

Merchants Transfer Company and PACE International Union, AFL-CIO.¹ Case 15-RC-8199

March 31, 2000

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on May 27, 1999, and the hearing officer's report recommending disposition of the objections. The election was held pursuant to a Stipulated Election Agreement. The tally shows 27 for and 29 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings² and recommendations as modified³ and finds that the election must be set aside and a new election held.

The hearing officer found merit in the Petitioner's Objection 3, which alleges that the election must be set aside because the Employer provided an *Excelsior*⁴ list with inaccurate addresses. For the following reasons, we agree with the hearing officer.

The hearing officer found that the addresses of 13 of the 58 employees on the *Excelsior* list were incorrect. The Petitioner was ultimately able to find correct addresses for 7 of the 13 employees, but was unable to contact the remaining 6 employees before the election. Thus, the Employer provided incorrect addresses for 22.41 percent of the employees on the *Excelsior* list and even with further efforts the Petitioner was still unable to reach 10.34 percent of the employees.

The hearing officer also found that in assembling the addresses of employees on the *Excelsior* list, the Employer acted in a "grossly negligent manner." In this connection, the record shows that the Employer's president, Tom Taul, admitted that he had known since 1992 that the Company had incorrect addresses for many of its rank-and-file employees. In fact, he testified that the Company ceased mailing W-2 forms to employees because many were returned by the Post Office due to in-

correct addresses. Further, Taul testified that although supervisors maintain updated lists of employee phone numbers so that employees can be contacted when the Employer needs to adjust their work schedules he did not direct anyone to telephone the employees to verify the accuracy of the addresses on the *Excelsior* list. In sum, the record shows that although Taul knew that a significant number of employee addresses on the *Excelsior* list were incorrect, he nevertheless forwarded it to the Union without taking a step that was readily available to him to correct the inaccuracies.⁵ In our view, such conduct demonstrates gross negligence or bad faith on the part of the Employer.

Although a finding of gross negligence or bad faith is not a precondition for the conclusion that an employer has failed to comply substantially with the *Excelsior* rule, the Board has held that a finding of gross negligence or bad faith will preclude a finding that an employer was in substantial compliance with the rule. See *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). See also *Women in Crisis Counseling*, 312 NLRB 589 (1993) ("Board may set aside an election because of an insubstantial failure to comply with the *Excelsior* rule if the employer has been grossly negligent or acted in bad faith in providing inaccurate addresses").

Our dissenting colleague's reliance on *Singer Co.*, 175 NLRB 211, 212 (1969), is misplaced. In *Singer*, the addresses the employer provided the union were the same addresses it used in communicating with the employees. In the instant case, unlike *Singer*, the Employer admitted that it no longer used the addresses it had submitted on its *Excelsior* list because mailings were returned as undeliverable. Therefore, unlike the employer in *Singer*, the Employer here provided the Union with addresses that were "less accurate than it used for its own purposes." 175 NLRB at 212.

Bear Truss, Inc., 325 NLRB 1162 (1998), is also inapposite. There, when the employer was informed by the Regional Office that its *Excelsior* list was rendered partially illegible by the fax transmission, the employer "promptly cooperated and supplied the Regional Office with a legible copy of the list," thus indicating "that the

¹ On January 4, 1999, the United Paperworkers International Union, AFL-CIO, CLC merged with the Oil, Chemical and Atomic Workers International Union. Accordingly, the caption has been amended to reflect that change.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ Because we adopt the hearing officer's recommendation to sustain Objection 3, we find it unnecessary to pass on his recommendations that Objections 1 and 9 should also be sustained.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the remainder of the Petitioner's Objection 1, and Objections 2, 4, 6, 7, and 8.

⁴ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

⁵ In its exceptions, the Employer argues that the Union failed to alert the Employer or the Board to the problem with the *Excelsior* list. Any such failure on the Union's part, however, is immaterial because, as explained above, the Employer knew at the time it furnished the *Excelsior* list to the Union that a significant number of employee addresses were inaccurate.

