

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GRACE INDUSTRIES, LLC,
Employer,

and

HIGHWAY, ROAD AND STREET CONSTRUCTION
LABORERS LOCAL 1010, LIUNA,
Petitioner – Intervenor,

Case 29-RC-12031
and
Case 29-RC-12043

and

UNITED PLANT AND PRODUCTION WORKERS,
LOCAL 175, IUJAT,
Petitioner – Intervenor.

**ANSWERING BRIEF ON BEHALF OF EMPLOYER IN OPPOSITION TO
LOCAL 175's EXCEPTIONS TO THE
REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL REPORT
ON CHALLENGED BALLOTS**

Statement of the Case

On August 24, 2012, United Plant and Production Workers Local 175, International Union of Journeymen and Allied Trades, unaffiliated, the Petitioner in Case 29-RC-12043 and the Intervenor in Case 29-RC-12031 (hereinafter referred to as "Local 175"), submitted its exceptions to the Second Supplemental Report on Challenges that was issued by the Regional Director in the above-captioned cases on August 15, 2012 (hereinafter the "Report on Challenges").

The Employer, Grace Industries LLC, pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board, submits this Answering Brief in opposition to Local 175's Exceptions in the above-captioned cases.

The Regional Director's Report on Challenges correctly concluded that neither Glen Patrick nor Melvin Rivera was an eligible voter at the time of the election in this consolidated case and the challenges to their ballots should be sustained. The Report on Challenges also correctly concluded that the appropriate unit to be certified in Voting Group B is the overall unit petitioned for in Case 29-RC-12031 by Highway, Road and Street Construction Laborers Local 1010, Laborers International Union of North America, AFL-CIO (hereinafter referred to as LIUNA).

Statement of Relevant Facts

The Regional Director's Order and Notice of Election provided for an election to be held on July 23, 2012 in two voting groups: Group A was composed of voters who "primarily perform asphalt paving" work, and met the usual construction industry eligibility requirements of the Steiny-Daniel formulae¹; and Group B was composed of voters who "primarily perform concrete paving" work, and similarly met the Steiny-Daniel eligibility requirements.

The Employer submitted an Excelsior list for the Group B voters and provided none for Group A because it employed no workers who "primarily perform asphalt paving" work and met the Steiny-Daniel requirements to be eligible voters.

At the July 23, 2012 election, three persons presented themselves to vote in Group A, and all were challenged by the Board Agent as not on the list of eligible voters, and by the Employer because they were not employees eligible to vote in the election. Subsequently, the Region prepared a Tally of Ballots that showed the three

¹ See, generally, *Daniel Construction Co.*, 133 NLRB 264 (1961), and 167 NLRB 1078 (1967); and *Steiny & Co.*, 308 NLRB 1323 (1992).

challenged ballots to be determinative of the results in the Group A vote and the Tally of Ballots was provided to the parties on July 24, 2012.

At no time did Local 175 or LIUNA file any objections to conduct allegedly affecting the results of the July 23, 2012 election.

Issues Presented, Legal Argument and Conclusion

Local 175 advances entirely specious arguments in support of its assertions that Glenn Patrick and Melvin Rivera were eligible voters employed by the Employer at the time of the election in this case, and alternatively that the unit to be certified should exclude employees “who primarily perform asphalt work.”

Point 1 – Local 175 asserts that its unfair labor practice charge in Case 29-CA-085667 warrants a finding that Patrick and Rivera were eligible voters; however, as Local 175 has not filed any objections in the representation cases, Local 175’s unfair labor practice allegations cannot appropriately be considered in this matter and the unfair labor practice charge is irrelevant, in addition to being without merit.

First it must be noted that the Regional Director, acting on behalf of the Acting General Counsel, has not yet made a determination as to the merits of the unfair labor practice allegations in Case 29-CA-085667 that is referred to by Local 175 in its Exceptions; and the Employer expects that the allegations of that charge will be dismissed in due course.

