

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

**NEW YORK PAVING INC.**

**Respondent**

**AND**

**Case No. 29-CA-254799**

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

**Charging Party Union**

**Counsel for the General Counsel's Post-Hearing Brief To The Administrative Law Judge**

John Mickley  
Erin Schaefer  
Counsel for the General Counsel  
National Labor Relations Board  
Region 29  
Two MetroTech Center – Suite 5100  
Brooklyn, NY 11201

## INDEX

I.	Statement of the Case.....	1
a.	Procedural History.....	3
II.	Statement of the Facts.....	4
a.	Background About Respondent and Local 175.....	4
b.	Respondent Begins Trying to Undermine Employee Support for Local 175.....	5
c.	Local 175 Files Grievance Regarding Respondent’s Understaffing Crews and a FLSA Suit Regarding Unpaid Wages.....	6
d.	The Parties Make Initial Steps Toward a Global Agreement.....	7
e.	Miceli Testifies at the Crew Size Arbitration.....	7
f.	Nadelbach’s April 2019 Decision Sustains the Union’s Grievance and Respondent Announces its Intention to Move to Vacate the Arbitrator’s Order.....	8
g.	Respondent Intentionally Withholds Employees’ July 2019 Pay Raises to Punish Local 175 Members.....	9
h.	On July 26, 2019, Respondent Petitions to Vacate Arbitration Award.....	10
i.	Respondent Counsel Farrell Threatens a Local 1010 Raid if Local 175 Does Not Agree to a Global Settlement.....	11
j.	Farrell Threatens Local 175 with Respondent’s Plan to Retaliate Against Local 175 Members by Laying Them Off if the Union Did Not Agree to Global Settlement.....	12
k.	Miceli Provided Unsubstantiated Testimony That Respondent Could Not Function with Larger Crew Sizes.....	13
l.	Local 175 Cancels the Mediation.....	14
m.	Respondent Did Not Intend to Bargain at the Mediation Session.....	14
n.	Respondent Lays Local 175 Members Off on December 20, 2019.....	15
o.	Respondent Admits That its Partial Shutdown of Asphalt Operations and Layoff of Thirty-Five Employees Was Motivated to Retaliate Against Local 175 Because it Filed and Won the Crew Size Arbitration.....	15
p.	The December 2019 Layoffs are the Most Significant Layoffs in Respondent’s Recent History.....	16

q.	Respondent Deviated From its Historic Practice of Trying to Keep its Employees Employed By Spreading Work Among Many Employees And Instead, Punished Local 175 Members by Only Employing a Select Few in January and February 2020.....	17
r.	Respondent Had A Practice of Negotiating with the Union to Keep Employees Working That It Did Not Provide the Discriminatees After Global Settlement Negotiations Failed.....	18
s.	Respondent Lied When It Claimed that it Needed Time to Hire A Replacement for Supervisor Zaremski.....	20
t.	Respondent Implements Larger Crew Sizes in Early January 2020.....	21
u.	Respondent Attempts to Engage in Effects Bargaining Only After Laying the Employees Off and Three Weeks After Deciding to Comply with the Award....	21
v.	January and February 2020’s Warm Weather Should Have Resulted in Fewer Layoffs, Not More.....	22
w.	Respondent Hired Two New Asphalt Paving Employees in August 2020 Instead of Recalling Local 175 Members from Layoff.....	23
III.	Argument.....	24
a.	Credibility Section.....	24
i.	General Counsel’s Witnesses Gave Consistent, Corroborative, and Straightforward Testimony Which Should Be Credited.....	24
ii.	Respondent’s Witnesses Cannot Be Credited.....	26
b.	Respondent Violated Section 8(a)(3) of the Act When it Laid off its Asphalt Workers in December 2019 to Retaliate Against the Local 175 Members for the Union’s Refusal to Abandon its Arbitration Victory.....	32
i.	Local 175’s Grievance and the Employees’ Union Membership are Protected Activity and Respondent Knew About That Protected Activity.....	34
ii.	The Overwhelming Record Evidence Establishes Respondent’s Unlawful Motive.....	34
iii.	Respondent Failed to Meet Its Burden Under <i>Wright Line</i> and Failed to Establish any Valid Defense.....	41

c.	Respondent Violated Section 8(a)(5) of the Act When It Did Not Provide Local 175 Notice or an Opportunity to Bargain About the Effects of its Decision to Shut Down Asphalt Paving Operations and Lay Off Its Employees.....	48
i.	Respondent’s Duty to Bargain Over the Layoffs and Partial Shutdown.....	48
ii.	Respondent Did Not Notify Local 175 About the Partial Shutdown or the Layoffs Until After the Fact.....	49
iii.	Respondent Cannot Rely on Language in the CBA to Avoid Effects Bargaining.....	51
iv.	The Union Did Not Waive its Right to Bargaining When it Cancelled the Mediation.....	52
v.	Two-Weeks’ Pay Per Discriminatee is An Appropriate Remedy for the Section 8(a)(5) Violation.....	52
d.	Respondent Should Be Sanctioned for Intentionally Withholding Documents Responsive to General Counsel’s Subpoena, Including Respondent Exhibit 33.....	53
i.	Facts Relating to the Admission of the Document.....	53
ii.	Board Law Demands Sanctions.....	55
e.	The Trial Proceeded Efficiently and Fairly Over Zoom.....	57
IV.	Conclusion.....	58

## Table of Authorities

	Page(s)
Cases	
<i>Atlantic Richfield Co. v. U.S. Dep’t of Energy</i> , 769 F.2d 771 (D.C. Cir. 1984) .....	55
<i>Austal USA, LLC</i> , 356 NLRB No. 65 (Dec. 30, 2010) .....	32
<i>Barnes &amp; Noble Bookstores, Inc.</i> , 237 NLRB 1246 (1978).....	41
<i>Barnes &amp; Noble Bookstores, Inc.</i> , 598 F.2d 666 (1st. Cir. 1979) .....	41
<i>Brad Snodgrass, Inc.</i> , 338 NLRB 917 (2003).....	34
<i>Case Farms of North Carolina, Inc.</i> , 353 NLRB 257 (2008).....	38, 39
<i>Cincinnati Truck Center</i> , 315 NLRB 554 (1994).....	33
<i>Columbia College Chicago</i> , 368 NLRB No. 86 (Sep. 30, 2019).....	51
<i>Comau, Inc.</i> , 364 NLRB No. 48 (Jul. 14, 2016).....	48
<i>Director, Office of Workers’ Comp. Programs v. Greenwich Collieries</i> , 512 U.S. 267 (1994) .....	32
<i>Electrolux</i> , 368 NLRB No. 34 (Aug. 2, 2019).....	42
<i>Eugene Iovine, Inc.</i> , 353 NLRB 400 (2008).....	49, 50
<i>First National Maintenance v. NLRB</i> , 452 US 666 (1981) .....	48
<i>Flexsteel Industries</i> , 316 NLRB 745 (1995).....	25
<i>GATX Logistics, Inc.</i> , 323 NLRB 328 (1997).....	42
<i>Greco &amp; Haines, Inc.</i> , 306 NLRB 634 (1992).....	33
<i>Harley-Davidson Motor Co.</i> , 366 NLRB No. 121 (Jun. 29, 2018) .....	52
<i>Healthbridge Mgmt, LLC</i> , 362 NLRB 310 (2015).....	41
<i>Hotel Bel-Air</i> , 358 NLRB 1527 (2012).....	48
<i>Kanawha Stone Company, Inc.</i> , 334 NLRB 235 (2001).....	38, 39

<i>Lucky Cab Company,</i> 360 NLRB 271 (2014).....	33, 42
<i>ManorCare Health Services – Easton,</i> 356 NLRB 202 (2010).....	34
<i>McAllister Towing,</i> 341 NLRB 394 (2004).....	55
<i>MCPC, Inc.,</i> 367 NLRB No. 137 (May 23, 2019) .....	42, 44
<i>Mid-Mountain Foods,</i> 332 NLRB 251 (2000) .....	33
<i>MV Transportation,</i> 368 NLRB No. 66 (Sep. 10, 2019).....	51
<i>New York Paving, Inc.,</i> 370 NLRB No. 44 (Nov 9, 2020).....	1, 6, 41
<i>New York Paving, Inc.,</i> 2019 WL 2208710 slip op. (May 20, 2019).....	1, 41
<i>NLRB v. Transmart, Inc.,</i> 117 F.3d 1421 (6th Cir. 1997).....	33
<i>NLRB v. Transportation Management,</i> 462 U.S. 393 (1983) .....	32, 34
<i>Perdue Farms,</i> 323 NLRB 345 (1997).....	55, 56
<i>Perdue Farms, Inc. v. NLRB,</i> 144 F.3d 830 (D.C. Cir. 1998) .....	56, 57
<i>Pontiac Osteopathic Hospital,</i> 336 NLRB 1021 (2001).....	49
<i>Reeves v. Sanderson Plumbing Products, Inc.,</i> 530 U.S. 133 (2000) .....	32
<i>Robert Orr/Sysco Food Services,</i> 343 NLRB 1183 (2004).....	38
<i>S &amp; I Transp., Inc.,</i> 311 NLRB 1388 (1993).....	50
<i>Shattuck Denn Mining Co. v. NLRB,</i> 362 F.2d 466 (9th Cir. 1966).....	33
<i>Traction Wholesale Center Co., Inc. v. NLRB,</i> 216 F.3d 92 (D.C. Cir. 2000) .....	33
<i>Transmarine Navigation Corp.,</i> 170 NLRB 389 (1968).....	53
<i>Union Carbide Corp.,</i> 190 NLRB 191 (1971).....	36
<i>Wells Fargo Armored Services Corp.,</i> 322 NLRB 616 (1996).....	33
<i>Willamette Tug &amp; Barge Co.,</i> 300 NLRB 282 (1990).....	48, 49
<i>Wright Line,</i> 251 NLRB 1083 (1980).....	32, 33, 41, 44, 46, 48

Statutes

29 U.S.C. § 161(1) ..... 56

Rules

Rule 11 of the Federal Rules of Civil Procedure ..... 11

**I. STATEMENT OF THE CASE**

In December 2019, New York Paving, Inc. (“Respondent”) announced that it was shutting down asphalt paving operations and laying off thirty-five of its asphalt paving employees in retaliation for and in order to punish employees because their Union, Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “the Union”) successfully pursued a grievance on the employees’ behalf. Not only did Respondent retaliate against its employees and the Union because the Union successfully arbitrated the grievance, but Respondent went further, devising an unlawful scheme to try to get rid of the Union. The evidence demonstrates that Respondent concocted a story falsely blaming Local 175 for Respondent’s shutdown and mass layoff to convince its employees to abandon Local 175 and replace the Union with Local 175’s rival, Highway Road and Street Construction Laborers Local 1010 (LIUNA), AFL-CIO (“Local 1010”). By laying off the employees in retaliation for the Union’s grievance, and by shutting down asphalt paving operations and laying off the workforce without providing notice to Local 175, Respondent violated the Act as alleged in the Complaint.

Respondent has been on a mission to remove Local 175 as its asphalt paving employees’ Union for years. From 2016 until the summer of 2019, the NLRB has found that Respondent has committed numerous unfair labor practices to achieve that unlawful end. *New York Paving, Inc.*, 2019 WL 2208710 NLRB slip op. (May 20, 2019); *New York Paving, Inc.*, 370 NLRB No. 44 (Nov 9, 2020). Local 175 endeavored to protect itself and its members from Respondent’s antagonism by pursuing litigation in various forums. Most notably, Local 175 filed a grievance alleging Respondent violated the parties’ collective bargaining agreement by sending out understaffed crews to perform asphalt paving work with only four or two workers, instead of the contractually required seven and three. The evidence presented at the Hearing in this case

demonstrates that Respondent was furious with the Union over its crew size grievance because Respondent had been using the smaller crews for many years without complaint from the Union.

From the summer of 2018 through the summer of 2019, the parties met several times to try to reach a global resolution of the many issues between them. By July 2019, the pressure on Respondent to come to a deal was reaching a boiling point. The arbitrator in Local 175's crew size grievance had found that Respondent had understaffed its asphalt paving crews for years, and remedying Respondent's violations would cost Respondent millions of dollars in backpay to employees and contributions to various Local 175 Funds. Faced with the potential cost of complying with the Arbitrator's award and other outstanding judgments against the company, Respondent pinned its hopes for a global agreement on a November 2019 mediation session. Respondent intended to use the mediation to pressure Local 175 to abandon the crew size grievance. When Local 175 canceled the mediation, Respondent retaliated and schemed to remove Local 175.

Respondent's plan was to lay off a majority of Respondent's workers shortly before Christmas, to make the layoffs as painful as possible, and to repeatedly tell employees that Local 175 was to blame for the layoffs. Respondent falsely told employees that because Local 175 filed a grievance and won the arbitration, Local 175 was "forcing" Respondent to shut down its asphalt operation and lay off employees. Respondent stated that the layoff would be at least until March 2020 – and dangled a veiled threat that the layoff could be even longer. Respondent calculated that if it kept the employees out of work from late December 2019 until March 2020, the returning employees would then vote to remove Local 175 in the Spring of 2020, when a representation election could be held. Respondent enacted the plan by including a damning, vitriolic, flyer with the employees' final paychecks in 2019, announcing, for the first time, that Respondent "has

decided to shutdown asphalt operations and *lay off nearly all asphalt paving workers* until March 2020 and possibly longer” and that Local 175 was to blame. Respondent kept the majority of the Local 175 bargaining unit out of work for January and February 2020, recalling some of them in March 2020, weeks before the open period for the filing of a representation petition was set to begin. As described in more detail here, the credible evidence admitted at trial shows that Respondent violated Sections 8(a)(3) and 8(a)(5) of the Act when it shut down operations and laid off the thirty-five Local 175 members in an effort to oust Local 175 and without giving Local 175 an opportunity to bargain over the effects of the shutdown and layoff decisions.

