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**Dimarco Paving & Construction, Inc. and Laborers
Local 135 a/w Laborers International Union of
North America AFL–CIO. Case 4–CA–31120**

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On June 11, 2003, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ and the General Counsel and Charging Party filed answering briefs. The Respondent filed a brief in reply. The General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions, and to adopt his recommended Order.

We find that the General Counsel satisfied his initial burden of showing union animus. However, in doing so, we do not rely on the following statement made by General Superintendent Dellostretto, upon learning that employee Nicholas Ferraioli had joined the Union: “This doesn’t mean sh– to me; you just can’t take it upon yourself to join the union and think you’re going to get a raise.”³ In our view, Dellostretto was stating his view that membership in the Union would not necessarily mean that a wage increase would be secured. Dellostretto was not stating the reverse, i.e., that membership in the Union would necessarily mean that a wage increase would be denied.

¹ The General Counsel filed a motion to strike or disregard the Respondent’s exceptions and brief because the exceptions fail to comply with Sec. 102.46 of the Board’s Rules and Regulations. The General Counsel contends, inter alia, that certain exceptions (1, 2, 3, 5, and 6) do not identify that part of the judge’s decision to which exception is taken. Although the Respondent’s exceptions are not in conformity with the Board’s Rules in all respects, we find that they are not so deficient as to warrant striking.

² The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Member Walsh agrees with the judge’s analysis of this statement.

Nonetheless, we find ample evidence of the Respondent’s union animus in the remaining record, including: (1) the timing of Ferraioli’s discharge (the day after he disclosed his union membership); (2) Dellostretto’s comment, upon laying off Ferraioli, that he should “get his work out of Local 135”; and (3) the Respondent’s pretextual assertion that Ferraioli voluntarily quit his job on September 10, 2001.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that, the Respondent, DiMarco Paving & Construction, Inc., King of Prussia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Peggy McGovern and Stan Simpson, Esqs., for the General Counsel.

Paul Logan, Esq., for the Respondent.

Robert Cohen, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 26, 2003. The charge was filed on March 7, and amended March 8, 2002, by Laborers Local 135 a/w Laborers International Union of North America, AFL–CIO (the Union or Local 135). A complaint was thereafter issued on April 30, 2002, by the Regional Director for Region 4 of the National Labor Relations Board (the Board) alleging that DiMarco Paving & Construction, Inc. (the Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging employee Nicholas Ferraioli on or about September 1, 2001,¹ because he joined and supported the Union. In a timely filed answer dated May 7, 2002, the Respondent has denied the allegation.

At the hearing, all parties were afforded a full opportunity to call and examine witnesses, to present oral and written evidence, to argue orally on the record, and to file posthearing

¹ All dates are in 2001, unless otherwise indicated.

briefs. On the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with a facility in King of Prussia, Pennsylvania, is engaged as a site development and paving contractor in the construction industry. During the year preceding issuance of the complaint, the Respondent, in the course and conduct of its above-described business operations, purchased and received at its King of Prussia facility goods valued in excess of \$50,000 from firms located in the Commonwealth of Pennsylvania which, in turn, received said goods directly from points and places outside the Commonwealth of Pennsylvania. The Respondent, admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Factual Background

At all material times, Robert DiMarco (DiMarco) has held the position of president, and Michael Dellostretto the position of general superintendent, of the Respondent. The Respondent is a nonunion operation owned by DiMarco and his brother, Wayne DiMarco. Another company of some relevance, P. DiMarco & Co., is owned by DiMarco's father, Robert DiMarco Sr., and is a unionized operation which employs members of Local 135. The record reflects that employees of both companies often work side by side on various projects, and that the employees are interchangeable, that is, the unionized employees employed by P. DiMarco will often do work for the Respondent, and the Respondent's nonunion employees will work for P. DiMarco (Tr. 90-91).

