

Thiele Industries, Inc. and United Mine Workers of America, AFL-CIO, CLC, Petitioner. Case 6-RC-11428

July 20, 1998

DECISION, DIRECTION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX,
LIEBMAN, AND BRAME

The National Labor Relations Board has considered determinative challenges and objections to an election held September 26, 1997, and the Acting Regional Director's report recommending disposition of the challenged ballots and the hearing officer's report recommending disposition of the objections. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 32 for and 30 against the Petitioner, with 4 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and adopts the Acting Regional Director's findings and recommendations regarding the challenged ballots¹ and the hearing officer's findings and recommendations regarding the Employer's objections to the election.²

The Employer excepts to the hearing officer's recommendation that its Objection 10, in which it is alleged that the election was flawed because probationary employees were improperly excluded from the voting list, should be overruled. Because there is no evidence that the Employer deliberately omitted the name of any employee that it believed to be eligible, we do

¹ We agree with the Acting Regional Director, for the reasons stated by him, that the irregularly marked ballot (in which an "X" was placed in the "YES" box, a diagonal line was placed in the "NO" box, and the word "YES" above the "YES" box was circled) should be counted as a vote in favor of the Petitioner. See *Mediplex of Connecticut*, 319 NLRB 281, 300 (1995) (valid "NO" vote where, although "X"s were placed in both boxes, "X" in "YES" box was covered by smudges indicating an attempted erasure with an inadequate eraser); *Brooks Bros.*, 316 NLRB 176 (1995) (valid "NO" vote where, although "X"s were placed in both boxes, voter effectively and clearly obliterated "X" in "YES" box by scratching over it with additional pencil markings). We have attached to this Decision that portion of the Acting Regional Director's report that addresses this issue.

² The Employer excepts to the hearing officer's failure to consider its objections "as a whole" and contends that "the cumulative effect of the [alleged objectionable] conduct affected the results of the election" and requires that the election be set aside. We find this exception without merit. We have considered the objections cumulatively and find that they do not warrant setting aside the election.

In adopting the hearing officer's recommendation to overrule Employer's Objection 7, in which it is alleged that the Union told employees that they could not come to preelection union meetings unless they had previously signed union authorization cards, we rely solely on her finding that a union's conditioning of employees' attendance at preelection union meetings on their signing of authorization cards is not objectionable. See, e.g., *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1345 (9th Cir. 1987).

not agree with the hearing officer that the Employer has engaged in "misconduct." However, where, as here, the Union has won the election, we agree with the hearing officer that the Employer is foreclosed from filing an objection based solely on its failure, even if inadvertent, to comply fully with its obligation under the *Excelsior* rule to include all eligible voters on the *Excelsior* list.

We agree with Member Brame that employees have a Section 7 right to make a "fully-informed" choice in an election, and that the purpose of the *Excelsior* rule is to protect that right. However, we cannot agree with his contention that our decision with regard to Objection 10 is at odds with that purpose. The *Excelsior* rule furthers the interest in "an informed employee electorate" by "allowing unions the right of access to employees that management already possesses," *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969), thereby helping to ensure that employees are able to hear not just the employer's point of view but also the union's arguments in favor of unionization. Where, however, a union wins an election notwithstanding the employer's failure to provide it with an accurate *Excelsior* list, the union has obviously managed to communicate its message to employees notwithstanding the employer's omission. For an employer to argue that its employees' vote to be represented by a union should not be allowed to stand because the employees did not have an adequate opportunity to receive from the union information about why they should vote for the union seems to us to be the height of silliness, and we are hard-pressed to understand why our colleague would take such an objection seriously.

DIRECTION

It is directed that the Regional Director for Region 6 shall overrule the challenge to the irregularly marked ballot and that this ballot be counted as a vote in favor of the Petitioner. It is further ordered that within 10 days of this Decision the Regional Director for Region 6 shall open and count the ballot of John Claycomb, and thereafter prepare and cause to be served on the parties a revised tally of ballots. If Claycomb's ballot is in favor of the Petitioner, the Regional Director for Region 6 is directed to certify the Petitioner as the exclusive collective-bargaining representative of the unit employees. If Claycomb's ballot is against the Petitioner, the Regional Director for Region 6 is directed to take further appropriate action not inconsistent with this Decision.

ORDER

It is ordered that this matter is referred to the Regional Director for Region 6 for further processing.

CHAIRMAN GOULD, concurring.

I join my colleagues in adopting the Acting Regional Director's findings and recommendations regarding the challenged ballots¹ and the hearing officer's findings and recommendations regarding the Employer's objections.² I write separately with regard to Objection 10. The Employer, in Objection 10, alleges that the election was flawed because the names of two probationary employees were "improperly excluded from the voting list." I agree with my colleagues in the majority and the hearing officer that the Employer cannot object to its own conduct and, on that basis, adopt the hearing officer's recommendation to overrule the objection.