**a. Procedural History**

Local 175 filed a charge in Case Number 29-CA-254799 on January 17, 2020, alleging that Respondent’s layoffs violated Section 8(a)(5) of the Act. GC Exh. 1(A). Local 175 amended its charge on January 30, 2020, to further allege that the layoffs also violated Section 8(a)(3) of the Act. GC Exh. 1(C). The Regional Director issued a Complaint and Notice of Hearing (“the Complaint”) on April 20, 2020, alleging that Respondent shut down its asphalt paving operations and laid off asphalt paving workers in order to retaliate against the employees for their support for Local 175, to discourage them from supporting Local 175, and to retaliate against them because Local 175 pursued the crew size grievance. The Complaint further alleged that Respondent failed to bargain with Local 175 over the effects of the shutdown and layoff. GC Exh. 1(E). Respondent answered the Complaint on May 8, 2020, admitting the jurisdictional allegations and denying that Respondent violated the Act in the manner alleged. GC Exh. 1(I).

On July 10, 2020, Counsel for the General Counsel (“CGC”) filed a motion for the hearing in this matter to proceed by videoconference due to the ongoing COVID-19 pandemic. GC Exh. 1(J). The same day, Respondent filed a motion requesting an in-person hearing. GC Exh. 1(L).

The Administrative Law Judge granted CGC's motion on July 27, 2020. GC Exh. 1(N). Respondent appealed to the Board and the Board denied Respondent's appeal on October 8, 2020. GC Exhs. 1(O), 1(T). The Administrative Law Judge presided over the hearing using Zoom videoconference software on November 2, 9, 10, 12, 16, 17, 18, and 19, 2020.

## **II. STATEMENT OF THE FACTS**

### **a. Background About Respondent and Local 175**

Respondent is a paving company located in Long Island City, New York. GC Exh 1(E). Utility companies in New York City hire Respondent to conduct various paving and repaving work. Respondent uses different crews to complete asphalt and concrete paving. The workloads vary based on the seasons and the amount of work, but generally about 55 employees work for Respondent's asphalt paving division. *See* GC Exh. 3. Respondent's asphalt employees are represented by Local 175. GC Exh. 9. Approximately 200 employees work in Respondent's concrete division. *See* GC Exh. 4. The concrete employees are represented by Local 1010.

Robert Coletti is Respondent's General Counsel. Respondent's Director of Operations, Peter Miceli, reports to Coletti. Miceli manages both the asphalt and concrete paving operations. Tr. 894-95. Robert Zaremski reports to Miceli and supervises the asphalt paving employees. Tr. 946-47.

Local 175 has represented Respondent's asphalt paving employees since the Union was formed in April 2005. R. Exh. 2 p. NYP000204. Local 175's Business Manager is Charles Priolo. Anthony Franco administers Local 175's benefit funds. As a part of his duties managing those funds, Franco participates in collective bargaining negotiations. Tr. 99. Terry Holder works for Respondent as an asphalt paving employee and is the Local 175 Shop Steward for the asphalt paving bargaining unit. Tr. 359. Until Respondent permanently laid him off in January 2020, Frank

Wolfe acted as an Assistant Shop Steward and filled in for Holder when Holder was absent from work. Tr. 278.

Respondent's attorneys Jonathan Farrell and Ana Getiashvili frequently bargain directly with Local 175's attorneys Eric Chaikin and Matthew Rocco. Farrell and Getiashvili are counsel of record for Respondent in this proceeding. Chaikin is counsel of record for Local 175.

Respondent disputes, but presented no evidence showing, that it is a signatory to the New York Independent Contractors Alliance, Inc. ("NYICA") collective bargaining agreement covering the Local 175 members' terms and conditions of employment. Tr. 150. However, Respondent also asserts that the management rights language in the very same collective bargaining agreement permitted Respondent to shut down its asphalt paving operations and conduct the layoffs at issue here without bargaining with Local 175. GC Exh. 1(I). That management rights language states, "Upon approval of the Union, Employers are at liberty to employ, discipline or discharge (with just cause setting forth in writing the reasons for such discipline or discharge within 48 hours), whomsoever they see fit who is referred by the Union." GC Exh. 9 p. 6. The agreement does not specify whether Respondent must bargain with the Union over the effects of a layoff, nor does it mention Respondent's bargaining obligation in the event of a partial shutdown of operations. GC Exh. 9.

**b. Respondent Begins Trying to Undermine Employee Support for Local 175**

In 2016, tensions between Local 175 and Respondent escalated after Respondent assigned two new types of paving work to employees that were represented by Local 1010 instead of employees represented by Local 175. *New York Paving, Inc.* 2019 WL 1514220 at \*6, NLRB Div. of Judges (Apr. 5, 2019) affd. 2019 WL 2208710, NLRB slip op. (May 20, 2019).

In 2017, Respondent determined that it would be better off with Local 1010 representing both asphalt and concrete workers and began a campaign to get rid of Local 175. To that end, in

April 2017, Respondent's agents unlawfully distributed Local 1010 authorization cards to Local 175 employees and threatened its employees that they would lose their jobs if they did not support rival Local 1010. *Id.* at \*23-24. The Board affirmed ALJ Gollin's determination that Respondent's conduct violated Sections 8(a)(1) and 8(a)(2) of the Act. *Id.* at 32. On April 28, 2017, within weeks of Respondent's unlawful threats of job loss to Local 175 members if they did not join rival Local 1010, Local 1010 filed a petition to raid the Local 175 bargaining unit. GC Exh. 21. The Regional Director blocked that petition, pending the outcome of the case before Judge Gollin. GC Exh. 21.

With the petition blocked, Respondent employed other unlawful measures to undermine Local 175 and discourage the Local 175 members from supporting the Union. First, in about May 2017, Respondent asserted that it was not bound by the collective bargaining agreement covering the asphalt paving employees. Tr. 97. Then, in January 2018, Respondent assigned three types of emergency and temporary paving work previously completed by employees who are represented by Local 175 to employees that are represented by rival Local 1010. *New York Paving, Inc.*, 370 NLRB No. 44 at \*1 (Nov. 9, 2020). Respondent transferred this work from Local 175 to Local 1010 without notifying Local 175. *Id.* Administrative Law Judge Esposito and the Board have since found that unannounced transfer of work violated Sections 8(a)(1) and 8(a)(5) of the Act. *Id.* That case is pending enforcement in the D.C. Circuit. *New York Paving, Inc. v. NLRB*, Case No. 20-1469.

**c. Local 175 Files Grievance Regarding Respondent's Understaffing Crews and a FLSA Suit Regarding Unpaid Wages**

Unwilling to sit idly by while Respondent pursued its unlawful tactics, Local 175 responded with lawful measures to protect its members and to pressure Respondent to relent. For many years, Respondent had violated the crew size provision in its asphalt paving collective bargaining agreement, which requires that Respondent employ seven workers on a top crew and

three workers on a binder crew. For decades, Respondent had only used four employees for top crews and two employees to do the binder work. Tr. 897-898. Local 175 knew about this contractual violation but chose not to pursue the issue until Respondent began its many-sided attack on the Union and its members in 2017. On March 28, 2018, Attorney Rocco filed a grievance alleging that Respondent was violating the crew size provision in the collective bargaining agreement. GC Exh. 10.

Similarly, Local 175 had known for years that Respondent directed employees to arrive at its Long Island City yard to set up and drive company trucks to their first paving job and that Respondent did not pay the employees for this time or the time spent driving the trucks back to the yard at the end of the day. In June 2018, Local 175 assisted a group of current and former asphalt paving employees in the filing of a Fair Labor Standards Act lawsuit to recoup these unpaid wages from Respondent. GC Exh. 8. The FLSA Complaint, which is still pending, demands \$50,000,000 in unpaid wages for Local 175 members and attorney's fees. GC Exh 8 p. 13.

**d. The Parties Make Initial Steps Toward a Global Agreement**

In the summer of 2018, Local 175 and Respondent began exchanging proposals toward a global deal that would settle the parties' several outstanding disputes. The parties enlisted Steven Elliot, the President of the International Union of Journeymen and Allied Trades, to preside over an informal mediation. Tr. 98. The meeting occurred on August 2, 2018. Tr. 99. While the parties did not resolve their issues that day, they made some progress toward a wide-ranging agreement. Tr. 100. However, from August 2018 until April 2019, Respondent and Local 175 remained in a holding pattern while they waited for the decision in the crew size arbitration. Tr. 101-102.

**e. Miceli Testifies at the Crew Size Arbitration**

The crew size arbitration occurred on January 11, 2019. R. Exh. 2. Arbitrator Jay Nadelbach presided at the hearing. *Id.* Rocco was Local 175's attorney for the arbitration. *Id.* Rocco argued that Respondent had violated the plain language of the collective bargaining agreement by using crews of four and two men, instead of the required seven and three. R. Exh. 2 p. NYP000186. Respondent, represented by Farrell, argued that requiring the larger crew size violated the agreement's Most Favored Nations clause, that Local 175 acquiesced to the smaller crew sizes, and that laches prevents Local 175 from grieving the crew size issue when Local 175 knew about it for years. R. Exh. 2 p. NYP000188-189.

Director of Operations Peter Miceli also testified at the arbitration, painting a grim picture of Respondent's chances of survival if it were forced to use larger crews to perform asphalt paving work. Miceli testified that "it's not even feasible" to have three men on a binder crew and seven men on a top crew. R. Exh. 2 p. NYP000209. He explained that there is not enough work to be done on either job to justify additional workers. *Id.* Moving to the larger crews "doesn't make any sense," Miceli concluded. *Id.*

**f. Nadelbach's April 2019 Decision Sustains the Union's Grievance and Respondent Announces its Intention to Move to Vacate the Arbitrator's Order**

On April 29, 2019, Arbitrator Nadelbach issued an award sustaining Local 175's grievance, concluding that Respondent violated the plain language of the parties' collective bargaining agreement by using four and two employees on the asphalt paving crews instead of seven and three as required by the agreement. GC Exh. 11. The award directed Respondent and Local 175 to negotiate an appropriate remedy and damages and to return the matter to Arbitrator Nadelbach if there was no agreement within ninety days. GC Exh. 11 p. 14.

According to Local 175, winning the crew size arbitration inspired the parties to start discussing a global resolution again. Tr. 102. Rocco testified that Nadelbach's award "narrowed

and clarified the issues” such that coming to a global resolution “was on everybody’s mind.” Tr. 102. Rocco and Farrell met at Farrell’s office on June 26, 2019. Tr. 102. The purpose of the meeting, according to Rocco’s credible testimony, was to “discuss all issues . . . and see if we could hammer out a new CBA.” Tr. 103.

Rocco and Chaikin attended the June 26 meeting on behalf of the Union. Tr. 102. Farrell and Getiashvili represented Respondent. Tr. 103. The parties reiterated their positions on the issues that needed to be resolved in order to come to a global agreement. Rocco’s unrebutted testimony establishes that during the meeting, Respondent’s counsel announced their intention to move to vacate the arbitrator’s order in Federal court. Tr. 103. Rocco told them that such a filing would be premature because Arbitrator Nadelbach had not yet ruled on the appropriate damages. Tr. 103.

**g. Respondent Intentionally Withholds Employees’ July 2019 Pay Raises to Punish Local 175 Members**

Clearly angered that the Union won the arbitration, after the June 26 meeting, Respondent began retaliating against Local 175 members to pressure Local 175 to abandon the arbitration and to acquiesce to Respondent’s terms in a global agreement. In that regard, while the collective bargaining agreement required Respondent to raise the asphalt paving employees’ pay on July 1, 2019, GC Exh. 9 p. 14-16, and the New York City Prevailing Wage law also required the employees to receive a raise on that day, GC Exh. 7, Respondent refused to implement the wage increase. Instead of implementing the wage increase and paying Local 175 members, Respondent put the money in escrow – intentionally violating the collective bargaining agreement and the prevailing wage law. Tr. 65; Tr. 108; Tr. 778-79; GC Exh. 7.

Just like the Local 175 members, Local 1010 members were also due a pay raise on July 1, 2019, pursuant to their collective bargaining agreement and the prevailing wage law. Tr. 64-65. That Respondent was retaliating against Local 175 and its members and attempting to coerce the

Union to abandon the arbitration was made painfully clear when comparing Respondent's conduct toward Local 175 members and rival union Local 1010 members. In marked contrast to Respondent refusing to implement the pay raise for Local 175 members, Respondent timely implemented the wage increases for the Local 1010 members, further demonstrating Respondent's willingness to punish Local 175 members to express its preference for Local 1010. Tr. 65.

Rocco first objected to Respondent's failure to implement the employees' wage increases in a phone call with Farrell in July 2019. Tr. 107-08. Rocco's un rebutted testimony establishes that he told Farrell that the Union believed Respondent was not paying the correct wage rate as of July 1, 2019. Tr. 108. According to Rocco, Farrell responded that "the increases were being put in escrow"<sup>1</sup> and that the money for employees' wage increases was being put in escrow because "we have to do a deal," admitting that Respondent was holding contractually and legally mandated wage increases hostage to coerce Local 175 to abandon the arbitration and capitulate to Respondent's settlement demands Tr. 108.

