

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

TULLY CONSTRUCTION CO., INC.
Employer

and

**THE SHEET ASPHALT WORKERS LOCAL
UNION 1018 OF THE DISTRICT COUNCIL
OF PAVERS AND ROAD BUILDERS OF THE
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA**

Petitioner

Case No. 29-RC-11706¹

and

**LOCAL 175, UNITED PLANT & PRODUCTION
WORKERS INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

Intervenor

YONKERS CONTRACTING CORP.
Employer

and

**THE SHEET ASPHALT WORKERS LOCAL
UNION 1018 OF THE DISTRICT COUNCIL
OF PAVERS AND ROAD BUILDERS OF THE
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA**

Petitioner

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and

**LOCAL 175, UNITED PLANT & PRODUCTION
WORKERS INTERNATIONAL UNION OF
JOURNEYMEN AND ALLIED TRADES**

Intervenor

¹ The two cases were not consolidated, and there is no evidence of any relationship between Tully and Yonkers.

DECISION AND DIRECTION OF ELECTIONS

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 Tara O'Rourke, a Hearing Officer of the National Labor Relations Board, herein called the 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, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. (a) The parties stipulated that Tully Construction Co., Inc., herein called Tully, is a domestic corporation, with its principal office and place of business located at 127-50 Northern Boulevard, Flushing, New York, where it is engaged in highway and street construction, including asphalt paving. During the past year, which period is representative of its annual operations generally, Tully, in the course and conduct of its business operations described above, purchased and received at its Flushing, New York facility, goods and materials valued in excess of \$50,000, directly from suppliers located inside the State of New York, said goods and materials having originated from points located outside of the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that Tully 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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- (b) The parties stipulated that Yonkers Contracting Corp., herein called Yonkers, is a domestic corporation, with its principal office and place of business

located at 969 Midland Avenue, Yonkers, New York, where it is engaged in highway and street construction, including asphalt paving. During the past year, which period is representative of its annual operations generally, Yonkers, in the course and conduct of its business operations described above, purchased and received at its Yonkers, New York facility, goods and materials valued in excess of \$50,000, directly from suppliers located outside of the State of New York.

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

3. The parties stipulated that the Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, herein called the Petitioner, and Local 175, United Plant & Production Workers International Union of Journeymen and Allied Trades, herein called the Intervenor, are organizations in which employees participate, and which exist, in whole or in part, for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment.

Based on the stipulation of the parties, and the record as a whole, I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The labor organizations involved herein claim to represent certain employees of Tully and Yonkers.

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

5. (a) The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time employees employed by Tully at its Flushing, New York facility, who perform asphalt paving, including foremen, rakers, screedmen, micro pavers, AC paintmen and liquid tar workers, but EXCLUDING all clerical employees, guards and supervisors as defined in the Act.

(b) The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time employees employed by Yonkers at its Yonkers, New York facility, who perform asphalt paving, including foremen, rakers, screedmen, micro pavers, AC paintmen and liquid tar workers, but EXCLUDING all clerical employees, guards and supervisors as defined in the Act.

At the hearing, the Intervenor took the position that the petitions should be dismissed on contract bar grounds. The Petitioner and the Employers took the contrary position.

In support of its position, the Intervenor called as its witnesses Roland Bedwell, the Intervenor's Business Manager, and Peter Tully, President of Tully. The Petitioner and Employers did not call witnesses. All of the parties filed post-hearing briefs.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that there is no contract bar to the instant petitions. Accordingly, I will direct elections in the bargaining units I have found to be appropriate. The facts and reasoning in support of my conclusions are set forth below.

FACTS

The petition in Case No. 29-RC-11706 was filed on December 30, 2008. The petition in Case No. 29-RC-11707 was filed on January 5, 2009.

The document asserted by the Intervenor to bar the instant petitions is titled, "Agreement Between Tully Construction Co., Inc. and Yonkers Contracting, Inc. [and]

United Plant and Production Workers Local Union 175 Paving Division.” These words are followed by a date, “June 30, 2008,” which is crossed out.

The first page of the document states that the agreement is “effective upon execution for a period of one year.” The words, “upon execution for a period of one year,” are handwritten (no initials), and replace the crossed-out date, “June 30, 2008.”

Article IX, Section 2, of the document states that, “This Agreement shall be executed by both parties hereto.” However, the signature page contains just one signature, by the Intervenor’s Business Manager, Roland Bedwell. Bedwell’s signature is dated December 29, 2008. It is followed by blank signature and date lines for Tully and Yonkers.²

The record reflects that the Intervenor delivered four originals of this document to Tully’s Flushing facility on December 30, 2008, with the request that it be signed by Tully and forwarded to Yonkers for signature. On that same date, December 30, 2008, the Intervenor’s attorney sent a letter to Yonkers and Tully’s attorney, requesting that the contract be executed. To date, neither Tully nor Yonkers has executed this document.

The Intervenor offered into evidence a December 19, 2008, e-mail from the attorney for Tully and Yonkers to the Intervenor’s attorney, indicating that “a clean copy of the agreement my clients are willing to sign” was attached to the e-mail. However, the Intervenor made handwritten changes to this document, purporting to incorporate changes to which the attorney for Tully and Yonkers had agreed. The document delivered to Tully on December 30, 2008, included these handwritten changes.

² The signature and date lines for Tully and Yonkers are set forth on the same document, rather than on a separate copy for Tully and a separate copy for Yonkers. Accordingly, the Intervenor sought to have Tully sign the contract first, and then forward this same document to Yonkers for its signature.

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