jr.'s Distribution of Authorization Cards and Solicitation of Signatures*

In around April, Joseph Bartone Jr. distributed Local 1010 authorization cards to employees in the Asphalt Unit. William "Billy" Smith Jr., a Local 175 laborer, testified that while he was driving to a jobsite in April, Bartone Jr. pulled out a stack of Local 1010 authorization cards and stated that (Respondent's General Counsel) Bob Coletti wanted him to pass them out. Bartone Jr. told Smith Jr. that he did not want to pass the cards out, and he was only going to do it if his uncle told him to do so. (Tr. 415-416). That was the end of their conversation. Smith Jr. did not witness Bartone Jr. hand the cards out to anyone. (Tr. 416).

Glenn Patrick, a discharged Local 175 laborer (and alleged discriminatee) and Local 175's Vice President, testified that in April he was working on a project in Queens. He saw Bartone Jr. sitting alone in a pickup truck. (Tr. 645-648). Patrick asked Bartone Jr. why he was sitting alone in the truck. Bartone

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<sup>10</sup> Local 175 challenged the reassignment of this emergency keyhole work. Respondent and Local 175 are engaged in ongoing settlement discussions over this matter, and one of the possible resolutions discussed is that Respondent would pay double benefits (to Local 1010 funds and to Local 175 funds) for the hours Local 1010 members spend performing this work. (Tr. 185-186).

Jr. replied that Coletti had asked him to give out Local 1010 authorization cards to employees. He told Patrick he did not want to do it, but they told him he had to. Bartone, Jr. then showed Patrick the cards. That was the end of their conversation. Later that day, at the end of the day, Bartone Jr. asked everyone on the jobsite to gather around and he passed out the authorization cards. Patrick did not testify about what  
5 Bartone Jr. specifically told the men at the time. (Tr. 649).

Michael Bartilucci, a Local 175 laborer and a member of Local 175's Executive Board, also was present at this jobsite with Glenn Patrick and others. He testified Bartone Jr. gathered everyone around and distributed the cards. According to Bartilucci, Bartone, Jr. "basically said that the office wanted us to sign  
10 the cards, and the company wanted to go in the direction by using the 1010 laborers, and that ... if we wanted to work there, we had to sign the cards." (Tr. 351).

Donald Mescetti,<sup>11</sup> a discharged Local 175 laborer (and alleged discriminatee), testified about a separate incident that occurred in the spring when he was working on a crew with Bartone Jr. and others performing patchwork. According to Mescetti, Bartone Jr. and the others discussed the Local 1010  
15 authorization cards. Bartone Jr. did not ask Mescetti to sign a card, but he did tell Mescetti that if he did not sign a card and the company switched to Local 1010, he would not have a job. (Tr. 1056-1057). Mescetti told them it would be pretty stupid for him to sign a card. (Tr. 1081).

On May 17, Salvatore Franco, a Local 175 laborer and brother of alleged discriminatee Anthony Franco Jr., sent Bartone Jr. a text asking why he was circulating Local 1010 authorization cards among the Local 175 members. (Tr. 1097-1098)(GC Exh. 22). Bartone Jr. responded to Franco, by text, saying:  
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I told the men I gotta do what office wants at the end of the day. And told the men here's the  
25 cards u can sign or wipe ur ass wit it I really don't care.

Word for word

(GC Exh. 22).<sup>12</sup>

<sup>11</sup> Mescetti's name is misspelled in the Amended Consolidated Complaint as "Mascetti."

<sup>12</sup> At the start of the hearing, I granted the Counsel for General Counsel's unopposed motion for sequestration, and each party was allowed to designate a representative to remain throughout the hearing and be eligible to testify. Local 175 chose not to designate a representative. (Tr. 34). On the first day of the hearing, during Counsel for General Counsel's direct examination of Peter Miceli, Local 1010's attorney raised that Salvatore Franco, brother of alleged discriminatee Anthony Franco Jr., was present in the hearing room. I asked Local 175's attorney if Franco was Local 175's representative, and he responded that he was not, and that Franco had been advised not to discuss the contents of the hearing with anyone other than Local 175's counsel. (Tr. 121-122). On the second day of the hearing, at the conclusion of Local 175's examination of Miceli, Local 1010's attorney pointed out that during Local 175's voir dire examination of Miceli, Local 175's attorney consulted with Franco regarding a particular document, and Local 1010's attorney again sought clarification as to Franco's role at the hearing. Local 175's attorney stated that Franco's role was "to observe, and if he hears something erroneous, to let me know." Local 175's attorney then offered to designate Franco as its representative "if that would satisfy [Local 1010's counsel]," but stated Franco was not "at the present time, a witness." (Tr. 213-214). To which, I stated Franco was not going to be a witness in light of our earlier discussions about the sequestration order. (Tr. 214).

At the conclusion of her case-in-chief, Counsel for General Counsel called Franco as a witness, and Respondent and Local 1010 objected, citing to the sequestration order. Counsel for General Counsel offered to limit Franco's testimony to the emails he exchanged with Bartone Jr., arguing that it would not violate the sequestration order to allow Franco to testify about those emails because the subject of those emails was not covered by any of the prior witnesses. After hearing argument, I allowed Counsel for General Counsel to question Franco on this limited topic, noting "the spirit of sequestration is so that no witnesses can be influenced by other witnesses' testimony or influence their testimony. If there has been no prior witness who has testified about a subject matter, then there's

Bartone Jr. testified he handed out Local 1010 authorization cards, but denied he did so at the direction of anyone else. (Tr. 1214-1215). He explained that he distributed the cards because he was young and thought that he would have more opportunity in the future as a member of Local 1010. (Tr. 1214-1215). He also denied stating that he was doing what the office, or anyone else, wanted by handing out the cards. (Tr. 1239). He further denied threatening or telling anyone that they needed to sign the card. (Tr. 1218). As for the above text, Bartone Jr. admits sending it to Franco, but that the statement “I gotta do what office wants at the end of the day” was a lie that he included to take the heat off of him, because he was “trying not to look like the complete bad guy.” He, however, never informed anyone that the statement was a lie. (Tr. 1216-1217).<sup>13</sup>

#### *Labate’s Alleged Statements and Conduct*

In around March and April, Paddy Labate was involved in conversations with Local 175 members about the Local 1010 authorization cards. Michael Bartilucci testified that he was in the yard at Respondent’s Railroad Avenue location with several Local 175 members, including Glenn Patrick, when Labate approached them and stated that he had come from “the office” and he then began to explain why the men needed to sign the Local 1010 authorization cards. Bartilucci testified that Labate said (referring to the office) that “they” wanted the men to sign the authorization cards because they wanted to go 1010; otherwise, the men would not be able to work there. (Tr. 353, 361). Glenn Patrick similarly testified about a conversation in the yard with a group of Local 175 employees in which Labate said that it looked like the company did not want to re-sign with Local 175 and that they wanted the employees to sign Local 1010 cards. According to Patrick, Labate stated if the employees did not sign the cards, and Local 1010 came in, the employees would no longer be able to work for the company; but if they did sign, then they could continue to work once Local 1010 became their union. (Tr. 651). Patrick later testified Labate asked him whether he “wanted to make \$150,000 or make zero.” (Tr. 731).

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been no influence arguably.” (Tr. 1094-1095). My ruling is supported by the Advisory Committee Notes on FRE Rule 615, which stated the efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 WIGMORE ON EVIDENCE §§1837–1838. I find Franco’s testimony was not influenced by the earlier witnesses because he was the first to testify about these emails.

<sup>13</sup> I credit Smith Jr. and Bartilucci because they testified with an honest and sincere demeanor, and their recollections were detailed and plausible. Additionally, as current employees who provided testimony adverse to the interests of their employer, I find their testimony was entitled to additional weight. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. See *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); and *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), *affd.* mem. 83 F.3d 419 (5th Cir. 1996). As discussed below, I generally did not find Glenn Patrick to be a reliable or trustworthy witness. However, I credit his testimony about Bartone Jr.’s statements during their one-on-one conversation because it is consistent with Bartone Jr.’s statements to Smith Jr. during their one-on-one conversation. I also credit Patrick’s testimony about Bartone Jr.’s statements to the group on the jobsite, because it is largely corroborated by Bartilucci. To the extent Patrick and Bartilucci offered conflicting or inconsistent testimony, I credit Bartilucci. Similarly, for the reasons stated below, I generally did not find Mescetti to be a reliable witness, but I credit his testimony regarding Bartone Jr.’s statements because it is consistent with Bartilucci’s testimony about Bartone Jr.’s statements to the group at the jobsite when he handed out the authorization cards.

I do not credit Bartone Jr. that he distributed the authorization cards on his own, without any involvement or direction from management, that he did not make any statements to employees about losing their jobs if they did not sign a card and the company went to Local 1010, or that he was lying in his text to Franco when he wrote that he was doing what the office wanted. Given Bartone Jr.’s familial relationship with ownership, and his guarded and defensive demeanor while on the stand, I find he was attempting to protect his family and management by denying their involvement in directing him to circulate the cards.

Greg Schmaltz, a Local 175 foreman and alleged discriminatee, testified that one morning, in April or May, Labate was speaking to several employees the yard, and he said that he spoke to “the office” and they told him that the company was going 1010, and if you want to continue to work there, you were going to have to sign the cards. Labate also said that he did not know where else the guys were going to work if they did not sign the cards, so they were better off signing the cards. (Tr. 854-855). Schmaltz also testified that shortly after this meeting in the yard, he spoke with Labate over the phone and told Labate that he had not signed the Local 1010 authorization card. Labate told Schmaltz that he had until noon that day to sign it. Schmaltz then asked how he could get his signed card to Labate, given that he was at work at the time. Labate suggested that Schmaltz sign the card, take a picture of it, and then send the picture to Labate, who would forward the text to Robert Coletti. (Tr. 856). Schmaltz did so. Schmaltz, however, later commented to employees on his crew, including Bartone Jr., that even though he had signed a Local 1010 authorization card, he still was going to vote for Local 175. (Tr. 857-858).

Billy Smith Jr. testified about a conversation he had with Labate following a safety meeting, in which Smith Jr. pulled Labate to the side and said, “Paddy, listen, I didn’t sign a card...what’s going to happen? Is my job in jeopardy?” (Tr. 417). Smith Jr. testified that Labate replied, “no, your job’s not in jeopardy, but if we don’t sign a card then we’re not going to have a job here.” (Tr. 417). Then, in response to a leading question from the General Counsel as to whether Labate said anything about pensions during this conversation, Smith Jr. recalled that Labate said that he had spoken with Coletti, who stated that if the asphalt workers didn’t sign the Local 1010 authorization cards by May 1, they could lose their pension, and that the pensions would not be transferable. (Tr. 418).

Donald Mescetti testified that Labate was “running around the yard” in the spring, telling people that if anyone did not sign a Local 1010 authorization card they would not be working for Respondent, and that Labate told him separately that he would have to sign a card if he wanted to remain employed with Respondent. (Tr. 1064-1065).