Regardless of the merits of that charge, it is now well-established that the Board will not consider or make any determination with regard to allegations of unfair labor practices in a representation case unless: the General Counsel has issued an unfair labor practice complaint based upon a relevant charge; and, timely objections to

conduct affecting the results of the election must have been filed in the matter involving the alleged unfair labor practices. *All County Electric Co.*, 332 NLRB 863, 863 (2000) (the Board cannot find a violation of Section 8(a)(3) of the National Labor Relations Act in a representation case because to do so interferes with the General Counsel's exclusive authority with respect to prosecuting unfair labor practice complaints; citing *Texas Meat Packers*, 130 NLRB 279 (1961)); and, *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2-3 (2010) (in the absence of some timely filed objections to an election, the election is immune from attack and allegations of unfair labor practices cannot be used to affect the results of the election; citing *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 54-55 (5th Cir. 1963)). Neither of those conditions has been met in the present matter.

Accordingly, Local 175's assertion in its Exceptions that Patrick and Rivera were denied employment because of anti-union discrimination, *i.e.*, they allegedly were the victims of unfair labor practices, is wrong as a matter of fact (they were not denied employment because of union membership); and, the allegation is entirely inappropriate in the present representation case in which no objections, let alone timely objections supported by competent evidence, have been filed.

With respect to the voter eligibility of Patrick, attached hereto as Exhibit A is a copy of the non-Board settlement agreement that is referred to by the Regional Director at page 6 of the Report on Challenges. That agreement, signed by Patrick, states, in relevant part, that Patrick's employment was terminated on March 30, 2010 and he waived all future employment or an offer of employment from the Employer. (Exhibit A, page 3, paragraph 5). In its Exceptions, Local 175 does not dispute that those are the settlement terms. As a result, Patrick was not an employee of the Employer at any time after March 2010, which places him will outside the two-year

eligibility period of the Steiny-Daniel formulae.² He was not an eligible voter at the time of the election in this case and the challenge to his ballot should be sustained.

With respect to the voter eligibility of Rivera, Local 175's Exceptions do not dispute that he was employed by InterCounty Paving Associates of NY, LLC, and not by the Employer, and the hours that he worked during the time preceding the election were not sufficient to make him an eligible voter under the Steiny-Daniel formulae.

The sole argument advanced by Local 175 in its Exceptions to claim that Rivera was an eligible voter is that he "should have been employed" by the Employer. Rivera had never been employed by the Employer and Local 175's only basis for asserting that he should have been so employed is the unfair labor practice alleged in the charge in Case 29-CA-085667. Those unfair labor practice allegations may not be considered by the Board in this representation case in the absence of a complaint *and* timely objections, neither of which has not been filed.³ There is no basis to conclude that Rivera was an eligible voter at the time of the election, and the challenge to his ballot should be sustained.

Point 2 – Local 175 asserts that the absence of eligible voters in Group A requires the conclusion that the only unit that may be certified in this case is one limited to employees "who primarily perform concrete paving" work and the unit must expressly exclude employees "who primarily perform asphalt paving" work. This

² The eligibility date was the pay week immediately preceding the Regional Director's June 25, 2012 Order and Notice of Election.

³ Former unit employees who are alleged in an unfair labor practice charge to have been discharged in violation of Section 8(a)(3) of the Act may vote a challenged ballot; and their employee status is determined in a subsequent, consolidated representation and unfair labor practice case if the General Counsel issues a complaint on the charge. See, e.g., *St. Thomas Gas*, 336 NLRB 711, 711 and 720-21 (2001), and *Superior Protection, Inc.*, 339 NLRB 954, 954-55 and 960 (2003). Rivera was never employed by the Employer and was not discharged, and therefore his ballot should not be subject to this procedure, and the challenge to his ballot should be sustained.

proposition is incorrect factually and doing as Local 175 urges would effectively dismiss the petition in Case 29-RC-12031, in which LIUNA seeks an overall unit of employees performing paving and related work “regardless of material used.”

