

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

NEW YORK PAVING, INC.

Respondent

and

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

Charging Party Union

Case No.: 29-CA-254799

POST-TRIAL BRIEF ON BEHALF OF RESPONDENT NEW YORK PAVING, INC.

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PRELIMINARY STATEMENT

Region 29 of the National Labor Relations Board filed a Complaint and Notice of Hearing (“Complaint”) in the instant matter on April 20, 2020 alleging various violations of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (the “Act”). In response, Respondent New York Paving, Inc. (“NY Paving” or “Respondent”) filed its Answer on May 8, 2020 denying all allegations of unlawful conduct, and asserting various Affirmative Defenses. A hearing via Zoom for Government was held on November 2, 9, 10, 12, 16, 17, 18 and 19, 2020.¹ NY Paving submits this brief in opposition to the charges alleged in the Complaint and in support of its request that the Complaint be dismissed in its entirety.

STATEMENT OF FACTS

A. NY Paving’s Operations

NY Paving provides, among other services, asphalt paving and repaving, construction, seal coating and related work to its customers in New York City and Long Island, including various utility companies, such as Consolidated Edison, Inc. (“ConEd”) and National Grid, PLC (“National Grid”). (GC Ex. 22, p.2). NY Paving also performs some work for Hallen Construction Inc. (“Hallen”), which is a subcontractor to ConEd and National Grid. *New York Paving, Inc.*, 370 NLRB No. 44, p. 5 (Nov. 9, 2020). In connection with providing these services, NY Paving employs individuals who are represented by various unions, including Construction Council Local 175, Utility Workers Union of America, AFL-CIO (“Local 175” or “Charging Party Union”), Local 282, International Brotherhood of Teamsters (“Local 282”); Local 1298, LIUNA; Local 14-15, IUOE; Local 138, IUOE; and Highway Road and Street

¹ All citations to the official transcript for this proceeding are identified as “Tr.” followed by the page number. References to the General Counsel’s (“GC”) exhibits shall be noted as “GC Ex.” followed by the exhibit number. References to New York Paving, Inc.’s (“NY Paving”) exhibits shall be noted as “Resp. Ex.” followed by the exhibit number. Relatedly, to assist Your Honor, to the extent any of the referenced exhibits contain NY Paving’s bates numbers, citations to said exhibits also include the existing bates number, followed by the page number.

Construction Laborers Local Union 1010 of the District Council of Pavers and Builders, LIUNA, AFL-CIO (“Local 1010”). (Tr. 895). Members of Local 175 perform asphalt paving work at NY Paving, while members of Local 1010 perform concrete work. *New York Paving, Inc.*, 370 NLRB at p. 6.

Respondent’s paving operations experience the typical “slow down” associated with the cold winter months, particularly around Christmas. (Tr. 74-75). Numerous factors contribute to the historic annual slowdown in the paving industry, including the weather conditions, the employees taking vacations around Christmas, closing of the asphalt plants, and the fact NY Paving receives less work from its top two (2) paving clients, National Grid and Hallen because they are closed as well. (Tr. 941-45). As a result of the winter “slowdown,” NY Paving annually lays off its paving employees, including members of Local 175. (Tr. 941-45).

Peter Miceli (“Miceli”), who has been NY Paving’s Director of Operations for twenty-four (24) years oversees all work, including utility paving, which NY Paving performs in New York City and Long Island. (Tr. 894-95). As part of his job duties, Miceli routinely interacts with the various labor organizations that represent NY Paving’s employees. (Tr. 895). The utility paving work performed by NY Paving for its paving clients involves digging-out the temporary filling installed by the utility companies, pouring concrete, and paving the hole. (Resp. Ex. 2, NYP 194). In connection with performing this utility work, NY Paving employs individuals who are represented by various unions, including Local 175.

B. Local 175 Filed the Belated Crew Size Grievance Resulting in the Liability Hearing and the Liability Award

On March 28, 2018, Local 175 filed a grievance (GC Ex. 10) against NY Paving, alleging NY Paving violated the crew size requirement contained in the Agreement between Members of the New York Independent Contractors Alliance, Inc. (“NYICA”) and United Plant and

Production Workers Local Union 175 Paving Division (July 1, 2014 – June 30, 2017) (“Prior CBA”). The Prior CBA required NY Paving assign three (3) employees to perform new binder work and seven (7) employees to apply a surface course (also known as “top”). (GC Ex. 10, p. 1). Binder work is temporary paving consisting of four (4) inches of asphalt being poured on backfill. (Resp. Ex. 2, NYP 204). Top work is pouring two (2) inches of asphalt on top of the street cuts to finish them. *Id.*

The arbitration to determine whether NY Paving violated the Prior CBA’s crew size requirement (and if so, whether NY Paving had valid defenses to any such violation) was held on January 11, 2019 in front of Arbitrator Jay Nadelbach, Esq. (“Liability Hearing”). *See Generally* Resp. Ex. 2. Both parties presented their witnesses and evidence (including the testimony of Local 175’s Shop Steward, Terry Holder (“Holder”), who testified for Local 175). (GC Ex. 11, pp. 4, 6). During the Liability Hearing, NY Paving admitted it did not comply with the Prior CBA’s crew size requirements by assigning two (2) employees to the binder crews since at least 1988, and five (5) employees to the top crews until approximately 2001 or 2002, at which time the number changed to four (4) Local 175 members. (GC Ex. 11, p. 12; Resp. Ex. 2, NYP 215-216). However, NY Paving contended it had numerous defenses to the alleged violation, including long-past practice and Local 175’s acquiescence and ratification of NY Paving’s past practices, waiver, as well as established industry standards. (GC Ex. 11, pp. 8-11).

Following the completion of the arbitration and post-arbitration briefing, Arbitrator Nadelbach issued the Award and Opinion (“Liability Award”) on April 29, 2019 sustaining Local 175 grievance. (GC Ex. 11). The Arbitrator provided the parties ninety (90) days to discuss and negotiate “the appropriate remedy and applicable damages.” (GC Ex. 11, p. 14). On July 26, 2019, NY Paving filed in Federal Court the Petition to Vacate the Liability Award. (GC

Ex. 12). NY Paving filed the Petition in order to preserve its statutory rights and remedies, and also because it disagreed with the Arbitrator's finding that NY Paving did not have valid defenses against the requirement to utilize 7 and 3 person crew sizes. (GC Ex. 12). However, the foregoing Petition was subsequently withdrawn without prejudice on August 26, 2019. (GC Ex. 13).

C. The Ongoing Meetings and Negotiations Between Respondent and Local 175

Subsequent to the issuance of the Liability Award, representatives of NY Paving and Local 175 met at least once, and continued having numerous discussions until August 28, 2019. For example, the attorneys for Local 175, Matthew P. Rocco, Esq. ("Rocco") and Eric B. Chaikin, Esq. ("Chaikin"), and the attorneys for NY Paving, Jonathan D. Farrell, Esq. ("Farrell") and Ana Getiashvili ("Getiashvili"), met on June 26, 2019 to discuss numerous ongoing issues between the parties, including but not limited to entering into a successor collective bargaining agreement with smaller crew size requirement, as well as the Liability Award and discussion regarding its ramifications. (Tr. 100-06, 541-45).

During this meeting, the counsels also discussed Local 175's June 20, 2019 grievance filed on behalf of two (2) Local 175 members, Jarod Fusco ("Fusco") and David Snyder ("Snyder"). (Tr. 129-41). Fusco and Snyder, while working on a National Grid jobsite, with the Local 175 foreman, Matthew Tuminello ("Tuminello") and one (1) of Local 14-15, were apparently involved in an incident where certain slurs were said, leading to a complaint being filed with National Grid. (Resp. Ex. 1). Given National Grid's directive banning the above mentioned crew members from any future National Grid work, NY Paving suspended Fusco and Snyder and eventually removed them from the list of approved and badged Local 175 members. (Resp. Ex. 1). Given Tuminello's long-tenure at NY Paving (10-15 years) (Tr. 1041) and because he did not participate in the incident, NY Paving transferred him to a supervisory

position. (Tr. 912-17). Tuminello has remained a member of Local 175 since the change in his position. (GC Ex. 3, NYP 967, p. 458). In order to resolve Local 175's grievance, NY Paving engaged in a collaborative dialogue with Local 175 and eventually agreed to replace Fusco and Snyder with two (2) Local 175 members recommended by Local 175. (Resp. Ex. 1). Thus, Local 175's June 20, 2019 grievance was resolved by July 1, 2019 (approximately two (2) months after the Liability Award was issued). (Resp. Ex. 1).

On July 10, 2019, Rocco emailed Arbitrator Jay Nadelbach stating the parties "met in-person to discuss this Award as part of a global resolution" and requested the Liability Award's ninety (90) day period be extended until August 31, 2019 to complete said "discussions." (Resp. Ex. 3). Farrell testified from July 10, 2019 through August 28, 2019, the parties continued their discussions regarding various issues, including the Liability Award. (Tr. 545-47). Rocco, on the other hand, initially testified the discussions did not continue because of NY Paving had filed the Petition to Vacate the Arbitration Award on July 26, 2019. (Tr. 178). However, Rocco's testimony was contradicted by his August 28, 2019 email to Arbitrator Nadelbach which stated, in pertinent part, "after discussion and negotiation, the parties were unable to agree on the appropriate remedy and applicable damages. Accordingly, [Local 175] requests that an inquest be scheduled." (Resp. Ex. 4, NYP 160-161). When Rocco was cross-examined regarding the foregoing email, he admitted - contrary to his prior testimony- the parties did continue discussions after the July 10th email:

A: There was definitely discussions because New York Paving wanted four and two. There was never a discussion regarding the remedy.

Q: There was never a discussion regarding -- there was never a discussion regarding --

...

Q: BY MR. FARRELL: There was -- so it's your testimony there was never a discussion regarding the remedy?

A: Not the amount of money.

(Tr. 181). Thus, Rocco admitted the parties continued discussions regarding the Liability Award and the remedies in connection with same, except they did not discuss the potential monetary damages. Notably, Rocco had not performed the damage calculations related to the Liability Award prior to August 28, 2019. (Tr. 182). NY Paving also did not perform damage calculations related to the Liability Award because it believed any damages would be too speculative and thus were not warranted. (Tr. 1115-17, 1128-29).

D. The Hearing Regarding Damages and Related Discussions Concerning the Implementation of the Liability Award

On October 24, 2019 at 4:29 p.m., Farrell and Getiashvili received an email from Rocco which included Local 175's proposed damage calculations related to the inquest hearing scheduled the following day, October 25th ("Damages Hearing"). (Resp. Ex. 13, 14). Farrell testified after reviewing Rocco's proposed damage calculations and realizing Local 175 sought approximately Ten Million Dollars, he decided NY Paving had to focus on resolving the crew size issue rather than continue to attempt to arrive at a global resolution of all matters. (Tr. 550-58). Stated differently, given the tremendous potential exposure, NY Paving had to cut-off ongoing and mounting liability. (Tr. 550-58).

On October 25, 2019, NY Paving provided Local 175 clear and unequivocal notice that NY Paving's implementation of the crew sizes required by the Liability Award would likely result in significant lay-offs of Local 175 members. (Tr. 558-70, 906, 917-23; GC Ex. 14, NYP 44-45, pp. 22-23). Discussions regarding the lay-offs took place both on the record and off the record. (Tr. 558-70, 906, 917-23; GC Ex. 14, NYP 44-45, pp. 22-23). For example, Miceli, testified at length regarding the effects of NY Paving's anticipated utilization of three (3) and seven (7) crews, including but not limited to the operational difficulties NY Paving would face when implementing same, which would result in the anticipated layoffs, including layoffs of the

foremen, and the anticipated reduction in overtime work available to Local 175 members. (GC Ex. 14, NYP 38, 45, pp. 16, 23). Miceli's uncontroverted testimony also established that unless NY Paving saved on labor costs by laying off asphalt workers, it would be unable to bid on any future asphalt work because the other paving companies (who are NY Paving's competitors) submitted bids with crew sizes significantly smaller than ten (10) workers. (GC Ex. 14, NYP 38, 45, pp. 16, 23). Finally, Miceli testified even though NY Paving did not wish to change its asphalt operations and lay-off Local 175 members, it (NY Paving) would be forced to do so in order to comply with the Liability Award and simultaneously hope to "stay in business." (GC Ex. 14, NYP 38, 45, pp. 16, 23).

In addition to Miceli's uncontroverted statements on the record, attorneys for NY Paving and Local 175 caucused off the record both before the start of the hearing on October 25, 2019 and after the hearing to discuss the effects of NY Paving's anticipated implementation of the Liability Award, including the anticipated layoffs. (Tr. 558-70). During these discussions, Farrell repeatedly advised attorneys Rocco and Chaikin NY Paving would inevitably lay-off Local 175 members in order to implement the Liability Award and simultaneously maintain profitable business operations. (Tr. 111, 558-70). Farrell also specifically told Chaikin that the layoffs were coming and he should not file an unfair labor practice charge when they are effectuated. (Tr. 549, 801).

After the conclusion of the hearing at 12:33 p.m., counsels for the parties conferenced wherein Farrell again requested, several times, for NY Paving and Local 175 to meet and conduct "effects bargaining" (or words of similar effect). (Tr. 558-70). In response, Rocco proposed the parties nevertheless engage the services of Mediator Elliott D. Shriftman, Esq. to facilitate the "effects bargaining." (Tr. 108-13). On October 25, 2019 at approximately 12:45

p.m., Farrell called Mr. Shriftman and left a message on his voicemail. (Resp. Ex. 15). The parties subsequently spoke with Mediator Shriftman at approximately 12:50 p.m. and reserved a date to conduct the “effects bargaining.” (Resp. Ex. 16, NYP 151). Even though Mediator Shriftman is extremely busy and parties usually have to wait several months for the next available date, due to the time-sensitive nature of the issue and **upon the express request of the parties**, Mediator Shriftman proposed to schedule the meeting to discuss the implementation of the Liability Award as well as other ongoing issues on December 16, 2019, a date less than two (2) months after the inquest hearing. (Tr. 766-75). Despite the short notice and recognizing the importance of the issue at hand, NY Paving immediately made available two (2) of its top decision-makers, General Counsel Robert J. Coletti, Jr., Esq., and Miceli, for the meeting. (Tr. 218-21, 224, 925-29). Local 175 was advised that NY Paving’s decision-makers would participate in the meeting with Local 175. (Tr. 218-21, 224, 925-29).

On October 28, 2019, Farrell sent a text message to Rocco to confirm the date for the meeting between the representatives of NY Paving and Local 175 to discuss the implementation of the Liability Award, to which Rocco responded he was waiting to hear back from his client. (Resp. Ex. 6). On October 30, 2019, Rocco advised Mediator Shriftman to release the December 16th date because of availability issues. (Resp. Ex. 5). Even though Rocco testified he knew as of October 30th, Local 175 did not wish to meet with NY Paving (Tr. 218), he also admitted he continued to have conversations with Farrell and did not advise NY Paving regarding Local 175’s refusal to meet until sometime in December 2019. (Tr. 229-30, 824-27, 856-59). Both Farrell and Miceli also testified even though the December 16th mediation date was released to Mediator Shriftman, NY Paving nevertheless believed (based on Local 175’s representations)

that December 16th was the “failsafe” date and the meeting was nevertheless possible. (Tr. 585, 934-36).

On December 5, 2019, rather than meet with NY Paving, Rocco filed a lawsuit in Federal Court, *Kilkenny, at al. v. New York Paving, Inc.* (Docket No. 2:19-cv-06846(SJF)(GRB)) (“ERISA Lawsuit”), on behalf of certain Local 175 Benefit Funds and against NY Paving, seeking, among others, unpaid benefit fund contributions related to NY Paving’s utilization of “short” crew sizes. (Resp. Ex. 7). Given the filing of this lawsuit and the fact that the meeting did not occur on December 16, 2019, NY Paving decided it had no other choice but to implement the Liability Award in January 2020 in order to stop the continuing violation of the Liability Award and limit the extreme mounting financial exposure. (Tr. 585, 934-36).

On December 20, 2019 at 6:09 p.m. Rocco emailed Arbitrator Nadelbach informing him “the parties were not able to agree on settlement and therefore request that you issue a final decision in this matter.” (Resp. Ex. 4, NYP 156).

E. Zaremski Is Forced to Retire to Maintain His Retiree Benefits

Robert Zaremski (“Zaremski”) is a long-term NY Paving employee who has worked as a full-time Operations Manager for approximately three (3) years. (Tr. 707). As the Operations Manager, Zaremski is in charge of NY Paving’s asphalt operations, including assigning the vehicles and machinery, ordering asphalt material, and creating daily routes for the paving employees. (Tr. 677-81, 707-11; Resp. Ex. 27, NYP 7886; Resp. Ex. 29, NYP 7891). Before becoming a full-time Operations Manager, Zaremski worked at NY Paving as a Local 282 truck driver; he was also a Local 282 Shop Steward, and performed some of the duties of the Operations Manager on a part-time basis. (Tr. 677-80). Zaremski retired as the Local 282 truck driver in or about October 2017, and commenced receiving Local 282 retiree benefits, including pension and health insurance. (Tr. 689-95).

In or about September 2019, the Local 282 Pension Fund contacted Zaremski and advised him that he (Zaremski) may have engaged in disqualifying employment by virtue of his employment as the Operations Manager for NY Paving. (Resp. Ex. 26). As a result of this and subsequent communications with the Local 282 Pension Fund, it became apparent to Zaremski that unless he stopped working at NY Paving, the Local 282 Pension Fund would suspend his pension and health insurance retiree benefits. (Tr. 647-60, 689-96, 698). Even though Zaremski did not intend to retire from NY Paving, he made the decision to retire effective December 20, 2020 in order to protect his retiree benefits. (Tr. 647-60, 689-96, 698).

Unfortunately, forcing Zaremski into unplanned retirement apparently was not sufficient. The Local 282 Pension Fund also insisted on retroactively recouping the pension and health benefits previously paid to Zaremski from October 2017 through December 2020. (Tr. 647-60; Resp. Ex. 28). As a result of the foregoing demand, Farrell negotiated a settlement and written Settlement Agreement with the Local 282 Pension Fund, which permitted Zaremski to return to work at NY Paving, stop his retiree benefits, and not seek recoupment of any previously paid benefits. (Tr. 647-60; Resp. Ex. 30). Thus, Zaremski requested reinstatement from NY Paving and returned to his former position as Operations Manager on March 6, 2020. (Tr. 722-24).

During the period of Zaremski's retirement, Patrick Fogarelli ("Fogarelli"), a Local 175 member, performed the duties of the Operations Manager. (Tr. 944-50). However and given his inexperience with many duties and tasks, Fogarelli's work performance as the Operations Manager was not on the same level as Zaremski. (Tr. 944-50).

F. NY Paving Announces Shut-Down of Asphalt Operations and Layoff of Certain Local 175 Members

On December 20, 2019, NY Paving held a meeting with the Local 175 and Local 1010 foremen. (Tr. 86-87, 280-84, 733-34, 950-53). During this meeting, NY Paving distributed the

Shut-Down Announcement (Tr. 733-34, 779-82, 950-53; GC Ex. 2) and informed the employees the annual seasonal layoffs would last longer due to Zaremski's retirement and NY Paving's anticipated implementation of the Liability Award, which required NY Paving to completely change its asphalt paving operations, including laying off the foremen. (Tr. 86-87, 280-84, 733-34, 950-53). Thus, NY Paving laid-off certain Local 175 members during the first week of January 2020. (GC Ex. 3).

According to Miceli, the only way NY Paving could implement the larger crew sizes was to start "bundling" the tickets. (Tr. 902-06). Essentially, rather than perform work orders as they were received on a daily basis (which was Respondent's prior practice), NY Paving let the work accumulate and deployed crews only when there was sufficient work concentrated in one (1) particular area. (Tr. 902-06). As a result of the bundling of tickets, NY Paving needed less asphalt paving crews (albeit with a total of 10 rather than 6 employees), which eventually resulted in employee layoffs, including layoffs of the foremen. (Tr. 902-06). According to Miceli, NY Paving started utilizing 3-person binder crews during the first week of January 2020, and 7-person top crews during the second or third week of February 2020. (Tr. 944-50). Thus and to the extent the layoffs were more pronounced compared to prior years, it was due to NY Paving's eventual implementation of ticket bundling.

Despite the foregoing, most of the Local 175 members who were previously laid-off were recalled back to work with few exceptions, including the two (2) foremen, William Smith ("Smith") and Frank Wolfe ("Wolfe"). (GC Ex. 3).

G. While Local 175 remained silent, NY Paving Continued Its Attempts to bring Local 175 to the negotiation table.

Local 175 had clear and unequivocal notice of the anticipated employee layoffs as early as October 25, 2019 and definitely by December 20, 2019. Despite the foregoing, Local 175 did

not contact NY Paving or its representatives to request bargaining either before the layoffs were effectuated or any time thereafter. (Tr. 471-74, 479-83). From October 25, 2019 to March 3, 2020, Local 175 did not request to meet with NY Paving to bargain. (Tr. 471-74, 479-83). While Local 175 steadfastly refused to meet with Respondent and its representatives, it continued to accuse NY Paving of failing to comply with the Liability Award requiring larger crew sizes and monetary damages in connection with same. (Resp. Ex. 14).

The first communication between the parties after the layoffs were effectuated did not occur until January 30, 2020 and said communication was initiated by Respondent's counsel. (GC Ex.15). On January 30, 2020, NY Paving contacted Local 175 attorneys to once again attempt to commence "effects bargaining." (GC Ex.15). In Local 175's usual fashion, Chaikin responded on February 4, 2020 with an ultimatum (unrelated to the Liability Award) as a prerequisite for Local 175 to even agree to meet NY Paving and bargain. (GC Ex. 16). In response, Farrell informed Chaikin while there would be no preconditions to the meeting, he was glad Local 175 was willing to meet to discuss the implementation of the Liability Award after its (Local 175's) refusal to do so for approximately three and one-half (3½) months. (GC Ex. 16). On February 6, 2020, Farrell and Getiashvili had a telephone conference with Chaikin during which conversation Chaikin admitted Local 175 indeed refused to meet with NY Paving in December 2019. (Tr. 1076-80; Resp. Ex. 33; GC Ex. 22).

Farrell emailed Chaikin and Rocco on February 12, 2020. (GC Ex. 16). In the email, Attorney Farrell informed Local 175 that due to unseasonably warm weather, NY Paving intended to resume asphalt operations earlier than anticipated. (GC Ex. 16). Further, Local 175 was informed NY Paving had already started to use a binder crew comprised of three (3) Local 175 members, and would be implementing the seven (7) member top crews shortly. (GC Ex. 16).

Finally, Farrell, yet again requested Local 175 meet with NY Paving to commence “effects bargaining.” (GC Ex. 16). Interestingly, on February 13, 2020, Chaikin responded and stated: “[a]s for Arbitrator Nadelbach's decision, until we have resolution of the “damages” issue regarding the crew size arbitration the parties are not in a position to fully explore its ramifications.” (GC Ex. 16). Stated differently, Chaikin’s statement proves Local 175’s “strategic decision” to delay meeting NY Paving (as referenced by him in the February 6th telephone call), and admits Local 175 did not plan to meet with NY Paving to discuss the effects of NY Paving’s implementation of the Award until a later unidentified date, if at all. Within seven (7) hours, Attorney Farrell responded to Chaikin’s email on February 13th offering eight (8) dates in the following three (3) weeks when NY Paving’s representatives and attorneys are available to meet with Local 175. (GC Ex. 16). On February 14, 2020, Chaikin informed Local 175’s attorneys and “possibly” Local 175’s Business Manager, Charlie Priolo (“Priolo”), were available on March 3, 2020 to meet, which date NY Paving promptly confirmed on February 18, 2020. (GC Ex. 16).

When the parties eventually met on March 3, 2020 (through NY Paving’s efforts as set forth above), Local 175 and its representatives were clearly unwilling to bargain regarding the employee layoffs and subsequent recalls and instead focused on entirely unrelated matters, such as dig-outs. (Resp. Ex. 34). To solidify Local 175’s demonstrated and intentional bad faith bargaining, its representatives (the Fund Manager Anthony Franco, his son Sal Franco, and Business Manager Charlie Priolo) walked out from the meeting merely twenty-four (24) minutes after it has started. (Resp. Ex. 34).

The foregoing facts demonstrate NY Paving’s continuous and repeated attempts to negotiate with Local 175 to no avail.

ARGUMENT

POINT I

THE TESTIMONIES OF GC'S WITNESSES WERE INCONSISTENT, SELF-SERVING AND COACHED, WHILE RESPONDENT'S WITNESSES TESTIFIED IN A FORTHRIGHT AND CONSISTENT MANNER.

Credibility determinations require the overall assessment of witness' testimony, including witness demeanor, the context of the witness' testimony, the quality of the witness' recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *See Noah's Ark Processors, LLC*, 370 NLRB No. 74, pp. 1, 13 (Jan. 27, 2021), *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), *enf'd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); *see also Hill & Dales Gen. Hosp.*, 360 NLRB 611, 615 (2014).

A. Charlie Priolo's Perjured Testimony

Priolo, as Local 175's Business Manager and the most senior level full-time employee of Local 175 (Tr. 492-93), committed perjury during his testimony. Respondent subpoenaed Priolo and questioned him as a hostile witness pursuant to Section 611(c) of the Federal Rules of Evidence. (Tr. 465). Given Priolo's top position at Local 175, Respondent questioned him regarding Local 175's actions, if any, in response to NY Paving's layoff of the asphalt paving employees in January 2020, including but not limited to Local 175's request, if any, to bargain with NY Paving regarding the effects of same, and the subsequent meetings, if any.

Priolo's testimony, in addition to being perjured, was remarkably incoherent and disjointed. Most of Priolo's testimony consisted of uncertain responses, such as "I do not know" or "I do not remember." Given Priolo's high-ranking position at Local 175, it strains credulity he would not know or remember significant events directly affecting the members of Local 175,

including the layoffs from NY Paving, and any subsequent communications with NY Paving attempting to address said layoffs, which Local 175 supposedly perceived as something that was unfair to its members.

Priolo testified he did not remember speaking with NY Paving management in January or February 2020 regarding the employee layoffs. (Tr. 482-83). Additionally and importantly, when questioned regarding Local 175's refusal to meet with NY Paving to bargain, Priolo repeatedly avoided providing an answer, and eventually stated he did not remember the reason for refusal, thereby implicitly admitting Local 175 indeed refused to meet. (Tr. 515). Of particular importance was Priolo's reticence to even mention the Local 175 Benefit Fund Manager, Anthony Franco in his testimony:

Q: Okay. Then why didn't 175 -- now, you mentioned they were general meetings. These meetings were about the crew size arbitration. Why didn't -- if you read that sentence, it says, "regarding the crew size arbitration". I'm only referring to the crew size arbitration. I can dissect this sentence. It says, the issue regarding the crew size arbitration, so regarding that only, why was 175 not willing to meet? What were -- can you please tell me why not?

A: I don't remember at the time what we spoke with with the lawyers, you know, but going forward to see what would be the best thing.

Q: Who's we? I'm not asking who you spoke with, the lawyers. You said who we spoke to.

A: The --

Q: Who's we?

A: Eric -- whoever is involved with this ca -- Eric, Matt Rocco

Q: Who else -- and who else? Anybody else from 175?

A: And myself.

Q: Who else?

A: It's hard to remember.

Q: No one -- you don't remember -- you never had any conversations with Mr. Franco about this? It's your testimony under oath that you don't remember speaking to Mr. Franco? ...

Q: It's your testimony under oath, right now that you -- you don't remember having any conversation about miss -- with any of these subjects with Mr. Anthony Franco? That's --

A: He is the fund administrator. You know, they have some --

Q: So do you remember having conversations with Mr. Franco about this issue? It's yes or no. You are under oath.

A: Okay, yes.

(Tr. 511-13). Clearly, Priolo did not want to truthfully testify regarding Mr. Anthony Franco's true role in the management of Local 175. Priolo's demeanor also demonstrated a woeful lack of candidness as he was utterly uncomfortable answering questions fearing he may give the "wrong" answers. Thus, Priolo was untruthful, evasive, and not forthcoming in his testimony.

Priolo's testimony eventually culminated in perjury. Specifically, during the break, Priolo called somebody on the phone, stated "it is Charlie," and left the room for approximately four (4) minutes. (Tr. 521). After the testimony resumed, Respondent's counsel questioned Priolo regarding the call:

Q: BY MR. FARRELL: Mr. Priolo, just a quick question. During the break, you actually called someone, said this was Charlie. You initiated the call. You walked out, and you were gone for about four minutes. Who -- who did you call? I'm just curious.

A: I had --

Q: What --

A: -- a lot of attention. Somebody had texted me. They wanted to -- to talk, and I just told them that I can't talk right now --

Q: Did you--

A: --and I sent him a text back.

Q: Okay, does that -- I -- did -- I -- I -- I have to ask who did you call, sir? I'm not asking about the content. Who did you speak to?

A: Anthony Ricco (phonetic).

Q: Okay. Did it have anything to do with this case?

A: Excuse me? No.

(Tr. 521-22). After the foregoing testimony, Chaikin reported that Priolo had in fact called Mr. Chaikin during the break. (Tr. 524-23). Even though Chaikin stated he did not know if Priolo had called anyone else during the break, the fact nevertheless remains Priolo was asked a straightforward question regarding the identity of the individual he called and he failed to admit he called Chaikin. Thus, and regardless of whether Priolo indeed spoke with "Anthony Ricco," he did not reveal his conversation with Chaikin.² For that reason alone, he committed perjury.

² Notably, Priolo also testified during the trial in *New York Paving, Inc.*, 370 NLRB No. 44 (Nov. 9, 2020), *appeal pending* (D.C. Cir.), presided over by Your Honor. In that case, Priolo testified on the GC's case-in-chief and was one of the primary witnesses to support Local 175's claim that NY Paving apparently unlawfully transferred certain

Respondent thus requests any and all sanctions appropriate in connection with said perjury, including the striking of any testimony supportive of Local 175.

B. Matthew Rocco, Esq.’s Inconsistent, Coached and Self-Serving Testimony

Rocco, who has represented Local 175 in numerous proceedings, testified in a self-serving and inconsistent manner, and by his own admission, prepared in anticipation of being called as a witness.³ Rocco suffered from significant and numerous credibility issues, including being able to remember older dates with surprising accuracy when asked by the GC while not being able to recall events that took place closer in time during his cross-examination. For example, Rocco’s recollection of the following occurrences was excellent when asked by GC on direct examination: (i) the meeting at Steve Elliott’s office took place on August 2, 2018 (Tr. 98); (ii) the meeting that occurred on June 26, 2019 and the individuals who attended same (Tr. 102-03); (iii) the Damages Hearing on October 25, 2019 started early because it was Friday (Tr. 109); (iv) the fact that the issue of prevailing wages was definitely discussed during the March 3, 2020 meeting, even though he conveniently could not recall if Local 175 insisted during that same meeting NY Paving return the dig-out work to the members of Local 175. (Tr. 246).

Even though Rocco appeared to have an excellent recollection of the events (including the specific minute details of same) which appeared to favor the GC and Local 175’s arguments,

asphalt work to the members of Local 1010. In that case, NY Paving argued, among others, Local 175’s claim of transfer of work was barred by Section 10(b) statute of limitations. *Id.* at 22. In support of its position, NY Paving filed a Motion to Reopen the Record to admit into the evidence certain emails sent by Holder demonstrating Local 175’s knowledge of the alleged transfer of work beyond the Section 10(b) period. *Id.* at 30. NY Paving also argued based on said emails, it was clear Priolo had committed perjury when he testified regarding the first time he learned of the alleged transfer of work from Holder. *Id.* at 22, n. 35. While Priolo testified he discussed the transfer with Holder in late 2018 or early 2019, Holder’s emails demonstrated he (Holder) informed Priolo and Anthony Franco regarding Local 1010 performing asphalt work as early as April 21, 2018. *Id.* Your Honor denied NY Paving’s argument and did not find Priolo had perjured himself. *Id.* Even though Priolo was not found to have committed perjury in that trial, he undoubtedly did so in the instant matter. Priolo’s penchant for testifying in an untruthful manner can no longer be doubted.

³ For example, Rocco admitted he did not remember the events surrounding NY Paving’s termination of two (2) Local 175 members because he did not “prepare them for [his] testimony.” (Tr. 133).

his ability to recall on cross-examination the occurrences that were arguably favorable for NY Paving was diminished, which casts significant doubt on his credibility. For example, Rocco conveniently could not recall exactly when he notified Arbitrator Nadelbach to proceed with issuing the decision on damages (“To the best of my recollection, it was around ... November-December 2019 ... I can’t say in point certain.”). (Tr. 114).

