

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**THE RIDGEWOOD COUNTRY CLUB**

**Employer**

**and**

**Case 22-RC-13161**

**LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 78**

**Petitioner**

***Chevella Brown-Maynor, Esq., for the  
Regional Director  
Sean H. Close, Esq. (Putney, Twombly,  
Hall & Hirson, LLP), of New York,  
New York, for the Employer  
Curtiss T. Jameson, Esq., (Kroll &  
Heineman, LLC, of Iselin,  
New Jersey, for the Petitioner***

**RECOMMENDED DECISION ON OBJECTION**

**ELEANOR MACDONALD, Administrative Law Judge:** Upon a petition filed on September 21, 2010 by Laborers International Union of North America, Local 78, and pursuant to a Stipulated Election Agreement dated October 12, an election was held on October 29, 2010, in the following Unit:<sup>1</sup>

All full-time, regular part-time and seasonal greensmen, mechanics, irrigation technicians, facility and maintenance staff (including mason/carpenters and carpenters) and turfmen employed by the Employer at its Paramus, NJ, facility during the payroll period ending Tuesday, October 5, 2010, but excluding all office clerical employees, temporary employees, casual employees, cart staff employees, restaurant employees, bar staff employees, pool staff employees, golf shop staff employees, tennis staff employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The tally of ballots showed that of approximately 36 eligible voters, 16 cast votes for the Petitioner, 20 votes were cast against the Petitioner and there were no challenged ballots. The Petitioner filed timely objections to conduct affecting the results of the election.

On November 19 the Acting Regional Director issued a Report on Objection and Notice of Hearing in which he found that the Petitioner's Objection raised substantial and material

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<sup>1</sup> All dates herein are in 2010 unless otherwise specified.

issues which could best be resolved on the basis of record testimony at a hearing.

In its Objection the Petitioner contends that it was not provided with a copy of the *Excelsior* list of eligible voters' names and addresses until just a few days before the scheduled election and was therefore not afforded a reasonable opportunity to communicate with all eligible voters prior to the election.<sup>2</sup>

A hearing was held before me in Newark, New Jersey, on December 1, 2010. Based upon the record and my observation of the demeanor of the witness and the Briefs submitted by the Petitioner and the Employer on January 5, 2011, I make the following Recommended Decision.

### Findings of Fact

Only one witness was called at the hearing. The Petitioner called Eli Kent, Director of Organizing for Local 78. Kent headed the Petitioner's organizing effort at Ridgewood, a country club containing a golf course. When the Petitioner filed its representation Petition it believed that the unit of groundskeepers consisted of 27 employees. At the employer's request, the unit was extended to include mechanics, carpenters/masons and irrigation technicians. The expanded unit described in the Stipulated Election Agreement dated October 12, 2010 comprised a total of 36 employees.<sup>3</sup>

The Employer's facility is on Country Club Road, a private road which may be accessed either from Midland Avenue or Paramus Road, both busy thoroughfares. Kent visited the premises of the Employer in January 2010 and spoke with one groundskeeper. After that time, the Union did attempt to enter the Club, believing it was barred from doing so because the Employer had sought an injunction against the Union for placing an inflatable rat outside the Club.

The Union began organizing the groundskeepers in March or April 2010. With two exceptions these employees are monolingual Spanish speakers; they do not speak English. The Union approached the employees on the public road about ½ to ¾ miles from the club entrance. Most days, Kent or a Union organizer named Ortega were on the street attempting to speak to the employees. There were two main activists for the Union among the 27 groundskeepers. The two activists were responsible for communicating with the ground crew on behalf of the Petitioner. Of the 27 groundskeepers, two did not speak Spanish and the activists were not able to communicate with them. Another two of the groundskeepers made it clear that they were not favorable to the Union. One of the ground crew did not want to meet with the Union and his sympathies were not known.

Of the 27 groundskeepers, only 6 work year round. The rest of the ground crew generally works only 8 months of the year.

As a result of organizing efforts by the two activists, the Union met with most of the groundskeepers during the campaign either in a parked car outside the club or outside their homes. The Union had telephone numbers for 24 of the ground crew. The Union did not send mailings during the campaign. Kent believed that it was important to speak to the employees

<sup>2</sup> *Excelsior Underwear*, 156 NLRB 1236 (1966).

<sup>3</sup> The Employer's Brief states that the 9 employees were added on October 7, but there is no evidence in the record before me to support this statement.

personally. He maintained that employees do not vote for a Union based on a flyer; rather, employees vote for the Union based on trust developed with the organizers and activists.

5 Prior to the execution of the Stipulated Election Agreement the Petitioner had not attempted to organize the 9 non-ground crew additional employees. The ground crew does not work side by side with the additional 9 employees and does not interact with them on a regular basis. The Union did not know the names of the added employees and had no information about them. After the election was set, Kent asked the two groundskeeper activists to seek out the 9 additional employees on their non-work time. The Union prepared flyers in English and 10 Polish for these employees and it asked the activists to hand these out. The activists could not reach 4 of these employees because they worked in separate areas. Two of the 9 did not work on a consistent basis; these were Jason Tomko and Marc Muniz. The activists were not able to obtain names or contact numbers for any of the 9 added unit employees.

15 Kent testified that he did not receive the *Excelsior* list on Tuesday, November 19. Instead, the list was faxed to his office about 4:40 pm on Monday October 25. Kent was out of the office and he had not been notified that the list was to be sent that day. Kent saw the list on Tuesday, October 26. The election was held the next Friday.

20 Kent had called Petitioner's attorney on Wednesday or Thursday, (the 20<sup>th</sup> or 21<sup>st</sup>) to say that he had not received the *Excelsior* list.<sup>4</sup> Attorney Jameson represented on the record that if he were called to testify under oath he would state that he made a total of three telephone calls to the Board Agent who had handled the case to ask about the list. On Thursday, October 21 he telephoned Board Agent Eric Pomianowski, who did not answer his telephone; Jameson left 25 a voicemail on Pomianowski's line asking for the list. On Friday Jameson repeated this action and left a voicemail on Pomianowski's telephone asking for the list. On Monday the 25<sup>th</sup> Jameson again telephoned Pomianowski and left a voicemail.<sup>5</sup> In addition, he faxed a letter to Pomianowski on October 25. The letter stated, in part

30 [p]lease allow this letter to follow-up with my messages beginning last week concerning an eligibility list from the Employer. Neither this law firm or Local 78 has received an eligibility list for the election scheduled for October 29, 2010. By my calculations, that list was due to the NLRB no later than Tuesday, October 19<sup>th</sup>. Please forward the eligibility list if you possess same....

35 At the instant hearing, a fax transmission sheet from the Regional Office addressed to Kent at Local 78 was introduced into evidence. The document shows that Pomianowski had attempted to fax the *Excelsior* list to Kent on October 19. The Regional Office fax sheet shows that the receiving line was "busy" and the fax did not go through. The record evidence does not 40 show that any further attempt was made to transmit the list to the Union or to its attorney until October 25.

45 At the hearing, the Employer stated its intention to ask for leave to call Pomianowski. An adjournment for this purpose was denied as Counsel for the Employer was well aware of the issues as set forth in the Region's Report on Objection, and steps should have been taken prior to the hearing to subpoena the Board Agent and the Board's records according to Section

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4 Kent's affidavit, introduced into evidence by the Employer, states that he telephoned Attorney Jameson on or about October 20, 2010.

50 <sup>5</sup> The Employer's Brief erroneously states that Jameson made only two telephone calls to the Board Agent.

102.118 of the Rules and Regulations. Consequently, there is no record evidence as to why the fax to the Union was not successful or why it was not re-transmitted, and there is no record evidence as to the receipt or non-receipt of Jameson's voice mail messages to Pomianowski.

5           The Employer did not issue a subpoena to Jameson so as to obtain his testimony under oath concerning the telephone calls he made to the Region even though such calls were detailed in the Report on Objection. Counsel for the Employer would be aware that Union Counsel would not consent to testify under oath at the hearing without the presence of another attorney. At the hearing, Counsel for the Employer tried without success to persuade Jameson  
10 to testify even though he had not been subpoenaed and was not accompanied by another attorney. Thus, I attach no significance to the fact that Jameson's representations about these telephone calls were not made under oath and subject to cross-examination.

15           Finally, I note that Kent was cross-examined at great length by the Employer at the instant hearing. However, Kent was not cross-examined by the Employer concerning the Union's fax machine. Kent could have been questioned as to whether the Union fax machine was operative on October 19. Thus, there is no evidence in the record to show that any malfunction by the Union's fax machine prevented timely transmission of the eligibility list, or that any other omission by the Union caused the failure to receive the list. The only competent  
20 evidence in the record shows that the Board Agent put the *Excelsior* list in the Region's fax machine and that the fax transmission was not completed. The Region's fax receipt clearly shows that the transmission was not successful.

25           Kent testified that Petitioner had been unable to contact the 9 added unit employees until he obtained the *Excelsior* list. In addition, the list contained the names of the two ground crew employees who did not speak Spanish and with whom the activists were not able to communicate at work. Of these 11 employees not previously contacted by the Union, Petitioner met with 5 employees between receipt of the list and the day of the election.<sup>6</sup> A Union organizer named Vladik Orek visited 4 of the English speaking employees. Kent met with two of the 11  
30 employees. The Union also gave pieces of campaign literature to these five employees.<sup>7</sup>

35           Kent stated that the Union was unable to meet with 6 of the 11 employees it had not contacted prior to receiving the list. With respect to these 6, one of these was listed at an address in New Mexico.<sup>8</sup> Kent went to the home addresses of the other 5 but he was not able to find the employees. At the home of one employee a person answered the door and Kent left his business card with that person.

40           Kent testified that the employer had conducted meetings and distributed literature to the employees at work. Kent thought it best to speak to the employees whom the Union had not yet contacted away from the work environment. Based on his experience, some employees are easier to find at home on the weekends. The Union did not yet have the *Excelsior* list on the

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<sup>6</sup> These were Jasek Kostra, Robert Data, Szczepan Szczes, Franciszek Krason, and a fifth unnamed employee.

45           <sup>7</sup> The Employer's Brief erroneously states that Kent testified that the Union met with 6 of the 11 non-Spanish speaking employees before the election. However, the record is clear that the Union met with only 5 of these employees with whom it had not spoken before receipt of the eligibility list. Indeed, the Employer stated that it was prepared to call 5 employees who would testify that they met with the Union.

50           <sup>8</sup> The Employer's Brief states that the employee was actually in New Mexico at the relevant time but there is no evidence as to the employee's whereabouts in the record.

weekend before the election.

The Union held a pre-election meeting at a restaurant on October 27<sup>th</sup>. Only Spanish-speaking members of the ground crew were invited to this event.

Kent stated that Petitioner was not prevented from contacting the ground crew because of its tardy receipt of the eligibility list. However, the Union was prejudiced by the late receipt of the list as to the 9 employees added to the unit. Kent wanted to visit the employees at their homes but he could not do so until he had their home addresses.

### Analysis

There is no dispute that the eligibility list was timely provided by the Employer to the Regional Office on October 19. The law is clear that, "the duty to send an *Excelsior* list to the parties lies squarely with the Region." *J.P. Phillips, Inc.*, 336 NLRB 1279, 1280 (2001). In *J.P. Phillips* the Board explained that

The *Excelsior* rule is designed 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. The *Excelsior* rule helps achieve this goal of an informed employee electorate by giving unions the right of access to employees that employers already have, thus enabling employees to hear from all parties on the unionization question. ...

[T]he relevant inquiry is whether the delay - however caused - interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation.... (quotation marks and citations omitted)

Section 11302.1 of the NLRB Casehandling Manual (Part Two), Representation Proceedings states that an election "may not be held sooner than 10 days after" the Regional Director has received the *Excelsior* list, but "[t]his provision merely directs that the Board will give the petitioner an opportunity make use of the list for at least 10 days before conducting the election." *Mod Interiors, Inc.* 324 NLRB 164 (1997). Here it is undisputed that Petitioner received the list late on Monday afternoon before a Friday election. Therefore the Union had use of the list for less than 4 full days, that is, less than one-half the time contemplated by the Board's long-established rule.

In a case similar to the instant case where the Petitioner received the eligibility list approximately 6 days late in part due to Regional Office error, the Board sustained the Petitioner's objection and set aside the election. *American Laundry Machinery Division*, 234 NLRB 630 (1978). The Board emphasized the significance of the Regional Office error in the case. The decision highlighted the Petitioner's campaign strategy to rely on meetings with employees rather than on mailing literature; the failure to timely receive the eligibility list prevented the business agent from visiting the employees at home or telephoning them to ask that they attend meetings near their homes.

In *Alcohol and Drug Dependency Services, Inc.*, 326 NLRB 519 (1998), the Board set aside the election where the Union did not receive the eligibility list until 5 days before the election due to Regional Office error. Declining to require the Petitioner to demonstrate "material prejudice" flowing from late receipt of the list, the Board stated that the relevant inquiry was whether the delay interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning

representation. 326 NLRB 520.

5 Even if the Petitioner were required to prove prejudice, I believe that the Union has stated sufficient grounds for its claim that it was prejudiced by its late receipt of the *Excelsior* list. The facts have been clearly established. The Union activists were solely Spanish speaking and the unit originally organized by the Union consisted of 27 groundskeepers of whom only 2 did not speak Spanish. The 9 employees who were added to the unit in the Stipulated Election Agreement on October 12 were not Spanish speaking and did not generally work side by side with the ground crew. Thus, the task of communicating with them about the arguments  
10 concerning representation necessarily fell to Union agents who could speak a language other than Spanish. The Union's strategy was to speak in person and away from the workplace to these 9 employees and to the 2 ground crew who did not speak Spanish. The Petitioner had what it believed to be valid reasons for this strategy; it is not for the Board to question the decisions of the Union on methods of campaigning. The Union agent's experience was that it  
15 was easier to contact some employees on the weekend than during the week. This may account, in part, for the fact that the Union was able to speak to only 5 of the 11 employees it sought to contact after obtaining the eligibility list on the Monday before the election. If the Union had been able to devote the full time contemplated by the Board rule to contacting the 11 employees it might have been able to speak to more of them. The election results were close: a  
20 difference of only three votes out of the 36 cast would have produced a different result.

25 The Employer's Brief urges that the Union should have taken additional measures to obtain the eligibility list. However, I find that the Union made sufficient efforts to obtain the eligibility list from the Regional Office. Petitioner's attorney made three telephone calls to the Board Agent charged with transmitting the list to the Union; he left a voice-mail each time. This was followed by a letter faxed to the Regional Office. Of course, Petitioner would have no way of knowing whether the *Excelsior* list had actually been received by the Region and whether the delay in obtaining the list was caused by the Employer's failure to send it to the Board. The Union reasonably would expect a Board Agent to discharge his duties properly and to send the  
30 list as soon as it was received. The Union would be acting reasonably in expecting that its telephone calls would be returned promptly by a Board Agent who knew that an election was pending within a few days.

35 The Employer's Brief concludes by arguing that a rerun election would be inequitable to the Ridgewood Country Club stating, "The Club did nothing wrong in this case and should not be punished for the Region's error." A rerun election should not be viewed as a punishment. Rather, a rerun election would effectuate the original intent of the *Excelsior* rule in ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.<sup>9</sup>  
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50 <sup>9</sup> I am aware of *Red Carpet Building Maintenance Corp.*, 263 NLRB 1285 (1982), and the fact that it has been cited in certain dissenting opinions. That case does not seem to be regarded as good law.

**Conclusion and Recommendation**

5 Having found that the Objection should be sustained due to the Union’s receipt of the  
*Excelsior* list less than 4 full days before the election, I recommend that the election should be  
set aside and the case be remanded to the Regional Director to schedule a new election.<sup>10</sup>

Dated, Washington, D.C. January 13, 2011

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Eleanor MacDonald  
Administrative Law Judge

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<sup>10</sup> Under the provisions of Sec. 102.69 of the Board’s Rules and Regulations, Exceptions to  
this Recommended Decision may be filed with the Board in Washington, DC within 14 days  
from the date of the issuance. Exceptions must be received by the Board in Washington by  
January 27, 2011.