Ferraioli began working for the Respondent earning \$16 per hour as a skilled laborer sometime in October 2000. He subsequently had his rate increased to \$17 an hour. He testified that except for some time off between April and June 2001, due to an injury, and during regular layoffs conducted by the Respondent during the Christmas period, he worked continuously for the Respondent until September 11, 2001. Ferraioli was not a member of any union when he first began working for the Respondent. However, he testified that the Respondent did have some 12-15 employees who were members of Laborers Local 57. He claims that because most of his fellow workers were union members, he tried on three or four occasions to talk to Dellostretto about joining a union but was unsuccessful. On September 6, Ferraioli decided to join the Union. Thus, that day, he went to the union hall and informed the secretary/treasurer that he worked for "DiMarco" and was interested in joining the Union. The Union's secretary/treasurer, he claims, told him that it would not be a problem because "DiMarco" was a "union company." Ferraioli then paid his initia-

tion fees and had his name recorded in the union books. (GC Exh. 2).

According to Ferraioli, on Monday, September 10, he went to Dellostretto's office in the morning, showed the latter the union receipt reflecting his membership in the Union, and asked that his wage rate be adjusted upward to the union rate.² Ferraioli claims that Dellostretto became upset, threw the union receipt on the table and stated, "This doesn't mean shit to me; you just can't take it upon yourself to join the union and think you're going to get a raise." (Tr. 16). Dellostretto then purportedly told Ferraioli that he would have to discuss the matter with DiMarco and instructed him to work that day and that he would get paid the union rate for that day. According to Ferraioli, his foreman, Tom Cassel, was outside waiting to see if he (Ferraioli) would be working that day.³ A daily job report for September 10, submitted into evidence as part of Respondent's Exhibit 3, reflects that Ferraioli was indeed scheduled to work. The September 10, daily job report, according to Dellostretto, was prepared the prior workday, Friday, September 7. The parties are in agreement that Ferraioli was paid a full day's work for September 10, but disagree on whether Ferraioli actually worked that day. The September 10 daily job report, it should be noted, shows Ferraioli's name as having been crossed out. Dellostretto's attempted explanation for how the deletion occurred was ambiguous and not very convincing. Thus, he testified that he "probably" told Cassel that Ferraioli would not be working that day, and that Cassel "probably" crossed out Ferraioli's name (Tr. 63-64).⁴

Ferraioli testified that the following day, Tuesday, September 11, he reported for work in the morning and, as was customary, hung around outside the office with the other employees waiting for the foremen to come out and call the employees' names and their work assignments for that day. When his name was not called, Ferraioli asked Cassel, with whom he regularly worked, why he hadn't been called. Cassel replied

² Ferraioli testified that he was "hesitant" to inform Dellostretto prior to September 10, that he had joined the Union because Dellostretto was a "fly off the handle kind of guy," and he (Ferraioli) had to "watch" what he said.

³ Cassel was employed by P. DiMarco & Co. and was a union member.

⁴ Dellostretto, however, did not adequately explain why, if Ferraioli did not work on September 10, R. Exh. 2 shows his "Starting Time" for that day as "7:00 am," his "Stopping Time" as "3:00 pm," and the "Actual Hours Worked" by Ferraioli as "8" hours. Dellostretto conceded that these entries, e.g., the start and finish times, as well as the total number of hours worked, are inserted by the individual supervisors "after the person works." (Tr. 76). His only explanation for the entries shown on R. Exh. 2 for Ferraioli amounted to nothing more than speculation. Thus, when asked to explain why Cassel made the entries after being notified that Ferraioli would not be working that day, Dellostretto replied, "Because I guess Tommy Cassel filled it in and shouldn't have." (Tr. 76). However, if Ferraioli did not in fact work on September 10, it seems highly unlikely that Cassel would have recorded on R. Exh. 2 Ferraioli's start and finish times, and the total number of hours worked on September 10, after being informed by Dellostretto that Ferraioli would not be working that day. Dellostretto, as noted, was simply guessing as to why Cassel did so. Dellostretto admits he never saw R. Exh. 2 after it was filled out by Cassel until the matter became an issue before the Board.

that Ferraioli's name was not on the list. Ferraioli claims that as he watched everyone heading out to their assignments, Dellostretto called him to the office and informed Ferraioli that he was being laid off due to a lack of work, and that Ferraioli should get his work out of Local 135. According to Ferraioli, he responded by simply shaking Dellostretto's hand and saying goodbye.