When testifying on cross-examination regarding the terminations of two (2) Local 175 employees (Fusco and Snyder) in or around July 2019, Rocco also could not remember if Local 175 had filed grievances on behalf of those two (2) individuals (Tr. 129) and whether NY Paving had also terminated other non-Local 175 members involved in the same underlying incident. (Tr. 133). Interestingly, while Rocco had absolutely no problem recalling the exact dates of the August 2, 2018 and June 26, 2019 meetings, he seemed unable to remember the details of the terminations of the two (2) Local 175 members even though Rocco was involved in same and they occurred closer in time to Rocco’s testimony (*i.e.*, June 2019 (Resp. Ex. 1, p. 1)) than the August 2, 2018 meeting. Thus, Rocco’s testimony in many regards was clearly self-serving and should not be credited.

In addition to having (supposedly) limited recollection of the events that detract away from the GC and Local 175’s arguments in this matter, on cross examination, Rocco testified in a remarkably guarded manner by providing vague and uncertain answers, thereby further damaging his credibility.⁴ By way of example, when asked whether the parties discussed the implementation of the Liability Award during the ninety (90) day period after April 2019, Rocco

⁴ When asked on cross-examination if Local 175’s wage rates were ever higher than the applicable prevailing wage rates, Rocco responded he did not know. (Tr. 154). It is hard to believe an attorney practicing in the areas of labor law and employee benefits, who has represented Local 175 for four (4) years (Tr. 91-92) and claimed to have discussed the issue of prevailing wage rates with NY Paving’s attorneys, was not aware of any differences between Local 175’s wage rates and prevailing wage rates.

responded he did not recall and believed the discussion revolved around the renewal CBA. (Tr. 175). When further questioned about the parties' discussions during that period of time, Rocco denied having any additional discussions. (Tr. 178). However, and when subsequently confronted with the email Rocco sent to Arbitrator Nadelbach on August 28, 2019 (“[A]fter discussion and negotiation, the parties were unable to agree on appropriate remedy and applicable damages.” (Resp. 4, NYP 160, p. 5)), he conveniently changed his prior testimony and admitted “[t]here was definitely discussions” but not about “the amount of money.” (Tr. 181).

As the cross-examination continued, Rocco’s demeanor became increasingly guarded and his testimony continued to be unforthcoming. When asked regarding Miceli’s testimony about the likelihood of employee layoffs during the October 25, 2019 hearing, Rocco clearly avoided answering the questions directly and kept insisting Miceli’s testimony was reflected in the transcript:

Q: Did Mr. Miceli testify what would happen if New York Paving was forced to implement the seven to three award?

A: I think -- I think generally that's -- that's true. I think he said something to the effect of --

Q: Okay.

A: -- it's unworkable, things -- things like that. But yes, it -- it's reflected in the transcript whatever he testified to.

Q: Okay. Do you remember if Mr. Miceli said if he had -- if New York Paving had to introduce the system the percentage of layoffs would be -- there would be a 100 set probability that there'd be layoffs? Do you remember his testimony about the -- that?

A: He --

Q: I can show you the testimony to refresh your memory.

A: Yeah. I think he --

A: I can certainly -- you know, I was doing the case, you know furiously taking notes and all that stuff, so I -- I wasn't tracking it like -- but I -- I -- I do remember that he was -- much of his testimony was focused on, you know, a parade of horrors if the arbitrator found monetary damages.

Q: Was the parade of horrors related to the implementation of the award?

A: I -- I think it was related to the damages because we were at the inquest when he was -- when he was testifying and the inquest was for damages. But li -- like I said, my -- my memory could be scatter shocked because I was taking notes and trying to focus and prepare for, you know, cross and all that stuff. And I haven't reread the transcript.

(Tr. 199-201). It cannot be disputed Rocco purposely avoided answering clear questions regarding Miceli's prior testimony concerning the likelihood of employee layoffs and blamed his lack of recollection on the fact that he (Rocco) was taking notes and preparing for cross-examination. Rocco's excuses, however, were unpersuasive because during the Damages Hearing, Rocco cross-examined Miceli in detail regarding his (Miceli's) testimony concerning employee layoffs:

Q: So since the award in this case came out in April, has New York Paving utilized seven men on top and three on binder?

A: No.

Q: So when you say -- when you were testifying so it has not actually used seven on top, three on binder. So when you were testifying before about things like overtime will be lost and hours will decrease, that actually hasn't happened yet?

A: That's correct. That's what we're contemplating. That's what we think we're going to have to do. That's correct.

Q: So that's what you're speculating will happen?

A: Absolutely.

MR. FARRELL: Objection as to the word speculation. He's already answered why he thinks, you can ask him why he thinks that.

THE WITNESS: I did explain it. I mean, the way that the work -- can I continue to talk? I don't know.

MR. ROCCO: Please.

A: I'm saying 'cause we don't see any other way with seven-man top gang. We're not going to give seven men what four men could do, we're not going to do that. So obviously we need to go back inhouse, think about how we're going to do this work now with seven men on top that somehow we can make money, 'cause obviously three extra men every day to go do work that four men can do, somehow that work's got to be made up.

(GC Ex. 14, NYP 44-45, pp. 22-23). Obviously, at the time of the Damages Hearing, Rocco's note-taking did not prevent him from comprehending Miceli's testimony regarding employee layoffs and enabling him (Rocco) to ask detailed questions about it. Further, merely a few minutes after avoiding Farrell's questions, he (Rocco) had absolutely no problem whatsoever recalling that the complaint filed in Federal Court alleging violations of the federal Fair Labor Standards Act ("FLSA") and New York Labor Law, styled *Diaz, et al. v. New York Paving, Inc.*,

(“FLSA Lawsuit”) (GC Ex. 8), was a “2018 docket number.” (Tr. 206). It strains credulity Rocco would not be able to recall Miceli’s prior testimony in an arbitration Rocco prosecuted “from soup to nuts,” while he could remember with specificity the year of the filing of the FLSA Lawsuit that he is not even an attorney of record for. This is the end of any semblance of credibility Rocco may have had given his intentionally selective memory.

Rocco’s explanation of the reasons for the delay between the Damages Hearing on October 25th and requesting the Arbitrator proceed with issuing the decision on damages on December 20th was similarly unpersuasive. (Tr. 225-27). Indeed, Rocco could not explain why he waited until December 20, 2019 to send an email to Arbitrator Nadelbach (Resp. Ex. 4, NYP 156, p. 1) even though by his own admission, he (Rocco) knew as early as October 30th that Local 175 would not meet NY Paving. (Tr. 218). Indeed, it was illogical for Rocco to suggest meeting with Mediator Shriftman in October 2019 if Local 175 wished to avoid delay in obtaining the decision on damages (Tr. 113) while simultaneously waiting until December 20th to email Arbitrator Nadelbach. (Resp. Ex. 4, NYP 156, p. 1). Rocco’s explanation that Local 175 wished to proceed with the damages decision because of Local 1010’s organizing activity (Tr. 13-14) also makes no sense in light of Rocco’s own testimony regarding said activity occurring in January 2020 (Tr. 324) and the documentary evidence (GC Ex. 21). Notably, Rocco emailed the Arbitrator on December 20, 2019, which is **prior** to any alleged Local 1010 organizing activity in January 2020. (Tr. 324; Resp. Ex. 4, NYP 156, p. 1; GC Ex. 21).

Rocco also avoided answering whether Local 175 ever asked to meet with NY Paving after December 20th, and testified he believed Chaikin had asked for the meeting. (Tr. 227). Of course, it was more convenient for Rocco to simply shift the burden to Chaikin, particularly because Chaikin was never called to testify. In any event, not only did Chaikin not request to

meet with NY Paving, he admitted Local 175 had made a strategic decision **not** to meet with NY Paving until Arbitrator Nadelbach rendered his decision on damages. (GC Ex. 16, NYP 179, p. 3). Thus and by his own admission, Rocco had no personal knowledge regarding any efforts Chaikin may have made to schedule a meeting with NY Paving – which Chaikin did not do. (Tr. 232, 245).

Rocco’s testimony was also riddled with factual inconsistencies and inaccuracies.⁵ For example, on direct examination, in an attempt to paint a picture of Miceli’s alleged hatred for Local 175, Rocco stated the reason for Miceli being “upset” on October 25, 2019 was because “the Union had filed two, you know, Section 8(a)(3) charges against New York Paving related to [the] discharge of two members on [the] National Grid project.” (Tr. 109). On cross-examination and after reviewing the relevant documents (Resp. Ex. 1), Rocco admitted it was the individual employees who filed unfair labor practice charges against NY Paving rather than Local 175. (Tr. 134). While the identity of who filed the charges may not be germane to the substance of the allegations in the instant matter, it does demonstrate Rocco’s willingness to confidently testify regarding events he perceived to be helpful to GC’s allegations. However, and once pressed on cross-examination, the gaps and patent misrepresentations in Rocco’s testimony became apparent.

Rocco provided similarly contradictory responses regarding his October 30, 2019 email to Mediator Shriftman. (Resp. Ex. 5: “Please give the date away. Everyone we need to have is not available on 12/16.”). When initially questioned regarding that exhibit, Rocco claimed he

⁵ Rocco’s recollection of when the parties called Mediator Shriftman on October 25, 2019 was erroneous. During his testimony, Rocco insisted the parties made the call before the damages hearing ended. (Tr. 111-12, 204). However and as clearly demonstrated by Resp. Ex. 15, NYP 146 (outgoing call at 12:43 P.M.) and Resp. Ex. 16, NYP 151 (call at 12:50 P.M.) said calls were made **after** the Damages Hearing closed at 12:33 P.M. (GC. Ex. 14, NYP 46, p. 24).

did not remember who was unavailable on December 16, 2019 for a meeting. (Tr. 213). After he was further pressed regarding the same exhibit, Rocco changed his testimony and stated at the time he (Rocco) sent the October 30th email to Mediator Shriftman, he knew his “client did not want to participate.” (Tr. 218). Stated differently, not only did Rocco misrepresent the extent of his knowledge during his initial questioning, he effectively omitted from the October 30th email the fact that Local 175 no longer wished to meet with NY Paving. This demonstrates not just one, but at least two layers of deception by Rocco.

Rocco’s testimony regarding NY Paving’s implementation of the Liability Award was similarly confusing and inconsistent. On GC’s direct, Rocco was asked extremely leading questions:

Q: during the ... October 25th meeting. Before the parties went on the record, did Mr. Farrell or any of the other New York representatives announce when they were going to implement the arbitration award?

A: No.

Q: Okay. And did they announce how many people would be laid off if they implemented the arbitration award?

A: No. they – they just said that it was unworkable.

(Tr. 119). Apparently, Rocco forgot shortly prior to this testimony, he stated, before going on the record on October 25, 2019, Farrell told Local 175 “there was going to be a lot of men out of work.” (Tr. 111). Once again, Rocco struggled with adhering to a single and coherent version of events.

In sum and substance, GC’s “star” witness’ testimony was inconsistent, vague, contradictory, self-serving, and at times demonstrably false. Those flaws, along with Rocco’s guarded demeanor on cross-examination taint his entire testimony. Thus, any credibility determinations involving Rocco’s testimony should be resolved against him.

C. Frank Wolfe's Inconsistent and Self-Serving Testimony

While Wolfe was very forthcoming when questioned by the GC, he was guarded and hostile during his cross-examination. The GC purposely kept the scope of Wolfe's direct examination narrow to encompass solely three (3) topics: the circumstances of Wolfe's layoff from NY Paving; Zaremski's retirement; and NY Paving's practices in the winter and during inclement weather. Wolfe's testimony on all three (3) subjects was either not based on his personal knowledge or was contradicted by GC's other witnesses.

Wolfe's employment at NY Paving commenced in or about March 2017. (Tr. 277). Wolfe testified he worked "a couple of weeks" in March and was laid-off until end of summer 2017. (Tr. 285). Wolfe also testified he has not worked at NY Paving since December 20, 2019. (Tr. 301-02). Thus, Wolfe's personal knowledge regarding NY Paving and its practices, including but not limited to any prior employee layoffs, was effectively limited to a period of a little over two (2) years (*i.e.*, from the end of summer 2017 through December 20, 2019). Despite Wolfe's blanket statements regarding the slow-down of work in the winter at NY Paving and its (NY Paving's) layoff practices, his personal knowledge is essentially limited to only two (2) winter seasons (winter of 2017-2018 and 2018-2019). Undoubtedly, and given such a limited period, Wolfe was not qualified to testify regarding NY Paving's established past practices and his testimony regarding same has minimal to no probative value.

Despite Wolfe's lack of personal knowledge, the GC nevertheless attempted to solicit testimony regarding NY Paving's past practices related to layoffs due to weather. To that effect and in answering the GC's leading questions, Wolfe testified he was out of work for a "day or so" due to a snowstorm (Tr. 285), and as a foreman, he was laid off "[m]aybe once or twice" for one (1) day due to reduction in work. (Tr. 285-86). Wolfe's testimony is contradicted by the documentary evidence. Specifically, the payroll records admitted by the GC into the evidence

clearly demonstrate Wolfe's work hours (similar to the other Local 175 employees) were typically significantly lower in January and February compared to the remainder of the year (presumably due to the inclement weather). For example, the payroll records demonstrate Wolfe typically worked well over two hundred fifty hours (250) per month. *See generally* GC Ex. 3. However, during the two (2) winter seasons he was employed at NY Paving, he only worked the following hours:

- January 2018: 109.5 (GC Ex. 3, NYP 741, p. 232);
- February 2018: 199 (GC Ex. 3, NYP 748, p. 239);
- January 2019: 209 (GC Ex. 3, NYP 835, p. 326); and
- February 2019: 176.5 (GC Ex. 3, NYP 841, p. 332).

Thus, and despite Wolfe's testimony to the contrary, the objective documentary evidence shows he worked significantly less hours during the winter months.

Wolfe's responses on cross examination regarding the slow-down of work in the winter months at NY Paving were deliberately evasive. For example, even though he admitted many factors make paving in the wintertime more difficult (Tr. 294-95), he was unable to answer questions in a straightforward manner, rather opting for constant qualifiers. For example, when asked on cross examination whether snowstorms and related elimination of alternate-side street parking and accumulation of garbage in the streets of New York City make paving in the winter more complicated, Wolfe routinely avoided giving "yes" or "no" answers. (Tr. 293-95). Instead, Wolfe responded the paving crew simply (1) swept any snow from the streets, (2) barricaded job sites to account for cancellation of alternate side street parking, and (3) did not frequently encounter accumulation of garbage in the streets of New York City. (Tr. 293-95). Wolfe's demonstrated inability to provide clear answers to simple questions taints his entire testimony.

Holder, the GC's witness and the current employee of NY Paving, contradicted Wolfe's reticent testimony. Specifically, Holder gave detailed testimony regarding the interruptions in

the paving work caused by inclement weather, including rain and snow. (Tr. 370-71). Unlike Wolfe, Holder testified he has been previously laid-off for a “couple of weeks” due to large snowstorms. (Tr. 371). Given Holder’s longer tenure at NY Paving and more forthcoming responses on direct examination, Holder’s testimony in this regard should be credited over Wolfe’s statements. Similar to Wolfe’s questionable knowledge regarding NY Paving’s practices during winter and/or inclement weather, his testimony regarding any potential interruptions to NY Paving’s operations as a result of Zaremski’s absences should be disregarded. (Tr. 279-80). On cross-examination, Wolfe admitted Zaremski’s vacations lasted no longer than one (1) week and in any event, he had no personal knowledge how NY Paving management handled the asphalt paving operations during such vacations. (Tr. 296-98).

Wolfe’s testimony regarding when he received the Shut-Down Announcement (GC Ex. 2) is also questionable and contradicted by two (2) other witnesses who also attended the foremen’s meeting on December 20, 2019. In response to the GC’s question whether NY Paving distributed GC Ex. 2 during the meeting, Wolfe unequivocally responded “no.” (Tr. 284). However, both Miceli and Zaremski, who attended the same meeting, testified the Shut-Down Announcement was distributed to the foremen during the December 20th meeting. (Tr. 86-87; 734). Given that Miceli’s and Zaremski’s testimonies in this regard are corroborated, they should be credited in this regard rather than Wolfe’s.

The ultimate blow to Wolfe’s credibility occurred when Wolfe testified about his discussions regarding the Shut-Down Announcement. Indeed, Wolfe initially confidently testified he did not discuss or speak with anyone about GC Ex. 2 other than Holder (Tr. 295-96). However, when he was asked regarding the meeting sometime in January 2020 with Local 175 and whether he discussed GC Ex. 2 with anyone during that meeting, Wolfe conveniently

avoided providing a straightforward answer, claiming he “was out of the room for quite a while talking to a lawyer for a separate issue.” (Tr. 315-16). Wolfe’s response was clearly purposely elusive, particularly in light of his testimony on direct examination regarding his clear recollection of the December 20th meeting and the statements made by NY Paving’s General Counsel, Robert J. Coletti, Esq., and Miceli during said meeting. (Tr. 281-82). In fact, the GC asked, “[d]id [Coletti] say that the foremen would be laid off?” Wolfe responded, “[n]o, I would remember that.” (Tr. 282). It is suspect on its face that Wolfe would have such a clear recollection of the statements made during the earlier, December 20th meeting at NY Paving, while he could not remember the discussions he may have had during the later January 2020 meeting with the members of Local 175. It strains credulity the members of Local 175, including Wolfe, would not have discussed the Shut-Down Announcement and the employee layoffs during their union meeting after approximately one (1) week of the occurrence of said layoffs.

For the foregoing reasons, Wolfe’s self-serving and reticent testimony should not be credited.

D. Terry Holder’s Inaccurate Testimony

Holder’s testimony was inaccurate in certain respects, and also lacked personal knowledge. For example, when questioned regarding Zaremski’s continued involvement in NY Paving’s asphalt operations during his (Zaremski’s) vacation(s), Holder admitted he had no knowledge of same. (Tr. 389-91). Specifically, Holder admitted he did not know any communications Zaremski may have had with NY Paving’s management and/or Fogarille during his (Zaremski’s) vacations. (Tr. 389-90).

Holder also testified regarding the dates when his ability to assign Local 175 members to asphalt paving crews was “taken away” from him. On cross-examination Holder stated NY

Paving started assigning the workers to asphalt paving crews in December 2019 or January 2020 (Tr. 409). In contrast, Zaremski testified he (Zaremski) started assigning Local 175 members to asphalt paving crews commencing January 2019. (Tr. 679-80). Given Holder's admitted difficulty to accurately remember dates, as well as Zaremski's generally consistent testimony, he (Zaremski) should be credited in this regard.

E. Unlike GC Witnesses, Respondent's Witnesses Testified in a Credible, Truthful and Consistent Manner.

Unlike the GC witnesses, NY Paving's witnesses were entirely credible as they testified in a consistent, forthright and truthful manner.

1. Peter Miceli⁶

Miceli testified regarding numerous issues in a consistent and truthful manner. Miceli's testimony regarding the two (2) arbitrations related to the crew size grievance and related discussions with Local 175 were consistent and corroborated both by Farrell and the documentary evidence. Indeed, Miceli convincingly discussed the numerous meetings with Local 175 designed to resolve the issues between the parties, including the implementation of the Liability Award. (Tr. 907-12, 917-23). Miceli specifically remembered his testimony on October 25, 2019 regarding the anticipated employee layoffs, including the foremen. (Tr. 906, 917-23). He also testified regarding Farrell's statement to Chaikin on October 25th informing him (Chaikin) of the anticipated layoffs and requesting he (Chaikin) not file an unfair labor practice

⁶ Miceli was found to be credible in two (2) prior Board proceedings. First, Your Honor found "Miceli was a credible witness, occasionally impassioned but generally forthright." *New York Paving, Inc.*, 370 NLRB at p.14. This credibility determination was not criticized or questioned by the Board. Second, in *New York Paving, Inc.*, JD-33-19 (case nos.: 29-CA-197798, 29-CA-209803, 29-CA-213828, 29-CA-213847) (Apr. 5, 2019), adopted by NLRB on May 20, 2019, Judge Andrew S. Gollin found Miceli to be a credible witness ("Miceli, at times, was volatile and defensive, but, in general, he had a forthright demeanor and his testimony was logical and plausible."). Judge Gollin's Decision, p. 15, n. 20.

charge in connection with same. (Tr. 922-23). Miceli and Farrell's testimonies were consistent with each other in this regard. (Tr. 549).

Miceli also testified NY Paving had reserved certain dates in December 2019 believing Local 175 would accept NY Paving's invitation to bargain. (Tr. 925-29). However, as a result of the filing of the ERISA Lawsuit coupled with the passing of the "failsafe" December 16, 2019 date, NY Paving realized Local 175 did not wish to negotiate and thus, NY Paving planned its implementation of the larger crew sizes. (Tr. 934-36). As a result, NY Paving implemented the 3-person binder crews during the first week of January 2020 and 7-person top crews during the second or third week in February 2020. (Tr. 944-45). Once again, Miceli's testimony in this regard was corroborated by both Farrell and documentary evidence. (Tr. 867-75; GC Ex. 16, NYP 180-81, pp. 4-5).

Miceli's testimony regarding the necessity of layoffs and "bundling" of tickets was also consistent with Zaremski's testimony. In this regard, Miceli truthfully testified regarding the dramatic change in NY Paving's operations given its implementation of the Liability Award. (Tr. 902-06). In sum, according to Miceli, the implementation of the 7 and 3 crew sizes was a huge change in NY Paving's operations, and the only way it could work was through "bundling" and employee layoffs. (Tr. 902-06). Miceli also consistently discussed the annual seasonal slow-down NY Paving experiences from mid-November to mid-March (Tr. 941-44, 945), which was amplified in 2020 due to the devastating impact of the COVID-19 Pandemic. (Tr. 950-53).

Finally, Miceli discussed the adverse impact Zaremski's retirement had on NY Paving's asphalt operations. In particular, even though Fogarille replaced Zaremski, his (Fogarille's) relative inexperience affected NY Paving's operations. (Tr. 944-50).

Miceli's testimony remained consistent and convincing on cross-examination. For example, the GC asked Miceli questions regarding his testimony during the Liability Hearing on January 11, 2019 wherein Miceli stated NY Paving did not want to change its crew sizes. (Tr. 969-70). However, and in his usual fashion, the GC completely ignored Miceli's subsequent testimony on October 25, 2019 regarding NY Paving's anticipated implementation of the larger crew sizes and related employee layoffs. (Tr. 917-23). Miceli also testified that he removed Wolfe and Smith from the list of badged Local 175 members in January 2020 because they were both foremen and NY Paving did not intend to continue using them as foremen any more. (Tr. 981-82). Miceli further stated he did not recall removing anyone else from the list in January 2020. (Tr. 982-83). This testimony does not contradict Zaremski's prior testimony regarding approximately nine (9) Local 175 members who were no longer on the list at the time he returned to work at NY Paving in March 2020. (Tr. 724-32). Indeed, Miceli was never asked if he removed any additional employees, other than Smith and Wolfe, from the list between January 2020 and March 2020.

Local 175's cross-examination of Miceli was equally unsuccessful. Through long and arduous questioning, Local 175 attempted to impeach Miceli's testimony during the Damages Hearing concerning the increased cost associated with implementing the larger crew sizes. (Tr. 1005-08; 1020-22). However, and as Your Honor noted, Local 175's questions focused solely on the issue of the composition of the crews and completely disregarded NY Paving's "bundling" of the tickets, which was implemented to address precisely the cost concern by reducing the number of employees and increasing productivity through more concentrated work. (Tr. 1015-16). Similarly, Local 175 questioned Miceli regarding NY Paving's failure to assign Codes 49 and 92 work to the members of Local 175 commencing the last two (2) weeks of

December 2019. (Tr. 1034-38). The assignment of the foregoing types of work is the subject of the prior unfair labor practice trial, which is currently being appealed to the D.C. Circuit Court of Appeals,⁷ and thus Miceli's responses regarding same should not be used to impeach the veracity of his statement concerning the limited asphalt work available in January 2020.

For the foregoing reasons, Miceli's testimony was truthful and consistent.

2. Jonathan D. Farrell, Esq.

Farrell testified in a consistent and comprehensive manner regarding various issues, including the two (2) crew size arbitration hearings, numerous discussions with Local 175's attorneys, requests to meet and Local 175's refusal in connection with same, as well as the prevailing wage issue and Zaremski's retirement.

Despite the GC's long and extensive cross-examination of Farrell, including asking extremely misleading questions, he (the GC) was unable to impeach Farrell's credibility. Notwithstanding the GC's effort to elicit testimony to the contrary, Farrell unequivocally testified despite Rocco's October 30, 2019 email to Mediator Shriftman (Resp. Ex. 5), Rocco did not tell Farrell Local 175 did not wish to meet at all until December. (Tr. 774-75). Notably, this was confirmed by Rocco. (Tr. 224, 230). Given Farrell and Rocco's continuous communications and Rocco's admission he did not advise Farrell regarding Local 175's desire to not meet until December 2019, it is not surprising no other dates were reserved with Mediator Shriftman. (Tr. 856-59). In any event, Farrell's testimony that December 16th was a "failsafe date" was also confirmed by Rocco. (Tr. 212).

Farrell's testimony regarding the first time NY Paving learned about the potential prevailing wage underpayment issue, the ongoing dispute regarding the applicability of the NYICA CBA to NY Paving, and Respondent's prior escrow of the monies related to the

⁷ See <https://www.nlrb.gov/case/29-CA-233990>.

contractual wage increases was generally consistent and corroborated by documentary evidence. (Tr. 859-62, 891-92; GC Ex. 16, NYP 182, p. 6; Resp. Ex. 17-23). Indeed, Farrell confidently responded to Local 175's questions regarding this issue; specifically, he stated if Local 175 had brought up the issue of prevailing wages before February 4, 2020, Farrell would have undoubtedly looked into it. (Tr. 834-42).

The GC also cross-examined Farrell to elicit testimony regarding the GC's anticipated "shifting defenses" argument regarding NY Paving's stated reasons for shutting-down its asphalt operations and laying off certain Local 175 members. As an initial matter and as set forth below in more detail, the GC's "shifting defenses" argument has no merit. To that effect, Farrell consistently testified regarding the various exhibits and NY Paving's reasons for taking the foregoing actions. Specifically, Farrell testified the employee layoffs were related to the seasonal slowdown, Zaremski's retirement and "bundling" of the tickets in compliance with the Liability Award. (Tr. 779-82). On re-direct examination, Farrell further discussed GC Ex. 2 and clarified the layoffs related to the implementation of the Liability Award were anticipated to take place in the future, and would potentially extend layoffs that took place at the beginning of January 2020. (Tr. 862-67). In his usual fashion, the GC attempted, without success, to impeach Farrell's foregoing testimony by referring him to various exhibits and the statements contained therein without providing the witness an opportunity to explain same. For example, the GC asked the witness to review certain portions of GC Ex. 1(o), 16, 22, 25, and accused Farrell of "threatening" Local 175 with the implementation of the Liability Award. (Tr. 792).

It is unfortunate the GC, throughout his questioning of both Farrell and Getiashvili, repeatedly accused both attorneys, without any evidence, of engaging in actions that are not only detrimental for their client (NY Paving) but also inherently implicate their character and fitness

(such as “threats” or willful concealment of evidence). Even though there is absolutely no evidence proving any malfeasance, the GC’s questions and innuendos regarding two (2) practicing attorneys with impeccable records is wholly deplorable and should not be sanctioned by this Court.

In any event, the GC’s attempt to impeach Farrell was unsuccessful because on-re-direct examination, after the witness was provided an opportunity to provide fulsome responses, Farrell explained the statements contained in each of the exhibits (GC Ex. 1(o), 16, 22, 25) and the reasons why they were entirely consistent. (Tr. 862-75). In sum and substance, Farrell testified the statements contained in the GC Ex. 2 related to NY Paving’s **anticipated** implementation of the Liability Award, and related future employee layoffs. (Tr. 862-75). Because Local 175 did not contact NY Paving to discuss the layoffs and thus waived its right, Farrell nevertheless sent the letter to Local 175 attorneys (which Rocco admitted he did not read) on January 30, 2020 to provide another opportunity for a meeting. (GC. Ex. 15). Given Local 175’s reticence to respond and schedule a meeting, on February 12, 2020, Farrell informed Local 175’s attorneys NY Paving had commenced using 3-person binder crews and once again requested a meeting to discuss the implementation of the 7-person top crews. (GC. Ex. 16). Despite the GC’s focus on the semantics, there is nothing in GC Ex. 2, 15, 16 and 22 that somehow contradict and/or are inconsistent with the statements contained in GC Ex. 1(o) and 25. (Tr. 862-75). Notably, the foregoing testimony also does not contradict Miceli’s statement that Respondent implemented the Liability Award on January 1, 2020. (Tr. 963-68). Indeed, according to Miceli, to the extent NY Paving started using larger crew sizes, it did so by utilizing 3-person binder crews in January; Respondent did not start utilizing 7-person crews until “end of February.” (Tr. 963-68).

The foregoing was also confirmed by Farrell in his February 12, 2020 email to Chaikin and Rocco. (GC Ex. 16). Thus, Miceli and Farrell's testimonies were consistent in this regard.

The GC continued to hurl baseless accusations at Farrell while discussing the text message Farrell sent to Rocco on August 13, 2019 regarding the new rules on blocking charges (GC Ex. 26):

Q: So in the course of your discussions with Local 175, did you ever use the threat of Local 1010 raiding Local 175 to try to pressure them to come to a deal?

A: I don't want to do the word pressure, okay, it's a -- see -- obviously, as I said yesterday, labor law is not for the faint of heart. Was Anthony Franco threatening New York Paving when he said I'm going to pull your men? I have said that it's good not to be in an open period. Every union wants a contract. Every union hates an open period. That's not a threat. That's just professional labor law. So no, that's not a threat. And I object to that characterization.

(Tr. 812). On re-direct, Farrell further clarified the reasons he sent Rocco the foregoing text message and why it definitely was not a threat:

Q BY MS. GETIASHVILI: Okay. Why did you send this text message to Mr. Rocco?

A: ... I said to Matt, I was trying to get a deal, so I said, also, no deal with Franco. So now we're in August. So this is -- isn't even a part of this case and we're talking about a deal, right? So again, let's get a deal, let's talk, and I said look, I -- I thought that -- this was like a heads up. This is another reason to get it done.

This isn't a threat. I mean, it's like, this doesn't say if you don't get it done, I'm going to make sure and I'm going to work -- make sure this happens, it's like, it's very simple. Let me ask you, 90 days from Monday, I'm sure Barbara [Melhsack] will file a request to proceed, which tells you I -- I -- which tells you how informed I am.

For some reason, this is in August of 2019, yeah, okay, so I thought she would file it. She didn't. She never filed an election. ... **it was a throwaway line ... to help get a deal done. Was there any activity? No. Did she do anything? No. Did they file a petition? No. Did I speak to Barbara? No.** And like I said, this was just a -- a throwaway line to say, I'm sure Barbara will file a request to proceed to get a deal done. That's it. It's not a threat ... She didn't do anything. They didn't do anything. Nothing happened. **Nothing has happened for three-and-a-half years.** Now, Ms. Mehlsack is actually in -- in -- on medical leave, she's very ill. There's -- there's nothing here.

So I -- New York Paving has been subject to far more rants by Mr. Franco, and I've said repeatedly, I view them as posturing. This is nowhere near the conduct or the statements said by Anthony [Franco]. It's just a heads up what --

not going to get a deal done, **a friendly heads up, reminding them that this is a possibility** and since -- so we can just close this loop. The deal that I'm trying to get with Eric, which I will resume after Thanksgiving, would eliminate this possibility as well, so yeah, that's why I sent it, just to try to foster -- to get a deal. And to tell them, this may happen.

Like I -- by the way, **like I have to tell Matt Rocco, a main partner in -- in -- in a leading labor law firm, that may happen. He knew it anyway.**

(Tr. 886-88) (emphasis added). Thus, and despite the GC's specious accusatory questioning, Farrell's foregoing testimony demonstrates GC Ex. 26 was not a threat but rather a discussion between two (2) experienced labor lawyers regarding the possibility of Local 1010 filing a Request to Proceed on its previous Petition in 29-RC-197886. (GC Ex. 21). Indeed, and as noted by Farrell, Rocco, who is an experienced labor lawyer and a named partner in a leading labor law firm, would hardly be intimidated by Farrell's statements regarding the Board's new rules on blocking charges. It is also telling the GC, despite his repeated innuendos, did **not** ask Rocco (the GC witness) if he and/or Local 175 ever felt threatened by any actions or statements made by Farrell or Respondent. Indeed, for this reason alone, an adverse inference should be taken against GC's attempt to portray Farrell as engaging in threatening conduct. In sum, the GC's insinuations and anticipated arguments regarding any alleged threats made by Farrell should be summarily rejected.

