

North Macon Health Care Facility and United Steelworkers of America, AFL-CIO. Case 10-RC-14442

October 26, 1994

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, AND COHEN

The National Labor Relations Board has considered objections to an election held December 8, 1993, and the hearing officer's report recommending disposition of them (pertinent portions of which are attached as an appendix). The election was conducted pursuant to a Stipulated Election Agreement, and the tally of ballots shows that of approximately 143 eligible voters, 57 cast valid votes for the Petitioner and 71 cast votes against the Petitioner. There were six challenged ballots, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and adopts the hearing officer's findings and recommendations only to the extent consistent with this decision.¹

In Objection 10, the Petitioner contends that the Employer provided a "substantial number of incorrect and incomplete addresses for the eligible voters and refused to supply complete names of voters, thereby violating the intent of the *Excelsior*² rules which give[] the union an opportunity to communicate with eligible voters prior to the election. This act . . . destroys the laboratory conditions necessary for a free and fair election."

The hearing officer found that the Employer provided a list of eligible voters containing 33 incorrect addresses and with employees' last names and first initials rather than their full names. In support of its objection, the Petitioner produced the *Excelsior* list provided by the Employer. The Employer submitted its own copy of the *Excelsior* list and a copy of the computer-generated payroll records of the unit employees provided it by a management corporation and based on

¹ During the course of the hearing, the Employer objected to the hearing officer's evidentiary rulings admitting into evidence P. Exh. 1 (a copy of the *Excelsior* list with annotations showing which of the addresses on the list were incorrect) and refusing to admit Emp. Exh. 1 (certain reports prepared by Petitioner after unsuccessful attempts to contact employees at the home addresses shown on the *Excelsior* list). However, we find that these issues are not properly before us, as the Employer has not filed exceptions to the hearing officer's rulings in this regard. Although the Employer notes in its brief that it filed motions for special permission to appeal these issues, the motions were denied on the grounds that the hearing officer's report had issued while the motions were pending, and the Employer was specifically advised that the appeals "are denied without prejudice to your renewing your arguments in appropriately filed exceptions." Nevertheless, the Employer did not file exceptions with the Board.

² *Excelsior Underwear*, 156 NLRB 1236 (1966).

the Employer's records. The payroll records included employees' addresses and full first and last names. On the *Excelsior* list it provided the Union, however, the Employer had deleted the employees' first names and supplied only the first letter of the employees' given names. Further, nearly 23 percent of the addresses on the *Excelsior* list, or 33 out of 144, were incorrect.

The hearing officer recommended that the Petitioner's objection be overruled, noting that the Board has held that it will not apply the *Excelsior* rule "mechanically" to set an election aside on the basis of an imperfect list, in the absence of an employer's deliberate or grossly negligent attempt to avoid compliance with the *Excelsior* rule. The hearing officer found no evidence of such gross negligence or bad faith. With respect to the Employer's use of initials rather than first names, the hearing officer found that, although the Board does not condone the practice, this shortcoming does not rise to the level of a substantial failure to comply with the rule's requirements.³

In its exceptions, the Petitioner argues, in essence, that the Board's policy of not applying the *Excelsior* rule "mechanically" has allowed exceptions to its strict application effectively to erode the rule, that the spirit of the rule is violated where nearly 25 percent of the addresses provided are incorrect and the full names of employees are not supplied, and that no means other than an accurate *Excelsior* list exist whereby a petitioner can obtain such information.

For the reasons stated below, we find merit in the Petitioner's objections with respect to the Employer's failure to include employees' first names on the *Excelsior* list. Therefore, we set aside the election and order that a second election be scheduled.⁴ Further, we hold that an employer's failure to provide the full first and last names of employees is a deviation from the Board's policy that an employer must "substantially comply" with the *Excelsior* rule and tends to interfere with a free and fair election. Although bad faith is generally not relevant in this area, under the particular circumstances of this case, we also find that the Employer's deliberate deletion of the unit employees' first names from the list provided by its management company is evidence of a bad-faith effort to impede the Petitioner's access to eligible voters and thus to avoid its responsibilities under *Excelsior*.

