

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DEMICCO BROTHERS INC.,
Employer

and

Case 29-RC-11109

THE SHEET ASPHALT WORKERS LOCAL
UNION 1018 OF THE DISTRICT COUNCIL
OF PAVERS AND ROAD BUILDERS OF THE
LABORER'S INTERNATIONAL UNION
OF NORTH AMERICA,
Petitioner

and

UNITED PLANT AND PRODUCTION
WORKERS, LOCAL 175, INTERNATIONAL
UNION OF JOURNEYMAN AND
ALLIED TRADES,
Intervenor

Eric Boerschinger, Esq., for the Regional Director.
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RECOMMENDED DECISION AND ORDER ON OBJECTIONS
AND CHALLENGES

MICHAEL A. ROSAS, Administrative Law Judge. Pursuant to a notice of hearing on objections to election and challenged ballots issued by the Acting Regional Director for Region 29 on November 3, 2006, and Order Rescheduling Hearing, dated November 8, 2006, I conducted a hearing in this matter on December 7, 8, and 12, 2006, in Brooklyn, New York. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, I make the following findings and conclusions.

The issues presented in the case arose from an election conducted on August 31, 2006, in accordance with a stipulated election agreement signed by Local 1018,¹ Local 175, and DeMicco Brothers Inc. (Employer DeMicco), in the following unit:

5 All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators employed by the Employer, who work primarily in the five boroughs of New York City, but excluding all employees who primarily perform the laying of concrete, concrete curb setting work, or block work, and/or who are currently represented by Highway, Road and Street Construction Laborers, Local Union 1010 of the District Council of Pavers and Road Builders, Laborers International Union of North America, or by Highway, Road and Street Construction Laborers, a Division of Amalgamated Local Union 450A, and excluding clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

20 The tally of ballots made available to the parties at the conclusion of the election revealed a tie—one vote for Local 1018, one vote for Local 175, and two challenged ballots, which were outcome-determinative. The Board agent conducting the election challenged the ballots of Eladio Lopez and Victor Paris on the ground that their names were not included on the list provided by Employer DeMicco prior to the election pursuant to *Excelsior Underwear*, 156 NLRB 1236 (1966).²

25 In addition, Locals 1018 and 175 filed timely objections to conduct affecting the results of the election. Local 1018's first objection alleged that Local 175 held a captive audience meeting within 24 hours of the election and, at that meeting, its representatives threatened, coerced, and misinformed members to vote in favor of Local 175. Local 1018's second objection alleged that Employer DeMicco omitted a substantial percentage of names and employees eligible to vote from the *Excelsior* list it provided prior to the election. Local 175 filed seven objections, essentially alleging that Local 1018 threatened to "blackball" employees who supported Local 175, demanded during the critical period prior to the election that Employer DeMicco dismiss any employee not a member of Local 1018, and threatened employees with expulsion, loss of employment, and loss of benefits if they supported Local 175.

35 Pursuant to Section 102.69 of the Board's Rules and Regulations, the Acting Regional Director caused an investigation to be conducted concerning the parties' challenges and objections, and afforded the parties full opportunity to submit evidence bearing on the issues. After conducting an investigation and considering the proof offered by the parties, the Acting Regional Director found that the challenges to the ballots of Paris and Lopez raised material and substantial issues of fact requiring a hearing. That issue was limited to a determination as to whether Lopez and Paris "performed primarily asphalt paving."³ In addition, the Acting Regional

45 ¹ Bd. Exh. 2.

² Jt. Exh. 1.

³ The Acting Regional Director reviewed payroll records submitted by Employer DeMicco for Lopez and Paris and found that they worked the requisite amount of time for eligible voters pursuant to an analysis under *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). No one took issue with this finding at trial, and the proof was limited to a determination of whether Lopez and Paris primarily performed asphalt paving.