The GC continued asking Farrell remarkably misleading questions regarding whether he (Farrell) advised Local 175 that the Liability Award was going to be implemented. As an initial matter, Farrell did tell Local 175's attorneys regarding this implementation in GC Ex. 15 and 16. As for the distribution of GC Ex. 2 on December 20, 2019, no prior notification was made because Local 175 refused to meet (as confirmed by both Rocco and Chaikin). (Tr. 218, 807-811, 1076-80; Resp. Ex. 33; GC Ex. 16, NYP 179, p. 3; GC Ex. 22, p. 8).

The GC also attempted to impeach Farrell's credibility by introducing into the evidence GC Ex. 24 to presumably show Farrell's prior testimony regarding him being in Argentina in January 2020 was inaccurate. Indeed, after reviewing GC Ex. 24, Farrell remembered he was not in Argentina in January 2020 and his prior statement regarding same was not accurate. (Tr. 798, 878-79). During this line of questioning, the GC, yet again, asked Farrell "flippant" (Your Honor's characterization, Tr. 801) questions regarding the witness' ability to remember a comment he made to Chaikin on October 25, 2019 even though he (Farrell) did not remember the January 2020 conversation with the GC. (Tr. 800-01). However, Farrell's responses were once again consistent and truthful. He testified he remembered telling Chaikin, on October 25, 2019, not to file an unfair labor practice charge when Local 175 members are laid off because there was more "gravitas" to that conversation⁸ (Tr. 801) as opposed to Farrell's relatively routine conversation with the Board agent in January 2020. (Tr. 879-88). It is unsurprising Farrell did not remember his initial conversation with the GC in January 2020 regarding the ULP Charge given that Farrell receives dozens of calls daily and Local 175 has filed several dozen charges against Respondent. (Tr. 880-83).

For the foregoing reasons, Farrell's testimony was consistent and truthful, and should be credited in its entirety.

⁸ Farrell specifically stated:

So you -- you -- you -- so I said, don't do this. This is -- these men are going to be laid off. You're going to cause it. It's going to be a huge op change. We've got to talk about it, I know you're worn out, but I said, don't do it. And Eric will admit to it. I -- I mean, if he's ever asked. But yeah, absolutely. Because I just -- I just -- because I just saw all the bad that was happening, that was going to happen because of this. And until actually New York Paving figured out a way to actually make it work and bring the people back and -- and -- which -- which they didn't think it was possible. And Matt Rocco saw the bad in it. Everybody saw the -- the only one who didn't see the bad in it was Anthony Franco, you know, because he's not walking on the street. But everybody around that table saw the bad that was happening.

(Tr. 879-80). The foregoing was corroborated by Miceli. (Tr. 922-23).

3. Ana Getiashvili, Esq.

Getiashvili's testimony was entirely credible. She testified regarding numerous issues and occurrences, including Local 175's refusal to meet with NY Paving to bargain and the eventual meeting that took place between the parties on March 3, 2020. (Tr. 1076-85). As set forth in more detail below, Getiashvili's testimony regarding the telephone conversation with Chaikin on February 6th and Resp. Ex. 33 should not be precluded. Even though the GC, on cross-examination, attempted to impeach Getiashvili's credibility by asking numerous questions about other notes of conversations she may have taken, any such attempts were patently unsuccessful. As an initial matter, Getiashvili stated unequivocally she conducted a thorough search of her files and records to identify any additional notes responsive to the GC's Subpoena (GC. Ex. 5) and other than Resp. Ex. 33, she did not locate any.⁹ (Tr. 1128-35). In particular, her responses regarding whether she took any notes during other conversations were both consistent and persuasive, particularly in light of the GC's propensity to ask pointed questions about particular events without providing the witness an opportunity to fully respond and/or explain same.

For example, the GC cross-examined Getiashvili regarding any notes she may have taken during her telephone conversation with Rocco in or about July 2019 regarding the filing of the Petition to Vacate the Arbitration Award (GC Ex. 12). (Tr. 1099-15). What the GC conveniently omitted to ask was whether those notes (if any) would have been responsive to any Subpoena

⁹ The GC questioned Getiashvili regarding the production of certain notes she may have taken, which were protected by the attorney-client and attorney work product privileges. (Tr. 1099-15). To the extent the GC is going to argue Getiashvili's credibility should be impeached solely due to Respondent's failure to produce a privilege log of same, any such argument should not be countenanced because the Charging Party Union also did not produce a privilege log. In any event, Respondent's production of the privilege log is a procedural issue and has absolutely no effect whatsoever on the substance of Getiashvili's testimony and her credibility. Finally, perhaps if Respondent had not spent several days attempting to cooperate with the GC by producing the Open Order Reports (which the GC eventually declined to use) and/or preparing a Confidentiality Stipulation (Tr. 21-25), Respondent would have been able to undertake the remarkably time-consuming task of preparing the privilege log.

request, which upon further examination of same, would undoubtedly not have been responsive.¹⁰ (GC Ex. 5). Getiashvili also credibly answered questions regarding other telephone conversations and absence of any notes memorializing same; for example, the fact that she was on vacation and thus did not participate in the telephone conversation with Arbitrator Nadelbach in or about August 2019, and the communications regarding the scheduling of the Damages Hearing, which were conducted via email (*see* Resp. Ex. 4, NYP 156-160, pp. 1-5) rather than telephone.¹¹ (Tr. 1126-28). Thus, despite the GC's transparent attempts to impeach Getiashvili's credibility, she nevertheless truthfully testified regarding the contents of the telephone conversation with Chaikin on February 6, 2020 and his admission that Local 175 indeed did not meet with NY Paving.

The GC will also argue the notes contained in Resp. Ex. 33 are not an accurate representation of the contents of the conversation. (Tr. 1118-25). However, any such argument should be rejected because the foregoing notes were also corroborated in NY Paving's Position Statement submitted to the Region on February 18, 2020. (GC Ex. 22, p. 8, n. 29).

During the cross-examination, GC continued attempting to impeach Getiashvili's credibility by asking questions regarding the text messages that were - and were not - produced in response to the Subpoena. However, and similar to the questions regarding the notes, the GC's questions pertaining to the text messages were utterly ineffective. For example, the GC questioned Getiashvili regarding the text messages between Rocco and Farrell that were previously marked by Respondent for impeachment purposes but were not admitted into the

¹⁰ Specifically, any such notes would not have been responsive to the Subpoena Request 11 because they would not have concerned bargaining regarding employee layoffs but rather would have simply discussed NY Paving's filing of the Petition. (GC Ex. 5). They would similarly not have been responsive to the Subpoena Request 3(a) because they would have fallen outside the temporal scope identified in said request. (GC Ex. 5).

¹¹ Once again, the GC did not permit Getiashvili to comment on whether the notes of the foregoing conversations, even if they existed, would not have been responsive to any Subpoena request. (GC Ex. 5).

evidence. (Tr. 1108-11). As an initial matter, those text messages are not in evidence in this matter – if the GC indeed believed they were responsive to any Subpoena request – which they were not – he should have introduced them into the evidence. As it pertains to the text message contained in GC Ex. 26, the GC once again, in his typical fashion did not permit the witness to comment on why said text message was not responsive to the Subpoena. (Tr. 1111-12). On re-direct, Getiashvili credibly explained why GC Ex. 26 was not responsive to any Subpoena request and thus Respondent was not obligated to produce same. (Tr. 1129-30). As an initial matter, GC Ex. 26, even if relevant, which it is not, was outside the temporal scope of the Subpoena Request 3(a). It did not concern bargaining between the parties relating to the employee layoffs, as set forth in Request 11. In fact, the sole Subpoena request referencing Local 1010 concerned the payroll and remittance reports (Request 1) – given that GC Ex. 26 is neither a payroll record nor a remittance report, it is thus unresponsive to Request 1 as well.

In sum and substance, the GC’s questioning technique should be seen for what it really was – a transparent attempt to ask the witnesses seemingly pointed questions while not permitting them to fully explain their responses, thus creating an appearance of untruthful answers and soliciting “sound bites” he will undoubtedly utilize in his post-hearing brief. However, and as demonstrated hereinabove, all the GC has achieved in terms of the Respondent’s witness’ credibility is merely “smoke and mirrors,” which necessarily falls apart upon closer examination.

4. Robert Zaremski

Despite the GC’s feeble attempts to impeach Zaremski’s credibility, he (Zaremski) testified in a consistent, truthful and persuasive manner regarding the dates of his retirement and reasons for same. (Tr. 689-95, 696, 698). As it pertained to Zaremski’s retirement, it appeared

the GC focused on demonstrating the statements contained in Resp. Ex. 27 and 29 were somehow inaccurate. For example, the GC continuously asked Zaremski questions whether he continued to “supervise” Local 282 drivers as the Operations Manager, to which Zaremski responded he assigned their trucks and created the routes they drove on. (Tr. 707-711). However, the GC did not establish the alleged “supervision” of the Local 282 drivers consisted solely of the foregoing two (2) tasks. Indeed, on re-direct, Zaremski testified after his retirement from Local 282 in 2017, he stopped driving the truck, allowed his CDL license to lapse, and no longer served as the Local 282 Shop Steward at NY Paving. (Tr. 756-57). Thus, the GC failed to demonstrate Zaremski continued to supervise Local 282 drivers after his retirement from Local 282 in October 2017.

The GC also questioned Zaremski regarding his state of mind when he initially retired from Local 282 and specifically, whether he (Zaremski) knew he would be returning to work at NY Paving as a full-time Operations Manager. (Tr. 713-14). The GC will undoubtedly argue Zaremski’s testimony in this regard was inconsistent with the statements contained in Resp. Ex. 29, thereby affecting Zaremski’s credibility. However, the GC’s protestations have no value for several reasons. As an initial matter, Resp. Ex. 29 was not drafted by Zaremski. Furthermore, Resp. Ex. 29 describes NY Paving’s reasons for re-hiring Zaremski as a full-time Operations Manager, which Zaremski had no personal knowledge of. At the end of the day, however, the reasons for Zaremski’s retirement from Local 282 in October 2017 and his eventual hire by NY Paving in or about November 2017 has absolutely no bearing whatsoever on Zaremski’s eventual retirement from NY Paving on December 20, 2019. Local 282 is a strong, well-established and reputable labor organization and it simply cannot be argued NY Paving and/or Zaremski somehow colluded with Local 282 officials to create an appearance of Zaremski’s retirement

(exposing Local 282 officials and the Local 282 Funds to potential civil liability or worse). No such argument can be made because there is no record evidence supporting same.

Zaremski, answering a misleading question from the GC, which mischaracterized Zaremski's prior testimony, stated he informed Miceli "[p]robably the beginning of December" regarding his intention to retire. (Tr. 717). Zaremski's subsequent testimony in this regard was consistent. For example, he stated he (Zaremski) told Fogarille about his retirement "[p]robably a week before December 20, 2019." (Tr. 735). The foregoing testimony is corroborated by Resp. Ex. 29, which is dated December 13, 2019, and wherein the Local 282 Funds were informed Zaremski would retire effective December 20, 2019. (Resp. 29, NYP 7890, n. 2). Finally, Zaremski's testimony regarding the events leading up to his retirement on December 20, 2019 and reasons for same was generally corroborated by Farrell. (Tr. 647-60).

Zaremski's response that Miceli and Coletti were aware of his "issue with Local 282 pension fund" as early as September 2019 (Tr. 753) does not detract from Zaremski's testimony regarding the fact he notified Miceli of his retirement in early December 2019. As it is undisputed from the documentary evidence, the communications with the Local 282 Funds regarding Zaremski occurred over a period of several months, and therefore, no knowledge of Zaremski's retirement and date certain of same can be imputed to NY Paving as early as September 2019. Miceli's testimony regarding Zaremski's retirement is not inconsistent. Miceli testified generally in response to the GC's questions that Zaremski "has been announcing [his retirement] since he was 62 years old" (Tr. 76) because that is the "natural" course of events for the union employees. (Tr. 76). Stated differently, Miceli did not testify regarding Zaremski's final decision to retire but rather described the "natural" course of events and the ongoing conversation regarding Zaremski's *potential* retirement.

Based on the foregoing, Zaremski's testimony regarding his retirement on December 20, 2019, the reasons for same, and his eventual return to his former position was truthful and corroborated by other witnesses and documentary evidence. The fact that NY Paving granted Zaremski a wage increase upon his return in March 2020 (Tr. 745-51), without more, had no bearing on Zaremski's credibility.

Zaremski also credibly testified regarding NY Paving's implementation of the 7 and 3 crew sizes and the significant impact it had on NY Paving's asphalt operations, including the reduction in the number of crews and foremen needed. (Tr. 681-89). This testimony was corroborated by Miceli. (Tr. 902-06). Finally, Zaremski also discussed, without contradiction, both on direct and cross-examination, the adverse effect the COVID-19 pandemic had on NY Paving's operations, and the reasons certain Local 175 members who were previously laid-off were not called back to work. (Tr. 695-705). Indeed, even though the GC asked Zaremski detailed questions on cross-examination regarding the named discriminatees and whether they were on the list of Local 175 members badged and approved to work at NY Paving at the time of Zaremski's return in March 2020, his (Zaremski's) testimony was entirely consistent with his prior statements. (Tr. 724-32). There were two (2) inaccuracies in Zaremski's testimony, which were noted by Miceli: (i) the period during which Hallen and National Grid were shut-down was mid-February to Mid-June 2020 rather than for just one (1) month (Tr. 695-705; 722-24; 950-53); and (ii) the reason Respondent hired two (2) African American employees in 2020 was because NY Paving wished to increase its diversity (Tr. 705; 736-37; 955-56). Given Zaremski's overall credibility, the foregoing inaccuracies are relatively inconsequential, particularly in light of the primary issues in this litigation. For the foregoing reasons, Zaremski's testimony was truthful and consistent.

POINT II

GETIASHVILI'S TESTIMONY AND RESPONDENT'S EXHIBIT 3 SHOULD NOT BE PRECLUDED

The GC will argue Resp. Ex. 33 and Getiashvili's testimony regarding the underlying telephone conversation should be precluded in their entirety due to Respondent's alleged non-compliance with the Subpoena. (GC. Ex. 5). However, and for the reasons identified below, the GC's request should be denied in its entirety. "The Board may impose a range of sanctions for 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.'" *Sisters' Camelot*, 363 NLRB No. 13, p. 8 (Sept. 25, 2015) quoting *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004). "The exercise of this authority is a matter committed in the first instance to the judge's discretion." *McAllister Towing & Transportation Co.*, 341 NLRB at 396. Additionally, "the Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance." *Sisters' Camelot*, 363 NLRB at 8.

In *Sisters' Camelot*, the Board rejected the respondent's request to draw an adverse inference from the individual discriminatee's failure to produce documents responsive to the respondent's subpoena. *Id.* There, the individual discriminatee produced at the hearing two (2) documents allegedly responsive to the respondent's subpoena but testified regarding the existence of additional emails, which were not produced. *Id.* In finding the requested sanction too severe, the Board noted (1) the scope of the subpoena was not entirely clear, and (2) the respondent had not shown any prejudice suffered from the alleged noncompliance. *Id.*

In *McAllister Towing & Transportation Co.*, the Board found the ALJ did not abuse her discretion in imposing sanctions for the respondent's willful refusal to comply with a subpoena.

341 NLRB at 394. There, the respondent refused to comply with the ALJ's order to comply with the General Counsel's subpoena *duces decum*. *Id.* at 396. Accordingly, the ALJ granted "General Counsel's request to prove by secondary evidence those matters where there was noncompliance with the subpoenas," and to preclude the respondent from rebutting said secondary evidence. *Id.* The ALJ, however, refused to limit the respondent's right of cross-examination, and refused to automatically draw adverse inferences against the respondent. *Id.* After the parties proceeded with opening statements, the respondent advised the ALJ it had conducted a search prior to opening statements, and several boxes of documents were on their way to the hearing room in response to the General Counsel's subpoena. *Id.* Following the direct examination of General Counsel's first witness, the respondent had three (3) litigation sized boxes of documents delivered to the hearing room. *Id.* The General Counsel, however, declined to accept the documents, and opted to proceed with the ALJ's imposed sanctions. *Id.* On review, the Board found the ALJ did not abuse her discretion in imposing the aforementioned sanctions, nor in refusing to impose the more drastic sanctions of limiting the respondent's right of cross-examination and automatically draw adverse inference against the respondent. *Id.* at 194.

As the foregoing cases demonstrate, precluding Resp. Ex. 33 and Getiashvili's testimony regarding the underlying telephone conversation from evidence will be a drastic sanction, and grossly disproportionate to the alleged noncompliance. *See Northstar Memorial Group, LLC*, 369 NLRB No. 145, p. 8 (July 30, 2020) ("Respondent requested that Strube's testimony be stricken, which I find too severe."). As an initial matter, GC's Subpoena was unclear regarding the scope of the documents requested.¹² Indeed, the GC's own *Opposition to Respondent's*

¹² "A subpoena *duces tecum* should seek relevant evidence and should be drafted as narrowly and specifically as practicable." NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (Oct. 2020), Section 11776.

Petition to Revoke Subpoena Duces Tecum, he (the GC) stated the Respondent must produce bargaining documents. (Tr. 1071). In contrast to GC's own clarification of what documents were sought in the Subpoena Request 11, Resp. Ex. 33 shows the lack of bargaining between the parties. Accordingly, Resp. Ex. 33 was not responsive to the GC's vaguely-drafted subpoena

Additionally, assuming Resp. Ex. 33 was responsive to the Subpoena, Respondent did not willfully withhold same from production in a bad-faith attempt to hide it from the GC. In fact, GC admitted: "[Respondent] believed that [Resp. Ex. 33] was not responsive." (Tr. 1073). There is no allegation Respondent acted in bad-faith, or knowingly withheld Resp. Ex. 33 in an attempt to surprise GC with new arguments or defenses. Respondent produced over Ten Thousand (10,000) pages of subpoenaed documents before the start of the hearing in this matter, and presented them in an organized and coherent manner. In fact and as Your Honor noted, Respondent expended significant time and resources not only producing the subpoenaed documents **before** the GC's presentation of his first witness, it (Respondent) undertook the tedious preparation of summaries of certain documents in a collaborative fashion with the GC:

And I think that **Respondent in this case really has gone through a substantial and significant effort to respond to the subpoena**, to the extent that Respondent was preparing summaries of the open order reports that, you know, then were not used because a protective order couldn't be negotiated. **So I don't think there's the sort of, like, kind of contumacious refusal to comply with the subpoena that would warrant the type of sanction that involves exclusion of the document from the record**, you know, given the -- given the -- the goal of creating a -- a complete record in the case. (Tr. 1075) (emphasis added).

And I just -- I -- I -- I would just like to thank you Mr. Farrell and Ms. Getiashvili, really, for working to resolve this and **for your work in preparing an entirely new set of documents summarizing the information in order to try to reach an accommodation with General Counsel of the subpoenaed materials, taking into account the Respondent's confidentiality concerns**. And again, I -- I want to note that the redacted documents were provided to General Counsel much earlier and it's a shame that these issues had to be addressed and resolved at a time so immediately proximate to the actual hearing date when everyone has a lot of other work to do, so.

(Tr. 24-25) (emphasis added). In fact, the GC himself thanked Respondent for its hard work in attempting to respond to the Subpoena in a fulsome manner.¹³ (Tr. 25). Based on uncontroverted record evidence, there was no willful non-compliance with the Subpoena by NY Paving. Accordingly, even if Resp. Ex. 33 was responsive to the Subpoena, Respondent's good-faith error in not producing same does not warrant the drastic sanction of precluding evidence concerning the issue in its entirety.

The sanction of precluding evidence in this case is also not warranted given that the GC suffered absolutely no prejudice from Respondent's initial alleged noncompliance with the Subpoena. As stated above, Respondent did not willfully withhold Resp. Ex. 33 from GC in bad-faith, preventing the GC from learning the contents thereof. In fact, GC knew of the conversation referenced in Resp. Ex. 33 as early as February 18, 2020, when said conversation was discussed at length in Respondent's Position Statement submitted to the Region. (GC Ex. 22, p. 8). In the Position Statement, NY Paving described precisely the same telephone conversation with Chaikin documented in Resp. Ex. 33 and testified to by Getiashvili. (Tr. 1076-80; GC Ex. 22, p. 8). Farrell and Getiashvili both also offered to provide the Region with affidavits regarding their conversation with Chaikin. (GC Ex. 22, p. 8, n. 29). Thus, the GC was advised of the telephone conversation with Chaikin as early as February 18, 2020, and he could have anticipated Respondent would have presented evidence and testimony regarding same. Given the foregoing, the GC cannot now argue he was somehow prejudiced by Resp. Ex. 33 and/or Getiashvili's testimony in particular. The GC knew about the February 6th telephone

¹³ In the unlikely event the GC is going to argue NY Paving did not comply with the Subpoena in other respects as well, including but not limited to the Subpoena Request No. 2, any such argument should be summarily rejected. As demonstrated by the record evidence, NY Paving collaborated with the GC and produced several thousands of pages of the Open Order Reports to the GC even though they were not responsive to Request No. 2, and in any event, said Request was withdrawn in its entirety by the GC. *See* GC Ex. 5; Resp. Ex. 36 (“[T]he Region hereby withdraws Request 2 of Subpoena DT B-1-19D5X19”); Tr. 21-25.

conversation and he simply chose to ignore it. Nonetheless, and to alleviate the GC's concerns, as a sanction on Respondent, Your Honor granted GC "substantial leeway" in cross-examining Getiashvili and in presenting any potential rebuttal evidence on the issue. (Tr. 1075). Despite being afforded such latitude, the GC elected not to present any rebuttal evidence on the issue.

By contrast, the noncompliance in *McCallister Towing & Transportation Co.* was even more egregious than Respondent's alleged noncompliance, as the employer in that case was ordered by the ALJ to produce the documents, however the employer refused to do so until after the ALJ imposed sanctions. 341 NLRB at 395-96. Respondent in this case, however, believing Resp. Ex. 33 was not responsive, nonetheless produced the document before sanctions were even mentioned. Furthermore, the employer in *McCallister Towing & Transportation Co.* willfully refused to produce approximately three (3) "litigation-size boxed of documents." 341 NLRB at 396. However, in the instant matter, the GC alleges Respondent failed to produce a single page containing notes of a single conversation, which, in any event, GC was previously made aware of as early as February 18, 2019 (as set forth in Respondent's Position Statement). (GC Ex. 22, p. 8). Accordingly, the noncompliance in *McCallister Towing & Transportation Co.* was significantly more egregious than Respondent's alleged noncompliance in this case.

The GC will most likely argue that the preclusion of evidence and testimony is warranted pursuant to *Perdue Farms, Inc., Cookin' Good Div. v. N.L.R.B.*, 144 F.3d 830 (D.C. Cir. 1998). However, the GC's argument must be rejected because the facts of that case are significantly different from the instant matter. Indeed, in *Perdue Farms, Inc.*, the Court upheld the ALJ's exclusion of evidence after the employer willfully withheld documents responsive to the General Counsel's subpoena. *Id.* at 833. In that case, the General Counsel served the employer with a subpoena requesting notes and other records regarding meetings conducted between May 1, 1995

and June 15, 1995. *Id.* The employer unsuccessfully moved to quash the subpoena, arguing it was overly broad because the complaint alleged violations occurred on or about May 11, 1995. *Id.* The ALJ disagreed, holding the materials requested in the subpoena were relevant and should be produced. *Id.* Nonetheless, the employer refused to produce all of the notes and other records regarding meetings responsive to the subpoena, and only produced notes and records regarding the May 11, 1995 meeting **in defiance of the ALJ's order**. *Id.* at 834. Accordingly, the Court upheld the ALJ's ruling barring the employer from introducing virtually any evidence regarding the meeting. *Id.*

Respondent's alleged noncompliance in this case is distinguishable from the noncompliance in *Perdue Farms, Inc.* The employer in *Perdue Farms, Inc.* willfully refused to produce documents after the ALJ ordered the employer to produce the specific documents withheld. *Perdue Farms, Inc.*, 144 F.3d at 834. Nonetheless, the employer in that case attempted to introduce some, but not all, of the documents ordered be produced, essentially picking and choosing what documents it wished to enter into evidence. *Id.* Importantly, throughout the entirety of the hearing, the employer in *Perdue Farms* **never produced the responsive documents**, leaving the contents of said documents unknown. *Id.*

In contrast, in the instant matter, Respondent has engaged in no defiance and never refused to comply with Your Honor's Order, and the contents of Resp. Ex. 33 were made readily available to the GC. More importantly, however, NY Paving advised the GC regarding the occurrence of the telephone conversation and contents thereof as early as February 18, 2020. (GC Ex. 22, p. 8). In *Perdue Farms, Inc.*, the employer knew the withheld documents were responsive, was ordered by the ALJ to produce the documents, but consistently refused to produce the documents. *See* 144 F.3d at 834. Here, however, Respondent's alleged

noncompliance with the Subpoena is not alleged to be in bad-faith, as GC readily admits Respondent believed Resp. Ex. 33 was not responsive. (Tr. 1073). In any event and unlike *Perdue Farms, Inc.*, the GC in this case cannot claim he was surprised by or unaware of Resp. Ex. 33 and/or Getiashvili's testimony regarding same given his prior knowledge of the telephone conversation. For the foregoing reasons, the facts of the instant case are drastically different from *Perdue Farms, Inc.* and thus, preclusion of evidence is not warranted.¹⁴ See *Queen of the Valley Med. Ctr.*, 368 NLRB No. 116, pp. 1, 43 (Nov. 25, 2019) ("We find that the sanctions imposed by the judge were proportionate to the [Respondent] Union's noncompliance and that the judge did not abuse her discretion in denying additional sanctions. . . With the eventual production of documents after my Orders, Respondent must demonstrate what effects, if any, the missing documents had to prejudice its case. *Sisters' Camelot*, [citation omitted]. Poulson's continued search for documents revealed one misplaced document and I find that this revelation showed a minimal mistake, which was easily corrected. Respondent suffered no prejudice as Poulson produced the document as soon as she found it.").

Accordingly, Respondent complied with the GC's Subpoena. However, Respondent's alleged noncompliance, if true, was minor, not willful, and said Subpoena was vague as to the documents demanded. Furthermore, even if Resp. Ex. 33 was responsive to the Subpoena, Respondent did not act in bad-faith by willfully refusing to comply with the Subpoena in an attempt to surprise the GC with new arguments or legal positions. Indeed, Respondent put

¹⁴ To the extent the GC and/or Charging Party Union are going to argue Resp. Ex. 33 and/or Getiashvili's testimony regarding same should be precluded because they include statements made in the course of settlement negotiations and are thus precluded by Rule 408 of the Federal Rules of Evidence, any such argument should be summarily rejected. There is nothing either in Resp. Ex. 33 or Getiashvili's testimony to even suggest the February 6, 2020 conversation concerned any alleged settlement discussions with Local 175. Rather, the conversation focused on scheduling a meeting between NY Paving and Local 175. The fact that the parties appear to have discussed other paving companies is not evidence of any settlement discussions. There is simply no record evidence demonstrating any settlement discussions took place on February 6, 2020. Chaikin could have testified regarding same, which he and/or the GC elected not to do.

tremendous effort into complying with the Subpoena, as recognized by Your Honor. Finally, GC suffered no prejudice as a result of Respondent's alleged noncompliance, nor could it as GC was well aware of the contents of Resp. Ex. 33 and the February 6th telephone conversation as early as February 18, 2019, when the contents of same were disclosed in Respondent's Position Statement submitted to the Region. (GC Ex. 22, p. 8). Accordingly, precluding Getiashvili's testimony and Resp. Ex. 33 from evidence will be a drastic sanction warranted by neither applicable law nor facts of this case. Thus, the GC's application for the preclusion of evidence should be denied in its entirety.

POINT III

ADVERSE INFERENCE SHOULD BE DRAWN AGAINST THE GC AND CHARGING PARTY DUE TO THEIR FAILURE TO CALL ERIC CHAIKIN, ESQ. AS A REBUTTAL WITNESS

An administrative law judge may draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB No. 37, pp. 1, 13, fn. 1 (Nov. 4, 2015), *enf'd.* 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1022 (2006).

It is well-settled law when a party fails to call a witness who may be reasonably assumed to be favorably disposed to the party, or fails to introduce documents that are within its control, an adverse inference may be drawn regarding any factual questions on which the witness may have relevant knowledge on or the documents may prove. *Int'l Automated Machs., Inc.*, 285 NLRB 1122, 1123 (1987), *enf'd.* 861 F.2d 720 (6th Cir. 1988); *Martin Luther King, Sr. Nursing Ctr.*, 231 NLRB 15 (1977); *Earle Industries, Inc.*, 260 NLRB 1128 (1982). The rule is typically applied against the party that has the burden of persuasion on the particular issue. *KBMS, Inc.*, 278 NLRB 826, 848-49 (1986). The relevant factors in determining whether an adverse

inference should be made is whether the potential witness would be predisposed to testify favorably for a particular party as opposed to being equally available to both sides. The potential witness' relationship to the party is also relevant. *NLRB v. MDI Commercial Servs.*, 175 F.3d 628 (8th Cir. 1999).

Here, the GC failed to call Local 175's long-term counsel, Chaikin, as a rebuttal witness. In addition to his lengthy representation of Local 175, Chaikin was attorney of record for Local 175 in the instant proceeding and was available and present during the entire trial. Thus, calling him as a rebuttal witness would have presented absolutely no hardship on the GC and/or Local 175. The GC's failure is particularly egregious given Your Honor's express grant of "wide latitude" and "substantial leeway" for the GC to not only cross-examine Getiashvili in connection with Resp. Ex. 33 but also to present any rebuttal evidence. (Tr. 1075-76). The GC was thus expressly permitted to present a rebuttal witness, which the GC elected not to do presumably because Chaikin would have corroborated Getiashvili's statements and the notes contained in Resp. Ex. 33.

Indeed, a case directly on point is *Health Care Investors, Inc. d/b/a Alexandria Manor*, 317 NLRB 2, 5 (1995) wherein the employer's attorney (who, like Chaikin) was present during a meeting with union personnel critical to determining whether an unfair labor practice occurred as well as the employer attorney's assistant who also attended this meeting and (like Chaikin) sat at the employer's table throughout the Board hearing – but neither testified on behalf of the employer. In response, the ALJ drew an adverse inference against both individuals (“(Neither Schneider nor Strasser testified. Strasser served as Respondent’s designated assistant at counsel table.) I draw an adverse inference from the failure of Schneider and Strasser to testify.”). The ALJ’s decision in this regard was affirmed by the Board and such decision is binding in this

matter given the striking similarity regarding Schneider's and Strasser's failure to testify and Chaikin's failure to testify.

The GC objected to the admission of Resp. Ex. 33 into evidence, as well as Getiashvili's testimony regarding that document, and the content of the conversation with Chaikin on February 6, 2020. However, Getiashvili's conversation was also corroborated by Farrell. (Tr. 595-96). Given that there were three (3) participants in the telephone conversation in question and absent any testimonial or documentary evidence rebutting the testimonies of Respondent's attorneys, it is logical to assume the GC would have called Chaikin to rebut same. Given the GC's failure to call Chaikin to testify, it can only be concluded Getiashvili's and Farrell's testimonies (and as contemporaneously documented in Resp. Ex. 33) were truthful and accurate and Chaikin indeed confirmed Local 175 made a decision to not meet with NY Paving to bargain. *See Rochester Telephone Corp.*, 333 NLRB 30, 50 (2001) (drawing adverse inference against the Respondent due to its failure to call a participant in the conversation to rebut the Union witness' testimony).

Such an adverse inference is particularly appropriate in the instant matter because the only other GC witness who could have testified regarding Local 175's decision to meet with NY Paving to engage in bargaining, Local 175's second counsel Rocco, admitted other than his participation in the Crew Size Arbitrations and related meetings, he (Mr. Rocco) delegated the decision-making authority to Chaikin. Of particular importance is Mr. Rocco's testimony regarding his failure to even read Respondent's January 30, 2020 letter (GC Ex. 15) and meaningfully participate in the subsequent email correspondence between the parties, including Chaikin's statements regarding Local 175's "strategic decision" to not meet with NY Paving (GC Ex. 16, NYP 179, p. 3):

I'll be honest with you, I -- I kind of threw [GC Ex. 15] on a pile on my desk, and I just asked Mr. Chaikin, anything in the letter I've got to read? But I am aware that after receipt of this letter, we did attempt to schedule an in-person meeting. (Tr. 116).

Q: On January 30th, Matt, did you receive this email? This card -- this letter? Do you recognize this letter?

A: I -- I definitely received it. I -- I -- I think I remember sticking it on my couch and never reading it. You know, calling Mr. Chaikin and saying, anything in there that we've discussed? But yes, I -- I got it.

Q: So it's your testimony that -- okay. So did you at least read it at some point? At some time, did you read it? Ever, actually, getting around to reading it?