#### **h. On July 26, 2019, Respondent Petitions to Vacate Arbitration Award**

Despite Rocco's warning that it was premature, on July 26, 2019, Respondent filed a Petition to Vacate Arbitrator Nadelbach's Award sustaining the Union's crew size grievance, alleging various legal errors by the Arbitrator. GC Exh. 12. Because he believed the Petition to be premature and baseless, Rocco sent Respondent's attorneys a letter threatening sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Tr. 106. Respondent agreed to withdraw the Petition, but only after insisting that Local 175 agree that Respondent can attempt to vacate the

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<sup>1</sup> Farrell did not deny that the conversation with Rocco occurred. Farrell testified that Local 175 first accused Respondent of violating the Prevailing Wage Law in February 2020. Tr. 591-92. However, he acknowledged that Local 175 questioned Respondent about its failure to pay employees their wage increases before then, "this was the first time I had ever seen this issue raised in print. **Not the issue of the escrowed monies**, but the issue of the prevailing wage." Tr. 592.

award again after Nadelbach ruled on damages. Tr. 106. In a joint stipulation withdrawing the award filed on August 26, 2019, the parties reserved Respondent's right to challenge the arbitration award. GC Exh. 13.

**i. Respondent Counsel Farrell Threatens a Local 1010 Raid if Local 175 Does Not Agree to a Global Settlement**

With his client's liabilities growing daily during the summer of 2019, Farrell became more and more agitated about getting to a resolution favorable to his client. On August 13, 2019, Farrell texted Rocco, threatening the possibility of rival Local 1010 petitioning to represent the asphalt paving unit represented by Local 175. GC Exh. 26. Farrell alerted Rocco about the Board's new proposed rules limiting blocking charges. GC Exh. 26. Knowing that Local 1010's 2017 petition raiding the Local 175 unit was still pending, Farrell threatened that he was sure that Local 1010's attorney Barbara Mehlsack would invoke the Board's new rules and file a request to proceed to an election in November 2019. GC Exh. 26. Farrell asked Rocco to bring the possibility of a Local 1010 petition to Anthony Franco, hoping that "the new rules will shake his complacency." GC Exh. 26.

Local 175 considered Farrell's threats regarding Local 1010's petition and Respondent's petition to vacate the arbitration award and determined that Respondent was intentionally delaying the parties' negotiations over the arbitration award until Local 1010 could file another petition raiding Local 175's bargaining unit. Tr. 257. Rocco emailed Arbitrator Nadelbach on August 28, 2019 asking him to schedule a hearing on the appropriate remedy and damages pursuant to his April 29 award sustaining the Union's crew size grievance. R. Exh. 4 p. NYP000160. The parties agreed that the hearing would occur on October 25, 2019 at 9:00 a.m. at Farrell's law office. R. Exh. 4 p. NYP000156.

**j. Farrell Threatens Local 175 with Respondent's Plan to Retaliate Against Local 175 Members by Laying Them Off if the Union Did Not Agree to Global Settlement**

On October 25<sup>th</sup>, Local 175 met Respondent at Farrell's office to conduct the inquest hearing. Eric Chaikin, Matthew Rocco, and Union President Charles Priolo were present for the Union. Tr. 108. Farrell, Getiashvili, and Respondent's Director of Operations Peter Miceli were present for the company. Tr. 109. Before the parties went on the record, Rocco suggested that they go into a separate conference room to try to make some progress towards a global agreement. Tr. 109. Everyone, except Priolo, went into the other room to discuss settlement. Tr. 109.

Once the parties arrived in the other room, Farrell unabashedly laid out Respondent's plan to retaliate against the Local 175 members if the Union did not abandon the crew size grievance as a part of a global agreement. Tr. 110-11. Farrell's plot was much more developed than his August 13 text message to Rocco warning about the possibility of rival Local 1010 reopening its petition to raid the asphalt paving Unit. This time, Farrell explicitly threatened Rocco and Chaikin that Respondent would lay off most of the Local 175 members *to help* rival Local 1010's takeover of the Local 175 Unit. Rocco testified that Farrell told Rocco and Chaikin that if Local 175 did not settle with Respondent, **"there was going to be a lot of men out of work."** Tr. 111. Farrell further threatened that Respondent will tell employees that Local 175 was to blame for them being out of work. Tr. 111. Farrell also warned that while the employees were out of work "there very well could be an open period and that Local 1010 very well could file a petition,"<sup>2</sup> a not-so-subtle subtle threat that Respondent would try to get rid of Local 175 by assisting Local 1010 to file a representation petition. Tr. 110.

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<sup>2</sup> Farrell admitted in his testimony that he invoked the open period during the parties' global negotiations. Tr. 812-13.

Rocco testified that he believed that Farrell would follow through on this threat to lay off most of the Local 175 members, so he proposed that the parties contact a licensed mediator to help resolve their outstanding issues. Tr. 111. Farrell called mediator Elliott Shriftman. Tr. 112. Shriftman offered the parties various dates in December, asking them to confirm the dates as soon as possible.<sup>3</sup> Tr. 112. Respondent and Local 175 then agreed to proceed with the inquest hearing that day but to ask Arbitrator Nadelbach to hold his decision in abeyance while the parties work towards a global settlement with the mediator. Tr. 112. Rocco announced the parties' agreement to meet with Shriftman on the record at the beginning of the hearing. GC Exh. 14 p. 2.

**k. Miceli Provided Unsubstantiated Testimony That Respondent Could Not Function with Larger Crew Sizes**

Peter Miceli was Respondent's first witness at the inquest hearing on October 25. Like he did during the first hearing on January 11, Miceli stressed that Respondent would not voluntarily comply with the arbitration award because of the significant strain the larger crew sizes would place on the business. GC Exh. 14 p. 23. Miceli explained that Respondent did not even know how to operate with the larger crew sizes. *Id.* He testified that he had many questions, including "How do you get seven men to a location with one pick-up? How do you get seven men to put down two inches of asphalt in a five-by-five opening? How do you even fit seven men around the hole to do the work? Don't know how that's going to work." *Id.* He testified that if Respondent uses the larger

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<sup>3</sup> Respondent insists that the parties caucused after the hearing and October 25 and it was during that meeting when Farrell called Shriftman after the hearing. Respondent maintains this timeline to falsely claim that the purpose of the mediation with Shriftman was solely to discuss the crew size issue. Respondent introduced phone records, purporting to show that Farrell called Shriftman at 12:43 pm and then Shriftman returned Farrell's call at 12:50 pm. R. Exh. 15 and 16. Even if Farrell spoke to Shriftman at that time, instead of earlier that day, the documentary evidence shows that the parties hoped Shriftman would mediate all of their issues, not just the crew size. Farrell admitted in his testimony that the parties met before the hearing. Tr. 769, "Q. Did the parties go into a separate room before the arbitration on the 25th? . . . Farrell: I'm sure we did." Rocco and Farrell then both asked the arbitrator to reserve his ruling while the parties discuss "global matters between them." GC Exh 14 p. 2. Farrell stated, "should our attempts to resolve **all** matters fail, similarly we would then proceed to post-hearing briefs." *Id.* Other than wholly unbelievable testimony from Farrell (who was not a credible witness generally), Respondent presented no evidence showing that the parties changed the goal of the mediation between the opening of the hearing at 10:30 am and Farrell's calls with Shriftman before 1:00 pm.

crews, “there’s absolutely no way we win any work . . . it’s impossible.” GC Exh. 14 p. 24. Confirming that Respondent would not implement larger crew sizes voluntarily, Miceli stated, “if we’re forced to do seven and three, we’re forced to do it. We definitely don’t want to do it.” GC Exh. 14 p. 16.

In addition to Miceli’s clear statements on the record during the arbitration that Respondent would *not* comply with the arbitration award, neither Getiashvili nor Farrell made any announcements to Local 175 on October 25 about when Respondent planned to implement the award, how many employees Respondent would lay off if the award were implemented, or that Respondent had decided to comply with any aspect of the award. Tr. 119, 259.

#### **l. Local 175 Cancels the Mediation**

After the October 25 hearing, Chaikin and Rocco told Local 175’s leadership that Respondent tentatively agreed to meet with mediator Elliott Shriftman on December 16, 2019 to get assistance in reaching a global agreement. Over several following days, Local 175 contemplated its position in the parties’ settlement discussions. Taking Miceli for his word that Respondent would not implement the arbitration award voluntarily, recognizing that the Union had no obligation to settle the myriad issues with Respondent, and believing that Respondent was dragging out negotiations on a global settlement as a tactic to undermine Local 175 in the eyes of its members vis-à-vis Local 1010, Local 175 directed Rocco to cancel the mediation. Tr. 113, Tr. 256. Rocco emailed Shriftman on October 30, 2019, canceling the December 16 mediation. R. Exh. 5. After October 30, neither Respondent nor Local 175 contacted Shriftman to schedule additional dates to meet.

#### **m. Respondent Did Not Intend to Bargain at the Mediation Session**

Even if the parties had met with Shriftman, the evidence establishes that Respondent would have continued coercing Local 175 to abandon the crew size grievance. In that regard, Miceli testified that his intention for the mediation session was to “convince 175 that going to seven-and-three would, again, not be good for their men and to have them reconsider forcing us to do this.” Tr. 977. As such, Respondent had no intention of using the scheduled mediation session to discuss compliance with the arbitration award or to bargain over the effects of its decision to shut down asphalt operations and lay off employees. Rather, it is clear from Miceli’s testimony that Respondent was going to use mediator Shriftman to pressure Local 175 to “reconsider” enforcing the arbitration award again. Tr. 977.

**n. Respondent Lays Local 175 Members Off on December 20, 2019**

On December 20, 2019, Miceli and Respondent’s General Counsel Robert Coletti held a meeting to address Respondent’s foremen. Tr. 283. Local 175 Assistant Shop Steward and New York Paving Foreman Frank Wolfe attended the meeting. Tr. 280-281. Wolfe testified credibly that Miceli began the meeting by announcing that Operations Manager Robert Zaremski was retiring and that the company wished Zaremski well. Tr. 281. Then, Coletti<sup>4</sup> told the foremen that Respondent would be making various operational changes because of a lawsuit related to manpower. Tr. 281. Coletti said that Respondent was going to lay off employees, some temporarily and some permanently. Tr. 282. Coletti added that Respondent would demote some foremen. Tr. 282. Even though Coletti stated that foremen would only be demoted, Wolfe’s last day working for New York Paving was on December 20. Tr. 283; GC Exh. 3 p. 413-458.

**o. Respondent Admits That its Partial Shutdown of Asphalt Operations and Layoff of Thirty-Five Employees Was Motivated to Retaliate Against Local 175 Because it Filed and Won the Crew Size Arbitration**

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<sup>4</sup> Coletti did not testify at the Hearing.

During the last week of December 2019, Respondent distributed a flyer to its employees in their paychecks advising for the first time about the layoffs. GC Exh. 2. With the flyer, Respondent commenced its unlawful plan to oust Local 175 by unequivocally admitting that the shutdown and the layoff were in retaliation for the Union filing and winning the crew size grievance. Emphasizing that Respondent was using the layoff to discourage the employees from supporting Local 175, Respondent accused Local 175 of “trying to hurt your jobs at New York Paving” by pursuing the crew size arbitration. GC Exh. 2. Respondent falsely wrote that Local 175 *forced* Respondent “to shutdown asphalt operations and *lay off nearly all asphalt paving workers* until March 2020 and possibly longer.” *Id.* (emphasis in original). Respondent ended the flyer by again informing the employees that Local 175, not Respondent, had harmed them, “New York Paving is sorry so many of you and your families will be harmed by Local 175’s deliberate efforts to interfere with our industry-standard asphalt paving operations.” GC Exh. 2.

Respondent also stated in its flyer that the retirement of asphalt paving supervisor Rob Zaremski forced Respondent to lay the employees off. As described below, the employees knew this additional reason was false because Respondent had groomed another employee to replace Zaremski. Understanding that Zaremski’s retirement was unlikely to harm Respondent’s business, the employees were left with only the unlawful explanation that Respondent was retaliating against the employees for their Union’s successful arbitration victory.

**p. The December 2019 Layoffs are the Most Significant Layoffs in Respondent’s Recent History**

Before these layoffs, Respondent employed approximately fifty Local 175 members in its asphalt paving division. By January 2020, Respondent employed only eighteen Local 175 members. GC Ex. 3 p. 413, 416. Just twenty-one Local 175 members worked for Respondent in February 2020. GC Exh. 3 p. 419.

Before 2020, Respondent's slowest winter was in 2018, when the Local 175 members worked a combined total of 10,340 hours in January and February.<sup>5</sup> GC Exh. 3 p. 232, 239. In January and February 2020, after the unlawful layoffs, Local 175 members worked only 5,007 hours – a reduction of more than half the total hours worked during the same months in 2018. GC Exh. 3 p. 416, 419.

**q. Respondent Deviated From its Historic Practice of Trying to Keep its Employees Employed By Spreading Work Among Many Employees And Instead, Punished Local 175 Members by Only Employing a Select Few in January and February 2020**

During previous years, when faced with the vicissitudes of weather changes, economic changes and other ups and downs inherent in the construction industry, Respondent historically made every effort to keep its employees employed. For example, the evidence establishes that in prior years, Respondent spread the available asphalt paving work among as many Local 175 employees as possible to keep its employees employed and to soften the financial blow to the employees. For example, in January 2018, the slowest month on record before January 2020, Respondent did not conduct a mass layoff but instead employed nearly all of its workforce, keeping some workers on the job for only one day for the entire month. GC Exh. 3 p. 228-231. However, in January and February 2020, Respondent did the exact opposite, choosing a select few Local 175 members to employ, resulting in twelve employees working more than 140 hours in January 2020 while the majority of the asphalt paving unit was laid off. GC Exh. 3 p. 414-419. Respondent offered no evidence at trial to show that it attempted to keep as many Local 175 members working as possible during January and February 2020, as Respondent had done during previous downturns inherent to the paving industry caused by cold weather or slower business. Instead, the evidence

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<sup>5</sup> These numbers are from the dues reports, received into evidence as GC Exh. 3. During the trial, Respondent explained that foremen receive a one-hour bonus for each day worked as a foreman. Tr. 996. The existence of this bonus does not detract from the ability to analyze the severity of the December 2019 layoffs.

shows that Respondent concentrated the work among a small group of employees to inflict the greatest amount of harm on the remaining employees who would be laid off.