Our analysis begins with the Board's holding in *Excelsior* itself. In that case, the Board determined that objections based on the employers' denial of the peti-

³ With respect to the number of incorrect addresses, the hearing officer noted that the list was based on the Employer's most recent records and that the Employer seldom had occasion to send mail to its employees.

⁴ Chairman Gould and Member Devaney would find also that the election should be set aside because of the large number of incorrect employee addresses on the *Excelsior* list submitted by the Employer. Member Stephens finds it unnecessary to reach this issue.

tioners' requests for the names and addresses of eligible voters raised grave questions respecting the administration of the Act. In response, the Board established

a *requirement* that will be applied in *all* election cases. That is, within 7 days [after the approval of an election agreement or the direction of an election], an employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.⁵

The Board reasoned that the new rule was based on two fundamental bases: first, its recognition that Congress had entrusted to the Board alone the function of conducting elections

free from interference, restraint, or coercion . . . [and] other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. . . . [A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.⁶

Second, the Board also perceived an intensely practical necessity for the new rule. It contrasted the situation of the employer, which is assured of continuing opportunities to present its views respecting unionization to employees to that of a petitioner, "whose organizers normally have no right of access to plant premises,"⁷ and therefore has no method by which it can be sure of reaching employees with its arguments in favor of representation, so that some employees might be unaware of them. The Board's express aim in promulgating the *Excelsior* rule was to ensure, as far as possible, that *all* employees be "exposed to the arguments for, as well as against, union representation."⁸ The fact that unions might, by expending resources and energy in other ways, gain access to some, or even most, employees, was not sufficient; the Board explicitly discounted the availability of alternative means of

communication with employees as a factor weighing against the requirement that employers provide a list of the names and addresses of eligible voters:

This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.⁹

Nor was the Board moved by the arguments that requiring employers to provide such a list would be burdensome or would infringe on any employer rights. Rather, the Board reasoned:

The arguments against imposing a requirement of disclosure are of little force especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free electorate.¹⁰

The Board also rejected the argument that provision of employee names and addresses infringed on any rights of employees, e.g., their Section 7 right to refrain from union activities. The Board found that the Section 7 rights were exercised when the employee voted for or against union representation.¹¹

The interpretation of the *Excelsior* rule adopted by the Board today with respect to employees' names derives from the Board's emphasis on the fundamental importance of the rule to a reasoned exercise of the Section 7 right and of the fundamentally practical nature of the rule. The *Excelsior* rule was not promulgated to test employer good faith, to augment other means of communication, or merely to "level the playing field" between petitioners and employers. It was imposed so that unions would have access to *all* eligible voters. As the Board stated, the prompt and com-

⁵ 156 NLRB at 1240 (emphasis added and citations omitted).

⁶ Id. (emphasis added and citations omitted).

⁷ Id. This consideration has taken on even greater significance in light of the Supreme Court's recent decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which the Supreme Court strictly interpreted *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), to limit further organizers' access to company property.

⁸ *Excelsior*, 156 NLRB at 1241.

⁹ Id. (emphasis in original). Thus, the fact that, as the hearing officer found, the Petitioner here was ultimately able to make contact with all but 12 of the employees is irrelevant.

¹⁰ Id. at 1243 (citations omitted).

¹¹ Id. at 1244.

plete disclosure of employee names and addresses is “necessary to insure an informed electorate.”¹² Under *Excelsior*, an employer’s failure to provide a complete and accurate list of eligible voters is an injury to *employees*, not just to petitioners; an incomplete or inaccurate list can effectively prevent employees from obtaining information necessary for the free and fully informed exercise of their Section 7 rights. The Board has long recognized that the rule is prophylactic, so that “[e]vidence of bad faith and actual prejudice is unnecessary because . . . the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply.”¹³