Labate generally denied “threatening” any one or telling them that if they did not sign a Local 1010 authorization card that they would not be working for Respondent. (Tr. 1321). However, he did acknowledge he talked with other Local 175 members about Local 1010, and he likely offered his opinion about if Respondent no longer used Local 175 to perform asphalt work. (Tr. 1330-1332). He testified it was “very possible” that they discussed what could happen, and that he might have stated there would be no jobs for any of them, including himself, if Respondent stopped using Local 175 to perform asphalt work. (Tr. 1331). He explained that he may have said that “...it’s either going to happen this way or that way. It’s -- it’s only going to be two ways. There’s no third way. It’s either this or that. You’re either here or there. It’s one or the other.” (Tr. 1332-1333). Labate also testified it was possible he may have made a comment about pensions and transferring pensions, but he did not recall specifics. (Tr. 1338-1339).<sup>14</sup>

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<sup>14</sup> I credit Bartilucci that Labate told the men he had come from “the office” and “they” wanted the men to sign the Local 1010 authorization cards, and that Labate stated the employees would not be employed there if they did not sign a card. I also credit Smith Jr. regarding his one-on-one conversation with Labate. I find both provided detailed, consistent, and plausible testimony regarding the conversations at issue. Similar to Glenn Patrick and Mescetti, I generally found the testimony of Schmaltz to be unreliable and not worthy of belief, particularly regarding the events surrounding his discharge. But I do credit Schmaltz, as well as Patrick and Mescetti, regarding Labate’s statements to them about signing the Local 1010 authorization cards, because their testimony was largely consistent with that offered by Bartilucci and Smith Jr.

Labate generally denied “threatening” employees or telling them to sign the cards. But with the exception of his specific denial of his statement to Smith Jr. regarding the loss of pensions--which he later appeared to hedge on by acknowledging he may have made a comment on pensions--Labate was not asked about, and did not refute, the credited testimony of Smith Jr., Bartilucci, Mescetti, Schmaltz, or Patrick regarding his statements to them.

*Petition, Charges, and Change in Local 175's Leadership*

On April 28, Local 1010 filed a representation petition in Case 29-RC-197886 seeking to represent Respondent's employees in the Asphalt Unit. Local 175 intervened. On May 2, the Regional Director issued an Order Cancelling Hearing and Holding Case in Abeyance. (Jt. Exh. 5).

At some point, Roland Bedwell stepped down as Local 175's business manager after he was arrested and charged with certain crimes for which he was later imprisoned. (Tr. 518-519). From May to December, Bedwell's son, Michael Bedwell, a Local 175 member, took over as Local 175's acting business manager and he performed the duties of that position, including the handling of referrals. (Tr. 476-478; 483).

*Implementation of Badging System*

In around April 2016, Respondent announced that it would be implementing a badging policy and procedure for all employees working out in the field. (Tr. 734-36, 1311-15). The reason was that certain of Respondent's customers, including National Grid, required that employees of all its contractors working on their jobsites have and wear company-issued photo identification. (Tr. 232-233, 1280-81, 1363). Respondent, however, did not begin implementing its badging policy until around July 2017. (Tr. 232, 1280-83, 1363, 1443-49).

Under Respondent's policy, all new and existing field employees were required to apply for and be approved for a photo identification badge. (R. Exh. 12). To apply, the employees were required to complete the necessary employment paperwork, go through the E-Verify process, and have their picture taken for their badge. (Tr. 1262-1265). Respondent's Director of Operations Peter Miceli is responsible for determining whether to approve an individual for a badge, and he maintains a book with photos of all those issued a badge. (R Exh. 13). If an individual does not go through this process and receive a badge, he/she is not permitted to work for Respondent. (Tr. 1446-1448).

Although Respondent required all field employees to have a badge, regardless of their union affiliation, it limited the number of badges it issued to Local 175 members. It was the only union to have the number of badges capped. (Tr. 1362). Miceli testified that Respondent did this because, despite his efforts to resolve the matter, Local 175 continued cycling through unfamiliar, inexperienced, or unqualified members, and that ended after the implementation of the policy. At some point following the implementation of the policy, Respondent provided Local 175 with a list of its members who had received a badge and were eligible to work for Respondent. (Tr. 487, 1273-1275, 1308). There are around 55 names on the list. (Tr. 1361).<sup>15</sup>

Local 175 filed unfair labor practice charges against Respondent regarding this policy and its effect on the hiring of Local 175 members, but the Amended Consolidated Complaint contains no allegations regarding the implementation of this policy or its application to Local 175 members, and there were no motions to amend to include such allegations. (Tr. 980-981, 1101-1102).

*Jurisdictional Dispute and Section 10(k) Hearing*


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<sup>15</sup> According to Miceli, if Local 175 could not refer someone from the list, the crew could chose to go out short a person or it could select someone from the platform who had been badged and was waiting for work. (Tr. 1447-1449). There were instances in which asphalt crews went out to work without a full complement of people.

As stated, in around April, Respondent reassigned certain work previously performed by Local 175 members to Local 1010 members, in response to new NYDOT regulations requiring the use of concrete to fill holes in city streets and sidewalks. On July 26, Respondent filed an unfair labor practice charge in Case 29-CD-203385, alleging that Local 1010 violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing Respondent to assign the work at issue to employees represented by Local 1010 rather than to employees represented by Local 175. The Board held a Section 10(k) hearing to resolve this jurisdictional dispute. The hearing was held on September 5 and 6 and October 2 and 10, at the Regional Office in Brooklyn, New York, where Local 175, Local 1010, and Respondent presented witnesses and documentary evidence regarding the issues.<sup>16</sup>

*Alleged Threats and Discharge of Glenn Patrick*

At the start of the Section 10(k) hearing, each party was able to designate a representative to remain throughout the hearing, regardless of whether they were going to be a witness. Respondent named Peter Miceli, and he attended all four days of the hearing. Local 175 named Constantine “Gus” Seminatore, a laborer and the President of Local 175. Glenn Patrick, another laborer and the Vice President of Local 175, attended the hearing on as a witness on September 6. After September 6, the hearing was recessed until October 2.<sup>17</sup>

When the hearing resumed on October 2, Local 175 intended to have Patrick replace Seminatore as its designated representative. Patrick took off from work to attend the hearing, and Seminatore reported for work. Seminatore was assigned to work on a crew with Joe Bartone Jr., Anthony DiMaio, and foreman Greg Schmaltz. Seminatore and his crew began working that day at around 7:00 a.m.

The hearing began on October 2 at 9:40 a.m., in the Brooklyn Regional Office. (R Exh. 6, pgs. 460, 463). At the start of the hearing, the hearing officer ruled that Patrick could not replace Seminatore as Local 175’s designated representative, and that Patrick could not remain in the hearing room because he was a witness. Patrick then left. (R. Exh. 6, pgs. 464-465).

Patrick called Seminatore to ask him to come to the Regional Office and act as Local 175’s designated representative. The two agreed that Patrick would drive to where Seminatore’s crew was working and take Seminatore’s place, so the crew would not be left a person short. They also agreed that Seminatore would drive Patrick’s vehicle back to Respondent’s yard and park it, and then Seminatore

<sup>16</sup> The Board issued its decision and awarded the saw cutting, excavation, and filling work to Local 1010, and the clean-up work to both Local 175 and Local 1010. See *Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (LIUNA), AFL-CIO*, 366 NLRB No. 174 (2018). (Jt. Exh. 8).

<sup>17</sup> Although he could not recall when, Glenn Patrick testified he had a conversation with Paddy Labate during or after this break in which Labate told him about being called into the office because the office was concerned Labate had listed Patrick as working on a day he supposedly was at the hearing. (Tr. 664-665). Patrick recalled that he was not at the labor board on the day in question; he was at work. Labate told him that he told the office that Patrick was working, and that Labate showed the office his timesheet proving that Patrick worked. (Tr. 665).

Labate had a different recollection. He testified he spoke with Miceli about a discrepancy in Patrick’s paycheck. According to Labate, Miceli asked if he had listed Patrick as working on a day that Patrick supposedly was in court. Labate said no, and that he would not do that. Labate later showed Miceli his timesheet for the day in question to confirm what he was saying to be true. Labate testified he later may have told Patrick about this conversation with Miceli. (Tr. 1335-1336). Miceli confirmed he spoke with Labate and asked if anybody asked or told him to pay Patrick for a day he was at the hearing, and Labate said he knew nothing about it. (Tr. 1380).

Overall, I find Labate’s recollection of his conversation with Patrick to be logical, plausible, and consistent with the other evidence, including Miceli’s testimony.

would take his own vehicle to the hearing. Patrick also called Greg Schmaltz, the crew foreman, and he agreed to the switch. At some point, a decision was made between Seminatore, Patrick, and Schmaltz that even though Seminatore work 3 or more hours that day, he would not be listed on the timesheet as working. Instead, Patrick would be listed and paid for all the hours both he and Seminatore worked that day. Schmaltz testified this was the first time he had to make a judgment call about who would be listed on a timesheet and paid. (Tr. 900-901). No one checked with management to get approval for their plan.

There is a dispute over when Patrick arrived at the jobsite on October 2. But after he arrived, he replaced Seminatore and worked the rest of the day. Schmaltz completed the timesheet for the day, and he reported that Bartone Jr., DiMaio, and Patrick each worked 10.5 hours, and that Seminatore did not work at all. (R Exh. 3).

About a week later, Patrick received and deposited his paycheck for the hours listed on the timesheet. Patrick earned about \$51 per hour in pay, plus an additional \$25-\$30 per hour in benefit contributions. Under the Local 175 collective-bargaining agreement, laborers receive daily overtime of 1.5 their hourly wage and benefit rates for any work performed in excess of 8 hours in a day. (GC Exh. 4, pg. 11)(Tr. 698-699). Based on the timesheet Schmaltz completed for October 2, Patrick was paid for 8 hours at his regular rate of pay and benefits, plus 2.5 hours of overtime pay and benefits, even though there is no dispute that he worked less than 8 hours that day. (Tr. 701-702).<sup>18</sup>

In early October, Patrick received a call on his cell phone from Robert Zaremski. When he called back, Zaremski said “Never mind. We figured it out.” (Tr. 666). Patrick later spoke with Paddy Labate about the call, and Labate told him that the company thought he had hit somebody’s truck and did not

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<sup>18</sup> I do not credit Patrick, Seminatore, or Schmaltz regarding the events of October 2. Patrick and Seminatore each testified that Patrick called Seminatore at 9:00 a.m., after he was informed that he would not be allowed to remain at the hearing as Local 175’s representative, and that Patrick arrived at the jobsite at 10 a.m. (Tr. 662-663, 685, 781, 826). Schmaltz testified that Patrick called him between 8:30 and 9:00 a.m. to tell him that he was coming to the jobsite to replace Seminatore so he could attend the hearing, and that Patrick arrived at the jobsite 30-45 minutes later. (Tr. 871). According to the Section 10(k) transcript, the hearing did not begin until 9:40 a.m. on October 2, and it was a few minutes before the hearing officer ruled that Patrick could not remain. (R Exh. 6, pgs. 460-465). Patrick, therefore, could not have called Seminatore or Schmaltz at 8:30 or 9 a.m., and he also could not have arrived at the jobsite by 10 a.m. While individual witnesses can be confused or incorrectly recall details, the fact that three separate, sequestered witnesses had the same, implausible recollection about what transpired is highly suspicious and strongly suggests they may have coordinated their testimony.

Patrick further undermined his credibility with his inconsistent and self-serving testimony about his drive from the Brooklyn Regional Office to the jobsite. On direct examination, Patrick testified that he drove directly from the Regional Office to the jobsite, which Patrick recalled was somewhere in East New York. (Tr. 663, 687). On cross examination, however, Patrick was confronted with his pre-hearing affidavit, dated December 11, in which he stated that he stopped at his home in Bed-Stuy to change his clothes before heading to the jobsite. (Tr. 688-689). Rather than acknowledge omitting that asserted fact from his testimony, Patrick claimed that portion of his affidavit (which he gave about two months after the events at issue) was inaccurate, and he likely had a change of clothes in his car, along with his work boots, vest, and other equipment. (Tr. 689-690). Patrick then stated that, even if he went home to change clothes before heading to the jobsite, it would have minimally added to his travel time. He initially testified it would have added 10 minutes to his trip, but then clarified it would have added 10 minutes each way (i.e., for a total of 20 minutes). (Tr. 700). Another significant change occurred regarding how long it took him to drive to the jobsite. On direct examination, Patrick testified it took him an hour. But, on cross-examination, he testified it only took him 45 minutes. (Tr. 694).

Finally, Seminatore, Patrick, and Schmaltz offered conflicting testimony about who decided how to record their hours. Patrick testified he told Schmaltz to list him as working, instead of Seminatore, because Seminatore would be paid by Local 175 for that day. (Tr. 663-664). Seminatore testified he told Schmaltz to list Patrick as working the whole day, and not list him at all. (Tr. 803-804, 834-835). Schmaltz, however, insisted that no one told him to do anything, and that he decided how to record the hours all on his own. (Tr. 898-899).

stop, but it turned out to have been Joe Bartone Jr. Patrick asked Labate, “Now that it’s Joe Jr., is everything fine now? Nobody cares about it no more?” Labate responded, “I guess.” (Tr. 668). The remainder of Labate’s testimony on this point is as follows:

5 Q: BY MS. ALAM: 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.

10 JUDGE GOLLIN: It's just very important that when you're relaying what was said, that you're just talking about the words that were said to you, okay? So was that -- what you just covered, was that what Mr. Labate said to you or is this --

THE WITNESS: Yes.

JUDGE GOLLIN: Okay. So that's what he said to you?

THE WITNESS: Yeah.

15 JUDGE GOLLIN: Okay.

...

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

A: Yes.

20 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.

(Tr. 668-669).

25 At the hearing, Labate was asked about this conversation with Patrick. On direct examination, Labate denied telling Patrick that Respondent was coming after him for going to the labor board, or words of similar effect, and he denied telling Patrick he would suffer any reprisal for attending or testifying at the hearing. (Tr. 1321, 1335-1336). Later, on cross-examination, in response to a direct question from Local 175’s counsel, Labate denied telling Patrick the company was after him.<sup>19</sup>

30 On around November 6, Zaremski informed Respondent that he could no longer work for Respondent. (Tr. 676-677). At the time, Patrick was not given a reason for why he was being discharged. (Tr. 677). At the hearing, Miceli testified Patrick was discharged for theft, because he stole money by cashing the check for hours he did not work on October 2. (Tr. 1375). Since his discharge, Patrick has not applied, or been referred, to work for Respondent.

#### *Discharge of Seminatore and Greg Schmaltz*

40 On October 16, Seminatore overslept and was late for work. He spoke with his foreman, Greg Schmaltz, on the telephone to explain what happened. Schmaltz told him to meet the crew at a jobsite. Seminatore then drove from his home in Oceanside to the jobsite. According to Seminatore, it took him an hour and a half to get there because of morning traffic, and he arrived at around 8:30 a.m. The crew

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<sup>19</sup> I do not credit Patrick regarding this conversation with Labate. Patrick had a poor recollection of what was said, and he appeared to conflate this conversation with his conversation with Labate about the office asking if he had listed/not listed Patrick on his timesheet. (Tr. 469-473). Additionally, Patrick did not testify based on his independent recollection. Rather, he responded to leading questions--or at least questions intended to prompt a particular response--by the General Counsel, during his direct examination. Also, Patrick gave contradictory responses. Initially, he testified Labate said the company was after him, and that was “all he said.” Then, after the General Counsel asked whether Labate said the company was going after him because of his testimony, Patrick replied “yes.” He then testified Labate said it was because he went to the labor board.

consisted of Joe Bartone Jr., Liro DaLuca, and Schmaltz. They picked Seminatore up and drove to the next jobsite because the first job had already been done. The crew worked the rest of the day, which included overtime. Schmaltz later completed a timesheet in which he wrote that Bartone Jr., DaLuca, and Seminatore all worked 12 hours that day. (R Exh. 7). Similar to Patrick, Seminatore's regular rate of pay is around \$50 per hour, plus about \$30-\$40 per hour in benefit contributions. He was later paid for 8 hours of regular pay and benefits and 4 hours of overtime pay and benefits for October 16, even though he did not work 12 hours.<sup>20</sup>

On around November 6, Zaremski informed Schmaltz and Seminatore that they would no longer work for Respondent. At the time, they were not given a reason why. At the hearing, Miceli testified that Seminatore was discharged for theft of time on October 16, and Schmaltz was discharged because he falsified timesheets on October 2 (for Patrick and Seminatore) and on October 16 (for Seminatore), which resulted in them getting paid for hours they did not work.<sup>21</sup> (Tr. 1387-1389).<sup>22</sup> Since their discharges,

<sup>20</sup> I do not credit Seminatore or Schmaltz regarding the events of October 16. Seminatore testified he woke up at 6:50 a.m. and then called Schmaltz to tell him that he overslept. (Tr. 786). Schmaltz, on the other hand, testified he called Seminatore at around 6 a.m. after noticing he was not at the yard at his normal time, and Seminatore told him he just woke up. (Tr. 888). Seminatore testified Schmaltz told him to meet the crew at the jobsite in Brooklyn. (Tr. 786). In contrast, Schmaltz testified he told Seminatore that their first job was a reseal job, and Seminatore asked where the next job was. Schmaltz told Seminatore the next job was in the Coney Island area, and Seminatore said he would meet the crew there. Schmaltz agreed and said they would work out a way to get Seminatore back to his car at the end of the day. (Tr. 888). According to Schmaltz, it ended up that the first job was a skip, so the crew went and picked up Seminatore and went about their day. Schmaltz, however, did not specify where or when they picked Seminatore up. Schmaltz testified the crew began working 30-45 minutes later than normal because the first job was a skip, so he estimated they started working between 7:30 and 8:00 a.m. (Tr. 889). Seminatore, on the other hand, testified the first job was a skip, so he met the crew at the second job at 8:30 a.m. (Tr. 786-787). Also, Seminatore testified on direct examination that the crew worked until about 7:30 or 7:45 p.m. that day. (Tr. 786-787). However, on cross-examination, after Seminatore was confronted with his pre-hearing affidavit, dated February 15, 2018, in which he stated the crew worked until 7 p.m., Seminatore acknowledged that the crew worked until around 7 or 7:30 p.m. (Tr. 815-816, 835-836).

Bartone Jr. testified he worked on a crew with Seminatore when Seminatore arrived late for work, and the crew had to pick him up midday, between 11 a.m. and 12 p.m. Bartone Jr. was not certain about the exact time, but he was certain it was after 9 a.m. (Tr. 1221-1222). Bartone Jr. later reported Seminatore's late arrival to Miceli. (Tr. 1222, 1383). Miceli checked the global positioning device on the truck the crew was using, and it showed the crew had gone back to a particular location (presumably to pick up Seminatore), worked the rest of the day, and then double-backed to that earlier location (presumably to drop Seminatore off back at his car). (Tr. 1383-1384). Miceli did not testify as to the specific location or when the truck was there. Based on the overall evidence, I find Seminatore did not begin work until after 9:00 a.m., and he worked until between 7 and 7:30 p.m.

<sup>21</sup> At the start of the hearing, Miceli testified as an adverse witness for the General Counsel. During his direct examination, he was asked whether Seminatore and Glenn Patrick were discharged because they both stole time on October 2, and he confirmed that to be true. (Tr. 104-105). This response was consistent with Miceli's pre-hearing affidavit. (Tr. 1437). However, while still testifying as an adverse witness, Miceli noted that his answers were based on his memory, and he would need to look at the actual timesheets to confirm the correct dates. (Tr. 149-151). Later, while testifying during Respondent's case-in-chief, and after reviewing the timesheets, Miceli confirmed that Patrick stole time on October 2, and Seminatore stole time on October 16, and that he gave the initial answers he did because he did not have the timesheets in front of him and he had based his answers on his recollection that they were both discharged at the same time for stealing time in October. (Tr. 1438). The General Counsel and Local 175 cite to these inconsistencies as undermining Miceli's credibility (and to argue he gave false or shifting explanations for Seminatore's discharge). Miceli, at times, was volatile and defensive, but, in general, he had a forthright demeanor and his testimony was logical and plausible. In this instance, I find that while it may have been imprudent for him to testify under oath based on his memory when he was aware of documents that would have provided the necessary information, I do not find he was intending to deceive or alter his stated reasoning for Seminatore's discharge.

<sup>22</sup> In the fall 2016, Respondent suspended Seminatore because he was on an asphalt crew involved in a verbal altercation in which a member of Seminatore's crew used profanity toward the wife of a judge at a jobsite. A complaint was made, and Miceli met with the crew. The crew members, including Seminatore, all denied any knowledge of the

neither Seminatore nor Schmaltz has applied, or been referred, to work for Respondent.

*Failure or Refusal to Recall Donald Mescetti and Alleged Threat*

5 Donald Mescetti worked intermittently for Respondent over the years. He worked more regularly from October 2016 through September 2017.<sup>23</sup> In September, Mescetti was part of a milling and paving crew consisting of about 15 men who were laid off because of lack of work. (Tr. 1035). In around October, Respondent began calling some of Mescetti's crew back to work, but not him. He made calls to get more information, and he was told that he was not on the list of people being brought back to work. On around 10 October 16, Mescetti went to Respondent's location and spoke with Robert Zaremski on the platform outside of the office. According to Mescetti, he asked Zaremski why he was not getting called back to work, and Zaremski told him that he was not able to work there anymore because he "had filed a grievance with the NLRB." (Tr. 1038). Mescetti responded that was ridiculous; he did not do that. Zaremski said that was the information he had received from the company lawyer (Robert Coletti), and Zaremski told 15 Mescetti he should go and talk to Coletti about it. Zaremski said that if it was not true, then he could come back to work. (Tr. 1038). According to Mescetti, he went and spoke to Coletti, and Coletti said that he knew nothing about an NLRB complaint, and he would know because it was his job to know. Mescetti then went back to Zaremski and told him that Coletti knew nothing about it. Zaremski said, "Well, that is what he told me." (Tr. 1039).<sup>24</sup>

20 According to Mescetti, at the time of this exchange, Greg Schmaltz was standing nearby and he said to Zaremski, "Well, if there is no complaint, he can go to work. I'll take him on my crew for the guy that's missing." (Tr. 1039-1040). Zaremski said that they would have to go and speak to Coletti about that. So, according to Mescetti, he and Schmaltz went back to speak to Coletti. According to Mescetti, Schmaltz 25 said to Coletti that there was no complaint. (Tr. 1061). Coletti shouted that Mescetti could not work there anymore, and that Schmaltz should get out of his office or he would not be working there either. Mescetti and Schmaltz then left Coletti's office. (Tr. 1062).

