

NATIONAL LABOR RELATIONS BOARD

AUTOMATIC FIRE SYSTEMS

Case No. 11-RC-6757

And

LOCAL UNION 669, UNITED ASSOCIATION
OF JOURNEYMEN, APPRENTICES OF THE
PLUMBING AND PIPEFITTING INDUSTRIES
OF THE UNITED STATES AND CANADA,
AFL-CIO

**EMPLOYER'S EXCEPTIONS
TO THE HEARING OFFICER'S
REPORT ON OBJECTIONS AND
RECOMMENDATION TO THE BOARD**

INTRODUCTION

As acknowledged by the hearing officer, this is a case of first impression. Hearing Officer's Report, p. 9. The employer, a small business in Hardeeville, South Carolina, won the election by a unanimous vote of 8 to 0. There were five challenges. The employer had erroneously excluded *Steiny/Daniel*¹ voters from the *Excelsior*² list. The hearing officer found that the employer acted in good faith in excluding these voters.³ During the hearing on the Union's objections, it was stipulated that there were eight potential *Steiny/Daniel* voters. At the hearing, the five challenges were not considered because the Region had deemed them non-determinative and did not submit the challenges to the hearing officer.⁴ Indeed, no records involving the challenges were available at the hearing. The hearing officer erroneously found that as many as four of the challenges could have come from voters on the *Excelsior* list, and that

¹ *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

² *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (N.L.R.B. 1966)

³ Hearing Officer's Report, pp.8- 9. Mr. Holmes testified that he had discussions both with Ms. Moffett, Union counsel, and the Region about the exclusion of *Steiny/Daniel* voters and that there was an agreement that they were not required in this election. Tr. pp. 141, ll. 5 to 146, ll. 17

⁴ This is probably not the best practice where an objection is based upon a claim that voters were improperly excluded from the *Excelsior* list. In such a case, the issue may arise as to whether the excluded voters could be determinative. If that issue arises, the challenges may decide it. *Woodman's Food Mkts. Inc.*, 333 NLRB 503 2000.

the *Steiny/Daniel* voters could be determinative. A second election was ordered. The employer sought – and eventually obtained – a summary from the Regional Office which indicated that three of the challenges involved “off list” former employees who sought to vote under *Steiny/Daniel*, and that 2 of the challenges involved voters on the *Excelsior* list. One of the challenged “on list” voters, Jay Doty, Sr., was the subject of an objection to the election. The objection was based on the contention that Doty, who served as the Employer’s election observer, was a supervisor. A full record was made on this objection, and the record unequivocally indicates that Doty was not a supervisor. Indeed, in its post-hearing brief, the Union withdrew the objection that the Union had based on a claim that Doty was a supervisor. The employer filed a motion for reconsideration with the hearing officer based upon the information received from the Region and the foregoing facts. As the employer argued, if Doty’s vote were counted – as it should be – and it favored the employer, the employer would have nine votes, and the potential *Steiny/Daniel* voters could not be determinative. The hearing officer refused to consider this evidence or to modify the earlier Order.

PROCEDURAL HISTORY

An election was conducted in the above captioned matter on June 23, 2011. Hearing Officer’s Report, p. 1. The Union received no votes at that election. *Id.*, p. 2. The Union then submitted six objections to the election to the Acting Regional Director. *Id.* A hearing was held on August 18, 2011 regarding these objections. Employer’s Brief in Opposition to Objections, p. 1. The hearing officer heard testimony, requested briefs from both sides, and issued a decision on September 1, 2011. See Hearing Officer’s Report. The hearing officer found merit in one of the Union’s objections, while the others were either withdrawn by the Union or decided for the Employer. Hearing Officer’s Report, pp.1-2.