First, LIUNA’s petitioned-for, overall unit was specifically found by the Regional Director to be an appropriate unit and this was affirmed by the Board in its June 18, 2012 Decision on Review and Order that resulted in the Group A and Group B election. *Grace Industries*, 358 NLRB No. 62, slip op. at 4, fn. 19 (2012). Additionally, under well-settled Board law, LIUNA’s “overall unit” of employees who perform paving work “regardless of material used,” is presumptively appropriate. *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966), cited with approval in 358 NLRB No. 62, slip op. at 4, fn. 19. Accordingly, in the event that there is not a majority vote in favor of Local 175 in Group A, the appropriate unit for certification is the unit sought by LIUNA in its petition in Case 29-RC-12031, which includes all employees performing paving and related work “regardless of material used.”

Second, Local 175 uses a false logic to assert that there are no “primarily asphalt workers” employed by the Employer; rather, the most that can be concluded in the present case is that there were no eligible voters in Group A at the time the Excelsior list was submitted.

As the Regional Director correctly stated in his Report on Challenges, it is “the Employer’s position that there are no *eligible voters* in Voting Group A” (emphasis supplied); but nonetheless, there may be workers employed by the Employer who “primarily perform asphalt paving work.” Such asphalt workers unquestionably have worked for the Employer in prior years; the original representation case hearing in this matter consumed days of testimony regarding such employees; and such employees may

again be employed by the Employer. All that the present case has determined is that no such worker was employed for a sufficient period of time to be an eligible voter in Voting Group A.

Local 175 cites no relevant authority in support of its extraordinary unit proposition.

In *Hamilton Watch Co.*, 118 NLRB 591 (1957), cited by the Regional Director, the hearing record established that no plant clericals were employed and none were contemplated, and the Board would “not make any unit determination with respect to this category.” The Board certified an overall unit of production and maintenance employees and it neither included nor excluded “plant clericals” from that unit. 118 NLRB at 592 fn. 4 and 593.

In *Coca-Cola Bottling Company of Wisconsin*, 310 NLRB 844, 844 (1993), referenced by Local 175 in its Exceptions, a union sought to accrete newly-hired production employees into a warehouse and drivers unit by way of a unit clarification proceeding. The Board dismissed the union’s unit clarification petition based in part on its finding that no production workers had been employed for twelve years. The Board held that this hiatus separated the newly-hired employees from the production employees who formerly had worked in the recognized “production and warehouse” unit so that accretion was not warranted. No finding was made that production workers could not be included in the unit; the only holding was that accretion was not appropriate and the petition was dismissed. 310 NLRB at 844.

Neither of these cases supports Local 175’s claim that employees who “primarily perform asphalt paving” should be expressly excluded from the overall unit already found appropriate in this case. Local 175 cites no controlling authority in

support of its demand for exclusion of the “primarily asphalt” employees from the overall unit. Such employees may be excluded from the overall unit, which LIUNA seeks to represent in the present case, only if there is a majority vote for Local 175 in Voting Group A.⁴ *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966) (a unit including all laborers employed by the employer was held to be appropriate as petitioned for by a local of the Laborers International Union of North America).

Conclusion – Based on the entire record in this case, the challenges to the ballots of Glenn Patrick and Melvin Rivera should be sustained, and the “primarily asphalt” workers should not be excluded from the unit sought by LIUNA unless Local 175 obtains a majority of the valid votes in Group A.

Dated: September 5, 2012 at New York, New York.

Respectfully submitted,

Kauff McGuire & Margolis LLP
Attorneys for the Employer,
Grace Industries LLC

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⁴ There can be no such result because there is only one arguably eligible voter remaining, Robert Maresco, whose challenged ballot is not the subject of the present Exceptions.