A: Honestly, no.

Q: Okay. So you never responded to this letter. I appreciate the honesty. So you never responded to this letter?

A: I -- I -- no, I -- I talked to Chaikin afterwards, Mr. Chaikin, and I -- I understood you were trying to set up some kind of meeting. And as I referred to, Mr. Chaikin is really the General Counsel, and I understood that he would handle it and do the email correspondences which followed, and -- and set the meeting up. And I would attend the meeting, too. (Tr. 232).

Q: I -- I'm just asking if you know. Do you have any idea what he was referring to when he referred where, "The parties are not in a position to fully explore its ramifications"? If you know.

A: You'll have to ask the author.

(Tr. 245). Based on Rocco's testimony, he delegated the role of communicating with NY Paving regarding any bargaining meetings in January and February 2020 to Chaikin. Chaikin was thus the only witness who could have rebutted Getiashvili's and Farrell's testimonies regarding the February 6, 2020 conversation and therefore was a necessary witness.

To the extent the GC and/or the Charging Party are going to suggest an adverse inference is inappropriate because Chaikin would have allegedly been an unnecessary witness, any such arguments should not be countenanced and were rejected by the Board in *Health Care Investors, Inc. d/b/a Alexandria Manor*, 317 NLRB 2 (1995). In that case, two (2) union representatives and three (3) employer representatives (Schneider, Strasser and employer President Fischman) attended a meeting critical to determining whether an unfair labor practice occurred. At the hearing, Fischman provided extensive testimony regarding this meeting. Schneider and Strasser

were not called as witnesses presumably because their testimony was duplicative of Fischman's testimony. The ALJ (and the Board) nonetheless drew an adverse inference against the employer even though "President Fischman (who contends that he was the Company's primary spokesperson) testified at the hearing. *See also, Roosevelt Memorial Med. Ctr.*, 348 NLRB at 1022; *One Stop Kosher Supermarket*, 355 NLRB 1237, 1238, n. 3 (2010). These decisions are distinguishable for several reasons. First, and for the reasons stated hereinabove, both Farrell and Getiashvili were credible witnesses and their testimony regarding the contents of the February 6, 2020 telephone conversation with Chaikin should be credited (and should not be precluded as discussed hereinabove). Second, and more importantly, documentary evidence corroborates said testimony. For example, Respondent's Position Statement submitted to the Region during its investigation not only included Chaikin's statements during said telephone conversation, but also offered to provide the Region with sworn affidavits regarding same:

On February 5 [sic], 2020, Attorney Farrell and the undersigned had a telephone conference with Attorney Chaikin on February 5 [sic], 2020 at approximately 6:18 p.m. during which conversation Attorney Chaikin admitted Local 175 made a "strategic decision" not to meet with NY Paving in December, and to delay any such meeting until April 2020 (or words of similar effect). (GC Ex. 22, p. 8).

Please note both Attorney Farrell and [Ana Getiashvili] are willing to provide the Region affidavits regarding our numerous conversations with the Attorneys of Local 175 regarding the attempts to meet and conduct negotiations.

(GC Ex. 22, p. 8, n. 29).¹⁵ Given that the Position Statement was submitted on February 18, 2020, which was less than two (2) weeks after the telephone conversation with Chaikin, the statements contained in the Position Statement have significant probative value. They also corroborate Farrell and Getiashvili's testimonial evidence.

¹⁵ Notably, neither the GC (who also investigated Local 175's ULP Charge at the Region) nor any other individual from Region 29 ever contacted Farrell and/or Getiashvili to take their sworn affidavits. (Tr. 1055-56, 1135).

Furthermore, Chaikin practically admitted Local 175's refusal to meet with NY Paving in his February 13, 2020 email to Farrell, wherein he stated, "[a]s for Arbitrator Nadelbach's decision, until we have resolution of the 'damages' issue regarding crew size arbitration the parties are not in a position to fully explore its ramifications." (GC 16, NYP 179, p. 3). When Rocco was asked on cross-examination regarding this statement, he (Rocco) denied knowledge and referred the question to Chaikin. (Tr. 245). The fact that the GC did not call Chaikin to testify regarding this statement and/or about the February 6th telephone conversation with the Respondent's attorneys is thus significant in light of the available documentary evidence. The only conclusion that can be drawn is that Chaikin would have corroborated Farrell and Getiashvili's statements, thereby warranting an adverse inference.¹⁶

POINT IV

RESPONDENT PROVIDED LOCAL 175 ADVANCE NOTICE AND OPPORTUNITY TO BARGAIN REGARDING THE EMPLOYEE LAYOFFS, WHICH RIGHT LOCAL 175 WAIVED, AND THEREFORE NY PAVING DID NOT VIOLATE SECTIONS 8(a)(1) AND (5) OF THE ACT.

A. Respondent Was Not Obligated to Provide Charging Party Union Advance Notice and Opportunity to Bargain Over Well-Established Past Practice and/or Its Entrepreneurial Decisions.

Employers whose employees are represented by a union have a duty to refrain from unilaterally changing any term or condition of its unit employees' employment that constitutes a mandatory subject of bargaining without first giving the union notice and opportunity to bargain over the proposed change. *NLRB v. Katz*, 369 U.S. 736 (1962). Respondent in this case did not run afoul of the foregoing requirement for several reasons as discussed below.

¹⁶ Even if drawing adverse inference in this case is not warranted – which it clearly is – Getiashvili's and Farrell's testimonies regarding the statements made by Chaikin during the February 6th telephone conversation remain uncontroverted. Therefore, the GC's failure to call Chaikin as a rebuttal witness, given his fiduciary responsibility to Local 175, is nevertheless compelling evidence that had he been called during rebuttal, Chaikin would not have contested the statements described by Getiashvili and Farrell. *See Precoat Metals*, 341 NLRB 1137, 1181 (2004).

An employer is entitled to lay off employees without providing the union notice and an opportunity to bargain if the practice occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enfd. mem.* 112 Fed. Appx. 65 (D.C. Cir. 2004). A past practice is defined as an activity that has been “satisfactorily established” by practice or custom; an “established practice”; an “established condition of employment;” and a “longstanding practice.” *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *see also, Golden State Warriors*, 334 NLRB 651 (2001); *Dow Jones & Co., Inc.*, 318 NLRB 574, 578 (1995). “[A]n activity ... becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, *e.g.*, over an extended period of time, that employees could reasonably ... be expected to continue.” *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB at 353, *citing Sykel Enterprises*, 324 NLRB 1123 (1997); *Blue Circle Cement Co.*, 319 NLRB 661 (1995); *Lamonts Apparel, Inc.*, 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel*, 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida*, 144 NLRB 311 (1963); and *The American Lubricants Co.*, 136 NLRB 946 (1962).

Here, Respondent demonstrated a consistent past practice of laying off its paving employees in the winter season and thus was not obligated to bargain with Local 175 regarding the employee layoffs effective January 1, 2020. NY Paving’s asphalt operations experience the typical “slow down” associated with the cold winter months resulting in the lay-off of the asphalt employees. (Tr. 687-89, 941-44, 945). Indeed, in the numerous prior proceedings at the Board and various other forums, Local 175 has never disputed that the amount of asphalt work available at NY Paving is significantly reduced in the winter season. For example, Your Honor

noted the following: “It is undisputed by the parties that there is generally less work in the colder months because the weather interferes with the various work processes.” *See New York Paving, Inc.*, 370 NLRB at p. 10, n. 12; *see also* Judge Gollin’s Decision, pp. 20-21 (“Respondent was nearing the start of its slower winter season.”); GC Ex. 14, NYP 32, p. 10 (“Well most of the work is done in the spring and fall. Obviously, the summer is a little slower ‘cause people take vacation. Winter is obviously bad weather, but the work obviously is predicated on the weather for concrete asphalt.”)).

Miceli testified NY Paving’s operations always slowdown in the winter, particularly around Christmas. (Tr. 74-75). It is further undisputed numerous factors contribute to the historic annual slowdown in the paving industry, including the weather conditions, the employees taking vacations around Christmas, closing of the asphalt plants, and the fact NY Paving receives less work from its top two (2) paving clients, National Grid and Hallen because they are closed as well. (Tr. 941-45). Zaremski similarly testified the winter slowdown is “historical” at NY Paving due to the cold weather and snow, and also because most asphalt plants in fact shut down. (Tr. 688). Both Holder and Wolfe confirmed certain factors in the winter, such as cold weather and/or inclement weather, affect NY Paving’s ability to engage in asphalt paving resulting in employee layoffs. (Tr. 293-95; 370-70).

Respondent’s proven past practice of the seasonal slowdown in its business and related employee layoffs is also demonstrated by the available documentary evidence. Annexed hereto as Appendix 1, please see the chart of the number of hours worked by the Local 175 members at NY Paving from January 2016 through September 2020, as well as the corresponding number of Local 175 members employed during each of the foregoing months.¹⁷ As demonstrated by the

¹⁷ The information contained in Appendix 1 (*i.e.*, the total monthly hours worked as indicated in the “WORK” column at the end of the underlying monthly payroll reports, and the total number of Local 175 members employed

foregoing, the number of hours worked by Local 175 members in the months of January and February have consistently decreased compared to the prior months in February 2016, January and February 2017, January 2018¹⁸, and January 2019. The number of Local 175 employees working similarly decreased in February 2016, January and February 2017, January 2018, and January and February 2019. *See* Appendix 1.

Based on the foregoing testimonial and documentary evidence, the historic slowdown of NY Paving's asphalt paving operations in winter, particularly in the months of January and February, cannot be disputed. Furthermore, Respondent has also demonstrated due to the slowdown in business, it lays off asphalt paving employees in the winter.¹⁹ Thus, and given the foregoing well-established past practice, NY Paving's seasonal employee layoffs became a term and condition of employment of Local 175 members, thus placing Respondent's actions outside *NLRB v. Katz's* mandate.

The GC will argue the layoffs at issue herein were different from the prior historic layoffs and thus do not qualify as the established past practice. As an initial matter, he will undoubtedly state NY Paving admitted it never previously announced layoffs to the members of Local 175, particularly in writing. (Tr. 74-75). However, the record in this case is clear that the historic seasonal layoffs were compounded in December 2019/January 2020 by several occurrences that

as indicated in “# EMPLOYEES” at the end of each monthly payroll report) is derived exclusively from GC Ex. 3. Indeed, there is a corresponding citation to GC Ex. 3 for each monthly entry (both total hours worked and the number of Local 175 employees). Thus, the empirical data contained in Appendix 1 is based solely on the record evidence and does not contain any information that is not in evidence. The “percentage change” columns for each particular month indicate percentage increase or decrease compared to the entries/values in the prior month.

¹⁸ Please note the number of hours worked in January 2018 decreased drastically to 3,421.5 compared to 10,028.5 hours worked in December 2017, which is equivalent to a 65.88% decrease. *See* Appendix 1. In comparison, the percentage decrease in the number of hours worked by Local 175 members from December 2019 to January 2020 was 61.16%, which is *lower* than the percentage decrease the previous winter season. *See* Appendix 1.

¹⁹ Given NY Paving's past practice of seasonal employee layoffs, it was not necessary for the Respondent to reference same in the Shut-Down Announcement. (GC Ex. 2).

were not typical of the prior years, to wit, the necessity to completely change NY Paving's asphalt paving operations to allow for the anticipated implementation of the 7 and 3 crew sizes (Tr. 82), as well as the unexpected retirement of Zaremski. (Tr. 944-50). These additional factors, which did not exist in the prior years, not only justified the written layoff announcement, but also amplified the degree and severity of the employee layoffs in January 2020. Despite Respondent adopting its practices to the new circumstances, NY Paving nevertheless did not have an obligation to provide Local 175 notice and opportunity to bargain because they were precisely the types of entrepreneurial decisions the Supreme Court excluded from *NLRB v. Katz's* mandate.

NY Paving was not obligated to provide the Charging Party Union notice and opportunity to bargain over its managerial decision to cease or significantly downsize its asphalt operations due to the unplanned retirement of Zaremski and the anticipated transformation of the entire asphalt paving operation to accommodate the implementation of the Liability Award concerning crew sizes. As stated by the Supreme Court, an employer is not obligated to bargain over entrepreneurial decisions involving a change in the scope and direction of the enterprise. *First Nat. Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 677 (1981); *see also Rigid Pak Corp.*, 366 NLRB No. 137, p. 4 (July 25, 2018) (“Respondent’s decision to abandon blow-molding manufacturing involved a significant change in the scope and direction of its enterprise and was thus not subject to mandatory bargaining.”); *Salem Hospital Corp.*, 363 NLRB No. 56, p. 7 (Dec. 2, 2015) (“Respondent had the right to make the management decision to close the inpatient obstetrics unit and discontinue administering the [medical] program.”).

As it pertains to the necessity for NY Paving to completely transform its long-term asphalt operations to accommodate the implementation of the 7 and 3 paving crew sizes, the

record evidence is both uncontroverted and abundant. Both Miceli and Zaremski testified in this regard while the GC and Local 175 have presented absolutely no evidence to disprove same. Miceli and Zaremski's testimonies are thus uncontradicted. Miceli's testimony was also consistent with his prior testimony during the Damages Hearing.

In sum and substance, as a result of the Liability Award, NY Paving was obligated to completely change its asphalt paving operations, which existed for at least the past thirty (30) years. (Tr. 899-02; Resp. Ex. 2, NYP 203-204). The most significant change was the implementation of "bundling" of the work tickets. Essentially, whereas before the change, NY Paving completed the client work orders as they were received, after the change, NY Paving accumulated the tickets, and sent out larger crews in a particular area once there were sufficient work orders in said area to justify the cost of a larger crew. (Tr. 902-06). According to Miceli, this was the only way NY Paving could justify the potential increase in labor costs relative to existing client contracts, which were previously bid assuming significantly smaller crew sizes. (Tr. 902-06). Notably, this change in operations affected not only Local 175, but also the members of other unions, including Local 1010:²⁰

Because if we have to bundle the work, it's not like we're digging the holes and then leaving them out there for a month or two before they -- you guys -- you know, until the 175 guys top them, so obviously, we don't dig out the holes until

²⁰ Annexed hereto as Appendix 2, please see the comparison of the monthly hours worked and the number of employees for Local 175 and Local 1010 from June 2019 through September 2020. The information contained in Appendix 2 (*i.e.*, the total monthly hours worked as indicated in the "WORK" column at the end of the underlying monthly payroll reports, and the total number of Local 175 and Local 1010 members employed as indicated in "# EMPLOYEES" at the end of each respective monthly payroll report) is derived exclusively from GC Ex. 3 and GC Ex. 4. Indeed, there is a corresponding citation to GC Ex. 3 and GC Ex. 4 for each monthly entry (both total hours worked and the number of Local 175 and Local 1010 employees). Thus, the empirical data contained in Appendix 2 is based solely on the record evidence and does not contain any information that is not in evidence. The "percentage change" columns for each particular month indicate percentage increase or decrease compared to the entries/values in the prior month.

Local 1010 hours and the number of members employed was affected by the seasonal winter layoffs, as well as NY Paving's implementation of the "bundling" system. For example, both the total hours worked as well as the number of Local 1010 employees consistently decreased in January and February 2020. *See* Appendix 2.

we have enough work in the area to go dig them. So everybody is delayed, not just 175. Everybody's delayed.

(Tr. 1021-22; *see also* Tr. 943, 1039-40). To the extent the typical seasonal lay-offs were more pronounced in January 2020, it was due to the foregoing drastic change in NY Paving's operations. Therefore, NY Paving's decision, rather than an alteration of terms and conditions of Local 175 members, was a core entrepreneurial decision regarding the direction of NY Paving's business operation which did not trigger the obligation to engage in decisional bargaining with Local 175 or any other labor organization.

The layoffs at issue in this case were also related to the unexpected retirement of Zaremski, which also is part and parcel of NY Paving's entrepreneurial decision to change its paving operations. As more fully described above, the record evidence is clear that NY Paving did not have a significant advance notice of Zaremski's retirement on December 20, 2019. (Tr. 717). Zaremski's retirement significantly affected NY Paving's ability to continue its asphalt paving operations without interruption given Zaremski's key role. (Tr. 944-50). Even though he was replaced by Fogarelli, another NY Paving employee and Local 175 member, Fogarelli admittedly did not have the same working knowledge of, and experience with, the asphalt paving operations as Zaremski did. (Tr. 944-50) Even by Holder's own admission, whenever Fogarelli was in charge, asphalt paving crews had to work longer hours because Fogarelli did not know the job as well as Zaremski. (Tr. 363-64).

The GC elicited testimony regarding whether Zaremski's prior vacations significantly disrupted NY Paving's operations. As an initial matter, both Holder and Wolfe admitted they did not have personal knowledge of NY Paving's operations in Zaremski's absence. (Tr.296-98, 389-91). More importantly, it is uncontradicted Zaremski took vacation once a year, which vacation did not last longer than one (1) week (five (5) business days); in fact, Zaremski did not

take any vacations in 2019. (Tr. 677-81, 734-36). It is beyond peradventure an occasional absence for no longer than one (1) week cannot compare with the permanent retirement of the senior management official in charge of the asphalt operations. Finally, and to the extent the GC is going to argue that Zaremski did not in fact retire and NY Paving somehow colluded with the Local 282 Funds, any such suggestion is not only unsupported by the record evidence, but also completely ludicrous. There is also no evidence demonstrating Zaremski continued performing work for NY Paving after his retirement on December 20, 2019 and prior to his return on March 6, 2020. (Tr. 745-51).

Thus, the decision to drastically reduce the asphalt paving operations and lay-off certain Local 175 members in January 2020 was related, in part, to NY Paving's change in operations due to the implementation of the Liability Award and sudden retirement of Zaremski. It was an entrepreneurial decision involving a change in the scope and direction of NY Paving and thus Respondent was not obligated to bargain with Local 175 over said decision.

B. NY Paving Provided Local 175 Advance Notice and Opportunity to Bargain Regarding Its Decision to Shut-Down Asphalt Operations and Lay-Off Employees, and Local 175 Waived Its Right to Bargain.

Even if NY Paving's announcement on December 20, 2019 to shut-down its asphalt operations and lay-off its asphalt paving employees in January 2020 constituted a change in the term and condition of employment – which it was not – NY Paving complied with its obligation and provided Local 175 advance notice and opportunity to bargain. Local 175, however, failed to request either decisional or effects bargaining, and thus waived its right to do so.

“[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.” *Jim Walter Resources, Inc.*, 289 NLRB 1441 (1988), quoting *Clarkwood Corp.*, 233 NLRB 1172 (1977); see also *Haddon Craftsmen*, 300 NLRB 789 (1990). It is well settled that

“full and formal” notice of a proposed change in terms and conditions of employment is not required before a union incurs an obligation to request an employer bargain over said proposed changes. *Medicenter, Mid-South Hosp.*, 221 NLRB 670 (1975); *United States Lingerie Corp.*, 170 NLRB 750 (1968); *see also YHA, Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993). The Board has stated “where a union had actual notice of an employer’s intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the employer may not be faulted for failing to afford formal notification.” *Medicenter, Mid-South Hosp.*, 221 NLRB at 678.

In this case, NY Paving provided Local 175 clear and unequivocal notice on December 20, 2019 regarding its decision to shut-down its asphalt paving operations and lay-off Local 175 members due to the retirement of Zaremski and the anticipated implementation of the Liability Award. In this regard, the witnesses testified on December 20, 2019, NY Paving’s management (including Coletti and Miceli) met with the paving foremen (including the Local 175 and Local 1010 foremen). (Tr. 86-87, 280-84, 733-34, 950-53). During this meeting, Coletti and Miceli announced the employee layoffs as well as the anticipated change in NY Paving’s operations due to the implementation of the crew sizes comprised of 7 and 3 paving employees, along with the “bundling” of the work orders. (Tr. 86-87, 280-84, 733-34, 950-53). NY Paving thereafter distributed the Shut-Down Announcement (GC Ex. 2) to the foremen. (Tr. 733-34, 950-53). Both Miceli and Zaremski testified regarding the foregoing announcement and the distribution of GC Ex. 2. (Tr. 733-34, 950-53). Farrell also testified GC Ex. 2 was distributed on December 20, 2019. (Tr. 779-82). Even though Wolfe testified GC Ex. 2 was not distributed during the December 20th meeting, given his questionable credibility, Miceli and Zaremski should be credited in this regard. Importantly, Holder testified prior to receiving GC Ex. 2 in his paycheck,

he heard rumors regarding the shutdown of asphalt paving operations and employee layoffs. (Tr. 367). Thus and by virtue of announcing the layoffs on December 20th and distributing GC 2 to the Local 175 foremen and Shop Steward, NY Paving provided Local 175 notice on that date. Holder further stated when he received GC Ex. 2, he took a picture of it and sent it to Local 175. (Tr. 432).

As it pertains to the long-term effects of NY Paving's eventual implementation of the Liability Award, it cannot genuinely be argued Local 175 did not have advance notice the employees would be laid off (including foremen) once NY Paving implemented the Award. Both Farrell and Miceli testified they advised Local 175, as early as October 25, 2019, that once NY Paving implemented the Liability Award, employees would be laid off. (Tr. 584-88, 807-11, 862-67, 968-69). Miceli and Farrell's testimonies should be credited in this regard because their statements are corroborated by the available documentary evidence, to wit, Miceli's testimony during the Damages Hearing on October 25th:

Q: Just so the record is clear, if you're forced to have a seven and three crew size, will men be laid off?

A: Yeah, absolutely.

Q: Will foremen be laid off?

A: That's a definite.

Q: Will the men receive a significant cut in their salaries?

A: Yes.

Q: Will the men basically have their overtime basically eliminated or significantly decreased?

A: Yes.

Q: Is that caused -- is that something New York Paving wants or is that in response to what is the change in the operations as required by any ruling by the arbitrator?

A: The latter. (GC Ex. 14, NYP 38, p. 16).

We've -- I've never operated under a seven and three system. We certainly are planning if we have to go to seven and three that the men will be cut significantly, the work will be bunched together in a much more consolidated area, and we will hit the work totally different than we're doing it now. (GC Ex. 14, NYP 39, p. 17).

Q: Attorney Rocco used the word “speculation” which I objected to. I'm going to ask you to explain on what -- two questions. First of all, on what level of certainty, if you can use an adjective, do you think employees will be laid off, overtime will be reduced, foremen will be laid off. Is it --

A: 100 percent.

Q. Okay. I guess that's pretty certain. Why do you think it's going to be 100 percent? In [granular] detail so no one thinks it's speculation. And first of all, when you had this discussion who did you consult with?

A: I spoke with Bob [Coletti] and Robert [Zaremski].

Q: Who is Robert [Zaremski]?

A: He's in charge the asphalt guys.

Q: Can you describe why you think it's 100 percent and not speculation? ...

A: ... So the only way we found -- and in a very short period of time we've only discussed it maybe two or three times since the ruling -- the only way we've thought we could possibly do it is get all the work back inhouse, group it, hold on to it, sit on it, wait until you have enough work to hit an area and then go there with maybe three or four dig-out crews and have one seven-man top gang come behind the four or five dig-out crews in a particular area at one time. That way you have enough volume of work where you can put the seven guys out there to go do the work. ... And will go with the work -- instead of going as the work comes in, we'll hold the work and do it before the expiration of the permit; not getting it done quickly 'cause that's not going to help us anymore. Now getting the work done within the time frame of the permit at the most volume to take advantage of seven men topping the work. That's going to be the case. That's going to be the key and how that's going to work. ... It's just -- we don't see any way to do it other than that way ... I don't see any other way.

(GC Ex. 14, NYP 45-46, pp. 23-24). The GC and the Charging Party Union will undoubtedly argue any off-the-record conversation and testimony on October 25th regarding the effects of NY Paving's implementation of the larger crew sizes was somehow uncertain and did not provide Local 175 any advance notice regarding NY Paving's intended actions. However, Miceli's foregoing testimony on October 25th provided Local 175 with sufficiently clear and certain advance notice regarding NY Paving's anticipated actions relative to the implementation of the larger crew sizes. Miceli, in no uncertain terms, advised Local 175 (including Rocco and Chaikin) NY Paving was going to implement the Liability Award, which would definitely result in the employee layoffs, including the layoffs of the foremen.

In addition to the foregoing, Farrell specifically advised Rocco and Chaikin on October 25, 2019 that NY Paving's implementation of the 7 and 3 crew sizes would undoubtedly result in the layoffs of Local 175 members. By Rocco's own admission, Farrell informed Local 175 on October 25, 2019 "a lot of men" would be out of work. (Tr. 111). Farrell in fact told Chaikin the layoffs would occur and Local 175 should not file an unfair labor practice charge in connection with same. (Tr. 549; *see also* GC Ex. 14, NYP 30, p. 8: "an adoption of a seven and three system will lead to layoffs, which the union is aware of.").

For the reasons discussed in detail hereinabove, Rocco's testimony in this regard should not be credited given the self-serving nature of his statements. For example, when testifying on cross-examination regarding Miceli's testimony on October 25, 2019, Rocco conveniently could not remember Miceli's statements regarding the likelihood of the employee layoffs even though he asked Miceli detailed questions on cross-examination regarding same. (Tr. 199-201). Rather, Rocco avoided providing direct answers to the question and instead pivoted focusing on NY Paving's alleged refusal to pay monetary damages assessed by the Arbitrator. It appears Rocco conveniently forgot the Liability Award did not concern solely monetary damages but rather addressed NY Paving's violation of the contractual crew size requirement. Indeed, the Arbitrator stated the following:

And while the Union's failure over the years to file a grievance or to protest the Company's contract violation may not be readily understood, **that failure does not prevent the Union from insisting on strict compliance with the clear contract language in the future**, in the absence of an agreement between the parties to amend or revise the contract language, **the Union in the future can rely in the clear contract language long ago negotiated.**

In conclusion, therefore, there is no justifiable basis in the records for the Company to have ignored the clear and unambiguous contract language setting forth utility asphalt paving crew sizes.

(GC Ex. 11, pp. 13, 14) (emphasis added). The Liability Award required NY Paving and Local 175 to negotiate regarding “the appropriate remedy” and “applicable damages.” (GC Ex. 11, p. 14). Thus, Local 175’s focus on solely monetary damages is both misplaced and misleading. The Liability Award clearly provided for NY Paving’s *future* obligation to comply with the crew size requirements, *in addition to* paying monetary damages to Local 175. By Rocco’s own admission, even if the Arbitrator awarded no monetary damages, the Liability Award nevertheless required NY Paving to implement the 7 and 3 crew sizes. (Tr. 321, 323). On cross-examination, Rocco also admitted if NY Paving did not comply with the crew size requirements set forth in the Agreement Between the New York Independent Contractors Alliance, Inc. (“NYICA”) and Construction Council 175, Utility Workers of America, AFL-CIO (“NYICA CBA”) (GC Ex. 9) in the future, Local 175 would certainly take actions to enforce same (“We would certainly try to do something ... it can’t be no remedy.”) (Tr. 193). Therefore, Local 175’s position that it did not realize NY Paving would implement the larger crew sizes simply makes no logical sense – there was absolutely no reason for NY Paving to allow the potential future liability to accrue while Local 175 awaited the Arbitrator’s decision on monetary damages knowing Local 175 would again attempt to enforce the crew size requirement.²¹ When considered in conjunction with Miceli’s unequivocal testimony on October 25, 2019, Local 175 cannot credibly argue it had no notice of NY Paving’s intended implementation of the larger

²¹ According to Farrell, NY Paving’s delay in implementing the Liability Award increased its potential monetary liability:

So if your answer -- if you're asking what was the final arbitral fact, the final arbitral fact was not meeting on the December 16th, realizing we were being strung along, realizing that we had delayed this for six months and -- seven months and Matt was going to want another \$1-1/2 to 2 million for our delay trying to meet, having an award that needed to be implemented.

(Tr. 585).

crew sizes and concomitant employee layoffs. Any such argument defies logic, is nonsensical and simply not supported by the record in this case.

Hartmann Luggage Co., 173 NLRB 1254 (1968) is instructive in this regard. In that case, the Board adopted the ALJ's decision the union was sufficiently noticed of employee layoffs, and waived its right to bargain over said layoffs. *Id.* at 1254-55. Although there was no direct communication to a union official, members of the union's bargaining committee were advised of the proposed layoffs on January 18, 1968 when the employer announced the layoffs in a speech to employees. *Id.* at 1255. During the speech, the employer announced, due to economic considerations, layoffs would be effective January 22, 1968. *Id.* at 1254. The Board adopted the ALJ's determination the employer's "failure to give formal notification directly to the Union under these circumstances does not render ineffectual or inoperative the notice actually received by [the Union]." *Id.* at 1255. "While only 4-1/2 days' notice was given prior to effecting the layoffs, I find in a matter so crucial as layoffs such time was adequate to alert and afford the Union an opportunity to protest and or request consultation in the matter." *Id.* at 1255-56. Thus, "the Union failed to exercise diligently its right to demand discussion or bargaining, and cannot claim a failure to bargain on the part of [the employer]." *Id.*

Similar to *Hartmann Luggage Co.*, Local 175 had concrete notice of NY Paving's anticipated employee layoffs as early as October 25, 2019 and definitely on December 20, 2019. The record evidence unequivocally demonstrates both Miceli and Farrell advised Local 175 regarding the anticipated employee layoffs once NY Paving implemented the Liability Award. Indeed, and based on Miceli's testimony and contrary to Rocco's unreliable statements, NY Paving anticipated to lay off employees absent any alternative solutions reached during the requested bargaining with Local 175.

Likewise, in *Kentron of Hawaii Ltd.*, 214 NLRB 834, 835 (1974), the Board held: “When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.” *See also U.S. Lingerie Corp.*, 170 NLRB at 751–752, where the Board declined to find a Section 8(a)(5) violation regarding an employer’s relocation because, according to the Board, “the Union had sufficient notice of Respondent’s intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights to bargain.” In *Carter Hawley Hale Stores, Inc.*, 221 NLRB 1211, 1214 (1975), the employer did not unlawfully fail to bargain over subcontracting when the union representative, after learning of the employer’s plans, “simply requested that Respondent not contract out,” complained that the contractor refused to recognize the union, asked whether the respondent would “do something about this” and “took the position that . . . Respondent had violated its bargaining agreement,” but where the union “never tested Respondent’s willingness to satisfy its bargaining obligation.” In *Medicenter, Mid-South Hospital*, 221 NLRB at 679, the employer was found not to have unlawfully failed to bargain over polygraph testing where the union “showed no inclination to do anything but object” and failed to request bargaining. The foregoing cases all stand for the same proposition: there can be no Section 8(a)(5) violation unless the union, after learning of an employer’s planned changes regarding a mandatory bargaining subject, makes a request that “clearly indicates a desire to negotiate and bargain.” *See Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971) (emphasis added).

The GC will likely argue despite Miceli’s statements, NY Paving nevertheless violated the law because it did not inform Local 175 regarding the specific date when NY Paving intended to implement the Liability Award. As an initial matter, the law does not require the

employers to provide such specific notice; in this case, Local 175 had sufficient information in its possession effective October 25, 2019 and through December 2019 regarding Respondent's position and plans to implement the larger crew sizes. Further and most importantly, NY Paving attempted to meet with Local 175 to discuss the anticipated implementation but Local 175 repeatedly refused to meet. Rocco's testimony in this regard is instructive. He admitted Local 175 knew as early as October 30, 2019 it (Local 175) did not want to meet with the Respondent so as to not delay the Arbitrator's decision on monetary damages. (Tr. 218). Thus, despite Farrell's repeated requests on behalf of NY Paving, the Charging Party Union refused to meet. It appears Local 175 prioritized the potential for receiving almost a Ten Million Dollar award from the Arbitrator over the possibility of meeting with the Respondent. Stated differently, Local 175 elected to wait for the damages in the hopes of obtaining a victory involving millions of dollars and therefore made a decision to ignore Respondent's repeated requests for a meeting. Apparently, in Local 175's version of the events, NY Paving was also supposed to wait "on the sidelines" by not implementing the larger crew sizes even though its (NY Paving's) liability would (and did) increase during that period (as admitted by Rocco). However, when the events did not proceed as planned and NY Paving announced its anticipated implementation of the Liability Award on December 20, 2019, rather than meet with NY Paving regarding same, Local 175 elected to assert the trumped-up allegations in the underlying ULP Charge.