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event. Miceli suspended the entire crew. It was later discovered which crew member was to blame, and he was discharged. The rest of the crew, including Seminatore, was brought back to work. Miceli testified that he considered Seminatore's involvement in this fall 2016 incident, and his failure to come forward with information, in making the decision to discharge him following this October incident.

<sup>23</sup> According to payroll records, Mescetti worked, on average, 3-4 days a week, in 2017. However, there were several weeks he did not work at all, including during the warmer months, such as in April (April 23 and April 30), May (May 7 and May 28), June (June 4 and June 11), July (July 16, July 23, and July 30), and September (September 10). (GC Exh. 17, pgs. 836-837).

<sup>24</sup> During this exchange, Mescetti recalls that Zaremski made the comment, "I needed the trucks." (Tr. 1041-1042). Mescetti opined that Zaremski was referring to a situation prior to his layoff in September when Mescetti was working on a project where a Local 1010 crew performed Local 175 work. On the first day, Mescetti unloaded the first asphalt truck, and when a second truck arrived, one of the Local 1010 foreman said to his men who were standing around, "I can't believe you young guys are going to let this guy do all this work by himself." The Local 1010 crew then helped Mescetti unload the second truck. The following day, when Mescetti arrived, he saw that the Local 1010 crew had already unloaded the asphalt truck. (Tr. 1044-1045). Mescetti asked what they were doing, and that they should not be performing Local 175's work. Mescetti later attended a Local 175 union meeting and notified the Local 175 Executive Board about the incident. (Tr. 1044-1045). Neither Mescetti nor Local 175 took any action about the matter--no grievance or charge. Zaremski and Coletti testified they were not aware of any issue. (Tr. 1264-1265)(Tr. 1405-1407). I find there is insufficient evidence linking Zaremski's alleged comment to Mescetti's going to the Local 175 meeting to raise the issue of Local 1010 performing Local 175 work, primarily because there is no evidence Respondent had any knowledge that Mescetti raised the matter with Local 175. The General Counsel essentially concedes this fact in her post-hearing brief. (GC Br. 77, fn. 23).

Schmaltz testified he was in the shop trying to get an extra person for his crew when he saw Mescetti. (Tr. 880-881). He told Mescetti that he needed a man and to ask if he could work on Schmaltz's crew. Schmaltz testified there was "some type of an issue" and Mescetti went back and forth between speaking with Zaremski and Coletti, and Coletti told Mescetti that he was not allowed to work there. 5 Schmaltz confirmed he was standing about 10 feet away when Mescetti spoke with Coletti. When Schmaltz was asked whether Coletti gave Mescetti any reason why he was not allowed to work, he said, "No, not that I remember." (Tr. 881).

Zaremski testified he had a conversation with Mescetti, but he denied making the alleged 10 statements, or making any reference to a Board charge, complaint, or grievance. According to Zaremski, Mescetti asked him about not being badged, and Zaremski told him he knew nothing about that. (Tr. 1173-1175; 1185-1187). Coletti specifically denied speaking with Mescetti about any unfair labor practice charge, but he was not asked about any other conversation with Mescetti. (Tr. 1264).<sup>25</sup>

Miceli testified Mescetti was not recalled to work because of his poor performance. Miceli testified 15 he had heard from others that Mescetti's work slowed down, his performance suffered, and they were switching him around to various crews and laying him off regularly in order to get other, better employees working. (Tr. 1404; 1503-1504). However, because Respondent does not document such matters, there are no records supporting or refuting Miceli's testimony.

20 Since this time, there is no evidence Mescetti has reapplied, or been referred, to work for Respondent.

*Alleged Threat and Discharge and Refusal to Reinstate Shomari Patrick*

25 In August, Glenn Patrick urged his nephew, Shomari Patrick, to apply for a job with Di-Jo Construction, telling him to ask to speak to Steve Sbarra. Shomari Patrick later spoke with Sbarra and eventually was hired to work for Di-Jo on a clean-up crew. On his employment paperwork, Shomari listed Glenn Patrick as his emergency contact person, noting that he was his uncle. (Tr. 621-622) (POI Exh. 2, 30 pg. 1).

As a member of the Di-Jo clean-up crew, Shomari Patrick was primarily responsible for driving around to Respondent's jobsites to set up and take down cones and barricades, remove debris from work sites, and otherwise return worksites to their normal conditions. These clean-up crews are usually one-

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<sup>25</sup> I do not credit Zaremski that Mescetti asked him why he had not received a badge, because the evidence indicates Mescetti already received a badge, which is why he was allowed to work through September, before his layoff. But I also do not credit Mescetti that Zaremski told him he was not being recalled because he filed a Board charge, complaint or grievance. First, these conversations occurred in mid-October. There is no record of any charge or grievance being filed between July 7 and November 13, and the only charge mentioning Mescetti was filed in 2018. Second, Mescetti testified Schmaltz told Zaremski that if Mescetti did not file a complaint, then he could work on Schmaltz's crew that day. He also testified that when he and Schmaltz spoke to Coletti, Schmaltz told Coletti there was no complaint. However, Schmaltz never testified about any conversation involving Zaremski, and he never testified about any reference to a complaint, charge, or grievance. Schmaltz recalled Coletti telling Mescetti that he could not work there, but he could not recall if Mescetti was given any reason why. I find that if Schmaltz heard Zaremski or Coletti mention a charge, complaint, or grievance as the reason why Mescetti was not working, the General Counsel or Local 175's attorney would have questioned Schmaltz about it. Third, according to Mescetti, after he came back from speaking with Coletti and informed Zaremski about their conversation, Zaremski responded that was not what Coletti had told him. I find it improbable that after Zaremski told Mescetti to speak to Coletti, and Mescetti reported back that he spoke to Coletti and he knew nothing about any Board charge or complaint, Zaremski would not check with Coletti, who is Zaremski's superior, to confirm what Mescetti was saying.

person jobs, but because Shomari Patrick did not have a driver's license, he worked with another employee (Anthony (last name unknown)), who drove the truck. Once the clean-up crews completed their work, they could be sent to assist Respondent's concrete crews.<sup>26</sup> Patrick was assigned to assist Local 1010 crews pour concrete on two or three occasions. (Tr. 581-583). At some point during his employment, Sbarra told Patrick that he was doing well and suggested that he get his driver's license so that he could drive his own truck. (Tr. 568). Patrick, however, never went to get his license. (Tr. 1505).

On around October 20, Patrick was on the platform outside of the office at the start of the day. According to Patrick, Sbarra came out of the office and walked up and told him "kid, today's your last day." Patrick testified as follows about what happened next:

Q: Did he say why it was your last day?  
 A: Yeah. He said it was because of my last name.  
 Q: He said it was because of your last name?  
 A: Yeah.  
 Q: Did he say anything else?  
 A: Yeah. He was like -- I asked him, what do you mean. He said it was because of my family. They were going through a list and they picked out my name, they saw my last name, picked out my name and said get rid of him.  
 (Tr. 570).

Following certain objections, Patrick was asked again on direct examination to recount what was said, and his testimony was as follows:

Q: BY MS. ALAM: Okay. So let's just back up. When -- so you're sitting outside with Anthony and Steve walks up from the office. So if you could just rephrase exactly what did he say to you?  
 A: He basically told me I was fired because of my uncle.  
 Q: And did you ask any follow-up questions?  
 A: I asked him why. He was like, it's because the boss, that's what the boss has said. It's not him. He said it's not him. It's not his call. The boss has told him to fire.  
 Q: And he said it was because of your name?  
 A: Yes.  
 (Tr. 572-573).<sup>27</sup>

Following his October 20 discharge from Di-Jo, Shomari Patrick became a member of Local 175. (Tr. 574, 593). On around November 2, Local 175 referred Patrick and three others to work for Respondent, even though Patrick had not been badged to work for Respondent. Patrick reported for work and was assigned to an asphalt crew. He worked one day. Respondent initially refused to pay Patrick and the others, because they had not been badged to work. (Tr. 507). As discussed below, Local 175's acting business manager Mike Bedwell later met with Respondent, and it eventually paid Patrick and the others

<sup>26</sup> According to Miceli, if Di-Jo clean-up crew members showed an interest and ability in performing this concrete work, they would be transferred over to work for Respondent and placed in the Concrete Unit represented by Local 1010. A very small number of the Di-Jo clean-up crew members transferred over to work for Respondent and were placed in the Asphalt Unit represented by Local 175.

<sup>27</sup> Neither Sbarra nor Anthony (last name unknown) was called to testify.

for the work they performed on November 2. After November 2, Patrick did not apply, and was not referred, to work for Respondent or Di-Jo. (Tr. 577-578).<sup>28</sup>

5 Miceli testified he discharged Shomari Patrick on October 20, because he was not working out. (Tr. 1504-1505). According to Miceli, Patrick was hired by Di-Jo as an extra on a cleanup crew, which really is a one-man job where the person drives the truck around to the jobsites. But after several months, Patrick still had not obtained his driver's license and was not showing any promise about becoming a decent laborer, so Miceli told Sbarra to discharge Patrick. (Tr. 1408-1409). Miceli confirms that Patrick was not re-hired to work for Respondent following his one-day assignment on November 2, because he had not been  
10 issued a badge, had no training to perform asphalt work, and should not have been referred to work on the crew in the first place. (Tr. 1411-1412).

*Alleged Threat and Refusal to Hire or Consider for Hire Anthony Franco Jr.*

15 Anthony Franco Jr. is the son of Local 175's Fund Administrator (Anthony Franco Sr.), and the brother of Salvatore Franco. Franco Jr. worked for Respondent in the summer of 2014, after he graduated from high school. He then went to college. He worked for Respondent again in December 2016. He worked through March, and a few hours in April. (GC Exh. 17, pgs. 789, 807). In the summer, Local 175 sent Franco Jr., Salvatore Franco, and Louis Ruggiero to Respondent's office to get their photos taken for  
20 identification badges. (Tr. 1101-1002). The three went together and got their photos taken, but Franco Jr. did not receive a badge at the time. (Tr. 989).<sup>29</sup>

On August 27, Local 175 sent Franco Jr. to work for Respondent. (Tr. 990-992). According to Franco Jr., when he arrived at Respondent's location, he spoke to Coletti and asked for his badge. The two  
25 walked into the office, but there was no badge for Franco Jr. He asked Coletti if it was going to be a problem if he went out and worked that day, and Coletti said, "I'm not going to send you home." (Tr. 991). Franco Jr. worked that day and was paid. In October, Local 175's shop steward, Terry Holder, contacted Franco Jr. about working for Respondent on an asphalt crew. (Tr. 997). According to Franco Jr., when he reported for work, Holder told Franco Jr. that he was not allowed to work "because of union hierarchy or something."  
30 (Tr. 998). Franco Jr. asked Holder what he meant, and Holder indicated that it had come from Coletti.<sup>30</sup> Franco Jr. then went home. Since then, Franco Jr. has not applied, or been referred, to work for Respondent.