**SEPARATION AGREEMENT, RELEASE, WAIVER
AND NON-DISCLOSURE AGREEMENT**

AGREEMENT, made and entered into as of the 18th day of January, 2011 between GLENN PATRICK, residing at 691 DECATUR ST. BROOKLYN, NY 11233 (hereinafter, "Mr. Patrick"), and GRACE ASPHALT LLC (hereinafter "Grace" or the "Company");

WHEREAS, Mr. Patrick was employed by Grace and his employment with Grace terminated as of March 31, 2010; and

WHEREAS, on or about April 14, 2010, Mr. Patrick filed an unfair labor practice charge in National Labor Relations Board ("NLRB"), Case 29-CA-30173, (the "NLRB Charge"); and

WHEREAS, the parties, have reached a mutually agreeable settlement of all of Mr. Patrick's claims and potential claims arising from his employment and the termination of his employment with Grace; and

NOW THEREFORE, in consideration of the mutual undertaking set forth herein, the parties agree as follows:

1. Nothing in this Separation Agreement, Release, Waiver and Non-Disclosure Agreement ("Agreement") shall be deemed an admission by Grace that it violated any law or any statutory, regulatory, collective bargaining agreement, or common law right of Mr. Patrick and Grace expressly denies any wrongdoing whatsoever with respect to Mr. Patrick or any other employees.

2. Mr. Patrick hereby withdraws the NLRB Charge with prejudice.

3. Provided that this Agreement is not revoked as set forth in Section 14 below, Grace shall make the following payments to or on behalf of Mr. Patrick, in complete satisfaction of all of Mr. Patrick's claims, within ten (10) business days following the Effective Date (as defined in Section 14 below):

(i) One lump sum payment in the gross amount of \$30,000 payable by check to Glenn Patrick, less all applicable statutory withholdings and deductions; and

(ii) One payment in the amount of \$6,320 to the Local 175 Welfare Fund ("Welfare Fund").

4. Mr. Patrick waives and hereby releases and discharges Grace and Grace Industries, LLC, and affiliated companies and their respective members, employees, agents and their legal representations (the "Released Parties") from any and all claims, demands, debts, causes of action and all liabilities of any kind or nature, which he has ever had; or now has, or may have known or unknown, against the Released Parties including, without limitations, claims arising out of or related to his employment by Grace, his treatment while so employed, or his departure from employment with Grace, including without limitation (i) all liability for any acts that violated or may have violated his rights under any contract (including collective bargaining agreements), tort, or other common law theory of recovery, any federal, state, or local fair employment practice or civil rights law or regulation, any employee relations statute, executive order, law, regulation, or ordinance, or any other duty or obligation of any kind, including but not limited to rights created by the Age Discrimination in Employment Act of 1967, and all other Federal, State and local laws

prohibiting discrimination of any kind or nature; (ii) all asserted and unasserted rights to and claims for wages, benefits, monetary and equitable relief, and compensatory, punitive, or liquidated damages; and (iii) all asserted and unasserted rights to and claims for attorneys' fees, disbursements and costs of suit.

5. Patrick hereby waives any right or claim to reinstatement to his employment with Grace and any offer of employment from Grace Industries, LLC.

6. Except to the extent lawfully compelled by court order, or by a lawfully issued subpoena, Mr. Patrick shall not disclose to any person (including, without limitation, any present or former employees, or applicants for employment of Grace or Grace Industries, LLC) the terms of this Agreement.

(a) Notwithstanding the foregoing, Mr. Patrick may make disclosures that otherwise are prohibited by this Agreement to his attorneys and accounting professionals solely to the extent necessary to report and account properly for the costs, fees, or payments described in this Agreement, provided that any such disclosure is accompanied by a directive that the information disclosed is to remain confidential and to enforce this Agreement.

(b) In the event Mr. Patrick receives a subpoena or other mandate pursuant to law for information from any person which requires or could require disclosures prohibited by this Agreement, he shall (unless prohibited by law) immediately transmit a copy of such subpoena or mandate to Grace at the address set forth in Section 10 below.