EXCEPTIONS

In part iii. of her report, the officer found sustainable objection six: “The Employer submitted an incomplete *Excelsior* list to the Board and the petitioner, knowingly leaving out the names and addresses of eligible voters.” Hearing Officer’s Report, p. 7. After sustaining this objection, the hearing officer recommended a second election; alternatively, the hearing officer recommended a remand for consideration of the challenged ballots. Employer excepts to the recommendation that a second election need be held without first affording consideration to one or more of the challenged ballots. Specifically, the Employer, Automatic Fire Systems, hereby submits the following exceptions to the board:

1. The hearing officer makes the finding that “[t]he number of *Steiny/Daniel* eligible employees omitted from the list potentially affected the results of the election. Hearing Officer’s Report, p. 7. The grounds for this exception are detailed in section 1, below.
2. The hearing officer makes the finding that “[i]t is inherently implausible that experienced union-side labor counsel would seek to include *Steiny/Daniel* voters, but agree that the Employer had no obligation to include these employees on the *Excelsior* list. Such action would leave the Union no access to potential voters, if the Union had no interest in representing them, there would be no reason to include them in the unit description. I find, therefore, that the Petitioner’s counsel did not engage in any deliberate misrepresentations or act in bad faith.” Hearing Officer’s Report, p. 9. The grounds for this exception are detailed in section 2, below.
3. The hearing officer makes the finding that “...the number of voters names omitted was sufficient to effect *sic* the results of the election and that this breach of the *Excelsior* rule

warrants setting aside the results of the election.” Hearing Officer’s Report, p. 11. The grounds for this exception are detailed in section 1, below.

4. The relief recommended in the hearing officer’s report – a new election – is inappropriate considering the new evidence regarding the challenged ballots. Her alternative grounds – remand to the Acting Regional Director for resolution of the challenged ballots – should be the Order of the Board. Hearing Officer’s Report, p. 11. The grounds for this exception are detailed in section 1 and 3, below.

SECTION 1 – Exceptions 1, 2, and 4

The report of the hearing officer contains an erroneous supposition of fact which influenced the officer’s consideration of appropriate relief.

The relevant portion of the Report states:

The parties stipulated that eight Steiny/Daniel eligible employees’ names were omitted from the Excelsior list, with a total of 22 eligible voters. The Employer omitted the names and addresses of a substantial number of eligible employees, approximately 36%, from its Excelsior list. Furthermore, the number of eligible voters omitted from the list, 8, had a potentially prejudicial affect on the election results.

The inquiry herein is hampered by the absence of evidence regarding the challenged ballots. There were 14 ballots cast in the election, and 13 names on the Excelsior list. Five ballots were challenged, but those challenges were not determinative based on the “approximate number of eligible voters” –which was calculated based solely on the number of ballots cast during the election. This figure, of course, is artificially low, as it includes none of the ballots of Steiny/Daniel eligible employees. Because the challenged ballots were not deemed determinative, the record does not reveal which voters were challenged or the bases for those challenges. It is undisputed that two of the challenged ballots were cast by current employees who are listed on the Excelsior list, Jay Allen Doty, Sr. and JaColeman Hutto. However, potentially 2 of the 3 remaining challenged ballots were cast by employees on the list. [note omitted]. Thus, there were potentially as many as 7 additional eligible employees -- 12 potential votes that have not been counted. [note omitted]. The number of Steiny/Daniel eligible employees omitted from the list potentially affected the results of the election.

Hearing Officer’s Report, pp. 7-8.

The officer presumes that the *Steiny/Daniel* voters and the challenged ballots are mutually exclusive. This is an error, correctable by the board.

Employer argued this point fully in its Motion for Reconsideration filed September 7, 2011. Prior to the filing of briefs, the Employer sought unsuccessfully to confirm the identity of the challenged voters with the Regional Office of the Board. As soon as the September 1st Report was received, the Employer again sought this information on the basis of that Report. Exhibit One to Employer's Motion for Reconsideration. This resulted in the provision by the Regional Office of the identity of the challenged voters. Exhibit Two to Employer's Motion for Reconsideration. Jay Allen Doty, Sr., and JaColeman Hutto were challenged and on the *Excelsior* list. The remaining challenged voters are off list. Two are among the eight voters who meet the *Steiny/Daniel* criteria for eligibility. The third is a former employee who does not meet the *Steiny/Daniel* criteria for eligibility.⁵

