

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**ACANTHUS, INC.**

**Employer**

**and**

**Case No. 2-RC-22768**

**LOCAL 1, NEW YORK INTERNATIONAL  
UNION OF BRICKLAYERS AND  
ALLIED CRAFTWORKERS**

**Petitioner**

**And**

**OPERATIVE PLASTERERS' AND CEMENT  
MASONS' INTERNATIONAL ASSOCIATION  
LOCAL No. 530**

**Intervenor**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding<sup>1</sup>, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that Acanthus, Inc. (the Employer) is a plaster contractor with an office and place of business located at 450 West 31<sup>st</sup> Street, New York, New York. During the past year, the Employer has purchased and received goods, supplies and materials valued in excess of \$50,000 directly from points located outside the State of New York. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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<sup>1</sup> The parties filed briefs, which were carefully considered.

3. The parties stipulated and I find, that Local 1, New York International Union of Bricklayers and Allied Craftworkers (Petitioner) is a labor organization within the meaning of Section 2(5) of the Act. The parties did not stipulate to the labor organization status of Operative Plasterers' and Cement Masons' International Association, Local No. 530 (Intervenor). However, the record establishes that Intervenor maintains collective-bargaining relations with various employers and represents employees concerning their wages, hours and terms and conditions of employment. Thus, it appears that Intervenor exists, in whole or in part, to represent employees concerning their terms and conditions of employment. See *Litton Business Systems*, 199 NLRB 354 (1972); and *Butler Mfg. Co.*, 167 NLRB 308 (1967). Based upon the record, I find that Intervenor is also a labor organization within the meaning of Section 2(5) of the Act.

4. The petition, as amended at hearing, seeks an election in a unit of all plasterers employed by the Employer in the following counties: Brooklyn, Queens, Staten Island, Bronx, Manhattan, Nassau, Suffolk, Westchester, Putnam, Rockland, Orange, Dutchess, Columbia, Ulster, Greene, Delaware, Albany, Sullivan and Rensselaer and who work on any job performed on Rikers Island, Ellis Island, Liberty Island, Ward Island and Roosevelt Island, excluding all other employees including office employees and supervisors as defined in the Act.<sup>2</sup>

At the hearing, the sole issue raised and litigated by the parties concerned whether a collective-bargaining agreement executed by the Intervenor and the Employer, effective from July 1, 2002 through January 31, 2006, bars the instant petition. In this regard, the Intervenor contends that it has met its burden of demonstrating that its relationship with the Employer is one governed by Section 9(a) of the Act, and that any challenge to its majority status must be rejected inasmuch as it is outside the statutory limitations period. The Intervenor further argues that, the evidence adduced at the hearing, in fact, establishes its majority status. Contrary to the Intervenor, the Petitioner contends that the collective-bargaining agreement relied upon by the Intervenor is a Section 8(f) agreement, and therefore not a bar, to the election. In support of this argument, the Petitioner contends that, as the collective-bargaining agreement at issue does not evince an unequivocal recognition of the Intervenor, it fails the basic requirement for 9(a) status. Further, Petitioner argues that the record as a whole fails to support the Intervenor's assertions that it demonstrated, or offered to demonstrate, its majority support in June 2002, when the collective-bargaining agreement was executed. Moreover, Petitioner contends that the Intervenor, in fact, did not possess evidence of majority support during the relevant period. Finally, Petitioner contends that Section 10(b) is not applicable herein, as there is no evidence that any action was taken on the basis of the Intervenor's purported 9(a) status until the filing of the instant petition. The Employer has taken no position with respect to the issues raised by the Petition.

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<sup>2</sup> The parties additionally stipulated that those eligible to vote in the election would be all plasterers employed by the employer for a period of 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24 month period immediately preceding the eligibility date.

The collective-bargaining agreement asserted to be a bar by the Intervenor contains the following security clause:

It shall be a condition of employment that all Plasterers of the Employer covered by this Trade Agreement who are members of the Union in good standing on the date of execution of this Trade Agreement shall remain members in good standing and those who are not members on the date of execution of this Trade Agreement shall, on or after the eighth (8<sup>th</sup>) day following the date of execution of this Trade Agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Trade Agreement and hired after the date of execution shall, on or after the eighth (8<sup>th</sup>) day following the beginning of such employment on a construction site, become and remain members in good standing in the Union.

Based upon the foregoing, I find it unnecessary to address the Intervenor's claim that its collective-bargaining relationship with the Employer was converted from one governed by Section 8(f) to one encompassed within Section 9(a) of the Act. Even assuming, without deciding, that the evidence supports the Intervenor's contentions in this regard, I find that the collective-bargaining agreement at issue does not possess bar quality and, accordingly, that it is appropriate to direct an election herein.

It is well settled that a contract containing a union-security clause which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, does not bar an election. *Paragon Products Corp.*, 134 NLRB 662, 666 (1962). See also *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031(1993). It is the clause itself, and not extrinsic evidence, which must establish the illegality. *Jet-Pak Corp.*, 231 NLRB 552 (1977).

In *Paragon Products*, *supra*, the Board set out the three instances where a contract will not bar the processing of a petition because of an unlawful union security provision:

[W]e now hold that only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.

Such unlawful provisions include (1) those which expressly and unambiguously require the employer to give preference to union members in (a) hiring, (b) in laying off, or (c) for the purpose of seniority; **(2) those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period**; and (3) those which expressly require as a condition of continued employment the payment of sums of money other than 'periodic dues and initiation fees uniformly required.' *Id.* At 666 (emphasis supplied).

In the instant case, the union-security provision at issue, on its face, denies to employees the statutory 30-day grace period during which they may consider joining the Intervenor. Thus, it is unlawful,<sup>3</sup> and will not be found to bar the instant petition, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Based on the foregoing reasons, and the record as a whole, I find that the following employees constitute an appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time plasterers employed by the Employer in the following counties: Brooklyn, Queens, Staten Island, Bronx, Manhattan, Nassau, Suffolk, Westchester, Putnam, Rockland, Orange, Dutchess, Columbia, Ulster, Greene, Delaware, Albany, Sullivan and Rensselaer and who work on any job performed on Rikers Island, Ellis Island, Liberty Island, Ward Island and Roosevelt Island, excluding all other employees including office employees and supervisors as defined in the Act.<sup>4</sup>

Excluded: All other employees, including office employees and guards, professional employees and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time<sup>5</sup> and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>6</sup> Eligible to vote are those in the unit who have been employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date for the election, or had some employment with the Employer during those 12 months and have been employed by the Employer for 45 working days or more within the 24-month period immediately preceding the eligibility date. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been

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<sup>3</sup> The Board has held that similar clauses, when implemented by an employer, constitute unfair labor practices. See *Zidell Explorations, Inc.*, 175 NLRB 887 (1969) and *Western Building Maintenance Co.*, 162 NLRB 778 (1967).

<sup>4</sup> Those eligible to vote in the election are all employees in the unit employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment with the Employer in those 12 months and have been employed by the Employer for 45 working days or more within the 24-month period immediately preceding the eligibility date. *Steiny & Co.*, 308 NLRB 1323 (1992).

<sup>5</sup> Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25<sup>th</sup> and 30<sup>th</sup> day after the date of this Decision.

<sup>6</sup> Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>7</sup> Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes by Local 1, New York International Union of Bricklayers and Allied Craftworkers, Operative Plasterers' and Cement Masons' International Association Local No. 530 or neither labor organization.<sup>8</sup>

Dated at New York, New York  
April 20, 2004

***Celeste J. Mattina***

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/s/Celeste J. Mattina  
Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Rm. 3614  
New York, New York 10278

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<sup>7</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **April 27, 2004**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

<sup>8</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth St., NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by **May 4, 2004**.