

Wasatch Medical Management Services, Inc., a wholly owned subsidiary of Care Enterprises d/b/a Pajaro/Pajaro West Convalescent Hospital and Margaret Williams, Petitioner and Local 250, Hospital and Institutional Workers' Union, Service Employees International Union, AFL-CIO. Case 32-RD-563

23 November 1984

DECISION AND ORDER DIRECTING HEARING

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered the objection to a decertification election held on 20 March 1984¹ and the Regional Director's report recommending disposition of it. The Board has reviewed the record in light of the Employer's exceptions and supporting brief and adopts the Regional Director's findings and recommendation only to the extent consistent with this decision.

The Regional Director recommended that the Union's objection be sustained, that the election be set aside, and that a second election be directed. We disagree with his recommendation and we shall remand this proceeding to the Regional Director to conduct a hearing on the Union's objection and the Employer's response thereto.

In its sole objection the Union contended that the Employer had supplied the Board and the Union with an *Excelsior* list containing "false and inaccurate addresses for at least 40 employees in the voting unit." In support of its objection the Union stated that 55 names and addresses were "either wrong/number address [sic], moved and/or no longer working [for the Employer]." This fact was ascertained by postal returns and physical home visits." The Union argued that as a result of these inaccuracies it was denied access to 43.3 percent of the employees.

The Regional Director found that the percentage of inaccuracies in the *Excelsior* list in the instant case distinguished it from previous cases in which the Board has refused to set aside election results based on such inaccuracies without evidence of gross negligence or bad faith. The Regional Director observed that in *Lobster House*, 186 NLRB 148 (1970), where the Board refused to set aside an election, approximately 20 percent of the addresses were inaccurate, whereas in the instant case ap-

proximately 43 percent of the names/addresses were inaccurate. He concluded that, since the Board's rationale in establishing the *Excelsior* list requirement was to insure an informed electorate, "the failure of the Employer in the instant case to provide accurate addresses for almost half of the individuals on its *Excelsior* list" was sufficient grounds for setting aside the election. He thus rejected the Employer's defense that the information on the *Excelsior* list was submitted in good faith.

In its exceptions the Employer contends that a hearing was warranted based on its response to the Union's objection. We agree. In *Holladay Corp.*² we declared that where an objecting party submits prima facie evidence that an election was not held under the proper laboratory conditions, the Board will not hesitate to commit the necessary investment of time and money to protect its election processes. The Board is no less committed to protect its election processes with the necessary investment of its resources when a party respondent to election objections supported by prima facie evidence itself submits evidence to raise a material issue of fact.

In addition to its good-faith defense the Employer in the instant case contended that after receipt of the Union's objection it had reexamined the *Excelsior* list which it had submitted to the Board and Union. The Employer maintained that this reexamination yielded the discovery of approximately six typographical errors contained in the *Excelsior* list of 126 names and addresses. The Employer argued that these errors were the result of time constraints in preparing the list and not bad faith on its part. The Employer further maintained that to the best of its knowledge the addresses which it had submitted were in fact accurate.³

As we recently noted in *River Walk Manor Inc.*, 269 NLRB 831 (1984), our 1981 revisions of the Board's rules and procedures pertaining to the disposition of objection to election conduct make clear that proper resolution of substantial and material issues of fact requires a hearing and that an ex parte investigation is not to be substituted therefor. See *Erie Coke & Chemical Co.*, 261 NLRB 25 (1982). There is before us in the instant case a dispute over a material issue of fact. The Union claims that the substantial number of inaccuracies contained in the *Excelsior* list warrants a new election. The Employer maintains that, but for the six

² 266 NLRB 621 (1983).

³ The Employer also argued that the responsibility for inaccuracies that may have resulted from an employee's failure to apprise it of any address changes should not rest with the Employer since it was the Employer's established written policy that employees keep it advised of such changes.

¹ The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows that of 126 eligible voters, 24 cast ballots for and 61 against the Union; there were 5 nondeterminative challenged ballots and 1 void ballot.

typographical errors to which it admits, the list was accurate and has not been proven otherwise. We also note the apparent discrepancy between the Union's assertion in its objection of at least 40 inaccuracies (31 percent) in the *Excelsior* list and its assertion in its argument in support of its objection of a total of 55 inaccuracies (43 percent).⁴

We find that the record before us provides no evidence on which to resolve the factual dispute raised by the parties' contentions or the discrepancy in the Union's own position. Accordingly, we shall remand this proceeding to the Regional Director to arrange a hearing on the Union's objection.

ORDER

It is ordered that the above-captioned matter be remanded to the Regional Director for Region 32.

⁴ Ascertainment of the precise percentage of inaccuracies is necessary to evaluate properly the significance of good or bad faith on the Employer's part or if indeed that issue need be reached.

for the purpose of conducting a hearing on the Union's objection in accordance with the terms of this Decision and that the Regional Director is authorized to issue a notice of hearing.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing pursuant to this Order shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections. Within 10 days from the date of issuance of the report, either party may file with the Board in Washington, D C, eight copies of exceptions. Immediately upon the filing of the exceptions, the parties filing shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.