Our dissenting colleague's reliance on *Women in Crisis Counseling*, 312 NLRB 589 (1993), is also misplaced. In finding that there was no evidence that the inaccurate addresses the employer provided for the *Excelsior* list were the result of bad faith or gross negligence, the Board noted that on being informed by the Regional Office of the inaccuracies, "the Employer immediately obtained and submitted corrected addresses to the Resident Office, which relayed them to the Petitioner on that same day." Here, the Employer knew that many of the addresses it was supplying were incorrect but made no effort to correct them.

Employer was not acting in bad faith when it submitted the original list.” Furthermore, although the employer’s submission included errors on approximately 7 percent of the addresses, there was no showing that the employer knew that it was supplying incorrect addresses.

Nor does *Lobster House*, 186 NLRB 148 (1970), support Member Brame’s position. In that case, the Board affirmed the rule that an election may be set aside if an employer has been grossly negligent and acted in bad faith, but held that, while the employer may have been negligent in not supplying address changes it apparently received before the election, it was not *grossly* negligent, nor did it act in bad faith. Underlying the Board’s decision, however, was a set of facts different from those involved here. In that case, the employer did not supply five corrected addresses that may have been reported to its restaurant between the submission of the *Excelsior* list and the election, but, if so, apparently were not forwarded from the restaurant to its corporate offices where the master employee list was kept and from which the *Excelsior* list had been prepared. *Lobster House*, therefore, is simply a case where the employer maintained two sets of business records and its system for updating addresses from one set to the other did not produce a list that was perfectly current. The employer’s system for transmitting correct addresses was inefficient, or at worst, negligent in its operation. By contrast, the Employer here had no system for transmitting correct addresses. Thus, it knew that its addresses were wrong, and yet it supplied those addresses to the Union.⁶ Cf. *Texas Christian University*, 220 NLRB 396, 398 (1975) (although *Excelsior* list contained inaccuracies, “there is no indication that at the time of the submission of the list the Employer was aware of the inaccuracies in the addresses”); *Fontainebleau Hotel Corp.*, 181 NLRB 1134 fn. 1 (1970) (although *Excelsior* list contained inaccuracies in addresses, “there is no indication that the Employer knew of the inaccuracies”).

Our colleague also relies on *Dr. David M. Brotman Memorial Hospital*, 217 NLRB 558 (1975). In that case, the employer’s initial list was not attacked as objectionable, even though some addresses were incorrect. After the Regional Director sought correct addresses, the employer declined to supply them, even though it had the same on file. Notwithstanding this, the Board declined to overturn the election because the election margin was substantial and the number of address corrections the employer refused to provide comprised only 2 percent of the eligible voters. Obviously, none of these facts is present here.

In short, the dissent’s claim that this is a case in which the Employer provided “its latest, best, list” lacks support

⁶ Contrary to the contention of our dissenting colleague, we are not saying that the Employer has a duty to investigate. We are saying that the Employer in this case knowingly supplied incorrect addresses.

in the record. Because the facts clearly show that the Employer itself recognized that the list was essentially worthless for its own purposes, a far more accurate characterization of this case is that the Employer provided its “laid-to-rest list.”

Here, as discussed above, the record fully supports the hearing officer’s finding that, at least, the Employer was grossly negligent in providing an *Excelsior* list with inaccurate addresses. In these circumstances, the Employer’s conduct constitutes a failure to comply with the *Excelsior* rule. Accordingly, we shall sustain the Petitioner’s Objection 3 and set aside the election.

[Direction of Second Election is omitted from publication.]

MEMBER BRAME, dissenting.

The majority finds that the Employer engaged in objectionable conduct by furnishing the Union with an *Excelsior*¹ list, which contained inaccurate addresses for some of the unit employees. Solely on the basis of this finding, they nullify the results of the election and direct that a second election be held.² Contrary to the majority, I would overrule this objection. It is undisputed that the list furnished to the Petitioner included the most recent and accurate information in the Employer’s possession. In these circumstances, there is no precedent and no warrant for setting aside the election.

