

**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 REPORT ON CHALLENGES

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.

¹ All dates hereinafter are in 2011 unless otherwise indicated.

Specifically, Local 175 sought a unit of laborers who performed primarily asphalt work employed by the Employer within the five boroughs of New York City.

On August 18, 2011, the Regional Director issued a Decision and Direction of Election, which directed that an election be held among the employees in the following unit:

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.

On June 18, 2012, the Board issued a Decision on Review and Order in which it found that the above unit, including laborers performing paving work “regardless of material used,” was appropriate and that the smaller unit sought by Local 175, limited to laborers performing primarily asphalt paving, was also appropriate. Accordingly, the Board ordered that a self-determination election be held. Grace Industries, LLC, 358 NLRB No. 62 (2012).

Pursuant to the Board’s order, on June 25, 2012, the undersigned issued a Order and Notice of Election. The undersigned ordered that an election be held among employees in the following voting groups:

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.

Voting Group A

All full-time and regular part time laborers employed by Grace Industries LLC³, who primarily perform asphalt paving, including foremen, rakers, shovelers, screedmen, micro pavers, AC paintmen, liquid tar workers, seal coaters, small equipment operators, landscape planting and fence/ safety surface installers, within the five boroughs of New York City, but excluding all other employees, employees primarily performing concrete paving, 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.

and

Voting Group B

All full-time and regular part-time laborers employed by Grace Industries LLC⁴, who primarily perform concrete paving, including site and ground improvement, utility, paving and road building work and all related work, including site preparation, milling and finishing of surfaces, within the five boroughs of New York City, but excluding all other employees, employees who primarily perform asphalt paving, 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.

The June 25 Order provided that the ballots for Voting Group A would ask laborers who primarily perform asphalt paving whether they wish to be represented (1) by Local 175; or (2) by

³ 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.

⁴ 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.

Local 1010; or (3) neither. If a majority of the valid ballots were cast for Local 175, those employees would be deemed to have indicated their desire to be represented by Local 175 in the smaller, separate unit of employees who primarily perform asphalt paving. If a majority of the valid ballots were cast for Local 1010, those employees would be deemed to have indicated the desire to be represented by Local 1010 in the larger mixed unit, including laborers performing paving work “regardless of material used.” Those ballots would then be pooled with the Voting Group B ballots. If a majority of the valid ballots in Voting Group A were cast against representation by either Local 175 or Local 1010, then those employees would be deemed to have indicated their desire to be unrepresented and those ballots would then be pooled with the Voting Group B ballots.

With regard to the employees in Voting Group B, if Local 175 were to prevail in Voting Group A and Local 1010 were to prevail in Voting Group B, Local 1010 would be certified as the exclusive collective bargaining representative of all laborers performing primarily concrete paving but excluding laborers performing primarily asphalt paving. If the employees in Voting Group A were to vote for Local 1010 or against union representation, and Local 1010 were to prevail in Voting Group B, Local 1010 would be certified in its petitioned-for unit, including all laborers performing paving work “regardless of material used,” thereby including both concrete and asphalt pavers.

On July 2, the Employer provided an Excelsior list for the employees employed in Voting Group B. With regard to Voting Group A, the Employer provided no Excelsior list, stating “[t]here is no Excelsior list for Group A because Grace has not employed workers who primarily performed asphalt paving within the eligibility period detailed in footnote 1 of the Region’s Order and Notice of Election.”

An election was held on July 23, 2012. The Tally of Ballots⁵, made available to the parties pursuant to the Board's Rules and Regulations, showed the following results for Voting Group A:

Approximate number of eligible voters	0
Number of void ballots	0
Number of ballots cast for Local 1010	0
Number of ballots case for Local 175	0
Number of votes cast against participating labor organization	0
Number of valid votes counted	0
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	3

Challenges are sufficient in number to affect the results of the election.⁶

The Board Agent conducting the election challenged the ballots of Glen Patrick, Melvin Rivera, and Robert Moresco on the ground that their names did not appear on an Excelsior list. The Employer also challenged these three ballots on the ground that they were not employed by the Employer within the Steiny-Daniel eligibility period. Following the election, the ballots for Voting Group B have been impounded.