Director recommended overruling 1018's first objection, but recommended sustaining its second objection—Employer DeMicco's failure to provide an eligibility list that substantially complies with *Excelsior*—if it is found, after a hearing, that either Paris or Lopez is found eligible to vote and Local 1018 loses the election after all eligible votes are counted. With respect to Local 175's second objection, the Regional Director noted that Local 175's allegations of threats by Local 1018 that employees would lose their jobs if they supported Local 175, which Local 1018 denied, raised material and substantial issues of fact and credibility requiring a hearing. The Acting Regional Director also directed that the hearing officer's report contain resolutions of credibility of witnesses, findings of fact, and recommendations to the Board.

I. The Challenges

The two challenges, as to which I heard evidence, are outcome-determinative. They involve the two employees, Eladio Lopez and Victor Paris, who were challenged by the Board's agent because their names did not appear on the eligibility list submitted by Employer DeMicco. Local 175 requests that the challenges to their ballots be sustained because they did not primarily perform asphalt paving, but rather, trench work that included excavation, installation of utility pipes and sheeting, backfilling, and framing curbs. In addition, Local 175 contends that Paris and Lopez are members of Local 731, whose jurisdiction, as set forth in its collective-bargaining agreement, fails to mention asphalt paving work. (Int. Exh. 1L.) It also suggests that there is a significant wage and benefits differential between asphalt pavers and workers whose primary work is not asphalt paving. Local 1018 contends that the provisions of the stipulated election agreement refer to part-time, as well as full-time, asphalt pavers and excluded only members of Locals 1010 and 450A. Local 731 members, therefore, were not excluded under the stipulated election agreement, even if they performed functions other than asphalt paving. Employer DeMicco concurs with Local 1018 and takes the position that the two challenged voters were eligible.

A. Victor Paris

Paris, a member of Local 731, has been employed by Employer DeMicco for 6-1/2 years. Employer DeMicco generally provides asphalt paving services for government agencies and utility companies within the City of New York. Paris testified that, when hired, he was told that he would "do a little of everything." However, he also testified that he has been performing mostly asphalt paving on trenches for sewer and water restoration projects. (Tr. 98-100.) Paris was familiar with, and performed the same work as, three other asphalt pavers, Steve Fuentes, Hank Weber, and Eladio Lopez.

From July 2003 through most of 2004, Paris worked on a sewer line restoration project. (Tr. 126.) He was regularly assigned to a crew of eight to nine individuals. Their daily work activity included trench excavation, removal of sheeting, backfilling of the trench with dirt after the work in the section was completed, and the applications of five to six truckloads of temporary asphalt to street sections of up to 2 blocks long. (Tr. 128-129, 132-133, 141-142.) Paris testified that, on certain days, approximately 25 percent of his time was spent installing bracing and sheeting. At other times, he could spend another 25 percent of his time shoveling and raking dirt and asphalt. (Tr. 137, 151-152.) Paris spent the rest of his time pouring temporary asphalt, cutting the asphalt to straighten out the trenches, or filling the trench with a payloader. He denied, however, pouring concrete, micro-paving, and slurry seal coating. (Tr. 132-138.) Paris testified that his wage rate in July 2003 was \$31. It increased to \$32 in 2004. He did not know the amount that his employer contributed toward his benefits. (Tr. 105.)

5 In 2005, Paris performed temporary asphalt and finished asphalt paving work in Bronx and Kings Counties. His wage rate increased that year to \$33 an hour. Paris worked with Lopez every day that year. (Tr. 105-109.) During the first 6 months of 2005, he worked on a water restoration trench project in Bronx County. Paris was in a crew of five to six persons. The work consisted of trench excavation, backfilling the trench, tamping the backfill, applying binder material, and applying final asphalt. Paris would usually "stay in the back" and, as work in each section was completed, apply the binder, followed by the temporary asphalt as each section was completed (Tr. 118-121, 125.) He would also help fill the trench by shoveling dirt. (Tr. 122-123.) Paris, Lopez, and another employed named "Joe" applied the final asphalt layer. He denied performing excavation work or pouring concrete, but conceded that he constructed the wooden braces and installed the prefabricated metal panels necessary to support the trench while utility workers installed or repaired pipes. In addition, when asked, Paris would dig additional dirt from the hole. (Tr. 107, 112-114, 116-118.)