Consequently, as the Employer argued in its post hearing brief, the ballot of Jay Allen Doty, Sr., the Employer's observer, should be opened and counted before any decision is made to order a new election. Whatever effect resulted from the good faith exclusion of the *Steiny/Daniel* voters, it had no effect on the voters listed on the *Excelsior* list. If the vote of Jay Doty, Sr., is against the Union, the *Steiny/Daniel* voters are non-determinative, and no election is needed. Jay Doty, Sr., was challenged on the claim that he was a supervisor. The absence of any merit to that challenge is evidenced by the Union's withdrawal of its objection based upon the same contention. Hearing Officer's Report, p. 1. As yet, the Union has been unable to identify an employee who voted for it, or who wanted to vote for it. Consequently, it is

⁵ This uncontroverted fact is proven by the parties' stipulation of the *Steiny/Daniel* eligibles, the former employee's presence on the list from which the eligibles were stipulated, the Employer's offer of proof and, in addition, by the uncontroverted testimony at the hearing. Tr. pp. 17-18, 114-115. Of course, it is also a finding of the Hearing Officer. Hearing Officer's Report, p. 7.

extremely unlikely that the *Steiny/Daniel* voters would have unanimously voted in opposition to all of the *Excelsior* list voters. Nonetheless, the Employer accepts that possibility – however unlikely – as necessary to a consideration of determinativeness. However, the record reveals that nothing more is needed to decide the potential determinativeness of the *Steiny/Daniel* voters than to open a single improperly challenged ballot. Before a small Employer in a depressed industry is put to the expense of a second election, surely it is not too much to ask that this one ballot be opened and tallied.

The hearing officer, by way of an Order denying Employer’s motion for reconsideration, refused to tally the “challenged” vote. Order Denying Employer’s Motion, p. 2. In effect, the act of the Union withdrawing its objection to Jay Doty, Sr. based on their erroneous belief that he was a supervisor has saved the Union from having objection six denied. Despite the overwhelming evidence presented by the Employer at the August 18 hearing, the hearing officer did not consider in her Report Doty’s status as either a supervisory or non supervisory employee. Contrary to the hearing officer’s contention in her Order, the Union had ample due process – they presented evidence and took testimony in a failed attempt to prove that Doty was a supervisor – and the vote should be opened. Order Denying Employer’s Motion, p. 2; see also, hearing transcript, pp. 134-138.

In her Order, the hearing officer contends that the evidence presented – the names of the challenged voters – did not constitute “newly discovered” evidence because of the possibility that the Employer could have “...elicit[ed] testimony regarding this matter during the hearing, but opted not to do so.” Order Denying Employer’s Motion, p. 2. In fact, any testimony as to what anyone was told by a Board Agent after the election would have been patent hearsay. The same would be true with regard to testimony about any observations of records maintained by the

Board. The challenged ballots, voting records, and so forth were not available at the hearing. Employer has provided proof that attempts were made prior to the filing of its post-hearing brief to retrieve this evidence. Exhibit One to Employer's Motion for Reconsideration. Employer's counsel was flatly told by Acting Director, Jane North, that the information was unavailable except with permission from General Counsel. *Id.* Employer's counsel sought and attained that permission after the issuance of the hearing officer's report. See Motion for Reconsideration. The timing of the availability of this evidence and the hearing officer's error based on an incorrect assumption about the number of available voters is thereby an extraordinary circumstance that requires Board correction.

SECTION 2 – Exception 2

The finding of the hearing officer in Exception 2 above is in direct disagreement with the uncontroverted testimony in the record. The officer assumes facts and bases her decision thereon. First, the officer assumes that Ms. Moffett is “experienced union side labor counsel” without basis in any testimony or other evidence in the record. Hearing Officer's Report, p. 9. Second, she asserts that it is “implausible” that such counsel would seek to include *Steiny/Daniel* voters on one hand, and agree that the Employer might exclude these employees on the *Excelsior* list. *Id.* On the basis of these assumptions, she fails to accept the testimony of the Employer's counsel that the Union's lawyer agreed to the exclusion of the *Steiny/Daniel* voters from the list. Her assumptions are based on something other than evidence; indeed, they contradict all of the evidence submitted, and are nothing more than her personal suppositions. They are Board correctable error.