By letter dated September 13, sent on P. DiMarco & Co., Inc. stationary, Ferraioli was notified that his health insurance was being cancelled as of September 15, 2001 due to a "lack of work." (GC Exh. 3.) Ferraioli claims that he was unaware of P. DiMarco's existence until sometime after his alleged layoff, when he went to the Union hall and was told by a "Mr. Cohen" that there were two "DiMarco" companies, e.g., the Respondent and P. DiMarco & Co., that the distinction between the two existed in name only, and that the entire operation was more like a "shell game." (Tr. 25.)

Dellostretto admits having certain conversations with Ferraioli in September, but disagrees on when precisely they occurred and what was said between the two. Thus, he testified that on Friday, September 7, Ferraioli approached him and said he needed to talk to Dellostretto because he had just joined a union. Dellostretto's testimony on how he responded was somewhat ambiguous. Thus, he testified that he "might have" told Ferraioli that it was not a good time to discuss the matter, and that Ferraioli would have to come back to him at a later date. Dellostretto did not expressly deny Ferraioli's claim that he, Dellostretto, became upset, and testified only that he did not know if he became loud during said conversation. (Tr. 57.) However, his subsequent comment, that Ferraioli, on September 7, "just threw this on me" and "just never . . . discussed that he was going to join the union," suggests that Dellostretto may have wanted or expected Ferraioli to notify him in advance before joining a union (Tr. 64). Dellostretto never explained his comment in this regard. This latter unexplained comment by Dellostretto, and the latter's inability to recall whether or not he became "loud" during his September 7, conversation with Ferraioli, leads me to believe that Dellostretto did indeed become upset on learning that Ferraioli had joined the Union.

Dellostretto and DiMarco both claim that they discussed Ferraioli that same day, September 7. Dellostretto recalls that after speaking with Ferraioli, he told DiMarco that he (Dellostretto) had to have a talk with Ferraioli "about joining the union." DiMarco, he claims, made no comment on whether Ferraioli should or should not be in a union, and simply asked about the circumstances under which Ferraioli had been hired. Dellostretto told DiMarco that Ferraioli had been hired by the Respondent at \$16 an hour, that he was a good employee and had recently received a raise, and that he intended to keep Ferraioli in the same position and pay rate. According to Dellostretto, the conversation with DiMarco ended at that point. (Tr. 98.)

DiMarco recalled having a brief conversation on September 7, with Dellostretto regarding Ferraioli during which Dellostretto described "the situation" to him. He testified that both he and Dellostretto agreed during that conversation that Ferraioli was a good employee but that, since he had been hired by the Respondent, they decided to "keep him under those same terms and conditions." (Tr. 104.) He testified that the next thing he

heard about Ferraioli was that the latter, following a meeting with Dellostretto, had "decided to go work out of Local 135." DiMarco testified that Ferraioli was not hired by the union firm, P. DiMarco & Co., because Ferraioli "never applied to P. DiMarco for work," and that there was work available at P. DiMarco & Co. (Tr. 108-109). DiMarco's claim in this regard, however, is squarely contradicted by a November 21 letter sent by the Respondent's attorney to the Union stating, *inter alia*, that Ferraioli had indeed sought employment with P. DiMarco & Co., Inc. but "told that no positions were then available." (See GC Exh. 2.)

