

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

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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

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**UNITED PLANT AND PRODUCTION WORKERS, LOCAL 175's  
EXCEPTIONS TO SECOND SUPPLEMENTAL REPORT ON CHALLENGES**

On August 15, 2012, Regional Director, James G. Paulson, Region 29, issued a Second Supplemental Report on Challenges in the captioned matter. Local 175 takes exception to the finding that neither Glen Patrick nor Melvin Rivera would be eligible to vote in light of the fact that the Employer, Grace Industries, LLC, has purposefully violated its collective agreement with Local 175 by not hiring its members to perform asphalt paving over the last two to three years to avoid having Local 175 members be eligible to vote in the election; by subcontracting out all of its asphalt paving work to other contractors; and/or by importing from other locals

workers whom the parties stipulated were not eligible to vote, (eg., members of Locals 1298, 731 or 60 LIUNA.

Alternatively, Local 175 takes exception to the decision on the unit to be Certified in this case as **material facts** have changed since Local 175 filed a Request for Review of the initial Decision and Direction of Election on September 12, 2011 and the Board's determination on June 18, 2012 that both units petitioned for by Local 175 and Local 1010, are appropriate, (eg., Local 175's narrow unit of persons primarily performing asphalt paving; and Local 1010's unit comprising of laborers "performing site and ground improvement, utility, paving ... regardless of material used... .").

It is clear from the fact that Grace Industries, LLC failed to present an Excelsior List in regards to Voting Group A, which was for the asphalt pavers unit, that the Employer itself is acknowledging it employs no persons who perform that work who would be eligible to work. The fact is that they have not employed directly on their own payroll such persons for well over two years in an effort to prevent an election in which Local 175 members would vote.<sup>1</sup>

**GLEN PATRICK AND MELVIN RIVERA WOULD HAVE BEEN ELIGIBLE TO VOTE  
HAD THE EMPLOYER NOT VIOLATED ITS COLLECTIVE AGREEMENT WITH  
LOCAL 175**

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<sup>1</sup> To that effect Local 175 has filed an 8(a)(1) and (3) charge against the Employer at Case No. CA 085667 asserting that Grace Industries violated the collective agreement with Local 175 by refusing to hire Local 175 members as required by their collective agreement with the intent of preventing such members from being eligible to vote in an election.

The collective agreement between Local 175 and the Employer, an exhibit in the Representation hearings held in May, 2011 required the Employer to employ members of Local 175 when the employer performed asphalt paving work. It did so in the years 2007, 2008, and 2009 but stopped doing so in 2010 and thereafter. The facts regarding Glen Patrick clearly show the Employer's intent in regards to Local 175 members.

As the Regional Director stated in the Second Supplemental Report on Challenges, at page 6, Glen Patrick filed an unfair labor practice charge against Grace Industries in Case No. 29 CA 30173 because the employer refused to continue his employment unless he changed his union membership from Local 175 to Local 1298 or Local 731, LIUNA. Rather than go to hearing on the matter the parties entered into a non board settlement, overseen by the Region, wherein significant lost pay and benefits were paid to Mr. Patrick. The fact that since that time no other Local 175 member has been employed by Grace Industries certainly shows the employer's intent to exclude Local 175 members from its payrolls. They would have employed Patrick if he changed his union affiliation. They would have employed the other 175 members as Local 1298 members as well; but not as 175 members.

The situation with Melvin Rivera is similar in that he should have been employed directly on the employer's payroll. The fact that he was placed on Intercounty Paving Associates of NY, LLC indicates further, (as does the contracting of the work out to Intercounty's asphalt paving crew), that Grace Industries did not want to have asphalt paving employees on its payroll. Had Grace Industries not violated its collective agreement with Local 175 numerous individuals would have

been eligible to vote in Voting Group A; but the work was sub contracted out to other entities.

