

**Laidlaw Medical Transportation, Inc d/b/a Medtrans and/or American Medical Reserve/AMR and Professional EMTs and Paramedics, a division of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL-CIO, CLC, Petitioner.** Case 31-RC-7473

August 27, 1998

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board has considered objections to an election held July 28 and 29, 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 53 for the Petitioner, 141 for the Intervenor,<sup>1</sup> and 277 for neither labor organization, with 27 challenged ballots, an insufficient number to affect the results.

The Board, by a three-member panel, has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this decision, and finds that the election must be set aside and a new election held.<sup>2</sup>

We sustain the Intervenor's Objection 1 and find that the Employer did not substantially comply with the *Excelsior* rule. The hearing officer found that the Intervenor's mailings to 94 employees during the election campaign were returned to it due to incorrect addresses on the *Excelsior* list. By letter dated July 1, 1997, the Inter-

<sup>1</sup> The Intervenor is the International Association of EMTs and Paramedics, a division of the National Association of Government Employees, SEIU, AFL-CIO.

<sup>2</sup> The Employer contends that the Intervenor's November 7, 1997 request for an extension of time to file its exceptions was untimely and should have been rejected. In support of that contention, the Employer appears to have mistakenly relied on an old version of Sec. 102.69(j)(3) of the Board's Rules and Regulations (Rules), which provided that such requests be filed "not less than 3 days before the date the brief or other document is due." Sec. 102.69(j)(3) has been revised to eliminate that provision. See 56 Fed. Reg. 49141, Oct. 28, 1991.

The Employer also contends that the Intervenor's exceptions should have been rejected because they were not filed in accord with the Board's Rules governing service of papers. We disagree. Sec. 102.114(a) of the Board's Rules provides, in pertinent part, that "service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner . . . ." The Intervenor filed its exceptions with the Board by facsimile transmission, but mailed the exceptions to the Employer. Sec. 102.114(c) of the Rules provides that, in the event of a party's failure to comply with this requirement, the Board may nonetheless accept the filing but "withhold [ ] or reconsider [ ] any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond." The Employer received the Intervenor's exceptions 2 days after they were served on the Board. The Employer has not shown any prejudice from the delay. Matters raised in the exceptions were fully litigated at a hearing, where the Employer had an opportunity to present evidence, cross-examine union witnesses, and present argument in support of its position.

venor informed the Employer of its concern that the *Excelsior* list contained numerous incorrect addresses and requested an "updated mailing list." The Intervenor reiterated its concern and request in a July 8 telephone conversation with the Employer's counsel, who told the Intervenor that the Employer had received only about 5 returns based on incorrect addresses. The Employer did nothing further to correct the list.

It is undisputed that the Employer failed to furnish the Intervenor with corrected addresses of any employees. Specifically, although the Employer has a policy requiring employees to report address changes to it within 7 days of the change, it made no attempt to enforce this policy after being informed that it had incorrect addresses for a number of employees. Quite simply, the Employer simply disregarded the Intervenor's request for a revised list.

The Board has made clear that:

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 concerning representation and can freely and fully exercise their Section 7 rights. *Mod Interiors, Inc.*, 324 NLRB No. 33 (August 7, 1997). See also, *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994).

Here, the Employer's disregard for the Intervenor's request for a corrected list is incompatible with these principles underlying the *Excelsior* requirements. When presented with the Intervenor's report that numerous employees had failed to receive its mailings, the Employer was obligated to use its best efforts to furnish corrected addresses, especially in light of its policy that employees were required to report address changes.<sup>3</sup> The fact that

<sup>3</sup> Our dissenting colleague asserts that the Employer made a good-faith effort to satisfy its *Excelsior* obligation by timely submitting a list which it reasonably believed was accurate. In Chairman Gould's view, however, whether the Employer acted in good faith is not relevant to resolving an objection to an *Excelsior* list. As he has previously observed, due to the prophylactic nature of the *Excelsior* rule, evidence of employer bad faith or a showing of actual prejudice to a union is unnecessary to support a finding that an employer has not complied with the rule. See *Thiele Industries*, 325 NLRB 1122 (1998) (W. Gould, concurring); *American Biomed Ambulette, Inc.*, 325 NLRB 911 (1998) (W. Gould, concurring); and *Mod Interiors, Inc.*, 324 NLRB 164 (1997). Chairman Gould notes that his view comports with the law as the Board should define it.

Member Fox does not disagree that the Employer may well have been acting in good faith at the time it submitted the original list. In her view, the objectionable conduct was the Employer's response to the message that a substantial number of the addresses were inaccurate. Regardless whether different instructions on the envelopes regarding deliveries to incorrect addresses might also have helped alleviate the problem, the Employer acted in bad faith when it failed to take any

the Postal Service could have forwarded some of the Intervenor's mailings to the employees' correct addresses in no way minimizes this obligation, and the hearing officer's reliance on this fact to find that the Employer substantially complied with its *Excelsior* duty is erroneous.

For these reasons, we therefore find that the Employer has not substantially complied with the *Excelsior* requirements, and we set aside the election and direct a new election.<sup>4</sup>

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

I conclude that the Employer acted in good faith and in substantial compliance with the *Excelsior* rule. Any problems that may have developed were the results of inaction by the objecting Union (Intervenor) and the employees.<sup>1</sup>

The Employer prepared an *Excelsior* list containing the most current, known address of its 685 unit employees, as reflected on its payroll records. It timely delivered the list to the Board's Regional Office. The Employer has a policy which requires employees promptly to report changes of address. Thus, acting in good faith, the Employer provided an *Excelsior* list that it believed to be wholly accurate.