In Objection 1, the Petitioner contends that the Employer engaged in objectionable conduct when Supervisor Mike Lamey observed Union Organizer Thomas distributing union fliers to employees as they entered the facility’s parking lot a few weeks prior to the election and then questioned employee Eagan “about” the handbill he had received from Thomas as Eagan entered the facility. The hearing officer sustained the objection, finding that by observing Eagan accepting the flier and then interrogating him about it, Lamey “crossed the threshold” from the permissible act of watching Thomas handbilling to the impermissible act of surveillance in violation of Section 8(a)(1) of the Act.”

In Objection 3, the Petitioner asserts that the Employer provided an *Excelsior* list with inaccurate addresses. The hearing officer found that the addresses of 13 of the 58 employees on the list provided by the Employer were incorrect. Thus, the Employer provided incorrect addresses for 22.41 percent of the employees on the *Excelsior* list.³ There is no evidence or contention that any eligible voter’s name was omitted from the list. The Petitioner did not advise the Employer or the Board that the *Excelsior* list was deficient prior to the election. Never-

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

² The majority finds it unnecessary to pass on Petitioner’s Objections 1 and 9. For the reasons set forth below, I would also overrule those objections.

³ The Petitioner was able to find correct addresses for 7 of the 13 employees prior to the election, but was unable to locate or contact the remaining 6 employees.

theless, the hearing officer found that the Employer acted in a “grossly negligent manner” in preparing the *Excelsior* list because the Employer knew that many addresses on the list were inaccurate but made no effort to correct the known inaccuracies.

In Objection 9, the Petitioner claims that the Employer engaged in objectionable conduct by withholding information on employee Debbie Tanner’s employment status. Tanner was one of the employees listed on the *Excelsior* list furnished by the Employer. About a week before the election, which was held on May 27, 1999, Tanner took a leave of absence to care for her sick father in Georgia.

On May 26, Tanner requested an extended leave of absence, which was denied.⁴ During the preelection conference the next day, the Petitioner asked if there were any changes to the *Excelsior* list and the Employer responded that there were no changes. During the second, and final, voting session, the Petitioner’s observer asked the Employer’s observer if Tanner would return to work and vote, and the Employer’s observer told him that Tanner had called in a week and a half ago and said she was not coming back. The hearing officer found that, while these facts were not very troubling when viewed in isolation, they provided further support for the conclusion that the Employer was grossly negligent in the manner in which it assembled the *Excelsior* list.

The Majority’s Decision

As noted above, the majority does not pass on Objections 1 and 9. With regard to Objection 3, the majority concludes, without discussion or citation to any authority, that the Employer’s failure to verify and correct the addresses on the *Excelsior* list demonstrates gross negligence or bad faith on the part of the Employer and establishes that the Employer did not comply with the *Excelsior* rule. The majority asserts that it is immaterial that the Petitioner did not alert the Employer or the Board to the problems with the inaccurate addresses because the Employer knew that the addresses were inaccurate. They therefore set aside the election.

Analysis

Objection 1

Contrary to the hearing officer, the evidence adduced at the hearing does not establish that the Employer engaged in surveillance of employees’ union activities. As the hearing officer correctly recognized, an employer does not engage in objectionable conduct merely by observing open and public handbilling at or near its premises. See, e.g., *Roadway Package Systems*, 302 NLRB 961 (1991); *Chemtronics, Inc.*, 236 NLRB 178 (1978), *enfd.* 98 LRRM 1559 (2d Cir. 1979) (unpublished deci-

⁴ The Employer’s president and owner, Thomas Taul, told Tanner on May 26 that she no longer had a job but that the Employer would consider rehiring her.

sion), supplemental decision 250 NLRB 17 (1980). The hearing officer apparently found that Lamey’s observation of the handbilling was objectionable because he also questioned employee Eagan about the handbill he had received. However, it is well settled that not every “instance of casual questioning concerning union sympathies violates the Act.” *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985) (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)). Instead, the Board employs “a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and does not ignore the reality of the workplace.” *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).⁵