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<sup>28</sup> According to Shomari Patrick, at some point in March 2018, Local 175's new business manager, Charlie Parola, told Patrick to go to Respondent's office and apply for a badge to work there. Patrick testified he was told to go by his business manager, so he went. According to Patrick, he went to Respondent's offices and spoke with Miceli, who informed him that Respondent was not issuing badges at that time. (Tr. 580). Miceli denies speaking with Patrick in March. Respondent introduced testimony and documents showing that Miceli was on vacation or gone from work for most of the month of March. (Tr. 1411-1416) (R Exh. 17). Regardless, even if Patrick and Miceli spoke, there is no evidence Respondent requested additional asphalt employees or had any openings at the time Patrick allegedly went to Respondent's facility to apply for a badge.

<sup>29</sup> Payroll records indicate Franco Jr.'s brother, Salvatore Franco, was issued a badge, because he worked full time for Respondent in August and then a few hours in September, October, and December. (GC Exh. 17, pg. 827).

<sup>30</sup> I do not credit Franco Jr.'s testimony. In general, I did not find him to be a reliable and forthright witness. He had a poor recollection about events, including basic background information about himself and what he was doing for work and school, and he had difficulty responding to straightforward questions. Additionally, I observed Franco Jr. periodically looked at his brother, who was sitting in the hearing room, when he gave certain answers, seemingly looking for confirmation or validation about what he was saying in his testimony.

When Franco Jr. attempted to testify about Holder's alleged statements to him, there was a hearsay objection raised and sustained, because Holder was not alleged or proven to be an agent of Respondent, and the General Counsel presented no exception or basis for why Holder's alleged statements to Franco Jr. were admissible. (Tr. 999, 1002-1003). I, therefore, have not considered Holder's alleged statements for any purpose.

Miceli testified that Franco Jr. was not issued a badge because he was not a full-time employee, and Respondent only issued badges to individuals who could work full time. Franco had not been a full-time employee for Respondent for several months, and Miceli believed Franco Jr. was in college at the time. (Tr. 1397)(R. Exh. 8). Furthermore, Respondent was nearing the start of its slower winter season, and it did not issue any new badges to Local 175 members in October and November. (Tr. 1397 1443; 1493-1494).

*Alleged Threat and Refusal to Hire or Consider for Hire Michael Bedwell*

Michael Bedwell worked for Respondent from December 2016 through the first week of April 2017. (R. Exh. 16). In May, Bedwell took over for his father as Local 175's acting business manager, and he held that position into December. (Tr. 476-478, 483). Bedwell acknowledged the role of acting business manager was a full-time job. (Tr. 482). One of his duties as acting business manager was to handle referrals to contractors, like Respondent.

In August, Bedwell received a call from Billy Smith Jr., who was Local 175's acting shop steward while Labate was on vacation, requesting people to work for Respondent on an asphalt crew. Bedwell sent Keith Farrell, who apparently had not worked for Respondent before and did not have a badge. Smith Jr. later called Bedwell and told him that, per Coletti, Farrell could not work there because Respondent did not want any new employees. (Tr. 485-486). At some point, Bedwell went to speak to Coletti. During their meeting, Coletti handed Bedwell a list of employees who were badged to work for Respondent. (Tr. 507).

On November 2, Bedwell again referred individuals to work for Respondent who were not badged. (Tr. 498-499). Bedwell referred Shomari Patrick and three others, as well as himself to work for Respondent. When the men were initially not paid, Bedwell spoke with Coletti and was able to get them all paid. On November 13, Bedwell spoke to Coletti at Respondent's facility. (Tr. 508-510). According to Bedwell, Coletti handed him his paycheck (for November 2) and told him that he would not be allowed to work there anymore. Bedwell did not testify whether he was given any reason. Coletti did not testify about this alleged conversation.

On around December 13, Bedwell went back to Respondent's location and met with Coletti in the kitchenette area in the office. According to Bedwell, Coletti explained that because Bedwell was "union hierarchy," Respondent would not be hiring him because of who his father was. Bedwell responded that, with all due respect, he was not his father. Coletti replied that was "the path New York Paving is taking, and that is the reason you or Anthony Franco Jr. will not be allowed to work here at all." (Tr. 511-512). There was no one else present.

Coletti confirmed he had conversation with Bedwell in the kitchenette at Respondent's office. (Tr. 1276-1277). He recalled that Bedwell asked about getting two men who had not been paid for work. And, then, at some point during the conversation, Bedwell asked Coletti whether there was any chance that he (Bedwell) could come to work there. Coletti responded that, first, it was not up to him, and, second, he (Bedwell) already had a full-time job. According to Coletti, Bedwell just laughed. Coletti denied ever using the term "union hierarchy."<sup>31</sup>

<sup>31</sup> I do not credit Bedwell regarding this conversation with Coletti. Overall, Bedwell had poor recollection of events (e.g., the year he last worked for Respondent, when he was Local 175's acting business manager, and the details and context of his communications with Respondent's managers). There also were critical aspects of his testimony that were illogical, implausible, or false. One key example concerned "the list" Bedwell allegedly received from Coletti with the names of the Local 175 members eligible to work for Respondent. (GC Exh. 12). Bedwell insisted Coletti gave him "the list" in August as one document. The first nine pages are a multi-page report of the names, hours, and earnings of 62 Local 175 members who worked for Respondent *in the month of January*, and the last page is a one-

Miceli testified that Bedwell was not issued a badge because Bedwell was not available for full-time work; he already was working full-time as the Local 175 business manager. Miceli testified Respondent does not hire or employ individuals who already are working full time, regardless of where they work, because they need people who can perform physically demanding work for 50-60 hours a week. (Tr. 1401-1402). Additionally, as stated, Respondent was not issuing any new badges at this time, in part because it was nearing the start of the slower winter season. (Tr. 1493-1494).

#### IV. LEGAL ANALYSIS

##### *Agency Status of Labate, Bartone Jr., and Sbarra*

##### *Legal Standard*

The Amended Consolidated Complaint alleges that Respondent, through its agents Bartone Jr., Labate, and Sbarra, violated the Act. The threshold issue is whether these individuals are agents within the meaning of Section 2(13) of the Act. Section 2(13) of the Act states: “[i]n determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” The party asserting that an individual acted as an agent of the employer must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001).

The Board applies the common-law principles of agency to determine whether an employee’s statements or conduct are binding on their employer. *Mastec North America, Inc.*, 356 NLRB 809, 809-810 (2011). Under common law, an agency relationship is established by vesting an agent with actual or apparent authority. *A.D. Conner Inc.*, 357 NLRB 1770, 1790 (2011); and *Blankenship & Associates*, 306 NLRB 994, 1000 (1992), enfd. 999 F.2d 248 (7th Cir. 1993). In addition, an employer may be responsible for an employee’s conduct if the employee is “held out as a conduit for transmitting

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page report with the names, hours, and earnings of 44 Local 175 members who worked for Respondent *during the week ending August 6*. Bedwell acknowledged not noticing the several differences between these reports. Yet, he insisted that he received them as one document, and he refused to acknowledge even the possibility that they were two separate lists, or that they were given at different times. (Tr. 525-526). Also, Bedwell testified that Coletti told him that “anybody who has ever worked here or--whether badged or not badged or that are in the system, will be allowed to work off -- based off this document.” (Tr. 538). It strains credulity that Coletti would provide two separate documents, which were created seven months apart, as “the list” of eligible employees, particularly when the first list was from five months prior to when Respondent implemented its badging policy *and* limited the number of Local 175 members eligible to work for the company. It also is entirely inconsistent with Respondent’s badging policy--which Coletti drafted—to state that everyone on those documents would be allowed to work for Respondent, *regardless of whether or not they were issued a badge*. Finally, after Bedwell repeatedly insisted that “the list” was presented to him as it was introduced into evidence, with the employees’ social security numbers redacted, Counsel for General Counsel acknowledged she redacted most of that information prior to the hearing. (Tr. 1290-1291).

In contrast, Coletti’s testimony about this conversation was more logical, plausible, and consistent with the overall evidence. To begin with, it was not up to Coletti if Bedwell worked for Respondent. Bedwell would need a badge, and Miceli decided who received a badge. The Local 175 shop steward also would then need to refer Bedwell to work for Respondent. Second, Coletti reasonably believed Bedwell was Local 175’s business manager because he was there, in front of him, discussing union matters, trying to get Local 175 members paid. To Coletti’s knowledge, being a local business manager was a full-time job, and Respondent’s policy was not to hire/give badges to individuals who were already working full time, regardless of whether it was for a union or another entity.

information [from the employer] to the other employees.” *D & F Industries Inc.*, 339 NLRB 618, 619 (2003). The test for determining whether an individual is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the individual in question was reflecting company policy and speaking and acting for or on behalf of management. *Waterbed World*, 286 NLRB 425, 426-427 (1987); *Southern Bag Corp.*, 315 NLRB 725 (1994).

*Agency Status of Joseph Bartone Jr.*

The Board considers familial relationship a significant factor when determining whether the conduct of a particular individual may be imputed to the employer. See, e.g., *Tres Estrellas de Oro*, 329 NLRB 50, 57 (1999); *Scotts IGA Foodliner*, 223 NLRB 394, 400-401 (1976), enfd, 549 F.2d 805 (7th Cir. 1977); and *South Shore Pontiac Co.*, 203 NLRB 928, 932-933 (1973). Bartone Jr. is the nephew of three of Respondent’s owners—a fact known by the employees. He also received certain additional benefits because of his familiar relationship. Most notably, Bartone Jr. was paid for at least 40 hours a week, every week, regardless of how many hours he actually worked. This was pursuant to a directive from Bartone Jr.’s grandmother, Martha Bartone, to Miceli prior to her death—a fact known only to Miceli and Respondent’s payroll manager. (Tr. 1417-1418). As far as his duties and responsibilities, between March and November, Bartone Jr. worked as a laborer on a Local 175 crew, wearing the same equipment, using the same tools, and performing the same work, as the others laborers.

As stated, Bartone Jr. told the men when he gathered them together to hand out the cards that “the office” wanted the men to sign the cards, and “the company” wanted to go in the direction of using Local 1010 laborers. Respondent has one office, and it is where Anthony Bartone, Miceli, Zaremski and Coletti are all located. Additionally, Bartone Jr. told the men he did not want to hand out the cards. He separately told Smith Jr. and Glenn Patrick, in separate conversations, that he was doing what his uncle and Coletti wanted. These statements undermine Respondent’s claims that Bartone Jr. was acting in his individual capacity and sharing his personal views when distributing the cards. Under the circumstances, I find that employees would reasonably conclude that Bartone Jr. was reflecting the company’s views and speaking and acting for management, which, of course, was more credible considering his close familial relationship with the owners of the company. I, therefore, conclude Bartone Jr. was acting as a Section 2(13) agent of Respondent when he distributed the cards and made the statements at issue.

