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**Lakewood Engineering and Manufacturing Company
and United Electrical, Radio & Machine Work-
ers of America (UE), Petitioner and Interna-
tional Brotherhood of Teamsters, Local 743,
AFL-CIO. Case 13-RC-20869**

April 30, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER
AND WALSH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's "exceptions"¹ to the Regional Director's Second Supplemental Decision on Objections. The Employer's request for review is granted as it raises substantial issues warranting review. Having carefully considered the matter in light of the undisputed facts², the Employer's request for review and brief in support and the Petitioner's opposition, we find, contrary to the Regional Director, that Petitioner's Objections 1 and 2 are without merit and must be overruled. Accordingly, we remand this case to the Regional Director to resolve the outstanding challenges and Petitioner's Objection 3.

Facts

On October 15, 2002, the Petitioner filed a petition to represent production, maintenance, and warehouse workers at the Employer's Chicago, Illinois facility. The Regional Director issued a Decision and Direction of Election on December 23, 2002, directing an election for January 22, 2003, with an eligibility cutoff date of December 22, 2002. The January 22 election was blocked by an unfair labor practice charge filed by the Intervenor. At the close of its investigation, the Regional Director dismissed the Intervenor's charge and rescheduled the election for February 24 and 25, 2003. Over the Employer's objection, the Regional Director decided to use the same December 22 eligibility cutoff date for the February election.

In response to the Region's request, the Employer provided an updated *Excelsior* list on February 14, 2003. Among the 320 names on the list, the Employer added eight employees who were hired between December 22, 2002, and February 2, 2003, who the Employer con-

tended should be eligible to vote.³ The Employer also included a separate list along with the *Excelsior* list, breaking out the names of the eight new hires for ease of reference. At the preelection conference, the Petitioner noticed the inclusion of these eight new hires on the *Excelsior* list and requested their removal. A Board agent stated that she could not remove the names in question without the agreement of the parties. Because the Employer refused to strike the names, the Board agent allowed them to vote in the election.⁴ The February 24 and 25 election resulted in no party receiving a majority of the votes cast. The Region scheduled a runoff election for April 24, 2003.⁵

The Regional Director decided to continue to use both the December 22, 2002 eligibility cutoff date and the February *Excelsior* list for the April 24 runoff election. Once again, the issue of the eligibility of the eight new hires came up at the preelection conference. Once again, the Board agent stated that she could not strike the names without the agreement of the parties. And, once again, the Employer refused to so agree. The Board agent then informed the parties that absent such agreement, the party challenging the employees' eligibility must lodge proper ballot challenges and that they should instruct their observers to make such challenges. The tally of votes for the April 24 election shows 140 votes for the Petitioner, 143 votes against the Petitioner, and 8 challenged ballots. Of the disputed new hires, four voted without challenge; three voted under challenge; and one presumably did not vote.

On May 1, 2003, the Petitioner filed three timely Objections to Conduct Affecting the Results of the Election. Objection 1 alleges "the Board Agent failed to challenge four voters, despite having objective evidence, and thus actual knowledge, of their ineligibility to vote." Objection 2 alleges, "the day of the April 24 election, [Employer's] counsel . . . suppressed the facts regarding four voters' ineligibility to vote." Objection 3 alleges "the day of the April 24 election, [Employer's] Plant Manager . . . told at least two employees known to have been hired after the cutoff date to vote in the election." After investigating the Petitioner's objections, the Regional Director sustained Objections 1 and 2 without a hearing and set

³ February 2, 2003, was the payroll period ending prior to the February 7, 2003, date of the new direction of election.

⁴ There is no indication whether the Petitioner challenged these ballots during the February 24 and 25 election.

⁵ The April 24 runoff election was scheduled after Intervenor's objections to the February election were investigated and dismissed. The ballot question before the employees at the April 24 runoff election was between representation by the Petitioner and no representation.

¹ We have treated the Employer's exceptions as a request for review. See NLRB Rules and Regulations § 102.69(g)(3)(i).

² The Employer and the Petitioner attached relevant documents and affidavits to their submissions.

aside the results of the election.⁶ The Regional Director determined that because the Board agent knew the eight new hires were hired after the eligibility cutoff date, her failure to challenge their ballots required that the election be set aside. We disagree.

Analysis

Petitioner's Objections 1 and 2 raise two separate but interrelated issues. Objection 1 essentially alleges that the Board agent's failure to challenge the ballots of the four new hires who voted without challenge amounts to Board agent misconduct requiring that the election be set aside. This objection requires the Board to determine whether the Board agent was required to challenge these ballots. Objection 2 makes a different allegation. Regardless of the Board agent's duties, Objection 2 attempts to raise a postelection challenge to the eligibility of the four new hires who voted without challenge. This objection requires the Board to determine whether the Employer knew of the new hires' ineligibility and suppressed the facts such that the Petitioner was unaware of a reason to challenge their ballots. We address these separate questions in turn.

It is well settled that parties to an election bear the primary responsibility for challenging voter eligibility. See *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 22 (1956); *Solvent Services*, 313 NLRB 645, 646 (1994). Accordingly, the circumstances under which a Board agent must challenge a ballot are exceedingly narrow, lest the parties' responsibility to lodge eligibility challenges be transferred to the Board and its agents.