Consistent with the foregoing principles, there is no basis for finding that Lamey’s questioning Eagan about the pronoun flier was objectionable conduct unless the surrounding circumstances establish that Lamey’s actions reasonably tend to interfere with employees’ free and uncoerced choice in the election. However, there is no record evidence concerning those circumstances in this case. The sole evidence in the record concerning Lamey’s questioning of Eagan is as follows:

HEARING OFFICER: Did [Supervisor Lamey] question you about the handout?

EAGAN: Yes, sir.

HEARING OFFICER: When?

EAGAN: When I came up the steps.

HEARING OFFICER: What did he say?

EMPLOYER’S ATTORNEY: Once again, we don’t have an interrogation charge here.

HEARING OFFICER: Yes, I know that, but—was that the only time he questioned you about the handbill?

EAGAN: Yes, sir.

HEARING OFFICER: And, sure enough, we don’t have that on the record. That’s not an objection that has been raised.⁶

In the absence of record evidence describing what Lamey said to Eagan, there is no factual basis for a finding that Lamey engaged in objectionable conduct.⁷

⁵ See generally my concurring opinion in *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999).

⁶ In light of the hearing officer’s somewhat cryptic response to the Employer’s objection to the taking of evidence concerning the alleged interrogation, it is not clear that this matter is even properly before us. However, I find it unnecessary to pass on that issue as I would in any event overrule the objection.

⁷ *Flexsteel Industries*, 311 NLRB 257 (1993); and *Carry Cos.*, 311 NLRB 1058, 1072–1073 (1993), *enfd.* in pertinent part 30 F.3d 922 (7th Cir. 1994), cited by the hearing officer in support of his finding that the Employer engaged in objectionable conduct, are plainly distinguishable as in both of those cases there was record evidence concerning the questions asked of the employee, including evidence that the threats were accompanied by statements found by the Board to constitute unlawful threats of reprisal. No such evidence is present in this case.

Objections 3 and 9

In *Excelsior Underwear*, supra, 156 NLRB at 1236, 1239–1240, the Board established the rule that an employer “must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case.” The purpose of the rule is two-fold: “(1) to insure an informed electorate by affording all parties an equal opportunity to communicate with eligible employees, and (2) to expedite the resolution of questions of representation by minimizing challenges solely on lack of knowledge as to the voter’s identity.” *Women in Crisis Counseling*, 312 NLRB 589 (1993).

It is well settled that the *Excelsior* rule “will not be applied mechanically.” *Women in Crisis Counseling*, supra, 312 NLRB at 589. See also *Telonic Industries*, 173 NLRB 588 (1969); *Program Aids Co.*, 163 NLRB 145, 146 (1967). Moreover, the Board has recognized that the omission of an eligible voter’s name from the *Excelsior* list is more serious than inaccuracies in addresses, as in *Women in Crisis Counseling*, supra at 589:

A party that is unaware of an employee’s name suffers an obvious and pronounced disadvantage in communicating with that person by any means and in assessing prior to the election whether that person is eligible to vote. A party with an employee’s name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail. Moreover, the Board’s greater tolerance of address inaccuracies in *Excelsior* lists reflects a pragmatic recognition that an employer reasonably should know the names of employees in its current work force but may be less able, without prompt disclosure from the employees themselves, to maintain a completely accurate list of their current addresses.

Applying these principles, it is evident that the Employer has complied with its obligation under the *Excelsior* rule. As noted above, 22 percent of the addresses on the list provided by the Employer were shown to be inaccurate. No names of eligible voters were omitted. The Board has consistently found that inaccurate addresses of the character presented in this case are insufficient to establish that an employer has not complied with the *Excelsior* rule. See *Women in Crisis Counseling*, supra (30-percent inaccuracy rate in addresses not objectionable); *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (inaccuracies in 22 percent of addresses not objectionable).

The majority apparently seeks to distinguish these precedents by finding that the Employer is guilty of “gross negligence or bad faith” because it knew that at least some of the addresses were inaccurate but failed to update and correct that list. However, the Board has previously rejected precisely the position advanced by the

majority today. *Lobster House*, 186 NLRB 148 (1970), the employer produced an *Excelsior* list in which 16 of 97 addresses were inaccurate.⁸ The Regional Director found that the employer had failed to exercise “due diligence” in the preparation of the list because,

[A]lthough the list was taken from records which the Employer kept in the ordinary course of business [at its central office], the Employer was well aware that those records might be incorrect and that it had other records readily available, namely, the records kept at the restaurant, which it knew to be more up to date. [Id. at 150.]

The Board, however, squarely rejected the Regional Director’s conclusion, holding that,

[W]hile the Employer may have been negligent in not supplying address changes it apparently received before the election, it was not grossly negligent. Nor do we believe that, in the context of this case, its failure may be attributed to bad faith. Except for the two clerical errors and the failure to provide two zip codes, which we do not find meaningful, the Employer furnished its latest, best list. We shall overrule the objection. [Id. at 148–149.]

The Board has consistently followed the principle that an employer does not engage in objectionable conduct when it provides “its latest, best list” in other cases as well. Thus, in *Singer Co.*, 175 NLRB 211, 212 (1969), the Board overruled an *Excelsior* list objection based on the number of inaccurate addresses where, as here, “It is not alleged, nor does the record indicate, that the Employer provided the Petitioner with addresses which were less accurate than it used for its own purposes . . . the original *Excelsior* list provided information comparable to that available to, and utilized by, the Employer.” See also *Bear Truss, Inc.*, 325 NLRB 1162, 1164 (1998) (no objectionable conduct where employer furnished “the most recent and best possible information it possessed as to employee names and addresses”); *Women in Crisis Counseling*, supra (no evidence or contention that inaccurate addresses were the result of bad faith or gross negligence where “[t]he Employer obtained the addresses from its personnel files”). The majority provides no justification for its disregard of well-established precedent in this case.

The clear import of these cases is that the *Excelsior* rule does not require an employer to do more than provide the information contained in its records. Until today, the Board has not held that an employer engages in objectionable conduct by failing, under any circum-

⁸ Twelve of the sixteen inaccurate addresses were due to employees having moved after their initial employment, two were due to clerical errors, and two were deemed inaccurate because the employer omitted the zip codes (which would have allowed for identification of the municipality in which the given street address was located).

stances, to investigate its employee address records to insure that they are up to date. To the contrary, the Board has rejected the position that an employer “is obligated to investigate and secure additional information.” *Dr. David M. Brotman Memorial Hospital*, 217 NLRB 558, 559 (1975) (no objectionable conduct where employer failed to provide corrected addresses in its possession despite Board agent’s request that it do so).⁹ See also *Days Inns*, 216 NLRB 384, 385 (1975) (fact that employer’s personnel files were scattered and chaotic “are factors we must consider in assessing the Employer’s compliance with our [*Excelsior*] rule”); *Texas Christian University*, 220 NLRB 396, 398 (1975) (reversing hearing officer’s conclusion that employer engaged in objectionable conduct by failing “to make all possible efforts to correct the list”).

Consistent with these principles, and contrary to the majority, the Board has overruled *Excelsior* list objections in cases where the employer admittedly knew that the list contained inaccurate addresses,¹⁰ and it has reached the same result regardless of whether the employer used the mailing list for its own purposes.¹¹ The majority’s failure to cite to a single case in which the Board has set aside an election on facts even remotely similar to those in this case is itself a damning admission that they are overruling, sub silentio, precedent of 30 years standing by their decision today.