*Agency Status of Paddy Labate*

Labate was a working foreman who regularly transmitted information from management to the employees. For example, he notified his crew on a daily basis about their job assignments and routes, as determined by Zaremski, and he also relayed instructions/reminders from management to the employees about safety, such as wearing hard hats, vests, personal identification, and setting out safety signs. And, similar to Bartone Jr., when Labate spoke to the men about signing the authorization cards, he stated he had come from “the office” and “they” wanted the men to sign the Local 1010 authorization cards, and Labate told the men they would not be employed there if they did not sign a card. While Labate, in his mind, may have been offering his personal opinion, I find based his role a foreman, the words he used, and the context in which he spoke, employees would reasonably believe he was speaking for or on behalf of management. I, therefore, conclude Labate was acting as a Section 2(13) agent of Respondent when he made the statements and engaged in the conduct at issue.<sup>32</sup>

<sup>32</sup> Based on my finding that Labate was acting as a Section 2(13) agent for Respondent when he made the statements and engaged in the conduct at issue, I need not decide whether he also was a Section 2(11) supervisor. On April 2, 2019, Respondent filed a motion to reopen the record for the limited purpose of introducing into evidence the unfair labor practice charge that Local 175 filed against Respondent on or about January 29, 2019 in Case 29-CA-234894, as well as Region 29’s request for information, dated March 6, 2019, in connection with the Region’s investigation

*Agency Status of Steve Sbarra*

5 Unlike Bartone Jr. and Labate, I find the General Counsel failed to establish that Sbarra was a  
 Section 2(13) agent of Respondent, or that he was acting as such, when he made the alleged statements to  
 Shomari Patrick about the reason he was being discharged. The record regarding Sbarra's position, duties,  
 and authority is limited, and it is almost entirely based on Patrick's testimony about his interactions with  
 Sbarra *as an employee of Di-Jo*. Miceli confirmed that he directed Sbarra to tell Patrick that he was no  
 longer needed based on Patrick's performance and lack of initiative, but Miceli also is Di-Jo's Director of  
 10 Operations. While I recognize there are several commonalities between Respondent and Di-Jo, there is  
 insufficient evidence that Miceli was authorizing Sbarra to act in anything other than his capacity as an  
 agent of Di-Jo when he told Sbarra to tell Patrick he was no longer employed. And absent clearer evidence,  
 I am unwilling to infer that Sbarra was acting *as an agent of Respondent* when he allegedly made the  
 statement at issue.

15

*Respondent, through Bartone Jr., unlawfully assisted and supported Local 1010.*

The Amended Consolidated Complaint alleges that on about mid-to-late April, a more precise date  
 unknown, Respondent, through Bartone, Jr. gave assistance and support to Local 1010 by urging its  
 20 employees in the Asphalt Unit represented by Local 175, to sign union membership cards for Local 1010,  
 in violation of Section 8(a)(2) and (1) of the Act. Section 8(a)(2) of the Act makes it an unfair labor practice  
 for an employer "to dominate or interfere with the formation or administration of any labor organization or  
 contribute financial or other support to it." The Board has held that an employer which allows one of its  
 agents to distribute authorization cards to employees for a favored union during work hours at the worksite  
 25 is providing unlawful assistance and support, in violation of Section 8(a)(2) and (1) of the Act. See  
*Michigan Roads Maintenance Co., LLC*, 344 NLRB 617, 624 (2005); and *Baby Watson Cheesecake*, 320  
 NLRB 779 (1996). I find that Bartone Jr. was acting in his capacity as an agent of Respondent when he  
 gathered the Local 175 members together at the end of their work day, handed out the Local 1010  
 authorization cards, stated "the office" wanted them to sign the cards, and "the company" wanted to go in  
 30 the direction of using Local 1010 laborers. I further find he was acting in his capacity as an agent of  
 Respondent when he told them that if they wanted to work there, they had to sign the cards. In light of this  
 evidence, I conclude Respondent violated Section 8(a)(2) and (1) of the Act, as alleged.

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into that charge. According to Respondent, this charge contradicts the position taken by both the General Counsel  
 and Local 175 at hearing, and their respective post-hearing briefs, regarding the alleged supervisory status of Labate  
 in his capacity as Local 175 shop steward.

The Board has consistently held that, pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations,  
 evidence warranting reopening the record must have been capable of being presented at the original hearing. *Western  
 Refining*, 366 NLRB No. 83 fn.1 (2018)(denied motion to reopen the record to enter an arbitration award relating to  
 discriminatee's discharge); *Rush University Medical Center*, 362 NLRB 218 fn. 2 (2015) (denying request to reopen  
 record for election petitions that did not exist at the time of the hearing), enfd. 833 F.3d 202 (D.C. Cir. 2016); see also  
*Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987) (denying "the motion [to reopen] as it proffers evidence  
 concerning an alleged event that occurred after the close of the hearing"). Because the information at issue did not  
 exist at the time of the hearing, it does not provide a basis for reopening the record. *APL Logistics, Inc.*, 341 NLRB  
 994, 994 fn. 2 (2004), enfd. 142 Fed.Appx. 869 (6th Cir. 2005).

Furthermore, the new charge and the Region's request for information, which is solely being offered as  
 relevant to arguments concerning Labate's supervisory status, are irrelevant because, as stated, I am not reaching  
 Labate's alleged supervisory status; therefore, the proffered new evidence would not mandate a different result in this  
 case. *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 fn. 1 (1998); *Opportunity Homes, Inc.*, 315 NLRB 1210, 1210  
 fn. 5 (1994), enfd. 101 F.3d 1515 (6th Cir. 1996).

*Respondent, through Labate, unlawfully threatened employees on around April 27.*

5 The Amended Consolidated Complaint also alleges that on or about April 27, Labate threatened Asphalt Unit employees represented by Local 175 with discharge if they did not sign union membership  
 10 cards for Local 1010, in violation of Section 8(a)(1) of the Act. Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” The Board has held that threats of job loss if employees did not support preferred union over another union constitutes unlawful interference with employees Section 7 rights, in violation Section 8(a)(1) of the Act. See *Baby Watson Cheesecake*, supra at 785-786. See also *Meyers Transport of New York, Inc.*, 338 NLRB 958 (2003). In assessing whether a remark constitutes a threat, the appropriate test is whether the remark can reasonably be interpreted by the employee as a threat. The actual intent of the speaker or the  
 15 effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). The threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).

20 As stated, I find Labate was acting as Respondent’s agent when he told a group of Local 175 employees at Respondent’s facility that he had just come from the office and “they” wanted the men to sign the Local 1010 authorization cards because they wanted to go 1010; otherwise, the men would not be able to work there. He made similar statements to employees during one-on-one conversations. Under these circumstances, I find employees would reasonably interpret Labate’s comments as relaying threats from  
 25 Respondent about what would happen if the Local 175 members did not sign a Local 1010 authorization card, in violation of Section 8(a)(1) of the Act.<sup>33</sup>

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<sup>33</sup> At the hearing, Labate claimed he simply offered his opinion about what might happen if the Local 175 members did not sign a Local 1010 authorization card. As stated, his subjective intent in making the statements is irrelevant; it is whether the statements could be reasonably interpreted as a threat. Under the U.S. Supreme Court’s decision in *NLRB v. Gissel Packing Co.*, 395 U.S.575, 589 (1969), an employer’s predictions of adverse consequences are either coercive threats in violation of Section 8(a)(1) or lawful expressions protected by Section 8(c) of the Act. To determine the difference, the proper inquiry is whether, based upon the totality of the circumstances, the employer’s prediction is “carefully phrased on the basis of objective fact to convey the employer’s belief as to demonstrably probable consequences beyond his control.” *Id.* at 618. If so, the statement is considered a reasonable prediction of adverse consequences resulting from unionization and is lawful free speech under Section 8(c) and the First Amendment. On the other hand, if there is any implication that the employer will take action solely on its own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction but a threat of retaliation. These types of statements are not protected by Section 8(c) or the First Amendment; rather they are unlawful coercive threats that violate Section 8(a)(1). *Id.* Thus, for example, where an employer predicts that union activity will result in a loss of benefits when there “is no lawful explanation based on objective facts as to why [the] loss of a benefit would occur,” the employer’s statement violates the Act. *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), *affd.* in relevant part *Poly-America, Inc. v. NLRB*, 260 F.3d 465 (5th Cir. 2001); *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 188 (2000). In short, the trier of fact must assess, under the totality of the circumstances, whether the employer conveyed what “could” occur (which would be lawful predictions) versus what “would” occur (which would be unlawful threats). Under the circumstances, I find Labate’s statements were not carefully phrased on the basis of objective facts to convey Respondent’s belief as demonstrably probable consequences beyond its control, but rather what *would* occur if the Local 175 members did not sign the Local 1010 cards. I, therefore, find Labate’s statements to be unlawful threats.

*Respondent did not commit the other alleged independent violations of Section 8(a)(1).*

5 The Amended Consolidated Complaint alleges that on or about October 15, Labate, at Respondent's Railroad Avenue facility, threatened employees with unspecified reprisals for participating in proceedings before the Board, in violation of Section 8(a)(1) of the Act. This concerns the alleged statement Labate made to Glenn Patrick that the company was after him because he went to the Board and/or testified at the Section 10(k) hearing. For the reasons previously stated, I do not credit Patrick regarding Labate's alleged statements, and there is no other evidence to support the alleged violation. As a result, I recommend dismissing this allegation.

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15 The Amended Consolidated Complaint alleges that on or about October 16, Zaremski, at Respondent's Railroad Avenue facility, told employees they could not work for Respondent because they had filed charges with the Board. This concerns the alleged exchange between Mescetti and Zaremski when Mescetti went to Respondent's facility to ask why he was not being recalled, and Zaremski allegedly told him that it was because he had filed a Board charge, complaint, or grievance. As stated, I do not credit Mescetti's testimony regarding this conversation, and there was no other evidence to support the alleged violation. I, therefore, recommend dismissing this allegation.

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20 The Amended Consolidated Complaint alleges that on or about October 20, Respondent, by Sbarra, at Respondent's Railroad Avenue facility, told employees that they could not work for Respondent because of their support for and affiliation with Local 175. This allegation concerns Sbarra's alleged statement to Shomari Patrick that he was being let go because of his family and/or his name. As stated, the General Counsel failed to establish that Sbarra was an agent of Respondent when he made the statement. Consequently, I recommend dismissing this allegation.

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30 The Amended Consolidated Complaint alleges that on or about December 13, Respondent, by its attorney, at Respondent's Railroad Avenue facility, threatened employees that Respondent would not hire them because of their support for and affiliation with Local 175. This relates to Coletti's alleged statement to Michael Bedwell during their meeting in the kitchenette at Respondent's facility that Respondent would not hire Bedwell or Anthony Franco Jr. because they were part of the union hierarchy. As discussed, I do not credit Bedwell's testimony about this conversation, and there is no other credible evidence to support this alleged violation.<sup>34</sup> I, therefore, recommend dismissing this allegation.

