NATIONAL LABOR RELATIONS BOARD

Grace Industries, LLC, Employer, and Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO, Petitioner-Intervenor, and United Plant and Production Workers Local 175, IUJAT, Intervenor-Petitioner.	: : : : : : : : : : : : : : :	Case No. 29-RC-12031 Case No. 29-RC-12043

PETITIONER/INTERVENOR HIGHWAY ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010'S RESPONSE TO INTERVENOR/PETITIONER LOCAL 175'S EXCEPTIONS TO REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL REPORT ON CHALLENGES AND OBJECTIONS

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Introduction

Pursuant to the Rules and Regulations of the National Labor Relations Board, 102.69, Petitioner Highway Road and Street Construction Laborers Local 1010, by its undersigned attorneys, hereby submits this opposition to Local 175's Exceptions to the Regional Director's Second Supplemental Report on Challenges. Local 175 takes exception: a) to the finding by the Regional Director that challenged voters Glen Patrick ("Patrick") and Melvin Rivera ("Rivera") were not eligible to vote under the *Steiny-Daniel* formula; and b) to the ruling by the Regional Director that if challenged voter Robert Maresco ("Maresco") is ineligible to vote in Group A, and Local 1010 prevails in voting Group B, Local 100 will be certified in the larger unit found appropriate by the Board, of all laborers employed by Grace Industries LLC ("Grace" or "Employer") who perform site and ground improvement, utility, paving and road building work, and related work including site preparation, milling and finishing of all surfaces, regardless of material used, within the five boroughs of New York City.

Local 175's exceptions to the Report on Challenges should be dismissed because: a) as to Patrick, Local 175 submits no evidence to controvert the finding by the Regional Director that Patrick, in a 2011 non-Board settlement of an unfair labor practice filed in 2010, waived any right to employment by Grace Industries; and b) as to Rivera, Local 175 points to no evidence in the record that Rivera was on the Employer's payroll or, that, even if he "should have been employed directly on the employer's payroll" as alleged by Local 175, that he worked enough hours to qualify under the *Steiny-Daniel* formula.

Local 175's exceptions to the Region's ruling that Local 1010, if it prevails, will be certified in the overall unit found appropriate by the Board is an improper and untimely effort on the part of Local 175 to re-litigate the holding by the Board issued on June 18, 2012 that the

overall unit petitioned for by Local 1010 of laborers who perform paving and road building work, regardless of whether they work with asphalt or concrete, is an appropriate unit.

Background

On April 25, 2011, Local 1010 filed a petition for a unit of the Employer's laborers who perform "site and ground improvement, utility, paving and road building work and all related work...regardless of material used," including both concrete and asphalt materials, in the five boroughs of New York City. Local 175 filed a petition seeking to represent a unit of laborers who "primarily perform asphalt paving but excluding all persons who primarily perform concrete paving." The Regional Director issued a decision finding that the overall bargaining unit was the only appropriate unit. Upon exceptions filed by Local 175, the Board ruled on June 18, 2012 that, while the overall unit sought by Local 1010 is an appropriate unit, there was insufficient overlap between the asphalt pavers and other employees to render a separate unit of asphalt pavers inappropriate and ordered a self-determination election. The Regional Director issued an Order and Decision directing that employees who primarily perform asphalt paving be given the choice of voting for Local 175, Local 1010 or no union and that all other employees who perform paving, road building and related work be given a choice of Local 1010 or no union. In the event that a majority of voters in Group A chose Local 1010 their votes were to be pooled with the votes of Group B. In his Order and Decision, the Regional Director found that if the Group A voters selected Local 175 and the Group B voters selected 1010 that the Group A voter would be certified in a "primarily asphalt paving unit" and the Group B voters would be certified in a "primarily concrete and milling, surfacing related work" unit.

Thereafter the Employer submitted an Excelsior List which contained no names in Group A. The Employer reported that there were no employees with sufficient hours within the *Steiny*

Daniel formula to qualify to vote in Group A. At the election, three employees who were not on the Excelsior List appeared to vote. They are Robert Maresco, Melvin Rivera and Glen Patrick. The Regional Director in his Second Supplemental Report on Challenges found that Patrick was ineligible to vote because he had entered into a non-Board settlement of a 2010 unfair labor practice charge in which he waived any claim to reinstatement or any offer of employment from Grace. The Regional Director found that Melvin Rivera was ineligible to vote because he had never been on the Employer's payroll and that even if, as claimed by Local 175, he should have been on the Employer's payroll while doing an airport job for another company called Intercounty, he had not worked sufficient hours at the airport to be eligible to vote under the *Steiny-Daniel* formula.

The Region also ruled that as to the third employee Robert Maresco, it was necessary to hold a hearing as to his eligibility but if he was found to be eligible his ballot would be pooled with the Group B ballots. The Regional Director also found that, in either case, whether Maresco is eligible or ineligible, if Local 1010 prevailed, it would be certified in the overall unit of employees who perform site and ground improvement work and all related work, regardless of material used.

Argument

A. Local 175 presents no evidence to controvert the findings of the Regional Director with respect to the ineligibility of Patrick and Rivera.

Local 175's exception as to the Regional Director's finding with respect to Patrick's ineligibility is a *reductio ad absurdum*, since it is founded solely on the premise that Patrick filed an unfair labor practice charge against the Employer. As found by the Regional Director, in settling his unfair labor practice charge, Patrick waived all rights to employment at Grace. Hence the Regional Director correctly found him ineligible to vote.

As to Melvin Rivera, Local 175's exceptions rest on the argument that he would have been eligible to vote because he should have been on the Employer's payroll during a period of time when he was working on an airport job for another employer, Intercounty Paving. Local 175 has appended to its exceptions no evidence to support its contentions, as required by Board Rule 102.69 (g) (3). But even assuming *arguendo* that Rivera should have been on the Employer's payroll, the Regional Director found that Rivera's hours while working at the airport were insufficient to qualify him under the *Steiny-Daniel* formula. Local 175 submits no evidence in support of its exceptions to controvert that finding.

As a result, Local 175's exceptions to the Regional Director's Report on Challenged Ballots must be dismissed.

B. The Regional Director properly found that Local 1010, if it prevails in Group B, even if Maresco is ineligible to vote, shall be certified in the overall unit.

Local 175 argues that the Board should reconsider its determination that the overall unit is appropriate in the grounds that the Employer has not employed any employees who do primarily asphalt paving for the last two years. Local 175 has no right to re-argument of the Board's unit determination. Moreover, Local 175 cannot support an argument that the Employer does not employ asphalt pavers. The only thing Local 175 can demonstrate is that the Employer has not employed laborers who do "primarily asphalt paving" for enough hours to meet the *Steiny-Daniel* formula.[1] That fact is consistent with the reality of the Employer's workforce, that it is made up of laborers who do both kinds of work, so that there is less need for those who do primarily asphalt work. Local 175 submits no evidence that the Employer does not employ

[1] The *Heavy Construction* decision cited by Local 175 is inapposite, as in that case the Region found that the Employer did not employee any employees who do any utility paving, asphalt paving or milling work at all. In the instant case, the Region and the Board found that the Employer employs both laborers who do primarily asphalt paving and laborers who do asphalt paving and related work even if does not make up over 50% of their job duties.

laborers who do asphalt paving work, even if it is not the primary work they do. The overall unit petitioned for by Local 1010 and found appropriate by the Board, reflects the reality of the Employer's work force, that its laborers do both asphalt paving and other work. For that reason voting group B included all laborers other than those who "primarily did asphalt paving."

Thus the Regional Director properly held that even if Maresco is ineligible to vote, if Local 1010 prevails, it shall be certified in the overall unit of laborers who do site and ground improvement work, regardless of material used.

Conclusion

For the forgoing reasons, there is no basis upon which the Board may overrule the Regional Director's findings in the Second Supplemental Report on Challenges.

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Respectfully submitted,

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