Dellostretto claims his next conversation with Ferraioli took place on Monday, September 10. Ferraioli, he recalls, was scheduled to work that day. On the morning of September 10, according to Dellostretto, his foremen were outside waiting for Ferraioli and other employees to head out for their assignments. He claims, however, that on September 10, Ferraioli came into his office and sat down. Dellostretto claims he told Ferraioli that he was aware that the latter had joined the Union, but that that was a different matter, and that right now, there was a foreman waiting outside for him and that, if he wanted to, Ferraioli could go out and work at his normal rate of \$17 per hour. Ferraioli insisted that he wanted to work at the union rate, and Dellostretto reminded him that he had agreed to work for DiMarco Paving at \$17 per hour, and would have to work at that rate. According to Dellostretto, he also told Ferraioli that P. DiMarco & Co., Inc. was a different situation, and that if he wanted to work for the union firm, he would have to let Dellostretto know and fill out the necessary paperwork. He purportedly further told Ferraioli that he would either have to work with the Respondent under the established conditions, or he could join Local 135, if allowed to do so, and they would have to find work for him (Tr. 63). Ferraioli purportedly chose not to do so and simply shook his hand and left.

Dellostretto insists that Ferraioli, in fact, did not work on September 10, and simply quit his employment when he failed to obtain the union wage rate. Ferraioli, as noted, was paid a full day's pay for September 10. Asked why Ferraioli was paid if he did not work on September 10, Dellostretto explained that he was paid "because he showed up." (Tr. 74).⁵ Regarding General Counsel Exhibit 3, which reflects that Ferraioli was laid off for lack of work, Dellostretto testified that Respondent's office manager, "Chuck" Pulsfort, is responsible for preparing such notices when employees are laid off or no longer work for the Respondent, and that, while he recalls only telling Pulsfort that Ferraioli "no longer works here," Pulsfort nevertheless inserted "lack of work" as the reason for the discontinuation of insurance. Although Pulsfort was never called to explain why he made the entry, Dellostretto explained that during the winter layoffs, Pulsfort typically writes "lack of work" on the various forms as the reason for the layoffs. Dellostretto denies telling Pulsfort that Ferraioli's cessation of work resulted from a layoff, and, in fact, testified that there was work available for Ferraioli on September 11. (Tr. 65, 67.)

⁵ Dellostretto admitted that the unionized employees working for P. DiMarco are only paid a 2-hour show up time when they show up but do not work.

DiMarco likewise denies having had anything to do with the filling out of General Counsel Exhibit 3, or discussing Ferraioli's departure with Pulsfort. However, he too, like Dellostretto, offered an explanation for why Pulsfort would have written "lack of work" on General Counsel Exhibit 3. Thus, he testified that Pulsfort "typically puts lack of work or always puts lack of work" on the insurance forms whenever an individual leaves his employment.⁶

DISCUSSION

The General Counsel contends that Ferraioli was unlawfully laid off or discharged on September 11, for having joined the Union. The Respondent counters that Ferraioli was not discharged at all but rather voluntarily quit his employment on September 10, after being denied a raise. Whether Ferraioli was laid off on September 11, or simply quit his employment on September 10, hinges on which of the two—Ferraioli or Dellostretto—provided a more accurate and credible account of their September conversation. As noted, there is substantial disagreement between Ferraioli and Dellostretto on when that conversation took place, and what was said during that discussion.

On balance, I found Ferraioli to be the more reliable and credible of the two. Thus, Ferraioli's testimony that he worked a full day on September 10, is consistent with, and corroborated by, the entries found in the Respondent's September 10, daily job report which, as noted, shows Ferraioli as having worked from 7 a.m. to 3 p.m., or a total of 8 hours, that day. While claiming that Ferraioli showed up but did not work on September 10, Dellostretto offered no real explanation for the entries found next to Ferraioli's name on the September 10, daily job report, and simply speculated that Cassel must have made the entries by mistake. Cassel, the one person who could have explained the obvious discrepancy between the entries on the September 10, daily job report and Dellostretto's claim that the entries are a mistake and that Ferraioli did not work a full day on September 10, was not called to testify, leaving this rather crucial question unanswered, and justifying an adverse inference against Respondent that, if called to testify, Cassel would not have supported Dellostretto's claim.