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35 *Respondent did not discriminatorily discharge, or fail to reinstate, Glenn Patrick, Constantine Seminatore, or Gregory Schmaltz.*

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40 The Amended Consolidated Complaint alleges that on about November 6, Respondent discriminatorily discharged Patrick, Seminatore, and Schmaltz, and has since failed to recall or reinstate them to their former positions. Respondent allegedly discharged and failed to recall/reinstate Patrick, Seminatore, and Schmaltz because they assisted, supported and/or were affiliated with Local 175, and/or engaged in concerted activities, in violation of Section 8(a)(3) and (1) of the Act. Respondent also is

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<sup>34</sup> The General Counsel cites to Terry Holder's alleged statement to Anthony Franco Jr. that he had been told Franco Jr. could not work there because he was union hierarchy, as supporting Bedwell's testimony. As stated, Holder is not alleged or proven to be an agent of Respondent, and the General Counsel presented no exception to the hearsay rule that would make his alleged statement admissible. Neither the General Counsel nor Local 175 called Holder, who is Local 175's shop steward, to testify about this alleged conversation. And, as stated, I do not consider Holder's alleged statements for any purpose.

alleged to have discharged and failed to reinstate/recall Patrick and Seminatore because they participated in the Section 10(k) hearing, in violation of Section 8(a)(4) and (1) of the Act.<sup>35</sup>

Section 8(a)(3) makes it an unfair labor practice to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(4) makes it an unfair labor practice to discriminate against an employee because he has filed charges or given testimony under this Act.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set out the appropriate analytical standard for assessing the violations alleged in this case. *Wright Line* is the analysis in 8(a)(1), (3), and (4) cases turning on employer motivation for action against employees allegedly motivated by their statutorily protected activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983); *American Gardens Management Co.*, 338 NLRB 644, 645 fn. 7 (2002); *Verizon*, 350 NLRB 542, 546-547 (2007); and *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006)

Under *Wright Line*, the General Counsel has the burden of persuading by a preponderance of the evidence that union or other protected conduct was a substantial motivating factor for the employer's adverse employment action. Under the *Wright Line* framework, as developed by the Board, the General Counsel to show that the employee engaged in union or protected activity, employer knowledge of that activity, and union animus on the part of the employer. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). Animus can be established through direct evidence or inferred from circumstantial evidence. See *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation”). If the General Counsel establishes these factors, the burden shifts to the employer to show that it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. The employer cannot meet its burden merely by showing it had a legitimate reason for its action; rather, it must show it would have taken the same action in the absence of the protected conduct. See *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015); and *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

I find the General Counsel has established the first two elements. Patrick and Seminatore are Local 175 officers and they testified and/or acted (or attempted to act) as representatives for Local 175 at the Section 10(k) hearing, and Respondent was aware of this activity. As for Schmaltz, he is member of Local 175, and he stated in Bartone Jr.'s presence that even though he signed a Local 1010 authorization card, he would continue to support Local 175 if there were an election.

However, I find the evidence of animus to be minimal and remote. As stated, Bartone Jr. and Labate were actively soliciting support for Local 1010 on Respondent's behalf in April, including threatening employees with job loss if they did not sign a Local 1010 authorization card. Those statements and conduct occurred almost seven months prior to the discharges at issue, and, as stated, I do not credit any of the allegedly unlawful statements made in the interim. Under the circumstances, I conclude that a gap of almost seven months to be too remote to reasonably warrant inferring animus. See also *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (2 months between union activity and warning was too remote in time to show animus); *Laidlaw Environmental Services*, 314 NLRB 406, 406 fn. 1 (1994) (anti-union statement

<sup>35</sup> Any conduct found to be a violation of Sec. 8(a)(3) and/or 8(a)(4) would also discourage employees' Sec. 7 rights, and thus, is also a derivative violation of Sec. 8(a)(1) of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

made to employee 7 to 8 months prior to suspension was too remote to show animus); *New Otani Hotel & Garden*, 325 NLRB 928, 939 (1998) (expression of antiunion animus 8 months before discharge in part too temporally remote); *Upper Great Lakes Pilots*, 311 NLRB 131, 137 (1993)(unwilling to infer persistent animus from isolated statements made 3 months before the layoffs); and *Magic Pan, Inc.*, 242 NLRB 840, 853 (1979) (statements made 6 months before discharge too remote to support finding of animus). Cf. *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 13 (2016) (finding 3 months between activity and discharge not too remote and supported a finding of animus).

The General Counsel and Local 175 repeatedly argue animus should be inferred from Respondent's implementation of its badging policy in July, and, specifically, its decision to only limit the number of badges it issued to Local 175 members.<sup>36</sup> I reject these contentions. Respondent implemented the badging policy in response to a request from its customers to have Respondent's employees wear photo identification badges while on the jobsites, and Respondent limited the number of badges issued to Local 175 because Local 175 was the only union that continued to cycle through members, despite Respondent's repeated requests to cease this practice.

Finally, as stated, animus can be inferred from the relatively close timing between an employee's statutorily protected activity and the adverse action. See *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016) (animus found based on timing of discipline imposed within weeks of a Board hearing), enf. 713 Fed.Appx. 152 (4th Cir. 2017); and *Bates Paving and Sealing*, 364 NLRB No. 46, slip op. at 3-4 (2016), and cases cited therein (noting that a discharge occurring 2 months after an employee gave testimony at Board hearing suggestive of animus). However, that inference is lost when there is legitimate, alternative explanation for the adverse action. In this case, I find Respondent has presented a legitimate, alternative explanation for the timing of the discharges, which is that Respondent discovered that they colluded to falsify time sheets, resulting in Patrick and Seminatore both being paid for hours they did not work. Patrick was paid 2.5 hours of unearned overtime for October 2, and Seminatore was paid for at least 1.5-2 hours of unearned overtime for October 16, each amounting to \$200-\$300 in unearned compensation and benefits. Schmaltz signed off on both timesheets, knowing them to be false and knowing they would result in overpayments.

Based on the overall evidence, I conclude the General Counsel has failed to establish animus.

Even if the General Counsel had met its initial burden under *Wright Line*, I find Respondent has established it would have discharged Patrick, Seminatore, and Schmaltz, regardless of any statutorily protected activity. There is no dispute Schmaltz falsified time records and, as a result, Seminatore and Patrick received unearned overtime pay and benefits. There is no evidence of other similar incidents brought to Respondent's attention that were ignored or treated differently, so there are no direct comparators. However, there are other instances of theft or attempted theft in the record. For example, Respondent discharged an employee who stole a toll receipt from another employee's truck and tried to submit it as his own for reimbursement. It also discharged an employee who stole a box of Vermeer teeth. Finally, it discharged two entire crews for doing side jobs while at work. (Tr. 1427-1432).

The General Counsel argues theft of time and falsification of timesheets are pretext for Respondent's unlawful motivation. First, the General Counsel argues Respondent "often and knowingly misreports time records." (GC Br. 51-54). The General Counsel cites to examples, which include: (1) allowing foremen to write down and get paid an extra hour for every day they work as a foreman as

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<sup>36</sup> As noted, Local 175 filed charges against Respondent alleging the implementation of the badging policy and its application to Local 175 members violated the Act, but there are no allegations in the Amended Consolidated Complaint that either of these actions violated the Act. The Counsel for General Counsel argues the implementation of the policy is evidence of discriminatory motive, but fails to explain why it is not alleged as unlawful.

5 additional compensation for taking on the additional duties and responsibilities of being the foreman; (2) not paying employees for the time spent in the yard and traveling to jobs; (3) paying Bartone Jr. for at least a full week every week, regardless of how many hours he actually works; and (4) a single instance in which Glenn Patrick was paid for a full day when he left work early to pick up his wife following a medical procedure. For the first three examples, I find Respondent knowingly instituted or consented to the practice. For the last example, there is no evidence management knew Patrick was paid for time he missed to pick up his wife. I, therefore, do not find these to be evidence of disparate treatment or pretext.

10 The General Counsel also argues Respondent failed to thoroughly investigate before making the decision to discharge the three, noting that Miceli did not confront Patrick, Seminatore, and Schmaltz about their actions, and, instead, simply waited for them to deposit/cash their paychecks, before discharging them. I reject this argument. Miceli noticed that Patrick had hours listed on his timesheet for October 2, when he knew Patrick was at the Section 10(k) hearing, and he learned after speaking with Bartone Jr. and reviewing the truck's GPS device that Seminatore did not put in a full day on October 16. Also, Miceli knew from the timesheets that Schmaltz was the foreman in both instances and recorded them as working hours they did not work. Miceli had the evidence, and he waited to see if any of the three came forward after receiving their paycheck to report the error, to give them one last chance to correct matters. When they did not, Miceli concluded their conduct was intentional, not accidental, and he then made the decision to discharge.

20 The General Counsel argues Respondent has offered shifting defenses for why it discharged Seminatore, pointing out that Miceli initially testified (in his pre-hearing affidavit and while testifying as an adverse witness) that Seminatore and Patrick were discharged for both stealing time on October 2, and later testified that Seminatore was discharged for stealing time on October 16, not October 2. As previously stated, I find Miceli made an error, relying upon his memory rather than the timesheets, and he acknowledged his error after he had an opportunity to review the timesheets. Under the circumstances, I do not find this to be evidence of shifting defenses.

30 The General Counsel also argues Respondent was "piling on" when Miceli testified that he considered Seminatore's prior suspension for failing to come forward with information about the incident when one of his fellow crew members used profanity toward a member of the public while on a jobsite. I do not find Miceli's consideration of Seminatore's prior discipline to be "piling on." In both instances, Seminatore withheld or failed to come forward with information about misconduct, and it was not impermissible or discriminatory for Miceli to consider the prior incident when determining what action to take in response to the latter incident.

35 As a result, I find General Counsel failed to prove that Respondent unlawfully discharged or refused to rehire or reinstate Patrick, Seminatore, or Schmaltz, in violation of Section 8(a)(1), (3), or (4) of the Act. I, therefore, recommend dismissing these allegations.

40 *Respondent did not discriminatorily fail or refuse to recall Donald Mescetti from layoff*

45 The Amended Consolidated Complaint alleges that since on about October 16, Respondent has failed and refused to recall Mescetti from layoff because he assisted, supported and/or was affiliated with Local 175, and/or engaged in concerted activities, in violation of Section 8(a)(3) and (1) of the Act. The General Counsel's primary argument is that Respondent failed or refused to recall Mescetti because it mistakenly believed he had filed a Board charge or complaint. The sole evidence offered to support this claim is Mescetti's testimony, which I do not credit.

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The General Counsel next argues Respondent failed or refused to recall Mescetti because of his response when Bartone Jr. told him in the spring that if he did not sign a Local 1010 authorization card, and the company switched to Local 1010, he would not have a job. According to Mescetti, he told Bartone Jr. that it would be stupid for him to sign a card (presumably because of his age and years in the Local 175 pension fund). Even if Respondent had animus based on this statement, I am unwilling to infer that it motivated Respondent not to recall Mescetti six months later, particularly when he continued to work for Respondent for over four months after he made this statement.

Finally, the General Counsel argues Respondent's claim that it did not recall Mescetti because of his poor performance is pretext. The General Counsel points out that Respondent's contract with Local 175 does not have a "just cause" provision, and Respondent could have discharged Mescetti at any time because of his allegedly poor performance, but it failed to do so. This is a Catch-22—either Respondent discharges him a few months earlier and faces allegations that it acted in response to his unwillingness to sign a Local 1010 authorization card, or it lets him continue to work until his performance is no longer acceptable and face allegations it could not have been because of his poor performance, because it was tolerated for too long. Furthermore, the payroll evidence supports Miceli's testimony that Mescetti frequently did not work when others did. Mescetti worked, on average, 3-4 days a week, but there were several weeks, particularly during the warmer (and presumably busier) months, when he did not work at all. (GC Exh. 17, pgs. 836-837). Regardless, I am unwilling to infer animus or pretext based on the timing of Respondent's decision not to recall Mescetti, particularly with the lack of any other contemporaneous evidence of animus.

