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

SECOND SUPPLEMENTAL DECISION

This Second Supplemental Decision further supplements a prior Decision and Direction of Election ("DDE") issued in the above-captioned cases by the undersigned Regional Director, on remand from the National Labor Relations Board ("Board").

History of the cases:

Grace Industries LLC ("the Employer") provides construction services, including road paving services in the New York City area. On April 25, 2011, the Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America, AFL-CIO ("Local 1010") filed a petition under Section 9(c) of the National Labor Relations Act ("the Act") in Case No. 29-RC-12031, seeking to represent a unit of

the Employer's laborers who perform "site and ground improvement, utility, paving and road building work and all related work ... *regardless of material used*" (emphasis added), including both concrete and asphalt materials, in the five boroughs of New York City. On April 27, 2011, the United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades ("Local 175") filed a petition under Section 9(c) of the Act in Case No. 29-RC-12043, seeking to represent a unit of the Employer's laborers who "primarily perform asphalt paving" in the five boroughs of New York City. Thus, Local 1010's petition essentially sought a larger unit including laborers who work with both asphalt and concrete, whereas Local 175's petition sought a unit limited to laborers who work primarily with asphalt.

The foremost issue in these cases involved the appropriate unit or units for collective bargaining purposes. Specifically, Local 175 argued that a unit limited to asphalt laborers is appropriate, given the long history of separate concrete and asphalt units in the road construction industry in New York City. Local 175 also conceded that a combined unit of asphalt and concrete laborers would also be appropriate. Accordingly, Local 175 sought a so-called self-determination election, wherein asphalt employees may vote to be represented either by Local 175 in the smaller unit or by Local 1010 in the larger, combined unit. By contrast, Local 1010 contended that a distinct group of "asphalt workers" does not exist; that a unit limited to "asphalt workers" is not appropriate, and that the *only* appropriate unit is a combined unit of laborers who work with both materials. Likewise, the Employer contended that the combined unit is the only appropriate unit. Thus, both Local 1010 and the Employer sought an election in the combined unit.

A hearing on these issues was held before a Hearing Officer of the Board. Pursuant to Section 3(b) of the Act, the Board delegated authority in this proceeding to the undersigned Regional Director.

In a Decision and Direction of Election ("DDE") dated August 18, 2011, I concluded that the unit petitioned for by Local 175, limited to laborers who "primarily perform asphalt paving," is not appropriate for purposes of collective bargaining. I further concluded that the unit petitioned for by Local 1010, including laborers who perform paving and related work "regardless of the material used," is an appropriate unit. I therefore directed an election in the larger unit only.

On August 26, 2011, the Board issued a decision in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 ("Specialty Healthcare"), regarding representation cases in which a party challenges the appropriateness of the petitioned-for bargaining unit. As described in more detail below, the Board held in part that when an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees, "the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees." Id., slip op. at p. 14.

On September 12, 2011, Local 175 filed a Request for Review in the instant cases, asking the Board to reverse the Regional Director's DDE.[1] Shortly thereafter, Local 1010 and the Employer filed oppositions to the Request for Review.

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[1] Local 175 did not rely on, or even cite, Specialty Healthcare in its Request for Review.

On September 23, 2011, an election by secret ballot was conducted among employees in the unit found appropriate in the DDE. Local 175 thereafter filed Objections to the election. On October 14, 2011, the undersigned issued a Supplemental Decision, overruling Local 175's objections in their entirety. However, since the Request for Review of the original DDE was still pending before the Board, no certification issued at that time.

On December 8, 2011, the Board issued an order, granting Local 175's Request for Review. The Order specifically remanded the cases to the undersigned Regional Director for further consideration in light of Specialty Healthcare, *supra*. In his concurring opinion, Member Hayes stated that the undersigned should give "further consideration and explanation of why the asphalt workers bargaining unit sought by [Local 175] is not appropriate."

Discussion:

As stated above, the rival petitions in these cases sought two different units. The petition filed by Local 175 sought a unit limited to laborers who "primarily perform asphalt paving," whereas Local 1010's petition sought a larger unit including laborers who work with both asphalt and concrete. The Employer agreed with Local 1010 that only the larger unit would be appropriate for bargaining purposes.

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 is appropriate. The DDE acknowledged the long history of separate units in the road paving industry in the New York City area. However, the record also showed that, to some extent, the history of separate units was based on the inner workings of the former

LIUNA locals (and then was continued voluntarily by Locals 1010 and 175 for a few years thereafter), more than it was based on any inherent disparity of interests. In my 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. The record further showed: (1) that the parties no longer agreed on the appropriateness of separate "asphalt" and "concrete" units; (2) under such cases as Premier Plastering, Inc., 342 NLRB 1072 (2004), a bargaining history based on mutual agreement by unions carries less weight once the agreement has been "scuttled"; (3) the existence of bargaining units formed under Section 8(f) of the Act is not necessarily conclusive for determining appropriate units in a representation case; (4) evidence that laborers locals elsewhere in New York State have not been not divided in the same manner; (5) evidence that asphalt workers' work has changed over the years, in that it involves more preparation than it used to before the actual paving; (6) a significant amount of "overlap" of work performed by the Employer in recent years (i.e., Local 175 members performing concrete-related work, grading and other preparation; and Local 1010 members performing asphalt-related work); and (7) individuals from both groups frequently working side-by-side in combined crews under common supervision. Based on these and other factors, I concluded that the unit sought by Local 175 was not appropriate.

In its remand, the Board has asked the Region to consider the case further in light of Specialty Healthcare, *supra*. In that case, a single union sought to represent a unit limited to certified nursing assistants, whereas the employer claimed that the smallest appropriate unit must also include certain additional service and maintenance employees.

The Board articulated a "heightened" standard that an employer must meet to prove that a petitioned-for unit is inappropriate because it does not include additional employees:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be appropriate, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Id., 357 NLRB No. 83, slip op. at p.13. In that case, the Board found that the petitioned-for CNAs were a "readily identifiable" group who shared a community of interest, and that the employer had not met its burden of proving that the service and maintenance employees shared an "overwhelming" community of interest with the CNAs. The Board anticipated that articulating this heightened standard would reduce litigation. Id.

In my view, Specialty Healthcare does not apply to cases like the instant cases, where two different unions have petitioned for two different units, one smaller and one larger. In such a scenario, I do not believe the Board would require a union seeking *an* appropriate unit -- which happened to be larger than the unit sought by its rival – to prove that the additional employees share an overwhelming community of interest with the rival union's smaller group. For example, in a hypothetical case where one union seeks a wall-to-wall unit and another union seeks a smaller unit, I do not believe that the Board would require the former union to show that the additional employees in the wall-to-wall unit share an overwhelming community of interest with the smaller unit, for such a requirement would eliminate the presumptive appropriateness of a wall-to-wall unit and

would likely increase litigation. On the contrary, we believe that the Specialty Healthcare framework applies only to one-union cases where the employer seeks a larger unit.

In sum, I have found that the unit sought by Local 175 is not an appropriate unit for collective bargaining purposes, for all the reasons set forth fully in the DDE.[2] By contrast, I have found that the unit sought by Local 1010 is appropriate. Finally, I find that the Board's decision in Specialty Healthcare does not apply to two-union scenarios such as this, and therefore that Local 1010 need not prove an "overwhelming" community of interest between the so-called asphalt workers and concrete workers.

Accordingly, I repeat my finding that the following unit is appropriate for collective bargaining purposes:

> 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, 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.

I recommend that a certification issue in the instant cases, based on the election held on September 23, 2011, in the unit found appropriate.

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2 Perhaps it could be said, in the parlance of Specialty Healthcare, that the Employer has no "readily identifiable group" of laborers who primarily work with asphalt, and whose interests are separate from "concrete" laborers.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Second Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **January 11, 2012.** The request may be filed electronically through the Agency's website, www.nlrb.gov,[3] but may **not** be filed by facsimile.

Dated: December 28, 2011.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

[3] To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.