7. By executing this Agreement, Patrick acknowledges that:

(a) He has been paid all wages and benefits due him from Grace in consideration of the services he rendered while employed by Grace

(b) He is not relying upon any written or oral promise or representation made to him by any employee agent or other representative of Grace, other than the promises contained herein; and

(c) He has not been coerced in any manner whatsoever to sign this Agreement, and he has agreed to all of its terms voluntarily; he has read this Agreement in its entirety and understands that he has a period of twenty-one (21) days to consider its terms and whether to execute it; he has been advised to consult with an attorney and any other advisors of his choice prior to signing this Agreement and has, in fact, consulted with Eric Chaikin of Chaikin & Chaikin before he signed this Agreement; and he fully understands that by signing below he is giving up any right which he may have to sue or bring any other claims against Grace in connection with any matters which arose on or prior to the date on which he signs this Agreement.

8. This Agreement contains the entire agreement between Mr. Patrick and Grace regarding the subject matters relating hereto and, as such, fully supersedes any and all prior agreements or understandings between Mr. Patrick and Grace pertaining to the subject matters addressed in this Agreement.

9. This Agreement arises out of employment within the state of New York and shall be subject to, governed by and interpreted in accordance with the laws of the State of New York without regard to New York's conflict of laws principles, except as

to matters that are determined by Federal law; and, any court proceeding arising out of or relating to this Agreement shall be brought solely and exclusively in the Supreme Court of the State of New York, or the United States District Court in the County of New York.

10. All notices under this Agreement shall be in writing and shall be given (and shall be deemed to have been duly given, if sent) by confirmed fax, or by certified mail, return receipt requested, postage prepaid, or by overnight courier delivery (a) to Mr. Patrick at the address set forth above; or (b) to Edward Tackenberg, Vice President, Grace Asphalt LLC, 11 Commercial Street, Plainview, NY 11803; or to such other address as either party designates by written notice to the other.

11. This Agreement may not be amended, modified, or discharged except by a writing duly executed by both parties.

12. The invalidity or unenforceability of any provision contained herein shall in no way affect the validity or enforceability of any other provision of this Agreement.

13. The waiver by either party of the breach of any provision of this Agreement by the other party shall not operate or be construed as a waiver of any subsequent breach by such other party.

14. Mr. Patrick shall have a period of seven (7) days following his execution of this Agreement to revoke the Agreement. Therefore, this Agreement shall not become effective until the eighth (8th) day following Mr. Patrick's execution of the Agreement, provided he has not revoked his signature ("Effective Date"). Mr. Patrick

may revoke this Agreement, only by written notification received by Edward Taakenberg at Grace Asphalt within seven (7) days after Mr. Patrick executes this Agreement.

15. This Agreement shall be effective upon receipt by counsel for Grace of written notification that the Acting General Counsel of the National Labor Relations Board has withdrawn the unfair labor practice Complaint issued in NLRB Case 29-CA-30173.

WHEREFORE, intending to be legally bound, the parties have agreed to the aforesaid terms and indicate their agreement by signing below.

GLENN PATRICK

Glenn Patrick

GRACE ASPHALT LLC

By: *[Signature]*

Title: *VP*

Date: *1-18-2011*

Date: *1/20/11*

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CERTIFICATION OF SERVICE BY EMAIL UPON ELECTRONIC FILING

G. Peter Clark certifies that, on September 5, 2012, he caused true copies of the ANSWERING BRIEF ON BEHALF OF EMPLOYER IN OPPOSITION TO LOCAL 175's EXCEPTIONS TO THE REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL REPORT ON CHALLENGED BALLOTS to be filed with the National Labor Relations Board and the Regional Director of Region 29 of the Board by electronic filing, and to be served by electronic mail (e-mail) upon:

Eric B. Chaikin, Esq.
Chaikin & Chaikin
ChaikinLaw@aol.com
(Counsel for Local 175 - Petitioner in Case 29-RC-12043)

Barbara S. Mehlsack, Esq.
Gorlick, Kravitz & Listhaus, PC
BMehlsack@gklpc.com
(Counsel for Local 1010 - Petitioner in Case 29-RC-12031)

Dated: September 5, 2012

By: _____


G. Peter Clark