**ALTERNATIVELY, THE UNIT TO BE CERTIFIED SHOULD BE VOTING GROUP B CONSISTING OF PERSONS WHO PRIMARILY PERFORM CONCRETE PAVING AND EXCLUDING PERSONS WHO PRIMARILY PERFORM ASPHALT PAVING**

It is indisputable that Local 1010, LIUNA and Local 175 have for seven years been in a pitched battle for the hearts and minds of persons who primarily perform asphalt paving. Local 1010, historically a union that represented persons primarily performing Concrete work, inherited the asphalt paving jurisdiction when its sister local, 1018, (which had the asphalt paving jurisdiction in New York City), folded due to membership losses to Local 175 in Board certified elections.

In an effort to re-capture the market, Local 1010 began to insert into its agreements language purporting to cover road building, regardless of material used, and in April, 2011, filed various Representation Petitions requesting, (contrary to industry bargaining history), a bargaining unit that included all road building workers, regardless of material used. In this particular case, at the time of filing the Petition, Grace Industries LLC did employ some persons on its payroll who primarily performed asphalt paving, going back to April, 2009. Thus, it was appropriate for Local 175 to file its Petition for an election for persons primarily performing asphalt paving; and it was fair for Local 1010 to ask for those persons to be included in the broader unit they sought. And the Board so found that both units could be an appropriate unit on that basis.

However, by June, 2012, things had materially changed. Grace Industries no longer employed persons who primarily performed asphalt paving for over two years. To the extent it had such work it sub-contracted it out to other entities. In the other Petitions simultaneously brought with this one by Local 1010 in April 2011 requesting the broader unit sought here numerous of them were subsequently limited to only persons who primarily performed concrete work expressly because it was determined, after a hearing, that the employer either employed no one who primarily performed asphalt paving or if they had such work; they sub-contracted it out to other entities and did not do it.

Thus, in Heavy Construction Company, Inc., Case Nos. 29 RC 12040 and 12045 the Region found, after hearing, that:

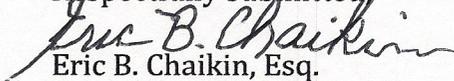
“although Local 1010’s proposed unit includes laborers engaged in asphalt paving, utility paving and milling, the probative evidence does not establish that the Employer employs laborers who engage in such work. I recognize Local 1010’s contract with the Employer includes employees performing, among other things, utility paving, asphalt production paving and milling. However, in the circumstances of this case, and specifically where there is no probative evidence of employees of the Employer performing utility paving, asphalt paving, or milling, such classifications cannot be included in the unit found appropriate. In this regard, I note that the Board looks to the actual, existing composition of units and to employees actually working to determine the composition of units, not to abstract grants of recognition. See Coca-Cola Bottling Company of Wisconsin, 310 NLRB 844 (1993)...” (emphasis supplied)

Heavy Construction Company, Inc., Case Nos. 29 RC 12040 and 12045, Decision and Direction of Election, p 36, November 4, 2011. See also Deborah Bradley Construction, Case Nos. 29 RC 12036 and 12042 for the proposition that the Board will not find appropriate an election for a unit covering work classifications that the

employer does not perform. There, Deborah Bradley had contracted the work out to other entities.

In this case, Grace Industries LLC asserts it has no persons directly employed who primarily perform asphalt paving at this time, and for at least the last two years, who are eligible to vote in an election. Local 175 knows that the Employer has intentionally not hired its members directly on its payroll to perform such work; and Local 1010 has made no assertion that it is aware of any persons who primarily perform asphalt paving who work for Grace Industries. In keeping with the Region's prior decisions on the subject, and in keeping with Board Precedent, the unit to be certified in this case should be modified due to materially changed circumstances to delete the phrase "regardless of material used" and should be stated as that referred to as Voting Group B—"All full-time and regular part-time laborers employed by Grace Industries LLC, who primarily perform concrete paving, ... but excluding all other employees, employees who primarily perform asphalt paving, ..."

Respectfully submitted,

  
Eric B. Chaikin, Esq.

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