As a general proposition, a Board agent must challenge a ballot only when he or she "has actual knowledge of the voter's ineligibility" and not merely where an employee's eligibility is "in dispute." *Solvent Services*, 313 NLRB at 646. This actual knowledge requirement is satisfied in two limited circumstances: (1) where the employee's name does not appear on the *Excelsior* list or (2) where the Board has made an affirmative ruling that a given employee or employee classification is ineligible to vote or is to vote under challenge. See *Wayne Hale*, 62 NLRB 1393 (1945) (election set aside where Board agent failed to challenge foreman specifically excluded by the Board's Direction of Elections); *Laubenstein & Portz, Inc.*, 226 NLRB 804, 805 (1976) (election set aside where Board agent failed to challenge voter pursuant to a "quintessential condition of the settlement agreement which had been worked out by the parties and approved by the Board"). Absent such clear-cut facts, it

⁶ Because the Regional Director set aside the election based on her resolution of Objections 1 and 2, she did not address Objection 3 or the eight outstanding ballot challenges.

cannot be said that the Board agent has actual knowledge of ineligibility. While other situations, like the current one, might create strong suspicions that a given employee might eventually be found ineligible to vote, such suspicions, however strong, are not sufficient.⁷ Circumscribing the situations in which a Board agent must challenge a ballot serves the Board's longstanding policy that the parties have the burden to raise eligibility issues and, importantly, protects the Board's position as an unbiased neutral in the resolution of the question concerning representation raised by the petition.

Based on our review of the undisputed facts, this case does not present the rare circumstances in which a Board agent's failure to challenge a particular ballot will result in the election being set aside. The eligibility of the eight new hires was in dispute for at least 2 months before the April 24 runoff election, and the Petitioner was well aware of the presence of the new hires' names on the *Excelsior* list. At no point during this time did the Board rule in any way on the appropriateness of the cutoff date or the eligibility of the new employees to vote. Absent such a ruling, we will not impute actual knowledge of ineligibility to the Board agent, requiring the Board agent to challenge the disputed ballot. Rather, we continue to leave the decision to raise such eligibility issues solely in the hands of the parties to the election.⁸

Our resolution of Objection 2 further supports our conclusion that the Board agent did not err in refusing to challenge the disputed ballots. Objection 2 is in effect a postelection challenge to the new hires' eligibility to vote. The Board, with consistent approval of the courts, has long required that "challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946); *Solvent Services*, 313 NLRB at 646 ("[I]n the interest of promoting election finality, post-election challenges will not be permitted"). An exception to this prohibition is where the party benefiting from the Board's refusal to entertain the issue (1) knew of the voter's ineligibility and (2) suppressed the facts masking the need for a challenge. See *A. J. Tower Co.*, 329 U.S. at 333. Based on our review of the undisputed facts, the circumstances surrounding the eight new hires establish that the Employer did not suppress the facts concerning the eligibil-

⁷ Similarly, a Board agent is not required to challenge voters where one of the parties does not have an election observer. See *Balfre Gear & Mfg. Co.*, 115 NLRB 19, 22 (1956) ("The Union's failure to provide an observer did not shift the responsibility of challenging to the Board agent.")

⁸ Of course, the Board agent may within his or her discretion challenge such a ballot or at the preelection conference strike certain names from the *Excelsior* list.

ity issue. Indeed, the Petitioner was aware of the Employer's inclusion of the new hires on the updated *Excelsior* list for two full months before the April runoff election.

This case is distinguishable from *Beggs & Cobb, Inc.*, 62 NLRB 193 (1945), relied on by the Regional Director, where the Board sustained an objection amounting to a postelection challenge. In *Beggs*, eight employees who were originally included on the *Excelsior* list were no longer in the employ of the employer at the time of the election. The employer, the Board agent, and one of the two petitioning unions were all aware of the employees' ineligibility, but the second union on the ballot was not. Because only three of the four parties were aware of the employees' ineligibility, the Board determined the Board agent should have challenged the ballot. Here, there is no such prejudice to the Petitioner. The Petitioner was fully informed that the Employer had included the new hires on the *Excelsior* list and had an election observer capable of lodging objections throughout the balloting.⁹ The Employer even went as far as to include an additional list highlighting these new employees for ease of reference.

The Petitioner contends that the Employer suppressed the information by not explicitly stating that the new hires were both on the main *Excelsior* list and on the second new hire list.¹⁰ Two facts belie the Petitioner's

⁹ In fact, the Petitioner challenged three of the eight new hires' ballots at the election. No party provides an explanation for why the Petitioner challenged these three ballots, but did not challenge the ballots of the other four new hires who voted.

¹⁰ The relevant portion of the cover letter accompanying the *Excelsior* list states: "It is the Company's current position that these employees should be entitled to vote and should not be disenfranchised. We are, therefore, sending you a separate list of those employees hired in the apparently disputed time frame. We are submitting the list as a separate list so that it can be supplied to both Petitioners in this case to avoid arguments over the identity of these individuals in the future."

argument. First, a simple comparison of the *Excelsior* list and the new hire list would have easily shown that the new hires were indeed included on the *Excelsior* list.

Second, even if we were to accept the Petitioner's argument that the Employer's letter implies that the new hires were included on only the separate list and not on the main *Excelsior* list, the simple fact remains that the Petitioner discovered the presence of the new hires on the *Excelsior* list before the first election in February. In fact, anticipating a similar problem at the runoff election, the Petitioner requested extra time at the pre-election conference to deal with potentially ineligible voters being included on the *Excelsior* list.

Under these circumstances, it is clear that the Employer did not attempt to suppress the facts surrounding the eight new hires. Accordingly, we find no merit in Petitioner's Objection 2.

For the reasons discussed above, we therefore overrule Petitioner's Objections 1 and 2. We remand this case to the Regional Director to resolve the outstanding challenges and the Petitioner's Objection 3.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD