

Bear Truss, Inc. and Interiors Systems Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Petitioner. Case 7–RC–21097

July 23, 1998

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board has considered an objection regarding an election held June 25, 1997, and the hearing officer's report (pertinent portions of which are attached as Appendix) recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots showed 67 for, and 69 against, the Petitioner.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations, and finds that a certification of results of election should be issued.

The hearing officer found no merit in the Petitioner's objection which contends that the election must be set aside because the *Excelsior*¹ list of employees' names and addresses provided by the Employer contained 10 inaccurate addresses out of approximately 142 eligible voters. Contrary to our dissenting colleague, we agree with the hearing officer's finding, for the reasons stated below, that the circumstances here are insufficient to warrant a new election. In concluding that the Employer substantially complied with the *Excelsior* requirements, however, we emphasize that it is important to the holding of fair elections that employers supply unions with timely, complete and accurate information on *Excelsior* lists. "The *Excelsior* rule is . . . intended . . . to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." *Mod Interiors*, 324 NLRB 64 (1997).²

In adopting the hearing officer's recommendation to overrule the Petitioner's Objection 1, we emphasize the absence of evidence that the illegible names and incorrect addresses on the *Excelsior* list were due to inten-

tional misconduct or bad faith on the part of the Employer.³ The *Excelsior* list, developed by the Employer's payroll contractor, was ultimately derived from addresses provided by employees to the Employer's own personnel office employee. They provided their addresses when they were first hired, and the Employer's operations manager indicated in his un rebutted testimony that employees were under a continuing obligation to report address changes to that personnel office employee if they moved. The list was clear and legible, but was rendered partly illegible when the Employer faxed it to the Board's Regional Office. When the Regional Office apprised the Employer of the problem, the Employer promptly cooperated and supplied the Regional Office with a legible copy of the list. Such cooperation is to be encouraged, and is an indication that the Employer was not acting in bad faith when it submitted its original list. From the new copy supplied, the Regional Office was able to clarify, over the telephone, any questions that the Petitioner raised as to names and addresses appearing on the list. The Petitioner did not request another copy of the list.⁴

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Interiors Systems Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN GOULD, dissenting.

I would reverse the hearing officer's finding of no objectionable conduct, sustain the Petitioner's Objection 1, and set aside the election held on June 25, 1997. Contrary to my colleagues, I find that the illegible and inaccurate eligibility list faxed by the Employer was objectionable where, as here, the election was decided by a close margin and the inaccuracies may have compromised the Petitioner's ability to communicate with a determinative number of voters. See my concurring opinion in *Fountainview Care Center*, 323 NLRB 990 (June 16, 1997). See also *Mod Interiors*, 324 NLRB 164 (1997).

The Board has long recognized that the purpose of the *Excelsior* rule is not to test employer good faith or "level the playing field" between petitioners and em-

¹ *Excelsior Underwear*, 156 NLRB 1236 (1966).

² The result in *Mod Interiors* is distinguishable. There, the incorrect addresses were 40 percent of the unit. Here, the error rate was 7 percent. In that regard, we do not rely on the statement in the hearing officer's report that "[e]ven assuming that another 10 addresses and or [sic] names were illegible, that would make for an error rate of about 14%."

Since *Mod Interiors* is factually distinguishable, Member Hurtgen and Member Brame do not pass on the holding of that case. In finding the case distinguishable, Member Hurtgen further finds that there was no evidence in *Mod Interiors*, as there is here, that employees were under a continuing obligation to report changes of addresses.

³ Although a finding of bad faith is not a precondition for a finding that an employer has failed to comply substantially with the *Excelsior* rule, the Board has held that a finding of bad faith will preclude a finding that an employer was in substantial compliance with the rule. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).

⁴ Member Hurtgen further finds that although the Petitioner became aware, before the election, that 10 of the addresses on the list (about 7 percent of the total) were incorrect, it did not bring the matter to the attention of the Regional Office or the Employer. Nor did the Petitioner give the Employer an opportunity to secure and furnish corrected addresses prior to the election.

ployers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments for and against representation and can freely and fully exercise their Section 7 rights. *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994). See also *Excelsior Underwear*, 156 NLRB 1236, 1241 (1966). In the instant case, the Petitioner's representative testified that he had so much difficulty in trying to decipher the list that he had to contact the Region for clarifications from the Employer. He further testified that, only a few days before the election, he discovered that 10 of the approximately 142 addresses were inaccurate. In the circumstances of this case, where the election was decided by two votes, these inaccuracies involved determinative votes. In my view, this inaccurate information may have compromised the Petitioner's ability to communicate with all of the eligible voters and deprived those employees of the ability to cast a free and reasoned vote. Accordingly, I would set aside the election.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO THE CONDUCT AFFECTING THE RESULTS OF THE ELECTION

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Objection No. 1

In this objection allegation the Petitioner asserts that the Employer interfered with the conduct of election by furnishing an inaccurate and illegible election eligibility list. The Petitioner called one witness, Edward Musser, in support of this objection allegation. The Employer called two witnesses, Larry Helman and Larry Steffenhagen, regarding its position on the objection allegation. Their pertinent testimony is recounted below:

Edward Musser testified that he had occupied the position of union representative/organizer for about one year. He testified that there had been previous elections with Bear Truss, the most recent in 1996. Musser testified that a union official picked up the *Excelsior* list on June 11, 1997 at the Board Regional Office. (The list that was received by the Petitioner was entered into evidence as Petitioner's Exhibit No. 1.) Musser testified that he found the list difficult to read, having difficulty trying to decipher the names and addresses. Thereafter, probably the next day, Musser telephoned the Board agent handling the case and said that he was having difficulty figuring out the spelling of the names. After going over the list with the Board agent, on that occasion, and again later the following week, Musser obtained the correct spellings of the names. Musser testified that he did not do any mailing of literature during the election campaign. However, a few days prior to the election, he did conduct home visitations. It was at that time, according to Musser, that he found that some of the addresses on the *Excelsior* list were incorrect. Musser testified that he made approximately 80 home visits, and for 10 of those he did not find the person who was listed on the *Excelsior* list to be at that address.

Musser did not contact the Board agent about the addresses. He said that because the home visits were done on Monday, June 23 or Tuesday, June 24, just prior to the election date of Wednesday June 25, 1997, he felt it was too late to contact the Board.

Larry Helman testified that he occupied the position of operations manager for the Employer for approximately 2 years. Helman said that upon receiving the request for the *Excelsior* list from the Board agent, he contacted the outside accounting firm, Roslund Prestage, which does the Employer's payroll, for an alphabetized list of its employees and their addresses. (The information regarding the addresses of the employees is originally obtained by the personnel department at Bear Truss from the W-4 the employees fill out when they are hired. Any subsequent change of address is done on a form for that purpose. This information is sent to the accounting firm for payroll and other purposes.) In response to the request from Helman, Roslund Prestage faxed a copy of their most current employee listing to Helman. Helman then faxed a copy of that list to the Regional Office. According to Helman, some names on the list were obliterated with a heavy dark line, those individuals being employees who were no longer employed by the Employer or who were supervisors and/or managerial persons. Some of the other names, approximately 13, had a thin line drawn through them. According to Helman, he drew such a line through the names because he did not think they would be eligible to vote because they were hired as "89 day employees." Subsequently, Helman said that he received a telephone call from the Board agent who said that a gentleman from the union was having a hard time reading the list. Helman was asked to send another list. Thereupon, Helman sent the original list from Roslund Prestage to the Regional Office by U.S. mail. Helman testified that he was not contacted again by the Board about any difficulties with the *Excelsior* list prior to the election. Helman did testify that he did have a conversation at some point prior to the election with the Board agent about the "89 day employees" and was told by the Board agent that according to case law they would be eligible to vote, and Helman said, "Fine, no problem." Helman stated that the Board agent did not ask to have him re-send those names and addresses. Helman testified that Employer's Exhibit No. 1 was a copy of the list that was received from Roslund Prestage and mailed to the Regional Office.

Larry Steffenhagen testified that he was employed as a crew leader for the Employer, and served as the observer for the Employer at the election held on June 25, 1997. He said that during the course of the election he sat with the Petitioner observer at the table and checked the names of employees as they came into vote. He said that at no time did they have difficulty finding the names on the list, or reading the names.

Discussion:

Petitioner asserted in its closing argument that because the *Excelsior* list was difficult to read, and contained 10 incorrect addresses, the election should be set aside. Petitioner argued that this is particularly necessary in view of the election being decided by a few votes. Moreover, the Petitioner argued that the Board should as a matter of policy refuse to accept facsimiles for *Excelsior* purposes.

The Employer takes the position that it complied with the *Excelsior* requirement, that it faxed a legible *Excelsior* list to the Board, and upon the request of the Board agent immediately followed up with a hard copy. The Employer also asserts that it sent the most recent and best possible information it possessed as to employee names and addresses. Finally, the Employer notes that it did not act in bad faith or with gross negligence in this matter.¹

Although the *Excelsior* rule is not to be applied mechanically, it is well established that substantial compliance is required. *Gamble Robinson Co.*, 180 NLRB 532 (1970). The Employer, by omitting a substantial number of voters' names from the *Excelsior* list, can defeat the very purpose of the *Excelsior* rule: "to further the fair and free choice of bargaining representatives . . . by encouraging an informed employee electorate and by allowing unions the right to access to employees that management already possesses." *EDM of Texas*, 245 NLRB 934 (1979) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)). The Board views the omission of names and addresses of eligible voters from the *Excelsior* list as a more serious matter than inaccuracies regarding names and addresses.

In the case of omissions from the *Excelsior* list, the Board presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election. Thus, the question of whether the omissions were the result of bad faith or mere inadvertence does not influence the calculation of whether compliance has been substantial or not. Evidence of bad faith is unnecessary in these situations because the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious compliance, *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989). In *Thrifty Auto Parts, Inc.*, supra, omissions of 9.5% of eligible voters' names from the eligibility list resulted in setting aside the election in the absence of bad faith. A similar result was reached in *Gamble Robinson Co.*, supra, where 10% of eligible voters were inadvertently left off the list. In a recent case, *Shore Health Care*, 323 NLRB No. 172 (1997), omission of 5% of eligible voters from the *Excelsior* list was sufficient to set an election aside where the employer had acted in bad faith. In cases where such omis-

sions were not found to be substantial enough to affect the results of the election, the omissions amounted to 7% in *Kentfield Medical Hospital*, 219 NLRB 174 (1975), and 6% in *Advance Industrial Security*, 230 NLRB 72 (1977).

However, as noted above, the Board views the omission of names and addresses of eligible voters from the *Excelsior* list as a more serious matter than mere inaccuracies regarding names and addresses, and this distinction is given effect in determining whether the employer had substantially complied with the *Excelsior* rule. *Thrifty Auto Parts*, supra. In this line of cases the Board generally will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith. In *Lobster House*, 186 NLRB 148 (1970), inaccuracies on the *Excelsior* list were found to be of an insubstantial nature to affect the results of the election, where 20 out of 97 addresses were erroneous (a 16% error rate). Similarly, in *West Coast Meat Packing Co., Inc.*, 195 NLRB 37 (1972), 22% of addresses on the *Excelsior* list were inaccurate, the inaccuracies were not found to be substantial enough to require setting aside the election. In that case, the addresses had been drawn from the W-4 forms completed by employees. In *Days Inns of America*, 216 NLRB 384 (1975), 13.2% of voter addresses were incorrect, those addresses also having been drawn from employee personnel forms. In *Fontainebleau Hotel Corp.*, 181 NLRB 1134 (1970), the Board found substantial compliance with the *Excelsior* requirement despite inaccuracies on the list which involved 18% of eligible voters. In *Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993), there was a 30% inaccuracy rate, and the Board ruled that the employer had substantially complied with the requirements of the *Excelsior* rule, by providing the full names and addresses of all the eligible voters it had on file.

In all these cases there was no showing of bad faith or gross negligence, and the errors involved inaccuracies and not the omission of eligible voters from the list. Further, in many of these cases the vote was close enough to have been possibly affected by the number of errors on the list. In *Lobster House* the vote was 27 yes and 41 no; in *West Coast*, the vote was 17 yes and 19 no; in *Fontainebleau* the vote was 125 yes and 138 no.

However, most recently in *Mod Interiors, Inc.*, 324 NLRB No. 33 (1997), the Board ordered a new election in the absence of bad faith, where the original *Excelsior* list contained a significant number of inaccurate addresses (40%); a corrected list was only available to the union for eight days before the election; and the election was decided by a close margin. In downplaying the good-faith test, the Board noted that, "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 concerning representation and can freely and fully exercise their Section 7 rights." The Board noted that the employer had not substantially complied with the *Excelsior* rule inasmuch as 40% of the addresses on the original list were inaccurate, and a corrected list was received only eight days prior to the election, noting that in a close election this lack of information may have impeded a free and reasoned choice.

¹ The Employer filed a motion to reopen the record, received on July 30, 1997. In that motion, the Employer urged that the hearing be reopened so that it could present evidence with respect to the issue that the Petitioner had other avenues to contact the employees, and indeed did reach employees despite the errors in the addresses. The Board has held that the issues of the union's actual access to employees, or the extent to which employees are aware of the election issues and arguments are not litigable in applying the *Excelsior* rule. "To look beyond the question of substantial completeness of the lists and into the further question of whether employees were actually informed about the election issues despite their omission from the list would spawn an administrative monstrosity. Thus, no inquiry is therefore made into the question of whether the union might have obtained some additional names and addresses of eligible employees prior to the election or whether the omitted employees might have garnered sufficient information about the issues to have made an intelligent choice. *Sonfarrel, Inc.*, 188 NLRB 969 (1971). Thus, I would deny the motion on the basis that the evidence is not relevant to the disposition of the case. The Employer also asserted that 9 not 10 addresses were incorrect on the list. This factor will not affect my ultimate finding on the issue, and thus I will not reopen the record on this account. Accordingly, the motion is denied.

In the instant case, the Employer faxed the *Excelsior* list on June 11, 1997, the same day that the Stipulated Election Agreement was approved. The list that was faxed was legible. However, for whatever reason, the fax did not come across with the same clarity as the original document.² The Regional Office turned this faxed list over to the Petitioner, and when it voiced its inability to discern completely certain names and addresses, the Regional Office contacted the Employer who immediately put a hard copy in the mail. From that list, the Board agent was able to clarify over the telephone any questions the Petitioner had as to spellings of names and addresses, within a few days, but probably less than 10 days before the election. Petitioner could not recall the exact dates of the conversations with the Board agent. The Petitioner was not specific as to which or how many names and or addresses it could not completely decipher. The Petitioner never asked for or received another copy of the list from the Regional Office. Additionally, it came to light just a day or two prior to the election that the list contained 9 or 10 incorrect addresses.

The percentage of error in the instant case does not approach the 40% error rate in *Mod Interiors*. Nine or ten inaccurate addresses in a list of 142 would constitute an error

²The Petitioner did not assert at the hearing that it could not read fully any name or address, only that the quality of the list was poor, and it could not ascertain the correct spellings of some names. From my own review of that list, I note that there were a handful of entries that were smudged and the characters in the names or number in the addresses were difficult to decipher correctly. The names that had the thin line drawn through them, as testified to by Helman, were still discernible.

rate of about 7%. Even assuming that another 10 addresses and or names were illegible, that would make for an error rate of about 14%. However, as in *Mod*, the election was close. Notwithstanding this, *Mod* did not establish a rule automatically overturning the results of an election where the number of inaccuracies on the *Excelsior* list exceeded the margin of the vote. Had the Board done so the task in this case would have been easy. *Mod* does not specifically overrule previous case law, including those cases cited above, involving inaccuracies. Furthermore, although at first blush such a rule would seem to be reasonable, it would require that if there was one inaccurate address and the election was decided by one vote, that the election be set aside, even if the inaccuracy rate was only 1% or less. Thus, it appears that the Board is still applying a case by case analysis as to whether the employer had substantially complied with the *Excelsior* requirement. I am mindful that this was a close election, but I do not think that the percentage of inaccuracies on the list was sufficient to overturn the election, inasmuch as the number does not approach the 40% in *Mod*, which was an inaccuracy rate higher than in all the above-cited cases.

Finally, as noted above, the Petitioner makes the argument that the Board should as a matter of policy refuse to accept facsimile copies for *Excelsior* purposes. Indeed, this matter is dealt with in the Board's Rules and Regulations, Section 102.114. *Excelsior* lists are not one of the documents listed in subsection (g) of Section 102.114 for which facsimile transmissions are not to be accepted for filing.

Accordingly, I recommend that this objection allegation be overruled.