

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRACE INDUSTRIES, LLC,
Employer,

and

HIGHWAY, ROAD AND STREET CONSTRUCTION
LABORERS, LOCAL 1010, LIUNA,

Petitioner – Intervenor,

Case 29-RC-012031

and

UNITED PLANT & PRODUCTION WORKERS
LOCAL 175, IUJAT,

Petitioner – Intervenor.

Case 29-RC-012043

EMPLOYER’S STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW
BY UNITED PLANT & PRODUCTION WORKERS LOCAL 175, IUJAT
AND MOTION TO STRIKE REQUEST FOR REVIEW

Statement of the Case

The Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election on August 18, 2011 in the above-captioned cases. On September 12, 2011, United Plant & Production Workers Local 175, IUJAT, the Intervenor in Case 29-RC-12031 and the Petitioner in Case 29-RC-12043 (hereinafter referred to as “Local 175”), filed with the Board and served its “Request for Review of Regional Director’s Decision & Direction of Election.”

The Decision and Direction of Election found that the only appropriate bargaining unit was one composed of:

All full-time and regular part-time laborers employed by Grace Industries LLC who perform site and ground improvement, utility, paving

and road building work and all related work, including site preparation, milling and finishing of all surfaces, regardless of material used, within the five boroughs of New York City....

Decision and Direction of Election (hereinafter “Decision”) at page 42. In reaching this conclusion, the Regional Director found the unit sought by Local 175 in Case 29-RC-12043, composed “of the Employer’s laborers who ‘primarily perform asphalt paving’ in the five boroughs of New York City” not to be appropriate for purposes of collective bargaining. Decision at pages 2 - 3. Finding that the unit sought by Highway, Road and Street Construction Local 1010, Laborers International Union of North America (“Local 1010”), the Petitioner in Case 29-RC-12031, including laborers who perform paving and related work regardless of the material used,¹ is an appropriate unit, the Regional Director directed an election in that larger unit. Decision at page 3.

The Employer concurs with the Regional Director’s determination that the only appropriate bargaining unit is one combining the Employer’s asphalt laborers and its concrete laborers as set forth in the Decision and Direction of Election.

Local 175’s Request for Review seeks to overturn the Regional Director’s unit determination but it fails to specify what contrary direction it seeks from the Board. The Decision notes that Local 175 asserted in support of its election petition that a unit limited to asphalt laborers is appropriate; and alternatively, in relation to Local 1010’s petition, Local 175 asserted that a *Globe* self-determination election is appropriate allowing asphalt laborers to vote for

¹ In substance, Local 175 seeks to limit its unit to laborers working primarily with asphalt paving materials and excludes those working primarily with concrete paving material; Local 1010’s petition includes both asphalt workers and concrete workers in a single bargaining unit. Decision at pages 2-3 and fn. 2.

representation by Local 175 separately or for representation by Local 1010 in a unit combining asphalt and concrete laborers. The Regional Director determined that only a unit combining asphalt and concrete laborers is appropriate and a *Globe* self-determination election is not warranted because a unit of the Employer's asphalt laborers alone is not an appropriate unit for purposes of collective bargaining. Decision at pages 2. and 40 and fn. 23. Local 175's Request for Review fails to identify which of these alternatives it is arguing for before the Board.

In addition to the indefiniteness of Local 175's intentions, its Request for Review should be stricken and disregarded by the Board because of Local 175's failure to abide by controlling provisions of the Board's Rules and Regulations.

Pursuant to Section 102.67(e) of the Rules and Regulations of the Board, 29 C.F.R. s. 102.67(e), the Employer, Grace Industries, LLC, hereby opposes Local 175's Request for Review and moves to strike the Request for Review on the grounds that the Request for Review:

(i) violates Section 102.67(d) of the Board's Rules and Regulations, 29 C.F.R. s. 102.67(d), by repeatedly failing throughout the Request for Review to provide "page citations from the transcript" or any other citation to evidence received at the hearing for factual assertions made in the Request for Review, and by alleging "facts not timely presented to the Regional Director," and,

(ii) the Request for Review and the brief that is appended to and incorporated in the Request for Review total 60 pages, which violates the 50-page

limitation of Section 102.67(k)(1) of the Board's Rules and Regulations, 29 C.F.R. s. 102.67(k)(1) by a substantial amount.