Thus, we find that, in ruling that employers must provide the names and addresses of eligible voters, the Board intended that employers provide the employees’ *full names*. There is no language in the *Excelsior* decision that even suggests that an employer has “substantial[ly] compli[ed]” with the rule where the employer has deliberately deleted the employees’ first names in working up the *Excelsior* list from its payroll or other records. Consequently, we find that the Employer here was not in “substantial compliance” with the *Excelsior* rule, and we clarify the “substantial compliance” standard accordingly. Further, although, as noted above, a finding of bad faith is not a precondition for the conclusion that an employer has failed to comply substantially with the rule, we shall view the submission of an *Excelsior* list containing only last names and first initials as evidence of a bad-faith effort to avoid the obligations the *Excelsior* rule imposes.¹⁴

We further find that, based on our administrative experience in the area of representation elections, retroactive application of our clarification of the *Excelsior* rule will further the purposes of the Act. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958) (“the judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, we believe, the wiser course to follow”). See also *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988) (per curiam) (approving retroactive application of *Deklewa* rules regarding 8(f) collective-bargaining agreements), enfg. *John Deklewa & Sons*, 282 NLRB 1375 (1987), cert. denied 488 U.S. 889 (1988).

Contrary to our dissenting colleague, we find no circumstances here sufficient to overcome the Board’s presumption in favor of retroactivity. As discussed above, application of the rule that an *Excelsior* list

must include employees’ full names serves important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation. It would be anomalous for the Board to certify results of elections conducted without compliance with the *Excelsior* rule as set forth herein, after the Board has found that such elections do not ensure that employees are fully informed about the arguments concerning representation and thus are not able to exercise fully their Section 7 rights.

Nor do we agree with our dissenting colleague’s argument that employers would be prejudiced by the retroactive application of our holding. In practical terms, retroactive application will require that a second election be held, and that the employer provide an *Excelsior* list containing full names prior to that election. Any burden imposed on the employer by this requirement is extremely slight. Thus, there is no indication that preparation of a list of employees which includes their full names will require employers to expend any additional time or effort.¹⁵ Nor do we perceive any significant burden resulting from the mechanics of holding a second election. Although many employers accommodate Board elections by allowing them to be conducted on the employer’s premises and by releasing employees from duty for appropriate periods of time so that they may vote, such accommodations involve at most a minimal burden and in any event are, of course, voluntarily assumed.¹⁶

Although it is true that a second election may result in a certification of representative, whereas the first election did not, we decline to find prejudice to employers on that basis. Any certification of representative that may result from the holding of a second election would occur only if a majority of unit employees currently desire representation. It would be inconsistent with the Act’s animating principles to find that an employer is prejudiced by the Board’s recognition of employee choice under these circumstances.

Thus, the Board finds that the election must be set aside and a new election directed.

[Direction of Second Election omitted from publication.]¹⁷

¹⁵ In this case, for example, the Employer admittedly maintains lists of employees which include their first names; indeed, in the first election the Employer voluntarily assumed the burden of generating an additional list of employees for production to the Union from which first names had been redacted.

¹⁶ In this case, the first election was conducted, by agreement of the Employer, on its premises during two 2-hour periods on December 8, 1993.

¹⁷ We note that the language of the Direction of Second Election has been revised to reflect our holding here. We further direct that the *Excelsior* language set forth below, together with a citation to this decision, shall be used in all future election cases.

¹² Id. at 1242.

¹³ *Thrifty Auto Parts*, 295 NLRB 1118, 1118 (1989).

¹⁴ Accordingly, we overrule the contrary holdings in *St. Francis Hospital*, 249 NLRB 180, 181 (1980), and other similar cases.

MEMBER COHEN, dissenting.

My colleagues have made a change in the law and in established practice, and they have applied the change retroactively. In my view, assuming that the change is warranted—an issue that I do not reach in this case—this retroactive application is fundamentally unfair to the Employer who relied on then-extant law and practice. Accordingly, I dissent.

The Supreme Court has set forth three factors to be considered in determining the legality of a retroactive application of a change in law. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). These factors are: (1) whether the decision that is to be applied retroactively establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression; (2) the effect of retroactivity on accomplishing statutory objectives; and (3) the inequity imposed by retroactive application.

With respect to the first factor, the law was clear that an employer complied with *Excelsior* requirements even if the employer gave only first initials and last names of employees, rather than full names.¹ Indeed, my colleagues candidly concede that “the contrary holdings in *St. Francis*” are to be “overruled.” Thus, the law was clear, and it is being changed.

With respect to the second factor, I do not believe that a “full name” requirement is a necessary ingredient for the accomplishment of a statutory purpose. My colleagues assert that a “full name” requirement will give unions greater access to employees and will result in a better-informed electorate. Assuming *arguendo* that the new requirement will help to achieve these goals, this is not to say that the statutory purpose has been unfulfilled in the past. There is no showing that the prior rule led to the destruction of “laboratory conditions” for the conduct of elections. Indeed, the Board has conducted elections, without the “full name” requirement, for 28 years under *Excelsior*. There is no suggestion that these elections have been invalid, i.e., that they have not been held under laboratory conditions.

Finally, as to the third factor, the imposition of the new rule is patently unfair to the Employer. The Employer relied on then-extant law, and the Petitioner lost the election. My colleagues now change the law and take that result away.² Moreover, my experience com-

¹ *St. Francis Hospital*, 249 NLRB 180 (1980). As that case made clear, the fact that the employer’s records contained full names did not warrant a contrary result.

² Although Chairman Gould and Member Devaney would set aside the election on the additional basis of incorrect addresses, there is no Board majority for so doing. With respect to this issue, the hearing officer ruled, with appropriate case citations, that the incorrect addresses were insufficient to warrant setting aside the election. I would adopt this ruling. Thus, this dissent focuses on the “name” issue.

pels the conclusion that the Employer’s failure to include full names was in no way determinative of the outcome of the election. Thus, even if my colleagues wish to impose a “full name” requirement, there is no reason to upset the election here. If my colleagues wish, as a matter of policy, to change the *Excelsior* rule by requiring full names, they could accomplish that change by other means. For example, in *Shepard Convention Services*, 314 NLRB 689 fn. 3 (1994), my colleagues denied as premature a preelection challenge to the use of initials. They could have simply included a “full name” requirement in their preelection order.³ Instead, they now overturn an accomplished election result and put the parties and employees through another election.⁴ I therefore dissent.

³ A change could also have been accomplished by rule-making under Sec. 6 of the Act. Such a rule would, of course, operate prospectively.

⁴ My colleagues assert that retroactivity will result only in a second election. However, the fact is that my colleagues take away from the Employer and employees a certification of the Petitioner’s loss, and deprive the Employer and employees of 1 year’s repose from the conduct of an election. See Sec. 9(c)(3).

APPENDIX

(Hearing Officer’s Report on Objections and Recommendation on Objections)

FINDING OF FACTS AND CONCLUSIONS

Objection 10:

During the period following the filing of the petition and until the election, the Employer provided a substantial number of incorrect and incomplete addresses for the eligible voters and refused to supply complete names of voters, thereby violating the intent of the *Excelsior* rules which gives the union an opportunity to communicate with eligible voters prior to the election. This act further destroys the laboratory conditions necessary for a free and fair election.

The issue, herein, is not controlled by credibility findings. Indeed, the relevant facts are not in dispute. Rather, the resolution of this issue is one controlled by Board law. In support of this objection, the Petitioner submitted the *Excelsior* list, provided by the Employer, as Petitioner’s Exhibit 1. It is undisputed that the Employer used initials for the employees’ given names. The Petitioner noted that of the 144 addresses provided thereon, a total of 33 were incorrect. In further support thereof, the Petitioner supplied copies of 19 returned envelopes, returned by the post office due to a variety of reasons, namely, insufficient address, not deliverable as addressed, no forwarding address and “attempt not known” (in evidence as P. Exh. 2). The addresses on the 19 returned envelopes were taken from the list. The 19 returned envelopes are part of the 33 incorrect addresses in contention, herein, and not in addition thereto. A review of Petitioner’s Exhibit 2 reveals that at least 9 of the documents were not mailed to the employees until well after the election. The remaining 10 were mailed and returned by the post office, or

