NATIONAL LABOR RELATIONS BOARD

Heavy Construction Company, Inc. :

Employer

Case No. 29 RC 12040

Highway, Road and Street

Construction Laborers Local 1010,

LIUNA, AFL-CIO

and

Petitioner

and

United Plant and Production

Workers Local 175, IUJAT

Intervener

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Case No. 29 RC 12045

PETITIONER/INTERVENER LABORERS LOCAL 1010 MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR REVIEW

Preliminary Statement

Petitioner/Intervener Highway Road and Street Construction Laborers Local 1010 ("Local 1010"), by its undersigned attorneys, hereby submits this request for review of the Regional Director's Decision and Direction of Election on the basis that the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and the error prejudicially affects the rights of Local 1010.

Local 1010 filed a petition in the instant action seeking a bargaining unit of employees who work with both asphalt and concrete. (DD&E, p. 2). Intervener/Petitioner Local 175 ("Local 175") filed a petition seeking a unit limited to laborers who work primarily with asphalt. (Id.) The Regional Director correctly found that the Employer, Heavy Construction Company, Inc. ("Heavy") employed no employees who work primarily with asphalt and that all of the employers of the Employer in the bargaining unit work with asphalt as well as concrete. The Regional Director also correctly found that the appropriate unit consisted of all employees of the employer with the exception of drivers (and employees represented by other unions not parties to the proceedings). (DD&E p 38) However, based upon: a) unsupported conclusions that that the only asphalt work that the employees did was the cutting of asphalt and that work was "incidental to the concrete work" and; b) unsupported conclusions that Local 1010's witness "admits" that there is "generally more concrete work than asphalt work in (the) sidewalk/pedestrian ramp projects performed by the Employer", the Regional Director determined that such incidental work need not be specifically included in the unit description. (Id. At pp 37-39) In support of his decision, the Regional Director cited to inapposite precedent involving a case in which the Board determined not to include specific classifications in a unit description where there were not employees in that classification but the work performed was done by the included classifications. (DD&E p. 39).

The Regional Director's determination was apparently also driven by the erroneous view, contrary to the record testimony of both Local 1010 and Local 175 witnesses, that "asphalt paving work" does not include asphalt preparation work. As a result, because the reader of the record erroneously concluded that there was insufficient evidence in the record to establish that the Employer's employees actually perform the laying of asphalt, notwithstanding that: a) there

is no dispute that the Employer replaces asphalt paving on the ramp work that it does; b) that asphalt paving is an essential part of the handicap access ramp work that the Employer does; c) the unit covers the only employees of the employer, so that *res ipse loquitar* dictates that those employees must have done asphalt paving work. Furthermore, there is zero evidence contradicting the testimony of Local 1010's witness that asphalt work is an essential part of the ramp process and the work had to have been done by the employees who also do the concrete work.

Local 1010 is substantially prejudiced by the unit description for several reasons. The first is that by not specifically mentioning asphalt work the unit description gives the erroneous impression that it is limited to employees who perform only concrete work, which would mean that there are no employees in the unit. The Employer was required to submit the Excelsior List to Region 29 by November 15, 2011. As of the making of this Request for Review, the Employer has still not submitted the list.

In addition Local 1010 and the members of the bargaining unit are severely prejudiced by the unit description because one of the central disputes in the case between the two petitioning unions is whether or not employees who do concrete work also perform asphalt and whether or not it is appropriate to combine in a single unit employees who work with both asphalt and concrete. As the record demonstrates that all of the employers' employees in the bargaining unit work with both asphalt and concrete and there are no employees who work only with concrete or only with asphalt, the decision, by disregarding the record evidence, denies Local 1010 the ruling to which it is entitled on a substantial issue in the case. Moreover, Local 175 claims that it has a pre-hire agreement covering asphalt work; as a result, the unit description by failing to expressly recognize that the performance of asphalt work is covered by the unit description creates a

potential conflict between a Local 1010 9(a) bargaining unit and a Local 175 pre-hire agreement. The unit description is prejudicial to Local 1010 because it does not state clearly that employees who perform both concrete and asphalt work are encompassed in the 9(a) bargaining unit.

Local 1010 has set forth below the specific record citations that demonstrate the errors in the decision and respectfully requests that the Board modify or direct the Regional Director to modify the unit description to include "all full time and regular part time employees of the employer who perform concrete work and asphalt work."

ARGUMENT

THE RECORD EVIDENCE DEMONSTRATES THAT THE EMPLOYER'S CONCRETE EMPLOYEES DO ASPHALT WORK AND THE ASPHALT WORK IS AN ESSENTIAL PART OF THE RAMP REPAIR AND CONSTRUCTION THAT THE EMPLOYEES DO AND SHOULD BE EXPRESSLY INCLUDED IN THE UNIT DESCRIPTION.

The record evidence in this case is found in the transcript of the instant matter as well as the record in Grace Industries, LLC (DD&E p. 9 fn. 16). In his decision in Grace Industries, LLC the Regional Director noted the changes in the heavy highway industry, as testified to by Local 175's witness Glenn Patrick. In particular the Regional Director noted that Patrick testified that whereas in the past asphalt paving meant "just paving" *i.e.* the actual spreading of asphalt, presently it means performing more preparation work which includes removing old asphalt and especially *grading the base*, tamping it and rolling it. (Grace DD&E pp 19-20) Local 1010's witness in that case expressly testified that asphalt paving jobs entail 80% preparation and 20% final paving. (Heavy DD&E, p. 6). Lowell Barton, Local 1010's witness in the instant matters, expressly testified that employees of Heavy saw-cut asphalt and compact the sub-grade in preparation for replacing the asphalt to ensure that the sidewalk is level and that the repair of

the asphalt has to do with the relationship between the original grade and the new grade and how much concrete or asphalt you are taking out depends upon the particular circumstances of the job. (Heavy TR. pp. 23 L8 to p. 24 L13.) While at one point the witness said that the primary job of the installation is ripping out the concrete, he went on to explain that depending upon the circumstances you could be ripping out and replacing larger or smaller amounts of asphalt. (Id. at p. 24: 3-13). Moreover, Barton's testimony makes it clear that when it comes to making sure the grades are level and there is proper drainage, the asphalt work is very important. Thus the reliance by the Regional Director for his finding that "asphalt work" at Heavy is only incidental to concrete work is not supported by the record. When asked on cross if the "bulk" of the work is concrete work for each curb, Barton answered "No, you have three phases. You have the removal, which is a lot of work." (Heavy TR. p. 21 L16-24). When asked removal of what, he answered "The concrete, (sic) curb and the asphalt." (Id. p. 21 L25 - p. 22 L1) As Barton's testimony makes clear the mere fact that more concrete may actually be removed than asphalt does not make the asphalt removal and replacement merely "incidental" to the concrete work, as the successful removal and replacement of the asphalt is equally important to the successful construction of a pedestrian ramp since it is essential to leveling the grade and insuring proper drainage. (Id. p. 24 L3-13).

The Regional Director's finding that there was insufficient evidence that Heavy employees do actual laying of asphalt is also not supported by the record. Barton testified that the process engaged in by the Heavy employees for the building of the pedestrian ramps always involved the same processes of removing concrete and asphalt and replacing asphalt. (Heavy Tr. p. 10 L4 - p. 13 L6). Barton testified that he had been observing Heavy doing the work over a period of two years. The most recent observation was in April 2011, where he saw the

employees saw-cutting asphalt. (*Id.* p. 33 L5). And although he did not see them spread asphalt that day, he had seen them over the past two years and based upon his understanding of the process that is what they would have to do. (*Id.* p. 32 L8-17). Furthermore, it is undisputed that replacing the asphalt was done by the same crew that removed the asphalt and replacing it is an essential part of completing the ramp work.

As a result of the foregoing the Regional Director's conclusion that asphalt work was an incidental part of the work that Heavy employees in the bargaining unit do was clearly erroneous. The record does not support his conclusion to exclude asphalt work from the unit description. Moreover *Huntley Industrial Millings*, 131 NLRB 1227 cited to by the Regional Director, is inapposite to the issue. In that case the joint petitioners were seeking a unit description that included classifications that did not exist at the employer and there was no issue in dispute as to whether or not the work performed was in or outside of the bargaining unit. In the instant case Petitioner is not seeking a unit description defined by employee classifications but by the work performed by employees, which indisputably includes asphalt work. Even assuming *arguendo* that there is insufficient evidence that the employees actually spread asphalt there is no dispute between the parties that asphalt work includes preparation work, including the saw-cutting of asphalt and there is no dispute that the employees in the bargaining unit saw-cut asphalt and do other asphalt preparation work.

CONCLUSION

The record evidence demonstrates that Regional Director's decision on the substantial factual issue of whether or not the unit employees do asphalt work and whether or not asphalt work is merely incidental to the concrete work they do was clearly erroneous on the record and has prejudiced the rights of Local 1010. Local 1010 respectfully requests that Board revise the

unit description to include employees of the employer who perform both concrete and asphalt work or remand the case to the Regional Director with a direction to revise the unit description to include employees of the employer who perform both concrete and asphalt work.

Date: November 17, 2011 New York, New York

Respectfully submitted,

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