

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD, REGION 20

COTTONWOOD HEALTHCARE,

Case No. 20-RC-18208

Employer,

and

NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST,

Incumbent Union.

**RESPONSE TO EXCEPTIONS TO
THE REGIONAL DIRECTOR'S
SUPPLEMENTAL DECISION
REGARDING INTERVENOR'S
OBJECTIONS TO THE ELECTION**

WOODLAND SKILLED NURSING CENTER,

Case No. 20-RC-18211

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NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

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SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST,

Incumbent Union.

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I. INTRODUCTION

In February of 2009, *over two years ago*, workers at three facilities, Cottonwood Healthcare, Woodland Skilled Nursing Center and Linda Mar Rehab Center filed separate petitions seeking to join a labor organization of their choice, the National Union of Healthcare Workers (NUHW). Over two years after filing their Petitions, employees at both facilities voted overwhelmingly for NUHW over SEIU (54-1 at Cottonwood, 40-4 at Woodland). At each facility, employees are still awaiting certification.

The Intervenor filed Exceptions to the Regional Director's dismissal of Objections in these two separate elections. The two same Exceptions were made concerning each election and accordingly, are addressed in a combined Response. The first exception argues that although the objecting party filed no offer of proof, no request for extension, and made no effort to provide any evidentiary or legal support for its objections, nonetheless, the Region should have independently considered evidence in prior *remediated* ULPs. This exception is frivolous, as the Regional Director committed no error in dismissing these unsupported Objections, and in any case, the failure to consider evidence of remediated unfair labor practices is neither erroneous nor prejudicial. The second exception argues that the Regional Director erroneously found that a short delay in the employer's transmission of the Excelsior list did not compromise Excelsior's goals of ensuring that all unit employees had an opportunity to be fully informed of the election. The Regional Director found that here, the employer's six-day delay in delivering the Excelsior list to both unions was not objectionable conduct, noting "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." Reports at 6.

II. BACKGROUND

From day one, the Intervenor has done all it can to prevent these workers from certification. Initially, soon after the Petitions were filed, the Intervenor filed several types of unfair labor practice charges. While one set of charges did relate to the employer's initial misunderstanding of the law relating to card check, and initial recognition, that initial recognition was short-lived, as it was withdrawn by the employer almost immediately after the SEIU UHW filed its charges alleging unlawful recognition (e.g., Case Nos. 20-CB-13281, filed on 2/13/2009). The only reason these charges were not resolved for some time was because the Region placed the investigation of these charges in abeyance pending the resolution of the Intervenor's "global blocking charges" which the Board allowed to block the processing of this petition, and virtually all others filed by NUHW, for well over one year. Accordingly, the Intervenor is completely incorrect and misleads this Board in asserting that the Employer recognized NUHW "for a period of one year." See Exceptions, at 2. To this day, the employer continues to recognize the Intervenor. The NUHW enjoyed neither long-standing recognition nor enhanced access, and the Intervenor presented no evidence of the same.

These Exceptions have no merit and have been made solely to achieve further delay and frustrate the stated desires of the employees at Cottonwood and Woodland. It bears mention that the Intervenor's underlying Objections (for which it filed no offer of proof) and even the Intervenor's issues in the pre-election hearing (demanding to combine historically separate units that it represented and refusing to stipulate to commerce) were also without merit. However, in total, these allegations have served to deny certification of representative to employees at these two healthcare facilities for what will soon be two and one half years. With this in mind, we respectfully ask this Board to promptly dismiss these Exceptions so that these employees may

finally have some semblance of labor stability and resume the business of forming a functional and effective collective bargaining relationship.

III. ARGUMENT

To warrant hearing on its Objections, the Intervenor must meet a formidable burden. “It is well settled that [r]epresentation elections are not lightly set aside. . . . Thus, “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *In re Safeway, Inc.*, 328 NLRB 525, 525 (2002) (internal citations and quotation marks omitted). “The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal citations and quotation marks omitted). “[I]n order to raise “substantial and material factual issues,” the objecting party must do more than disagree with the Regional Director’s findings and conclusions.” *NLRB v. McFarland*, 572 F.2d 256, 261 (9th Cir. 1978). “To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director.” *Ibid.*, citing to *NLRB v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 868-69 (8th Cir. 1972). With these standards in mind, we turn to the Exceptions asserted in this case.

