

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

DRAGONETTI BROTHERS LANDSCAPING,)	
Employer)	
and)	Case No. 29-RC-126285
)	
)	
LOCAL 1010 HIGHWAY ROAD AND)	
STREET CONSTRUCTION LABORERS)	
UNION, LABORERS INTERNATIONAL)	
UNION OF NORTH AMERICA, AFL-CIO,)	
Petitioner)	
and)	
)	
LOCAL 175, UNITED PLANT AND)	
PRODUCTION WORKERS, INTERNATIONAL)	
UNION OF JOURNEYMEN AND ALLIED)	
TRADES,)	
Intervenor)	

REPORT ON OBJECTIONS

On April 19, 2014,¹ Local 1010 Highway Road and Street Construction Laborers, Laborers International Union of North America, AFL-CIO, herein called the Petitioner or Local 1010, filed a petition in this matter seeking to represent certain employees employed by Dragonetti Brothers Landscaping, herein called the Employer. Local 175, United Plant and Production Workers, International Union of Journeymen and Allied Trades, herein called the Intervenor or Local 175, intervened on the basis of a collective bargaining agreement.

¹ All dates hereinafter are in 2014 unless otherwise indicated.

Pursuant to a Stipulated Election Agreement signed by the Petitioner, the Intervenor and the Employer, and approved by the Regional Director on April 25, an election by secret ballot was conducted on May 13 among the employees in the following unit:

All laborers performing asphalt paving and concrete work including but not limited to Site and Ground Improvement, Utility, Paving and Road Building Work as defined as: preparing for and performing all types of asphalt paving and concrete paving work, slurring including methacrylate and other similar materials and milling of streets and roads, and all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all materials, install and repair fences and all incidental work thereto to continue into parks, plazas, malls, housing projects, playgrounds, said work including but not limited to public highways and roads and bridges; including, but not limited to the digging of trenches, cable pulling, duct installation, and all subsequent work prior to final paving.

All asphalt slurry (protective polymer) restoration work, including all preparation for slurry and all bridges, temporary asphalt paving necessary on streets, sidewalks and private property and federal, city, local and state and roads subsequent to subway, sewer, water main, duct line construction and other similar type jobs.

Any laboring work related to the preparation, maintenance, cleanup, installation and removal of play equipment, slurry/seal-coating, line striping, and saw cutting not related to work performed by Local 175 under the landscape agreement with the Landscape Gardener Growers Association. Maintenance and protection of traffic safety for all work sites.

All other General Construction work related to asphalt and concrete paving. Safety watchman who perform signaling in connection with the handling of materials, watchmen on all construction sites, traffic control and all elements to ensure a safe work environment.

But excluding all work as covered by Article 1, Section 3 of the Local 175 IUJAT Collective Bargaining Agreement with the Landscape Gardener Growers Association, all cement finishing work under the jurisdiction of Operative Plasterers and Cement Masons International Association of the United States and Canada, Cement Masons Union #780, all clerical workers, guards and supervisors as defined in Section 2(11) of the Act.

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	37
Number of void ballots	0
Number of ballots cast for the Petitioner	5
Number of ballots cast for the Intervenor	19
Number of votes cast against participating labor organizations	1
Number of valid votes counted	25
Number of challenged ballots	11
Number of valid votes counted plus challenged ballots	36

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 United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades.

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

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

Objections Nos. 1 through 6, and 10 through 12

In its first objection, the Petitioner alleges that the Employer failed to comply with the posting requirements established in Section 103.20 of the Board's Rules and Regulations by failing to post election notices in a timely manner. In its second objection, the Petitioner alleges that the Employer promised employees wage increases and other benefits to encourage them to vote against the Petitioner and/or for the Intervenor. In its third objection, the Petitioner alleges that the

Intervenor promised employees wage increases and other benefits to encourage employees to vote against the Petitioner and/or for the Intervenor. In its fourth objection, the Petitioner alleges that the Employer threatened to take and/or took adverse action against employees if the Petitioner won the election. In its fifth objection, the Petitioner alleges that the Employer and the Intervenor solicited grievances from employees and promised employees wage increases and other benefits to encourage employees to vote against the Petitioner and/or for the Intervenor. In its sixth objection, the Petitioner alleges that the Employer promoted, encouraged, or otherwise assisted the Intervenor in activity directed at persuading employees to vote against Local 1010.

