

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

GRACE INDUSTRIES, LLC, Employer,

And

**Case Nos: 29 RC 12031 and
29 RC 12043**

**HIGHWAY ROAD and STREET CONSTRUCTION
LABORERS, LOCAL 1010, LIUNA, AFL-CIO,
Petitioner/Intervenor,**

And

**REQUEST FOR REVIEW
OF REGIONAL
DIRECTOR'S DECISION
& DIRECTION OF
ELECTION and SECOND
SECOND SUPPLEMENTAL
DECISION**

**UNITED PLANT & PRODUCTION WORKERS
LOCAL 175, IUJAT,
Petitioner/Intervenor**

Local 175, United Plant & Production Workers, Local 175, IUJAT, the Petitioner in Case No. 29 RC 12043 and Intervenor in Case No. 29 RC 12031, (hereafter "Local 175"), requests review of both the Regional Director's Original Decision and his Second Supplemental Decision dated December 28, 2011 on the appropriate unit pursuant to Section 102.67(c) of the Board's Rules and Regulations because it is contrary to NLRB precedent, policy and clear uncontested facts contained in the record and contrary to the NLRB's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83.

On September 12, 2011 Local 175 submitted its Request for Review of the Regional Director's original Decision & Direction of Election. On December 8, 2011 the Board granted Local 175's Request for Review as it raised substantial factual issues and remanded the matter to the Regional Director for further consideration in light of *Specialty Healthcare*, with Member Hayes specifically requesting that an explanation of why the asphalt workers bargaining unit sought by Local 175 was not appropriate. On December 28, 2011 the Regional Director issued

his Second Supplemental Decision that specifically reiterated his original decision finding that Specialty Healthcare did not apply to a situation where two unions submitted Petitions for different units, where one union sought to enlarge established bargaining units and where the Employer agreed with that union that the established bargaining unit should be expanded to include additional workers.

This Request for Review is submitted because the Regional Director once again has made a Decision that is contrary to Board precedent, policy and clear uncontested record facts. I would direct the Board to the initial submission by Local 175 in regards to its initial Request for Review of the original Decision & Direction of Election; the substance of which the Regional Director wholly relies upon in his Second Supplemental Decision. In addition, the following is directed towards the faulty analysis set forth in the Regional Director's Second Supplemental Decision.

The Regional Director acknowledges that essentially Local 1010 and the Employer sought a larger unit than previously existed for over a 70 year bargaining history and that Local 175's Petitioned for unit sought to maintain the *status quo*. (Supplemental Decision, p. 2)¹ The Employer, aligning itself with Local 1010's request for a larger unit, conceded, at Volume 1, page 37 of the Transcript, that its position was that Local 1010's requested unit was appropriate even "if it includes or combines into a new unit two historically separate units, it's still appropriate." Thus, from the record, it is clear that there were only two positions taken in this proceeding: one that wanted to maintain the unit's *status quo*; and one that wanted to enlarge those separate units by including additional laborers. Contrary to the Regional Directors

¹ The Regional Director wrongly asserts that Local 175 conceded that a combined unit of asphalt and concrete laborers would also be appropriate but had requested a self determination election if that was found to be the appropriate unit. Those conversations were made as alternative suggestions and were not set forth as concessions. See Transcript, Vol. 1, pp 25-27.

statement at page 7 of the Second Supplemental Decision that *Specialty Healthcare* does not apply here because this is a fight between two unions, it is abundantly clear that this fight is also between one union, Local 175, and the Employer as well. (Second Supplemental Decision, bottom of page 2). That disagreement over unit between a union that filed a Petition and an Employer that believed the unit should be larger than the one Petitioned for is the *Specialty Healthcare* circumstance. And there has been no showing here as required by that case that the community of interest between asphalt pavers and persons who pour concrete is “overwhelming.”

To the contrary, the Regional Director fails to give weight to the fact that asphalt pavers are trained in the use and application of asphalt, concrete workers are not; asphalt pavers use totally different equipment from concrete workers, (paving machines, rollers, special rakes and shovels; dump trucks), deal with material that is 350 degrees, (compared to cold concrete); are paid at higher wage rates; have different skills and are governed by collective agreements that reference very different job classifications. (See Original Request for Review and Exhibits attached thereto for Transcript references).

Further, the Second Supplemental Decision does not discuss the question raised by Board Member, Brian E. Hayes, who specifically requested that it be further explained why the bargaining unit consisting of only asphalt pavers requested by Local 175 was not appropriate. The Regional Director’s response to that request was to say: “As set forth fully in the DDE, the undersigned found that Local 175’s unit is inappropriate for bargaining, and that only the larger unit sought by Local 1010, (*and the employer*), is appropriate.” (Second Supplemental Decision, page 4). No further explanation was offered. Without citation the Regional Director asserts that “to some extent, the history of separate units was based on the inner working of the former

LIUNA locals ... more than it was based on any inherent disparity of interests .” (Id., at 4-5).

The Regional Director ignored totally the record testimony concerning the origins of the former LIUNA Asphalt Union, Local 1018, which was created, maintained and separately Chartered by LIUNA for over 70 years. (Transcript, Volume 5, pp 582-583; Original Request for Review, p 18 and footnote 7) And the Regional Director disregarded the fact that Asphalt Paving workers and Concrete laborers are not fungible; (*eg.*, you don’t take a concrete form setter and have him rake asphalt, and you don’t take an asphalt screedman or raker and throw him on a trowel to level concrete. It just is not done.)

The Regional Director recites, at page 5 of the Second Supplemental Decision, that the existence of units formed under Section 8(f) of the Act are “not necessarily conclusive for determining appropriate units in a representation case;” but ignores the fact that at least since 2005 these separate bargaining units were based upon secret ballot elections held by the NLRB and certified thereby under 9(a) of the Act; not 8(f). The Regional Director, without citation, bases his entire decision on the asserted change in the industry related to preparation work. The only evidence in the record was general reference that one asphalt worker perceived he was being asked to help more with preparation work before he actually did the asphalt paving. But preparation work was always part of the work assigned to asphalt pavers when the jobs involved asphalt paving. There was no change in industry practice or in the methods used or in the work assigned to asphalt pavers. No empirical facts or evidence was ever submitted by any party on that point; yet the Regional Director appears to wholly base his decision on that asserted change.²

² The fact that sometimes, incidentally, an asphalt worker might participate in a function one could call work for a concrete worker, was recognized by all parties when the elections were held under Board auspices in 2005 and thereafter with the use of the phrase “primarily perform asphalt paving.” The parties, including all employers, always acknowledge the separate nature of the work, the skills, the equipment, and the wages.

The Regional Director opined that in his “view the record did not support a finding that the Employer’s asphalt workers are a craft or departmental unit, or even an identifiable and distinct group with a community of interest separate from other employees.” (Second Supplemental Decision, p. 5) This statement ignores again the 70 years of separate bargaining, the prior elections held by the NLRB, the separate job classifications set forth in the collective agreements that exist, the higher wages paid asphalt workers, the different skills needed by asphalt workers, the different equipment used by asphalt pavers and the training needed to handle, pave and level asphalt; all of which identifies and separates persons who primarily perform asphalt paving from persons who primarily perform the pouring of concrete. (See Original Request for Review for citations to record).

CONCLUSION:

The Second Supplementary Decision continues to rely upon the faulty reasoning set forth in the Original DD&E; all of which was addressed in Local 175’s original Request for Review. The Regional Director fails utterly to deal with the issue of “overwhelming community of interest” in relationship to the Employer’s and Local 1010’s singular position that the existing bargaining units; established through Board elections under 9(a) of the Act, should be modified by adding additional job classifications and workers. *Specialty Healthcare* stands for the principle that where one party seeks to enlarge an existing unit or a petitioned for unit with additional employees the party (or parties) proposing the addition have the burden of establishing that the workers to be added into the unit have an overwhelming community of interest with each other. In *Specialty Healthcare* the question was not whether the larger unit was appropriate (as it clearly could have been); but whether when a union petitions for a particular unit; and other parties seek to enlarge that petitioned for unit, (whether it be another union or an employer), the

party seeking the larger unit needs to establish an “overwhelming community of interest” between the workers in the proposed larger unit.

For the reasons stated both here and in Local 175’s original Request for Review, (including exhibits attached thereto), Local 175’s Request for Review of the Regional Director’s Original DD&E and Second Supplemental Decision should be granted once again.

Respectfully submitted,

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Certificate of Service

Eric B. Chaikin hereby certifies that he served a true and correct copy of this Request for Review upon the following persons/parties on January 6, 2012:

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