

Women in Crisis Counseling & Assistance and United Food and Commercial Workers Union Local 1496, AFL-CIO, Petitioner. Case 19-RC-12587

September 30, 1993

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issue presented here is whether the Regional Director correctly recommended sustaining the Petitioner's objection and setting aside the results of a representation election because the list of 20 eligible employees prepared by the Employer contained 6 inaccurate addresses.¹ The Board has reviewed the record in light of the exceptions and brief and has adopted the Regional Officer's findings and recommendations,² only to the extent consistent with this decision. For reasons which follow, we reverse the Regional Director and find that the Employer substantially complied with the eligibility list requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966).

The relevant facts are not in dispute. On July 20, 1992, the Board's Resident Office received from the Employer and transmitted to the Petitioner an *Excelsior* list with the names and addresses of 20 eligible unit employees. The Employer obtained the addresses from its personnel files. On July 28, the Petitioner notified the Resident Office that six addresses on the list were incorrect because mail sent to those addresses had been returned as "undeliverable" or "addressee unknown." On July 29, the Resident Office informed the Employer about the incorrect addresses. The Employer immediately obtained and submitted corrected addresses to the Resident Office, which relayed them to the Petitioner on that same day. There is no evidence or contention that the original inaccuracies were the result of bad faith or gross negligence by the Employer. The election was conducted on August 4.

The Regional Director found that the 30-percent inaccuracy rate for addresses represented a failure by the Employer to submit an eligibility list which substantially complied with the *Excelsior* requirements. We disagree.

It is well settled that the *Excelsior* rule will not be applied mechanically. See, e.g., *Program Aids Co.*, 163

NLRB 145, 146 (1967). In determining whether an employer has substantially complied with the rule, the Board has consistently viewed the omission of names as more serious than inaccuracies in addresses.³ This distinction derives from a consideration of the policies underlying the *Excelsior* rule. The Board devised that rule for two basic purposes: (1) to insure an informed electorate by affording all parties an equal opportunity to communicate with eligible employees, and (2) to expedite the resolution of questions of representation by minimizing challenges based solely on lack of knowledge as to the voter's identity.⁴

The omission of names from an *Excelsior* list is far more likely to frustrate the Board's purposes than inaccuracies in addresses. A party that is unaware of an employee's name suffers an obvious and pronounced disadvantage in communicating with that person by any means and in assessing prior to the election whether that person is eligible to vote. A party with an employee's name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail. Moreover, the Board's greater tolerance of address inaccuracies in *Excelsior* lists reflects a pragmatic recognition that an employer reasonably should know the names of employees in its current work force but may be less able, without prompt disclosure from the employees themselves, to maintain a completely accurate list of their current addresses.

We do not mean to suggest that inaccurate addresses, standing alone, can never be the basis for finding that an employer has not substantially complied with the *Excelsior* rule.⁵ In addition, the Board may set aside an election because of an insubstantial failure to comply with the *Excelsior* rule if the employer has been grossly negligent or acted in bad faith in providing inaccurate addresses.⁶ In this case, however, we find that the number of address inaccuracies in the *Excelsior* list was not substantial enough to require setting aside the election. Furthermore, as previously noted, it is undisputed that the inaccurate addresses were not the result of gross negligence or bad faith. Accordingly, we shall overrule the Petitioner's Objection 1 and certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have not been cast for United Food and Commercial

¹The National Labor Relations Board has considered the objections in an election held on August 4, 1992, and the Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 16 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the election.

²In the absence of exceptions, the Board adopts, pro forma, the Regional Director's recommendation to overrule the Petitioner's Objections 2-5.

³Contrast *Thrifty Auto Parts*, 295 NLRB 1118 (1989) (omission of 2 of 21 names, 9.5 percent of eligible unit employees, was substantial noncompliance) with *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (inaccuracies in 10 of 42 addresses, 22 percent, and omission of 2 names, 4 percent, was substantial compliance).

⁴See *Excelsior Underwear*, 156 NLRB at 1239-1243.

⁵See *Wasatch Medical Management Services*, 272 NLRB 1180 (1984).

⁶See *Lobster House*, 186 NLRB 148 (1970).

Workers Union Local 1496, AFL-CIO and that it is not the exclusive representative of these bargaining unit employees.

MEMBER DEVANEY, dissenting.

My colleagues reverse the Regional Director and find that the Employer substantially complied with the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966). I disagree.

The facts are not in dispute. Six of 20 addresses provided were incorrect. This constitutes an inaccuracy rate of 30 percent. I agree with the Regional Director that a 30-percent inaccuracy rate is simply too high, even in the absence of an employer's bad faith or gross negligence.

As my colleagues note, the Board has viewed the omission of names and addresses as more serious than inaccuracies in addresses. However, at some point even address inaccuracies can be so substantial as to require setting aside the election. I believe that the limit has been exceeded in this case.

In *Rite-Care Poultry Co.*, 185 NLRB 41 (1970), the Board discussed the rationale for the requirement that addresses be correct. It noted that one of the purposes of *Excelsior* was to remove impediments to commu-

nication. It further noted that address inaccuracy "seriously impairs the ability of labor organizations to locate employees at the home addresses for the purpose of making face-to-face campaign appeals. Clearly, under *Excelsior*, it was contemplated that the addresses should be adequate to enable labor organizations to use the list to make such personal appeals to employees at their homes." *Id.* at 42 fn. 9. Although the Petitioner in the instant case did eventually obtain the correct addresses a couple of days before the election, prior to that time the Petitioner did not have the opportunity to communicate with 30 percent of the unit employees at their homes. Under such circumstances, I believe that the delay effectively impaired the Petitioner's ability to make personal appeals to unit employees at their homes.

While I recognize that the *Excelsior* rule is not to be applied mechanically, I have not found any case in which the Board has endorsed such a high inaccuracy rate.¹ I see no reason to do so in this case. I would set aside the election.

¹But see *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (22-percent inaccuracy and 4-percent omission constitute substantial compliance with *Excelsior*).