BEFORE THE NATIONAL LABOR RELATIONS BOARD

Heavy Construction Company, Inc., Employer And Highway, Road and Street Construction Laborers, Local 1010, LIUNA, AFL-CIO, Petitioner And United Plant & Production Workers, Local 175, IUJAT, Intervenor.	Case No. 29 RC 12040
Heavy Construction Company, Inc., Employer, And United Plant & Production Workers, Local 175, IUJAT, Petitioner And Highway, Road and Street Construction Laborers, Local 1010, LIUNA, AFL-CIO, Intervenor.	Case No. 29 RC 12045

LOCAL 175, UNITED PLANT & PRODUCTION WORKERS MEMORANDUM OPPOSING LOCAL 1018'S REQUEST FOR REVIEW AND SUPPORTING DECISION OF REGIONAL DIRECTOR

PRELIMINARY STATEMENT:

Local 175, the Intervenor in Case No. 29 RC 12040 and the Petitioner in Case No. 29 RC 12045 submits this Opposition to Local 1010's Request For Review. Contrary to Local 1010's claim that a substantial factual error has occurred that prejudices Local 1010, the Regional Director's Decision and Direction of Election filed in this matter was substantially based on the record testimony, or lack thereof, and does not prejudice Local 1010 because it already has, or so it claims[1], a contract with the Employer for jobs that are primarily performing the preparation for pouring of concrete, (*eg., the ripping out of old concrete walkways/curbs and the setting of forms into which concrete is poured)* and the actual pouring of concrete; which is the unit found to be appropriate by the Regional Director. The facts presented at the hearing held on these Petitions failed to establish that the Employer's workers performed jobs where the primary function was asphalt paving, used tools related to the paving of asphalt, or were educated or experienced in the handling of asphalt. The Decision was also consistent with the prior collective bargaining history between the Employer and its Unions.

The Regional Director found here:

(a) There was no probative evidence that the Employer employs or has employed in the relevant time period any employees who primarily perform asphalt work; thus the Director dismissed Local 175's Petition for a unit consisting solely of persons who primarily perform asphalt paving.

[1] See Transcript, 46-47 where it is noted that the contract offered by Local 1010 as evidence of a showing of interest and of performing work substantiating its petitioned for unit is signed April, 2008 but is not to be effective until July 1, 2009. This agreement purports to cover both asphalt and concrete work. However, Local 1010 could not sign an agreement that contained jurisdiction over asphalt work as that was the exclusive jurisdiction of its sister local, 1018, with which it did not merge until late 2009; more than a year and one half after the purported signing of this contract. Further, Local 1010 contracts were not combined with Local 1018 contracts until May, 2010. It would appear that the signature page of the submitted contract is not the signature page of the contract signed in April 2008.

(b) That since there is insufficient evidence to establish that the Employer's employees perform utility, asphalt paving or milling work those categories of work will not be specifically included in the bargaining unit.

Pursuant to the Board's Rules and Regulation, Section 102.67, Requests for Review will be granted only if compelling reasons exist upon one or more grounds. Local 1010 relies upon Section 102.67(c) (2) asserting that the Decision is clearly erroneous on a substantial factual issue and that they have been prejudiced. We will demonstrate below that the Decision was factually correct, not substantially erroneous, and consistent with industry bargaining history.

BARGAINING HISTORY:

The Regional Director is very familiar with the bargaining history that exists between Employers in the asphalt paving and the concrete pouring industries in New York City having conducted dozens of hearings on the subject and elections in the industry since 2005. The Decision recites with clarity that there can be no dispute that in New York City there has been a long history of separate contracts with construction employer associations and independent firms covering different aspects of paving and related work. (DD&E, pp. 9-14) In its Request for Review, Local 1010 ignores this substantial bargaining history that places a significant burden on Local 1010 to overcome.

THE EMPLOYER DID NOT DIRECTLY PERFORM ASPHALT PAVING:

The record is devoid of testimony that the Employer did traditional asphalt paving work or directly employed in the past members of Local 1018, the LIUNA asphalt paving union, to perform any of its work. There is no testimony in the record that the Employer used tools or equipment normally associated with an asphalt paving job or a job that is primarily asphalt

paving as opposed to tools or equipment used for pouring of concrete. There is no testimony that any worker operated an asphalt spreading machine, used the special asphalt rake to actually spread asphalt; or the unique asphalt shovel to move asphalt; or a tamping machine or roller to compact asphalt once it is put down. The employer may at one time years ago have had a sewer construction job in which it hired directly or subcontracted for, (the record does not state which), asphalt paving work; but that work would have been covered by a separate collective agreement (T. 28). The record does not recite that the employer's workers actually performed the asphalt paving work for that sewer work that involved asphalt paving!

Lowell Barton, Local 1010's elected officer and Business agent, testified generally and at times evasively. He was the only witness called in the hearing. In an attempt to over generalize the work involved, Barton claimed that the Local 1010 employees of the Employer were currently, in May 2011, doing concrete, asphalt, heavy construction, heavy highway construction. [2] He admitted never having spoken to any management member of the Employer about placing Local 1010 employees with them so he had no knowledge of whether the firm had ever asked for persons skilled or experienced in the laying or handling of asphalt. (T. 21)

When asked on cross examination what the work consisted of he acknowledged that at all of the various worksites where the Employer was present that he witnessed the Employer was there to perform the installation of a concrete ramp on a street corner. When asked if the bulk of that work involved was working with concrete, (*eg.*, breaking the sidewalk, the curb and installing a new concrete ramp and taking care of any needed asphalt at the end), he responded "NO, you have three phases. You have the removal which is a lot of work" referencing the removal of the concrete sidewalk, the concrete curb, and the minimal asphalt that may come up

[2] Local 1010 petitioned for inclusion of utility paving and milling of roadways in addition to paving regardless of material used. Barton never testified that the employer ever did or was doing utility paving or milling and therefore the Regional Director properly excluded those kinds of work from Appropriate Unit finding.

when the curb was excavated. (T. 21-22) Barton finally retracted his original position that the bulk of the work was not involving concrete and acknowledged that there is more concrete work involved in the installation of a ramp. (T. 22)

He went on to describe that each corner may be different, you may go back into the walkway further and have to rip and replace more concrete (T. 22-23). Importantly, Barton agreed that the primary job of a ramp installation relates to the ripping out and replacement of concrete sidewalk and curb. (T. 23). The purpose of the installation is to make the sidewalk slope gradually down to street level. (T. 23). Barton once again tried to exaggerate the existence of asphalt work by saying there is work related to asphalt to make sure water flows; or that by accident when they rip up the curb a large chunk of asphalt from the road might come up. (T. 23) But he admitted that each job was different, there was no set rule, and they dealt with various conditions. (T. 24). The job itself involved ripping out concrete, setting concrete forms, and pouring new concrete. The object of the job was to rip up concrete. It was to disturb the street as little as possible; but to the extent some asphalt came up the workers, according to Barton, came back latter to lay it down. (T. 23-24)

When asked about the crew performing the work and the reason why workers did the concrete work first and came back hours or days latter to perform asphalt he stated: "...again I don't run those up. I imagine that they would, they would just do whatever the boss told them, you know." (T. 27) Barton essentially did not know why the asphalt was done later. He was guessing using the words "I imagine." When asked if he could identify the workers who he saw working for the employer he named a few; but could not name any individual who was previously a member of the asphalt union Local 1018. He simply did not know the history. (T.

27-28) He admitted that he has never seen employees of Heavy Construction perform curb to curb asphalt paving. (T. 28)

Barton testified mostly from his experience in the industry making statements that : "Most of the time, most of the time I've seen this done and most heavy contract works the same way. It appeared to me that they were working the same way based on my observations of the existing work and the current work that was going on. They would go in there and do concrete, get the curbs in, do the excavation, get the curbs in fully poured." (T. 32) This demonstrates that the primary purpose of the ramp installation job related to work with concrete; not asphalt. Barton went on to say in reference to asphalt: "At the end of the day go and do a temporary patching even if it was a little bit higher or lower they patch that up." He indicated that based on his experience that some workers would come back a day or two later to saw cut that area out to do a finished asphalt patch. (T. 32) In the end, however, Barton readily admitted that: "I didn't, I didn't see them long enough to know exactly what their, what their habits were and how they did it, but I could see like a standard project." (T. 32-33). Barton never saw the workers actually lay asphalt on the job immediately after they poured concrete. He saw someone on one job, in Rockaway, saw cut a patch of temporary asphalt; but he saw no one actually repair that asphalt at the Rockaway job. (T.33) Moreover, he never saw the workers who would come a day or two later to perform the finished asphalt work. Thus, there is no testimony that the persons who came back later were actually employees of the Employer or workers from the same Local 1010 crew. That fact leaves open the question of whether separate asphalt workers didn't actually come back days later to perform that work.[3]

[3] To the extent Local 1010 claims that there was "grading" work related to asphalt on the ramp jobs they have simply turned the issue inside out. On the ramp jobs it was preparation for a concrete job which typically is covered by a concrete contract and not preparation for an asphalt job. (See, Request for Review, p. 2, 4-5. Local 1010 cites T. pp23 L8 to T.p24, L13 for the proposition that employees of Heavy saw-cut asphalt and compact the

Notably, Barton spent little time observing any of the jobs he testified about. He claimed to either have passed by driving and observed or stopped for a few minutes to speak with workers. He says he saw a worker place asphalt in the road; but he did not testify as to where, how much asphalt was placed or the extent of that work in relation to the primary purpose of the job which was to tear out concrete and replace concrete. (See T. 34)

Looking at Barton's testimony he never once referred to tools or equipment used by the workers as being those used for asphalt paving. He never mentioned the use of a machine to lay asphalt, a special rake or shovel to move it, or a tamper or roller to compact it. And although the Petitioned for Unit included a request that Utility Paving and Milling functions be included in the Petitioned for Unit there was nothing in Barton's testimony that remotely intimated that the Employer was involved in such work.

THERE IS NO PREJUDICE TO LOCAL 1010:

Local 1010 asserts it is prejudiced by the Regional Director's determination that the appropriate unit does not include incidental work related to the handling of asphalt. Local 1010 refers to a sever eprejudice. Local 1010 says this is so because the Unit found appropriate, they assert, gives an erroneous impression that it is limited to employees who perform only concrete work. They claim that there are no employees who perform "only" concrete work and therefore that there are no employees in the bargaining unit. This is a specious argument since the unit does not use the word "only" when describing employees "who perform concrete work... ." And the NLRB has approved units where other incidental work was performed without that work being specifically set forth in a bargaining unit.

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sub-grade in preparation for replacing the asphalt the amount of which depended on the particular circumstances.) Regrettably, Barton never mentioned that the Employer's workers were compacting the sub-grade in preparation for replacing the asphalt; and at that juncture Barton never mentioned saw cutting of asphalt. All he ever saw, maybe, is a person throwing some asphalt into the road as a temporary fix to some asphalt that came up when they excavated concrete. (T. pp 23-24)

The next basis for alleged prejudice is that their members, who already are covered by a concrete agreement with the employer) are somehow "entitled" to be given the bargaining unit they described even in the face of the industry bargaining history showing asphalt contracts were separate from concrete contracts, and the fact that there is no testimony that Heavy's workers are performing in the classifications of an asphalt paver or are being paid prevailing wage rates required for those who perform asphalt work. There is no testimony that the Employer or the workers use tools used by asphalt pavers in their work. Where does the "entitlement" stem from?

Finally, on this point, Local 1010 asserts that the unit determined by the Regional Director leaves open a "potential conflict" between a Local 1010 bargaining unit that covers concrete pouring jobs and a Local 175 agreement requiring the Employer to use its asphalt paving employees when performing a job that primarily consists of asphalt paving work. First of all, Local 1010 currently has the collective agreement covering concrete work. What it attempts to do here is gain a certification for asphalt paving work, which is work this employer does not truly perform. That is why they never previously had a collective agreement with the Asphalt Paving union of LIUNA, Local 1018 in the past. At the very least this fact points to there being only "incidental asphalt paving work" done historically by this Employer. Otherwise LIUNA would have insisted on them signing an Asphalt Paving contract with the old Local 1018. There is no evidence or testimony that ever occurred. Furthermore, to date no such conflict has ever arisen between Local 175 and Local 1010 with this Employer and should one hypothetically arise there are statutory avenues available to all parties to resolve it.

CONCLUSION:

The Regional Director distilled the testimony of Barton, and looked at the unique bargaining history of the parties, (which showed that Heavy Construction only had a Pre-Hire Asphalt Paving contract with Local 175; and never previously had one with Local 1010 or Local 1018 of LIUNA), and

determined that the work done by the Employer was primarily that of working with and pouring concrete.[4] The workers working for them primarily performed work with concrete sidewalks, curbs, their excavation, grading and the setting of forms into which concrete was poured. Their work with asphalt was incidental in that it related in a very small way specifically to the varied extent that asphalt came up from the roadway during the excavation phase of the concrete sidewalk or curb. That analysis is amply supported by the record transcript and the bargaining history between the parties.

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[4] Local 1010 asserts that the Regional Director's determination was "apparently also driven by the erroneous view, "... that 'asphalt paving work' does not include asphalt preparation work." (Request for Review, p. 2-3) The preparation work for the job performed by Heavy Construction was preparation to perform a concrete paving (pouring) job and not an asphalt paving job. The record shows, as it does in all these cases, that incidental asphalt work may occur when the job is primarily one to excavate, grade, create forms and pour concrete. Barton never testified that asphalt paving is an "essential" part of installing a concrete handicap access ramp on a street corner. To the contrary, he said there was no set rule, it depended on what came up from the road when the excavation was performed; and it varied widely. (T. 24) He never testified as to the amount of asphalt needed for such a job. Finally, there is no testimony whatsoever that the unit requested covers the only employees of the employer. Barton never saw the persons who performed the finish asphalt work, only persons throwing down temporary asphalt.

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