15 Paris was a credible witness. He responded spontaneously and with an impressive amount of detail regarding questions about his major projects. Paris seemed quite knowledgeable about the asphalt paving process and readily conceded his involvement in the various aspects of the work.

20 *B. Eladio Lopez*

25 Lopez has been employed by DeMicco for 10 years and is also a member of Local 731. He testified that he did temporary asphalt paving all day on several projects during the period of July 2003-July 2005. He would work in a three-person crew. One would rake, another would shovel, and the other would roll or tamp the asphalt. Lopez' 2003 pay rate was \$31 an hour, but he did not know what his benefits rate was. He denied performing any other functions, except for shoveling asphalt. Lopez has worked with Steve Fuentes, another laborer and Local 1018 member, since 1998. Fuentes primarily did the raking. (Tr. 184-187, 193, 195, 199-200, 211, 215.)

30 Lopez was assigned mainly to three projects during that 2-year period. The first project was located at 149th Street in Bronx County. He worked on that project from October 2001, until the end of 2003. The 149th Street project entailed the reconstruction of a 2-mile stretch of roadway, including sidewalks and curbs. While the crew was excavating, Lopez was spreading one to three truckloads of asphalt per day. Asphalt spreading involved raking, rolling, and shoveling. In addition to covering trenches, Lopez was also filling potholes. Lopez insisted that he did that for 6 hours a day and denied installing sheeting or performing any other functions. (Tr. 186-190, 212-213.)

40 Toward the end of 2003, Lopez was assigned to a project located at Cherry Street in Queens County. He worked there until January 2004. The Cherry Street project was similar to the 149th Street project. Each day, Lopez spread approximately two truckloads of asphalt over 100-150 feet of temporary asphalt over a sewer trench. The work would also include covering street potholes. From January 2004 through 2005, Lopez was assigned to a project at Flushing Avenue in Kings County. That project, like the Cherry Street contract, entailed the reconstruction of an entire roadway, including sidewalks and curbs, and affected water and sewer lines. The final paving, however, was done by another crew. (Tr. 186-187.)

50 I found Lopez credible. He seemed extremely at ease in the witness box and responded spontaneously to all questioning. He too appeared quite knowledgeable about the asphalt

paving process and recalled the details of his major projects during the period of July 2003 to July 2005.

C. Michael Hurr

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Hurr has been employed by Employer DeMicco as a project superintendent for 5 years. He explained that, during the July 2003–July 2005 period, his Company employed about 10 full-time asphalt workers and had collective-bargaining agreements with several unions, including Locals 731 and 1018. Hurr was familiar with Paris and Lopez. Paris is a follow-up crew member. A truck brings in dirt fill, dumps it into the trench and the crew tamps it. Although payloaders are occasionally used, asphalt is then unloaded from little shoots at the back of a truck. (Tr. 226–228). With respect to Paris’ work in Bronx County, Hurr estimated that Paris spent his time backfilling trenches, and spreading and tamping asphalt. Out of an 8-hour workday, Hurr estimated that Paris spent approximately 5.5 hours working with asphalt. (Tr. 229–230.) In contrast, Lopez was in a three-person crew that just did asphalt work all day. (Tr. 231.)

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I found Hurr to be candid, detailed, and reliable in his testimony. He had an excellent grasp of the work performed by Lopez and Paris. Hurr struck me as a completely neutral witness who had no reason to lie and readily conceded his limited knowledge when confronted with questions about DeMicco’s bookkeeping practices and payroll records.