More particularly, Local 175's repeated violations of the requirement that it cite to the transcript and hearing record greatly prejudice the Employer by making it impossible for the Employer to rebut Local 175's factual claims in the Request for Review, most of which appear to be false.

Local 175's substantial violation of the 50-page limitation is prejudicial to the Employer by unfairly burdening the Employer with excessive argumentation that must be reviewed in the short time allowed for submission of this opposition to the Request for Review.

In view of Local 175's aggravated violations of the Board's Rules, the Request for Review should be stricken and given no further consideration.

The Request for Review Fails to Cite to the Transcript of the Hearing

Beginning at page 2 of the Request for Review, Local 175 repeatedly fails to cite to any record support for its factual assertions. Following are particular examples of Local 175's many failures to cite to the evidentiary record in its Request for Review.

Local 175 states, at page 2 of the Request for Review, that "Concrete, simply put is cold with none of the attendant risks or issues." Local 175 is referring to alleged risks attendant to working with asphalt material; but there is no citation to the transcript or an exhibit that was received in evidence at the hearing relating to the qualities of concrete work as contrasted with asphalt-related tasks.

At page 3, the Request for Review asserts, with reference to preparation of a roadbed for finishing, that, "The reality is that for seventy (70) years nothing changed."

But there is no citation to any record evidence of seventy years of industry practice and certainly none warranting a conclusion that road building now is entirely unchanged from what it may have been in the 1930s or 1940s.

Page 4 is replete with unattributed factual assertions. In the first full paragraph on that page, Local 175 asserts that, after a concrete base is laid, one must wait days before asphalt pavers are able to perform their work, and therefore concrete and asphalt workers do not work at a common location at the same time. There is no citation to record evidence nor is there any citation to such a finding in the Decision and Direction of Election (the “Decision”).

In the second paragraph beginning on page 4, it is asserted that demolition, excavation and drainage are not paving tasks. There is no citation to the record or the Decision in support of this claim.

In footnote 2 on page 4, it is asserted that the Laborers International Union of North America (“LIUNA”), purposefully negotiated separate collective bargaining agreements for separate units of asphalt and concrete workers, and that what Local 175 asserts to have been the “concrete” local of LIUNA had three times the membership of the “asphalt” local. Once again, there is no citation to record evidence or a finding in the Decision supporting these assertions.

At the top of page 5, it is asserted that, “Occasionally concrete Laborers would help out doing clean up of millings; but they did not run milling machines – only Operating Engineers or 1018 members did that in the past.” There is no citation to record evidence or a finding in the Decision showing that to be the fact.

The second paragraph beginning on page 5 states that, “If repairs in the road base required what was known as a ‘full depth repair’ they were performed by a

concrete worker; not a 1018 or 175 worker; although either may have done some saw cutting to get the repair ready for concrete.” There is no citation to record evidence or a finding in the Decision supporting that claim.

On page 6, in the first full paragraph appearing there, Local 175 states that, “In fact, outside of New York City, the road building industry history of collective bargaining has been totally different; culminating and continuing in 8(f) agreements. In Nassau and Suffolk Counties there is a single collective agreement that sets forth the different road building job classifications and wages under LIUNA jurisdiction.” There is no citation to record evidence or a finding in the Decision to that effect.

Similarly, later in the same paragraph, Local 175 asserts that, “The fact is, depending on the job to be performed, workers are referred to employers to do a specific job. There is no citation to record evidence or a finding in the Decision to that effect. Indeed, it is not even clear whether Local 175’s assertion there applies to the New York City or Nassau and Suffolk Counties locale.