Further bolstering Ferraioli's claim that he was laid off and did not quit on September 11, is the insurance cancellation notice sent to him by Pulsfort reflecting that the cancellation was prompted by a layoff due to "lack of work." Here again, rather than calling Pulsfort, who prepared the document, as a witness to explain the entry, the Respondent chose instead to rely on Dellostretto's assertion that Pulsfort always uses a "lack

⁶ Although GC Exh. 3, the insurance cancellation notice, reflects that it was sent to Ferraioli by P. DiMarco & Co., Inc. and not the Respondent, neither Dellostretto nor DiMarco claimed that the notice had been erroneously sent to Ferraioli. Rather, their testimony, as noted, sought to legitimize the "lack of work" entry on GC Exh. 3 as consistent with Pulsfort's practice. Implicit in their testimony is that the document and its "lack of work" entry was properly issued to Ferraioli. However, in GC Exh. 12, the November 21, letter sent by Respondent's attorney to the Union, the Respondent took the position that GC Exh. 3 had been "issued in error" to Ferraioli, a claim that, as noted, neither Dellostretto nor DiMarco made at the hearing.

of work" explanation on such insurance forms when the Respondent undergoes its yearly "Christmas time" layoffs. However, as noted, Ferraioli's September cessation of employment was not part of any general winter layoff. I am convinced that Dellostretto, as he did with the entries made by Cassel on the September 10, daily job report, was again speculating as to why Pulsfort cited a "lack of work" as the reason for canceling Ferraioli's insurance. DiMarco's own attempt to explain Pulsfort's "lack of work" notation on Ferraioli's insurance cancellation letter was equally unconvincing. DiMarco, as noted, readily admitted that he had nothing to do with the preparation of the insurance letter, and had had no discussion with Pulsfort regarding Ferraioli. DiMarco was also somewhat ambivalent in explaining why Pulsfort would have made the entry, explaining that "Chuck typically puts lack of work *or always* [emphasis added] puts lack of work" when an employee leaves his or her employment. Further, there is strong reason to doubt DiMarco's credibility given the unexplained inconsistency between DiMarco's assertion at the hearing, that Ferraioli did not apply for work with P. DiMarco & Co., Inc. and that work was available with that company, and the contrary position taken by the Respondent in GC Exh. 12 that Ferraioli did apply for work with P. DiMarco & Co., Inc. and that there was no work for him.

The Respondent could have easily corroborated Dellostretto's and DiMarco's above claim by producing, as it did with General Counsel Exhibit 3 in Ferraioli's case, copies of insurance cancellation notices containing similar "lack of work" entries that were presumably given to other employees who, purportedly like Ferraioli, left its employ under similar circumstances. No such evidence was produced by the Respondent, nor was any claim made that said evidence was unavailable.⁷ In sum, I credit Ferraioli's account and find that he did indeed work a full day on September 10, and that, when he reported for work on September 11, Dellostretto informed him he was being laid off due to a lack of work.

Having found that Ferraioli did not quit but rather was laid off on September 11, there remains for consideration the question whether his discharge was, as alleged by the General Counsel, prompted by his decision to join the Union. Where, as here, the discharge of an individual turns on employer motivation, the Board applies the causation test established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).⁸ Under *Wright Line*, the General Counsel must make an initial prima facie showing that the adverse action taken against an employee was motivated, at least in part, by his involvement in union or other protected activity. The General Counsel can satisfy this initial burden by demonstrating that the employee had engaged in union or protected activity prior to the adverse action being taken, that the employer was aware of such activity, that it harbored antiunion animus,

⁷ Dellostretto's admission that the Respondent maintains personnel files on all employees suggests that such documents indeed were available (Tr. 84).

⁸ See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

and that said animus was a motivating factor in the decision. If the General Counsel succeeds in establishing a prima facie case, the burden then shifts to the employer to demonstrate that the same actions would have taken place in the absence of union or other protected conduct.

