

**Mod Interiors, Inc. and Interior Systems Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Petitioner.** Case 7-RC-20952

August 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 December 12, 1996, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 for and 5 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and adopts the Acting Regional Director's findings and recommendations<sup>1</sup> only to the extent consistent with this decision.

As found by the Acting Regional Director, on November 25, 1996, the Employer provided an alphabetized list containing the names and addresses of 10 employees. On December 2, the Petitioner notified the Regional Office that 4 of the 10 addresses on the *Excelsior* list were incorrect.<sup>2</sup> On December 4, 8 days before the election, the Regional Office received a corrected list and the list was faxed to the Petitioner the same day. In its exceptions, the Petitioner argues that the election should be set aside because of the large number of incorrect addresses and the closeness of the election. We find merit in this exception.

Under the Board's *Excelsior* rule, an employer must file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within 7 days after approval by the Regional Director of an election agreement or after a Direction of Election and no extension of time is granted except in extraordinary circumstances. *Excelsior Underwear*, 156 NLRB 1236 (1966). It is extremely important that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters. The *Excelsior* rule is not intended to test employer good faith or "level the playing field" between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments con-

cerning representation and can freely and fully exercise their Section 7 rights. *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994). In all the circumstances of this case, we are not satisfied that the Employer has substantially complied with the requirements of the Board's *Excelsior* rule. Forty percent of the addresses on the original list were inaccurate and the corrected list was received by the Petitioner for use in its informational campaign only 8 days before the election. Thus, for a week following the date the eligibility list was originally due, Petitioner was unable to communicate with nearly half of the unit employees, thus effectively preventing them from obtaining information necessary for the exercise of their Section 7 rights. In an election, such as this one, decided by a close margin, this lack of information may have impeded a free and reasoned choice.

The dissent suggests that there is no support for our statement that the incorrect addresses prevented effective communication by the Petitioner. The issue of a union's access to employees is irrelevant to the application of the *Excelsior* rule. As discussed above, the *Excelsior* rule was adopted in the hope of insuring a "fair and informed" electorate, and the Board has long held that to look beyond the issue of substantial compliance with the rule and into the additional issue of whether employees were actually informed about election issues would "spawn an administrative monstrosity." *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971). The Board has also held that a union's ability to communicate with employees by means other than the eligibility list does not influence the determination of whether the employer has substantially complied with its *Excelsior* duty. *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

Our dissenting colleague argues, citing the Board's Casehandling Manual, that the Petitioner is only entitled to the list for 10 days. Section 11302.1 Manual (Part Two) states that an election "may not be held sooner than 10 days after" the Regional Director has received the *Excelsior* list. This provision merely directs that the Board will give the petitioner an opportunity to make use of the list for at least 10 days before conducting the election. Under the Board's decision in *Excelsior*, the employer must file the names and addresses of all eligible voters with the Regional Director within 7 days after approval of the election agreement. Depending on when the election is scheduled, the petitioner is entitled to the list for significantly more than 10 days.

The dissent further suggests that we are giving the Petitioner some additional "entitlement." In fact, we are attempting to ensure that the Petitioner has access to the information that the Board requires the Employer to provide for the entire period set forth in the Direction of Election. The eligibility list is due 7 days

<sup>1</sup> In the absence of exceptions, we adopt, pro forma, the Acting Regional Director's recommendation to overrule the Petitioner's Objection 3.

<sup>2</sup> There is no evidence or contention that the inaccuracies on the original voter eligibility list were the result of Employer gross negligence or intentional misconduct. The Employer supplied the most recent information it had in its possession.

after the direction of the election. Section 11312.1 of the Casehandling Manual (Part Two). The Petitioner is entitled to receive the list as soon as it is filed. While it is true that the Region might issue the Direction of Election at a later date resulting in a later due date for the eligibility list, the fact remains that the Direction of Election is the trigger event determining when the list is due. In this case, it is undisputed that a complete and accurate list was due on November 27. The election was scheduled for December 12, and the Petitioner did not receive accurate addresses for 40 percent of the unit until December 4. Thus, if the Employer had met its obligation under *Excelsior*, the Petitioner would have received a complete and accurate list by November 27 and been able to use that list from November 27 until the December 12 election, a period of approximately 2 weeks.