Lastly on page 6, in footnote 3, Local 175 asserts that, in other regions of the country, local unions performing asphalt and concrete work “are combined due to their smaller size in those areas and because it is convenient for LIUNA to maintain them that way.”² Not only is there no citation to record evidence because the Hearing Officer did not permit examination in this area, but, intriguingly, Local 175 asserts it knows the mental process of LIUNA officials as to why they maintain small locals. This rank speculation further illustrates the entirely insubstantial quality of the “factual” portion of the Request for Review. Local 175’s unsubstantiated speculations throughout the

² Local 175 admits in footnote 3 at page 6 of the Request for Review that the Hearing Officer excluded testimony on this subject, but Local 175 nevertheless asserts its own version of these “facts” in the Request for Review.

Request for Review particularly underscore why the Request for Review should be stricken and given no further consideration by the Board.

Page 8 of the Request for Review, including footnote 4, purports to detail certain representation cases previously filed by Local 175 and Local 1010. Suffice it to say that Local 175 has neither cited to the record nor listed the case names and numbers of any such cases so that it might be appropriate for the Board to take official notice of the cases claimed, or for the Employer to be able to dispute Local 175's claims. In particular, there is no factual basis cited, because there is none, for Local 175's assertion that it was recognized by the Employer based on a "showing of cards" as is stated in the last paragraph on page 8. The Employer was, at most, a successor and there has been no proof that there was a showing of union authorization cards by Local 175 with the Employer and demonstration of majority support on which recognition of Local 175 was based. (Hearing Transcript pages 650-655.)

At the top of page 9, Local 175 again speculates about facts admittedly not in the record, stating: "No one inquired, but the fact is that Local 1010 came out of Trusteeship much earlier; probably in 2007; and Local 1018 was not released from a trusteeship; but was simply merged into Local 1010 in late 2009." Here there is no citation to the record and Local 175's speculation about the history of LIUNA trusteeships should not be considered in any regard in this matter.

More egregious speculation by Local 175 occurs on page 10 of the Request for Review where it states that Frank Puma, Giuliano Rozza and Victorino Cruz "were in fact Local 1018 members; persons trained and experienced as asphalt pavers; not concrete workers as implied by witnesses for 1010 or Grace Industries." There is no citation to record evidence that these three workers had neither training nor experience

as concrete pavers as Local 175 asserts. The crucial point is that, throughout Local 175's Request for Review, it has not tied its arguments to the record evidence and the Request for Review is replete with speculation if not fabrication.

More of the same is found at page 11, in the paragraph beginning on that page, where Local 175 states: "Whatever concrete patches that were performed at that job were by Carlos Nunes' concrete crew, probably days before the asphalt workers even showed up....This was not a mixed crew as is implied by the Decision." There is no citation to the record evidence, and Local 175 speculates that certain concrete work was "probably" performed "days before the asphalt workers showed up." Typically, Local 175 interjects that "fact" with no support from the record in a grossly inappropriate attempt to contradict a contrary finding in the Decision. This unsupported speculation should be disregarded along with all of the Request for Review.

In footnote 7 at page 18 of the Request for Review, Local 175 makes its final factual assertion that is not only unsupported by the hearing record, but was clearly not presented to the Regional Director. It refers to an event that only occurred subsequent to the hearing; that is, the Employer's submission of the Excelsior list after the issuance of the Decision. Local 175 asserts in footnote 7 that, "The list compiled pursuant to the Steiny-Daniels criteria lists eight individuals all of whom are 1010 concrete workers; there are no asphalt paving workers listed." There is no citation to the record because there can be none; the Excelsior list post-dates the hearing by many weeks; and this factual assertion by Local 175, like all of its Request for Review, should be stricken and disregarded in this case.

The foregoing examples of Local 175's utter failure to cite to the specific portions of the hearing record relied upon in support of the Request for Review are

illustrative but they are not exhaustive. Virtually every page of the Request for Review contains factual assertions that are devoid of citation to the record.