Here, the record makes clear that Ferraioli did engage in protected activity when he joined the Union on September 6, and that the Respondent, as per Ferraioli's credited account, learned of such activity when the latter notified Dellostretto on September 10, that he had joined the Union.⁹ While there is no evidence which directly links Ferraioli's September 11, layoff to his joining the Union just days earlier, there is sufficient circumstantial evidence from which such an inference can be drawn.¹⁰ Thus, the close timing of the layoff, just one day after the Respondent learned of Ferraioli's union involvement, the absence of any evidence to show that Ferraioli, or any other employee for that matter, was scheduled to be laid off on September 11, Dellostretto's admission that there was work available for Ferraioli, and the lack of any credible explanation to justify the layoff, all strongly support an inference that the Respondent's decision to lay off Ferraioli on September 11, must have been motivated, if not wholly at least in part, by his decision to join the Union. *Wilco Business Forms, Inc.*, 280 NLRB 1336 (1986); *Aluminum Technical Extrusions, Inc.*, 274 NLRB 1414, 1418 (1985). Dellostretto's display of anger on learning that Ferraioli had joined the Union without first discussing it with him further tends to support such an inference. Given these facts, I have no difficulty finding that the General Counsel has met her initial *Wright Line* burden of establishing a prima facie case of discrimination.

As noted, the Respondent's sole defense to the allegation that it discriminatorily laid off Ferraioli on September 11, is that Ferraioli was not laid off but rather voluntarily quit his employment when his request for a raise to the union-scale rate was denied. Its defense in this regard, however, is based largely on Dellostretto's discredited version of events. Ferraioli, as found above, provided a more accurate and credible account of the events that led to his layoff on September 11, an account that was, for the most part, corroborated by the Respondent's own records. Having rejected the Respondent's defense that Ferraioli voluntarily quit his employ and was not laid off, and as the Respondent has presented no credible or legitimate explanation for having laid off Ferraioli on September 11, it follows that the Respondent has not rebutted the General Counsel's prima facie case. Accordingly, I find that Ferraioli's September 11, layoff was motivated by unlawful anti-union considerations, and violated Section 8(a)(3) and (1) of the Act.

⁹ The Respondent does not deny learning, prior to the September 11, layoff, that Ferraioli had joined the Union, but claims, based on Dellostretto's testimony, that it obtained such knowledge on September 7. I have, as noted, credited Ferraioli over Dellostretto regarding these events.

¹⁰ An improper employer motivation may be inferred from circumstantial as well as direct evidence. See, e.g., *Vico Products Co.*, 336 NLRB 583 (2001); *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998).

CONCLUSIONS OF LAW

1. The Respondent, DiMarco Paving & Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Union, Laborers Local 135 a/w Laborers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Nicholas Ferraioli on September 11, 2001, because he joined the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Thus, the Respondent shall be required to, within 14 days of the date of this Order, offer Nicholas Ferraioli reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall be ordered to make Ferraioli whole for any losses he may have sustained as a result of his discriminatory layoff, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such amounts to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to, within 14 days of the Order, remove from its files any reference to Ferraioli's unlawful layoff, and within 3 days thereafter, to notify him in writing that it has done so and that the layoff will not be used against him in any way. Finally, the Respondent shall be required to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, DiMarco Paving & Construction, Inc., King of Prussia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against Nicholas Ferraioli, or any other employee for supporting Laborers Local 135 a/w Laborers International Union of North America, AFL-CIO, or any other union.

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

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

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Nicholas Ferraioli full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without regard to his seniority or any other rights and privileges previously enjoyed.

(b) Make Nicholas Ferraioli whole for any losses he may have suffered as a result of the discrimination against him, with interest, as described in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Nicholas Ferraioli's unlawful September 11, 2001 layoff, and within 3 days thereafter, notify him in writing that this has been done, and that the unlawful layoff will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in King of Prussia, Pennsylvania, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2001.

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

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 11, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT layoff, discharge or otherwise discriminate against any of you for supporting Laborers Local 135 a/w Laborers International Union of North America, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nicholas Ferraioli full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Nicholas Ferraioli whole for any losses he may have suffered due to his unlawful layoff, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Nicholas Ferraioli, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

DIMARCO PAVING & CONSTRUCTION, INC.