Our dissenting colleague would also obligate the petitioner to seek a delay of the election to cure the employer's objectionable conduct. Neither the Board's rules nor its decisions compel such an action. *Excelsior* imposes a duty on the employer and provides that the employer's failure to comply with the rule is grounds for setting aside the election whenever proper objections are filed. We see no reason to require the petitioner to choose between a prompt election and an accurate *Excelsior* list when the employer's compliance with the rule would have avoided the problem in the first place.

In these circumstances, where the original list contained a significant number of inaccurate addresses and the corrected list was only available to the Petitioner for 8 days before the election, we find that the Employer has not substantially complied with the *Excelsior* requirements. Accordingly, the election must be set aside and a new election directed.

[Direction of Second Election omitted from publication.]

MEMBER HIGGINS, dissenting.

I agree with the Regional Director that the Petitioner has not established a basis for setting aside the election.

On November 20, the Regional Director directed an election. On November 25, 1996, the Employer timely submitted an *Excelsior* list. On December 2, the Petitioner told the Regional Office that four addresses were incorrect. There is no contention or evidence that the incorrect addresses were due to intentional mis-

conduct or bad faith on the part of the Employer. The Regional Office apprised the Employer of the problem, and the Employer promptly secured and furnished the correct addresses. The Petitioner received the correction on December 4. The election was set for December 12, and the Petitioner did not ask for a postponement.

The Regional Director overruled the objection and I would affirm that decision. In this regard, I note: (1) the only error was with respect to addresses, not names;<sup>1</sup> (2) the error was not intentional or in bad faith; (3) the Employer acted promptly to secure and provide the correct addresses; (4) the Petitioner did not ask for a delay in the election; (5) the Petitioner had the accurate information for 8 days.<sup>2</sup>

In these circumstances, and absent controlling authority, I would not reverse the reasoned judgment of the Regional Director.<sup>3</sup>

<sup>1</sup> An error as to addresses is less serious than an error as to names. See *Women in Crisis Counseling*, 312 NLRB 589 (1993).

<sup>2</sup> A Petitioner is entitled to the list for only 10 days prior to an election. See Casehandling Manual (Part Two), Section 11302.1.

My colleagues assert that the Petitioner was "entitled" to the list from November 27 until December 12, about 2 weeks. There is no support for this view. The only entitlements are: (1) The Region is entitled to the list 7 days after the direction or stipulation of election, and the Region should immediately send it to the petitioner; (2) the election will not be held sooner than 10 days after Regional receipt of the list. Because the Board controls the timing of the election, the Board can effectively choose to give the petitioner more than 10 days of usage of the list. But this is not to say that the petitioner is "entitled" to more than 10 days.

<sup>3</sup> My colleagues assert that, prior to the supplying of the four correct addresses, the Union "was unable to communicate" with the four employees. There is no support for this assertion. We know only that the Employer did not supply correct addresses.

Contrary to the assertion of the majority, I am *not* asking the question of "whether employees were actually informed about election issues." Rather, I ask only whether the Union had the *ability* to inform employees about these issues. As stated above, the Union has not established that it lacked such ability.

My colleagues assert that the ability to inform employees is not the issue. I agree that where an employer does not furnish an *Excelsior* list, the election is to be set aside without further inquiry. However, where, as here, the employer *does* furnish a list, the issue is one of "substantial compliance." In resolving that issue, I would consider, *inter alia*, whether the union had the ability to communicate with the employees. *Thrifty Auto Parts*, 295 NLRB 1118 (1989), is not to the contrary. At most, that case holds that the Board will not inquire into whether omitted employees in fact garnered information about election issues, e.g., from other sources. As noted above, I do not ask whether employees were actually informed; I ask whether the union had the ability to inform.