In its tenth objection, the Petitioner alleges that the Employer threatened loss of work or other harmful economic consequences if Petitioner won the election. In its eleventh objection, the Petitioner alleges that the Intervenor engaged in electioneering at or near the polls, or otherwise interfered with the election process. In its twelfth objection, the Petitioner alleges that the Employer promoted or acquiesced in the illegal or coercive activity of a third party directed against the Petitioner. The Employer and the Intervenor assert that these objections lack merit.

In its offer of proof in support of these objections, the Petitioner failed to identify the witnesses who would testify in support of these objections. The Petitioner stated that it objected to the production of names of employees who would testify in support of its objections due to the risk of retaliation against its witnesses.

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.

On May 21, 2014, the Regional Director sent the Petitioner a letter which states that the Petitioner was required to present evidence in support of its objections. That letter specifically states, “The evidence should be in the form of affidavits, written statements, or documents. If the evidence cannot be submitted in those forms, you may submit in writing the names of each witness you wish to present and a detailed statement which describes the specific evidence each will be able to furnish in support of each objection. . . . Please be advised that the burden is on you, the objecting party, to timely submit specific prima facie evidence which raises substantial and material factual issues warranting further proceedings.”²

With regard to the Petitioner’s concern about potential retaliation against its witnesses, the Board has held that this argument does not provide sufficient justification for a party’s failure to comply with its obligation to furnish evidence in support of its objections. In Helen H. Dietze, Julie Earl, and Rudolph Halm, Partners, 106 NLRB 1314 (1953), an employer objected to the results of an election. The Employer refused to furnish the names of its witnesses in support of its objections, stating that it feared retaliation against its witnesses. The Board rejected this excuse, stating that the “Board is fully able to protect individuals who may appear as witnesses at its investigations or hearings against retaliatory action either by unions or employers.” Id. at 1316. The Board further noted that absent evidence in support of objections, the Regional Director is not required to pursue an investigation of the objections, stating “[a]ny other rule would seriously impede the processing of representation petitions.” Id.

Absent the required offer of proof in support of the Petitioner’s objections, I recommend overruling Objections Nos. 1, 2, 3, 4, 5, 6, 10, 11, and 12.

² In an email to the Region, the Petitioner acknowledged receipt of this letter.

Objections Nos. 7 and 8

In its seventh objection, the Petitioner alleges that the Employer provided an inaccurate or “loaded” Excelsior³ list. In its eighth objection, the Petitioner alleges that the Employer encouraged or facilitated voting by individuals who were ineligible to vote in the election. The Employer and the Intervenor assert that these objections lack merit.

In its offer of proof, the Petitioner states that the Employer omitted names of employees who were eligible to vote in the election from the Excelsior list, and that certain employees did not work perform sufficient work for the Employer to meet the Steiny/Daniel formula for eligibility. The Petitioner further states that two named employees who appear on the Excelsior list will testify that they do not perform bargaining unit work.

With regard to the allegation that the Employer omitted names from the Excelsior list, the Petitioner has not presented any evidence in support of this allegation. The Board has long held that substantial compliance with the Excelsior rule is required. In Thrifty Auto Parts Inc., 295 NLRB 1118 (1989), the Board observed that by “omitting a substantial number of names from the Excelsior list, an employer can defeat the very purpose of the Excelsior rule,” which is meant to ensure an informed electorate by providing unions access to voters. See Thrifty Auto Parts Inc., 295 NLRB at 1118 (in which the Board found that an omission rate of 2 voters out of 21 eligible voters, or 9.5 percent of the eligible voters was objectionable); see also North Macon Health Care Facility, 315 NLRB 359, 359 (1994) (finding that the employer’s failure to provide full information on its Excelsior list constitutes a “deviation from the Board’s policy that an employer must ‘substantially comply’ with the Excelsior rule and tends to interfere with a free and fair election.”); Woodman’s Food Markets, Inc., 332 NLRB 503, 503 (2000) (finding that factors other than the

³ Excelsior Underwear, 156 NLRB 1236 (1966).

percentage of omissions from an Excelsior list may be relevant in Excelsior cases, such as whether the “omissions involve a determinative number of voters and the employer’s reasons for omitting the names.”). The Petitioner has not presented specific evidence in support of these two objections. The Petitioner does not even specify the number of employees it alleges were left off the list, instead simply stating that “the Employer failed to include employees eligible to vote in the election, including those who performed similar concrete and paving work as those identified on the Excelsior list.” Such conclusory statements are not sufficient to support objections. See Craftmatic Comfort Mfg. Corp., supra; Lange and Perkins LLC d/b/a The Daily Grind, supra.

With regard to the allegation that the Employer included employees who were not eligible to vote on the list, the Petitioner states that named employees whose names appeared on the Excelsior list, but who did not perform unit work, will testify. This objection raises a post-election challenge to these voters’ eligibility. The Board has long held that challenges to a voter’s eligibility must be made before that voter casts his or her ballot. The Board does not permit post-election challenges in the guise of objections such as this one. See Lakewood Engineering and Mfg. Co., 341 NLRB 699, 700 (2004). Accordingly, I recommend overruling the Petitioner’s seventh and eighth objections.

Objection No. 9

In its ninth objection, the Petitioner alleges that the Employer impeded or discouraged eligible employees from voting in the election by stating that those employees were ineligible to vote in the election. The Employer and the Intervenor assert that this objection lacks merit.

The Petitioner failed to present any evidence in support of this objection. As stated above, a party filing objections must provide evidence sufficient to prove a prima facie case within seven days of the date for filing objections. See Craftmatic Comfort Mfg. Corp., supra. If the Regional

Director does not receive timely evidence in support of objections, those objections should be overruled. See Star Video Entertainment L.P., supra. Absent receiving any support for Objection No. 9 from the Petitioner, I recommend overruling this objection.

Objections Nos. 13 and 14

In its thirteenth objection, the Petitioner alleges that the Employer interfered with the rights of employees to engage in protected activity and thereby destroyed the laboratory conditions necessary for the conduct of the election. In its fourteenth objection, the Petitioner alleges that the Intervenor interfered with the rights of employees to engage in protected activity and thereby destroyed the laboratory conditions necessary for the conduct of the election. The Employer and the Intervenor assert that these objections lack merit.

The Petitioner did not produce any evidence in support of these objections that had not been submitted and considered in regard to the other objections. Accordingly, I recommend overruling the Petitioner's thirteenth and fourteenth objections.

Summary and Recommendations

I have recommended overruling the Petitioner's objections in their entirety. Accordingly, I further recommend Local 175, International United Plant and Production Workers, International Union of Journeymen and Allied Trades be certified as the exclusive bargaining representative for the following appropriate unit:

All laborers performing asphalt paving and concrete work including but not limited to Site and Ground Improvement, Utility, Paving and Road Building Work as defined as: preparing for and performing all types of asphalt paving and concrete paving work, slurring including methacrylate and other similar materials and milling of streets and roads, and all other preparation work involved to prepare for resurfacing and to operate small power tools, operate all equipment necessary to install all types of resurfacing including sandblasting, chipping, scrapping of all materials, install and repair fences and all incidental work thereto

to continue into parks, plazas, malls, housing projects, playgrounds, said work including but not limited to public highways and roads and bridges; including, but not limited to the digging of trenches, cable pulling, duct installation, and all subsequent work prior to final paving.

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But excluding all work as covered by Article 1, Section 3 of the Local 175 IUJAT Collective Bargaining Agreement with the Landscape Gardener Growers Association, all cement finishing work under the jurisdiction of Operative Plasterers and Cement Masons International Association of the United States and Canada, Cement Masons Union #780, all clerical workers, guards and supervisors as defined in Section 2(11) of the Act.