Respondent also deviated from its established practice when it cherry-picked which employees would work instead of grouping foremen together in a crew. Before January 2020, when there was not enough work for foremen to lead their own crew, Respondent reassigned foremen to work as laborers. Tr. 286, 304-305, 373, 733, 906, 923. Foremen were always the last to be laid off because, as Miceli admitted, “we try to keep the foremen working.” Tr. 923. However, Respondent’s preference for employing foreman changed in late December 2020, when, instead of employing foremen as laborers during a slowdown as it had for many years, Respondent permanently laid off foremen Frank Wolfe and William Smith Jr. Tr. 981-982. When Respondent began recalling some of the discriminatees in March 2020, Respondent did not consider recalling Wolfe or Smith. Tr. 281-283. In fact, Respondent never even notified Wolfe or Smith that they were permanently laid off. Tr. 282. Respondent also kept other foremen, including Jonathan Oliver, out of work in January and February 2020 when they normally would have been assigned to work as laborers in other crews. Tr. 377; GC Exh. 414-419. Respondent utterly failed to present any evidence to explain why, in December 2019, it deviated completely from its past practice of trying to keep employees employed when faced with a financial change and, instead, laid off half of the asphalt employees.

**r. Respondent Had A Practice of Negotiating with the Union to Keep Employees Working That It Did Not Provide the Discriminatees After Global Settlement Negotiations Failed**

Respondent’s unannounced permanent layoff of Frank Wolfe and William Smith and sudden layoff of thirty-three other employees constituted a significant departure from its standard

practice of going to extraordinary lengths to mitigate harm to employees, even for those employees who committed significant misconduct.

That Respondent had a long-standing practice of working with the Union to help its asphalt paving employees is clearly demonstrated by Respondent's actions regarding employees Jared Fusco, David Snyder, and Matthew Tuminello. In June 2019, the Director of the Queens Center for Gay Seniors reported to National Grid, one of Respondent's largest clients, that Fusco, Snyder, and Tuminello made a series of extremely vile and homophobic slurs while working at one of Respondent's jobsites near the Center. R. Exh. 1 p. 7. National Grid contacted Respondent immediately and demanded that none of these workers work on National Grid jobs again. R. Exh. 1 p. 4-6; Tr. 912-17.

When many employers would have fired the employees immediately, Respondent worked collaboratively with Local 175 throughout the summer of 2019 to secure other employment for Fusco and Snyder. *See* R. Exh. 1; Tr. 260; Tr. 980. Respondent also permitted the Union to select Fusco and Snyder's replacements. *See* R. Exh. 1. Respondent went even further for Tuminello, by creating an entirely new supervisory position for him. Tr. 916-17.<sup>6</sup> These instances clearly

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<sup>6</sup> Respondent also provided remarkable assistance to Operations Manager Robert Zaremski when he encountered legal trouble with his former union, Teamsters Local 282. The Teamsters' Pension Fund prohibits members from collecting a pension if the member did not separate from the bargaining unit but in fact took a promotion. R. Exh. 28. In September 2019, the Pension Fund sent Zaremski a letter, accusing him of receiving a pension while engaging in "disqualifying employment." R. Exh. 26. The Pension Fund had learned that Zaremski did not retire from Respondent in October 2017 as he had claimed, but instead took a promotion to be its full-time Operations Manager. R. Exh. 26; Tr. 708-09. The Fund threatened to suspend Zaremski's pension and demanded that Zaremski reimburse all pension payments from October 2017 to September 2019. R. Exh. 26; R Exh. 28. Undeterred by Zaremski's obvious fraud, Coletti immediately forwarded the Pension Fund's letter to Farrell, asking Farrell to "take care of this for Robert." Tr. 648. Farrell's firm then represented Zaremski as an individual in the effort to defend him from the Fund's substantial accusations. Tr. 647; R. Exh. 27. Around late November 2019, Zaremski decided to retire to limit the amount of money he would owe the Fund. Tr. 717. Respondent threw Zaremski a retirement party. Tr. 719. Farrell continued to represent Zaremski after Zaremski retired, spending significant time and resources on a settlement between Zaremski and the Fund. Tr. 657-60; R. Exh. 30. In March 2020, Respondent rehired Zaremski, accepting his plea to return as Operations Manager when he could not live on his pension alone. Tr. 694, 722, 950.

demonstrate how Respondent's sentiments toward Local 175 members changed when it became apparent that the parties would not be able to settle their outstanding disputes. Instead of announcing its intentions to Local 175 and working with the Union to protect the employees, as it had in the past, Respondent laid the employees off with no notice to the Union and in manner that exacted as much pain as possible from the employees. Respondent offered no evidence to show that it attempted preserve employees' jobs or protect their livelihoods through the December 2019 layoffs.

**s. Respondent Lied When It Claimed that it Needed Time to Hire A Replacement for Supervisor Zaremski**

In its late December flyer, Respondent told Unit employees that one of the reasons for the layoffs was, "with Rob [Zaremski] gone, we lack a supervisor to run the asphalt paving division," but this was a blatant lie. GC Exh. 2. For years, Respondent had employee Patrick Fogarile fill in for Zaremski as Operations Manager whenever Zaremski took time off. Tr. 279-280, 360-365, 735. In fact, Miceli admitted that Respondent had planned for years for Fogarile to replace Zaremski when Zaremski retired. Tr. 75-76. Miceli admitted that, "we had Patty [Fogarile], I've always told him that he was in the bullpen and when Robert decided to retire, he was going to be the guy to do it." Tr. 75. Miceli explained that it was important for Respondent to prepare in advance for Zaremski's retirement "anytime anybody hits 62 years old [Zaremski was 64 years old] and they're in the Union, they start talking about retirement." Tr. 75-76. When Zaremski finally retired in December 2019, Respondent did not post Zaremski's position for hire or interview any candidates because, as Miceli testified, "this was a forgone conclusion that Patty was going to take over that position for years." Tr. 77.

Therefore, there was no truth to Respondent's claim that Respondent had to lay off 35 asphalt employees because it lacked a supervisor to run the asphalt paving division after Zaremski

retired. Instead, as Miceli admitted during his testimony, Fogarile had been Zaremski's heir apparent for years. Moreover, because the employees knew that Fogarile was able to perform Zaremski's job, Respondent's explanation rang false to employees as well. Tr. 280, 362. Unit employees plainly understood the real reason for their layoffs: that Respondent laid them off because Local 175 successfully pursued a grievance on their behalf in order to enforce crew sizes set forth in the collective bargaining agreement.

**t. Respondent Implements Larger Crew Sizes in Early January 2020**

Respondent began using the larger crew sizes required by Arbitrator Nadelbach's April 29, 2019 award during the first week of January 2020. Tr. 965. For January and most of February 2020, Respondent used three workers in the binder crews, as opposed to the two workers per crew that it had used for many years. Tr. 963-65. When Respondent started performing top work in late February, Respondent started using seven men per crew as required by the award. Tr. 964-65.

**u. Respondent Attempts to Engage in Effects Bargaining Only After Laying the Employees Off and Three Weeks After Deciding to Comply with the Award**

Respondent laid off thirty-five employees on December 20, 2019 but waited until January 30, 2020 – two weeks after the unfair labor practice charge was filed, three weeks after Respondent began using larger crews, and more than a month after the layoffs – to ask the Union to bargain over the effects of complying with the crew size arbitration award. This was the first time Respondent told the Union that it intended to comply with the arbitration award or that it intended to shut down operations and lay off employees. The offer to bargain came in a letter from Farrell to Chaikin and Rocco. GC Exh. 15. The letter was also the first time Respondent used the phrase “effects bargaining” over the course of its many discussions with Local 175. Tr. 802-803.

Farrell and Chaikin exchanged a series of emails in early February 2020 about a possible meeting between the parties. GC Exh. 16. They also spoke on the phone on February 6, 2020. GC

Exh. 16 p. 4. In a February 12 email, Farrell lied by continuing to describe the arbitration award as unimplemented, “NY Paving’s implementation of Arbitrator Nadelbach’s award **will** result in the layoffs of Local 175 members, which **will** occur when NY Paving implements the crew sizes mandated by Arbitrator Nadelbach.” *Id.* at 4-5 (emphasis added). The parties eventually met at Farrell’s office on March 3, 2020, but this *ex post facto* bargaining did not lead to an agreement.

R. Exh. 34. The parties have continued to discuss a possible settlement of the crew size issue as a part of a global deal to resolve all their pending disputes.

**v. January and February 2020’s Warm Weather Should Have Resulted in Fewer Layoffs, Not More**

Undisputed testimony from Respondent’s employees and supervisors established that extreme rain, extreme snow, and very cold weather force Respondent to stop or dramatically reduce asphalt and concrete paving work. Tr. 284-285, 370-371, 688-689, 942. In its position statement to the Regional Director, Respondent claimed that the December 2019 layoffs were “unrelated” to the crew size arbitration and simply “standard . . . associated with the typical “slow down” of the winter months.” GC Exh. 22 p. 7-8.

However, Respondent did not present any evidence establishing that the weather necessitated the mass layoff of Unit employees in December 2019. Rather, United States Department of Commerce data show New York City was warmer in January 2020 as compared to prior winters. The average Fahrenheit temperatures for the months of January 2017, 2018, and 2019 were 38, 31.7, and 32.5 degrees, respectively. GC Exh. 20 p. 1, 3, 5. The average temperature in January 2020 was 39.2. GC Exh. 20 p. 7. In February 2017, 2018, and 2019, the average New York City temperatures were 41.6, 42.1, and 36.2, respectively. GC Exh. 20 p. 2, 4, 6. February 2020’s average temperature of 40.1 degrees Fahrenheit was by no means a colder-than-average month in New York City. GC Exh. 20.

The data also show remarkably little precipitation in January and February 2020. In January 2017, February 2017, January 2018, February 2018, January 2019 and February 2019, New York City received between 2.18 and 5.83 inches of precipitation per month.<sup>7</sup> GC Exh. 20. In January 2020, New York City received only 1.93 total inches of precipitation – less than any January or February in the previous three years. GC Exh 20 p. 7. In February 2020, only 2.54 inches of precipitation fell in New York City, one of the lowest numbers in recent winter months. GC Exh. 20 p. 8. Only one inch of snow fell in January 2020. GC Exh. 20 p. 7. There was no snow whatsoever in February 2020. GC Exh. 20 p. 8. Therefore, the record evidence shows that the extreme rain, snow, and cold that typically cause layoffs did not occur in January and February 2020.

**w. Respondent Hired Two New Asphalt Paving Employees in August 2020 Instead of Recalling Local 175 Members from Layoff**

Despite its repeated prognostications that larger crew sizes would doom Respondent’s business, Respondent has successfully operated while using seven and three workers on asphalt paving crews. Not only did operating with a larger crew size not devastate Respondent’s business, but the evidence establishes that Respondent’s asphalt paving workload increased in Summer 2020 so much that Respondent needed to hire two additional workers. However, instead of recalling laid off Local 175 members Frank Wolfe or William Smith, Respondent chose to hire new employees Shaquille Russell and Rasheem Stroud instead. GC Exh. 3 p. 451-452. Miceli testified that Respondent hired Russell and Stroud because they are African American. Tr. 86. Throughout the trial, Respondent explained that it hired Stroud and Russell as a “minority presence in some of the areas where we were working.” Tr. 956. Miceli presented the strangely vague testimony that, “[in] a lot of the areas where we worked with, you know, there’s protests and everything going on.” Tr.

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<sup>7</sup> This information appears in the data as TLC, which means “Total Liquid Content.”

985. Respondent did not create an affirmative action plan, nor did Respondent hire Stroud and Russell because of historical discrimination in the construction or paving industries. Rather, Respondent seems to be asserting that it hired Stroud and Russell simply because Respondent worried about having enough black employees in the event that Black Lives Matter protests might happen near their jobsites. Tr. 956. Respondent hired these new employees even though former employees and Local 175 members Wolfe, Smith Jr., and other long-time asphalt pavers were still laid off.

### **III. ARGUMENT**

The credible testimonial and documentary evidence establishes that Respondent violated Sections 8(a)(3) and 8(a)(5) of the Act by retaliating against Local 175's members because the Union filed, successfully arbitrated, and refused to abandon a grievance regarding Respondent's understaffing its work and by failing to give the Union notice before implementing its retaliatory layoffs. Respondent relied on shifting defenses, incredible testimony, and no documentary evidence in its failed effort to meet its burden of showing that it laid off the employees for nondiscriminatory reasons. Further, Respondent failed to present any evidence establishing that, at any time before December 20, 2019, it notified Local 175 that it intended to shut down its asphalt paving operations and lay off its Unit employees. As such, it should be found that Respondent violated the Act as alleged in the Complaint.

#### **a. Credibility Section**

##### **i. General Counsel's Witnesses Gave Consistent, Corroborative, and Straightforward Testimony Which Should Be Credited**

General Counsel's witnesses Attorney Matthew Rocco, Shop Steward Terry Holder, and Laid Off Employee Frank Wolfe gave clear, consistent, and credible testimony. Each made a

sincere effort to provide the Administrative Law Judge with their honest recollection of what they observed at each critical event. Their testimony, in contrast to Respondent's witnesses' testimony, was rich in detail drawn from their personal observations and recollections. Each witness was cooperative and direct when responding to questions – regardless of whether the questions were from the General Counsel, Respondent, or the Administrative Law Judge. Their demeanor defies attack on their credibility.

