Ponce Television Corporation (WRIK-TV-Channel 7) ***and*** **Asociacion Puertorriquena De Artistas Y Tecnicos Del Espectaculo, Inc., Petitioner.** Case 24-RC-4165

July 19, 1971

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

Pursuant to a Stipulation for Certification Upon Consent Election executed on October 5, 1970, an election by secret ballot was conducted in the above-entitled matter on November 13, 1970, under the direction and supervision of the Regional Director for Region 24, among the employees in the stipulated unit. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 62 eligible voters, 17 cast ballots for, and 42 against, the Petitioner, and there were 10 challenged ballots.[1] The challenged ballots were not sufficient in number to affect the results of the election. Thereafter, on November 17, 1970, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on February 2, 1971, issued and duly served on the parties his Report and Recommendation on Objections, in which he found the objections were without merit and recommended that they be overruled. Thereafter, the Petitioner filed timely exceptions to the Regional Director's report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case 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 Petitioner is a labor organization claiming 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 Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. As stipulated by the parties, the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All studio and transmitter technicians, maintenance employees and actors and actresses employed by the Employer at its facilities in San Juan and Ponce, P.R., including all announcers, narrators, newscasters, graphic artists, scenery department employees, stage hands, prop crews, musical and sound effects technicians, make-up artists, messengers, news film photographers and film editors; but excluding all other employees, including musicians, singers, dancers, office clerical employees, guards and supervisors as defined in the Act.

5. Petitioner's Objections 3 and 4 concern the eligibility of five antenna installers and a group of actors and actresses on the Rikalocuras program who Petitioner contended were in the unit and who were omitted from the eligibility list submitted by the Employer on October 13, 1970. Relying on the Petitioner's failure to protest the omission of the antenna installers from the list prior to the election, the Regional Director, without reaching the issue of their eligibility, concluded that the Petitioner was estopped from raising the issue after the election. With respect to the actors and actresses, the Employer omitted the names of approximately 25 entertainers on the Rikalocuras program from the eligibility list, 14 of whom it subsequently agreed were eligible voters. The Regional Director found that a genuine dispute existed between the parties about the eligibility of these employees and concluded that, in light of this dispute, mere exclusion of these employees from the list did not constitute grounds for setting aside the election. We do not agree.[2]

In essence, Petitioner's Objections 3 and 4 place the issue of the Employer's substantial compliance with our *Excelsior* rule before us for consideration.[3] The facts in this case clearly reveal that when the Employer omitted the names of 14 eligible actors and actresses from the *Excelsior* list, it omitted 22 percent of the electorate. If the antenna installers were also eligible voters, this ratio would climb to a striking 30 percent. The only reason advanced for the Employer's failure to supply a complete list of names with respect to the actors and actresses is that the Employer contested the eligiblity of certain employees on the Rikalocuras program. However, there appears to be no basis for the exclusion of all actors and actresses in view of their specific inclusion in the unit agreed on

[1] It appears that the "approximate number of eligible voters" reflected on the tally of ballots is not accurate. It does not reflect the number of voters who cast ballots, nor does it appear to include the voters who were eligible to vote, but were omitted from the eligibility list.

[2] We agree, however, with the Regional Director's findings, conclusions, and recommendations with respect to Petitioner's Objections 2, 5, 6, 7, and 8 and accordingly adopt them. Moreover, in the absence of exceptions, we adopt, *pro forma*, the Regional Director's findings, conclusions, and recommendations with respect to Petitioner's Objection 1.

[3] *Excelsior Underwear Inc.*, 156 NLRB 1236.

by the parties as appropriate in the Stipulation for Certification Upon Consent Election agreement. In *Excelsior* we stated that one purpose of the requirement that the employer submit a list containing the names and addresses of all eligible employees was that:

> . . . bona fide disputes between [the] employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.[4]

It would appear that the instant case particularly exemplifies that kind of situation contemplated by the Board's *Excelsior* decision. Although it is not Board policy to apply the *Excelsior* rule mechanistically,[5] neither is it our policy to vest the Employer with unlimited discretion with respect to the content of the eligibility list. The rule's value as a means of insuring a fair and free election lies in its simplicity and ease of administration. For this reason, we need look only to whether or not, under the circumstances of a particular case, the Employer has substantially complied with its *Excelsior* obligations.[6] As we recently noted, the rule imposes a simple duty on employers which can be satisfied by the application of a reasonable amount of diligence.[7] We do not find that the Employer here exercised such diligence. Rather, it appears that the Employer has willfully refused to meet its *Excelsior* duty in order to support its position with regard to the actors and actresses on the Rikalocuras program. If the Employer wished to contest the eligibility of these employees it could have indicated its intention to challenge them when they appeared to cast ballots at the polls. Here, however, the Employer in effect arrogated to itself the Board's powers with regard to eligibility determinations in representation proceedings. Such usurpation of the Board's authority to make these determinations interferes with our orderly election processes.[8] Under all the circumstances present herein, and in view of the omission of approximately 22 percent of the electorate from the eligibility list, we find that the Employer has failed to substantially comply with our *Excelsior* requirements.[9] Accordingly, we shall sustain Petitioner's Objections 3 and 4 and set aside the election and direct a new election.

ORDER

It is hereby ordered that the election of November 13, 1970, among the unit of employees hereinbefore set out, be, and it hereby is, set aside.

[Direction of Second Election[10] omitted from publication]

[4] *Excelsior Underwear Inc., supra* at 1243; *see also Murphy Bonded Warehouse, Inc.*, 180 NLRB No. 29; *Rite-Care Poultry Co.*, 185 NLRB No. 10.

[5] *Telonic Instruments, a Division of Telonic Industries, Inc.*, 173 NLRB 588; *Program Aids Company, Inc.*, 163 NLRB 145.

[6] *Pacific Gamble Robinson Co /Omaha Branch d/b/a Gamble Robinson Co.*, 180 NLRB No. 84.

[7] *Sonfarrel, Inc.*, 188 NLRB No. 146.

[8] See *Ace Letter Service Co.*, 187 NLRB No. 79.

[9] Like the Regional Director, we do not reach the issue of the eligibility of the antenna installers. We note, however, our disagreement with his rationale that the Petitioner's failure to raise the issue prior to the election operates as an estoppel on the Petitioner's right to raise the issue in subsequent objections to the election. Cf. *Time-World Corp.*, 151 NLRB 947; *Norris-Thermador Corp.*, 118 NLRB 1341.

[10] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an 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 24 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.