

Tom's Train Treats, Inc. d/b/a Auntie Anne's and District 6, I.U.I.S.T.H.E., Petitioner. Case 2-RC-21795

May 7, 1997

DECISION AND DIRECTION OF A SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections to an election held February 18, 1997, and the Regional Director's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 5 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

¹ Pertinent portions of the Regional Director's "Report on Objection and Recommendation" are attached as an appendix.

APPENDIX

REPORT ON OBJECTION AND RECOMMENDATIONS

On February 21, the Petitioner filed a timely objection to conduct affecting the results of the election. The objection, verbatim, is as follows:

The *Excelsior* list was not provided to this office until Wednesday, February 13 five days prior to election, and the list was received at 4:35 p.m. at the closing of that day. Accordingly, a new election among the members of the bargaining unit covered by the petition filed by District 6 in the above matter should be conducted.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the objection was conducted, during which the parties were afforded a full opportunity to submit evidence and statements of position regarding the issues raised by the objection. The results are set forth below.

The administrative investigation of the objection revealed that the agreement was approved on January 24. Thus, pursuant to item 2 of the agreement, and in accordance with the rule set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966), and affirmed and restated in *North Macon Health Care Facility*, 315 NLRB 359 (1994), the Employer was required to submit a list (the *Excelsior* list), containing the full first and last names and addresses of all employees eligible to vote, by the close of business on the seventh day after the approval of the agreement, which in this case would have

been January 31. The investigation further established that the Employer submitted the *Excelsior* list on February 12, and it was transmitted by the Region to the Petitioner by facsimile transmission on February 13. The election was held on February 18. Ten of approximately seventeen eligible voters voted in the election.

The Petitioner contends that the *Excelsior* requirement is a bright-line rule which should be strictly construed and applied. The Employer argues that the Board has held that the rule need not be mechanically applied. The Employer notes that the list was submitted 6 days prior to the election and argues that there has been no showing by the Union that the delay in submitting the list detrimentally impacted on its efforts to organize employees. In this regard, the Employer notes that the bargaining unit consists of relatively few employees and argues that the Petitioner had ample time to organize such employees. Additionally, the Employer has asked that consideration be given to the fact that counsel for the Employer initially requested a later date for the election, and agreed to an earlier date at the behest of the Region and, further, that the Employer had been in the process of moving its offices with a consequent disruption of telephone, mail, and telecopier services, at the time the agreement was being negotiated. In addition, the Employer argues that, upon being notified that the list had not been timely filed, it offered to delay the election to allow the Petitioner to have ample access to the *Excelsior* list.²

It is well settled that a failure to comply with the *Excelsior* requirement will, by itself, constitute grounds for setting aside an election. However, it is also true, as the Employer contends, that in certain circumstances, where the Board has found substantial compliance with the rule, it has declined to set elections aside. The Employer, relying on *Pole Lite Industries*, 229 NLRB 196 (1977), argues that, based upon the factors considered relevant by the Board, including, inter alia, (1) the number of days the list was overdue, (2) the number of days Petitioner had the list prior to the election, and (3) the number of employees eligible to vote in the election, this case should be one in which the election is not set aside. I find, however, that the facts and circumstances of the instant case do not warrant such a result. As noted above, the *Excelsior* requirement is triggered, not by the election date, but the date upon which the election agreement is approved or an election is directed by decision. Thus, in the instant matter the *Excelsior* list was submitted 12 days after the date on which it was due, and the Petitioner had access to the list for only 5 days before the election, a period which included a weekend and a Federal holiday.³ Moreover, the other considerations present in the *Pole Lite* case differ

² Inasmuch as the election had been stipulated to by the parties, any such delay would have required the consent of the Petitioner. There is no evidence that the Employer made any attempt to secure the Petitioner's agreement for a new election date, and the Petitioner did not seek another date for the election.

³ In this regard I note that the Employer received notice of the Board's *Excelsior* requirement in both the initial notice regularly sent to Employers (Form NLRB-4812), and in the agreement itself. In addition, the Region sent to the Employer another document on January 24, in which among other things, the *Excelsior* requirement was described, and the last date by which the list had to be submitted to the Region was set forth.

markedly from those herein.⁴ The instant case is more similar to *Rockwell Mfg. Co.*, 201 NLRB 358 (1973). In that case, the Board set aside an election where the *Excelsior* list was submitted 11 days late. The Board noted that the only reason offered for the delay was unintentional oversight,

⁴In *Pole Lite*, the Board found that the employer had substantially complied with the *Excelsior* requirement where the employer sent the list for hand delivery on the date on which it was due; the delay in delivery was due to holiday traffic; the union had the list for 14 days prior to the election, and thus had ample time to communicate with a relatively small number of employees and the submission was merely 3 calendar days and 1 working day late.

without a showing of extenuating circumstances. Similarly, the Employer's late submission of the *Excelsior* list herein has not been justified by any compelling explanation, so as to warrant deviation from this well-established rule. Finally, I note that, as the Board has recently stated, due to the "prophylactic" nature of the requirement, evidence of employer bad faith or a showing of actual prejudice to a union is unnecessary, in light of a preference for a "strict rule that encourages conscientious efforts to comply." *North Macon Health Care Facility*, supra at 361 (citations omitted).

For all of the foregoing reasons, I find Petitioner's objection to have merit and it is recommended that it be sustained.