Matthew Rocco testified candidly and credibly about the key events of the crew size grievance and arbitration and the parties' efforts to come to a global resolution of their disputes. His testimony was corroborated by the documentary evidence, including the transcripts of the arbitration proceedings, emails and text messages between him and Farrell, and Respondent's legal filings attempting to vacate the arbitration award. Rocco readily acknowledged on direct and cross examination when he did not remember details of certain events. Unlike the attorneys who testified for Respondent, Rocco limited his testimony to his personal recollection of meetings, phone calls, and legal filings and did not pepper his testimony with self-serving argument.

Employee Frank Wolfe's testimony was similarly direct and honest. He offered clear and un rebutted testimony about Respondent's business generally, Robert Zaremski's retirement, how Respondent announced the December 2019 layoffs, and how those layoffs differed from prior ones. He answered questions on cross examination candidly and without reservation. Based on his forthrightness and demeanor, Wolfe's credibility is unassailable.

Current employee Terry Holder's testimony corroborated much of Wolfe's testimony and was also forthright and truthful. Holder testified with great detail about events that he remembered and readily acknowledged incidents he did not remember. His status as a current employee who is not a discriminatee named in the Complaint further bolsters his credibility. *Flexsteel Industries*,

316 NLRB 745, 745 (1995) (“the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.”).

## **ii. Respondent’s Witnesses Cannot Be Credited**

In general, Respondent’s witnesses were not credible, as their testimony was evasive, contradictory, and unsupported by other record evidence. As discussed in detail below, Respondent’s counsel Jonathan Farrell was evasive and lied during his testimony, relying on a theory that Respondent began complying with the arbitrator’s award in late February 2020 which Respondent’s own witnesses and documents had already disproven during the trial. Farrell also filled his testimony with unnecessary argument that is unsupported by the facts. Respondent’s Director of Operations Peter Miceli testified with substantial detail about some issues but relied on argument and conclusory statements for other matters that he perceived would be unfavorable to Respondent’s defense. Operations Manager Robert Zaremski cannot be credited since his testimony conclusively establishes that he fabricated his October 2017 retirement in order to trick his own union into paying him a pension improperly after Respondent promoted him.<sup>8</sup>

More broadly, Respondent’s shifting defenses about the reason for the layoffs and partial shutdown, and Respondent’s ever-changing position about when it began complying with the arbitration award, demonstrate that Respondent’s entire defense is a sham and that Respondent’s witnesses’ testimony cannot be trusted. To the extent there is any dispute, the credibility determinations must favor the General Counsel’s witnesses.

## **1. Respondent’s Shifting Defenses Undermine its Credibility**

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<sup>8</sup> Respondent also called Local 175 business manager Charles Priolo as an adverse witness. Priolo was nervous and unprepared. He testified untruthfully about calling Union attorney Eric Chaikin during a break in the testimony. However, Priolo’s conduct as a nervous witness is not probative of any of the issues in the Complaint and should not detract from Respondent’s clear unlawful motivation and refusal to bargain about the layoffs.

Respondent's constantly shifting defenses make it impossible to trust the testimony of Respondent's witnesses and counsel, as they have all shown that they are willing to present different facts to different audiences when they believe it will help their case.

Respondent presented many different and inconsistent explanations for why it partially shutdown asphalt paving operations and laid off thirty-five employees on December 20, 2019. First, in its initial announcement to the employees, Respondent offered two reasons: (1) Operations Manager Robert Zaremski's retirement and (2) Local 175's "many grievances and arbitrations against New York Paving," including the crew size arbitration. GC Exh. 2. Then, in its February 18, 2020 position statement to the Regional Director, Respondent changed course, explaining that the December 2019 layoffs were "unrelated" to the crew size arbitration and instead were "associated with the typical "slow down" of the winter months" and "in accordance with [Respondent's] standard and long past practice." GC Exh. 22 at 7-8. However, in its opening statement, Respondent made up a third purported explanation for the layoff. In an apparent effort to reconcile the contradictory positions taken in Respondent's flyer notifying employees of the layoffs and in its position statement, Respondent argued that three factors caused the layoffs: (1) "the undisputed seasonal slowdown in the winter months;" (2) "the retirement of New York Paving's operations manager;" and (3) "reorganizing its entire asphalt operation as a result of the crew size decision." Tr. 50-51.

To obscure its blatant failure to notify Local 175 before laying the employees off, Respondent also took diverging positions about *when* it began complying with the crew size arbitration award. In its position statement, its Petition to Revoke the Subpoena, and its Special Appeal to the Board on the videoconference issue, Respondent maintained that it did not implement the award in late December 2019 or early January 2020, but rather implemented it in

mid or late February 2020. GC Exh. 22 p. 8; GC Exh. 25 p. 7; GC Exh. 1(O) p. 6. Respondent relied on the later implementation date in these submissions in order to cite Farrell's January 30, 2020 letter as timely effects bargaining. *See e.g.*, GC Exh. 22 p. 8. However, on the first day of trial, Miceli, testifying as the custodian of records, stated that Respondent in fact implemented the award in early January 2020. Tr. 72-73, 82. During direct examination, attorney Farrell testified that Respondent implemented the award around late December or early January. Tr. 584-585. However, on cross examination, Farrell changed his testimony, contradicting himself and Miceli by offering self-serving testimony that Respondent implemented the award in late February or early March, apparently attempting to preserve the argument that his January 30 letter constituted sufficient notice of Respondent's planned implementation of the award. Tr. 779-781. Miceli testified again, after Farrell testified, as Respondent's witness. During that testimony, Miceli contradicted Farrell, stating that the arbitration award was fully implemented in early January 2020. Tr. 965.

During its opening statement, Counsel for the General Counsel noted Respondent's shifting defenses. Yet, during the trial, Respondent proffered new shifting defenses and contradictory theories depending on which witness was testifying. Respondent's willingness to provide conflicting testimony about its own actions confirms that its witnesses are not credible.

## **2. Respondent's Attorney Farrell's Testimony Was Evasive and Untruthful and Should Not Be Credited**

Farrell packed his testimony with argumentative tangents that ranged from extreme hyperbole, to obfuscations, to lies. For example, when Farrell was attempting to paint Local 175 as uncooperative during the negotiations for a global settlement, he stated that his January 30, 2020 post-layoff letter offering effects bargaining was "another unanswered letter." Tr. 589. But the evidence shows that Chaikin answered the letter via email just five days later, on February 4, 2020.

GC Exh. 16 p. 6. In his attempt to make Rocco's ten million-dollar damages demand for the crew size arbitration seem outlandish, Farrell stated, "I don't know if GM could pay \$10 million." Tr. 571. But General Motors posted a \$6.58 billion profit for 2019.<sup>9</sup> During Rocco's cross-examination, Farrell argued that Local 175 caused the delay between Farrell's January 30, 2020 letter offering "effects bargaining" and their eventual March 3, 2020 meeting. Tr. 233-234. However, on direct examination, Farrell revealed that he also contributed to the delay as he underwent surgery during that time. Tr. 630.

On direct examination, Farrell attempted to bolster his credibility by stressing his good memory and his substantial authority within his law firm, but on cross examination he portrayed himself as too busy to remember key meetings, phone calls, and legal filings. On direct examination, Farrell testified in detail about various conversations that occurred more than a year before the trial, making a point of telling the judge that he has a "very, very good memory." Tr. 559. However, during cross-examination, when asked about facts that could damage Respondent's case, Farrell testified that he "could not remember the contents of a conversation 11 months ago." Tr. 800. On direct examination, Farrell boasted about how he personally "authorize[s] everything concerning New York Paving." Tr. 667. However, when confronted on cross examination with motions and other filings that showed Respondent's shifting defenses regarding the layoffs, Farrell suddenly claimed that he had no role in drafting those documents. Tr. 789. As such, Farrell's testimony was self-serving, contradictory, evasive, and untruthful. He should not be credited.

### **3. Peter Miceli's Testimony was Conclusory and Speculative and Should Not Be Credited**

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<sup>9</sup> Tom Krisher, *GM's Profits Shrank 17% in 2019 Thanks to Slumping Sales and a Paralyzing Worker Strike*, BUSINESS INSIDER (Feb. 5, 2020 8:01 a.m.), <https://www.businessinsider.com/gm-turns-full-year-profit-despite-strike-slumping-sales-2020-2>

Miceli was able to testify with specificity and clarity about certain issues but he resorted to unfounded conclusions and speculation about key matters in the case. For example, Miceli testified in detail about Jared Fusco and Matthew Snyder's termination, recalling conversations with National Grid officials that occurred more than a year before the trial. Tr. 914-15. He also recalled the exact outcome for each of the five employees involved in the incident. Tr. 914-15. However, when Miceli testified about why using larger asphalt paving crews was problematic for Respondent, he resorted to hyperbolic conclusions. He stated, "it was titanic. It was explosion." Tr. 901. He stated that implementing the larger crew sizes, "blew it up . . . we had to change everything," because it forced Respondent to bundle the work by region instead of sending out crews as the work came in, but Miceli failed to explain why bundling the work was such a seismic change. Tr. 902-03.

Miceli was similarly conclusory and evasive about why Respondent did not continue to employ Frank Wolfe and William Smith as laborers, stating vaguely that, "we didn't think it would work well with the crew at hand. And that's the decision we made." Tr. 925. On cross examination, Miceli avoided explaining why it was necessary to permanently lay off Wolfe and Smith, testifying, "A lot of our guys are some long-term employees. But there's also a lot that get bounced around from company to company. It happens. It's just. . . that's the way it works. Construction." Tr. 984.

Miceli's vague testimony continued when he discussed the impact Zaremski's retirement had on Respondent's business. He testified, "I mean, he wasn't – it wasn't going to run, like, you know, like as smooth as it was with Robert [Zaremski]. It – it couldn't. You know, you had to wait a little longer. They have different ways of doing things." Tr. 950. Miceli established that he possesses substantial experience in and knowledge of the paving industry, which made his

undetailed testimony about the key issues in this case even more apparent. His conclusory testimony about the central issues in this proceeding should not be credited or relied on.

#### **4. Zaremski's Willingness to Perpetrate a Fraud by Faking His "Retirement" Shatters Any Credibility He May Have Had**

Although Robert Zaremski's testimony included very little information probative to the allegations in the Complaint, credibility disputes should be resolved against Zaremski because the record conclusively established that Zaremski lies and cheats; in collaboration with Respondent, Zaremski devised a scheme to perpetrate a fraud on the Teamsters Pension Fund.

The Teamsters' Pension Fund requires employees to separate from service in order to receive a pension. R. Exh. 28 p. 1-2. The probative record evidence establishes that in 2017, with Respondent's help, Zaremski faked his retirement so he could receive his Teamsters pension without actually separating from Respondent. Instead, he took a promotion and tried to frame it as a retirement. Respondent asked Zaremski to become a full-time Operations Manager while he was working as a Teamster. Tr. 713. Zaremski took no time off between working as a Teamster and taking the Operations Manager position. Tr. 708.<sup>10</sup> When the Fund demanded Zaremski pay back approximately \$110,000, Zaremski took the action of a guilty man: he retired to cut off his liability. Tr. 693-694. These are profoundly deceptive acts which demand that any credibility disputes be resolved against Zaremski.

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<sup>10</sup> Zaremski's testimony about this issue shows that Farrell and Getiashvili blatantly lied to the Teamsters' Fund in their December 13, 2019 letter, which was admitted as Respondent Exhibit 29. They wrote, "at the time of Mr. Zaremski's retirement, both he and NY Paving reasonably anticipated that the employee would not provide services in the future." But Zaremski testified that the opposite is true:

Counsel for the General Counsel: and so it's true that – isn't it, that you retired in October of 2017, knowing that you would return as an asphalt paving supervisor, right?

Zaremski: In 2017?

Counsel for the General Counsel: Yes.

Zaremski: Yes.

Tr. 713. Farrell and Getiashvili's false statements to the Pension Fund in this letter on Zaremski's behalf further undermine their credibility.

**b. Respondent Violated Section 8(a)(3) of the Act When it Laid off its Asphalt Workers in December 2019 to Retaliate Against the Local 175 Members for the Union’s Refusal to Abandon its Arbitration Victory**

Analyzed under the *Wright-Line* framework, Respondent’s December 2019 layoffs violated Section 8(a)(3) of the Act. In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer’s hostility to that activity “contributed to” its decision to take an adverse action against the employee. *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

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Evidence that may establish a discriminatory motive - i.e., that the employer’s hostility to protected activity “contributed to” its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee’s protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and

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<sup>11</sup> The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the “prima facie case” standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, “prima facie case” refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer’s hostility toward protected activities was a motivating factor in the employee’s discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel’s “prima facie case” or “initial burden” are not quite accurate, and can lead to confusion, as General Counsel’s proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer’s hostility toward protected activities was a motivating factor in the discipline.

supervisors told activist that management was “after her” because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee’s protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer’s animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4<sup>th</sup> Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer’s asserted reason for the employee’s discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014) ; *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6<sup>th</sup> Cir. 1997)).

Once the General Counsel has established that the protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 (“the Board’s construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation”). The employer has the burden of establishing that affirmative defense. *Id.*

**i. Local 175’s Grievance and the Employees’ Union Membership are Protected Activity and Respondent Knew About That Protected Activity**

In March 2018, Local 175 filed a grievance on behalf of Respondent’s asphalt paving employees regarding Respondent’s understaffing of its asphalt crews. Local 175 brought the grievance to arbitration throughout 2019. It is well-settled Board law that the filing and arbitration of the grievance were protected union activity for which an employee cannot be disciplined. *Brad Snodgrass, Inc.*, 338 NLRB 917, n. 1 (2003). It is undisputed that Respondent knew of the grievance and arbitration. Tr. 895.

**ii. The Overwhelming Record Evidence Establishes Respondent’s Unlawful Motive**

When Local 175 canceled the mediation session and refused to abandon the crew size grievance, Respondent acted on a scheme to oust Local 175. Respondent’s plan, which Farrell first announced at the October 25 arbitration, was to lay the employees off in December 2020 and to blame the Union for the layoffs. Respondent implemented the scheme by distributing a flyer to the employees that denigrated the Union and announced that the employees would be out of work until the arbitration award was reversed. Respondent timed and structured the layoffs and its corresponding smear campaign to have the greatest impact before an anticipated Spring 2020

election when Respondent hoped the employees would replace Local 175 with Local 1010. As such, Respondent's anti-union animus was a substantial and contributing factor in its decision to lay the employees off in December 2019.

**A. Respondent's Late December Flyer to Employees is Smoking Gun Evidence of Respondent's Anti-Union Animus**

In the flyer included the employees' final paychecks of 2019, Respondent unequivocally and blatantly admits that, out of animus for the Union pursuing and succeeding with the arbitration, Respondent retaliated against the employees by laying them off. GC Exh. 2. The flyer is dripping with Respondent's fury at Local 175 because Local 175 filed and successfully arbitrated the grievance about Respondent understaffing asphalt crews. For example, Respondent distorts reality by repeatedly and falsely claiming that it was Local 175, not Respondent, who decided to lay the members off. *Id.* Respondent states that it wants the employees to "know the truth about the future of asphalt paving at New York Paving," and the truth is Respondent, not Local 175, "is the *only one* that cares." *Id.* (emphasis in original). Respondent then announced that it was holding the employees' livelihoods hostage and keeping the employees out of work "until the arbitration decision is reversed." *Id.*

The flyer initiated Respondent's scheme to make sure the employees voted against Local 175 in a future representation election. Instead of providing details about why the crew size grievance would cause a partial shutdown of the company, Respondent used the flyer to smear Local 175, ending the flyer with its most callous missive: that even though Respondent's managers chose to lay off the employees indefinitely, "we wish you and your families well in the holiday season, and hope Local 175 will stop trying to hurt your jobs at New York Paving and start putting its members first in 2020." GC Exh. 2 (emphasis in original). The flyer is a straightforward announcement that Respondent used the layoffs to discourage the employees from supporting

Local 175. On its own, the flyer supports a finding that unlawful anti-union intent motivated Respondent to lay the employees off.

**B. Respondent Timed the Layoffs to Cause the Greatest Harm to Employees so as To Undermine the Union and Cause Disaffection with the Union among Employees Just Before the Open Period for a Representation Election**

In furtherance of its scheme, Respondent timed the layoffs to undermine the Union and demoralize the Local 175 members as much as possible before an election in which Respondent hoped that the employees would vote against Local 175. The layoffs began the week before Christmas. Tr. 283. At the time of the layoff, Respondent saw two avenues to oust Local 175. The earliest possible election, Respondent thought, could come after Local 1010 asked the Regional Director to resume processing the petition in Case Number 29-RC-197886. GC Exh. 26. Respondent believed Local 1010 would make that request in December 2019 or January 2020. *Id.* If that avenue failed, Respondent assumed Local 1010 would file a new petition during the contract's open period, which would begin on April 1, 2021. Tr. 110, 812-13; *Union Carbide Corp.*, 190 NLRB 191, 191 (1971) (holding that the open period for an agreement longer than three years begins ninety days before the third anniversary of the contract's effective date).

Respondent's own words in the flyer establish that it planned for the employees to be out of work "until March 2020." When read in context, Respondent used the flyer to warn employees that Respondent had the power to keep them out of work if the Union did not relent and if employees did not abandon their support for the Union. GC Exh. 2. Thus, employees who returned after the months-long layoff would be reinstated just as the open period in the collective bargaining agreement to file a petition began. GC Exh. 2; GC Exh. 9 p. 1. Respondent's goal was to keep the employees out of work for several months stewing over how Local 175 caused the layoff. Then, Respondent would appear magnanimous recalling them in the Spring, shifting the employees'

loyalties from Local 175 to Respondent and Local 1010 just before the election. Respondent therefore timed the layoffs to decimate the support for Local 175 within the bargaining unit, expecting that the employees' frustration would peak right in time to vote Local 175 out in the Spring of 2020.

**C. Respondent Structured the Layoff to Cause Employees the Most Harm to Erode their Support for Local 175 In the Lead Up to the Open Period, When Rival Union Local 1010 Could File a Representation Petition**

In order to frustrate and discourage as many employees from supporting Local 175 as possible, Respondent deviated from its standard practice of spreading work among all its employees during a downturn and chose just eighteen employees to work in January 2020, adding three more employees in February 2020. GC Exh. 3 p. 414-419. The Employer's payroll records show that in previous years, Respondent kept as many employees working as possible, sometimes employing a worker for just one or two days a month during slower periods. GC Exh. 3 p. 143-150, 228-232. However, in January 2020, Respondent changed this practice, employing only a select minority (eighteen) and leaving the majority of the bargaining unit unemployed. GC Exh. 3 p. 414-16. In February 2020, work became available for three more employees and, instead of rotating in Local 175 members who had been laid off the month before, Respondent kept the same eighteen employees working that month who had worked in January. GC Exh. 3 p. 417-19.

The effect of assigning all of the available work to a minority of the workforce was that a majority of the asphalt paving employees were laid off with the understanding, established by Respondent's own words in its flyer disparaging Local 175, that the layoff was Local 175's fault. Respondent's decision to condense the available work within a small group of Local 175 members, and therefore withhold any pay from the majority of Local 175 members, was another part of

Respondent's devious plan to punish and demoralize the employees before the anticipated Spring 2020 election.

Respondent's unlawful motivation for its December 2019 layoffs is further elucidated by the comparison between the brutality of those actions with the generosity Respondent extended Jared Fusco, David Snyder, and Matthew Tuminello after they committed egregious misconduct in June 2019. In the earlier case, Respondent bargained with the Union in order to ensure that Fusco and Snyder – who tarnished the company's reputation by making vile slurs at a jobsite – obtained new jobs as soon as possible after their layoffs. Respondent went further for Tuminello, creating a brand-new supervisory position for him. For the December 2019 layoffs, instead of demonstrating the largesse and will to collaborate it had months before, Respondent provided no notice to the Union or the employees when it deviated from its past practice and kept thirty-five employees out of work for two months.

#### **D. Respondent's Unprecedented Decision to Lay Off Foremen First Demonstrates Its Unlawful Motive**

Respondent further revealed its unlawful motivation by deviating from its established practice in December 2019 and permanently laying off two foremen. The Board will infer discriminatory intent when an employer deviates from its past practice when taking the adverse action. *Case Farms of North Carolina, Inc.*, 353 NLRB 257, 260 (2008) citing *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004). In *Kanawha Stone Company, Inc.*, 334 NLRB 235 (2001), the Board found that a construction company violated the Act when it permanently discharged a key union supporter without explanation during a union organizing drive. In earlier slow periods, the employer offered the employee other work even when other employees were laid off. *Id.* at 243. After the employer laid him off, the employer hired three additional employees. *Id.* The Board and the ALJ found that the employer's deviation from its past practice of keeping the

employee working during slow periods, along with the hiring of additional workers after his layoff, showed that the layoff violated Section 8(a)(3) of the Act. *Id.*

Like the employer in *Kanawha*, Respondent revealed its unlawful motive when it departed from its past practice of keeping Unit-foremen employed during downturns and permanently laid off foremen Frank Wolfe and William Smith in December 2019. The undisputed record evidence establishes that, before December 2019, if work did not exist for each foreman to lead his own crew, Respondent grouped Local 175 foremen together in one asphalt paving crew and laid off other laborers instead. Tr. 286, 304-305, 373, 733, 906, 923. This time, in contrast to its long-standing practice of finding ways to keep the foremen employed, Respondent permanently laid off Wolfe and Smith in December 2019. Moreover, Respondent continued to recall other laborers in March and April 2020, even though Wolfe and Smith were available to work. When Respondent had more work available in the summer, Respondent hired two new employees without even considering calling back Wolfe, Smith, or other Local 175 members.

Respondent's decision to lay off long-time foremen and employ laborers – a significant deviation from Respondent's long history of prioritizing foremen – shows Respondent's animus toward Local 175 motivated the December 2019 layoffs. *Case Farms, supra*. By recalling laborers before Wolfe and Smith, and then hiring new employees in the summer of 2020 while Wolfe and Smith were still out of work, Respondent demonstrated the drastic punishment it was willing to exact from the employees to oust Local 175. As foremen, Wolfe and Smith were two of Respondent's most trusted employees. And yet, Respondent permanently laid them off to intimidate them and the other workers from supporting the Union. These departures from past practice are simply more evidence that Respondent's December 2019 layoffs were an unlawful effort to discourage employees from supporting Local 175.

**E. Respondent's Refusal to Pay the July 2019 Raises Demonstrates How Far Respondent Would Go to Coerce Local 175 to Abandon the Crew Size Arbitration Award and to Force a Global Agreement**

Respondent revealed the significant unlawful actions it was willing to take to pressure the Union to come to a global agreement when it intentionally withheld the Local 175 members' July 2019 pay increases. The record conclusively established that instead of paying unit employees the contractually mandated wage increase, Respondent put the money that it owed to the employees for the wage increase in escrow. Tr. 65; Tr. 108; Tr. 778-79; GC Exh. 7. Respondent then held the wage increases hostage and used it as a bargaining chip in the global negotiations, Responding to Local 175's complaints about the unpaid increases with, "we have to do a deal." Tr. 108.

Respondent's brazen refusal to pay the Local 175 members their July 2019 raises sheds light on its unlawful motivation for the layoffs. By July 2019, Respondent and Local 175 were locked in a deteriorating negotiation. Every day the parties did not come to an agreement, Respondent's potential financial liabilities from the crew size arbitration, the FLSA lawsuit, the transfer-of-work case, and other disputes increased. Tr. 580 ("It's clear as day our liability's increasing"). Respondent withheld the pay raises to increase its leverage over Local 175, hoping that frustration from its members would force Local 175 to accede to Respondent's demands. The tension continued to rise throughout the Fall of 2019, reaching a zenith at the October 25 arbitration, when Farrell threatened that if Local 175 did not come to a deal with Respondent, Respondent would retaliate by laying off the Local 175 members and blaming the Union right before Local 1010 filed a petition. Tr. 110-111. When Local 175 canceled the mediation session scheduled for December 16, 2019, Respondent was fed up and pivoted from trying to amass bargaining chips to deploying its plot to lay off the employees to remove the Union from its position as the asphalt-paving employees' collective bargaining representative.

## **F. Respondent's Recent Prior Unfair Labor Practices Establish Respondent's Animus Against Local 175**

The Board has repeatedly held that an employer's prior violations of the Act may be considered as background evidence of the employer's animus in later cases. *Healthbridge Mgmt, LLC*, 362 NLRB 310 n. 3 (2015) citing *Barnes & Noble Bookstores, Inc.*, 237 NLRB 1246 n. 1 (1978) enfd. 598 F.2d 666 (1st. Cir. 1979). Respondent's recent violations of the Act, as found by the Board, place its December 2019 layoffs in the larger context of its years-long effort to get rid of Local 175.

In 2019, the Board found that in 2017, Respondent unlawfully assisted Local 1010's attempt to raid the Local 175 bargaining unit by urging Local 175 members to sign Local 1010 authorization cards and by threatening to fire Local 175 members who did not sign. *New York Paving, Inc.*, 2019 WL 1514220 at \*32, NLRB Div. of Judges (Apr. 5, 2019) affd. *New York Paving, Inc.*, 2019 WL 2208710, NLRB slip op. (May 20, 2019). In 2020, the Board found that Respondent also unlawfully shifted work from Local 175 to Local 1010 without notice to Local 175. *New York Paving, Inc.*, 370 NLRB No. 44 (Nov. 9, 2020). Respondent's unlawful assistance to Local 1010 during the most recent open period, and its prior unlawful transfer of work from Local 175 to Local 1010, should be relied upon as evidence of Respondent's long-standing animus against its employees for their support for Local 175. *Healthbridge, supra*.

### **iii. Respondent Failed to Meet Its Burden Under *Wright Line* and Failed to Establish any Valid Defense**

Respondent's shifting defenses expose its explanation for the layoff as mere pretext. Respondent openly and willingly contradicted its own legal filings and witnesses before and during the trial. There is nothing to glean from Respondent's incoherent, constantly changing defenses. Even if Respondent's differing explanations for the layoffs are to be considered on their merits

(and they should not be), Respondent has failed to meet its burden in establishing any of its defenses and each of them fails. Respondent failed to prove that Robert Zaremski’s retirement, the weather in December 2019, January 2020, and February 2020, or compliance with the crew size award caused the layoffs.

**A. Respondent’s Shifting Defenses Establish that Its Defenses Are Pretextual**

At various stages of the investigation and litigation of this case, Respondent presented several shifting explanations for why it laid off the asphalt paving employees, revealing that its defense is pretextual. *MCPC, Inc.*, 367 NLRB No. 137 at \*5 (May 23, 2019) (“we find that the shifting rationales provided by the Respondent support a conclusion that the proffered reasons for Galanter’s discharge . . . are pretextual”) citing *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997).<sup>12</sup> Respondent also presented inconsistent positions on *when* it implemented the award. The below chart summarizes Respondent’s different positions on these issues.