Using this list, the Employer and Intervenor each conducted informational mailings to unit employees in connection with the election campaign. The Employer and the Intervenor experienced substantially different rates of return from the mailings, indicating incorrect addresses for some employees. The Employer, which used envelopes bearing a "please forward" request, received about 31 returned envelopes from its initial mailing. These were addressed to employees who left no forwarding address with the Postal Service. The Intervenor's envelopes, which bore an "address correction requested" notation, received about 94 returns from its initial mailings. However, 64 of these had the new addresses, as provided by the Postal Service. Thus, Intervenor updated its mailing list accordingly.<sup>2</sup>

---

steps to correct addresses when it was advised of the numerous inaccuracies. Member Fox notes that, 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).

<sup>4</sup> In light of this finding, we find it unnecessary to pass on the hearing officer's recommendation to overrule Intervenor's Objection 5.

<sup>1</sup> I adopt the hearing officer's finding, regarding Objection 5, that the Employer's display of "Vote Neither" banners at the Southgate, Los Angeles/Jefferson, and Palmdale facilities did not constitute objectionable conduct. I do not adopt her statement that this conduct "indicates a disregard, bordering almost on contempt, for the Board's processes and laboratory conditions which the Board strives to maintain during elections."

<sup>2</sup> Assuming that an addressee has left a forwarding address with the Postal Service, there are two possible results. If the envelope bears the

Using the corrected addresses provided by the Postal Service, the Intervenor's success rate in delivering its mailings improved dramatically. Intervenor's office manager Jennings testified that the Intervenor received only a few returns after its second mailing and even fewer after subsequent mailings. Ultimately, the Intervenor reached all but about 30 unit employees with its mailings. Thus, using the same *Excelsior* list, the Employer and the Intervenor ultimately experienced about a 4-percent undeliverable rate, that is, about 31 and 30 returned envelopes respectively.<sup>3</sup>

The hearing officer correctly relied on the Employer's good faith and on case law interpreting the Board's "substantial compliance" test for compliance with the *Excelsior* rule.<sup>4</sup> He found that the Employer substantially complied with the *Excelsior* rule. I agree.

There is no evidence that the inaccuracies in the *Excelsior* list were caused by gross negligence or bad faith on the Employer's part. It was the Employer's last, best list. See *Lobster House*, 186 NLRB 148 (1970). The inaccuracies were limited to employee addresses, not names. As the hearing officer correctly observed, the Board views the omission of names as more serious than inaccuracy in addresses, as the former is far more likely to frustrate the purposes of the Act. See *Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993). Moreover, the ultimate inaccuracy rate, at 4 percent, is well within the margin of error in which the Board has found substantial compliance in the absence of bad faith.

My colleagues say that the Employer, upon being informed of the Intervenor's initial return number of 94, was obligated to go to its employees and get the addresses. In my view, the Employer's conduct was neither in bad faith nor otherwise improper. The Employer had furnished its last best list. Further, as a fail-safe measure, it used the "please forward" legend on its envelopes; the Intervenor could have done the same. Finally, the Postal Service took care of the problem (except for 4 percent) by giving the Intervenor the new addresses. Intervenor then successfully used these new addresses.

My colleagues do not quarrel with the clear proposition that the Employer's original submission of the *Excelsior* list was in good faith. However, Member Fox says that it was bad faith for the Employer not to correct

---

message "please forward," the Postal Service will forward the mailing to the addressee's new address. If the envelope bears the message "address correction requested," the Postal Service will return the mailing to the sender, along with the addressee's new address.

<sup>3</sup> In view of this percentage, the Employer substantially complied with the *Excelsior* rule. Thus, I find it unnecessary to pass on the hearing officer's discussion on p. 10 of her report concerning the Intervenor's argument that it had a 14-percent return rate on its mailings, and on her comparison between the size of the unit in *Chromalloy American Corp.*, 245 NLRB 934 (1979), and the unit here.

<sup>4</sup> *Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993) (absent employer bad faith, 30-percent inaccuracy rate is substantial compliance); and *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (27.3-percent inaccuracy rate).

addresses after being told of the Union's rate of return.<sup>5</sup> My colleague cites no case for this proposition. Nor could she in the circumstances of this case. It was the Union's failure to use the "please forward" legend that resulted in the relatively high rate of return (i.e., relative to the Employer's rate of return). And, even with the Union's use of the "address correction requested" legend, the return rate dropped to 4 percent. In these circum-

---

<sup>5</sup> Chairman Gould believes that the issue of good faith versus bad faith is irrelevant. He does not claim that his position comports with Board law. He simply claims that the board should change its views so as to comport with his. I will follow board law as it exists.

stances, I do not agree that the Employer's good faith was suddenly transformed into bad faith.

In sum, *Excelsior* does not divest the union and the employees of all responsibility to send and receive mailings. Some due care on their part is to be expected. In the instant case, they failed to use that due care. That is, some employees did not keep the Employer or the Postal Service apprised of current addresses. And, the Intervenor Union failed to use the "lease forward" method of mailing. Finally, even with all of this, the return rate was only 4 percent. In these circumstances, I would not require another election.