Overall, I find the General Counsel failed to prove that Respondent unlawfully failed or refused to recall Mescetti from layoff, in violation of Section 8(a)(3) and (1) of the Act. I, therefore, recommend dismissing this allegation.

*Respondent did not discriminatorily fail or refuse to hire, or consider for hire, Anthony Franco Jr. or Michael Bedwell*

The Amended Consolidated Complaint alleges that on about October 15, Respondent discriminatorily refused to hire, or consider for hire, Anthony Franco, Jr., and on about November 13, Respondent refused to hire, or consider for hire, Michael Bedwell, because they assisted, supported and/or were affiliated with Local 175, and/or engaged in concerted activities, in violation of Section 8(a)(3) and (1) of the Act. In *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enf. 301 F.3d 83 (3d Cir. 2002), the Board set forth the analytical frameworks for refusal-to-hire and refusal-to-consider allegations. To establish a discriminatory refusal-to-hire, the General Counsel must establish: (1) the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. *Id.* at 12. If established, the employer must show it would not have hired the applicants even in the absence of their union activity or affiliation. *Id.*<sup>37</sup>

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<sup>37</sup> The Board modified the *FES* refusal to hire framework in *Toering Electric Co.*, 351 NLRB 225, 232-234 (2007). Under *Toering*, the General Counsel bears the ultimate burden of proving the applicant's genuine interest in employment. This burden has two components: (1) that there was an application for employment; and (2) that if the employer contests the applicant's actual interest employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship.

To establish a discriminatory refusal-to-consider violation, the General Counsel must prove: (1) the employer excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider the applicants for employment. *Id.* at 15. If established, the employer must show it would not have considered the applicants even in the absence of their union activity or affiliation. *Id.*

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 In applying these factors, I find the General Counsel has failed to meet the above burdens. To start, the General Counsel failed to present any evidence that Respondent was hiring, or had concrete plans to hire, asphalt laborers at or around the time Franco Jr. and Bedwell were allegedly denied employment. Miceli testified the late fall is the start of Respondent's slower months, and he did not issue badges to anyone to perform asphalt work in October or November. Without such evidence, the General Counsel also cannot establish that Respondent excluded Franco Jr. and Bedwell from the hiring process. Additionally, even if Respondent was hiring asphalt workers at the time, the General Counsel failed to establish Respondent's decisions not to hire or consider for hire Franco Jr. or Bedwell was based on anti-union animus. I do not credit that Coletti, or anyone else in management, told Franco Jr. or Bedwell they could or would not be hired because they were "union hierarchy." In fact, the claim Respondent unlawfully refused to hire or consider for hire Franco Jr. or Bedwell because they were "union hierarchy" is belied by Respondent's hiring and employment of Franco Jr.'s brother, Salvatore Franco, who worked full time in August and then fewer hours in September, October, and December. (GC Exh. 17, pg. 827). Respondent employs several Local 175 officers and family members of Local 175 officers. The only ones not employed are Patrick and Seminatore, who were discharged.

Even if the General Counsel met his burden under *FES*, I find Respondent has established it would not have hired or considered them for hire. Miceli and Coletti credibly testified that when Respondent is hiring, it seeks individuals who are available to work full-time because the employees work long hours and Respondent wants stable, experienced crews. Franco Jr. and Bedwell had not worked for Respondent for several months, except for a day or two when Local 175 assigned them to work for Respondent without a badge. Miceli further testified he believed Franco Jr. was a college student, and, therefore, not available for full-time work. Similarly, Miceli and Coletti believed Bedwell was the acting Local 175 business manager—which there is no dispute is a full-time position. Miceli testified, and the General Counsel failed to refute, that Respondent does not hire individuals who are not available for full-time work, including those who already have full-time jobs, regardless of their employer.

As a result, I find the General Counsel failed to establish that Respondent discriminatorily refused to hire, or consider for hire, Franco, Jr. or Bedwell, in violation of Section 8(a)(3) and (1) of the Act.

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*Respondent did not discriminatorily cause Di-Jo Construction Corp. to discharge, or refuse to reinstate, Shomari Patrick*

The Amended Consolidated Complaint alleges on or about October 20, Respondent caused Di-Jo Construction Corp. to discharge employee Shomari Patrick, and since has refused to reinstate Patrick to his former position, in violation of Section 8(a)(3) and (1) of the Act. The General Counsel contends that Respondent directed the termination of Patrick, and (presumably) blocked his reinstatement or rehire, because his familial relationship with Glenn Patrick, and Glenn Patrick's role in the Section 10(k) hearing.<sup>38</sup> The Board has held that an adverse action against a person in order to retaliate against his/her relative for statutorily protected activity is unlawful. See generally, *Tasty Baking Co.*, 330 NLRB 560 (2000); *American Ambulette Corp.*, 312 NLRB 1166, 1169-1170 (1993); and *Thorgren Tool & Molding*, 312 NLRB 628, 631 (1993). The General Counsel relies on Sbarra's statement to Shomari Patrick that he

<sup>38</sup> There is no contention that Shomari Patrick, who was not a member of any union at the time he worked for Di-Jo, was personally engaged in, or was believed to have been engaged in, any statutorily protected activities.

was directed to discharge him because of his name, combined with the timing of Shomari Patrick's discharge from Di-Jo in close temporal proximity to his uncle's testimony at the Section 10(k) hearing, to argue unlawful discrimination.

5 As previously discussed, I find the evidence does not establish that Sbarra was acting as Respondent's agent when he made the statements and discharged Patrick. Furthermore, even if Sbarra's statements and conduct were attributable to Respondent, I find the timing of the discharge in relationship  
10 Glenn Patrick's presence or testimony at the Section 10(k) hearing, without more, is insufficient to establish unlawful animus. There were multiple events involving Glenn Patrick that Sbarra could have been referring to when he made the statement. The first is his attendance at the Section 10(k) hearing, and the second is his colluding with his foreman and a coworker to receive overtime pay and benefits for hours he did not work. If timing was a relevant factor in this case, and I do not find that it is, then Shomari Patrick's discharge occurred 18 days after his uncle last appeared at the hearing, but 9 days (or less) after his uncle deposited his paycheck containing the October 2 overpayment. (R Exh. 4). Sbarra's statement to Shomari Patrick  
15 that he was discharged because of his name would apply equally to either event, and, absent any additional evidence, I decline to infer it was one over the other.

The General Counsel also argues Shomari Patrick's alleged poor performance is pretext, citing to Sbarra's statement to Patrick that he was doing well in the weeks prior to his discharge. What the General  
20 Counsel fails to mention is that, in that same conversation, Sbarra also told Patrick that he should get his driver's license so that he could drive his own clean-up truck. Clean-up crew is a one-person position, and Di-Jo allowed Patrick to work with another employee (Anthony) until he obtained his license. Di-Jo allowed this for several months, but Patrick never went to obtain his license. Additionally, Miceli testified that Patrick showed no initiative or ability in performing the concrete work, a prerequisite for transferring to Respondent and being assigned to a Local 1010 crew. Patrick confirms he assisted Local 1010 crews  
25 pour concrete 2 or 3 times during his 2-3 month employment. It is unclear whether this was because Patrick was not given, or did not take advantage of, other opportunities to perform this work. Regardless, the evidence is insufficient to infer that the stated reasons for his discharge were pretext.

The General Counsel argues pretext or shifting defenses based on the position statement that Respondent submitted to the Region during the investigation into the unfair labor practice charges, noting that it contains no mention of Patrick's poor performance as a reason for his termination. Rather, it only addresses when Patrick was assigned and worked for Respondent on November 2, without a badge and without any prior experience performing asphalt work. The position statement states Patrick worked for  
30 Di-Jo from *approximately* August 25 through November 2, and then addresses the events of November 2. (GC Exh. 23). Absent other evidence, I do not interpret Respondent's silence about the events prior to November 2 as evidence of shifting defenses for Patrick's discharge.

Based on the foregoing, I find the General Counsel has failed to establish that Shomari Patrick  
40 was discharged and not reinstated in violation of Section 8(a)(3) and (1) of the Act. I find no evidence that Shomari Patrick engaged in, or was believed to have engaged in, any statutorily protected activity, and I find the evidence is insufficient to establish he was being discriminated against because of his uncle's protected activities. Furthermore, when Local 175 sent Shomari Patrick to work for Respondent on November 2, it knew Respondent required referrals to be badged and that Patrick had not been issued a badge. Additionally, in March, when Local 175's business manager told Patrick to go to Respondent's  
45 offices to get a badge, there is no evidence that Respondent was seeking additional asphalt workers. In light of the foregoing, I recommend dismissing these allegations.

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**CONCLUSIONS OF LAW**

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

2. Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175”) and Highway Road and Street Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, Laborers International Union of North America, AFL-CIO (“Local 1010”) are each labor organizations within the meaning of Section 2(5) of the Act.

3. Local 175 has been the certified bargaining representative of Respondent’s full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators, who work primarily in the five boroughs of New York City (hereinafter referred to as the “Asphalt Unit”).

4. Respondent has engaged in an unfair labor practice in violation of Section 8(a)(2) and (1) of the Act when it, through its agent Joe Bartone Jr., gave assistance and support to Local 1010 by urging its employees in the Asphalt Unit represented by Local 175, to sign union membership cards for Local 1010.

5. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act when it, through its agent Pasqual “Paddy” Labate, threatened Asphalt Unit employees represented by Local 175 with discharge if they did not sign union membership cards for Local 1010.

6. Respondent has not violated the Act except as set forth above, and I recommend dismissing the remaining allegations

**REMEDY**

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

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:<sup>39</sup>

**ORDER**

1. Cease and desist from
  - (a) Giving assistance and support to Local 1010 by urging its employees in the Asphalt Unit represented by Local 175, to sign union membership cards for Local 1010.
  - (b) Threatening Asphalt Unit employees represented by Local 175 with discharge if they did not sign union membership cards for Local 1010.

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<sup>39</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

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(a) Within 14 days after service by the Region, post at its Long Island City, New York facility at its copies of the attached notice marked "Appendix."<sup>40</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2017.

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

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Dated, Washington, D.C., April 5, 2019.

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ANDREW S. GOLLIN  
ADMINISTRATIVE LAW JUDGE

<sup>40</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT  
FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT give assistance and support to Highway Road and Street Construction Laborers Local Union 1010 of the District Counsel of Pavers and Builders, Laborers International Union of North America, AFL-CIO (“Local 1010”) by urging its employees represented by Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175”) to sign union membership cards for Local 1010.

WE WILL NOT threaten employees represented by Local 175 with discharge if they did not sign union membership cards for Local 1010.

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

**NEW YORK PAVING, INC.**  
**(Employer)**

**DATED:** \_\_\_\_\_ **BY** \_\_\_\_\_  
**(Representative) (Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: [www.nlr.gov](http://www.nlr.gov).

**Two Metro Tech Center, 100 Myrtle Avenue, Suite 5100, Brooklyn, NY 11201-3838  
(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.**

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-197798](http://www.nlr.gov/case/29-CA-197798) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND  
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS  
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE  
REGIONAL OFFICE'S COMPLIANCE OFFICER (718) 765-6190.