UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DIAMOND ASPHALT CORP.
Employer

and **Case No. 29-RC-10982**

HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS, A DIVISION OF AMALGAMATED LOCAL UNION 450A
Petitioner

and

HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL UNION 1010 OF THE DISTRICT COUNCIL OF PAVERS AND ROAD BUILDERS, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
Intervenor

DIAMOND ASPHALT CORP.
Employer

Case No. 29-RC-11213

and

HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL UNION 1010 OF THE DISTRICT COUNCIL OF PAVERS AND ROAD BUILDERS, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
Petitioner

and

HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS, A DIVISION OF AMALGAMATED LOCAL UNION 450A
Intervenor

DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera, a Hearing Officer of the National Labor Relations Board, herein called the Board.[1]

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, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. Diamond Asphalt Corp., herein the Employer, did not appear at the hearing. Prior to the hearing, however, the Employer signed a Commerce Questionnaire, attached hereto as Exhibit 1, indicating that Diamond Asphalt Corp., with an office and principal place of business located at 91 Paidge Avenue, Brooklyn, New York, is engaged in the construction industry. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations described above, provided services valued in excess of $50,000 to customers within the State of New York, which customers are directly engaged in interstate commerce.

[1] The labor organizations involved herein filed separate petitions in Case Nos. 29-RC-10982 and 29-RC-11213, seeking to represent employees of the Employer in the same bargaining unit. In order to effectuate the purposes of the Act, and to avoid unnecessary costs and delay, it is hereby ordered, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that Case Nos. 29-RC-10982 and 29-RC-11213 be consolidated.

Based on the Employer's stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. All parties present at the hearing stipulated that with regard to the issue of labor organization status, the evidence adduced at the hearing in CM & E Con, Inc., Case Nos. 29-RC-10473 and 29-RC-10972, is applicable to the instant case.

Section 2(5) of the Act defines "labor organization" as follows:

> "Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

In CM & E Con, Inc., officials of the Petitioner and cross-Petitioner testified that the Petitioner and cross-Petitioner represent employees, that employees participate in the Petitioner and cross-Petitioner, and that the Petitioner and cross-Petitioner deal with employers regarding labor disputes, wages, hours, benefits and other working conditions. This testimony is sufficient to establish that the Petitioner and cross-Petitioner satisfy the statutory definition of "labor organization" set forth above. See *Yale New Haven Hospital*, 309 NLRB 363 (1992); *Butler Manufacturing Company*, 167 NLRB 308 (1967); *The East Dayton Tool & Die Company*, 194 NLRB 266 (1971); *Alto Plastics*, 136 NLRB 850, 851-52 (1962). Accordingly, I conclude that the Petitioner and cross-Petitioner are labor organizations as defined in Section 2(5) of the Act.

The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. All parties present at the hearing stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time[2] site and grounds improvement, utility, paving & road building workers who primarily perform the laying of concrete, concrete curb setting, or block work, including foremen, form setters, laborers, landscape planting and maintenance employees, fence installers and repairers, slurry/seal coaters, play equipment installers, maintenance safety surfacers, and small power tools and small equipment operators employed by the Employer, who work primarily in the five boroughs of New York City, but EXCLUDING all employees who perform primarily asphalt paving work and/or who are currently represented by the Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers International Union of North America, AFL-CIO, or by Local 175, United Plant and Production Workers, and excluding clericals, guards, and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining 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, AFL-CIO or by Highway, Road and Street Construction Laborers, a division of Amalgamated Local Union 450A or by neither labor organization. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

[2] Also eligible to vote are all unit employees who have been employed for a total of 30 working days or more within the 12 months immediately preceding the eligibility date, or who have had some employment during that period and who have been employed 45 days or more within the 24 months immediately preceding the election eligibility date.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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 permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Also eligible to vote are all unit employees who have been employed by the Employer for a total of 30 working days or more within the twelve months preceding the eligibility date, or who have had some employment with the Employer during that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure 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. 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, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **November 14, 2005**. No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election.

Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REOUEST REVIEW

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, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 18, 2005.** The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated: November 4, 2005.

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John J. Walsh
Acting Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201