

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GRACE INDUSTRIES LLC
Employer

and

HIGHWAY ROAD AND STREET
CONSTRUCTION LABORERS LOCAL 1010,
LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO
Petitioner-Intervenor

Case Nos. 29-RC-12031
and 29-RC-12043

and

UNITED PLANT AND PRODUCTION
WORKERS, LOCAL 175, INTERNATIONAL
UNION OF JOURNEYMEN AND ALLIED TRADES
Petitioner-Intervenor

SUPPLEMENTAL DECISION ON OBJECTIONS

On April 25, 2011,¹ the Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America, AFL-CIO (“Local 1010”) filed a petition in Case No. 29-RC-12031, seeking to represent certain employees employed by Grace Industries LLC, herein called the Employer. On April 27, 2011, the United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades (“Local 175”) filed a petition in Case No. 29-RC-12043, seeking to represent certain employees of the Employer. The unit sought by Local 175 included some, but not all of the employees in the unit sought in Local 1010’s petition.

Pursuant to a Decision and Direction of Election, issued by the undersigned on August 18, an election by secret ballot was conducted on September 23 among the employees in the following unit:

¹ All dates hereinafter are in 2011 unless otherwise indicated.

All full-time and regular part-time laborers employed by Grace Industries LLC² 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, but excluding all other employees, those represented by Laborers International Union Local 1298, Laborers Local 60, or Local 731, Building, Concrete, Excavating and Common Laborers, LIUNA, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

On September 12, Local 175 filed a Request for Review of the Decision and Direction of Election. That Request for Review is pending before the Board.

On September 23, the ballots were counted at the conclusion of the election. The Tally of Ballots, made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	12
Number of void ballots	0
Number of ballots cast for Local 1010	7
Number of ballots case for Local 175	0
Number of votes cast against participating labor organization	0
Number of valid votes counted	7
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots	11

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for Local 1010.

Local 175 filed timely objections to conduct affecting the results of the election. Local 175's objections are attached hereto as Exhibit A.

² In addition to those eligible to vote under the Board's standard criteria, unit employees are eligible to vote if they have been employed for 30 days or more within the 12 months preceding the eligibility date, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24 month period immediately preceding the eligibility date. Employees who have been terminated for cause or quit voluntarily prior to completion of the last job for which they were employed would not be eligible under this formula.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

Objection No. 1

In its first objection, Local 175 alleges that the Excelsior³ list provided prior to the election was deficient in two ways. First, Local 175 alleges that the employees included on the Excelsior list were not eligible to vote because they did not work the requisite number of hours under the Steiny-Daniel formula for eligibility used in this case. Second, Local 175 alleges that eight named employees were omitted from the list. The Employer and Local 1010 assert that this objection is without merit.

In its offer of proof, Local 175 states that the Employer's payroll and work records would support its allegations, but offers no records in support of this objection. Moreover, Local 175 does not name any witnesses who could testify in support of its allegations.

The independent investigation established that there were eight names included on the Excelsior list. During the pre-election conference, all parties were given an opportunity to inspect and sign the Excelsior list. Roland Bedwell, a Local 175 business agent, signed the Excelsior list on behalf of Local 175. Local 175 did not challenge the votes of any individuals during the election.

It is well settled that post-election challenges may not be considered as objections. See Babcock & Wilcox, 118 NLRB 944 (1957) (in which the Board held that challenges to voters'

³ Excelsior Underwear, 156 NLRB 1236 (1966).

eligibility cannot be considered as objections); see also Interstate Hosts, Inc., 131 NLRB 1221, 1224 (1961) (holding that post election challenges cannot be considered as objections). Here, Local 175 seeks to challenge the eligibility of the voters included on the Excelsior list in an objections proceeding, which it may not do. Accordingly, I overrule this portion of Local 175's first objection.

With regard to Local 175's allegation that the Employer omitted eight names from the Excelsior list, Local 175 asserts that the Employer's records will support its objection. The Employer asserts that the individuals named by Local 175 did not work the requisite number of hours under the Steiny-Daniel formula to be eligible to vote in the election.

It is incumbent on the party filing objections to provide evidence sufficient to prove a prima facie case within seven days of the date for filing objections. See Craftmatic Comfort Mfg. Corp., 299 NLRB 514 (1990). If the Regional Director does not receive timely evidence in support of objections, those objections should be overruled. See Star Video Entertainment L.P., 290 NLRB 1010 (1988). In order to support objections adequately, a party must do more than "rely on its bare allegations." Lange and Perkins LLC d/b/a The Daily Grind, 337 NLRB 655, 656 (2002). A party must at least identify its witnesses and provide a description of the evidence the named witnesses could provide. See id.

The independent investigation established that Local 175 offered some of the Employer's payroll records into evidence during the pre-election hearing. A review of those payroll records is inconclusive and does not establish that any of the named employees worked the requisite amount of time under the Steiny-Daniel formula.

In this case, Local 175 has not provided sufficient evidence in support of its allegations regarding omissions from the Excelsior list. Local 175 offers no documentary or testimonial

evidence to support its claims. Such an offer of proof is insufficient from the party bearing the burden of proof on those claims. Accordingly, I overrule Local 175's first objection.

Objection No. 2

In its second objection, Local 175 asserts that the ballots should not have been counted at the close of the polls, but rather should have been impounded, because Local 175's Request for Review of the Decision and Direction of Election was pending. The Employer and Local 1010 assert that this objection lacks merit.

The independent investigation established that the Decision and Direction of Election was issued on August 18. On September 12, Local 175 filed its Request for Review with the Board. On September 23, following the close of the polls, the Board Agent conducting the election opened and counted the ballots, and issued a Tally of Ballots to the parties.

Local 175 alleges that the ballots were opened in violation of the Board's Rules and Regulations which provide that "if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision." Rules and Regulations, Section 102.67(b).

Local 175 business agent Roland Bedwell was present at the count. Although Local 175 asserts that Bedwell complained to the Employer's representative that the votes should not be counted, Local 175 does not assert that Bedwell ever raised this concern with the Board Agent conducting the election. Bedwell signed the Tally of Ballots on behalf of Local 175.

The Board's election procedures are intended to provide "those safeguards of accuracy and security thought to be optimal in typical election situations." Polymers, Inc., 174 NLRB 282, 282 (1969). These procedures "are designed to ensure both parties an opportunity to

monitor the conduct of the election, ballot count, and determinative ballot procedure.” Paprikas Fono, 273 NLRB 1326, 1328 (1984). The Board recognizes that strict compliance with its election procedures does not guarantee the validity of an election; similarly, deviation from these procedures does not necessarily require setting aside an election. See St. Vincent’s Hospital, LLC, 344 NLRB 586, 587 (2005) (stating that there is no “per se rule that . . . elections must be set aside following any procedural irregularity.”). “The question which the Board must decide in each case in which there is a challenge to the conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” Polymers, 174 NLRB at 282. When conducting such an inquiry, the Board “requires more than mere speculative harm to overturn an election.” Transportation Unlimited, 312 NLRB 1162 (1993); see also J.C. Brock Corp., 318 NLRB 403, 404 (1995).

In this case, the Board Agent opened and counted the ballots after all the ballots had been cast. There was, therefore, no possibility that counting the ballots could have affected the fairness and validity of the election. Because there is no possibility that the Board Agent’s failure to impound the ballots could have affected the validity of the election, I overrule Local 175’s second objection.

Objection No. 3

In its third objection, Local 175 alleges that the polling place, the engineer’s office at the work site located at 565 City Island Avenue, City Island, New York, was not a neutral site because the Employer’s supervisors visit this office frequently. The Employer and Local 1010 assert that this objection lacks merit.

In its offer of proof, Local 175 asserts that business agent Roland Bedwell will testify that the Employer’s supervisors and foremen use the Engineer’s office at the worksite frequently.

Local 175 does not allege that the office used is a supervisor's office. The Employer states that this office is a temporary office at a job site and that this office is used by everyone, including eligible voters, daily.

The independent investigation established that on September 14, the Board Agent conducting the election sent a letter to the parties setting forth the election details, including the use of the engineer's office in question. At no time prior to the election did Local 175 raise the concern that the engineer's office was not an acceptable location for the election.

It is well established that the Regional Director has wide discretion in setting the arrangements of an election. The Board will not set aside an election because of the Regional Director's choice of location absent "some specific showing that prejudice resulted." Jat Transportation Corp., 131 NLRB 122, 126 (1961), see also Cupples-Hesse Corp., 119 NLRB 1288 (1958) (Regional Director's decision to hold the election in a cafeteria near certain company offices did not raise a substantial question with respect to the conduct affecting the election results). Here, Local 175 has made no showing that the use of the engineer's office had any prejudicial affect on the results of the election. Further, even assuming that supervisors do visit the engineer's office "frequently," this fact alone does not taint the neutrality of the office for the election. Significantly, Local 175 does not allege that there were any supervisors present before or during the polling. Accordingly, I overrule Local 175's third objection.

Summary

I have overruled Local 175's objections in their entirety. With regard to the issuing of any certification, I will await the Board's determination of Local 175's Request for Review of the Decision and Direction of Election.

Right to File Request for Review

Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this Supplemental Decision by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing a Request for Review

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on October 28, 2011, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause

