

Custom Catering, Inc., d/b/a Blue Onion Petitioner and Local Joint Executive Board of Las Vegas, Nevada, namely, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel, Restaurant & Bartenders International Union, AFL-CIO, Union. Case 31-RM-132

March 21, 1969

DECISION ON REVIEW, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 31 on July 17, 1968, an election by secret ballot was conducted in the above-entitled proceeding on August 14, 1968, under his direction and supervision. In accordance with National Labor Relations Board Rules and Regulations, a tally was furnished the parties at the conclusion of the balloting, which showed that the challenged ballots were sufficient in number to affect the results of the election. Thereafter both parties filed timely objections to conduct affecting the results of the election.

The Regional Director caused investigations to be conducted of the objections and challenges and, on November 12, 1968, issued his Supplemental Decision and Order in which he sustained the challenges to certain ballots, overruled the challenges to others, sustained the Employer's objection,¹ and overruled the Union's objections in their entirety. Thereafter, the Union filed a timely Request for Review of the Regional Director's Supplemental Decision.

By telegraphic Order dated December 12, 1968, the National Labor Relations Board denied the Union's request for review in part, directed the Regional Director to open and count the challenged ballots, and deferred ruling on all other matters contained in the request for review. Pursuant thereto, the Regional Director opened and counted the challenged ballots, and issued and duly served on the parties a revised tally which indicated that of approximately 36 eligible voters, 31 cast valid ballots, of which 9 were for, and 22 against, the Union. The challenge to one ballot was sustained. By telegraphic Order dated January 17, 1969, the Board granted review as to certain of the Union's objections, deferred ruling as to others, and denied review as to all the remaining issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Regional Director's Supplemental Decision, the Union's request for review, and the entire record in this case with respect to the issue under review, and makes the following findings:

The Union's objections 1 through 4 allege in various particulars that the Employer failed to comply with the requirements of the Board's *Excelsior* rule² and that the election should, therefore, be set aside and a second one directed. Thus, the Union avers that the lists of employee names and addresses furnished by the Employer to the Regional Director were untimely, incomplete and misleading. The Regional Director found in all the circumstances that the Employer had substantially complied with the *Excelsior* rule, and he accordingly overruled these objections. In its Request for Review, the Union renews its contentions. We find merit in the Union's position.

The Employer operates a lunch counter and drive-in restaurant. For a period of time not disclosed in the record, it has recognized the Union in a unit of all employees. In March 1968, the Union commenced an economic strike, and the Employer began hiring replacements for striking employees. On April 25, the Employer filed the instant petition. Thereafter, on July 17, the Regional Director issued his Decision and Direction of Election, requiring the submission of the *Excelsior* list by July 24.

On July 25, the Employer filed an *Excelsior* list which omitted the names and addresses of all 11 eligible strikers and of 5 of the eligible replacements.³ Further, the list furnished incorrect addresses for three of the replacements,⁴ and contained the names and addresses of two other employees later agreed to be ineligible. Thereafter, the Union protested to a Board Agent the absence of the names and addresses of the strikers. The Board Agent brought the matter to the attention of the Employer, who on August 5 filed with the Regional Office a supplemental list containing the names and addresses of 10 of the strikers, but omitting the 11th. The supplemental list likewise omitted the names and addresses of the 5 eligible replacements previously omitted. The Union received this supplemental list on August 8, and as noted above the election was conducted on August 14.

In all the circumstances of this case, we are not satisfied that the Employer has substantially complied with the requirements of the *Excelsior* rule. Even if we were willing to overlook the late filing of the original list, that list omitted the names and addresses of nearly half of the eligible voters. The supplemental list, itself deficient by the

¹*Excelsior Underwear Inc.*, 156 NLRB 1236

²The Employer contended, and the Regional Director found, that the omission of some or all of the replacements was due to inadvertence

³The Regional Director found that the Employer furnished whatever addresses had been given it by the replacement employees

⁴The Employer's objection related to the validity of a ballot purportedly mismarked.

continued omission of the names and addresses of six eligible voters, was furnished to the Regional Director at a time which permitted its utilization in the Union's informational campaign for only the 6 days preceding the election. Had the entire list been furnished on July 24, the date set by the Regional Director for its submission pursuant to the *Excelsior* rule, the list would have been available for use during a period of some 3 weeks.

Nor can we conclude, as we have in other cases,⁵ that the Employer's failure to provide a complete and timely list is excused on the basis that the Employer provided the Regional Director with all the information it had available. For here, there can be no question that the Employer could have furnished the names and addresses of the strikers on the original list, since it gave almost all of them promptly on a supplemental list when requested by the Regional Director. And we cannot accept the Employer's claim of inadvertence to explain away its total failure to provide the names and addresses of the 5 replacements, who constituted one-fifth of the complement working during the strike.

Accordingly, we shall sustain the Union's

objections 1 through 4, and we shall set aside the election herein and direct the holding of a new one.⁶

ORDER

It is hereby ordered that the election conducted herein on August 14, 1968, among the employees of Custom Catering, Inc., d/b/a Blue Onion, at its Las Vegas, Nevada, lunch counter and drive-in restaurant be, and it hereby is, set aside.

[Text of Direction of Second Election⁷ omitted from publication.]

⁵*Telonic Instruments, a Division of Telonic Industries, Inc.*, 173 NLRB No 87, *Valley Die Cast Corporation*, 160 NLRB 1881

⁶Our decision makes it unnecessary to dispose of certain other issues raised in the Request for Review.

⁷A revised election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236