

American Laundry Machinery Division, a McGraw Edison Company and Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 9-RC-12048

February 1, 1978

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

Pursuant to the terms of a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 9 on May 23, 1977, an election by secret ballot was conducted on June 17, 1977, under the Regional Director's direction and supervision among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that, of approximately 197 eligible voters, 191 cast valid ballots, of which 82 were for and 109 were against the Petitioner.¹ Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election and to the conduct of the election.

In accordance with the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and on October 20, 1977, issued and duly served on the parties his Report on Objections, relevant portions of which are attached.² His report recommended, *inter alia*, that the Petitioner's Objection 2, relating to its late receipt of the *Excelsior* list, be sustained, that the results of the election be set aside, and that a second election be conducted. Thereafter, the Employer filed timely exceptions to the Regional Director's Report on Objections and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the

¹ Two ballots were challenged, a number insufficient to affect the results of the election.

² Apparently by inadvertence, the Regional Director found that June 4, 1977, was 11 days prior to the election rather than 13 days (see first paragraph of his report), and that the *Excelsior* list was received only 2 days late rather than approximately 6 days late (see second-to-last paragraph of his report). We hereby correct those findings accordingly.

We do not rely on *Commercial Air Conditioning Co., Inc. d/b/a Sprayking, Inc.*, 226 NLRB 1044 (1976), for the principle of law cited by the Regional Director. (See text at fn. 9 of his report.) In that case, the delay was not caused by the Regional Office but by the United States Postal Service.

Lastly, inasmuch as we have decided below that the Petitioner was prejudiced by the late receipt of the *Excelsior* list, we do not rely on the Regional Director's consideration of the "closeness of the vote."

³ The Regional Director also recommended that the Petitioner's Objec-

National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, including lead employees, employed by the Employer at its plant located on Highway 41A at Madisonville, Kentucky; but excluding all inspectors, office clerical employees, professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the exceptions thereto and supporting brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations.³

In adopting the Regional Director's Report on Objections with respect to Petitioner's Objection 2, as set forth in the attached portion of his report, some additional comments are necessary to respond to the Employer's exceptions. The Employer contends that no prejudice resulted to the Petitioner from its delayed receipt of the *Excelsior* list 8 days before the election. In support of that position, the Employer relies, *inter alia*, on *Taylor Publishing Company*, 167 NLRB 228 (1967). That case is clearly distinguishable.⁴ There the employer inadvertently filed the list 1 day late, but offered to postpone the election by 1 day to cure the effect of its noncompliance. The union apparently declined this offer. In these circum-

tions 1(a), (b), (c), (d), and (f) be overruled, that Petitioner's Objection 1(e) be resolved by a hearing, and that "other conduct" uncovered during his investigation of the Petitioner's objections be resolved by a hearing. In the absence of exceptions thereto, the Board adopts *pro forma* the Regional Director's recommendations that Objections 1(a), (b), (c), (d), and (f) be overruled. Moreover, since we adopt the Regional Director's recommendation to direct a second election due to the Petitioner's late receipt of the *Excelsior* list, it is unnecessary for us to pass on the Regional Director's recommendations that a hearing be conducted regarding Objection 1(e) and the "other conduct" alluded to in his report.

⁴ The Employer also cites *The Singer Company*, 175 NLRB 211 (1969); *Telonic Instruments, a Division of Telconic Industries, Inc.*, 173 NLRB 588 (1968); *Program Aids Company, Inc.*, 163 NLRB 145 (1967); *United States Consumer Products*, 164 NLRB 1187 (1967). We find that these cases are also inapposite.

stances, the Board was unwilling, "absent an affirmative showing to the contrary," to conclude that the petitioner was prejudiced by the 1-day delay. Here, on the other hand, the affirmative evidence set forth in the Regional Director's report clearly shows that the Petitioner was indeed prejudiced by the tardy receipt of the *Excelsior* list, which arrived approximately 6 days late. Furthermore, the late receipt of the list in this case was occasioned not only by delays of the United States Postal Service but also by the Board's own error. See *The Coca-Cola Company Foods Division*, 202 NLRB 910 (1973).

ORDER

It is hereby ordered that the election conducted on June 17, 1977, be and it hereby is, set aside.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

OBJECTION NO. 2:

The Petitioner contends that the Employer failed to timely submit to the Regional Office a list of the names and addresses of all eligible voters in the appropriate unit, as required by the Board's Rules⁷ and, further, that the Regional Office delayed mailing the list to the Petitioner, thereby prejudicing the Petitioner's campaign. The investigation disclosed that the *Excelsior* list was delivered to the Regional Office during the late afternoon of May 31, 1977, the eighth day after approval of the Stipulation. On June 4, 1977, eleven days prior to the election, counsel for the Petitioner telephoned the Regional Office and requested the date of delivery of the list. The *Excelsior* list was mailed that same afternoon but was not received in the Petitioner's Evansville, Indiana office until June 9, 1977, eight days before the election. On the morning of June 10, 1977, counsel for the Petitioner telephoned the Regional Office and requested a week's postponement of the election because of the late receipt of the list. However, inasmuch as counsel for the Employer would not agree to a postponement and because no change in a stipulation could have been affected without the consent of all parties involved, the election was held as scheduled on June 17, 1977.

In support of this Objection, the business agent of the Petitioner, in a sworn statement given to an agent of the undersigned, states that he had planned two weeks of continuous campaigning prior to the elec-

tion and asked his counsel on June 3, 1977, to determine why the *Excelsior* list had not been received. He added that he intended to use the *Excelsior* list to obtain the names and addresses of all the employees who had not signed authorization cards so that he could visit their homes, or at least telephone them to ask that they attend meetings he planned to hold near their homes. He stated that because the list was late and because the employees live in an area covering a 40-mile radius surrounding the plant, he was unable to coordinate his plan to conduct meetings in any location other than in Madisonville, Kentucky where three meetings were held with sparse attendance. He added that because he had not planned on a mailing campaign, he had insufficient time to draft and mail a leaflet to the employees. Finally, he stated that he had to conclude his campaign by distributing leaflets at the plant.

The Employer, in its statement of position, asserts that it provided the *Excelsior* list within the proscribed time limits. The Employer also contends that had the Petitioner needed the list, it would have contacted the Region Office on June 1 or 2, 1977 and would have made at least one mailing to employees during the eight days before the election that it had possession of the list.

In recent decisions, the Board has held that the rule as expounded in *Excelsior Underwear, Inc., supra*, is not to be mechanically applied. Rather, the number of days the list is overdue, the number of days the union has the list in its possession prior to the election, and the number of employees eligible to vote in the election must all be considered in determining whether an employer has substantially complied with the rule.⁸

The Board has also held that late receipt of the list by a union because of a Regional Office error will not warrant setting aside an election unless the union was prejudiced by the delay.⁹

In light of the evidence presented, the undersigned is of the opinion that the one day delay by the Employer in submitting the list to the Regional Office constitutes substantial compliance with the requirements of the *Excelsior* rule. However, with regard to the error in the Regional Office resulting in the list not being received by the Petitioner until July 9, 1977, the undersigned is of the opinion that an opposite conclusion must be reached.

An analysis of the voter eligibility list reveals that the employees of the Employer live in no less than 30

⁷ *Excelsior Underwear Inc.*, 156 NLRB 1236, 1239, requires "... within seven days after the Regional Director has approved a consent election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, or after the Regional Director or the Board has directed an election pursuant to Sections 102.67, 102.69, or 102.85 thereof, the employer must file with the Regional Director an eligibility list containing the names

and addresses of all eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed."

⁸ *Pole-Lite Industries Ltd.*, 229 NLRB 196 (1977).

⁹ *Commercial Air Conditioning Co., Inc. d/b/a Sprayking, Inc.*, 226 NLRB 1044 (1976).

separate communities outside the city in which the Employer's facility is located. Further, 74 of the 197 employees have rural route or box number addresses. In addition, approximately 55 of the eligible voters are female employees and may have been listed in telephone directories under their husbands' names.

While the efficacy of the Petitioner's campaign strategy, relying on employees attending meetings rather than mailing literature, may be subject to question, the undersigned is not in a position to substitute his judgment for the Petitioner's in this respect. The fact that the Petitioner attempted to ascertain its location, at least one day prior to the

date the *Excelsior* list was due, and the Petitioner's subsequent request for a week's postponement of the election one day after the list was received indicates that the list was of great importance to the Petitioner's campaign plans.

Considering all of the above and in view of the closeness of the vote, the undersigned must conclude that the delay in receipt of the list prejudiced the Petitioner's campaign, notwithstanding that the list was received only two days late.¹⁰

Accordingly, the undersigned recommends that the results of the first election be set aside and that a second election be directed.

¹⁰ Compare *Ben Pearson Plant, Consumer Division, Brunswick Corporation*, 206 NLRB 532 (1973).