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

⁵ The Tally of Ballots was prepared and provided to the parties on July 24, 2012.

⁶ Since this was a self-determination election involving the potential pooling of votes, the ballots cast in Voting Group B could not be counted due to the determinative challenges.

A. The Challenges

1. Glen Patrick

The Board Agent conducting the election challenged the ballot of Glen Patrick on the ground that his name did not appear on an Excelsior list provided by the Employer. The Employer also challenged his ballot on the ground that he did not work for the Employer during the Steiny-Daniel eligibility period. Local 1010 and Local 175 have not presented any evidence regarding Patrick's eligibility.

The Employer asserts that it entered into a settlement agreement with Patrick in which he waived reinstatement. The investigation revealed that Patrick was employed by the Employer, but was laid off in or about March 2010. On April 14, 2010, Patrick filed an unfair labor practice charge against the Employer in Case No. 29-CA-30173 alleging that the Employer failed to hire him because he refused to join Local 1010, Local 1298 Laborers International Union or Local 731, Building, Concrete, Excavating and Common Laborers, LIUNA, as a condition of employment. The parties subsequently entered into a non-Board settlement. On February 7, 2011, the Regional Director approved Patrick's request to withdraw his charge. The Employer submitted a copy of the non-Board settlement agreement between the Employer and Patrick, entered into in January 2011. Pursuant to that agreement, Patrick explicitly waived his right or claim to reinstatement to his employment "and any offer of employment from Grace Industries, LLC."

The un rebutted evidence shows that Patrick has not worked for the Employer for more than two years and has released the Employer from any claims to future employment with the company. Accordingly, Patrick was not eligible to vote in this election under the Steiny-Daniel formula. I therefore recommend sustaining the challenge to his ballot.

2. Melvin Rivera

The Board Agent conducting the election challenged the ballot of Melvin Rivera on the ground that his name did not appear on an Excelsior list provided by the Employer. The Employer also challenged his ballot on the ground that he did not work for the Employer during the Steiny-Daniel eligibility period. Local 1010 asserts that Rivera is not an eligible voter. Local 175 asserts that Rivera performed sufficient asphalt work to qualify as eligible under the Steiny-Daniel formula.

The Employer asserts that Rivera has never worked for the Employer. Local 175 contends that Rivera performed asphalt paving for the Employer in May and June 2012 on a job at LaGuardia airport. Local 175 presented Rivera's paystubs for this job. The paystubs show, however, that Rivera was not directly employed by the Employer, but was paid by Intercounty Paving Associates NY, LLC for payroll periods ending May 6 and 12, and June 9, 2012. He worked a total of forty hours during that period. Local 175 did not present any other evidence to show that Rivera performed asphalt work for the Employer at any other time during the Steiny-Daniel period. Although Local 175 asserts that Rivera was on the Employer's payroll for the period immediately preceding the Region's June 25 Order and Notice of Election, it has not submitted a paystub or any other evidence to support this assertion.

Local 175 has not produced any evidence to establish that Rivera was employed by the Employer. The paystubs Local 175 presented were not issued by the Employer and Local 175 has not presented any evidence to establish any sort of relationship between the Employer and Intercounty Paving Associates NY, LLC. Even if Local 175 were to establish that the Employer actually directly employed Rivera on this airport job, Rivera's hours, which total forty during

this period, were not sufficient to satisfy the Steiny-Daniel formula.⁷ Because the evidence presented does not establish that Rivera worked for the Employer for a sufficient number of hours to satisfy the Steiny-Daniel eligibility formula, I recommend sustaining the challenge to Rivera's ballot.