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D. Opinion Testimony

In an attempt to support or impeach the testimony of Paris and Lopez, the parties called additional witnesses to testify about the nature of Employer DeMicco’s asphalt paving work, as well as industry standards for New York City asphalt paving projects. Local 175 called its business manager, Luciano Falzone, and Mark Palumbo, a Local 1018 member. Local 1018 called its deputy trustee, John Peters.

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Falzone, Local 1018’s former business manager until 2005, had over 15 years of experience in asphalt paving in New York City. (Tr. 62, 473–479.) He is familiar with Employer DeMicco’s asphalt paving contracts. In support of Local 175’s contention that Lopez and Paris did not spend their work time primarily performing asphalt paving, Falzone explained that the asphalt paving component of a utility repair project could take anywhere from several minutes to 2 hours, but that would depend on the work involved and the number of workers involved. (Tr. 63–66.)

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Falzone subsequently testified that, in accordance with Local 1018’s collective-bargaining agreement with Employer DeMicco, Local 1018 members typically performed the asphalt paving on utility projects. (Exh. Int. 1M.) He noted that, during the January–June 2005 period, Employer DeMicco reported two employees as Local 1018 members. At that time, the wage rates for Local 1018 members were \$35 per hour, plus \$20 in benefits, night differential, and seven paid holidays.

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Local 731 members like Lopez and Paris, on the other hand, get paid less, with no night work pay differential or paid holidays. They usually spend most of their time excavating, digging, and laying pipes in the trenches, but would not do much asphalt work. Falzone conceded, however, that if members of Locals 731 and 1018 were on the same crew, “[t]hey would do the same thing”—digging, removing dirt, help lay pipe and “at the end of the day if they need to put the asphalt they would perform the asphalt also.” (Tr. 476–481.)

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Palumbo has been employed as a laborer, foreman, and superintendent in the New York City asphalt paving industry for over 24 years. Rebutting Paris' testimony that asphalt paving was a mostly an all day job, Palumbo opined that a crew of five workers, using two loads of asphalt, could use a payloader to temporarily pave a 225 foot-section in 2 hours. He noted, however, that if the same crew spread the asphalt by hand, it would take approximately 2 hours. (Tr. 173-177.) In addition, asphalt pavers do not usually spend time preparing to spread asphalt. They are either spreading asphalt or waiting for the asphalt to be delivered. (Tr. 178-179.)

Peters, Local 1018's deputy trustee for the past 18 months, runs the Union's day-to-day activities and is familiar with the day-to-day activities of the New York City paving industry. He gets calls to send Local 1018 members to worksites. Peters visits worksites and checks sites when he gets complaints. (Tr. 454-456.) Peters opined that workers performing asphalt paving in New York City are not limited to those whose job classification is asphalt paving and paid at a certain hourly rate. He explained that there are approximately 1,000 workers in the utility paving industry in New York City, including 200 members of Local 1018. The rest are members of other labor organizations, including Locals 14, 15, 60, 282, 731, and 1298, and perform the various functions of asphalt paving. Of all the workers on an asphalt paving crew, only members of Local 14 and 15 have a primary function – they operate the machines. In addition, members of Locals 1018 and 731 perform preparation work. (Tr. 456-457, 461, 470-472.)

I found the opinion testimony of Falzone, Palumbo, and Peters somewhat helpful in explaining the general processes involved in the New York City asphalt paving industry. However, their testimony was not credible as it related to the specific details of Employer DeMicco's asphalt paving work during the period of 2003-2005. Given my determination that Paris and Lopez, as corroborated by Hurr, were credible witnesses, I gave the opinion testimony very limited weight.

E. Analysis of Evidence Regarding the Challenges

The burden is on the party seeking to exclude someone from voting. See *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998), citing *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). As there was no contention by the parties that the stipulated election agreement was ambiguous—the stipulated bargaining unit included all part-time and full-time asphalt workers, including workers who performed related work, such as raking and shoveling—the sole determination was whether Lopez and Paris primarily performed asphalt paving from July 2003 to July 2005. See *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002).

It is undisputed that Paris and Lopez were members of Local 731. Membership in that labor organization, unlike Local 1010, did not exclude one from voting in the election. The only issue was whether they primarily did asphalt paving. I find that they did. Lopez was entirely assigned to asphalt paving, while Paris's responsibilities also included asphalt paving. Paris was assigned to the back of a large crew and he would follow with the asphalt crew. While he helped install bracing and sheeting, and backfilling the trench, the majority of his time was spent on the asphalt paving aspect of the work.

There is a salary and benefits differential between members of Locals 731 and 1018. However, that difference can be reasonably attributed to the fact that Local 731 members do temporary asphalt paving, while Local 1018 members mainly performed final asphalt paving. Furthermore, I am not swayed by the notion that New York's prevailing wage law would have required Local 731 members to be paid at the higher rates paid Local 1018 members who perform asphalt paving. It is undisputed that Local 731 members, as laborers, do asphalt

paving. The fact that they do this as part of their work and for a certain wage rate is an issue best left to collective bargaining or enforcement by the New York State Department of Labor.

II. The Objections

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The proponent of an election objection has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Double J. Services*, 347 NLRB No. 58, slip op. at 1-2 (2006). That burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. See *Safeway, Inc.*, 338 NLRB 525 (2002), and cases there cited.

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A. Local 175's Objection

In its offer of proof submitted to the Acting Regional Director in support of its second objection, Local 175 asserted that "a named employee" would testify that a few days before the election, Local 1018 representatives told employees that they would lose their jobs if they voted for Local 175. As Local 1018's alleged conduct occurred "within the critical period prior to the election," if true, it would warrant setting aside the election. See Regional Director's Report on Objections and Notice of Hearing, pp. 17-18.

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Local 175 did not, however, produce a witness with respect to the alleged objection. Neither Employer DeMicco nor Local 1018 called witnesses either. Under the circumstances, I find that Local 175 has not met its burden of proving that Local 1018 engaged in conduct that tended to interfere with employees' free choice. Accordingly, I overrule Local 175's second objection.

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B. Local 1018's Objection

The Acting Regional Director recommended sustaining Local 1018's second objection if it was found, after a hearing, that either Paris or Lopez was eligible to vote and Local 1018 lost the election after all eligible votes are counted. Having found that Lopez and Paris are eligible to vote, Local 1018 has met its burden regarding the first part of its objection, as Employer DeMicco omitted from its *Excelsior* list two out of four names. As determined by the Acting Regional Director, the omission of both names from the list involves a determinative number of voters and, pursuant to Board precedent, this does not constitute substantial compliance with *Excelsior*. See *Thrifty Auto Parts Inc.*, 295 NLRB 1118 (1989). The second part of this objection obviously depends on the outcome of the election after the votes of Lopez and Paris are counted. In the event that Local 1018 does not prevail after all eligible votes are counted, the election shall be set aside, and a new election run.

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III. Conclusions and Recommended Order

In accordance with the above findings, I conclude that the challenges to the ballots of Eladio Lopez and Victor Paris should be overruled and order that the Regional Director open and count their ballots, I further conclude that Local 175's second objection to the election does not have merit and should be overruled. Lastly, in the event that Local 1018 does not prevail after all eligible votes are counted, the election held on August 31, 2006, shall be deemed invalid, set aside, and a new election run. The case is remanded to the Regional Director for

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Region 29 to process the matter in accordance with this recommended decision and to issue an appropriate certification.⁴

Dated: Washington, D.C., January 16, 2007

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Michael A. Rosas
Administrative Law Judge

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⁴ Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of the issuance of this recommended decision and order, either party may file with the Board in Washington, D.C., an original and eight copies of exceptions thereto. Immediately upon filing such exceptions, the party filing them shall serve a copy upon the other parties and a copy with the Regional Director. If no exceptions are filed to this decision and order, the Board may adopt the decision and order as its own.

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