Importantly and contrary to the GC's allegation, layoffs were not effective on December 20, 2019.²² Rather, NY Paving's decision to lay-off Local 175 members did not become effective until on or about January 1, 2020. Despite the GC's arguments, there is absolutely no

²² At the close of the GC's case-in chief, the GC amended Paragraph 8 of the Complaint to state layoffs occurred on December 20, 2019 rather than January 1, 2020. (Tr. 448-49). Upon information and belief, the GC amended the Complaint after it realized what would be one of the Respondent's legal arguments.

evidence on the record demonstrating the layoffs were effective December 20, 2019. In fact, the Local 175 payroll records introduced into the evidence by the GC as Exhibit 3 demonstrate the contrary. Indeed, and according to those records, at least five (5) alleged discriminatees named in the Complaint worked during the week ending Sunday, December 29, 2019, including Michael Bartilucci (GC Ex. 3, NYP 916, p. 407), Norris Benjamin (*Id.*), Jonathan Oliver (GC Ex. 3, NYP 920, p. 411), German Restrepo (GC Ex. 3, NYP 921, p. 412), and William Smith (GC Ex. 3, NYP 922, p. 413). In fact, William Smith worked forty (40) hours during the last week of December 2019. (GC Ex. 3, NYP 922, p. 413). Thus, of the ten (10) Local 175 members who worked during the week ending December 29, 2019 (GC Ex. 3, NYP 916-922, pp. 407-13),²³ five (5) were the alleged discriminatees named in the Complaint and the 6th individual was Shop Steward Holder. (GC Ex. 3, NYP 919, p. 410). GC's anticipated reliance on the text message exchange between Holder and Curtney King (GC Ex. 23) also does not prove the layoffs were effective December 20th, because said text messages are all dated December 26, 2019.

Therefore and similar to *Hartmann Luggage Co.*, Respondent gave notice to Local 175 as early as October 25, 2019 and certainly on December 20, 2019 regarding the intended layoffs by announcing same during the foremen's meeting on December 20, 2019 and distributing GC Ex. 2. Furthermore, because the layoffs related to the implementation of the Liability Award, they did not become effective until at least beginning of January 2020. Accordingly, Local 175 had at

²³ By way of comparison and as further evidence that the last week in December is typically "slow" at NY Paving, only 13 Local 175 members worked in the last week of December 2018 (GC Ex. 3, NYP 822-829, pp. 313-320) and 14 Local 175 members worked in the last week of December 2017. (GC Ex. 3, NYP 729-736 pp. 220-227). Thus, the fact that only ten (10) Local 175 members worked during the week ending December 29, 2019 is not unusual and is not evidence that the crew size-related layoffs became effective on December 20, 2019. **What is significant is that of the limited work available during the last week of December 2019 (as is typical), NY Paving elected to assign said limited work to five (5) Local 175 members who were apparently (according to the GC) laid off on December 20, 2019, and also to Shop Steward Holder.**

least eleven (11) days to contact NY Paving to request bargaining, which Local 175 admittedly did not do. (Tr. 486-87). Instead of requesting bargaining with NY Paving, Local 175 filed the underlying ULP Charge on January 17, 2020. (GC Ex. 1(A)). It is also significant in the ULP Charge filed on January 17th, Local 175 did not allege Respondent violated Sections 8(a)(1) and (5) of the Act by laying off Local 175 members; rather, that version of the ULP Charge solely focused on NY Paving's alleged violation of transferring Local 175's unit work to the employees who were not members of Local 175 effective December 20, 2019. *Id.* Notably, the allegation regarding the employee layoffs did not appear until January 30, 2020, when Local 175 filed the First Amended ULP Charge. (GC Ex. 1(C)).

Once a union has notice of a proposed change to terms and conditions of employment, the union must request the employer bargain over the proposed change, or else the union waives its right to do so. *KGTV*, 355 NLRB 1283, 1284 (2010) (“Once notice is received, the union must act with ‘due diligence’ to request bargaining, or risk a finding that it has waived its bargaining right.”); *Lenz & Riecker*, 340 NLRB 143, 145 (2003) (“Once an employer gives notice of its decision and affords a reasonable opportunity for bargaining, the union has an obligation to take advantage of the opportunity by requesting bargaining. Where the union does not do so, the Board will not find a failure-to-bargain violation.”); *AT&T Corp.*, 337 NLRB 689, 692 (2002) (“It is well settled that when a union is given notice of an employer’s intent to change a term or condition of employment, the union must act with due diligence in requesting bargaining to enforce the employer’s bargaining obligation.”); *Towne Plaza Hotel*, 258 NLRB 69 (1981) (“[A]pparently for tactical purposes, the Union never demanded bargaining over the [proposed change]. In such circumstances, the Union must be held to have waived its right to bargain over the [proposed change] and I shall recommend dismissal of this allegation of the complaint.”). In

American Buslines, Inc., 164 NLRB 1055, 1055–56 (1967), there was no unlawful refusal to bargain over employee promotions that resulted in the bargaining unit’s elimination because the Board found that, upon receiving notice of the employer’s plans, “the Union failed to prosecute its right to engage in . . . discussion but contented itself by protesting the contemplated promotions . . . and by subsequently filing a refusal-to-bargain charge.”

In this case, Local 175 had clear and unequivocal notice of the anticipated employee layoffs as early as October 25, 2019 and definitely on December 20, 2019. Despite the foregoing, it is undisputed, Local 175 did not contact NY Paving or its representatives to request bargaining either before the layoffs were effectuated or any time thereafter. It is undisputed the parties attempted to schedule a meeting with the Mediator sometime in December 2019. There is also no dispute that the crew size issue was definitely going to be discussed during that meeting. (Tr. 976-77). Respondent reserved several dates for the meeting, and made its two (2) top decision-makers, Miceli and Coletti available for same. (Tr. 218-21, 224, 925-29). Local 175, on the other hand, apparently knew as early as October 30, 2019 it would not meet with NY Paving. (Tr. 218). Despite knowing his client’s position, Rocco nevertheless communicated with Farrell in October, November and December and assured him Rocco was trying to schedule a meeting. (Tr. 229-30, 824-27, 856-59).²⁴ Eventually, however, rather than meet with NY Paving, Rocco, on behalf of certain Local 175 Benefit Funds, sued NY Paving in Federal Court on December 5, 2019 seeking, among others, damages related to NY Paving’s failure to implement the larger crew sizes. (Tr. 576-82; Resp. Ex. 7, ¶¶11, 16, 29, 32-33). To be clear, at no point from October

²⁴ NY Paving again notes the duplicitous actions of Local 175, effectuated through its counsel.

25, 2019 through March 3, 2020 did Local 175 or its representatives request to meet with NY Paving.²⁵ (Tr. 584-88).

The GC repeatedly asked Farrell if he (Farrell) called the Mediator again after October 25th and/or request to reserve any dates in November 2019 or other dates in December 2019. (Tr. 771-75). This questioning created an appearance that the burden was on the Respondent to attempt to schedule a meeting (or mediation as the case may be). Despite the GC's position, the law does not impose such a burden on the Respondent. Rather, it was incumbent upon Local 175 to contact NY Paving and schedule such a meeting after October 25th when Local 175 was informed by Farrell and Miceli in no uncertain terms NY Paving's implementation of the larger crew sizes would result in the employee layoffs. Local 175 did not satisfy its statutory obligation, nor did it prove a valid exception from its statutory obligation. Local 175's explanation that it did not want to delay the issuance of the Arbitrator's decision on damages in light of the anticipated Local 1010 activity in 2020 is demonstrably false. (Tr. 113-14). As an initial matter, despite Rocco's admission Local 175 decided to not meet with NY Paving as early as October 30, 2019 (Tr. 218), he nevertheless waited for almost two (2) months (*i.e.*, until December 20, 2019 at 6:09 P.M.) to contact Arbitrator Nadelbach to request he issue the decision on damages.²⁶ (Resp. Ex. 4, NYP 156, p. 1).

Furthermore and more importantly, the record in this matter contains no evidence of any alleged Local 1010 activity at the time of Rocco's December 20th email to Arbitrator Nadelbach. Rocco testified he allegedly learned in January 2020 Local 1010 tried to get Local 175 members

²⁵ When the meeting did occur on March 3, 2020, Rocco confirmed Local 175's waiver: "In the arbitration, we are waiting for the decision on damages, and in ERISA [L]awsuit, we are seeking contributions for work that would've been done by ten (10) men crew" (or words of similar effect). (Resp. Ex. 34, NYP 8056).

²⁶ The GC attempted to get Rocco to testify the reason he (Rocco) emailed Arbitrator Nadelbach on December 20, 2019 (Resp. Ex. 4, NYP 156, p. 1) was as a result of Respondent's distribution of GC. Ex. 2 earlier that day. However, Rocco denied same and testified he was "operating in a vacuum." (Tr. 252).

to “sign cards” and that occurred around the same time Local 1010 withdrew the Petition previously filed in case no. 29-RC-197886, which withdrawal was approved on January 21, 2020. (Tr. 324; GC Ex. 21 (stating Local 1010 filed the request to withdraw on January 12, 2020)). Notably, given that the foregoing Local 1010 activity occurred in January 2020 and there is no evidence of any alleged activity prior to January 2020, it simply cannot explain or justify Local 175’s refusal to meet with NY Paving in November or December 2019.²⁷ Nor does it somehow excuse or justify Local 175’s failure to contact NY Paving during the foregoing two (2) month period to request decisional bargaining related to the implementation of the Liability Award.

In addition to Rocco’s statement Local 175 did not wish to meet Respondent, Chaikin also confirmed Local 175 refused to meet to discuss NY Paving’s anticipated implementation of the larger crew sizes. (Tr. 1076-80; Resp. 33). Chaikin in fact confirmed the foregoing admission in writing: “As for Arbitrator Nadelbach’s decision, until we have resolution on the ‘damages’ issue regarding the crew size arbitration the parties are not in a position to fully explore its ramifications.” (GC. Ex. 16, NYP 179, p. 3). By virtue of the foregoing numerous admissions, Local 175 failed to comply with its obligations under the Act, and clearly and unequivocally waived its right to bargain with NY Paving regarding the implementation of the 7 and 3 crew sizes, and the effects of same. To “add insult to injury,” while Local 175 steadfastly refused to meet with Respondent and its representatives, it continued to accuse NY Paving of

²⁷ NY Paving’s filing of the Petition to Vacate Arbitration Award on July 26, 2019 (GC Ex. 12) also did not justify Local 175’s failure to request bargaining, nor did the fact that NY Paving may potentially have filed another Petition to Vacate after Arbitrator Nadelbach issued the Damages Award. (GC. Ex. 13). Miceli’s testimony and the subsequent conversation with the representatives of Local 175 on October 25, 2019 superseded NY Paving’s filing of the Petition in July 2019. Thus, regardless of the statements contained in the Petition, Miceli made it clear to Local 175 that NY Paving would implement the larger crew sizes, which would result in employee layoffs. Local 175 was absolutely advised and put on notice on October 25, 2019 and it subsequently failed and refused to bargain with NY Paving.

failing to comply with Arbitrator Nadelbach's Liability Award requiring larger crew sizes. For example, in Local 175's Post-Arbitration Brief, dated January 24, 2020, Rocco stated:

Although the Arbitrator's Liability Award was transmitted to the parties on April 30, 2019, New York Paving refused to abide by the Arbitrator's ruling and, by its own admission, continued to violate the contract by using less than three (3) employees on the new binder work and fewer than seven (7) employees on the application of the top or final surface material.

(Resp. Ex. 14, pp. 1-2). Thus, on **January 24, 2020, after** Local 175 refused to meet with NY Paving, in support of the claim for several millions of dollars in monetary damages, Rocco told the Arbitrator NY Paving was refusing to implement the 7 and 3 crew size award. Subsequently, on June 4, 2020, in awarding Local 175 more than two-and-a-half million dollars, the Arbitrator relied, in part, on Local 175's (mis)statements concerning NY Paving's continuing violation of the CBA:

The Union again pointed to the Company's consistent violation of the collective bargaining agreement as well as its **continuous post Award obstinance**. Notably, the Union asserted, the Company **continued** to use less than the contractually required three (3) employees on new binder work and less than seven (7) employees on the application of top surface material. ...

While the ongoing violation and the corresponding failure to properly pay contractual wages and benefits may be deemed to be a **continuing violation**, there can be no award of damages granted for years prior to the time of the Union's awakening and pursuit of a contractual remedy.

(GC Ex. 17, pp. 2, 6) (emphasis added). It is important to note what transpired here. On the one hand, Rocco (and Local 175) repeatedly refused to meet with NY Paving to discuss NY Paving's implementation of the larger crew sizes. As Respondent discovered later through Chaikin's admission, apparently Local 175 did not wish to meet until the Arbitrator rendered a decision on the available monetary damages. Conversely, on January 24, 2020, Rocco submitted a brief to the Arbitrator accusing NY Paving of a continuing violation of the CBA's crew size requirement. Essentially, Local 175 leveraged NY Paving's stated desire to meet with Local 175 (which NY

Paving was repeatedly falsely advised said meeting might occur) and alleged continuous non-compliance with NYICA CBA's crew size requirements to obtain monetary damages from Arbitrator Nadelbach.²⁸ However, according to Miceli, NY Paving commenced assigning three (3) employees to the binder crews during the first week in January 2020 (Tr. 934-36), which fact Local 175 would have known, had it met with NY Paving. The only logical conclusion is that Local 175 indeed made a "strategic decision" to prioritize its effort to obtain actual monetary award from Arbitrator Nadelbach and Federal Court (by fling the ERISA Lawsuit), which would undoubtedly financially benefit Local 175's officials, including the Benefit Fund Administrator, Mr. Anthony Franco, rather than engage in a constructive dialogue with the Respondent to try to avoid employee layoffs. Local 175's strategy is as transparent as it is unfortunate for its rank-and-file members.

The first communication between the parties after the layoffs were effectuated did not occur until January 30, 2020 and said communication was initiated by Respondent's counsel.²⁹ (GC Ex. 15). During subsequent email communications in February 2020, even though Local 175 agreed to meet, it preconditioned any such meeting on the requirement to discuss matters that were entirely outside the scope of the employee layoffs at issue in the instant matter. (GC Ex. 16, NYP 182, p. 6). Thus, based on Local 175's documented failure to contact NY Paving at

²⁸ This is in addition to the ERISA Lawsuit Rocco filed in Federal Court against NY Paving seeking monetary damages for, among others, NY Paving's utilization of "short" crew sizes. (Resp. Ex. 7).

²⁹ Based on the record in the prior proceedings, Local 175 and NY Paving have a long history of labor relations, which has included in the past numerous unfair labor practice charges, meetings and negotiations. Additionally and as is evident from the record in this matter, the parties' attorneys also know each other and communicate with each other frequently. In fact, Chaikin has sent dozens of emails to NY Paving's attorneys regarding various labor issues. Based on the foregoing history, there is absolutely no reason why Local 175, Chaikin and/or Rocco could not have contacted NY Paving, and/or Farrell and/or Getiashvili to engage in the decisional and/or effects bargaining in connection with the employee layoffs.

any point to request either decisional or effects bargaining, Local 175 has waived its right to bargain over the employee layoffs.³⁰

Merely protesting the employer's proposed change does not satisfy a union's obligation to request the employer bargain over the proposed change. *The Boeing Co.*, 337 NLRB 758, 763 (2002) ("A union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by protesting an employer's conduct or by filing an unfair labor practice charge..."); *Clarkwood Corp.*, 233 NLRB at 1172; *Medicenter, Mid-South Hospital*, 221 NLRB at 670; and *American Buslines, Inc.*, 164 NLRB at 1056. Indeed, in *Clarkwood Corp.*, the employer posted a notice on an employee bulletin board indicating certain telephones would be removed from the premises, and posted a notice on an employee restroom indicating the restroom would no longer be available for employee use after August 14, 1976. 233 NLRB at 1172. Shortly after the aforementioned notices were posted, employees notified union officials, who then contacted the employer protesting the proposed actions. *Id.* The union officials never requested the employer bargain about removing the

³⁰ The GC has failed to establish the Agreement Between the New York Independent Contractors Alliance, Inc. ("NYICA") and Construction Council 175, Utility Workers of America, AFL-CIO, effective July 1, 2017-June 30, 2022 ("NYICA CBA") (GC Ex. 9) applies to NY Paving. Other than Rocco's vague statement regarding Local 175's position that it (Local 175) believes the NYICA CBA applies to NY Paving (Tr. 92-93), there is no record evidence conclusively establishing NY Paving is covered by same. As previously noted, it is NY Paving's position NYICA CBA does not apply to NY Paving because NY Paving adopted the terms of the prior agreement between NYICA and Local 175, effective July 1, 2014 – June 30, 2017 ("Prior CBA") by conduct even though NY Paving was not a member of NYICA, the terms of the Prior CBA continued through June 30, 2018, at which time it was terminated. See *New York Paving, Inc.*, 370 NLRB at p. 6.

In any event, even if the NYICA CBA applies to NY Paving, which it does not, Local 175 has waived its right to bargain regarding employee layoffs related to lack of work. Specifically, the article entitled "Declaration of Principles," Section (f) provides: "[t]he employer remains having the discretion to determine what work is to be performed; to assign the work and decide whether the work is performed in a satisfactory manner." (GC Ex. 9, p. 6). Because the employers, such as NY Paving, have the discretion to determine what work must be performed and to assign said work, any layoffs resulting from such decisions are expressly permitted as well. This is particularly important given the sentence immediately prior to the foregoing provision in the NYICA CBA requiring "just cause" termination and notification to Local 175 when the employees are discharged or disciplined. (GC Ex. 9, p. 6). Notably excluded from any such mandatory notification is the employer's decision to lay off employees. For these reasons, Local 175 has waived its right to bargain regarding employee layoffs pursuant to the NYICA CBA assuming *arguendo*, it was applicable to NY Paving.

phones or closing the restroom. *Id.* The Board overturned the ALJ's finding the employer violated Section 8(a)(5) by unilaterally making the proposed changes. *Id.* In dismissing the charges, the Board stated "[s]uch lack of diligence by a union amounts to a waiver of its right to bargain and that is precisely what occurred here with respect to both the pay phone and restroom changes." *Id.*; see also *Ohio Edison Co. v. NLRB*, 847 F.3d 806, 810 (6th Cir. 2017) ("to protest is to seek change by disapproval; to request bargaining, in contrast, is to seek change by signaling a willingness to offer something in return").

In *Associated Milk Producers*, 300 NLRB 561, 563 (1990), the employer sent a letter to the union on July 5, 1984 notifying the union the employer did not intend to continue contributing to the Pension Fund. *Id.* The employer's next payment was due ten (10) days later, on July 15, 1984, on which date it failed to make contributions. *Id.* Despite receiving the ten (10) days' notice, the Union did not request bargaining, but instead filed an unfair labor practice charge on July 17, 1984. *Id.* The Board stated the Union's filing of an unfair labor practice charge "did not relieve it of its obligation to request that the [employer] bargain over the proposed change," and held the Union had waived its right to bargain. *Id.*

Similar to *Associated Milk Producers*, in this case, Local 175, rather than contact NY Paving to request bargaining regarding the employee layoffs, filed the ULP Charge on January 17, 2020 (which did not even mention employee layoffs) (GC Ex. 1(A)) and subsequently amended same on January 30, 2020. (GC. Ex. 1(C)). However, and to be clear, at no point did Local 175 contact NY Paving or its attorneys from December 20, 2019 through January 30, 2020 to request bargaining or to address the employee layoffs in any manner. It thus cannot be disputed by virtue of Local 175 "sitting on its rights," it waived the right to engage in decisional

and/or effects bargaining related to the employee layoffs. The GC and Charging Party's argument(s) to the contrary must end here.

As further evidence of Local 175's unwillingness to bargain over the effects of NY Paving's implementation of the 7 and 3 crew sizes, when the parties did meet on March 3, 2020, Local 175's representatives insisted on discussing issues unrelated to the Liability Award, prior to ending the meeting abruptly in only approximately twenty-four minutes. (Resp. Ex. 34). Thus, any allegation NY Paving violated Section 8(a)(5) of the Act by failing to engage in effects bargaining with Local 175 is without merit.

Similarly, Respondent satisfied its statutory obligation(s) in connection with recalling the previously laid-off employees, while Local 175 waived its right to bargain over same. As an initial matter, Local 175 had notice as early as December 20, 2019 regarding the potential recall of employees effective March 2020. (GC Ex. 2). Respondent provided additional notice in its January 30, 2020 letter, requesting meeting in an expeditious manner before the "resumption of NY Paving's usual spring schedule." (GC Ex. 15, p. 3). NY Paving again advised Local 175 on February 12, 2020 NY Paving would be resuming its asphalt paving operations "earlier than usual" due to "unseasonably warm weather," and requested a meeting in connection with same. (GC Ex. 16, NYP 180, p. 4). As a result of the **Respondent's request to meet**, the parties did meet on March 3, 2020, however, Local 175's representatives made it abundantly clear they did not wish to discuss either the employee layoffs and recalls, or the implementation of the larger crew sizes. Instead, Mr. Anthony Franco demanded NY Paving re-assign the "dig-out" work back to the members of Local 175 (contrary to the Board's Section 10(k) Decision in *New York Paving, Inc.*, 366 NLRB No. 174 (Aug. 24, 2018)), and threatened that Local 175 would send all

the good workers to work at NY Paving's competitor companies unless NY Paving complied.³¹ Thus, NY Paving satisfied any obligation it may have had under Section 8(a)(5) of the Act to bargain with Local 175 regarding the recall of the previously laid-off employees.

To the extent the GC and/or Charging Party Union are going to argue Local 175 was not required to request bargaining from NY Paving because any such request would have been futile, their argument has no basis in law or fact. A union may be excused from the bargaining request requirement if the employer has made it clear that it has no intention of bargaining about the issue. *KGTV*, 355 NLRB at 1284. However, a "*fait-accompli* finding requires objective evidence; a union's subjective impression of its bargaining partner's intention is insufficient." *Id*; see also *Bell Atl. Corp.*, 336 NLRB 1076, 1086 (2001); *NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 244. App'x 104, 115 (4th Cir. 2001).

In *KGTV*, the Board reversed the ALJ's finding the employer's decision to lay off three (3) employees was a *fait accompli*. 355 NLRB at 1284. There, the Board found (1) the fact the union filed two grievances about the layoff decision did not demonstrate the employer had no intention of bargaining about the layoff decision; (2) the employer's simultaneous notice to the union and employees did not indicate the employer would refuse the union's bargaining request; and (3) the union's subjective belief the employer's notice was a *fait accompli* because the notice invoked a section of the expired collective bargaining agreement addressing layoffs was unsupported by objective evidence and insufficient to excuse the union's failure to request

³¹ Indeed, Mr. Anthony Franco issued the following threat during the March 3, 2020 meeting:

"You're never going back to 4 and 2 crew sizes; maybe, 5 and 2 but not 4 and 2. Tri-Messine is going to call me for more work and I'm going to take your men and give them to Tri-Messine, and you'll be stuck with unskilled men. Plus, there's prevailing wage complaint filed with National Grid. Get ready, it's coming your way" (or words of similar effect).

(Resp. Ex. 34, NYP 8057).

bargaining. *Id.* at 1284-1285. As such, the Board held “Respondent did not unlawfully refuse to bargain over the layoff decision, given the Union’s failure to request bargaining.” *Id.* at 1284.

In this case the GC and/or the Charging Party Union cannot argue Local 175 did not request bargaining with NY Paving because it (Local 175) believed any such bargaining would have been futile. As an initial matter, there is no evidence on the record (testimonial or documentary) demonstrating Local 175’s subjective and objective belief. In fact, Priolo, despite his perjury, stated Local 175 did not request a meeting with NY Paving from October 25, 2019 through March 3, 2020 even though he believed a meeting between parties would have been a good idea. (Tr. 485-89). Notably absent from Priolo and Rocco’s testimonies is any indication Local 175 believed that requesting bargaining from the Respondent would have been futile.

In fact, the opposite is true because the record in this case is replete with NY Paving’s repeated attempts to schedule a meeting with Local 175 as early as October 25, 2019 by reserving dates and making its top two (2) decision-makers available to participate. (Tr. 925-26). To further demonstrate the anticipated *fait accompli* argument has no merit, both Rocco and Chaikin admitted it was Local 175, not NY Paving that did not wish to meet. (Tr. 218, 1076-80; Resp. Ex. 33; GC Ex. 16, NYP 179, p. 3). Indeed, Rocco testified as early as October 30, 2019, he knew Local 175 did not want to meet with NY Paving and rather wished to proceed to the damages decision. (Tr. 218). Chaikin similarly admitted Local 175 made a “strategic decision” to not meet with NY Paving until the crew size damages issue was resolved. (Tr. 1076-80; Resp. Ex. 33; GC Ex. 16, NYP 179, p. 3). Clearly, Local 175 had already made its decision regarding its plans and had absolutely no intention to meet with NY Paving and bargain in good faith. Thus, it appears it was NY Paving that faced *fait accompli* from Local 175, not the other way around.

Given the absence of any objective evidence supporting bargaining futility, in conjunction with the undisputed evidence demonstrating Local 175's refusal to meet, any anticipated *fait accompli* argument must necessarily fail. The objective evidence is clear: NY Paving attempted to engage in bargaining with Local 175 on several occasions, both before and after announcing and implementing the layoffs. Accordingly, any allegation Local 175 was presented with a *fait accompli* is demonstrably false.

For the foregoing reasons, Respondent did not violate Sections 8(a)(1) and (5) of the Act.

POINT V

RESPONDENT DID NOT DISCRIMINATORILY LAY-OFF THE NAMED DISCRIMINATEES AND THEREFORE DID NOT VIOLATE §8(a)(1) AND (3) OF THE ACT.

In *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Board set out the appropriate analytical standard for assessing the Section 8(a)(1) and (3) violations alleged in this case. *Wright Line* is the analysis in 8(a)(1), (3), and (4) cases turning on employer motivation for action against employees allegedly motivated by their statutorily protected activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983); *American Gardens Management Co.*, 338 NLRB 644, 645, n. 7 (2002); *Verizon*, 350 NLRB 542, 546-47 (2007); *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006); *SW Design School, LLC, d/b/a Interns4Hire.com, K12 Coders, and SW Design School, L3C*. 370 NLRB No. 77, p. 10 (Feb. 10, 2021).

Under *Wright Line*, the General Counsel ("GC") has the burden of persuading by preponderance of the evidence that: (1) the employee was engaged in protected concerted activity; (2) the employer was aware of that activity; (3) the protected activity of the employee was a substantial motivating factor in the employer's decision; and (4) there was a causal connection between the employer's *animus* and its discharge decision. *Animus* can be

established through direct evidence or inferred from circumstantial evidence. *See Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of *animus* and discriminatory motivation”). If the GC establishes these factors, the burden of persuasion then shifts to the employer to show that it would have made the same decision in the absence of the employee’s protected activity. *Wright Line*, 251 NLRB at 1089. The employer cannot meet its burden merely by showing it had a legitimate reason for its action; rather, it must show it would have taken the same action in the absence of the protected conduct. *See Bruce Packing Co.*, 357 NLRB 1084, 1086-87 (2011), *enfd. in pertinent part* 795 F.3d 18 (D.C. Cir. 2015); and *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

In this case, the GC failed to establish the *prima facie* case of the violation of Sections 8(a)(1) and (3) pertaining to the alleged discriminatees, while NY Paving proved beyond question that it would have taken the same action in the absence of any alleged protected or union activity.

A. The GC Has Not Established Anti-Union Animus By a Preponderance of Evidence.

To establish a violation of Section 8(a)(3) in cases where unlawful discharges are alleged, the GC has the burden to prove that the discharges were motivated by employer antiunion *animus*. *Roemer Industries*, 367 NLRB No. 133, p. 15 (May 23, 2019). “Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union

affiliation, and an employer's deviation from past practice.” *Id.*; see also *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), *denying rev.* 311 NLRB 1118 (1993). The General Counsel must do more than produce *any* evidence of *animus* or hostility toward union or other protected activity; rather, the evidence must be sufficient to establish a causal relationship between the employee’s protected activity and the employer’s adverse action against the employee.” *Volvo Group North America, LLC*, 370 NLRB No. 52, p. 2 (Dec. 3, 2020); *Tschiggfrie Properties, LTD*, 368 NLRB No. 120, p. 1 (Nov. 22, 2019). The GC in this case has failed to satisfy the foregoing standard.

Here, the GC’s theory of the case is that during the relevant period, Respondent laid-off the alleged discriminatees to retaliate against them and Local 175 due to the Charging Party Union’s pursuit of the crew size grievance, as well as other litigations against NY Paving (including the FLSA Lawsuit), with the ultimate goal of ousting Local 175 and assisting Local 1010 during the upcoming “open period” effective April 1, 2020. The GC’s theory of the case is just that, merely a theory, which the GC was unable to prove. What the GC surmised to be NY Paving’s actions against Local 175, were, in reality, NY Paving’s legitimate business decisions in light of the Liability Award, which required Respondent to completely transform its decades-long paving practices, and which affected all paving employees, not just members of Local 175. NY Paving’s actions that the GC alleged were motivated by anti-union animus were in fact NY Paving’s legitimate business decisions made in an effort to prevent the company from being debilitated by Local 175’s selfish and unilateral demands.

1. No animus should be inferred from NY Paving's prior violation of the Act given the significant time gap, absence of common underlying facts, and lack of independent evidence of animus in this case.

The GC argues that general *animus* is established in this case based on the two (2) instances of prior Section 8(a)(1) and (2) violations by NY Paving in Judge Gollin's Decision, and 8(a)(1) and (5) violations in *New York Paving, Inc.*, 370 NLRB No. 44 (Nov. 9, 2020). However, a finding of a prior violation does not warrant an automatic finding of *animus* in the pending case. Rather, several criteria were typically satisfied in the cases where prior unfair labor practice violations have been used to establish *animus* in the pending case: (1) the events in the prior case occurred close in time and were connected to the events underlying the alleged violation in the pending case; and (2) there was independent evidence of *animus* in the pending case. *See Mt. Clemens General Hospital*, 344 NLRB 450, 455-56 (2005) (declining establishing general *animus* based on the unlawful conduct in the prior case because of a significant time gap and also due to absence of factual connection).

In *Sunland Construction Co.*, the Board affirmed the ALJ's decision, wherein the ALJ refused to take notice of a prior decision involving the employer for the purpose of finding animus. 307 NLRB 1036, 1037 (1992). The prior decision, in which the employer was found to have anti-union *animus*, involved different management supervisors working on unrelated jobs. *Id.* The ALJ stated the prior decisions "failed to establish animus among the supervisors [in the instant matter]." *Id.* Accordingly, the ALJ was "unable to consider the [prior decisions] in determining whether Respondent illustrated antiunion *animus* [in the instant matter]." *Id.*

In *Mt. Clemens General Hospital*, the Board also affirmed the ALJ's decision, wherein the ALJ refused to find general *animus* based on the employer's unlawful conduct in a prior case. 344 NLRB at 455. There, the employer was alleged to have committed Section 8(a)(3)

violations by refusing to hire a former employee and union member. *Id.* at 451. In the prior case, occurring four (4) years earlier, the employer was found to have unlawfully prohibited wearing union protest buttons. *Id.* at 456. Thus, the ALJ held the circumstances of the prior decision were not closely related in time, nor factually connected to the circumstances in the pending case. *Id.* Accordingly, the ALJ declined “to infer general *animus* in the present case based on unlawful conduct in the prior case.” *Id.*

The ALJ in *Mt. Clemens General Hospital* distinguished the facts in that case from the facts of *Stark Electric, Inc.*, 327 NLRB 518 (1999). In *Stark Electric, Inc.* the Board affirmed the ALJ’s findings and conclusions that in March 1996 the Respondent unlawfully refused to hire five (5) union electricians. 327 NLRB at 518. In *Stark Electric, Inc.*, the ALJ found evidence of *animus* based on a prior case where the employer was found to have made unlawful discriminatory statements, including statements about the five (5) job applicants involved in the pending matter. *Id.* at fn. 1. Specifically, in the prior decision, the employer was found to have referred to the five (5) job applicants as “union bastards.” *Id.*, citing *Stark Electric, Inc.*, 324 NLRB 1207 (1997). Furthermore, the discriminatory statements were made only two (2) months after the employer refused to hire said job applicants. *Id.* Therefore, and as recognized by the ALJ in *Mt. Clemens General Hospital*, the circumstances demonstrating *animus* in the prior case were factually connected to the circumstances in the pending case. *Id.*

The instant matter is factually more similar to *Mt. Clemens General Hospital* than *Stark Electric, Inc.* In the prior decision involving NY Paving, Local 175, and Local 1010, Judge Gollin determined NY Paving violated: (1) Section 8(a)(1) and (2) of the Act in “mid-to-late” April 2017, when, through its agent Joseph Bartone, Jr., it solicited cards on behalf of Local 1010; and (2) Section 8(a)(1) of the Act on or about April 27, 2017, when, through its agent,

Pasquale Labate, it threatened employees with discharge if they did not sign Local 1010 cards. (Judge Gollin's Decision, pp. 23-24).³² The foregoing violations occurred subsequent to Local 1010 filing a petition in spring 2017 seeking to replace Local 175 as the bargaining representative of the employees engaged in performing asphalt work. (Judge Gollin's Decision, p. 7).