3. Robert Moresco

The Board Agent conducting the election challenged the ballot of Robert Moresco on the ground that his name did not appear on an Excelsior list provided by the Employer. The Employer also challenged his ballot on the ground that he did not work for the Employer during the Steiny-Daniel eligibility period.

The Employer contends that Moresco had worked for the Employer, but voluntarily resigned on May 2, 2010, before the eligibility period for this election. Although requested, the Employer has not provided any evidence to support this position. Local 175 and Local 1010 have not submitted any evidence regarding Moresco's eligibility.

In general, it is the party seeking to exclude an individual from voting for a collective bargaining representative that has the burden of establishing that an individual is in fact ineligible. See Bo-Ed, Inc., d/b/a Golden Fan Inn, 281 NLRB 226, 231 fn. 24 (1986); Hospital Del Maestro, 323 NLRB 93 (1997). In this regard, it should be noted that when resolving challenges made by the Board Agent conducting the election because the voters' names are not on the eligibility list, it is the obligation of the parties to support their contentions that these voters should or should not be included in the unit. See Willet Motor Coach, Co., 227 NLRB

⁷ To be eligible, Rivera had to have been employed for thirty days or more in the twelve months preceding the Notice of Election. He was only employed, at most, twenty-one days, assuming he worked seven days in each of the three pay periods.

882, 882 fn. 3 (1977). In this case, the parties have not submitted evidence with regard to Moresco's eligibility. Accordingly, I find that the challenges to his ballot raises material and substantial issues of fact and credibility that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding Robert Moresco's eligibility to vote.

B. The Unit to Be Certified

If the Board adopts my recommendations regarding sustaining the challenges to Patrick and Rivera's ballots and Moresco is found eligible to vote in Voting Group A, there would be only one employee in Voting Group A, which would not constitute an appropriate unit.⁸ Accordingly, in that circumstance, Moresco's ballot would be pooled with the ballots for Voting Group B.

If the Board adopts my recommendations regarding sustaining the challenges to Patrick and Rivera's ballots and Moresco is found ineligible to vote in Voting Group A, it will confirm the Employer's position that there are no eligible voters in Voting Group A.⁹ Thus, there will be no votes to pool with Voting Group B. Should Local 1010 prevail in Voting Group B, it will be certified in the larger unit, as the Board found appropriate in its June 18 Decision and Order.¹⁰

⁸ If the Board does not adopt my recommendations and two or three employees are ultimately found eligible in Voting Group A, the ballots would be counted in accordance with my June 25 Order and Notice of Election.

⁹ I note that neither union has filed an objection regarding the Employer's failure to produce an Excelsior list for Voting Group A.

¹⁰ In its Decision and Order, the Board found that the Employer employed employees who performed primarily asphalt paving and that those employees possess distinct skills and functions, including screedpersons, rakers, shovelers, and tampers. The Employer now, in effect, asserts that it has not employed any employees in these classifications within the eligibility period. In general, the Board will not include in a certified unit description classifications in which there are no employees. See e.g., Hamilton Watch Co., 118 NLRB 591, 592 fn. 4 (1957) (where the Board declined to make a unit determination with respect to a job classification in which there were no employees and the employer did not contemplate hiring employees for that position). In this case, however, the Board has found the overall unit of laborers who perform paving "regardless of material used" appropriate.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held regarding the challenge to the ballot of Robert Moresco.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the challenge to the ballot of Robert Moresco.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on August 30, 2012, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. 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 Report, 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 Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

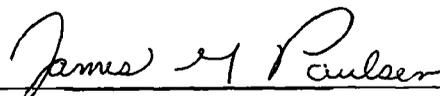
Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on August 29, 2012, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions 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 exceptions filed by facsimile transmission. Upon good cause shown, the Board

may grant special permission for a longer period within which to file.¹¹ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at Brooklyn, New York, on this 15th day of August, 2012



James G. Paulsen
Regional Director
Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

¹¹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.