

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 20

COTTONWOOD HC, INC. d/b/a COTTONWOOD
HEALTHCARE CENTER,

Employer,

and

20-RC-18208

NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST,

Intervenor

SUPPLEMENTAL DECISION REGARDING
INTERVENOR'S OBJECTIONS TO THE ELECTION

Pursuant to a petition filed by National Union of Healthcare Workers (NUHW or Petitioner) on February 2, 2009, I issued a Decision and Direction of Election (Decision) in this matter on February 25.² In accordance with that Decision, a Board agent conducted an election by secret ballot on March 23 at the Employer's 625 Cottonwood Street facility in Woodland, California among the Employer's employees in the following appropriate collective-bargaining unit:

All full-time and regular part-time housekeeping, maintenance, laundry, dietary, janitor, nursing assistant, certified nurses assistant, restorative aide, cook, relief/prep cook, and licensed vocational nurse; excluding office clerical employees, guards, and supervisors as defined in the Act.

Upon the conclusion of the election, the Board agent served a copy of the official *Tally of Ballots* on the parties. The *Tally* showed the following results:

¹ Also referred to as Board.

² This and all subsequent dates refer to 2011 unless otherwise noted.

Approximate number of eligible voters	74
Void ballots.....	..1
Votes cast for NUHW	54
Votes cast for SEIU	1
Votes cast against participating labor organization(s).....	0
Valid votes counted.....	55
Challenged ballots.....	..0
Valid Votes counted plus challenged ballots.....	55

The Objections:

On March 30, Service Employees International Union, United Healthcare Workers-West (SEIU or Intervenor) timely filed *Objections to the Conduct of the Election* (Objections), a copy of which was served on the Employer and NUHW.³ The Objections read verbatim as follows:

1. The employer, by its agents, placed the names of persons not eligible to vote on the *Excelsior* List.
2. The employer, by its agents, failed to place names of persons or addresses of persons eligible to vote on the *Excelsior* list.
3. The employer, by its agents, failed to timely deliver and transmit the *Excelsior* list to the Region and parties.
4. The employer, by its agents, provided support and assistance to the Petitioner, including but not limited to unlawfully recognizing Petitioner for a period of year and providing access to Petitioner's agents.
5. The employer, by its agents, created confusion as to who the collective bargaining representative was, because it unlawfully recognized Petitioner for a period of one year.
6. The employer, by its agents, discriminatorily and disparately enforced its access policy by limiting access to the Intervenor but by providing access to Petitioner.

For the reasons that follow, I have concluded that the Objections raise no substantial or material issue of fact that would warrant either a hearing or setting aside the election, and I overrule them in their entirety.

³ Only conduct which occurred during the “critical period” (between the February 2, 2009 filing date of the petition and the March 23 election date) can form the basis for objectionable conduct. *E.L.C. Electric, Inc.*, 344 NLRB 188, 189, n. 6 (2005), citing *Ideal Electric Co.*, 134 NLRB 1275 (1961). The unusually lengthy critical period in this matter resulted from the investigation and resolution of blocking charges that alleged pre- and post-petition misconduct.

Objections 1 through 6:

Section 102.69(a) of the Board's *Rules and Regulations* requires, inter alia, that, "Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections." Section 11392.6 of the Board's *Casehandling Manual, Part Two, Representation Proceedings* (Manual) provides that absent receipt of timely evidence that establishes a prima facie case in support of objections, the Regional Director need not investigate them. Further, the Manual instructs that unless the objecting party has specifically identified witnesses who it claims would provide direct evidence to substantiate its allegations, the Regional Director should overrule them without further ado.

To comply with its obligation, SEIU had to submit evidence in support of its Objections by April 6. It failed to do so, and neither did it seek or receive an extension of time for such a submission. In short, SEIU identified no potential witnesses and made no offer of proof, timely or otherwise. Consequently, I have before me only SEIU's above-noted assertions. In these circumstances, SEIU has failed to establish the existence of any issue that would warrant further investigation, much less a hearing. Accordingly, I overrule SEIU's Objections.

Objection 3: The Employer failed to timely deliver and transmit the *Excelsior* list to the Region and parties.

Unlike Objections 1, 2, 4, 5 and 6, the Region possesses first-hand evidence of the timing of the Employer's delivery, and the Region's dissemination to the other parties, of the *Excelsior* list. Accordingly, I am able to consider the merits of Objection 3 in spite of SEIU's failure to fulfill its obligation to submit supporting evidence, and have done so in spite of the above-noted suggestion in the Manual that I need not.

In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board promulgated a rule requiring that employers file with the regional director an election eligibility list containing the names and addresses of all eligible voters within seven days of the approval of a consent election agreement or direction of election, unless the regional director granted an extension of time. See also *NLRB v. Wyman-Gordon Co*, 394 U.S. 759 (1969). The Board's regional office is responsible for

furnishing the list to the other parties on the ballot as soon as the list is received. *Mod Interiors*, 324 NLRB 164, 165 (1997).⁴ It is vital that the information in the *Excelsior* list be timely, complete and accurate so that all parties may have access to all eligible voters. The relevant inquiry in cases where there has been a delay in providing the *Excelsior* list is whether the delay interfered with the purposes behind the *Excelsior* rule, i.e., to ensure that “all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.” *Mod Interiors, Inc.*, supra; citing *North Macon Health Care Facility*, 315 NLRB 359, (1994).

To ensure that the important statutory goal of having an “informed employee electorate” is met, the Board generally requires that parties to an election receive the *Excelsior* list at least ten days before the election commences. An employer’s failure to comply fully with the *Excelsior* rule, however, does not constitute an objection that per se requires that an election be set aside. The Board has repeatedly stated that the *Excelsior* rule is not to be “mechanically applied.”⁵ Whether the employer acted in good faith and in substantial compliance with the *Excelsior* rule is “not the relevant inquiry;” rather, it is whether “the purposes behind the *Excelsior* requirement of providing employees with a full opportunity to be informed of the arguments concerning representation have been frustrated.”⁶ *Bon Appétit Management Co.*, supra; citing *Special Citizens Futures Unlimited*, 331 NLRB 160 (2000). To judge whether that goal has been achieved, the Board considers the accuracy of the information on the list, the closeness of the election, the number of facilities involved, and when the election parties received the list.⁷

Pursuant to Section 11312.1 of the Manual and the rule set forth in *Excelsior Underwear*, supra, I directed the Employer to submit to the Regional Office an election eligibility list containing the

⁴ Section 11302.1 of the Manual indicates that an election “may not be held sooner than 10 days after” the Regional Director has received the *Excelsior* list.

⁵ See e.g., *Bon Appétit Management Co.*, 334 NLRB 1042 (2001); *Woodman’s Food Markets*, 332 NLRB 503 (2000); *Telonic Instruments*, 173 NLRB 588, 589 (1968).

⁶ Compare *Woodman’s Food Markets*, supra, (“substantial compliance” relevant when names of eligible voters are omitted from *Excelsior* list).

⁷ See e.g., *Bon Appétit Management Co.*, supra, (employer deemed to have substantially complied by submitting corrected *Excelsior* list one day late and when union received it nine days before election) *Special Citizens Futures Unlimited*, supra, (Board found noncompliance in close election involving three facilities when employer delayed in submitting corrected list and union’s organizing team never received it); *Drug Dependency Services*, 326 NLRB 519, 520 (1998) (election set aside when both employer and regional office to blame for union’s receipt of list mere five days before election, where the employees were dispersed over five locations, and the vote tally was “extremely close”); *Mod Interiors*, supra (election set aside due to union’s receipt of corrected list only eight days in advance of election); *Taylor Publishing Co.*, 167 NLRB 228 (1967)(union’s receipt of accurate list nine days in advance of the election considered substantial compliance).

full names and addresses of all eligible voters on or before March 4, within seven days from the issuance of my Decision.⁸ The Employer, however, did not provide the Region with the *Excelsior* list until March 10, after the Region inquired as to its whereabouts. Within two hours from receipt, the Region distributed the list via fax and/or email simultaneously to Petitioner and Intervenor. As a result, both participating unions received the eligibility list thirteen days before the election.

The Employer thus deviated from the *Excelsior* requirements by providing the eligibility list to the Region six days after it was originally due, but nonetheless 13 days before the election. The Region immediately disseminated the list to the other parties and there isn't any claim or evidence that there was an error in transmission, that the list was inaccurate or incomplete, or that one party received the list appreciably earlier than the other.⁹ In these circumstances, the Employer's delivery, and the parties' receipt, of the list 13 days in advance of the election cannot reasonably be construed as having interfered with the employees' ability to familiarize themselves with the parties and their respective campaign arguments.

I am aware of only one case in which the Board invalidated an election based substantially on an employer's noncompliance with the seven-day *Excelsior* requirement when the other election party received an eligibility list at least ten days prior to the election. In *Special Citizens Futures Unlimited*, supra, the company submitted its initial list after office hours on the date due. The Regional Office relayed the incomplete list to the union eleven days before the election, and a corrected list precisely ten days in advance. The Board set aside the close election¹⁰ on the basis that:

Although the Employer submitted a revised *Excelsior* list the next business day, thereby curing the deficiencies in the first list, neither the Employer nor the Regional Office advised the Petitioner's counsel that the second list, which he received 4 days late, was not a duplicate of the first list, but rather a revised list meant to supersede it. Unaware of the disparity between the two lists, the Petitioner's counsel never forwarded the complete and revised list, which omitted one name and added four new names to the original list, to the Petitioner's organizing staff for use in its election

⁸ Section 11312.1 of the Manual, citing the Board's *Excelsior* decision, informs that the employer submit the list within 7 days after approval an election agreement or issuance of a direction of election and that "the list must be received by the Regional Director at least 10 days before the election."

⁹ Compare *J. P. Philips Inc.*, 336 NLRB 1279 (2001)(Board set aside election when the petitioner received a full *Excelsior* list 7 and 10 days, respectively, before the two unions that constituted the intervenor.)

¹⁰ The tally of ballots showed nine votes for and 16 against the union, with four challenged ballots.

campaign. We further note that the unit employees worked at three different facilities. Under these circumstances, the Petitioner here was at an obvious disadvantage in communicating with the unit employees.

The critical factors present in *Special Citizens* are not in play in the instant matter. Here, the unions received a complete and accurate list 13 days in advance of the election, the employees worked at a single facility, and NUHW's margin of victory was enormous. In these circumstances, I conclude that the Employer's six-day delay in delivering the Excelsior list did not compromise the important goal of ensuring that all employees had an opportunity to become "fully informed about the arguments concerning representation." *Mod Interiors; North Macon Health Care Facility*, supra.

Summary:

I conclude that the Intervenor has failed to raise any material and substantial issue of fact that would warrant a hearing over its Objections, much less require invalidating the election results. For the reasons set forth above, I overrule Intervenor's Objections in their entirety, and, absent the Board's grant of a Request for Review, shall issue a Certification of Representative designating the Petitioner as the Section 9(a) representative of the Employer's unit employees.

DATED AT San Francisco, California this 12th day of May 2011.¹¹

/s/ J Frankl

Joseph F. Frankl, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

¹¹ Under the provisions of Section 102.69(c)(4) of the Board's Rules and Regulations, a Request for Review may be filed with the Board in Washington, D.C. within 14 days. The Request for Review thus must be received by the Board by May 26, 2011. Under the provisions of Section 102.69(g)(3) of the Board's Rules and Regulations, documentary evidence, including declarations, which a party has timely submitted to the Regional Director in support of its objections and which is not included in the Supplemental Decision, is not part of the record before the Board unless appended to the Request for Review or opposition thereto which the party files with the Board. Failure to append copies of the evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude the party from relying on that evidence in any subsequent related unfair labor practice proceeding.

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Cottonwood Healthcare	Employer
and	
National Union of Healthcare Workers	Petitioner
and	
SEIU United Healthcare Workers - West	Union

CASE: 20-RC-18208

DATE MAILED: May 12, 2011

AFFIDAVIT OF SERVICE OF Supplemental Decision Regarding Intervenor's Objections to the Election

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 12 th day of May,, 2011.	DESIGNATED AGENT /s/ Donna C. Gentry NATIONAL LABOR RELATIONS BOARD
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