The mandate of Section 102.67(e) of the Board's Rules is clear:

Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with ***page citations from the transcript*** and a summary of argument. ***But such request may not raise any issue or allege any facts not timely presented to the Regional Director.*** (emphasis supplied)

In the analogous area of Board practice involving exceptions to decisions of Administrative Law Judges, the Board requires that exceptions, like requests for review in representation cases, "designate by precise citation of page the portions of the record relied on" for review by the Board. Section 102.46(b)(1)(iii) of the Board's Rules and Regulations, 29 C.F.R. s. 102.46(b)(1)(iii).

The Board has had frequent occasion to strike a party's exceptions when they fail to cite to the hearing record for support of factual assertions made to the Board. See, for example, *BCE Construction, Inc.*, 350 NLRB 1047, 1047-1048 (2007) (Board disregarded exceptions that, *inter alia*, failed to cite to the portion of the record relied upon, as required by the Board's Rules, and adopted the ALJ's decision *pro forma*); *Carson Trailer, Inc.*, 352 NLRB 1274, 1274 (2008) (Board granted General Counsel's motion to strike exceptions that failed, *inter alia*, to designate the portion of the record relied upon as required by the Board's rules); and cases there cited. Similarly, where a party refers to facts that are not contained in the record, its exceptions are stricken and

given no consideration by the Board. *Redok Enterprises, Inc.*, 277 NLRB 1010, 1010 fn. 1 (1985).

It is indisputable that Local 175's Request for Review violates the Board's requirements for citation to the hearing record on virtually every page containing a factual assertion. This dereliction prejudices the Employer by making a substantive response to the Request for Review effectively impossible. In these circumstances, the Employer's motion to strike the Request for Review should be granted; Local 175's arguments should be given no further consideration; and the Decision and Direction of Election should be summarily affirmed.

The Request for Review Exceeds the 50-page Limitation

Local 175's "Request for Review of Regional Director's Decision & Direction of Election," is nineteen pages (excluding the certificate of service). In addition, at page 19 of the Request for Review, Local 175 expressly incorporates in its Request for Review, "the attached brief that was previously submitted to the Regional Director" as a basis for granting the Request for Review. The "Local 175's Brief In Support of Petition Filed in 29 RC 12034," which is incorporated into the Request for Review, is 41 pages (also excluding its certificate of service). The total is 60 pages.

Section 102.67(k)(1) of the Board's Rules states:

All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. ***Requests for review, including briefs in support thereof***, statements in opposition thereto; and briefs on review **shall not exceed 50 pages in length**, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days,

including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited. (emphasis supplied)

The Request for Review and its incorporated brief exceed the 50-page limit by ten pages (this exceeds the amount allowed by twenty per cent). Local 175 flagrantly violated the Board's restrictions, and this violation prejudices the Employer's ability to respond to the Request for Review. Accordingly the Request for Review should be disregarded and the Decision and Directions of Election should be summarily affirmed.

CONCLUSION

Based on the foregoing arguments and the entire record in these cases, the Employer's motion herein to strike Local 175's Request for Review of the Regional Director's August 18, 2011 Decision and Direction of Election should be granted and the Request for Review should be disregarded, and thereupon the Board should summarily affirm the Regional Director's Decision and Direction of Election.

Dated: September 19, 2011,
at New York, New York.

Respectfully submitted,
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CERTIFICATION OF SERVICE BY EMAIL UPON ELECTRONIC FILING

G. Peter Clark certifies that, on September 19, 2011, he caused true copies of the Employer's Opposition and Motion to Strike Local 175's Request for Review in Cases 29-RC-12031 and 29-RC-12043 to be filed with the National Labor Relations Board and the Regional Director of Region 29 of the Board by electronic filing, and to be served by electronic mail (e-mail) upon:

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Dated: September 19, 2011

By: /s/G. Peter Clark