The hearing officer's suppositions ignore many other possibilities which are no less plausible. The Union's attorney may have been ignorant of the duty to put *Steiny/Daniel* voters

on the *Excelsior* list. After all, the Employer's attorney, admitted to the Bar in 1973 and certified by the South Carolina Supreme Court as a specialist in employment and labor, testified that he was ignorant of that duty. The hearing officer accepted his testimony and found that he was acting in good faith in excluding the *Steiny/Daniel* voters from the *Excelsior* list. It's possible that the Union's counsel was willing to accept the exclusion so as to obtain a stipulation and avoid the time and expense required for attendance at the hearing scheduled for the next morning in Winston Salem. It's possible that the Union's counsel was "sandbagging." There was testimony that her client's organizers were aware of the absence of *Steiny/Daniel* voters from the list and advised counsel of this absence. Tr. pp. 73 ll. 18 to 76 ll. 15. Yet, no objection was made until after the election. Counsel for the Employer suspects that in most elections, the turnout of *Steiny/Daniel* voters is negligible when compared to turnout of employees who are contemporaneously working for the Employer. Perhaps the Union's counsel decided to agree to leave these negligible voters off the list so that a readymade objection would be available in the event of an unfavorable election result.

There was nothing at the hearing which prevented the Hearing Officer from taking evidence as an alternative to needless speculation. Nothing prevented the Union's counsel from offering testimony. Such testimony as was taken on this issue was neither controverted nor impeached. Mr. Holmes was not even cross-examined.

The point of all of this is not a contention that the Board should exclude *Stein/Daniel* voters from the *Excelsior* list on the basis of the oral agreement between the parties' counsel. From the beginning of the post-election process, the Employer has recognized that *Steiny/Daniel* voters are to be placed on the *Excelsior* list. Rather, this exception is offered as a showing that the Union made a substantial contribution to the process by which these voters were excluded.

Indeed, as the Employer has argued, the failure of the Union to offer any evidence on this point requires adverse inference. The failure of the Union to confess its involvement is evidence of bad faith. As the Employer has argued, this conduct of the Union should be considered when weighing the equities required for the fashioning of an appropriate remedy.

SECTION 3 – Exception 4

Alternatively, the Board should remand to the Region for a hearing on the challenged ballots instead of holding another election. It is extremely likely that the opening of just one challenged ballots – that of the Employer’s observer, Jay Doty, Sr. – will render the *Steiny/Daniel* voter issue in this case moot. However, if the Board finds that it cannot or will not open and tally the ballot of Jay Doty, Sr., the Board should allow for a hearing on the challenged ballots, rather than order a new election.

At the hearing it became apparent that the Union’s objection six was based upon the fact that potential *Steiny/Daniel* voters were not included on the *Excelsior* list. Although it stopped short of adopting a *per se* rule, in *Woodman's Food Mkts. Inc.*, 333 NLRB 503 2000, the NLRB held that where the number of eligible voters omitted from the *Excelsior* list is such that it could have affected the outcome of the election, that fact must be given substantial weight in determining whether there had been substantial compliance with the *Excelsior* rule.

The task is to recognize the importance of the policies served by protecting the integrity of the *Excelsior* list while also recognizing that: 1) exclusion of *Steiny/Daniel* voters from the list would not have occurred without the collusion of the Union; and 2) the Union is attempting to benefit from its own misconduct. At the least, equity demands that these facts be considered in fashioning a remedy. If there is a remedy which protects the integrity of the *Excelsior* list rule

without ordering a new election, that remedy should be adopted. Careful consideration should be given to the practicalities which underlie the *Woodman's Food Mkts. Inc.* decision.