The violations in that case are both too remote in time and unrelated to the facts in the instant proceeding to warrant a finding of general animus. Indeed, while the events in the prior case took place in April 2017, the relevant allegations in the instant matter did not occur until December 2019. Significantly, Your Honor previously denied the GC's identical argument:

General Counsel argues that animus against Local 175 can also be established by the violations found by Judge Gollin in *New York Paving, Inc.*, JD-33-19. As discussed above, in that case Judge Gollin found that NY Paving provided unlawful assistance and support to Local 1010 when Anthony Bartone, Jr. urged employees represented by Local 175 to sign authorization cards for Local 1010, in violation of Sections 8(a)(1) and (2), in mid to late-April 2017. *New York Paving, Inc.*, JD-33-19, at p. 23, 32. Judge Gollin also found that on April 27, 2017, Paddy Labate threatened employees represented by Local 175 with discharge if they did not sign authorization cards for Local 1010, in violation of Section 8(a)(1). *New York Paving, Inc.*, JD-33-19, at p. 22, 24, 32. However, the violations found by Judge Gollin are extremely attenuated to support a finding of animus with respect to Jordan's discharge. *New York Paving, Inc.*, JD-33-19, at p. 7-10. Where the Board has based a finding of animus on violations occurring more than one year prior to the allegedly unlawful conduct in a subsequent case, the earlier violations have involved the same type of unlawful conduct, and/or the same employer representatives or discriminatee. See *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 159, at p. 1, fn. 1 (2017), enf'd. 783 Fed.Appx. 1 (D.C. Cir. 2019); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 (2017); *Midwest Terminals of Toledo International, Inc.*, 362 NLRB No. 57, affirmed 365 NLRB No. 157 (2017), enf'd. 783 Fed.Appx. 1 (D.C. Cir. 2019); see also *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007). It is true that the conflict amongst NY Paving, Local 175, and Local 1010 ultimately engendered by the NYSDOT's change in regulations and ConEd's enforcement of its

³² Even though NY Paving disagreed with Judge's Gollin's determination that NY Paving violated Section 8(a)(1) and (2) of the Act, given the **overwhelming victory** on the remaining allegations, including the alleged violations of Section 8(a)(3), for financial reasons only, NY Paving made a decision not to file exceptions with the Board in connection with the determination of its limited liability.

subcontracting language was ongoing through the time of Jordan's discharge. In addition, Jordan's allegedly unlawful discharge here is a violation of the same type as the threat of discharge found by Judge Gollin, involving the interference with employees' Section 7 rights. See *St. George Warehouse, Inc.*, 349 NLRB at 878. However, the discharge occurred on January 7, 2019, 18 months after the unlawful assistance and threat of discharge in the previous case, which took place in April and March 2017, respectively. Furthermore, neither Bartone nor Labate, the supervisor and agent who committed the violations found by Judge Gollin, were involved in any way in Jordan's employment or discharge. As a result, the violations of Sections 8(a)(1) and (2) found by Judge Gollin provide only minimal support for a finding of animus in the instant case.

New York Paving, Inc., 370 NLRB at 18. Similarly, Judge Gollin's finding that Respondent violated Sections 8(a)(1) and (2) of the Act in April 2017 should not form the basis of finding *animus* in the instant matter for several reasons. One, the alleged violation in this case (in or about December 2019) occurred almost three (3) years after the April 2017 violations determined by Judge Gollin.³³ Therefore, given the significant lapse in time between the prior violations and the allegations in the instant matter, no *animus* should be inferred.

Two, the prior violations found by Judge Gollin do not warrant finding of general *animus* in the instant case given the significant factual differences between the two (2) cases. As an initial matter, there is no record evidence demonstrating the agents who committed the violations found by Judge Gollin (Joseph Bartone, Jr. and Pasquale Labate) were involved in the decision to lay off the Local 175 members in or about January 2020. Significant factual differences also militate against inferring *animus*. The determination of violation of Sections 8(a)(1) and (2) was made solely in the context of the representation petition filed by Local 1010, and the liability was

³³ Significantly, Judge Gollin declined to find *animus* based on these very 8(a)(1) and (2) violations, which occurred in April 2017, for the discharge and/or failure to hire seven (7) discriminatees merely seven (7) months later ("I find the evidence of *animus* to be minimal and remote ... Those statements and conduct occurred almost seven months prior to the discharges at issue, and, as stated, I do not credit any of the allegedly unlawful statements made in the interim. Under the circumstances, I conclude that a gap of almost seven months to be too remote to reasonably warrant inferring animus."). Judge Gollin's Decision, pp. 26-27. Here, the temporal gap between the 8(a)(1) and (2) violations from the earlier case and the allegations of unlawful layoffs in the instant case is far longer than the seven (7) months noted by Judge Gollin.

imputed to NY Paving through the alleged agents. Here, the GC will undoubtedly argue the type of alleged violation by Respondent is similar to the one committed in April 2017, *i.e.*, threats of discharge and unlawful assistance to Local 1010. However, GC's anticipated argument is without merit because there is no evidence supporting the GC's conjecture in this case regarding Respondent's alleged assistance to Local 1010. Notably, no such allegation is contained in the Complaint in this matter (in fact, Local 1010 is not even mentioned in the Complaint). More importantly, the sole testimony regarding this issue was provided by Rocco, who testified he learned in January 2020 Local 1010 tried to get Local 175 members to "sign cards" and that occurred around the same time Local 1010 withdrew the petition previously filed in case no. 29-RC-197886, which withdrawal was approved on January 21, 2020. (Tr. 324; GC Ex. 21 (stating Local 1010 filed the request to withdraw on January 12, 2020)). Given that the GC alleges NY Paving discriminatorily laid-off the named Local 175 members on or about December 20, 2019, it makes no logical sense as to why NY Paving would have made its decision in December 2019 even though there was absolutely no evidence of any alleged Local 1010 activity until a month later.³⁴ In any event, Respondent cured the violations determined by Judge Gollin in or about August 2019 and that case is now closed for several years. (Tr. 665-68; Resp. Ex. 31, 32).

³⁴ To the extent the GC is going to argue Farrell threatened Rocco with the prospect of Local 1010 filing a Request to Proceed on its prior Petition based on GC Ex. 26 and Farrell's testimony (Tr. 811-21), any such argument should be summarily rejected. As an initial matter, GC Ex. 26 contains no threat whatsoever. Further, both Farrell and Rocco are attorneys experienced in traditional labor law. Any argument that Farrell threatened Rocco, or that Rocco felt somehow compelled by Farrell's statement is quite ridiculous. As an experienced labor attorney, Rocco undoubtedly realized the effect, if any, the new rules pertaining to blocking charges, may have had on the relationship between Local 175 and Local 1010. At the end of the day, however, it is telling Local 1010 withdrew its Petition (GC Ex. 21) and did not refile same. The GC conveniently downgrades the importance of the fact that Local 1010 did not re-file its Petition in 2020. Stated differently, the GC cannot argue NY Paving's alleged threats to Local 175 and assistance to Local 1010 during the "open period," while simultaneously failing to present any evidence whatsoever of any Local 1010 activity in 2020, particularly during the "open period" of that year. Indeed, we note the examination of the Board's website demonstrates Local 1010 has not filed any representation petition as it pertains to NY Paving for almost four (4) years since its last organizing activity in April 2017. Given that the Board's website is public, Respondent requests Your Honor take judicial notice of the foregoing.

The GC will also argue Your Honor’s prior determination in *New York Paving, Inc.*, 370 NLRB No. 44 (Nov. 9, 2020) regarding NY Paving’s alleged violation of Sections 8(a)(1) and (5) of the Act related to the transfer of work to the members of Local 1010 should also form the basis of *animus* in the instant case. Essentially, Your Honor determined NY Paving violated Sections 8(a)(1) and (5) of the Act when NY Paving transferred the following three (3) types of work to the members of Local 1010 without providing Local 175 notice and opportunity to bargain: (i) asphalt portion of the emergency keyhole work in “early 2018;” (ii) Code 49 work in the summer 2018; and (iii) Code 92 work since fall 2018. *New York Paving, Inc.*, 370 NLRB at 25, 26, 27. Similar to the prior determination, the violations found by Your Honor occurred in 2018, which was more than one (1) year before the relevant allegations in the instant case. Thus, they are too remote in time to form the basis of *animus* in this case. Finally, although Your Honor’s decision was affirmed by the Board, NY Paving respectfully notes it has filed a Petition to Review the Board’s Decision in the United States Court of Appeals for the D.C. Circuit on November 25, 2020.³⁵ Accordingly, given Respondent is appealing the decision pertaining to its alleged violation of Section 8(a)(1) and (5) – and no Court of Appeals’ decision has yet been issued – it cannot and should not serve as a basis for finding *animus* in the instant proceeding.

Finally, as set forth below, the GC has utterly failed to prove any other *animus* in this matter. Without more, no *animus* should be found solely based on the alleged violations established in the prior case(s).

2. No animus should be imputed to Respondent based on other litigations initiated by or related to Local 175.

The GC will also attempt to demonstrate NY Paving harbored anti-Local 175 *animus* due to the litigations initiated by Local 175 against NY Paving. Indeed, the GC and the Charging

³⁵ See <https://www.nlr.gov/case/29-CA-233990>.

Party Union will attempt to paint a picture of NY Paving tirelessly attempting to “get rid” of Local 175, in part, to end multiple lawsuits and legal actions purportedly filed and/or initiated by Local 175 against NY Paving. As with the other attempts, any such arguments are simply factually inaccurate and thus cannot form the basis for any alleged *animus*.

For example, and despite the GC’s protestations to the contrary, the filing of *Diaz, et al. v. New York Paving, Inc.* (GC Ex. 8) simply does not demonstrate *animus*, nor can it form the basis of any alleged retaliatory action by NY Paving. One, the complaint in *Diaz, et al. v. New York Paving, Inc.* was filed on June 3, 2018. (GC Ex. 8). Had NY Paving harbored any *animus* and wished to retaliate against Local 175, there is absolutely no reason why it would have waited for approximately eighteen (18) months to take any responsive action. In fact, Holder testified he joined the FLSA Lawsuit on or about June 6, 2018 (shortly after it was filed) (Resp. Ex. 11) and despite the foregoing, he did not believe NY Paving treated him worse for that reason. (Tr. 421-31). Holder admitted despite joining the FLSA Lawsuit and testifying against NY Paving during the prior unfair labor practice trial (Resp. Ex. 12) and the crew size arbitration, NY Paving did not treat him any worse; in fact, NY Paving continued compensating Holder the extra hour’s pay each day even though he no longer served as a permanent foreman. (Tr. 421-31). If NY Paving had *animus* against Local 175 in December 2019, it would have targeted Holder – the Shop Steward and staunch Local 175 supporter. Surely, the foregoing demonstrates absence of any anti-Local 175 *animus* on the part of the Respondent.

More importantly, *Diaz, et al. v. New York Paving, Inc.* was initiated on behalf of the “pavers” working at NY Paving and not specifically on behalf of the members of Local 175. (GC. Ex. 8, p. 1). **The complaint in that case does not even mention Local 175.** In fact and throughout the numerous discussions with NY Paving, Local 175 and its representatives have

repeatedly denied their involvement in and/or association with the foregoing lawsuit. Furthermore, members of Local 1010 have also opted-into the FLSA Lawsuit. (Tr. 1097). It is also significant to note thirteen (13) named discriminatees in this matter who are members of Local 175, have **not** opted-into the FLSA Lawsuit and thus are not part of same. (Tr. 1096-99). The final “blow” to the GC’s theory of the case is the review of the monthly hours worked by the remaining named discriminatees who joined *Diaz, et al. v. New York Paving, Inc.*³⁶ Indeed and as demonstrated by the annexed Appendix 3,³⁷ Local 175 members named in this case and who also opted-into the FLSA Lawsuit, did not suffer any adverse action from NY Paving, including any marked or steady reduction in hours worked. For the foregoing numerous reasons, the filing of *Diaz, et al. v. New York Paving, Inc.* is unrelated to Local 175 and cannot form the basis of any *animus* and/or motive for retaliation on Respondent’s part.

Similar to *Diaz, et al. v. New York Paving, Inc.*, the GC’s reliance on the alleged prevailing wage complaint filed by the members of Local 175 as evidence of *animus* and retaliatory intent is misplaced. Essentially, it appears the issue of prevailing wage underpayment is yet another piece in the GC’s puzzle that, similar to other allegations, simply does not fit. Both Rocco and Holder testified regarding this issue. According to Rocco’s testimony on direct examination, Local 175 believed, by virtue of the increases in the wage and benefit rates in the

³⁶ The GC presented no evidence demonstrating if and when the discriminatees named in paragraph 8 of the underlying Complaint joined *Diaz, et al. v. New York Paving, Inc.* This is not surprising given the GC’s established *modus operandi* of painting a picture that suits his case in broad strokes while simultaneously failing to adduce detailed evidence that may not be as favorable to his case. In fact, thirteen (13) discriminatees named in paragraph 8 have not opted into and are thus not part of the FLSA Lawsuit.

³⁷ Annexed hereto as Appendix 3, is a chart of the named discriminatees who have opted into the FLSA Lawsuit and their monthly hours worked (if any) from June 2018 (the date the FLSA Lawsuit was filed (GC Ex. 8)) through December 2019. The information contained in Appendix 3 (*i.e.*, the total monthly hours worked as indicated in the “WORK” column by each discriminatee) is derived exclusively from GC Ex. 3. Indeed, there is a corresponding citation to GC Ex. 3 for each entry. Thus, the empirical data contained in Appendix 3 is based solely on the record evidence and does not contain any information that is not in evidence.

NYICA CBA,³⁸ NY Paving failed to compensate the members of Local 175 the applicable New York City prevailing wage and benefit rates effective July 1, 2019. (Tr. 106-08). According to Rocco, he raised this issue with Farrell, who apparently responded the wage raises were being put in escrow pending the parties “doing a deal.” (Tr. 106-08). Interestingly, at no point during the limited direct examination on this issue did Rocco specifically state his conversation with Farrell concerned prevailing wages – rather, he stated, “I called ... Jonathan Farrell up. And I – and I said to the effect of just you know, the Union thinks they’re not paying the right wage and they haven’t paid the increase.” (Tr. 108). Even though Rocco further testified a complaint was filed with the New York City Comptroller’s Office, no such complaint(s) was introduced into evidence.³⁹ Holder briefly testified he received GC Ex. 7 with the check. (Tr. 368).

In an effort to make the prevailing wage issue fit his theory of the case, GC, in eliciting Rocco’s testimony, appeared to conflate that issue with the wage and benefit increases allegedly called for by the NYICA CBA effective July 1, 2019. However, and based on the evidence presented by the Respondent, those two (2) issues must be distinguished. According to Farrell, the first time he learned of the alleged prevailing wage issue was on February 4, 2020 when Chaikin mentioned it in his email. (Tr. 591-93; GC Ex. 16, NYP 182, p. 6). It was subsequently also mentioned by Anthony Franco during the meeting on March 3, 2020. (Resp. Ex. 34, NYP 8057). Farrell further gave detailed and convincing explanation regarding the escrowed monies mentioned by Rocco. Specifically, Farrell testified because NY Paving adopted a position that it

³⁸ Please note the GC and/or Charging Party Union have introduced no evidence demonstrating the wage and benefit rates paid by NY Paving to the Local 175 members during the relevant period, and how those wage rates compared to the applicable prevailing wage rates. Please also note the NYICA CBA does **not** contain the alleged wage and benefit increases effective July 1, 2019 or any time thereafter. (GC Ex. 9, pp. 14-16, 19).

³⁹ Even though Miceli initially testified NY Paving had received a complaint from the New York City Comptroller’s Office, he eventually clarified he was referring to the letter NY Paving received from National Grid in or about March 2020. (Tr. 962, 1034).

was not bound by the NYICA CBA, it did not grant the wage and benefit increases purportedly required by same effective July 1, 2019 – said increases were placed in escrow pending the resolution of the contract coverage issue. (Tr. 859-62). Farrell explained the reason for this course of action was because NY Paving did not wish to abide by the terms of the NYICA CBA so as to foreclose Local 175’s anticipated argument that Respondent was bound by the NYICA CBA by virtue of complying with its terms. (Tr. 778, 859-62). Thus, NY Paving’s refusal to pay the wage and benefit increases were unrelated to the alleged violation of the prevailing wage law.

On cross-examination, Rocco admitted if NY Paving paid the contractual wage increases, Local 175 would argue that NY Paving adopted the NYICA CBA by conduct and thus was bound by same. (Tr. 150-57). Given the detailed testimony in this regard, which was corroborated, in part by Rocco, Farrell’s testimony should be credited, in particular the fact that the issue of prevailing wages was never raised by Local 175 until February 4, 2020. Because NY Paving was not aware of the potential prevailing wage violation until February 4, 2020 and never received any complaints and/or communication from the New York City Comptroller’s Office regarding same, it could not have formed the basis for any *animus* or retaliatory motive against Local 175 as it pertains to the Shut-Down Announcement in December 20, 2019 and the layoff of the employees in January 2020.

Despite the GC’s attempts to the contrary, it is clear NY Paving was not advised of the alleged prevailing wage issue until February 4, 2020 through Chaikin’s email. Any prior conversations between the parties concerned strictly the wage increase allegedly required by the NYICA CBA and NY Paving’s refusal to pay same pending the resolution of the issue of whether NY Paving was bound by the terms of said CBA. The wage increases, to the extent they were eventually required, were being put into escrow by NY Paving. Farrell also gave detailed

testimony regarding his communications with National Grid concerning the prevailing wage issue. It was not until March 9, 2020 that NY Paving was contacted by National Grid and was provided with a copy of the letter sent to National Grid by Attorney Jennifer Smith. (Tr. 606-30; Resp. Ex. 17). Notably, Smith's letter to National Grid is dated January 17, 2020, which is the same date Local 175 filed its ULP Charge in this case. Smith, nor any other Local 175 attorney, bothered to contact NY Paving regarding this issue or to even send a copy of the correspondence to NY Paving. (Tr. 606-30). In any event, NY Paving conducted an expeditious investigation and responded to National Grid on March 13, 2020. (Tr. 606-30; Resp. Ex. 18; *see also* subsequent correspondence to National Grid, Resp. Ex. 20). Please note Respondent's position stated in the March 13th letter is precisely the same as what was testified to by Farrell. (Resp. Ex. 18, p. 2).

Local 175's plan in connection with the prevailing wage issue is woefully transparent; indeed, it is clear even though the violation allegedly occurred as early as July 1, 2019, Local 175 did not take any actions in connection with same until January 17, 2020, when it filed the underlying ULP Charge along with the complaint to one of NY Paving's largest clients. (Resp. Ex. 17). Similar to the crew size issue, rather than engage with NY Paving in a collaborative dialogue, Local 175 instead elected to involve National Grid undoubtedly to put additional pressure on NY Paving while simultaneously concocting the prevailing wage issue in anticipation of the hearing in this matter. Otherwise, there is simply no explanation to Attorney Smith's insistence to continue to threaten National Grid rather than contact Farrell despite his (Farrell's) express instruction. (Resp. Ex. 21, pp. 1, 2: "Please feel free to provide Ms. Smith my office and cell numbers as well as my email." "I received another email from Ms. Smith today threatening to file a complaint ... did she contact you to discuss the differences in both of your

prevailing wage calculations?” “No. She never contacted me.”). Smith did not contact Farrell until May 21, 2020, four (4) months after her initial letter to National Grid (Resp. Ex. 22) and subsequently did not respond to Farrell’s May 28th letter. (Resp. Ex. 23).

In sum, NY Paving rectified the prevailing wage underpayment expeditiously after receiving the relevant communication from National Grid regarding same. To that effect, on or about April 17, 2020, NY Paving issued the prevailing wage supplemental payments to the members of Local 175. (Resp. Ex. 20; GC Ex. 7) and did not require that the employees execute a waiver of their rights. However, and while NY Paving was glad to make the employees whole, given that NY Paving was not aware of the prevailing wage issue prior to February 4, 2020, it cannot form the basis of *animus* for NY Paving’s actions in December 2019 and January 2020.

3. The alleged assistance to Local 1010 did not form Respondent’s motivation for layoffs as a matter of law.

To the extent the GC will argue NY Paving laid off Local 175 members in January 2020 to assist Local 1010 with its anticipated election petition (which petition was never filed) in order to remove said individuals from the eligible voter list is ridiculous, unsupported by applicable legal precedent and the undisputed facts in this case.

In *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Constr. Co.*, 133 NLRB 264 (1961), the Board created a special formula to be used in construction worker elections because the “construction industry is different from many other industries in the way it hires and lays off employees.” *Steiny*, 308 NLRB at 1324. The formula recognizes that “construction employees may experience intermittent employment, be employed for short periods on different projects, and work for several different employers during the course of a year.” *Id.* Under the so called *Steiny/Daniel* formula, an employee is eligible to vote if he (1) was employed by the company for 30 working days or more within the 12 months preceding the eligibility date for the

election, or (2) had some employment with the company during the 12-month period, and had been employed for 45 working days or more within the 24 month period preceding the eligibility date. *Steiny*, 308 NLRB at 1326. The formula, however, also excludes those employees who were fired for cause or quit voluntarily prior to the election, no matter the duration of their prior employment. *See Metfab, Inc.*, 344 NLRB 215, 222 (2005) (“Employees who had been terminated for cause or quit voluntarily prior to completion of the last job for which they were employed would not be eligible under this formula.”).

In this case and given the relatively steady hours worked by the named discriminatees during the months, if not years prior to their layoff, they clearly would nevertheless have been eligible to vote in accordance with the *Steiny/Daniel* formula even if Local 1010 filed a petition for an election during the “open period” commencing April 2020 (which it did not). Additionally and had NY Paving indeed intended to eliminate the discriminatees’ eligibility from voting, there is no reason why NY Paving would have recalled most of them back to work as early as February 2020. The only logical conclusion is that NY Paving’s stated reasons for laying off the employees in January 2020 are true and entirely lawful.

NY Paving’s continued documented attempts to negotiate a successor collective bargaining agreement with Local 175 and thus eliminate any “open period” is further evidence that Respondent was not in fact trying to oust Local 175 or unlawfully assist Local 1010 in the petition, which was never filed. (Resp. Ex. 24, 25). For these reasons, the GC’s arguments to the contrary must necessarily fail.

4. Respondent's maintenance of the approved list of Local 175 members, and the process by which the employees are added and/or removed from same has been established as a consistent lawful past practice.

It is well established NY Paving maintains a list of the Local 175 members who were previously badged and approved to work by NY Paving, and the foregoing practice is not evidence any anti-Local 175 animus:

General Counsel further argues that animus against Local 175 should be inferred based upon NY Paving's decision to limit the number of badges issued to workers represented by Local 175. G.C. Post-Hearing Brief at p. 54. The identical contention was raised by General Counsel and Local 175 in the previous case against NY Paving, and was explicitly rejected by Judge Gollin. *New York Paving, Inc.*, JD-33-19, at p. 11, 27. As Judge Gollin noted in his Decision, although Local 175 filed charges against NY Paving alleging that the implementation of the badging policy violated the Act, the Consolidated Complaint in that case did not contain such an allegation. *New York Paving, Inc.*, JD-33-19, at p. 27, fn. 36. Nor does the Consolidated Complaint in the instant case. In any event, here, as in the case before Judge Gollin, Miceli testified that the number of badges issued to Local 175-represented asphalt workers was limited to a specific list of individual members because Local 175 began "cycling" members through NY Paving who had never before worked for the company, including two individuals who were not legally authorized to work in the United States. Tr. 839-841, 845-846, 848-849, 990-992. General Counsel and Local 175 introduced no evidence whatsoever to contradict Miceli's contentions in this regard. Thus, here, as in the case before Judge Gollin, the evidence establishes that the list of union-represented employees was limited solely to Local 175 because none of the other unions were "cycling" random members through NY Paving. Tr. 985-986; see *New York Paving, Inc.*, JD-33-19, at p. 11, 27. Therefore, in the absence of any countervailing evidence I find, as did Judge Gollin, that the limitation on the number of badges issued to Local 175-represented employees was implemented for the business reasons described by Miceli in his testimony, and was not motivated by animus against Local 175.

New York Paving, Inc., 370 NLRB at 18-19 (footnote omitted). Given the fact two (2) ALJ's (including Your Honor) have determined Respondent's maintenance of the list of approved Local 175 members was not motivated by anti-union *animus*, and the absence of any evidence to the contrary in this matter, it must be concluded NY Paving's continued maintenance of such a list is not evidence of anti-Local 175 *animus*. Indeed, even though the GC and Local 175 questioned both Miceli and Zaremski regarding the Local 175 list and Miceli's decision to

remove certain individuals from same (Tr. 724-32, 979-84), they did not elicit any evidence showing NY Paving somehow changed its past practice related to the January 2020 employee layoffs.

The GC's attempt to demonstrate Miceli's decision to remove Smith and Wolfe from the list in January 2020 departed from Respondent's prior practices must necessarily fail. (Tr. 981-82). Miceli testified NY Paving informed Fusco and Snyder they could no longer work at NY Paving. (Tr. 979-80; Resp. Ex. 1). GC thereafter attempted to obtain an admission from Miceli that Wolfe and Smith were not notified they could no longer work at NY Paving in an apparent attempt to contrast same with Fusco's and Snyder's end of employment at NY Paving. As an initial matter, Miceli responded the foremen were notified during the meeting on December 20, 2019. (Tr. 982). Miceli further stated he personally spoke with Smith and told him he (Smith) should get another job if he can. (Tr. 984). Furthermore, even if Smith and Wolfe were not notified, which they were, it makes no logical sense that the Respondent would treat two (2) Local 175 members (Fusco and Snyder) differently from the other Local 175 members (Smith and Wolfe). Additionally, it is Respondent's well established past practice that it "typically does not discharge or discipline employees but instead sends them ... 'back to the union.'" *New York Paving, Inc.*, 370 NLRB at 20.⁴⁰ Therefore, even if NY Paving did not inform Wolfe and Smith individually regarding their removal from the list – which it did – NY Paving did not depart from

⁴⁰ Even though Miceli testified a former employee and the alleged discriminatee in the prior trial, Gus Seminatore, received a written termination notice (Tr. 1040), his testimony was inadvertently inaccurate given the fact that Seminatore was discharged more than three (3) years before Miceli's testimony. *See* Judge Gollin's Decision, p. 15 ("On or around November 6, [2017], Zaremski informed ... Schmaltz and Seminatore that they would no longer work for Respondent. At the time, they were not given a reason why.").

its past practice. In fact, and even if there was any deviation from past practices, any such deviation occurred when Fusco and Snyder were discharged rather than with Wolfe and Smith.⁴¹

Moreover, NY Paving did not depart from its established past practice of hiring new employees into the asphalt paving unit from outside (*i.e.*, not calling Local 175) related to a particular cause (ideological or otherwise). (Tr. 1029-30). NY Paving hired only two (2) new employees in the asphalt paving unit in 2020;⁴² they are African American and became members of Local 175. (Tr. 77-78, 85-86, 380, 409-12, 415-19). In 2019, NY Paving badged eleven (11) new employees and in 2018 NY Paving hired eight (8) veterans into the asphalt paving unit. (Tr. 409-12, 415-19). Similar to its prior practice, even though NY Paving hired only two (2) employees in 2020 (which is significantly less compared to the prior years), NY Paving wished to increase the diversity of its workforce and support the Black Lives Matter movement.⁴³ (Tr. 955-56, 984-87). Given that NY Paving did not deviate from its established past practice, hiring the two (2) new African American employees, in part, to support the Black Lives Matter movement, and who became members of Local 175, is not evidence of *animus* against Local 175.

⁴¹ On cross-examination, Miceli also confirmed the Local 175 members who were eventually recalled back to work in or about February 2020 remained on the list and were not removed from same. (Tr. 983). Any argument NY Paving possessed *animus* against the named discriminatees in this case is thus without merit because there is no reason why NY Paving would have recalled back most of the laid-off employees while not recalling Smith and Wolfe. In fact, there is no evidence on the record explaining why Respondent would have had a particular *animus* against Wolfe and Smith, but not against the remaining discriminatees who were recalled. The sole possible conclusion is that NY Paving's reason (reduction in the number of foremen as a result of the "bundling" of tickets) is true and entirely lawful.

⁴² According to Holder, one of them is "good" while the other one requires "some work". However, he has encountered other employees who initially required assistance but eventually became good employees. (Tr. 409-12, 415-19).

⁴³ Miceli testified Zaremski's statement that Respondent had work available for the new hires was inaccurate. (Tr. 955-56). Given Miceli's more senior position at NY Paving coupled with his conversations with Coletti, Miceli's testimony should be credited in this regard rather than Zaremski's.

B. NY Paving Would Have Taken the Action(s) Regardless of Any Employee Support for Local 175.

It is well-established Board law an employer has an absolute right to maintain the efficient and orderly operation of its business. Indeed, an employer may discipline an employee for insufficient cause or no cause, and there is no violation of §8(a)(3) so long as the employer's purpose is not to encourage or discourage union membership. *Borin Packing Co.*, 208 NLRB 280 (1974); *Neptune Waterbeds, Inc.*, 249 NLRB 1122 (1980); *McClatchy Newspapers, Inc. d/b/a The Fresno Bee*, 337 NLRB 1161 (2002); *NLRB v. McGahey*, 233 F.2d 406 (5th Cir. 1956); *Indiana Metal Prods. v. NLRB*, 202 F.2d 613 (7th Cir. 1953); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); and *NLRB v. Condenser Corp.*, 128 F.2d 67 (3d Cir. 1942). Further, it is beyond peradventure that under Board and Court law an employer may discharge an employee for a good reason, a bad reason, or no reason at all, without running afoul of the Act. *Clothing Workers v. NLRB (AMF, Inc.)*, 564 F.2d 434, 440, (D.C. Cir.1977); *accord Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *Syncro Corp. v. NLRB*, 597 F.2d 922 (5th Cir. 1979); *NLRB v. Knuth Bros.*, 537 F.2d 950, (7th Cir. 1976); *Bayliner Marine Corp.*, 215 NLRB 12 (1974), *petition for review dismissed sub nom*; and *Brook v. NLRB*, 538 F.2d 260 (9th Cir. 1976).

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

by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports the employer's position, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992) and *Watco Transloading, LLC* 369 NLRB No. 93, at p. 3 (May 29, 2020) (same).

Here, even if the GC has established a *prima facie* case that Respondent violated Sections 8(a)(1) and (3) of the Act – which he has not – NY Paving has proved by a preponderance of evidence it would have taken the same actions regardless of the alleged discriminatees' support for Local 175. Here, Respondent has presented uncontroverted testimony that various significant events occurred in 2019, which eventually resulted in NY Paving making a business decision to temporarily shut-down asphalt operations and lay-off certain Local 175 members. To be clear, NY Paving's decision was not motivated by anti-Local 175 *animus*. As testified by both Miceli and Farrell, NY Paving's decision was primarily based on the unexpected retirement of Zaremski and NY Paving's anticipated drastic change in operations of bundling the tickets and implementing the larger asphalt paving crew sizes. Furthermore, and as stated by Miceli, given the typical and seasonal slowdown in NY Paving's operations and related employee layoffs around Christmas, December 2019 was a perfect time for NY Paving to shut-down for the most part and plan for the eventual implementation of the 7 and 3 crew sizes. (Tr. 82-83, 86-87).

Zaremski's unexpected retirement required NY Paving to adjust its operations, which would have resulted in employee layoffs even in the absence of the implementation of the crew size award. (Tr. 944-50). Indeed, and even though the GC will attempt to diminish the significance of Zaremski's retirement, it is clear from the record that Zaremski is the back bone of NY Paving's asphalt operations. Not only is he in charge of the equipment and vehicles needed for asphalt paving, he also assigns trucks to the Local 282 drivers, orders asphalt, and

creates the routes for all paving employees to follow (including Local 175, Local 1010, and Local 282) on daily basis. (Tr. 677-81, 707-11; Resp. Ex. 27, NYP 7886; Resp. Ex. 29, NYP 7891). He also assigns Local 175 members to the particular crews. (Tr. 677-81, 707-11; Resp. Ex. 27, NYP 7886; Resp. Ex. 29, NYP 7891). In fact, Zaremski regularly works into the late hours of the night to ensure that all tasks are completed and the workers are able to go out into the field and do their jobs every day. (Tr. 677-81, 707-11; Resp. Ex. 27, NYP 7886; Resp. Ex. 29, NYP 7891).

Given the essential role Zaremski played in its asphalt operations, NY Paving had to implement numerous adjustments due to his retirement. The fact Fogarille replaced Zaremski is of no consequence because Miceli testified without contradiction Fogarille's relative inexperience performing Zaremski's tasks was apparent and significantly impacted NY Paving's operations during the period of Zaremski's retirement. (Tr. 944-50). In fact, Holder also testified when Fogarille performed Zaremski's tasks, the paving crews typically worked longer hours because Fogarille was not as familiar with the job as Zaremski. (Tr. 391-95).

It is without question the tremendous impact of Zaremski's permanent retirement is not comparable to the brief periods when he was previously absent (including on vacations). First, Zaremski typically took a single one (1) week vacation during the year and did not take any vacation in 2019. (Tr. 677-81, 734-36). Additionally, and according to Miceli, during his vacations, Zaremski usually planned all work for the week so as to ensure the work was completed in a timely fashion and there were no issues with Fogarille temporarily replacing him. (Tr. 944-50). Furthermore, as a result of Zaremski's retirement, Fogarille had to start performing additional tasks he had never done before, such as interacting with the Local 282 drivers and assigning them vehicles. (Tr. 944-50). Thus, and even though Fogarille has known he would

have to take over Zaremski's job for the past few years, given Zaremski's unexpected retirement,⁴⁴ he was not prepared to fully take on this daunting task. The temporary shut-down of asphalt operations in December 2019 and lay off of Local 175 members was necessary for NY Paving to be able to adjust its operations in Zaremski's absence.

In addition to grappling with the effects of the sudden and unplanned retirement of the key figure in NY Paving's asphalt operations, Respondent simultaneously faced the daunting task of entirely transforming its several decades-long practice of assigning top and binder crews. Specifically, NY Paving had to comply with the Liability Award mandating compliance with CBA's crew size requirements despite its long past practice, while simultaneously ensuring it could continue operating within the parameters of previously approved bids for asphalt paving contracts. According to Miceli, the only way NY Paving could achieve both goals was to implement the system of ticket bundling. Essentially, rather than perform work orders as they came in (which was Respondent's prior practice), it let the work accumulate and deployed crews only when there was sufficient work concentrated in one (1) particular area. (Tr. 902-06). As a result of the bundling of tickets, NY Paving needed less asphalt paving crews (albeit with a total of 10 rather than 6 employees), which eventually resulted in employee layoffs, including layoffs of the foremen. (Tr. 902-06). According to Miceli, NY Paving started utilizing 3-person binder crews during the first week of January 2020, and 7-person top crews during the second or third week of February 2020. (Tr. 944-50). Thus and to the extent the layoffs were more pronounced compared to prior years, it was due to NY Paving's implementation of ticket bundling.

⁴⁴ Given the documentary evidence presented by NY Paving, any allegation NY Paving somehow colluded with the Local 282 Funds and/or Zaremski that he knew he would have to retire prior to December 2019 is pure speculation and should be summarily rejected.

The GC will likely argue NY Paving's stated reasons for temporarily shutting down its asphalt operations and laying off Local 175 members were pretext and designed to mask Respondent's alleged discriminatory and retaliatory motive. Similar to his other arguments, this position is unfounded, false and must also be rejected in its entirety. The GC apparently believes NY Paving's announcement of the shut-down of asphalt paving operations and layoff of certain Local 175 members was part of Respondent's larger and long-term plan to oust Local 175 and pave the way for Local 1010 to organize the asphalt unit during the "open period" (which as a matter of fact never occurred). According to the GC, NY Paving was angered by Local 175's ongoing litigations against NY Paving and seized the opportunity to "punish" Local 175 by virtue of the January 2020 layoffs. However, the GC's theory is just that – a conjecture unsupported by evidence.

In *Upper Great Lakes Pilots*, 311 NLRB 131, 137 (1993), the Board reversed the ALJ's finding the employer violated Section 8(a)(3) of the Act when it laid off, and eventually permanently discharged, seven (7) employees. On April 11, 1990, the employer laid off seven (7) employees as a result of decreased work causing economic hardship. *Id.* at 133. Prior to the layoffs, the employer and Union had exchanged contract proposals for the upcoming 1990 season. *Id.* at 134. The employer's proposal provided for ten (10) mandatory unpaid days off per month. *Id.* at 137. The union ultimately rejected the employer's offer, and the employer implemented the aforementioned layoffs. *Id.* The Board reversed the ALJ's finding the employer's layoffs were implemented for retaliatory purposes, stating:

“The judge thus concluded that the [employer] implemented the layoffs out of anger and frustration at having its contract proposal rejected. In so doing, he seems to have ignored the explanation that the [employer] acted as it did, not out of anger, but because the rejection of its proposal left it with no other way of reducing its costs of pilotage in the face of decreasing traffic.”

Id. (emphasis added). Furthermore, the Board stated, in pertinent part: “[t]he Union’s rejection [of the contract proposal], however, meant that no such contractual option was available, and that any reduction of the pilot work force would have to be accomplished by layoffs.” *Id.* As such, the Board found the General Counsel failed to establish a *prima facie* case the layoffs of the pilots were the result of unlawful motivation. *Id.* at 139.

Similar to *Upper Great Lakes Pilots*, any alleged “anger” and “frustration” alone cannot form the basis for Respondent’s alleged Section 8(a)(3) violation. NY Paving did not have a retaliatory or discriminatory motive; rather, it simply was adjusting its operation to an unexpected change in key personnel, and implementing the decision that Local 175 initiated, litigated and won. The GC will argue pretext should be imputed to NY Paving given its alleged prior repeated refusal to implement the Liability Award (including by virtue of Respondent filing the Petition to Vacate Arbitration Award on July 26, 2019 (GC Ex. 12)). Assuming *arguendo* the foregoing was true, NY Paving’s position changed drastically on October 24, 2019 (almost three (3) months after the Petition was filed) when it was advised, in writing, by Local 175 of the potential monetary exposure (Res. Ex. 13, 14) and ongoing mounting liability related to Respondent’s continued use of “short” crew sizes. Thus, NY Paving provided Local 175 unequivocal notice on October 25, 2019 that employees would be laid off, including foremen, once NY Paving implemented the Liability Award. Local 175 refused to meet with the Respondent and instead on December 5, 2019 sued NY Paving for, among other claims, failure to make proper benefit contributions to the various Local 175 Funds related to NY Paving’s utilization of “short” crew sizes. (Resp. Ex. 7). In other words, NY Paving was not retaliating against Local 175, it was simply implementing the Liability Award in a manner that would enable NY Paving to continue its operations.

Any alleged retaliatory and/or discriminatory intent is further negated by the fact that NY Paving recalled most the laid-off employees in February and March 2020.⁴⁵

The GC may argue Respondent provided different rationales for its actions and therefore Your Honor should draw an inference that said rationales were pretextual to hide its discriminatory and/or retaliatory motive. When an employer provides inconsistent or shifting rationales for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. *GATX Logistics, Inc.*, 323 NLRB 328 (1997); and *National Hot Rod Ass'n*, 368 NLRB No. 26, p. 4 n. 17 (July 29, 2019).

Despite the GC's perception of Respondent's defenses in this case, the facts and documents demonstrate NY Paving's defenses have been consistent throughout this litigation. In this regard, *Volvo Group North America, LLC*, 370 NLRB No. 52 (Dec. 3, 2020) is instructive. In that case, the Board reversed the ALJ's finding the employer offered shifting explanations for disciplining an employee. *Id.* at 4. The respondent employer operated a central distribution warehouse for truck parts, where the complainant employee worked as a warehouse operator. *Id.* The complainant was responsible for transporting arriving truck parts and placing them on shelves or picking truck parts off shelves for shipping out of the warehouse. *Id.* The employer issued the complainant a written warning for violating a policy prohibiting "wasting time during scheduled working hours." *Id.* The description of the employee's misconduct stated he "was in the front break room 25 minutes before lunch sitting down watching TV." *Id.*

⁴⁵ Annexed hereto as Appendix 4, is a chart of the named discriminatees and their monthly hours worked (if any) from January 2020 through September 2020. The information contained in Appendix 4 (*i.e.*, the total monthly hours worked as indicated in the "WORK" column by each discriminatee) is derived exclusively from GC Ex. 3. Indeed, there is a corresponding citation to GC Ex. 3 for each entry. Thus, the empirical data contained in Appendix 4 is based solely on the record evidence and does not contain any information that is not in evidence.

The employee admitted to being in the break room early, but disputed he was less than twenty-five (25) minutes early, arguing the employer's time tracking system ("DLX Logs") would support his argument. *Id.* As such, the employer reviewed the employee's DLX Logs, and discovered several other instances of unexplained time discrepancies. *Id.* Specifically, the employer discovered several instances where it took the complainant an unnecessary amount of time to transport a truck part from the loading dock to the specific warehouse shelf. *Id.* When the complainant met with his manager to discuss the written warning (which only alleged the complainant was in the break room twenty-five minutes early) the manager also pointed out the other discrepancies in the complainant's DLX Logs. *Id.*

The ALJ determined there was a distinction between being in the break room early and having unexplained time gaps in Complainant's DLX Logs. *Id.* The Board overruled, stating "this is a distinction without a difference, as these are merely two different ways of doing the same thing: 'wasting time during scheduled working hours' in violation of [the employer's policy]." *Id.* Accordingly, the Board held the employer consistently maintained the complainant was disciplined for wasting time. *Id. See also National Hot Rod Association*, 368 NLRB at p. 4 n. 17 (rejecting the ALJ's finding of shifting rationales when the employer consistently maintained the same reason for an employee's discharge).

Similar to the foregoing recent Board decisions, the Respondent in this case has consistently maintained its decision to shut down its asphalt paving operations and layoff certain Local 175 members was grounded upon the following three (3) reasons in no specific order: (1) seasonal employee layoffs; (2) retirement of Zaremski; and (3) NY Paving's eventual implementation of the larger crew sizes by virtue of ticket bundling. The GC will attempt to dissect NY Paving's prior written submissions and argue they are inconsistent. As discussed

below, NY Paving's documents and submission are entirely consistent. However, and more importantly, it is clear the foregoing three (3) rationales have been Respondent's consistent defenses in this litigation.

In GC Ex. 2, NY Paving announced the shut-down of its asphalt paving operations on December 20, 2019 for two (2) reasons: the retirement of Zaremski and the change in its asphalt paving operations as a result of the Liability Award. Importantly, and when discussing the latter, the statements contained in GC Ex. 2 are in the future tense ("will force," "we expect") and thus are discussing the changes that will eventually take place. The seasonal layoffs are not mentioned because, according to Farrell, there was limited space in the document and given that seasonal layoffs are a standard past practice, there was no need to specifically include same. (Tr. 862-67).

The statements contained in GC Ex. 2 are not inconsistent with NY Paving's Position Statement.⁴⁶ (GC. Ex. 22). In the Position Statement, the Respondent stated the shutdown of asphalt paving operations and employee layoffs were related to the seasonal slowdown in business as well as the retirement of Zaremski. (GC Ex. 22, p. 2). Subsequently, NY Paving stated the following:

NY Paving notified the asphalt employees regarding the layoffs by including an informational pamphlet in employee payroll. The pamphlet informed Local 175 regarding the layoffs due to the retirement of Mr. Zaremski. NY Paving also informed the laid-off employees regarding the *future potential layoffs* caused by NY Paving's anticipated compliance with the Award. Stated differently, nowhere in the pamphlet did NY Paving state the ... layoffs were caused by the Award; rather, NY Paving advised once asphalt work resumed (in spring), additional employees would be laid-off due to the Award (and potentially not be recalled as

⁴⁶ Please note the Position Statement also contains a footnote, which specifically states the Position Statement is not an "exhaustive statement of [Respondent's] position in connection with the allegations in the underlying Unfair Labor Practice Charge." (GC Ex. 22, n. 1).

a result of same). However and to be clear, because NY Paving had not yet implemented the Award, the ... layoffs were unrelated to same.⁴⁷

(GC Ex. 22, pp, 7-8). There is nothing in the foregoing statement that contradicts anything contained in GC Ex. 2, any testimony or any other document in this case. It is undisputed based on Miceli and Farrell's testimonies at the time of NY Paving's distribution of GC Ex. 2 on December 20, 2019, NY Paving had not yet implemented the Liability Award. Therefore, only potential future employee layoffs would be related to said implementation.

The statements contained in GC Ex. 16 are also entirely consistent with Respondent's uniform position throughout this matter. On February 5, 2020, in an email to Rocco and Chaikin, Farrell stated the following:

That being said, as I have advised you since October 25, 2019, New York Paving wants to meet to discuss the implementation of Arbitrator Nadelbach's Decision ("Decision"). For the last 3 ½ months Local 175 has refused to meet with New York Paving to discuss the Decision and the implementation of same ... While New York Paving believes Local 175 waived its right to effects bargaining by previously refusing to meet and discuss New York Paving's **planned implementation of the Decision**, New York Paving nevertheless prefers to discuss this issue with Local 175. To that end, Robert Coletti and Peter Miceli are willing to meet on extremely short notice in connection with said bargaining.

(GC Ex. 16, NYP 181-182, pp. 5-6 (emphasis added)). Thus, as early as February 5th, Local 175 was provided notice regarding the anticipated implementation of the Liability Award. In response, Chaikin called this office on or about February 6th and confirmed Local 175 had indeed refused to meet with NY Paving to discuss the employee layoffs related to the implementation of the larger crew sizes. (Resp. Ex. 33). Subsequently, and due to their failure to respond to the February 5th invitation to meet, on February 12, 2020, Farrell again emailed Chaikin and Rocco:

At this juncture, please accept this email as an official notification that due to unseasonably warm weather this winter, NY Paving anticipates to resume its

⁴⁷ NY Paving's narratives contained in GC. Ex. 25, pp. 5, 13 and GC Ex. 1(O), pp. 4-5 are consistent with the foregoing statements.

asphalt paving operations earlier than usual thereby implementing Arbitrator Nadelbach's award. **In fact, NY Paving is already using a binder crew comprised of three (3) Local 175 members. Similarly, NY Paving is anticipating to start using top crews comprised of seven (7) Local 175 members relatively soon.** As you are aware from our numerous discussions, as well as Mr. Miceli's testimony on October 25, 2019, 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. Accordingly, as you have been repeatedly advised, realize time is of the essence given the resumption of the regular spring schedule.

(GC Ex. 16, NYP 181-182, pp. 4-5 (emphasis added)). The foregoing timeline of NY Paving's implementation of the Liability Award is consistent with the statements contained in GC Ex. 25, p. 6 ("while NY Paving was tirelessly attempting to schedule a meeting with Local 175, commencing on or about February 12, 2020, NY Paving resumed performing certain asphalt work due to unseasonably warm weather earlier than anticipated ... and to implement the Award.); and GC Ex. 1(O), p. 6 ("While Respondent was attempting to engage in the effects bargaining with Local 175 despite its (Local 175's) steadfast refusal, commencing in or about February 2020, NY Paving resumed performing certain asphalt work and implemented the Award.")). Finally, the foregoing is also consistent with Miceli's testimony. Even though he testified the Liability Award was implemented as early as January 2020, he confirmed the implementation pertained solely to NY Paving's usage of 3-person binder crews. (Tr. 1038-40). Because NY Paving did not start utilizing 7-person top crews until February 2020 (as confirmed by Miceli (Tr. 1038-40)), Farrell's statements regarding the implementation of the Liability Award in or about February 2020 is not inconsistent since it refers to the full and final implementation.

For the foregoing reasons, the GC's claim of "shifting defenses" should be rejected in its entirety.

Any argument that NY Paving's announcement and layoff of Local 175 members deviated from past practice and related inference that the layoffs were effectuated with discriminatory motive is not warranted here. Despite the testimony (including that of Miceli and Zaremski) that NY Paving had never previously announced employee layoffs in writing, and that the foremen were typically recalled back to work first, Respondent's actions nevertheless are not evidence of Respondent changing its established practices and policies. Rather, they are evidence of NY Paving responding to the changed circumstances.

For example, when testifying regarding the reasons for Respondent's decision to issue GC Ex. 2, Miceli stated NY Paving wanted Local 175 members to know that the seasonal layoffs that year would be different and they should expect the layoffs to last longer than usual as a result of the anticipated bundling of the tickets and implementation. (Tr.82-83, 86-87). Essentially, GC Ex. 2 was issued to provide Local 175 members information about what to expect given the unprecedented change in operations Respondent had to implement and Zaremski's retirement.

Similarly, it is undisputed during inclement weather, NY Paving usually recalls the foremen first. In this case, NY Paving permanently laid-off two (2) foremen, Smith and Wolfe. The reason for same was NY Paving's bundling of the tickets, which resulted in the decreased number of crews and thus less foremen. Additionally, Miceli did not recall Wolfe and Smith to work as laborers because he believed they would be unable to take direction and orders from other foremen, and would also not agree to the reduction in their wages given that they would no longer be eligible to receive extra compensation allotted to the foremen. (Tr. 963-68, 1023-26, 1029-30). Temporary assignment of the foremen to work as laborers during inclement weather

is fundamentally different from permanently reclassifying them as laborers as a result of the ticket bundling policy.

The GC has also failed to present any evidence regarding the specific reasons Respondent would not have recalled Smith and Wolfe even though it recalled from layoff most of the Local 175 members. Indeed, there is nothing in the record demonstrating NY Paving's reasons for treating them differently were somehow discriminatory and/or related to any particular protected activity attributable to those two (2) individuals.⁴⁸ Given NY Paving's accommodation previously granted to Matthew Tuminello, the former Local 175 foreman (creating a supervisory office position specifically for him), it strains credulity that NY Paving would specifically target these two (2) foremen. The only logical conclusion is that NY Paving's stated rationale for the layoffs of the foremen after the implementation of the larger crew sizes is true and lawful.

⁴⁸ To the extent Local 175 is going to argue NY Paving's alleged animosity towards Smith was due to his alleged familial relationship with Anthony Franco, any such argument must necessarily be rejected because other than the following brief exchange, there is nothing in the evidence demonstrating any such familial relationship:

Q: But are you familiar with the fact that William Smith is related to Anthony Franco?

A: So's Vito Smith (phonetic).

Q So that's a yes?

A: And Vito Smith is working for New York Paving. I mean, we have Mike Bartilucci. He's an officer at 175. I mean, what are you -- what are you saying?

Q: I specifically asked if you were aware that William Smith is related to Anthony Franco. That's yes or no.

A: Yes, I'm aware.

Tr. 1023-24. Vito Smith has consistently continued working at NY Paving:

- January 2020: 140.5 hours (GC Ex. 3, NYP 924, p. 415);
- February 2020: 133 hours (GC Ex. 3, NYP 928, p. 419);
- March 2020: 239.5 hours (GC Ex. 3, NYP 934, p. 425);
- April 2020: 44.5 hours (GC Ex. 3, NYP 938, p. 429);
- May 2020: 123 hours (GC Ex. 3, NYP 944, p. 435);
- June 2020: 119.5 hours (GC Ex. 3, NYP 949, p. 440);
- July 2020: 101.5 hours (GC Ex. 3, NYP 955, p. 446);
- August 2020: 170.5 hours (GC Ex. 3, NYP 961, p. 452);
- September 2020: 103 hours (GC Ex. 3, NYP 967, p. 458).

Similarly, Michael Bartilucci (alleged discriminate) was recalled from layoff and has been consistently working at NY Paving. See Appendix 4 for Bartilucci's monthly hours worked since his recall.

For the foregoing reasons, Respondent did not violate Sections 8(a)(1) and (5) of the Act.

POINT VI

EVEN IF RESPONDENT VIOLATED THE ACT – WHICH IT DID NOT – ANY AWARD OF DAMAGES SHOULD BE SUBSTANTIALLY LIMITED

The GC in this case seeks “make whole” damages as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). As an initial matter and discussed herein, Respondent did not violate Section 8(a)(1), (3) and (5) of the Act and therefore no damages are warranted. Should Your Honor nevertheless award monetary damages in this case, any such award must be limited.

The Board in *Transmarine Navigation Corp.* ordered an employer - who had refused to bargain over the effects on unit employees of a plant closure decision - to pay the employees at their normal rate of pay beginning five (5) days after the Board's decision until (1) an effects bargaining agreement was reached; (2) a bona fide bargaining impasse was reached; (3) the union failed to timely request or commence bargaining or the employer's notice of its desire to bargain with the union; or (4) the union failed to bargain in good faith- whichever event occurred first. 170 NLRB 389 (1968). The Board further clarified any monetary damages should not exceed the wages the employees would have earned from the date of the employer's termination of operations to the earlier date of the employees securing equivalent employment or the date the employer offered the union to bargain. *Id.* Finally, “in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.” *Id.*

In this case, to the extent any monetary damages are awarded, any such damages should be limited to the period commencing January 1, 2020 (the date of layoffs) to the earlier date of the named discriminatees obtaining equivalent employment or two (2) weeks from the date of layoffs.

Any awarded damages should be further limited only to those named discriminatees who would not have been laid-off but for the Respondent's alleged violation of Section 8(a)(5). *Schuylkill Contracting Co.*, 271 NLRB 71, 73 (1984), *enf'd* 770 F.2d 1075 (3d Cir. 1985) ("All employees affected by the unilateral layoffs, however, are not *ipso facto* entitled to payments of some kind. Whether any particular employee would have been laid off but for the unfair labor practices, for what period of time, whether any particular employee is entitled to reinstatement or reimbursement and, if so, in what amount, are questions to be resolved in a compliance proceeding if the parties are unable to reach agreement on these issues."). Here, several named discriminatees are not entitled to receive any monetary damages because they either voluntarily resigned their employment from NY Paving or were terminated for reasons unrelated to the underlying employee layoffs. To that effect, Zaremski testified the following discriminatees voluntarily removed themselves from the Local 175 list and/or were unwilling to continue working at NY Paving: Hugo J. Castro, Anthony Dimaio, Sebastian Donoso, Calogero Falzone, Jason M. Hoffman, John C. Lester, Gennaro P. Rocco, Louis V. Ruggiero, and Hong Hao Zhong. (Tr. 695-05, 724-32). Anthony Dedentro was also removed from the list of approved asphalt pavers by NY Paving for reasons unrelated to the underlying layoffs or engaging in any protected activity. (Tr. 695-05, 724-32). With the exception of William Smith and Frank Wolfe, all remaining discriminatees were recalled back to work in or about February 2020 and thus their entitlement to any damages is necessarily limited.

Finally, and regardless of the employee layoffs in January 2020, according to Miceli and Zaremski, many asphalt pavers would have been laid off as a result of the devastating impact of the COVID-19 pandemic on NY Paving's operations. Zaremski stated NY Paving did not have enough work to assign Local 175 members who were recalled their full complement of work

hours. (Tr. 695-05). Miceli also testified as a result of the pandemic, NY Paving received extremely limited work from two (2) of its largest asphalt paving clients, Hallen and National Grid. Hallen was completely shut-down from the end of February 2020 until mid-June 2020, during which period NY Paving received no work from Hallen. (Tr. 951-52). Similarly, National Grid performed only emergency work, which was exponentially less than the volume of work NY Paving would have otherwise received from National Grid. (Tr. 952-53). Overall, NY Paving's "gross sales" for 2020 relative to National Grid and Hallen was reduced almost by fifty percent (50%) compared to prior years. (Tr. 953). This has resulted in the decrease of the available work for not just Local 175, but also Local 1010, Local 282, and Local 14-15. (Tr. 953). Based on this undisputed lack of work due to the pandemic, many (if not all) named discriminatees would have been laid off or would have their hours exponentially reduced. Therefore, they are not entitled to any monetary damages.

CONCLUSION

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

Dated: February 16, 2021
Mineola, New York

Respectfully submitted,
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APPENDIX 1

	Hours Worked (Local 175)	Percentage Change (Hours)	# of Employees (Local 175)	Percentage Change (Number of Employees)	Record Citation
Jan-16	5206.8		44		GC Ex. 3, NYP 574, p. 65
Feb-16	4593	-11.79%	34	-22.73%	GC Ex. 3, NYP 579, p. 70
Mar-16	7271.5	58.32%	44	29.41%	GC Ex. 3, NYP 585, p. 76
Apr-16	6614.5	-9.04%	46	4.55%	GC Ex. 3, NYP 592, p. 83
May-16	7607	15.00%	46	0.00%	GC Ex. 3, NYP 599, p. 90
Jun-16	6834	-10.16%	49	6.52%	GC Ex. 3, NYP 606, p. 97
Jul-16	8009.5	17.20%	44	-10.20%	GC Ex. 3, NYP 613, p. 104
Aug-16	7184.5	-10.30%	54	22.73%	GC Ex. 3, NYP 620, p. 111
Sep-16	6193.5	-13.79%	46	-14.81%	GC Ex. 3, NYP 627, p. 118
Oct-16	9211.5	48.73%	53	15.22%	GC Ex. 3, NYP 635, p. 126
Nov-16	7665	-16.79%	54	1.89%	GC Ex. 3, NYP 642, p. 133
Dec-16	8915.5	16.31%	70	29.63%	GC Ex. 3, NYP 651, p. 142
Jan-17	7892.5	-11.47%	62	-11.43%	GC Ex. 3, NYP 660, p. 151
Feb-17	6570.5	-16.75%	53	-14.52%	GC Ex. 3, NYP 667, p. 158
Mar-17	7921	20.55%	65	22.64%	GC Ex. 3, NYP 676, p. 167
Apr-17	9784.5	23.53%	67	3.08%	GC Ex. 3, NYP 684, p. 175
May-17	4964	-49.27%	38	-43.28%	GC Ex. 3, NYP 689, p. 180
Jun-17	5475.8	10.31%	42	10.53%	GC Ex. 3, NYP 694, p. 185
Jul-17	8708.58	59.04%	51	21.43%	GC Ex. 3, NYP 701, p. 192
Aug-17	8494	-2.46%	50	-1.96%	GC Ex. 3, NYP 708, p. 199
Sep-17	7063	-16.85%	48	-4.00%	GC Ex. 3, NYP 714, p. 205
Oct-17	10160	43.85%	46	-4.17%	GC Ex. 3, NYP 721, p. 212
Nov-17	8232.5	-18.97%	49	6.52%	GC Ex. 3, NYP 728, p. 219
Dec-17	10028.5	21.82%	49	0.00%	GC Ex. 3, NYP 736, p. 227
Jan-18	3421.5	-65.88%	42	-14.29%	GC Ex. 3, NYP 741, p. 232
Feb-18	6919	102.22%	47	11.90%	GC Ex. 3, NYP 748, p. 239
Mar-18	5967.5	-13.75%	48	2.13%	GC Ex. 3, NYP 755, p. 246
Apr-18	10239.5	71.59%	55	14.58%	GC Ex. 3, NYP 764, p. 255
May-18	10486.5	2.41%	55	0.00%	GC Ex. 3, NYP 772, p. 263
Jun-18	10,728.50	2.31%	56	1.82%	GC Ex. 3, NYP 780, p. 271
Jul-18	8,946.00	-16.61%	56	0.00%	GC Ex. 3, NYP 788, p. 279
Aug-18	9,781	9.33%	54	-3.57%	GC Ex. 3, NYP 796, p. 287
Sep-18	10,443.50	6.77%	53	-1.85%	GC Ex. 3, NYP 805, p. 296
Oct-18	9,001.50	-13.81%	51	-3.77%	GC Ex. 3, NYP 813, p. 304
Nov-18	8,145	-9.52%	52	1.96%	GC Ex. 3, NYP 821, p. 312
Dec-18	9,656.50	18.56%	53	1.92%	GC Ex. 3, NYP 829, p. 320
Jan-19	5,771	-40.24%	48	-9.43%	GC Ex. 3, NYP 835, p. 326
Feb-19	6,159.50	6.73%	43	-10.42%	GC Ex. 3, NYP 841, p. 332
Mar-19	10,505	70.55%	55	27.91%	GC Ex. 3, NYP 849, p. 340
Apr-19	9,818.50	-6.53%	62	12.73%	GC Ex. 3, NYP 858, p. 349
May-19	10,451.00	6.44%	60	-3.23%	GC Ex. 3, NYP 867, p. 358
Jun-19	9,391	-10.14%	58	-3.33%	GC Ex. 3, NYP 876, p. 367
Jul-19	6,787	-27.73%	57	-1.72%	GC Ex. 3, NYP 884, p. 375
Aug-19	7,807	15.03%	57	0.00%	GC Ex. 3, NYP 892, p. 383
Sep-19	9,098.50	16.54%	54	-5.26%	GC Ex. 3, NYP 900, p. 391
Oct-19	7,783	-14.46%	52	-3.70%	GC Ex. 3, NYP 908, p. 399
Nov-19	8,658	11.24%	51	-1.92%	GC Ex. 3, NYP 915, p. 406
Dec-19	5,855	-32.37%	50	-1.96%	GC Ex. 3, NYP 922, p. 413
Jan-20	2,274	-61.16%	18	-64.00%	GC Ex. 3, NYP 925, p. 416
Feb-20	2,733	20.18%	21	16.67%	GC Ex. 3, NYP 928, p. 419
Mar-20	7,668	180.57%	42	100.00%	GC Ex. 3, NYP 934, p. 425
Apr-20	3,786.50	-50.62%	34	-19.05%	GC Ex. 3, NYP 939, p. 430
May-20	5,841.50	54.27%	35	2.94%	GC Ex. 3, NYP 944, p. 435
Jun-20	5,575.50	-4.55%	38	8.57%	GC Ex. 3, NYP 950, p. 441
Jul-20	4,680.00	-16.06%	42	10.53%	GC Ex. 3, NYP 955, p. 446
Aug-20	6,351.00	35.71%	41	-2.38%	GC Ex. 3, NYP 962, p. 453
Sep-20	4,680.50	-26.30%	42	2.44%	GC Ex. 3, NYP 967, p. 458

APPENDIX 2

	Hours Worked (Local 175)	Percentage Change (Hours)	# of Employees (Local 175)	Percentage Change (# of Employees)	Record Citation		Hours Worked (Local 1010)	Percentage Change (Hours)	# of Employees (Local 1010)	Percentage Change (# of Employees)	Record Citation
Jun-19	9,391	-10.14%	58	-3.33%	GC Ex. 3, NYP 876, p. 367		34,216.58	-0.97%	202	-1.46%	GC Ex. 4, NYP 989, p. 38
Jul-19	6,787	-27.73%	57	-1.72%	GC Ex. 3, NYP 884, p. 375		24,409.50	-28.66%	200	-0.99%	GC Ex. 4, NYP 1015, p. 64
Aug-19	7,807	15.03%	57	0.00%	GC Ex. 3, NYP 892, p. 383		32,383	32.67%	205	2.50%	GC Ex. 4, NYP 1044, p. 93
Sep-19	9,098.50	16.54%	54	-5.26%	GC Ex. 3, NYP 900, p. 391		33,915.50	4.73%	203	-0.98%	GC Ex. 4, NYP 1074, p. 123
Oct-19	7,783	-14.46%	52	-3.70%	GC Ex. 3, NYP 908, p. 399		27,859.50	-17.86%	200	-1.48%	GC Ex. 4, NYP 1103, p. 152
Nov-19	8,658	11.24%	51	-1.92%	GC Ex. 3, NYP 915, p. 406		31,691	13.75%	200	0.00%	GC Ex. 4, NYP 1132, p. 181
Dec-19	5,855	-32.37%	50	-1.96%	GC Ex. 3, NYP 922, p. 413		23,394	-26.18%	197	-1.50%	GC Ex. 4, NYP 1158, p. 207
Jan-20	2,274	-61.16%	18	-64.00%	GC Ex. 3, NYP 925, p. 416		18,447.50	-21.14%	182	-7.61%	GC Ex. 4, NYP 1181, p. 230
Feb-20	2,733	20.18%	21	16.67%	GC Ex. 3, NYP 928, p. 419		15,445.50	-16.27%	167	-8.24%	GC Ex. 4, NYP 1203, p. 252
Mar-20	7,668	180.57%	42	100.00%	GC Ex. 3, NYP 934, p. 425		34,292	122.02%	193	15.57%	GC Ex. 4, NYP 1234, p. 283
Apr-20	3,786.50	-50.62%	34	-19.05%	GC Ex. 3, NYP 939, p. 430		11,481	-66.52%	143	-25.91%	GC Ex. 4, NYP 1251, p. 300
May-20	5,841.50	54.27%	35	2.94%	GC Ex. 3, NYP 944, p. 435		14,347	24.96%	101	-29.37%	GC Ex. 4, NYP 1266, p. 315
Jun-20	5,575.50	-4.55%	38	8.57%	GC Ex. 3, NYP 950, p. 441		14457.5	0.77%	108	6.93%	GC Ex. 4, NYP 1281, p. 330
Jul-20	4,680	-16.06%	42	10.53%	GC Ex. 3, NYP 955, p. 446		14336.5	-0.84%	130	20.37%	GC Ex. 4, NYP 1297, p. 346
Aug-20	6,351.00	35.71%	41	-2.38%	GC Ex. 3, NYP 962, p. 453		24929.5	73.89%	157	20.77%	GC Ex. 4, NYP 1320, p. 369
Sep-20	4,680.50	-26.30%	42	2.44%	GC Ex. 3, NYP 967, p. 458		20426.5	-18.06%	160	1.91%	GC Ex. 4, NYP 1340, p. 389

APPENDIX 3

Employee Name	Hours Worked (June 2018)	Hours Worked (July 2018)	Hours Worked (Aug. 2018)	Hours Worked (Sept. 2018)	Hours Worked (Oct. 2018)	Hours Worked (Nov. 2018)	Hours Worked (Dec. 2018)
Bartilucci, Michael	245.5 GC Ex. 3, NYP 773, p. 264	195.5 GC Ex. 3, NYP 781, p. 272	226.5 GC Ex. 3, NYP 789, p. 280	292 GC Ex. 3, NYP 797, p. 288	230.5 GC Ex. 3, NYP 806, p. 297	205 GC Ex. 3, NYP 814, p. 305	225 GC Ex. 3, NYP 822, p. 313
Dedentro, Anthony		39 GC Ex. 3, NYP 782, p. 273	193.5 GC Ex. 3, NYP 790, p. 281	213 GC Ex. 3, NYP 798, p. 289	186.5 GC Ex. 3, NYP 807, p. 298	169 GC Ex. 3, NYP 815, p. 306	199 GC Ex. 3, NYP 823, p. 314
Delgado, Eister	161 GC Ex. 3, NYP 774, p. 265	60.5 GC Ex. 3, NYP 782, p. 273	181.5 GC Ex. 3, NYP 790, p. 281	159 GC Ex. 3, NYP 798, p. 289	156.5 GC Ex. 3, NYP 807, p. 298	138.5 GC Ex. 3, NYP 815, p. 306	151.5 GC Ex. 3, NYP 823, p. 314
DeLuca, Ciro	196.5 GC Ex. 3, NYP 774, p. 265	145 GC Ex. 3, NYP 782, p. 273	202 GC Ex. 3, NYP 790, p. 281	149 GC Ex. 3, NYP 799, p. 290	140 GC Ex. 3, NYP 807, p. 298	108 GC Ex. 3, NYP 815, p. 206	160.5 GC Ex. 3, NYP 823, p. 314
DiCaro, Giuseppe	163 GC Ex. 3, NYP 774, p. 265	183 GC Ex. 3, NYP 783, p. 274	193.5 GC Ex. 3, NYP 791, p. 282	153 GC Ex. 3, NYP 799, p. 290	178 GC Ex. 3, NYP 807, p. 298	164 GC Ex. 3, NYP 815, p. 306	194 GC Ex. 3, NYP 823, p. 314
Donoso, Sebastian	209 GC Ex. 3, NYP 775, p. 266	46.5 GC Ex. 3, NYP 783, p. 274	113 GC Ex. 3, NYP 791, p. 281	100.5 GC Ex. 3, NYP 799, p. 290	95 GC Ex. 3, NYP 808, p. 299	113 GC Ex. 3, NYP 816, p. 307	102.5 GC Ex. 3, NYP 824, p. 315
Haldane, Jason	235.5 GC Ex. 3, NYP 776, p. 267	123 GC Ex. 3, NYP 784, p. 275	224 GC Ex. 3, NYP 791, p. 281	161.5 GC Ex. 3, NYP 800, p. 291	174 GC Ex. 3, NYP 808, p. 299	160 GC Ex. 3, NYP 816, p. 307	208 GC Ex. 3, NYP 824, p. 315
Hoffman, Jason	179 GC Ex. 3, NYP 776, p. 267	60.5 GC Ex. 3, NYP 784, p. 275	138 GC Ex. 3, NYP 792, p. 283	132 GC Ex. 3, NYP 800, p. 291	119 GC Ex. 3, NYP 808, p. 299	138 GC Ex. 3, NYP 816, p. 307	120 GC Ex. 3, NYP 825, p. 316
Kilroy, Dallas G.	171.5 GC Ex. 3, NYP 776, p. 267	196.5 GC Ex. 3, NYP 784, p. 275	171 GC Ex. 3, NYP 792, p. 283	219 GC Ex. 3, NYP 800, p. 291	209 GC Ex. 3, NYP 809, p. 300	156 GC Ex. 3, NYP 817, p. 308	199 GC Ex. 3, NYP 825, p. 316
King, Curtney	224 GC Ex. 3, NYP 776, p. 267	95.5 GC Ex. 3, NYP 785, p. 276	187 GC Ex. 3, NYP 792, p. 283	165 GC Ex. 3, NYP 800, p. 291	144 GC Ex. 3, NYP 809, p. 300	122.5 GC Ex. 3, NYP 817, p. 308	177.5 GC Ex. 3, NYP 825, p. 316
Lester, John	265.5 GC Ex. 3, NYP 777, p. 268	194 GC Ex. 3, NYP 785, p. 276	243.5 GC Ex. 3, NYP 793, p. 284	107.5 GC Ex. 3, NYP 801, p. 292	215 GC Ex. 3, NYP 809, p. 300	175 GC Ex. 3, NYP 817, p. 308	184 GC Ex. 3, NYP 826, p. 317
Locastro, Nicholas M.	230 GC Ex. 3, NYP 777, p. 268	164.5 GC Ex. 3, NYP 785, p. 276	218.5 GC Ex. 3, NYP 793, p. 284	205.5 GC Ex. 3, NYP 801, p. 292	198.5 GC Ex. 3, NYP 810, p. 301	173 GC Ex. 3, NYP 818, p. 309	213 GC Ex. 3, NYP 826, p. 317
Lombardi, Christopher	142 GC Ex. 3, NYP 777, p. 268	59 GC Ex. 3, NYP 785, p. 276	131 GC Ex. 3, NYP 793, p. 284	130 GC Ex. 3, NYP 801, p. 292	142.5 GC Ex. 3, NYP 810, p. 301	142 GC Ex. 3, NYP 818, p. 309	155 GC Ex. 3, NYP 826, p. 317
Nieves, Miguel	154.5 GC Ex. 3, NYP 778, p. 269	159.5 GC Ex. 3, NYP 786, p. 277	191.5 GC Ex. 3, NYP 794, p. 285	149.5 GC Ex. 3, NYP 802, p. 293	155 GC Ex. 3, NYP 810, p. 301	91 GC Ex. 3, NYP 818, p. 309	130 GC Ex. 3, NYP 826, p. 317
Oliver, Jonathan	198 GC Ex. 3, NYP 778, p. 269	169 GC Ex. 3, NYP 786, p. 277	198 GC Ex. 3, NYP 794, p. 285	205 GC Ex. 3, NYP 802, p. 293	195 GC Ex. 3, NYP 810, p. 301	185 GC Ex. 3, NYP 818, p. 309	200 GC Ex. 3, NYP 827, p. 318
Restrepo, German	198.5 GC Ex. 3, NYP 778, p. 269	74 GC Ex. 3, NYP 786, p. 277	201 GC Ex. 3, NYP 794, p. 285	129 GC Ex. 3, NYP 802, p. 293	154.5 GC Ex. 3, NYP 811, p. 302	114.5 GC Ex. 3, NYP 819, p. 310	147 GC Ex. 3, NYP 827, p. 318
Rocco, Gennaro	188 GC Ex. 3, NYP 778, p. 269	152 GC Ex. 3, NYP 786, p. 277	187 GC Ex. 3, NYP 794, p. 285	198 GC Ex. 3, NYP 802, p. 293	219.5 GC Ex. 3, NYP 811, p. 302	147 GC Ex. 3, NYP 819, p. 310	155.5 GC Ex. 3, NYP 827, p. 318
Ruggiero, Louis	205 GC Ex. 3, NYP 779, p. 270	135 GC Ex. 3, NYP 786, p. 277	138.5 GC Ex. 3, NYP 794, p. 285	184 GC Ex. 3, NYP 803, p. 294	166 GC Ex. 3, NYP 811, p. 302	151 GC Ex. 3, NYP 819, p. 310	138.5 GC Ex. 3, NYP 827, p. 318
Sciove, Salvatore	190 GC Ex. 3, NYP 779, p. 279	144.5 GC Ex. 3, NYP 787, p. 278	69 GC Ex. 3, NYP 795, p. 286	180.5 GC Ex. 3, NYP 803, p. 294	161 GC Ex. 3, NYP 812, p. 303	138.5 GC Ex. 3, NYP 820, p. 311	157.5 GC Ex. 3, NYP 828, p. 319
Smith, William	207 GC Ex. 3, NYP 779, p. 270	246.5 GC Ex. 3, NYP 787, p. 278	219 GC Ex. 3, NYP 795, p. 286	279 GC Ex. 3, NYP 804, p. 295	199 GC Ex. 3, NYP 812, p. 303	224 GC Ex. 3, NYP 820, p. 311	251 GC Ex. 3, NYP 828, p. 319
Wolfe, Frank	230 GC Ex. 3, NYP 780, p. 271	231 GC Ex. 3, NYP 788, p. 279	243 GC Ex. 3, NYP 796, p. 287	279.5 GC Ex. 3, NYP 804, p. 295	253 GC Ex. 3, NYP 813, p. 304	168 GC Ex. 3, NYP 821, p. 312	272.5 GC Ex. 3, NYP 829, p. 320
Zhong, Hong Hao	186 GC Ex. 3, NYP 780, p. 271	97.5 GC Ex. 3, NYP 788, p. 279	141 GC Ex. 3, NYP 796, p. 287	171 GC Ex. 3, NYP 805, p. 296	126 GC Ex. 3, NYP 813, p. 304	130 GC Ex. 3, NYP 821, p. 312	122.5 GC Ex. 3, NYP 829, p. 320

APPENDIX 3

Employee Name	Hours Worked (Jan. 2019)	Hours Worked (Feb. 2019)	Hours Worked (Mar. 2019)	Hours Worked (Apr. 2019)	Hours Worked (May 2019)	Hours Worked (June 2019)	Hours Worked (July 2019)	Hours Worked (Aug. 2019)	Hours Worked (Sept. 2019)	Hours Worked (Oct. 2019)	Hours Worked (Nov. 2019)	Hours Worked (Dec. 2019)
Bartilucci, Michael	135 GC Ex. 3, NYP 830, p. 321	215 GC Ex. 3, NYP 836, p. 327	295 GC Ex. 3, NYP 842, p. 333	135 GC Ex. 3, NYP 850, p. 341	201 GC Ex. 3, NYP 859, p. 350	210 GC Ex. 3, NYP 868, p. 359	187 GC Ex. 3, NYP 877, p. 368	186 GC Ex. 3, NYP 885, p. 376	170 GC Ex. 3, NYP 893, p. 384	190.5 GC Ex. 3, NYP 901, p. 392	210.5 GC Ex. 3, NYP 909, p. 400	132.5 GC Ex. 3, NYP 916, p. 407
Dedentro, Anthony	119.5 GC Ex. 3, NYP 831, p. 322	155 GC Ex. 3, NYP 837, p. 328	218 GC Ex. 3, NYP 843, p. 334	186 GC Ex. 3, NYP 852, p. 343	165 GC Ex. 3, NYP 861, p. 352	143 GC Ex. 3, NYP 870, p. 361	120.5 GC Ex. 3, NYP 878, p. 369	168.5 GC Ex. 3, NYP 886, p. 377	139.5 GC Ex. 3, NYP 895, p. 386	150.5 GC Ex. 3, NYP 903, p. 394	186 GC Ex. 3, NYP 910, p. 401	76.5 GC Ex. 3, NYP 917, p. 408
Delgado, Eister	56.5 GC Ex. 3, NYP 831, p. 322		134.5 GC Ex. 3, NYP 843, p. 334	171 GC Ex. 3, NYP 852, p. 343	167 GC Ex. 3, NYP 861, p. 352	145 GC Ex. 3, NYP 870, p. 361	110.5 GC Ex. 3, NYP 878, p. 369	174 GC Ex. 3, NYP 887, p. 378	158.5 GC Ex. 3, NYP 895, p. 386	158 GC Ex. 3, NYP 903, p. 394	132 GC Ex. 3, NYP 911, p. 402	73 GC Ex. 3, NYP 918, p. 409
DeLuca, Ciro	73.5 GC Ex. 3, NYP 831, p. 322	124.5 GC Ex. 3, NYP 837, p. 328	183.5 GC Ex. 3, NYP 843, p. 334	138.5 GC Ex. 3, NYP 852, p. 343	148 GC Ex. 3, NYP 861, p. 352	132.5 GC Ex. 3, NYP 870, p. 361	101.5 GC Ex. 3, NYP 879, p. 370	159 GC Ex. 3, NYP 887, p. 378	147.5 GC Ex. 3, NYP 895, p. 386	118 GC Ex. 3, NYP 903, p. 394	167.5 GC Ex. 3, NYP 911, p. 402	81 GC Ex. 3, NYP 918, p. 409
DiCaro, Giuseppe	46 GC Ex. 3, NYP 831, p. 322	127.5 GC Ex. 3, NYP 837, p. 328	198.5 GC Ex. 3, NYP 844, p. 335	187 GC Ex. 3, NYP 852, p. 343	183.5 GC Ex. 3, NYP 861, p. 352	156 GC Ex. 3, NYP 870, p. 361	101 GC Ex. 3, NYP 879, p. 370	183 GC Ex. 3, NYP 887, p. 378	196 GC Ex. 3, NYP 895, p. 386	115 GC Ex. 3, NYP 903, p. 394	191.5 GC Ex. 3, NYP 911, p. 402	73 GC Ex. 3, NYP 918, p. 409
Donoso, Sebastian	73.5 GC Ex. 3, NYP 831, p. 322		138 GC Ex. 3, NYP 844, p. 335	144 GC Ex. 3, NYP 853, p. 344	149.5 GC Ex. 3, NYP 861, p. 352	133 GC Ex. 3, NYP 870, p. 361	94 GC Ex. 3, NYP 879, p. 370	52 GC Ex. 3, NYP 887, p. 378	77 GC Ex. 3, NYP 895, p. 386	129.5 GC Ex. 3, NYP 903, p. 394	8.5 GC Ex. 3, NYP 911, p. 402	57.5 GC Ex. 3, NYP 918, p. 409
Haldane, Jason	97.5 GC Ex. 3, NYP 832, p. 323	147.5 GC Ex. 3, NYP 838, p. 329	213.5 GC Ex. 3, NYP 845, p. 336	147 GC Ex. 3, NYP 853, p. 344	169 GC Ex. 3, NYP 862, p. 353	114.5 GC Ex. 3, NYP 871, p. 362	113.5 GC Ex. 3, NYP 880, p. 371	153 GC Ex. 3, NYP 888, p. 379	189 GC Ex. 3, NYP 896, p. 387	139 GC Ex. 3, NYP 904, p. 395	177.5 GC Ex. 3, NYP 912, p. 403	81.5 GC Ex. 3, NYP 919, p. 410
Hoffman, Jason	81 GC Ex. 3, NYP 832, p. 323	51.5 GC Ex. 3, NYP 838, p. 329	80.5 GC Ex. 3, NYP 845, p. 336	167.5 GC Ex. 3, NYP 853, p. 344	147.5 GC Ex. 3, NYP 862, p. 353	144.5 GC Ex. 3, NYP 871, p. 362	113.5 GC Ex. 3, NYP 880, p. 371	87.5 GC Ex. 3, NYP 888, p. 379	144 GC Ex. 3, NYP 896, p. 387	120 GC Ex. 3, NYP 904, p. 395	111 GC Ex. 3, NYP 912, p. 403	60 GC Ex. 3, NYP 919, p. 410
Kilroy, Dallas G.	85 GC Ex. 3, NYP 832, p. 323	150.5 GC Ex. 3, NYP 838, p. 329	173.5 GC Ex. 3, NYP 845, p. 336	175 GC Ex. 3, NYP 854, p. 345	179.5 GC Ex. 3, NYP 863, p. 354	156.5 GC Ex. 3, NYP 872, p. 363	104.5 GC Ex. 3, NYP 880, p. 371	148 GC Ex. 3, NYP 888, 379	185.5 GC Ex. 3, NYP 896, p. 387	146 GC Ex. 3, NYP 904, p. 395	202.5 GC Ex. 3, NYP 912, p. 403	89.5 GC Ex. 3, NYP 919, p. 410
King, Curtney	73 GC Ex. 3, NYP 833, p. 324	101.5 GC Ex. 3, NYP 838, p. 329	200 GC Ex. 3, NYP 845, p. 336	178 GC Ex. 3, NYP 854, p. 345	180 GC Ex. 3, NYP 863, p. 354	154.5 GC Ex. 3, NYP 872, p. 363	141.5 GC Ex. 3, NYP 880, p. 371	149.5 GC Ex. 3, NYP 888, p. 379	183 GC Ex. 3, NYP 897, p. 388	145.5 GC Ex. 3, NYP 904, p. 395	203 GC Ex. 3, NYP 912, p. 403	72 GC Ex. 3, NYP 919, p. 410
Lester, John	127.5 GC Ex. 3, NYP 833, p. 324	96 GC Ex. 3, NYP 839, p. 330	220 GC Ex. 3, NYP 846, p. 337	117.5 GC Ex. 3, NYP 854, p. 345	134.5 GC Ex. 3, NYP 863, p. 354	124 GC Ex. 3, NYP 872, p. 363	93.5 GC Ex. 3, NYP 880, p. 371	152.5 GC Ex. 3, NYP 889, p. 380	98.5 GC Ex. 3, NYP 897, p. 388	126 GC Ex. 3, NYP 905, p. 396	169 GC Ex. 3, NYP 912, p. 403	93 GC Ex. 3, NYP 919, p. 410
Locastro, Nicholas M.	102 GC Ex. 3, NYP 833, p. 324		167.5 GC Ex. 3, NYP 846, p. 337	101 GC Ex. 3, NYP 855, p. 346	173.5 GC Ex. 3, NYP 863, p. 354	161.5 GC Ex. 3, NYP 872, p. 363	117 GC Ex. 3, NYP 881, p. 371	151 GC Ex. 3, NYP 889, p. 380	161 GC Ex. 3, NYP 897, p. 388	135 GC Ex. 3, NYP 905, p. 396	182 GC Ex. 3, NYP 913, p. 404	64 GC Ex. 3, NYP 920, p. 411
Lombardi, Christopher	90 GC Ex. 3, NYP 833, p. 324	30.5 GC Ex. 3, NYP 839, p. 330	149 GC Ex. 3, NYP 846, p. 337	190 GC Ex. 3, NYP 855, p. 346	188.5 GC Ex. 3, NYP 864, p. 355	149 GC Ex. 3, NYP 873, p. 364	115.5 GC Ex. 3, NYP 881, p. 372	85 GC Ex. 3, NYP 889, p. 380	103 GC Ex. 3, NYP 897, p. 388	137.5 GC Ex. 3, NYP 905, p. 396	131.5 GC Ex. 3, NYP 913, p. 404	72.5 GC Ex. 3, NYP 920, p. 411
Nieves, Miguel	90 GC Ex. 3, NYP 833, p. 324	116.5 GC Ex. 3, NYP 839, p. 330	207.5 GC Ex. 3, NYP 847, p. 338	182 GC Ex. 3, NYP 855, 346	161.5 GC Ex. 3, NYP 864, p. 355	205.5 GC Ex. 3, NYP 873, p. 364	67.5 GC Ex. 3, NYP 881, p. 372	141 GC Ex. 3, NYP 889, p. 380	146 GC Ex. 3, NYP 898, p. 389	120 GC Ex. 3, NYP 905, p. 396	81.5 GC Ex. 3, NYP 913, p. 404	91 GC Ex. 3, NYP 920, p. 411
Oliver, Jonathan	154.5 GC Ex. 3, NYP 834, p. 325	177.5 GC Ex. 3, NYP 839, p. 330	200 GC Ex. 3, NYP 847, p. 338	176 GC Ex. 3, NYP 856, p. 347	158.5 GC Ex. 3, NYP 864, p. 355	216.5 GC Ex. 3, NYP 873, p. 364	150 GC Ex. 3, NYP 881, p. 372	110.5 GC Ex. 3, NYP 889, p. 380	208.5 GC Ex. 3, NYP 898, p. 389	174 GC Ex. 3, NYP 906, p. 397	194 GC Ex. 3, NYP 913, p. 404	142.5 GC Ex. 3, NYP 920, p. 411
Restrepo, German	91 GC Ex. 3, NYP 834, p. 325		137 GC Ex. 3, NYP 847, p. 338	139 GC Ex. 3, NYP 856, p. 347	165 GC Ex. 3, NYP 865, p. 356	133.5 GC Ex. 3, NYP 874, p. 365	101 GC Ex. 3, NYP 882, p. 373	118 GC Ex. 3, NYP 890, p. 381	147.5 GC Ex. 3, NYP 898, p. 389	126 GC Ex. 3, NYP 906, p. 397	150.5 GC Ex. 3, NYP 914, p. 405	91 GC Ex. 3, NYP 921, p. 412
Rocco, Gennaro	102.5 GC Ex. 3, NYP 834, p. 325	169 GC Ex. 3, NYP 840, p. 331	233 GC Ex. 3, NYP 847, p. 338	182 GC Ex. 3, NYP 856, p. 347	150 GC Ex. 3, NYP 865, p. 356	235.5 GC Ex. 3, NYP 874, p. 365	84.5 GC Ex. 3, NYP 882, p. 373	171.5 GC Ex. 3, NYP 890, p. 381	153 GC Ex. 3, NYP 898, p. 389	146.5 GC Ex. 3, NYP 906, p. 397	180.5 GC Ex. 3, NYP 914, p. 405	55 GC Ex. 3, NYP 921, p. 412
Ruggiero, Louis	106.5 GC Ex. 3, NYP 834, p. 325	138.5 GC Ex. 3, NYP 840, p. 331	205.5 GC Ex. 3, NYP 848, p. 339	132.5 GC Ex. 3, NYP 857, p. 348	157.5 GC Ex. 3, NYP 865, p. 356	136 GC Ex. 3, NYP 874, p. 365	88 GC Ex. 3, NYP 882, p. 373	170 GC Ex. 3, NYP 890, p. 381	115.5 GC Ex. 3, NYP 899, p. 390	129.5 GC Ex. 3, NYP 906, p. 397	182 GC Ex. 3, NYP 914, p. 405	88 GC Ex. 3, NYP 921, p. 412
Sciove, Salvatore	94 GC Ex. 3, NYP 834, p. 325	75.5 GC Ex. 3, NYP 840, p. 331	184.5 GC Ex. 3, NYP 848, p. 339	151.5 GC Ex. 3, NYP 857, p. 348	161 GC Ex. 3, NYP 866, p. 357	137 GC Ex. 3, NYP 874, p. 365	112 GC Ex. 3, NYP 882, p. 373	70 GC Ex. 3, NYP 891, p. 382	145 GC Ex. 3, NYP 899, p. 390	134.5 GC Ex. 3, NYP 907, p. 398	185 GC Ex. 3, NYP 914, p. 405	64 GC Ex. 3, NYP 921, p. 412
Smith, William	182.5 GC Ex. 3, NYP 835, p. 326	219 GC Ex. 3, NYP 840, p. 331	246.5 GC Ex. 3, NYP 848, p. 339	207 GC Ex. 3, NYP 857, p. 348	206.5 GC Ex. 3, NYP 866, p. 357	243 GC Ex. 3, NYP 875, p. 366	175.5 GC Ex. 3, NYP 883, p. 374	204 GC Ex. 3, NYP 891, p. 382	272.5 GC Ex. 3, NYP 899, p. 390	198 GC Ex. 3, NYP 907, p. 398	219 GC Ex. 3, NYP 915, p. 406	220 GC Ex. 3, NYP 922, p. 413
Wolfe, Frank	209 GC Ex. 3, NYP 835, p. 326	176.5 GC Ex. 3, NYP 841, p. 332	242.5 GC Ex. 3, NYP 849, p. 340	192 GC Ex. 3, NYP 858, p. 349	211.5 GC Ex. 3, NYP 867, p. 358	256.5 GC Ex. 3, NYP 876, p. 367	171 GC Ex. 3, NYP 883, p. 374	111.5 GC Ex. 3, NYP 892, p. 383	225 GC Ex. 3, NYP 900, p. 391	171 GC Ex. 3, NYP 908, p. 399	231.5 GC Ex. 3, NYP 915, p. 406	150 GC Ex. 3, NYP 922, p. 413
Zhong, Hong Hao	84.5 GC Ex. 3, NYP 835, p. 326	18.5 GC Ex. 3, NYP 841, p. 332	129.5 GC Ex. 3, NYP 849, p. 340	131 GC Ex. 3, NYP 858, p. 349	180.5 GC Ex. 3, NYP 867, p. 358	143 GC Ex. 3, NYP 876, p. 367	105.5 GC Ex. 3, NYP 884, p. 374	41 GC Ex. 3, NYP 892, p. 383	144 GC Ex. 3, NYP 900, p. 391	138 GC Ex. 3, NYP 908, p. 399	166.5 GC Ex. 3, NYP 915, p. 406	60 GC Ex. 3, NYP 922, p. 413

APPENDIX 4

<u>Employee Name</u>	<u>Hours Worked (January 2020)</u>	<u>Hours Worked (February 2020)</u>	<u>Hours Worked (March 2020)</u>	<u>Hours Worked (April 2020)</u>	<u>Hours Worked (May 2020)</u>	<u>Hours Worked (June 2020)</u>	<u>Hours Worked (July 2020)</u>	<u>Hours Worked (August 2020)</u>	<u>Hours Worked (September 2020)</u>
Arango Taborda, John			122.5 GC Ex. 3, NYP 929, p. 417	141.5 GC Ex. 3, NYP 935, p. 426	197.5 GC Ex. 3, NYP 940, p. 431	169.5 GC Ex. 3, NYP 945, p. 436	85.5 GC Ex. 3, NYP 951, p. 442	113 GC Ex. 3, NYP 956, p. 447	41.5 GC Ex. 3, NYP 963, p. 454
Bartilucci, Michael			138.5 GC Ex. 3, NYP 929, p. 420		113 GC Ex. 3, NYP 940, p. 431	136.5 GC Ex. 3, NYP 945, p. 436	172 GC Ex. 3, NYP 951, p. 442	200 GC Ex. 3, NYP 956, p. 447	142 GC Ex. 3, NYP 963, p. 454
Benjamin, Norris			97.5 GC Ex. 3, NYP 929, p. 420	75 GC Ex. 3, NYP 935, p. 426	60 GC Ex. 3, NYP 940, p. 431	91.5 GC Ex. 3, NYP 945, p. 436	68.5 GC Ex. 3, NYP 951, p. 442	61 GC Ex. 3, NYP 956, p. 447	50.5 GC Ex. 3, NYP 963, p. 454
Bueno, Oscar		8 GC Ex. 3, NYP 926, p. 417	238 GC Ex. 3, NYP 929, p. 420	56.5 GC Ex. 3, NYP 935, p. 426	168 GC Ex. 3, NYP 940, p. 431	126 GC Ex. 3, NYP 945, p. 436	65.5 GC Ex. 3, NYP 951, p. 442	8 GC Ex. 3, NYP 956, p. 447	11 GC Ex. 3, NYP 963, p. 454
Castro, Hugo			31.5 GC Ex. 3, NYP 930, p. 421	71 GC Ex. 3, NYP 936, p. 427			10.5 GC Ex. 3, NYP 952, p. 443		
Cortes, Edgar			90 GC Ex. 3, NYP 930, p. 421	128.5 GC Ex. 3, NYP 936, p. 427	189 GC Ex. 3, NYP 941, p. 431	180 GC Ex. 3, NYP 946, p. 437	83.5 GC Ex. 3, NYP 952, p. 443	113.5 GC Ex. 3, NYP 957, p. 448	41.5 GC Ex. 3, NYP 964, p. 455
Dadabo, Louis	135 GC Ex. 3, NYP 923, p. 414	208.5 GC Ex. 3, NYP 926, p. 417	268 GC Ex. 3, NYP 930, p. 421			90 GC Ex. 3, NYP 946, p. 437	174 GC Ex. 3, NYP 952, p. 443	203 GC Ex. 3, NYP 957, p. 448	
Dedentro, Anthony									
Delgado, Eister				108.5 GC Ex. 3, NYP 936, p. 427	9 GC Ex. 3, NYP 941, p. 432		21 GC Ex. 3, NYP 952, p. 443		27.5 GC Ex. 3, NYP 964, p. 455
DeLuca, Ciro			169 GC Ex. 3, NYP 931, p. 422	141.5 GC Ex. 3, NYP 936, p. 427	198.5 GC Ex. 3, NYP 941, p. 432	180 GC Ex. 3, NYP 946, p. 437	83.5 GC Ex. 3, NYP 952, p. 443	138.5 GC Ex. 3, NYP 957, p. 448	110.5 GC Ex. 3, NYP 964, p. 455

Employee Name	Hours Worked (January 2020)	Hours Worked (February 2020)	Hours Worked (March 2020)	Hours Worked (April 2020)	Hours Worked (May 2020)	Hours Worked (June 2020)	Hours Worked (July 2020)	Hours Worked (August 2020)	Hours Worked (September 2020)
DiCaro, Giuseppe			162.5 GC Ex. 3, NYP 931, p. 422	150.5 GC Ex. 3, NYP 936, p. 427	144.5 GC Ex. 3, NYP 941, p. 432	138 GC Ex. 3, NYP 946, p. 437	76 GC Ex. 3, NYP 952, p. 443	195.5 GC Ex. 3, NYP 957, p. 448	99.5 GC Ex. 3, NYP 964, p. 455
DiMaio, Anthony									
Donoso, Sebastian									
Falzone, Calogero									
Haldane, Jason			172.5 GC Ex. 3, NYP 931, p. 422	145 GC Ex. 3, NYP 937, p. 428	213.5 GC Ex. 3, NYP 942, p. 433	177 GC Ex. 3, NYP 947, p. 438	80.5 GC Ex. 3, NYP 953, p. 444	143.5 GC Ex. 3, NYP 958, p. 449	72 GC Ex. 3, NYP 964, p. 455
Hoffman, Jason			59 GC Ex. 3, NYP 931, p. 422						
Kilroy, Dallas G.			50 GC Ex. 3, NYP 932, p. 423				24 GC Ex. 3, NYP 953, p. 444	110.5 GC Ex. 3, NYP 958, p. 449	38.5 GC Ex. 3, NYP 965, p. 456
King, Curtney			111.5 GC Ex. 3, NYP 932, p. 423	51 GC Ex. 3, NYP 937, p. 428	137.5 GC Ex. 3, NYP 942, p. 433	138 GC Ex. 3, NYP 947, p. 438	95 GC Ex. 3, NYP 953, p. 444	178.5 GC Ex. 3, NYP 958, p. 449	138.5 GC Ex. 3, NYP 965, p. 456
Lester, John							24 GC Ex. 3, NYP 953, p. 444		
Locastro, Nicholas M.			122.5 GC Ex. 3, NYP 932, p. 423	51 GC Ex. 3, NYP 937, p. 428	51.5 GC Ex. 3, NYP 942, p. 433	10 GC Ex. 3, NYP 947, p. 438	85.5 GC Ex. 3, NYP 953, p. 444	134.5 GC Ex. 3, NYP 959, p. 450	80.5 GC Ex. 3, NYP 965, p. 456
Lombardi, Christopher			141 GC Ex. 3, NYP 932, p. 423	134.5 GC Ex. 3, NYP 937, p. 428	136.5 GC Ex. 3, NYP 942, p. 433	138 GC Ex. 3, NYP 947, p. 438	95 GC Ex. 3, NYP 953, p. 444	171.5 GC Ex. 3, NYP 959, p. 450	138.5 GC Ex. 3, NYP 965, p. 456
Morrea-Gonzalez, Alexander			61 GC Ex. 3, NYP 932, p. 423	12.5 GC Ex. 3, NYP 937, p. 428	51.5 GC Ex. 3, NYP 943, p. 434	32.5 GC Ex. 3, NYP 948, p. 439	80.5 GC Ex. 3, NYP 954, p. 445	119.5 GC Ex. 3, NYP 959, p. 450	71.5 GC Ex. 3, NYP 965, p. 456
Nieves, Miguel			153 GC Ex. 3, NYP 932, p. 423	91.5 GC Ex. 3, NYP 938, p. 429	28.5 GC Ex. 3, NYP 943, p. 434	75.5 GC Ex. 3, NYP 948, p. 439	92.5 GC Ex. 3, NYP 954, p. 445	167.5 GC Ex. 3, NYP 959, p. 450	135 GC Ex. 3, NYP 966, p. 457

CERTIFICATE OF SERVICE

A copy of the within Post-Trial Brief on Behalf of Respondent New York Paving, Inc. (29-CA-254799) has been electronically filed and served via email this 16th day of February, 2021 on the following:

Hon. Lauren Esposito
Administrative Law Judge
National Labor Relations Board
Division of Judges
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New York, New York 10278
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