⁹ In *Dr. David M. Brotman Memorial Hospital*, the employer’s original *Excelsior* list included 117 incorrect addresses out of 967 employees included in the list—an error rate of 12 percent. Subsequently, the employer obtained 20 address corrections (which comprised 2 percent of the eligible voters) but refused to provide them to the Region even after being requested to do so. The Board held that even under these circumstances, the employer’s conduct did not warrant setting aside the election. In so doing, the Board also stated that, while the employer should have provided the updated information in its possession upon the specific request by the Board agent, it was “not holding that the Employer is obligated to investigate and secure additional information.” Yet, that is precisely what the majority today holds, in effect, that the Employer in this case was required to do so.

¹⁰ *Lobster House*, supra (employer knew list contained inaccurate addresses and did not use it for its own purposes); *Singer*, supra (employer knew that addresses were inaccurate as mail sent to its employees was “customarily” returned as undeliverable).

Significantly, the Board in *Lobster House* found that the employer was “well aware that those records might be incorrect” and that it did have other records available “which it knew to be more up to date.” 186 NLRB at 150. Nevertheless, the Board declined to set aside the election. The majority, ignoring the teachings of *Lobster House* and *Dr. David M. Brotman Memorial Hospital*, relies on precisely these facts as the basis for setting aside this election.

The majority asserts that *Singer* is distinguishable because the employer there used the addresses to communicate with the employees while the Employer here did not. My colleagues cite no precedent, and provide no justification, for their holding that an employer who provides the only address information in its records, knowing that the addresses are inaccurate, may avoid a finding that it violated the *Excelsior* rule simply by sending its own mailing to those addresses, but is somehow guilty of “bad faith and gross negligence” if it does not.

¹¹ Id.

Gravure Packaging, 321 NLRB 1296, 1311–1312 (1996), enfd. mem. 116 F.3d 941 (D.C. Cir. 1997), cited by the hearing officer in support of his finding that the Employer engaged in objectionable conduct, is wholly inapposite. As the Board’s decision makes clear, the sole basis for finding that the employer there had failed to comply with the *Excelsior* rule was the employer’s provision of only employees’ last names and first initials, although its records included the employees’ full names.¹² Here, there is no evidence that the Employer failed to provide the full name of any employee. Moreover, as discussed above, the Employer did not deliberately omit any information from the *Excelsior* list; instead, it provided the only addresses it had.¹³

Turning to Objection 9, the Employer’s failure to advise the Petitioner at the preelection hearing that Tanner was no longer in its employ likewise provides no basis for overturning the results of the election, and I note that the majority does not contend otherwise. The hearing officer concluded that the Employer’s actions were indicative of the “grossly negligent” manner in which it assembled the *Excelsior* list. In reaching this conclusion, the hearing officer ignores the fact that the *Excelsior* list had already been prepared and submitted by the time Tanner’s employment status changed. While the cooperation of all parties to an election in providing notice of any changes affecting voter eligibility at the preelection conference is, of course, to be encouraged, there is no warrant for setting aside an election solely on the basis of a failure to do so, at least in the absence of any showing of prejudice to a party to the election. No such showing has been made in this case.

Conclusion

For the foregoing reasons, I would overrule the Petitioner’s objections and certify the results of the election.

¹² See *North Macon Health Care Facility*, 315 NLRB 359 (1994) (no substantial compliance with *Excelsior* rule where employer deliberately omitted employees’ first names in preparing *Excelsior* list).

¹³ In *Laidlaw Medical Transportation*, 326 NLRB 925 (1998), a panel majority found that the Employer engaged in objectionable conduct when it disregarded a request for an “updated mailing list” after being advised that its original *Excelsior* list contained numerous errors. I find it unnecessary to pass on whether *Laidlaw* was correctly decided on its facts, as the Petitioner here failed to protest the incorrect addresses, or to request a corrected list, prior to the election. Compare *Bear Truss, Inc.*, supra at 1162 (noting that employer’s cooperation in furnishing legible copy of *Excelsior* list, after being requested to do so, “is to be encouraged, and is an indication that the Employer was not acting in bad faith when it submitted its original list”).