about December 1 and 4, 1993. Organizer Randal Rolen testified that the Petitioner made house calls to employees, based on the addresses provided on the list. According to Rolen, in several instances, the addresses did not exist or individuals other than the named employees lived at the addresses. According to Rolen, in some cases the individuals claimed to have resided at the address for extended periods of time. Additionally, Rolen testified that in several instances, addresses failed to include apartment numbers, further hindering the location of employees. Finally, Rolen testified that, while 33 of the addresses provided were incorrect he was able to make contact with all but 21 of the employees on the list, prior to the election.

The Employer submitted a copy of the *Excelsior* list as Employer's Exhibit 46. This document is the same as Petitioner's Exhibit 1, with the exception of the Petitioner's typed written notations regarding the incorrect addresses. The Employer also submitted a copy of the computer generated payroll records of all employees, including addresses department numbers (Emp. Exh. 47). According to Administrator Doreen Hansard, the payroll listing was compiled by the Employer's payroll department. Pruitt Corporation is responsible for managing the Employer's facility, including handling payroll matters. The addresses on the list were based on the payroll list provided to the Employer by Pruitt Corporation. An examination of Petitioner's Exhibit 1 and Employer's Exhibit 46 reflect identical addresses. The payroll records, however, included the given names. In each instance, however, the initials on the *Excelsior* list correspond with the given names and addresses on the payroll records. According to Hansard, these are the same addresses used by the Employer during the campaign. Hansard also testified that normally, the Employer does not have a need to send mail of any kind to its employees.

The Board has repeatedly held that the rule, set forth in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), will not be mechanically applied where there is evidence that the employer has "made some attempt" to comply with the requirements thereof. Indeed, there must be evidence indicating a deliberate or grossly negligent attempt to avoid compliance with the rule, not merely the existence of an imperfect list, before an election will be set aside. The Board does not deem an insubstantial failure to comply with the *Excelsior* rule to be tantamount to gross negligence or bad faith. The

evidence, herein, established that the Employer provided the Petitioner with the information in its files. There was no evidence presented to establish that the Employer was aware of the errors on the list or in some way acted in bad faith in the submission thereof. To the contrary, the evidence established that the Employer relied on the same list during the campaign. There was evidence offered to show that the Employer routinely sent mail to its employees, thus putting the Employer on notice of a need to correct its records. The Petitioner does not contend that any names were omitted from the list. In this regard, it should be noted that the Board has drawn a distinction between the submission of incorrect addresses and omission of names from the list. The record evidence established that due to the errors on the list, the Petitioner was unable to contact 12 employees or less than 9 percent. While, clearly the inaccuracies in the list were largely the cause of the Petitioner's inability to contact these employees, it is equally clear that current case law does not support a finding of a substantial failure to comply. Similarly, the use of initials for given names, while not condoned, are shortcomings that do not rise to a level sufficient to warrant setting aside the election. Finally, the record is completely void of evidence warranting a finding of gross negligence or bad faith. *Fontainebleau Hotel Corp.*, 181 NLRB 1134 (1970); *Days Inn*, 216 NLRB 384 (1975); *West Coast Meal Packing Co.*, 195 NLRB 37 (1972); *Lobster House*, 186 NLRB 148 (1970); *Kentfield Medical Hospital*, 219 NLRB 174 (1975). Accordingly, Objection 10 is overruled.

RECOMMENDATION

Having found Petitioner's Objection 10 to be without merit and having granted the Petitioner's request to withdraw Objection 1 through 9 and 11, I recommend to the Board that the objections be overruled in their entirety and that a Certification of Results issue.³

³ As provided in the Regional Director's Order Directing Hearing and Notice of Hearing either party may, within 14 days from the issuance of this report, file with the Board an original and 7 copies of exceptions. Immediately upon filing such exceptions, the party filing the same shall serve a copy with the Regional Director. If no timely exceptions are filed, the Board may adopt the recommendation of the Report.