

**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

THIRD SUPPLEMENTAL REPORT ON CHALLENGES

On August 15, 2012,¹ the undersigned issued a Second Supplemental Report on Challenges recommending that the challenges to the ballots of Glen Patrick and Melvin Rivera be sustained and directing that a hearing be held regarding Robert Moresco's eligibility.²

Prior to August 15, none of the parties submitted evidence regarding Moresco's eligibility. On August 27, the Employer belatedly submitted evidence regarding Moresco's eligibility. The Employer's evidence included a certification from Edward Tackenberg, the Employer's vice-president, who testified that Moresco had worked for the Employer, but resigned in late April

¹ All dates hereinafter are in 2012 unless otherwise indicated.

² Local 175 has filed exceptions to this Report, which are pending with the Board.

2010, prior to the Steiny Daniel period in the present case, which commenced in June 2010. The Employer also submitted an employee earnings record for Moresco on which the last the last payroll period listed is May 2, 2010.

On August 29, the undersigned issued an Order to Show Cause adjourning the hearing regarding Moresco's eligibility sine die and directing the parties to show cause why the eligibility of Moresco should not be determined based solely upon evidentiary submissions.

On September 4, Local 175 submitted a certification from Moresco. Moresco testified that he worked for the Employer over the course of several years,³ and that he was a member of Local 175 during that time. According to Moresco, in May 2010, Moresco's supervisor, Mike Pino, told him that he could no longer be employed there because he was a member of Local 175. Pino also advised Moresco that he could continue to work for the Employer if he joined Local 1298 LIUNA or Local 731 LIUNA. Moresco did not change his union membership and was terminated. Moresco testified that he declined to file a charge with the Board regarding his termination by the Employer.⁴ Moresco admits that he has not worked for the Employer since May 2010.

On July 18, 2012, Local 175 filed an unfair labor practice charge in Case No. 29-CA-085667 alleging that the Employer violated Section 8(a)(3) and (5) of the Act by failing to honor its collective bargaining agreement with Local 175 and by failing to hire Local 175 members.⁵ On September 13, the undersigned dismissed this charge because it was filed outside the period set forth in Section 10(b) of the Act. As stated in the dismissal letter:

The evidence obtained during the investigation of this charge shows that Local 175, United Plant & Production Workers, IUJAT (Union), had collective

³ Moresco does not specify when he began working for the Employer.

⁴ Such a charge would be untimely if filed at this time.

⁵ This charge does not name Moresco. Local 175 has not presented any evidence that Moresco has applied for a job with the Employer within the last six months.

bargaining agreements with Grace Asphalt, LLC and Grace Industries, LLC (the "Grace Companies"). In or around March 2010, both Grace Companies repudiated their agreements with the Union. The evidence further shows that since March 2010, neither of the Grace Companies made contributions to the Union benefit funds. Further, there were several conversations commencing in 2010 between the Grace Companies and the Union regarding Grace's failure to hire Local 175 members. Based on the foregoing, I find that the Grace Companies clearly and unequivocally repudiated their respective collective bargaining agreements with the Union sometime in 2010.

[Local 175] assert[s] that [its] charge is not barred by Section 10(b) because there was a continuous violation of the agreement with Grace Industries, LLC. However, in *A&L Underground*, 302 NLRB 467 (1991), the Board found that an unfair labor practice charge must be filed "within 6 months of [Charging Party's] receipt of clear and unequivocal notice of total contract repudiation." Further, in *Chemung Contracting Corporation and Dalrymple Gravel and Contracting Co., Inc.*, 291 NLRB 773 (1988), the Board found that there has to be a current collective bargaining agreement in order to establish a violation. The agreement that the Union had with Grace Industries was not only repudiated in or around 2010, but had also expired on June 30, 2011.

Inasmuch as the evidence established that any alleged violation occurred outside the 6 months period set forth in Section 10(b) of the Act, I am dismissing the charge.

Discussion

The Board will not consider unfair labor practice charges involving discharges in challenges and objections proceedings; such allegations must be addressed pursuant to an unfair labor practice charge. See Texas Meat Packers, 130 NLRB 279 (1961). There is currently no valid charge pending regarding Moresco's employment with the Employer. Further, the evidence establishes that Moresco has not worked for the Employer at any point during the Steiny Daniel period. Accordingly, he is not eligible to vote in the present election. I therefore recommend sustaining the challenge to Moresco's ballot.

SUMMARY AND RECOMMENDATIONS

In summary, I have recommended sustaining the challenge to the ballot of Robert Moresco.

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.

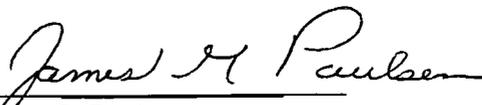
Procedures for Filing Exceptions

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 September 28, 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.⁶ 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 14th day of September, 2012


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

⁶ 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.