Evidence	Respondent’s explanations for <b>why</b> it laid off the employees	Respondent’s positions on <b>when</b> it implemented the crew size arbitration award
December 2019 Flyer to employees – GC Exh. 2	1. Local 175’s “many grievances and arbitrations against New York paving,” including the crew size arbitration. 2. Robert Zaremski’s retirement.	Respondent is shutting down asphalt operations and laying off nearly all asphalt paving workers and these changes will be in effect “until March 2020 and possibly longer.”
February 18, 2020 Position statement to the Regional Director – GC Exh. 22	Layoffs were “unrelated” to the crew size arbitration and instead were “associated with	Award implemented on or about February 13, 2020. GC Exh. 22 p. 9.

<sup>12</sup> This evidence of pretext serves both to discredit Respondent’s defense and also to prove Respondent’s unlawful motivation. *Lucky Cab*, 360 NLRB at 274 (“evidence of pretext may be used to show discriminatory motivation”). The Board’s recent decision in *Electrolux* does not detract from a finding here that Respondent’s pretext revealed its animus. In that case, the Board held that pretext alone is insufficient for a finding unlawful motivation, but also held that “the Board may infer from the pretextual nature of an employer’s proffered justification that the employer acted out of animus *at least where the surrounding facts tend to reinforce that inference.*” 368 NLRB No. 34 at \*4. Here, Respondent’s pretextual assertions simply add to the significant direct and circumstantial evidence of its unlawful intent.

	the typical slowdown of the winter months.” GC Exh. 22 p. 8.	
Opening statement at trial	1. “slowdown in the winter months;” 2. Zaremski’s retirement; 3. “reorganizing its entire asphalt operation as a result of the crew size decision.” Tr. 50-51	No mention of implementation date.
Miceli Testimony as Custodian of Records	“We thought the men should know that this wasn’t going to be just a normal layoff for the wintertime.” Tr. 83.	“It was at Christmastime, this would have been the best time to implement the 7 and 3.” Tr. 72-73. “We were going to implement the crew size changes in January.” Tr. 82.
Farrell direct examination	“There was probably eight different reasons that award had to be implemented.” Tr. 585.	“The arbitration award issued April 29 <sup>th</sup> , right, New York Paving eventually admitted [sic] the award about five months later, six months. May, June, July, August, September October, November, December, excuse me, I’m wrong, seven months later.” Tr. 548-85.  As of December 20, 2019, “the decision had already been made.” Tr. 585.
Farrell cross examination	“It’s one of three things . . . One, the weather . . . Two, you had Robert Zaremski retiring after doing his job. And three, you have the start of bundling the tickets for the implementation of the award required by Judge Nadelbach.” Tr. 781-82.	“The seven and three happened sometime in late February, early March.” Tr. 779.
Miceli testimony as Respondent’s witness	No clear explanation of why Respondent’s decision to “bundle the work” caused layoffs.	“We were going to start it in January.” Tr. 936.  New York Paving fully implemented the arbitration

		award as of January 1, 2020. Tr. 965.
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While each of the defenses are themselves unsupported by the evidence, Respondent's inability to cogently explain why it laid off the employees and when it began complying with the arbitration award demonstrates that all of its defenses are pretextual. *MCPC, supra*. As such, Respondent necessarily failed to meet its burden under *Wright Line* of showing that it would have taken the same action in the absence of the protected activity. *Id.*

**B. Respondent Failed to Establish that Zaremski's Retirement Caused the Layoffs**

Respondent stated in its layoff announcement to the employees and in its opening statement that Robert Zaremski's retirement caused Respondent to have to suspend asphalt operations and layoff most of the workforce. Respondent's claim was overwhelmingly disproved by the record evidence, including Respondent's own admissions. Moreover, Respondent never proved why Zaremski's retirement necessitated the mass layoff of Local 175 members. GC Exh. 2; Tr. 50. Instead, the evidence conclusively establishes that Respondent prepared for Zaremski's retirement for years by training Patrick Fogarile to replace Zaremski. Tr. 75. Respondent's own Director of Operations Peter Miceli testified that he groomed Fogarile to take over in the event of Zaremski's retirement. Tr. 75. Miceli's testimony contradicts argument from Respondent's counsel and earlier documents from Respondent, including its layoff announcement to the employees, which states that Respondent "lack[s] a supervisor to run the asphalt paving division." GC Exh 2. Respondent never attempted to reconcile Miceli's unequivocal testimony about Respondent's years-long plan to replace Zaremski with Fogarile with Respondent's arguments that Zaremski's absence forced layoffs. As such, Respondent's unsupported defense that Zaremski's retirement caused the layoffs should be rejected.

### **C. Respondent Did Not Establish That December 2019 was a Typical Seasonal Layoff**

Respondent argues that the December 2019 layoffs were the result of a typical slowdown during the winter. Tr. 50. However, Respondent failed to show that the normal factors that contribute to typical slowdowns in January and February – cold weather, snow, and vacations – were substantial enough in December 2019 and January 2020 to cause the unprecedented layoff of thirty-five asphalt paving employees.

Miceli testified generally that one reason for the decreased workload in a standard January and February is because workers take vacations, using these slower months to take long trips to see their families in other countries. Tr. 83, 942. However, Respondent offered no evidence demonstrating that in 2019, employees' vacations caused a slowdown that was so significant as to warrant the unprecedented layoff of 35 asphalt paving employees. In order to conclude that the employees' 2019-2020 vacations caused the unprecedented downturn in work in January and February 2020, Respondent would have to show that Local 175 members coordinated their vacations so that they all took much longer and much more synchronized trips than ever before. Respondent presented no evidence whatsoever demonstrating that the vacations among asphalt paving employees warranted the layoff of the 35 employees named in the Complaint.

Miceli and Zaremski also testified generally that cold weather and snow cause Respondent's usual slowdown. Tr. 688, 942. Miceli stated, "Obviously, the – snow and the cold weather is a problem." Tr. 942. When asked why there is a slowdown in the winter months, Zaremski answered, "Cold weather. Snow." Tr. 688. But neither mentioned that January and February 2020 were abnormally warm. GC Exhibit 20 demonstrates that it only snowed once in January and February 2020, and that the accumulation for that particular snowfall was only one inch. GC Exh. 20. Neither Miceli nor Zaremski offered any testimony explaining how the

unusually temperate weather in January 2020 or February 2020 contributed to the unprecedented layoff of 35 asphalt paving employees. Notably, Respondent also offered no financial records, weather reports, internal memoranda, or any other documentary evidence showing that the weather caused the layoffs. As such, Respondent failed to meet its burden and its argument that its extraordinary layoffs of the thirty-five discriminatees was “normal,” “typical,” or “seasonal” should be entirely rejected.

**D. Respondent Failed to Prove its Asserted Defense That Complying with the Arbitrator’s Award Would Necessarily Cause Layoffs**

Respondent has not met its burden of showing that complying with the crew size arbitration award warranted the unprecedented layoff of the thirty-five discriminatees. The evidence Respondent offered at trial to support this *Wright-Line* defense is shockingly thin. Respondent introduced no budgetary projections, work orders, strategic plans, or any other documents showing how the company decided that eliminating thirty-five employees’ jobs for two months was necessary to implement the arbitration award. Respondent relied solely on Miceli’s testimony on direct examination, which was rife with conclusory statements but void of any specific detail, about why the layoffs were necessary.

Miceli repeatedly testified that using larger crew sizes would cause significant problems for Respondent, including likely layoffs of asphalt paving employees, but utterly failed to explain why. He testified that “it makes no sense” to perform asphalt paving work with crew sizes of seven and three. Tr. 902. He testified that implementing the crew sizes would be “titanic.” Tr. 901. Miceli claimed with “100 percent” certainty that Respondent would have to lay employees off to implement the arbitration award, but he never provided any facts relied upon in making that claim. Tr. 922. Respondent did not introduce or refer to any documents that supported Miceli’s conclusory statements.

Miceli also testified that to implement the arbitration award, Respondent had to “bundle the work” geographically, assigning crews based on the location of the job instead of when Respondent received the work order. Tr. 903. He stated that bundling the work would cause “several layoffs.” Tr. 921. When asked why bundling the work would cause layoffs, Miceli continued to rely on conclusory claims and argument instead of concrete evidence, testifying, “Because we obviously have to go out and make money.” Tr. 922. He never explained how many of the thirty-five layoffs, if any, resulted from bundling the work.

Miceli never reconciled his gloomy forecasts about what would happen if Respondent complied with the crew size award with the reality that Respondent continued its operation, even to today, with productivity very similar to that before the implementation, even in the context of the pandemic. Miceli testified that the COVID-19 pandemic reduced Respondent’s work orders from National Grid and Hallen by “almost 50 percent.” Tr. 953. But even with that reduction, the Local 175 employees worked only 17% fewer hours in August 2020 compared to August 2019. GC Exh. 3 p. 383, 453. Therefore, despite Miceli’s predictions of larger crew sizes causing a “big explosion,” the record evidence shows that Respondent has continued to successfully operate its business since it started using larger crews, even during the massive disruption caused by the pandemic.

As such, Respondent failed to meet its burden of showing that nondiscriminatory reasons would have forced Respondent to lay off the employees even in the absence of protected activity. Respondent offered three explanations for the layoffs – Zaremski’s retirement, the seasonality of the work, and the implementation of the crew size award – but none of the three withstand even minimal scrutiny. The defenses rely on unsupported testimony from Respondent’s discredited witnesses. Of the thirty-six exhibits Respondent introduced at trial, none support Respondent’s

claims that its three proffered defenses were the reasons that Respondent laid off thirty-five employees.

Without a *Wright-Line* defense, and with a strong prima facie case established by the General Counsel, Respondent must be found to have violated Section 8(a)(3) of the Act when it laid off the asphalt paving employees as a part of its unlawful scheme to oust Local 175 as the employees' representative.

**c. Respondent Violated Section 8(a)(5) of the Act When It Did Not Provide Local 175 Notice or an Opportunity to Bargain About the Effects of its Decision to Shut Down Asphalt Paving Operations and Lay Off Its Employees**

Respondent had a duty to bargain with Local 175 over the effects of its decisions to shut down its asphalt paving operations and lay off more than half of Local 175's members, but Respondent violated that duty when it announced the shutdown and layoffs in late December 2019, days after implementing them. By announcing and implementing these changes without giving Local 175 prior notice, Respondent refused to bargain with Local 175 in violation of Section 8(a)(5) of the Act.

**i. Respondent's Duty to Bargain Over the Layoffs and Partial Shutdown**

Employers have an obligation to bargain with unions over the effects of a temporary shutdown of operations. *Comau, Inc.*, 364 NLRB No. 48 (Jul. 14, 2016) (duty to bargain over effects of temporary shutdown of one location); *Hotel Bel-Air*, 358 NLRB 1527 (2012) affd. 361 NLRB 898 (2014) (duty to bargain over effects of temporary closure of hotel for renovations). In *First National Maintenance v. NLRB*, 452 US 666 (1981), the Supreme Court held that effects bargaining must be "in a meaningful manner and at a meaningful time." *Id.* at 681-682. The Board has interpreted "meaningful" bargaining as "sufficiently before . . . actual implementation so that the union is not confronted at the bargaining table with a . . . fait accompli." *Willamette Tug &*

*Barge Co.*, 300 NLRB 282, 283 (1990). For an employer’s notice to be sufficient, “an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals.” *Eugene Iovine, Inc.*, 353 NLRB 400, 405 (2008) quoting *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Here, Respondent had a duty to notify Local 175 in a meaningful manner and at a meaningful time before December 20, 2019 that it intended to temporarily shut down asphalt operations and lay off employees as part of its compliance with the arbitration award. Respondent failed to notify the Local 175 in advance of the layoffs and notified the employees that same day. This unilateral implementation without bargaining clearly violates Section 8(a)(5) of the Act.

**ii. Respondent Did Not Notify Local 175 About the Partial Shutdown or the Layoffs Until After the Fact**

The evidence conclusively establishes that Respondent failed to notify Local 175 in advance of the shutdown of its asphalt operations and the layoff of 35 employees. Respondent’s first notice to Local 175 or its employees that it planned to shut down asphalt paving operations and lay off Local 175 members came at the foremen’s meeting on December 20, 2019 – the same day foreman Frank Wolfe and other employees were laid off. Tr. 283. Respondent only notified employees, not Local 175 as Respondent was required to do. In addition, Respondent inaccurately described Respondent’s planned actions; In-House Attorney Coletti told the employees that foremen would be demoted but not laid off. Tr. 282.

Respondent more accurately described its decision in the flyer it gave the employees the following week, along with their final checks of 2019, where it announced for the first time that it had chosen to “shutdown asphalt operations and lay off nearly all asphalt paving workers until March 2020 and possibly longer.” GC Exh. 2. Respondent did not notify the Union in advance of the shutdown and layoff and its notice to the employees was nothing more than a *fait accompli*.

The shutdown and layoff were already underway when Respondent announced them. It is well-established that such a *fait accompli* violates the Act. *S & I Transp., Inc.*, 311 NLRB 1388, 1390 (1993) (“Respondent presented the Union with a *fait accompli* in violation of Section 8(a)(5) and (1) of the Act”).

Respondent will argue that it satisfied the Board’s notice requirements when it threatened Local 175 that if the Union did not abandon its crew size grievance, Respondent would lay the employees off. This self-serving argument is disingenuous, unsupported, and should be rejected. Respondent never told Local 175 that it planned to implement or comply with the arbitration award. Instead, Farrell, Getiashvili, and Miceli repeatedly told Local 175 that Respondent was taking every measure to avoid complying with the award. Miceli said this during the October 25 arbitration, testifying, “if we’re forced to do seven and three, we’re forced to do it. We definitely don’t want to do it,” among other statements about how difficult complying with the award would be. GC Exh. 14 p. 16. Rocco testified credibly that Farrell and Getiashvili did not announce their intention to implement the arbitration award during any of the parties’ various discussions throughout 2019. Tr. 103-104, 119, 259. Respondent also signaled its unwillingness to implement the award through its actions, petitioning the Eastern District of New York twice to vacate the award. GC Exh. 12, GC Exh. 19.

Therefore, Respondent never informed Local 175 of its “proposed actions,” as the Board requires. *Eugene Iovine, Inc.*, 353 NLRB at 405 (“an employer must at least inform the union of its proposed actions . . .”). On the contrary, Respondent told Local 175 for months that it would do everything it could to avoid implementing the award, while also threatening Local 175 that Respondent would lay employees off if Local 175 did not withdraw the grievance. Respondent then surprised Local 175 with the partial shutdown and layoff in late December 2019. Such

deception is not proper notice and establishes that Respondent's partial shutdown and layoffs violated Section 8(a)(5) of the Act.

**iii. Respondent Cannot Rely on Language in the CBA to Avoid Effects Bargaining**

Respondent will likely argue that the collective bargaining agreement excuses effects bargaining. However, the Board has not extended the "contract coverage" standard to effects bargaining. *See Columbia College Chicago*, 368 NLRB No. 86 at n. 7 (Sep. 30, 2019). To date, the Board's decision in *MV Transportation*, 368 NLRB No. 66 (Sep. 10, 2019), applies only to the bargaining over decisions, not their effects. As such, Respondent had a duty to bargain with Local 175 over the effects of its decision to shut down asphalt operations and lay off Local 175 and Respondent violated the duty by laying the employees off on December 20, 2019 without prior notice to Local 175.

Furthermore, the agreement does not contain any provision that permits Respondent to unilaterally shut down its asphalt paving operations, as it did in late December 2019, without engaging in effects bargaining. *See GC Exh. 9*. For the collective bargaining agreement to excuse Respondent of its responsibility to bargain over the effects of the shut down and layoff, the collective bargaining agreement would have to clearly and unmistakably grant Respondent that unilateral authority. *MV Transportation, supra*. Because the CBA does not reference Respondent's right to unilaterally implement arbitration awards or partially shutdown operations, the CBA does not remove Respondent's obligation to bargaining over the effects of those decisions.

Finally, Respondent's defense that its collective bargaining agreement with Local 175 permits the unilateral layoff of employees without bargaining over the effects is also without merit because Respondent does not claim to be bound by the 2017-2022 collective bargaining agreement

and no other agreement is in evidence. Tr. 150. Respondent cannot be permitted to argue that only certain portions of the contract apply when it is convenient for Respondent.

**iv. The Union Did Not Waive its Right to Bargaining When it Cancelled the Mediation**

Respondent argues that Local 175 waived its right to bargain when it canceled the December 2019 mediation session in late October 2019. This argument is absurd. Respondent did not alert Local 175 of Respondent's intentions to shut down its asphalt operations and lay off 35 employees until *after* it had done so. It is axiomatic that, because Respondent never provided Local 175 with advance notice of its plans, Local 175 cannot be found to have waived its right to bargain. *Harley-Davidson Motor Co.*, 366 NLRB No. 121 at \*2 (Jun. 29, 2018) ("When an employer presents the bargaining representative with a fait accompli, however, the Board will not find a waiver.").

In addition, Respondent did not even intend to bargain over the effects of the implementation of the award at the mediation. As Miceli testified, Respondent's goal for the mediation was to "convince 175 that going to seven-and-three would, again, not be good for their men and to have them reconsider forcing us to do this." Tr. 977. Miceli's testimony reveals that Respondent hoped to use the mediation as another opportunity to pressure Local 175 to withdraw the crew size grievance, not as a collaborative forum for effects bargaining. Therefore, while Local 175 had no notice of Respondent's planned implementation of the award, it also correctly concluded that Respondent had no intention to bargain in good faith about anything at the mediation. Its cancellation was justified and not a waiver.

**v. Two-Weeks' Pay Per Discriminatee is An Appropriate Remedy for the Section 8(a)(5) Violation**

If the Administrative Law Judge finds that Respondent violated Section 8(a)(5) of the Act, but not Section 8(a)(3), Respondent should be ordered to bargain with Local 175 over the effects of Respondent's decision to implement the award and to pay each laid off Local 175 member two-weeks' pay, as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

**d. Respondent Should Be Sanctioned for Intentionally Withholding Documents Responsive to General Counsel's Subpoena, Including Respondent Exhibit 33**

Respondent's Exhibit 33 – Respondent's Counsel Ana Getiashvili's notes about a phone call with Local 175 Counsel on February 6, 2020 – should not have been received into evidence, and Getiashvili's testimony about the document and its contents should have been prohibited, because Respondent intentionally and improperly withheld the document from its subpoena production. At the time Respondent introduced the document, the Administrative Law Judge had reason to believe that Respondent largely complied with Counsel for the General Counsel's Subpoena *Duces Tecum* B-1-19D5X19 ("the Subpoena"). The ALJ relied on this supposed compliance as the basis for her decision to admit the document, however, as the ALJ recognized, the document was covered by the Subpoena. Tr. 1074-75. Subsequent questioning revealed Respondent's wanton disregard for the Subpoena process, thus justifying sanctions.

**i. Facts Relating to the Admission of the Document**

Counsel for the General Counsel ("CGC") issued Subpoena *duces tecum* B-1-19D5X19 on May 28, 2020. Request 11 of the Subpoena demands "documents showing or pertaining to bargaining between Respondent and Local 175 relating to layoffs of asphalt paving employees represented by Local 175 from April 29, 2019 to the present." GC Exh. 5 p. 4. On June 4, 2020, Respondent petitioned to revoke the subpoena, including Request 11. GC Exh. 25. The Administrative Law Judge denied Respondent's Petition to Revoke on June 23, 2020, specifically

denying Respondent's arguments relating to Request 11. GC Exh. 6. Respondent did not appeal the ALJ's order.

Respondent introduced Exhibit 33 in the afternoon on November 18, 2020, the seventh day of the hearing and almost six months after it received the Subpoena. Tr. 1046. The document appears to be notes Getiashvili took during or after a phone call between her, Farrell, and Local 175 attorney Eric Chaikin on February 6, 2020. Respondent introduced the document to support its defense that the Union waived its right to bargain over the layoffs. Tr. 1071. The Administrative Law Judge admitted the document over the CGC's objection, ruling that the document was covered by the subpoena but that Respondent's substantial compliance with other portions of the Subpoena meant sanctions were not warranted. Tr. 1075. After introducing the document, Respondent questioned Getiashvili about the contents of the document, using it to refresh her recollection about what she, Farrell, and Chaikin allegedly discussed. Tr. 1078-1079.

On cross examination, CGC asked Getiashvili for the first time about Respondent's non-compliance with the Subpoena, in addition to Respondent's intentional withholding of Respondent Exhibit 33. Getiashvili admitted that Respondent provided no text messages from Farrell in its subpoena production, even though Farrell is a "big texter" and his text messages with Local 175 counsel Matt Rocco and others would have been responsive to multiple paragraphs of the Subpoena. Tr. 541-542. Getiashvili also admitted that Respondent provided no internal emails within Farrell and Getiashvili's law firm or between them and Respondent, even though the record established that these emails exist and would be responsive to the Subpoena. Tr. 1106-1107. Nor did Respondent create or provide a privilege log to document which responsive documents it withheld due to a privilege, despite the Subpoena and the Administrative Law Judge's Order requiring such a log. Tr. 1106; GC Exh. 5 p. 3; GC Exh. 6 p. 4 ("NY Paving is instead ordered to

prepare and provide to General Counsel a privilege log.”). Getiashvili testified that it is her practice to disobey subpoenas and not create privilege logs “unless it becomes an issue somehow.” Tr. 1106.

## ii. Board Law Demands Sanctions

Section 11(a) of the Act authorizes subpoenas for evidence “that relates to any matter under investigation or in question.” 29 U.S.C. § 161(1). As the Board held in *McAllister Towing*:

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party . . . The Board’s authority to impose such sanctions flows from its inherent interest in maintaining the integrity of the hearing process. 341 NLRB 394, 297 (2004) (internal citations and quotations and omitted).

The Board and Circuit Courts preclude respondents from introducing documents covered by the General Counsel’s subpoena when respondent did not produce them originally. *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (“The preclusion rule,” we have said, “prevents the party frustrating discovery from introducing evidence in support of his position on the factual issue respecting which discovery sought,” citing *Atlantic Richfield Co. v. U.S. Dep’t of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984).

In *Perdue Farms*, the ALJ precluded the employer from introducing evidence about various meetings between a supervisor and employees when the employer refused to produce the supervisor’s notes from those meetings. 323 NLRB 345, 348 (1997). The complaint alleged that the supervisor interrogated employees at a captive audience meeting “on about May 11.” *Id.* The subpoena requested “any . . . documents . . . which reflect the content of meetings between [the supervisor] and employees. . . conducted between May 1, 1995 and June 15, 1995.” *Id.* Before trial, the employer petitioned to revoke that subpoena paragraph, arguing that it was overly broad

because it covers meetings not alleged in the complaint to be unlawful. *Id.* The ALJ denied the petition and ordered the employer to produce notes from all meetings covered by the subpoena. *Id.* The employer refused to comply with the Judge’s order and only produced documents related to its meetings during the week of May 11. *Id.* The employer then attempted to question its witnesses about the other meetings for which refused to produce documents. *Id.* The General Counsel objected and requested that the judge preclude respondent from asking any questions about these meetings. *Id.* The ALJ sustained the GC’s exceptions. *Id.* The Board and D.C. Circuit affirmed the ALJ’s sanctions. *Id.*; *Perdue Farms Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998). Respondent’s conduct in this case mirrors the employer’s in *Perdue Farms* and Respondent should be similarly sanctioned.

Respondent should have produced Getiashvili’s notes at the opening of the Hearing in response to CGC’s subpoena. These notes are clearly responsive to Request 11 of the Subpoena demanding “documents showing or pertaining to bargaining between Respondent and Local 175 relating to layoffs of asphalt paving employees represented by Local 175 from April 29, 2019 to the present.” GC Exh. 5 p. 4. Respondent petitioned to revoke Request 11, but the Administrative Law Judge denied the Petition and ordered Respondent to comply. GC Exh. 6 p. 10. Instead of providing the notes to CGC at the opening of the hearing, Respondent waited until after the CGC rested its case. Respondent stated on the record that it was introducing Getiashvili’s notes to show that Local 175 waived its right to bargain about the layoffs.<sup>13</sup> Tr. 1071 (“Respondent must provide all documents . . . it believes show that the parties bargained about the layoffs. We believe it shows

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<sup>13</sup> The probative value of this document is minimal, at best. The document does not contain a word-for-word transcription of what was said during the call. Instead, it shows Getiashvili’s self-serving conclusions for how Respondent could spin whatever Chaikin said during the call to Respondent’s advantage. The call occurred on February 6 – after the charge was filed on January 17. When she created Respondent Exhibit 33, Getiashvili was already anticipating the possibility of future litigation.

the opposite. This concerns not bargaining.”). Respondent was clearly required to produce this document in its Subpoena production.

Respondent was not the model of subpoena compliance that it appeared to be at the time it offered Respondent Exhibit 33. Respondent openly refused to comply with various subpoena paragraphs demanding internal communication between Respondent’s agents when it provided no text messages from Farrell, no emails between Farrell and Getiashvili and Respondent, and no privilege log. Therefore, Respondent’s refusal to provide Respondent Exhibit 33 was just one example of Respondent’s willful violation of the Subpoena and the ALJ’s Order.

As such, Respondent Exhibit 33 should be rejected and Respondent’s subsequent questioning of Getiashvili about the phone call should be stricken from the record. Even though the probative value of the post-hoc document and Getiashvili’s testimony about post-layoff bargaining is minimal, Respondent should be precluded from offering the document after knowingly withholding it from its subpoena production. As the D.C. Circuit reasoned in *Perdue Farms*, “without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and oftentimes has every incentive to refuse to comply.” 144 F.3d at 191.

**e. The Trial Proceeded Efficiently and Fairly Over Zoom**

Respondent will likely argue again that the trial should not have occurred remotely, but such arguments should be denied. All parties were able to present documentary and testimonial evidence effectively and clearly using the Zoom videoconference software. There were occasional times when attorneys or witnesses accidentally muted themselves briefly, or when the connection dropped, or when it was difficult to see witness’ face, but the Administrative Law Judge always provided ample opportunity for any party to make up for any disruption. These mishaps were

minor and similar to instances during an in-person trial where a witness may have not spoken loud enough for all parties to hear, or when a witness may not have understood the question. To further protect the integrity of the proceeding, the Administrative Law Judge provided detailed instructions to each witness about how to testify virtually and how to handle any issues that may arise. For these reasons, no party was disadvantaged in any way because the trial occurred over Zoom and any argument to the contrary should be rejected in its entirety.

#### **IV. CONCLUSION**

A preponderance of the credible evidence supports the allegations in the Complaint. It is respectfully urged that the Administrative Law Judge find that Respondent violated Sections 8(a)(1), (3), and (5) of the Act as alleged and grant any and all relief appropriate under the Act, including reinstatement offers and make-whole relief to the discriminatees named in the Complaint, and mailing and posting of a notice in which employees are assured of their Section 7 rights and in which Respondent promises to cease and desist from its unlawful conduct.

Signed electronically February 16, 2021 in Brooklyn, New York,

/s/  
John Mickley  
Erin Schaefer  
Counsel for the General Counsel  
National Labor Relations Board  
Region 29  
Two MetroTech Center – Suite 5100  
Brooklyn, NY 11201  
[John.mickley@nlrb.gov](mailto:John.mickley@nlrb.gov)  
718-765-6211