

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 RETURN BRIEF  
TO PETITIONER'S EXCEPTIONS TO  
THE REPORT ON OBJECTIONS AND  
RECOMMENDATION TO THE BOARD**

**INTRODUCTION**

On September 15, 2011, the Union, through its counsel, filed an exception to the Hearing Officer's report on objections and recommendation to the board in the above captioned case. This brief is in response to that exception.

**EXCEPTION**

The Union excepts to one portion of the hearing officer's report: the recommendation that the board remand this matter to the Acting Regional Director for resolution of the challenged ballots as alternative relief. Union Exceptions, p. 3 The exception is based, in its entirety, on the board's holding in *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989). *Id.* There, the board held that "[e]vidence of bad faith and actual prejudice is unnecessary because the rule is essentially prophylactic, *i.e.*, the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." *Id.* The Union's reliance on this case and its holding is misplaced.

## DISCUSSION

The controlling case for the scenario presented in this matter is *Woodman's Food Mkts. Inc.*, 332 NLRB 503 (2000), as cited in Employer's exception and post-hearing briefs. The Board there reviewed the previous case law and made a fundamental change in how the Board is to review *Excelsior*<sup>1</sup> omissions. The Board held:

Given this critical purpose of the *Excelsior* list, we have **reexamined our case law** on this issue. As explained below, we find that, in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer's reasons for omitting the names.

*Woodman's Food Mkts. Inc.*, 332 NLRB 503, 2 (2000), *emphasis added*.

The holding in *Woodman's* is instructive. The Board must consider not only the amount of eligible voters omitted from the *Excelsior* list, but also the prejudicial effect on the election and the employer's reasons for omission. This holding directly overrules the *Thrifty Auto Parts*, the decision upon which the Union entirely relies in making its sole exception. 295 NLRB 1118 (1989).

In *Thrifty Auto Parts*, the Board correctly applied the old, percentage rule and found that the omission of a small number of eligible voters meant that the Employer there did not "strictly comply" with the *Excelsior* rule. *Thrifty Auto Parts, Inc.*, 295 NLRB 1118, 2-3 (1989). The standard of "substantial compliance" was not met in that case because just two potentially eligible voters were left off of the list. *Id.* Besides the fact that *Thrifty Auto Parts* is plainly

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<sup>1</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (N.L.R.B. 1966)

distinguishable from the instant matter<sup>2</sup>, the Board should give no weight to its holding considering the change in the law accomplished in *Woodman's*.

Following the *Woodman's* holding, the Board must examine the potential prejudicial effect, reflected by determinativeness of the omitted voters. The facts in this case are that 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. Doty and another of the challenged voters both appear on the *Excelsior* list. The remaining 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 *Daniel Steiny* eligibles, or who might vote despite their non-appearance on the *Excelsior* list. Tr. 114. The employer's uncontested offer of proof indicates that there are no other potential voters. *Id.*

There is a strong factual record in the proceeding below indicating that Doty was not a supervisor. His vote should be opened and counted. If he voted against the Union, the eight potential *Steiny/Daniel*<sup>3</sup> eligibles could not have been determinative of the election. There is no better method of determining the prejudicial effect, as required by *Woodman's*, than by following the hearing officer's suggested alternative relief.

The Board has ordered the tallying of ballots in cases similar to the present situation in previous matters. *The Gerber Co., Inc.*, 270 NLRB 1235 (1984) ("Ordinarily, a tainted election should be held for naught and declared null-and-void; however, in this case in view of the

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<sup>2</sup> The vote tally was eight votes against and seven votes for the Union petitioner. The two eligible voters that were omitted from the *Excelsior* list were determinative of the outcome. In the present case, based on the stipulated facts and if the challenged vote of the Employer's observer is counted, it is impossible that the potential *Steiny/Daniel* voters that were left off of the *Excelsior* list in good faith would have any effect on the outcome of the election.

<sup>3</sup> *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

potential that the election would have resulted in a union majority notwithstanding the unlawful conduct of Respondent had Noel's ballot been counted, it is prudent in the interest of time and expense to validate the election if the Union obtains a majority as a result of Noel's ballot.); *Clark & Wilkins Indus.*, 290 N.L.R.B. 106, 118-119 (N.L.R.B. 1988)(“It is further recommended that the Regional Director for Region 2 shall, within 10 days from the date of this decision, open and count the ballots cast by Phillip Greene and Cessil Chinfloo in Case No. 2-RC-19908 and prepare and serve on the parties a revised tally of ballots.). *See also, Scientific Electric Company, Inc.*, 2002 NLRB LEXIS 62 (N.L.R.B. Feb. 22, 2002).

## CONCLUSION

For the above stated reasons, the Board should dismiss the Union’s Exceptions.

All of which is respectfully submitted.

GIBBS & HOLMES

September 22, 2011

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**CERTIFICATE OF SERVICE  
EMPLOYER'S RETURN BRIEF**

I hereby certify that I have served the foregoing Return Brief to Petitioner's 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 22<sup>nd</sup> day of September, 2011.

All of which is respectfully submitted.

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