

Bardon Enterprises, Inc. and Cabinet Makers, Millmen and Industrial Carpenters Local 721, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Petitioner. Case 21-RC-19803

August 27, 1998

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 3, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 49 for and 57 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and brief, has adopted the hearing officer's recommendation to sustain the Petitioner's Objection 4, and, accordingly, directs that a second election be held.¹

[Direction of Second Election omitted from publication.]

CHAIRMAN GOULD, concurring.

I agree with my colleagues' decision to adopt the hearing officer's recommendation to sustain the Petitioner's Objection 4, that the Employer threatened employees with plant closure or job loss if the Petitioner won the election and negotiations were not "beneficial" to the company, and to set aside the election.¹ I write separately with regard to Objection 2, that the *Excelsior* list contained a substantial number of inaccurate addresses. Unlike my colleagues who find it unnecessary to pass on this objection, I would adopt the hearing officer's recommendation to sustain this objection.

As found by the hearing officer, the Employer provided the Petitioner with an *Excelsior* list containing the names and addresses of 131 employees. The addresses on the list were taken from the employees' W-4 tax forms; however, 29 of the 131 addresses on the *Excelsior*

list were inaccurate. The election was decided by a margin of seven votes.

The intent of the Board's *Excelsior* rule is to ensure that all employees are fully informed about the arguments pro and con concerning representation and can freely and fully exercise their Section 7 rights. *Excelsior Underwear*, 156 NLRB 1236, 1241 (1966); *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994); *Mod Interiors, Inc.*, 324 NLRB 164 (1997). In *Excelsior*, the Board determined that the appropriate administrative mechanism for achieving a fully informed electorate was to impose on the employer the duty of preparing a complete and accurate list of all eligible voters.² In the instant case, where 22 percent of the addresses were inaccurate and the election was decided by a close margin, the lack of complete and accurate information may have impeded a free and reasoned choice. Accordingly, I agree with the hearing officer that the number of inaccurate addresses is both significant and determinative and provides an adequate basis for setting aside the election.³

I find no merit to the Employer's contention that the Petitioner failed to establish that it was prejudiced by the inaccurate addresses. 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." *Sonafarrel, Inc.*, 188 NLRB 969, 970 (1971). Further, 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). I also reject the Employer's contention that the Petitioner cannot rely on the inaccuracies because it failed to notify the Employer that it had found inaccuracies or to request more accurate addresses. As the Board stated in *Mod Interiors, Excelsior* imposes the 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. 324 NLRB 164 at 165.

¹ In light of our sustaining the Petitioner's Objection 4, we find it unnecessary to pass on the hearing officer's recommendation to sustain the Petitioner's Objection 2.

² As I noted in my dissenting opinion in *Eldorado Tool*, 325 NLRB 222 (1997), under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board may limit what would otherwise constitute employer First Amendment rights only to condemn three types of statements: promises of benefits; threats of reprisals; and predictions of adverse economic consequences suggesting that the action will not occur out of economic necessities but because the employer will seek to penalize concerted activity. The Employer's conduct in the instant case is clearly the type of statement that the Board may regulate under *Gissel*.

² *Fountainview Care Center*, 323 NLRB 990, 991 (1997). The addresses on the *Excelsior* list reflected the employer's best information and the hearing officer found no bad faith on the part of the employer. As the hearing officer correctly observed, evidence of bad faith or actual prejudice is unnecessary to the resolution of an *Excelsior* objection. The *Excelsior* rule is "essentially prophylactic, i.e., the potential harm from the list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." *Thrifty Auto Parts*, supra.

³ See *North Macon*, 315 NLRB at 359 fn. 4, and my concurring opinion in *Fountainview Care Center*, 323 NLRB 990 at 993.