A. It Was Not Error to Dismiss Objections That Were Wholly Unsupported by Any Offer of Proof

The Regional Director correctly states that it has no obligation to independently investigate bare assertions where unsupported by any offer of proof establishing a prima facie case. Report at 3, citing to the Board’s Rules and Regulations, Section 102.69(a), and to the

Board's Casehandling Manual, Part Two, Section 11392.6. Indeed, this is well-established Board law. The Board has required that Objections be supported by affidavits, or at least a listing of witnesses and the testimony each would provide, as a minimum proffer in support of objections to the conduct of an election:

...[E]ven if we were to consider the Employer's objections as raising the issue of misrepresentations by Board agents, we reject the notion that such an unsupported allegation is sufficient, by itself, to trigger an administrative investigation. The Employer must do more than simply raise the specter of Board agent misconduct to fulfill its obligation to submit timely supporting evidence. *The Employer was required to supply the Board with some evidence supporting its allegation, preferably in the form of an affidavit or affidavits. At a minimum, the Employer should have identified witnesses and provided a description of the relevant information they could provide.* It chose to do neither in a timely fashion. The Employer had many ways in which it could support its case, but it could not simply rely on its bare allegations.

The Daily Grind, 337 NLRB 655, 655-56 (2002) (emphasis added). "A party must at least identify its witnesses and provide a description of the evidence the named witnesses could provide." *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (2010), 2010 WL 3446126 (N.L.R.B.) Here, the Exceptions must be denied because the Intervenor provided absolutely no offer of proof whatsoever, and clearly did not meet the minimal threshold of providing an offer of proof that identifies the Intervenor's witnesses and provides a description of the relevant information each witness could provide. Report at 3. The Intervenor did not provide, and still does not provide, sufficient details about its Objections. Exceptions at 1-3. Thus, even the Record before this Board is incomplete. See 102.69(g)(3) of the Board's Rules and Regulations, providing that documentary evidence which was timely submitted but not included in the Regional Director's decisions is not part of the record before this Board unless appended to this

Request For Review. The Regional Director was correct in recommending these objections should be dismissed, and these Exceptions should accordingly be dismissed.

On last related point deserves mention. In order to be objectionable, the underlying evidence must be that which would impede a fair and free election. However, even had the Region considered evidence in the underlying unfair labor practices, such evidence is not before this Board, and in any case, would have shown, at best, that an unfair practice was remediated well before the election, and had no impact on the election at issue here, especially given the margin with which NUHW prevailed in this election.

B. Any Delays in the Transmission of the Excelsior List Did Not Interfere With the Objecting Party's Ability to Become Fully Informed About the Arguments Concerning Representation

The Regional Director's Report fully and thoroughly evaluated whether the employer's delay in transmitting the Excelsior list violated the purposes of Excelsior. As noted, the Regional Director found that here, the employer's six-day delay in delivering the Excelsior list to both unions was not objectionable conduct, noting "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." Reports at 6. Petitioner submits that the Regional Director's legal discussion and analysis is sound and we do not here repeat them.

However, we note that here, the Intervenor *had the same or greater access to communicate with employees than the Petitioner*, the party who prevailed in this election. At its core, the *Excelsior* rule is concerned with a very practical concern, that of making certain that all employees received information from all parties so that the electorate could make an "informed employee choice for or against representation." *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240-1241 (1966). "Second, the Board also perceived an intensely practical necessity for the

new rule. It contrasted the situation of the employer, which is assured of continuing opportunities to present its views respecting unionization to employees to that of a petitioner, ‘whose organizers normally have no right of access to plant premises,’ and therefore has no method by which it can be sure of reaching employees with its arguments in favor of representation, so that some employees might be unaware of them.” *North Macon Health Care Facility*, 315 NLRB 359, 360 (1994) (discussing and citing to *Excelsior*). See also *Excelsior*, *supra*, 156 NLRB 1236, 1241 (“...in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain”).

Turning to the concerns of *Excelsior*, the party *in this election* with the least information and ability to communicate with employees was the Petitioner, not the Intervenor. *Excelsior* involved an initial organizing situation and addressed, in part, an employer’s greater access to communicate with employees than an outside, non-incumbent union organizing a workplace. However, *in this election*, it was Petitioner, and not the employer nor the Incumbent, who won the election. Petitioner additionally observes that *in this election*, the Intervenor remained the Incumbent union representing these employees after they filed their representation petitions. Thus, the Intervenor, and not the Petitioner, had access to the most recent union contact information of all the employees in the bargaining unit, and thus had greater access to communicate with employees in the bargaining unit by all means, than did the Petitioner. Where the Petitioner’s information about the employees was limited to the information contained in the *Excelsior* list, the information the Petitioner possessed was far less than the information SEIU UHW-W obtained from its own members. It cannot be said that the Intervenor was at a disadvantage vis-à-vis the Petitioner in its ability to communicate with its own members *in this bargaining unit*.

IV. CONCLUSION

For the foregoing reasons, the Intervenor's two sets of Exceptions to the Regional Director's Supplemental Decision Regarding Intervenor's Objections to the Election should each be denied in its entirety, and this Board should uphold, in its entirety, the two Supplemental Decisions Regarding Intervenor's Objections to the Election, issued May 12 and 13, 2011, respectively, by Regional Director Joseph F. Frankl, Director of Region 20 of the National Labor Relations Board.

Dated: June 3, 2011

Respectfully submitted,

SIEGEL & LEWITTER

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