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

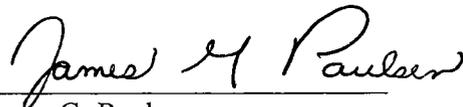
Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on June 23, 2014, at 5 p.m. (ET), unless filed electronically. **Consistent 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.⁴ 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

⁴ 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.

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.

Dated at Brooklyn, New York, June 9, 2014.

A handwritten signature in cursive script that reads "James G. Paulsen". The signature is written in black ink and is positioned above a horizontal line.

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

-----x
DRAGONETTI BROTHERS LANDSCAPING,

Employer,

and

Case No.: 29-RC-125693

LOCAL 1010, LIUNA

Petitioner,

and

LOCAL 175, UNITED PLANT & PRODUCTON
WORKERS, IUJAT,

Union.

-----x

**LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1010's
OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Petitioner Laborers International Union of North America, Local 1010, hereby files the following objections to the conduct of the election and to conduct affecting the results of the election held on May 13, 2014, in the above-captioned case, as follows:

1. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, failed to comply with the posting requirement of Section 103.20 of the Board's Rules and Regulations by failing to post the mandated posting in a timely manner.

2. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, promised its Employees wage increases and other enhanced benefits in order to persuade them to vote against the Petitioner and/or in favor of Local 175.

Exhibit A

3. The Union, Local 175, by its agents and/or representatives, promised Employees wage increases and other enhanced benefits in order to persuade them to vote against the Petitioner and/or in favor of Local 175.

4. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, threatened to take and/or took adverse action (e.g. discharge, layoff, loss of benefits, loss of work, other reprisals) against employees if Petitioner Local 1010 won the election or because of their support for the Petitioner Local 1010.

5. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., and the Union, Local 175, by their agents and/or representatives, solicited grievances from Employees and promised Employees wage increases and other enhanced benefits in order to persuade them to vote against the Petitioner and/or in favor of Local 175.

6. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, promoted, encouraged, or otherwise assisted a rival labor organization (Local 175) in activity directed at persuading Employees to vote against Petitioner (Local 1010).

7. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, provided an inaccurate or "loaded" Excelsior (employee eligibility) list.

8. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, encouraged, facilitated, or coordinated voting by persons not eligible to vote in the election.

9. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, impeded, discouraged, or prevented otherwise eligible employees from voting in the election by stating employees were ineligible to vote in the election and other similar acts.

10. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, threatened plant loss of work or other harmful economic consequences if Petitioner (Local 1010) won the election.

11. The Union, Local 175, by its agents and/or representatives, engaged in "electioneering" activity at or near the polls, or otherwise interfered with the election process.

12. The Employer, Dragonetti Brothers Landscaping Nursery & Florist Inc., by its agents and/or representatives, promoted or acquiesced in the illegal or coercive activity of a third party directed against Petitioner, Local 1010.

13. By these and other acts, the Employer, by its agents and/or representatives, interfered with the right of employees to engage in protected activities, to organize and support Petitioner, and thereby destroyed the laboratory conditions necessary for the conduct of the election.

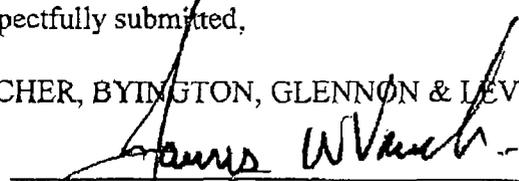
14. By these and other acts, Local 175, by its agents and/or representatives, interfered with the right of employees to engage in protected activities, to organize and support Petitioner, and thereby destroyed the laboratory conditions necessary for the conduct of the election.

WHEREFORE, for the foregoing reasons, Local 1010 requests that the election be set aside and a new election ordered.

Dated: Melville, New York
May 19, 2014

Respectfully submitted,

ARCHER, BYINGTON, GLENNON & LEVINE LLP

By: 

James W. Versocki

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