The purpose of the Board's *Excelsior* rule is to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.³ Under *Excelsior*, however, the employer has the duty to prepare a complete and accurate list of eligible voters. The analogous situation is the Board's requirements for the posting of election notices. To further the same statutory goals as the *Excelsior* rule and to promote clarity and uniformity in election procedures, the Board's rules require that employers shall post copies of the Board's official notice of election in conspicuous places for at least 3 full working days prior to the election and that the failure to post such a notice shall be grounds for setting aside the election upon the timely filing of objections.⁴ The rule further provides, however, that a "party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting."⁵ The same estoppel principle is applicable under the *Excelsior* rule. A party should not be able to assert its own failure to

¹With respect to the "irregularly marked ballot," I note that the decision to count this ballot as a vote in favor of the Petitioner is consistent with my dissenting opinion in *Bishop Mugavero Center*, 322 NLRB 209 (1996). See also *TCI West, Inc. v. NLRB*, No. 97-70135 (9th Cir. 1998), denying enf. to *TCI West, Inc.*, 322 NLRB 928 (1997), in which the court of appeals, in agreement with my dissenting opinion in the underlying representation case, found that the voter clearly intended to cast a "No" vote where the ballot was marked with one incomplete line in the "Yes" box and a dark, obviously emphasized, complete "X" in the "No" box.

²In adopting the recommendation to overrule the Employer's Objection 2, alleging that the Union abused Board processes by filing a frivolous charge on behalf of employee John Claycomb alleging that he was terminated because of his union activity, I agree with the hearing officer's conclusion that since the charge was filed prior to the critical period, this conduct cannot be the basis for overturning the election. Accordingly, I find it unnecessary to pass on the remainder of her rationale.

³*Excelsior Underwear*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB 359, 360-361 (1994).

⁴Sec. 103.20 NLRB Rules and Regulations and Statements of Procedure.

⁵Sec. 103.20(c).

meet its obligation as a basis for setting aside the election.

Finally, evidence of whether or not the omissions were "deliberate" is not relevant to resolving an objection to an *Excelsior* list. Under the Board's decision in *Excelsior*, "[e]vidence of bad faith and actual prejudice is unnecessary because the rule is essentially prophylactic."⁶

MEMBER BRAME, concurring in the result.

I agree with my colleagues' disposition of the objections to the election and challenged ballots.¹ As to Employer's Objection 10, I also agree with my colleagues that there is no evidence that the Employer engaged in "misconduct" by deliberately omitting the names of employees Davison and Yuhás from the *Excelsior* list. I write separately, however, because I disagree with the broad rule which my colleagues announce today to the effect that an employer is uniformly and automatically "foreclosed" or estopped from filing any objection to an election based on its own inadvertent failure to include the names of all eligible voters on the *Excelsior* list. As explained in *Excelsior Underwear*, 156 NLRB 1236, 1244 (1966), in the context of a Board-conducted representation election, "an employee exercises this [Section 7] right [to participate in or refrain from participating in union activity] by voting for or against union representation." Under the view of my colleagues, however, even if a substantial number of employees are omitted from the *Excelsior* list, and even if they fail to receive full information concerning the election issues, the election will not be set aside. In my view, the majority, by understandably seeking to ensure that a party does not benefit from its own mistake, undermines the very purpose of the *Excelsior* rule—to protect the Section 7 rights of employees to make a free and fully informed choice in an election—by foreclosing an objection to an election based on the breach of the *Excelsior* rule. The fact that the employer (through inadvertence) is responsible for the omission should be insufficient to defeat the employees' interest in receiving the information. The inadvertent error of the employer should not result in harm to employee interests.

I also reject my colleagues' assertion that the purpose of the *Excelsior* rule—to protect the Section 7 right of employees to make a free and fully informed

⁶*Thrifty Auto Parts*, 295 NLRB 1118 (1989).

¹In adopting the Acting Regional Director's recommendation to overrule the challenge to the irregularly marked ballot, I rely specifically on the fact that other markings on this double-marked ballot, i.e., the circle around the word "yes," indicate clearly the voter's intent to vote for the Petitioner. Accordingly, I find it unnecessary to pass on the Board's decision in *Bishop Mugavero Center*, 322 NLRB 209 (1996), a case discussed by the Acting Regional Director, because in that case, unlike here, there were no additional marks on the double-marked ballot.

choice in an election—is not at odds with their decision today. In this regard, I am not persuaded by my colleagues' argument that a union victory in an election somehow vindicates the Section 7 right of all unit employees, even those omitted from the *Excelsior* list, to make a free and fully-informed choice in the election.² If it be, in my colleagues' words, "the height of silliness" to reject such flawed logic, so be it.

Contrary to my colleagues, I believe that an effective protection of the Section 7 rights of employees requires the Board to investigate all objections based on an inadvertent breach of the *Excelsior* rule, even when the objection is based on the objecting party's own failure to supply a complete voter list. In such circumstances, the Board's investigation should be directed to whether eligible voters were prejudiced by the failure to adhere to the *Excelsior* rule and whether that prejudice could have affected the results of the election. Applying this analysis here, I find that the purposes of the Board's *Excelsior* rule were satisfied here because both Davison and Yuhás did, in fact, vote in the election, and there is no assertion by either the Employer or the Petitioner that these employees were not fully informed about the election issues when they voted. For these reasons, I would find that the election was not "flawed" as the Employer contends and would therefore overrule the Employer's Objection 10.

²In this regard, I am unwilling to make the assumption, which my colleagues have apparently made, that the more employees learn about a union, the more likely they are to vote for it in an election. This certainly does not hold true in the political arena, and I am therefore wary of applying it here. There may be cases, for example, where employees who were omitted from the *Excelsior* list, and who did not vote in the election, might have been prompted to vote against the union if they had received and evaluated for themselves the full union message. Also, employees who were omitted from the *Excelsior* list, and who did vote in the election, might have voted against the union if they had had the opportunity to evaluate more fully the union's message. In addition, receipt of the union's materials may have stimulated inquiry and questioning which could have altered intra-employee debates. The Board should focus on employee choice, and it is for the Board to determine whether the Sec. 7 right of employees to make a fully informed choice in an election has been so impaired as to affect the result of the election. By their decision today, my colleagues have created an unnecessarily rigid presumption and have effectively foreclosed the Board from making such a determination.

APPENDIX

The Irregularly Marked Challenged Ballot

At the election one irregularly marked ballot was challenged by the Employer as a void ballot. Petitioner takes the position that the ballot should be counted as a "yes" vote for the Union.

The disputed ballot was opened in the Office of the National Labor Relations Board, Region 6, on October 15, 1997, and a copy of said ballot is attached hereto as Exhibit A. Both parties were afforded the opportunity to witness the opening of the ballot and examine the ballot.³ The ballot at issue herein was marked in pencil. One diagonal line appears in the "No" box. A boldly marked "X" appears in the "Yes" box. In addition, the word "Yes" is circled, with a portion of the circle marking the "Yes" box.

The Employer contends that since the ballot does contain marks in both the "Yes" and "No" boxes, the clear intent of the voter cannot be ascertained and relies upon the Board's decisions in *Gerber Plastic Co.*, 110 NLRB 269 (1954), and *E-Z Way Towers, Inc.*, 121 NLRB 1175 (1958). The Petitioner, to the contrary, notes the clear "X" in the "Yes" box as well as the circling of the word "Yes" as an unambiguous expression of the voter's intent and argues that the ballot should be counted as a "Yes" vote. *Hydro Conduit Corp.*, 260 NLRB 1352 (1982).

It is the Board's longstanding policy to attempt to give effect to voter intent whenever possible and to count any unambiguous expression of voter intent as expressed on the ballot. *Hydro Conduit*, supra. Illustrative of the Board's application of this policy was its decision in *Abtex Beverage Corp.*, 237 NLRB 1271 (1978), in which the Board concluded that the intent of the voter to cast a "Yes" vote was clear. There, the challenged ballot was marked with an "X" in both boxes, but the "X" in the "No" box was scratched over with circular markings. More recently, in *Bishop Mugavero Center*, 322 NLRB 209 (1996), in somewhat similar but readily distinguishable circumstances, the Board found that the intent of the voter could not be ascertained. There, the ballot had been marked only with an "X" in the "No" box and a diagonal line in the "Yes" box. There, the Board stated, "that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot, the ballot is void." (Emphasis added.)

Applying the above-described principles to the disputed ballot herein, I find that the ballot does clearly and unambiguously express the voter's intent to cast a vote in favor of the Petitioner. In this regard, I note that although the ballot contains markings in both boxes, there is a complete, heavily marked "X" in the Yes box and the word "Yes" is circled. The circling of the word "Yes" resolves any ambiguity as to the voter's intent which is raised by the diagonal line in the "No" box and satisfies the other markings' requirement set forth by the Board in *Bishop Mugavero*.⁴

Accordingly, I find that the irregularly marked challenged ballot is a vote cast in favor of the Petitioner and recommend that a revised tally of ballots be issued to reflect said finding.

³The Petitioner was not present when the ballot was opened.

⁴The cases relied upon by the Employer are factually distinguishable. In *Gerber Plastic*, the disputed ballot was marked with a short diagonal line in the square under the word "Yes" and a heavily marked "X" with a wavy line through the "X" in the square under the word "No." In *E-Z Way Towers*, the disputed ballot was marked with horizontal pencil marks in both the "Yes" and the "No" boxes. In neither case could the voter's intent be ascertained.