In the present election, eight votes were counted and each of these was against the Union. Five votes were challenged. One of the challenged votes was that of Jay Doty, Sr., the Employer's observer. This challenged voter appears on the *Excelsior* list. One other challenged voter appears on the list as well. The remaining three challenges involve voters who were not on the *Excelsior* list. The hearing in this case has resulted in a stipulation that there are potentially only eight voters who may be *Steiny/Daniel* eligibles, or who might vote despite their non-appearance on the *Excelsior* list. Tr. p. 114. The Employer's uncontested offer of proof indicates that there are no other potential voters. *Id.*

As has been shown by the factual record, Jay Doty, Sr., is not a supervisor. Although a clear and extensive record was made proving this fact, the hearing officer did not address Doty's status in her Report because the Union withdrew its objection – plainly based on the wealth of uncontroverted evidence against its position, and the fact that an adverse ruling would operate as an estoppel to the Union's challenge of Doty's vote. Consequently, if any serious consideration is to be sustaining the Union's objection, Doty's ballot – challenged on the claim that he was a supervisor – should be opened and counted. If he voted against the Union, the eight potential *Steiny/Daniel* eligibles could not have been determinative of the election. This would make the hearing officer's recommendation of a second election moot.

The procedure would be entirely consistent with the *Woodmen's* case. *Woodmen's* is usually read as requiring a “determinativeness” test in addition to a percentage test in reviewing *Excelsior* list compliance. In *Woodmen's*, the percentage of employees omitted from the list was

low, and without *Woodmen's* requirement of the determinability test, the incomplete *Excelsior* list would have likely passed muster. However, a central point of the *Woodmen's* holding is its placement of determinativeness in the hierarchy of prejudicial effect: "Obviously, the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union's ability to communicate with a determinative number of voters." 332 NLRB at 504.

In *Woodmen's*, the question of the determinativeness of the Employer's omissions required the Board to remand the case for a consideration of the eligibility of two challenged voters, the Keesys. Twelve voters had been excluded from the *Excelsior* list. The Union lost the election by 13 votes. In *Woodmen's*, the Board held that if the two challenged voters were eventually determined ineligible, the excluded voters would be rendered non-determinative, and the election would be certified. Alternatively, a determination that the two voters were eligible would render the excluded voters determinative and require another election. In *Woodmen's*, the Board stated "Under the circumstances of this case, we will not direct that the ballots of the Keesys be opened if they are found to be eligible voters." 332 NLRB at 504 n. 14.

The Board gave no explanation for its determination that the Keesys' ballots were not to be opened. Unlike the Union in the within proceeding, the union in *Woodmen's* played no part in the exclusion of eligible voters from the *Excelsior* list. As shown by the uncontroverted testimony propagated at the hearing below, the Union both encouraged and agreed to the exclusion of the *Steiny/Daniel* voters. The fundamental question in this case is whether the excluded *Steiny/Daniel* voters are potentially determinative of the outcome of the election. If they are not, their omission from the *Excelsior* list did not contravene the policies served by

Excelsior. Opening and counting the Doty, Sr., ballot would likely resolve the issue, and this is the action which should be taken in this case.

Indeed, the hearing officer has recommended remand to the Acting Regional Director as a viable alternative to ordering a second election. It is respectfully submitted that the facts of this case require a remand and a consideration of the challenged ballots of Jay Doty, Sr., and such other challenged ballots as the Regional Director chooses.

CONCLUSION

For the above stated reasons, the Board should sustain the Employer's exceptions, and remand the matter of the challenged ballots to the Acting Regional Director for determination of their effect on the election.

All of which is respectfully submitted.

GIBBS & HOLMES

September 15, 2011

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**CERTIFICATE OF SERVICE
EMPLOYER'S EXCEPTIONS**

I hereby certify that I have served the foregoing Exceptions to the Hearing Officer Report on Objections and Recommendation to the Board on Natalie Moffett, Union counsel, Jane North, Acting Director of the Region, and Kerstin Meyers, Hearing Officer by electronic mail this 15th day of September, 2011.

All of which is respectfully submitted.

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