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Automatic Fire Systems and Local Union 669, United Association of Journeymen, Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Petitioner.
Case 11-RC-6757

January 3, 2012

DECISION AND DIRECTION OF SECOND
ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The National Labor Relations Board has considered objections to an election held June 23, 2011, and the hearing officer's report concerning disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows zero for and eight against the Petitioner, with five challenged ballots and one void ballot.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations² as modified below.

The hearing officer sustained the Petitioner's Objection 6, alleging that the Employer submitted an incomplete *Excelsior*³ list and knowingly omitted the names and addresses of *Steiny/Daniel*⁴ eligible voters from that list. The parties' Stipulated Election Agreement set forth the eligibility requirements for voting, which spelled out the *Steiny/Daniel* formula:

Also eligible to vote are all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eli-

gibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion for the last job for which they were employed [sic].

The Agreement directed the Employer to provide within 7 days of the Regional Director's approval of the Agreement, "an election eligibility list containing the full names and addresses of all eligible voters." The parties stipulated at the hearing that eight *Steiny/Daniel* eligible voters had been omitted. The hearing officer found that this omission of 36 percent of all eligible voters was sufficient to affect the results of the election and warranted setting the election aside.

Thus, the hearing officer's primary recommendation was to conduct a second election. Alternatively, the hearing officer observed that the Board might remand the matter to the Acting Regional Director to first resolve the outstanding challenged ballots, and to hold a second election only if a revised tally of ballots demonstrated that the number of *Steiny/Daniel* eligible voters who did not cast ballots was determinative. The Employer excepts to the primary recommendation; the Petitioner to the alternative recommendation. For the reasons explained below, we agree with the hearing officer's primary recommendation to set aside the election.

The purpose of the *Excelsior* rule is to ensure that all participants in an election have access to the electorate so that employees can make a free and reasoned choice regarding union representation. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1241-1242 (1966). Omissions from an *Excelsior* list undermine this objective. See *Women in Crisis Counseling*, 312 NLRB 589, 589 (1993). Indeed, the Board "presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election." *Thrifty Auto Parts*, 295 NLRB 1118, 1118 (1989).

Historically, the Board's application of those principles was guided almost exclusively by the percentage of eligible voters omitted from the *Excelsior* list relative to the number of employees in the unit. Where a high percentage had been excluded, the election would be set aside; if the percentage were low, the election results would stand. See *Woodman's Food Markets*, 332 NLRB 503, 504 (2000). In *Woodman's*, however, the Board eschewed that overly simplistic analysis.⁵ The Board opted instead for a more comprehensive approach:

⁵ The *Woodman's* Board observed that focusing only on the percentage omitted could produce anomalous results. Thus, elections were

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

The Employer excepted to the hearing officer's failure to draw an adverse inference from Petitioner's counsel's failure to testify on the subject of Petitioner's role in the Employer's *Excelsior* list omissions. "[T]he decision to draw an adverse inference lies within the sound discretion of the trier of fact." *Tom Rice Buick, Pontiac & GMC Truck*, 334 NLRB 785, 786 (2001) (citing *Underwriters Laboratories, Inc.*, 147 F.3d 1048, 1054 (9th Cir. 1998)). We find no abuse of discretion.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 3 and 4. The Petitioner withdrew Objections 1, 2, and 5.

³ *Excelsior Underwear*, 156 NLRB 1236 (1966).

⁴ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

Accordingly, while we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions.

Woodman's, 332 NLRB at 504.

Based on the *Woodman's* Board's discussion of determinativeness, the Employer argues that its omissions from the *Excelsior* list justify a second election only if the eight omitted *Steiny/Daniel* employees prove potentially determinative after resolution of the outstanding challenged ballots. We disagree.

Woodman's did not establish a three-part test under which each part must be satisfied for an election to be set aside. Rather, the *Woodman's* Board adopted a more flexible approach under which other factors, "including whether the number of omissions is determinative," would be considered. 332 NLRB at 504 (emphasis added). The Board's adoption of that approach was motivated by concern over instances in which the number of names omitted from an *Excelsior* list was small, but nonetheless those employees were potentially determinative. The Board observed that in such circumstances the potential prejudice to the union's ability to communicate with voters was "most clear." *Id.* Just as clearly, the Board did not hold that this was the only circumstance in which omissions from an *Excelsior* list would warrant setting aside an election. Certainly, there is no basis to conclude that the Board intended its new approach to bar setting aside elections where the percentage of omitted employees is high and where the employer's explanation for the omissions is not legally sufficient. That is the situation here.

First, we have a high percentage of omissions, 36 percent, far higher than many of the cases in which elections were rerun under the percentage-only rule. See, e.g., *Thrifty Auto Parts, Inc.*, supra (9.5 percent); *Avon Products, Inc.*, 262 NLRB 46, 48 fn. 5 (1982) (citing cases); *EDM of Texas*, 245 NLRB 934, 934, 940 (1979) (10.67 percent omissions and 17.9 percent inaccuracies); *Sonfarrel, Inc.*, 188 NLRB 969, 969–970 (1971) (11 percent); *Gamble Robinson Co.*, 180 NLRB 532, 532–533 (1970) (11 percent). Moreover, that percentage repre-

sents an entire segment of the Employer's work force: those employees laid off due to the seasonal nature of the Employer's work or the vagaries of the economy, who might share particular viewpoints that diverge from those of their still-employed counterparts.

Second, as the hearing officer found, the Stipulated Election Agreement unambiguously stated that employees meeting the *Steiny/Daniel* formula were eligible to vote. Thus, the Employer, by failing to include these voters on the *Excelsior* list, breached a binding agreement. There are no exceptions to this finding. We rely on this breach-of-contract theory but note that the hearing officer also found that the Employer's counsel acted in "reckless disregard" of the Stipulated Election Agreement in interpreting his client's *Excelsior* obligations. In addition, while the Employer's owner followed his consultant's advice in omitting the *Steiny/Daniel* voters from the list, upon learning of his obligations through the Notice of Election—belatedly, but still before the election—he took no action to correct the inadequate *Excelsior* list.

We find that the Employer's actions described above raise a serious question of bad faith, and, at the least, indicate gross negligence. See *Fantasia Fresh Juice Co.*, 335 NLRB 754, 763 (2001) (finding bad faith in employer's omission of 23 percent of eligible voters from *Excelsior* list in disregard of Regional Director's denial of Employer's motion to omit names); *Medtrans*, 326 NLRB 925, 925–926 (1998) (finding no substantial compliance where the employer was made aware of its *Excelsior* violation but failed to timely correct it); *Fountainview Care Center*, 323 NLRB 990 (1997) (finding bad faith or gross negligence where employer omitted names of four employees, constituting 5 percent of eligible voters, from list, in intentional disregard of the Stipulated Election Agreement). Although bad faith is not a prerequisite to finding that an employer has failed to substantially comply with the *Excelsior* rule, as stated above, it does preclude a finding of substantial compliance. *Woodman's*, 332 NLRB at 504 fn. 9; *Thrifty Auto Parts*, 295 NLRB at 1118.⁶

Finally, while this is not a case that requires an inquiry into whether the omitted employees' votes were potentially outcome determinative, we note that, under our normal approach to calculating margins of victory in election objections cases, we view the facts in the light most favorable to the objecting party, in this case the

upheld where the percentage of omissions was low, but the number of excluded employees was potentially outcome determinative—that is, the omitted employees could have changed the election results. 332 NLRB at 504 (citing *Kentfield Medical Hospital*, 219 NLRB 174, 175 (1975)). These outcomes contradicted *Excelsior's* policy of ensuring an informed electorate and required a different approach.

⁶ Consideration of bad faith will inevitably arise in considering the Employer's explanation, one of the factors addressed by *Woodman's*. Where bad faith is found, it is dispositive without consideration of other factors, thus illustrating that *Woodman's* cannot be mechanically applied to require that each prong of the three-part test be satisfied. *Woodman's Food Markets*, 332 NLRB 503, 504 (2000).

Petitioner. Accordingly, we assume that the five employees whose ballots were challenged were eligible to vote, and that they would have voted in favor of the objecting party. *Chinese Daily News*, 344 NLRB 1071, 1072–1073 (2005); *Harborside Healthcare, Inc.*, 343 NLRB 906, 913 fn. 23 (2004). The election results reflected eight votes against representation, zero votes for the Union, and five challenged ballots. Adding the assumed results of the challenged ballots would change the margin of victory to eight votes against and five votes in favor of representation, even before consideration of the omitted voters.

In response to the Employer's posthearing request for more information on the five challenged ballots, the Acting Regional Director revealed the name of each individual who cast a challenged ballot, the party asserting the challenge, and, insofar as was available, the reason for the challenge.⁷ That information demonstrated that two of the challenged ballots were cast by *Steiny/Daniel* voters. Thus, the remaining six omitted *Steiny/Daniel* voters failed to vote. Adding these possible votes to the tally, the Union could have won by a vote of 11 to 8. We find, therefore, that the number of omitted employees and challenged voters combined was potentially outcome determinative.

Given the high percentage of omitted eligible voters and the strong showing of the Employer's disregard for its *Excelsior* obligations, and given that the challenged and omitted employees were potentially outcome determinative, there is no reason to depart from our usual practice in objections cases by remanding the case for resolution of the five challenges.⁸ Indeed, to count the votes of the two challenged *Steiny/Daniel* voters who

presumably voted without the benefit of communications from the Union would defy the *Excelsior* requirement's long-established protection of "the access of *all* employees" to communications by the union, and ultimately "to the arguments for, as well as against, union representation." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1241 (1966).

Accordingly, we adopt the hearing officer's primary recommendation, and we shall set aside the results of the June 23, 2011 election and direct a second election.

ORDER

It is ordered that the election in Case 11–RC–6757 is set aside and that the case is remanded to the Regional Director for Region 11 for the purpose of holding a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than

⁷ We reject the Employer's request that the Acting Regional Director open and count only the ballot of Jay Doty Sr., challenged by the Petitioner on the grounds that he was a supervisor. Even if this were a situation requiring the resolution of challenged ballots, which it is not, allowing the Employer to select a single ballot from among those challenged would be unprecedented, procedurally improper, and, absent the need to do so, an affront to ballot secrecy. Moreover, the withdrawal of the Petitioner's objection based on Doty's supervisory status does not automatically render Doty eligible to vote: the Petitioner's separate challenge to his ballot has not been resolved by either a formal finding concerning Doty's status by the Acting Regional Director or by an approved stipulation between the parties. See *Mountaineer Park, Inc.*, 343 NLRB 1473, 1481 (2004); *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 299 (1995); see also Board's Rules and Regulations Sec. 102.69.

⁸ We note that resolution of challenged ballots prior to a second election has been ordered in situations where the objecting party may have, in fact, prevailed, making a second election unnecessary. See, e.g., *Fantasia Fresh Juice Co.*, 335 NLRB 754, 764 (2001); *Sonfarrel, Inc.*, 188 NLRB 969, 969–970 (1971). This is not the same situation as opening challenged ballots after a substantial *Excelsior* violation to determine if the Employer can avoid a rerun election.

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12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local Union 669, United Association of Journeymen, Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. January 3, 2012

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring.

I concur in the result. Contrary to my colleagues, however, I decline to find that the Employer's actions raise a serious question of bad faith.

Dated, Washington, D.C. January 3, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD