

Trustees of Columbia University in the City of New York and International Organization of Masters, Mates & Pilots, AFL-CIO, Petitioner. Case 2-RC-22355

August 9, 2007

DECISION ON REVIEW AND CERTIFICATION
OF RESULTS OF ELECTION

BY MEMBERS SCHAUMBER, KIRSANOW,
AND WALSH

On January 22, 2002, the Regional Director for Region 2 issued a Supplemental Decision and Direction of a Second Election (pertinent portions of which are attached), in which she set aside the mixed manual and mail ballot election, which concluded on June 12, 2001.¹ The Regional Director adopted the hearing officer's recommendation to sustain the Petitioner's objection, which alleged that the Employer's refusal to provide the Petitioner with the electronic mail (e-mail) addresses of eligible voters thwarted the manifest purpose of the requirements of *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Supplemental Decision. By Order dated November 15, 2002, the Board² granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, we reverse the Regional Director's Supplemental Decision and overrule the Petitioner's objection. We find that the Employer fully complied with its *Excelsior* requirements as heretofore defined by the Board. Thus, under the circumstances of this case, the Employer's refusal to provide the Petitioner with unit employees' e-mail addresses did not constitute objectionable conduct. Accordingly, we certify the election results.

I. FACTS

The facts are largely undisputed. The Employer operates an institute of higher learning, including a research vessel (R/V) named the *R/V Maurice Ewing*. The vessel is operated by licensed and unlicensed crew members. The parties stipulated, at an April 4, 2001 preelection hearing, that a unit of all unlicensed crew members of the *R/V Maurice Ewing* constituted an appropriate unit. The

¹ The manual election was held on May 29, 2001. Ballots for voting by mail were mailed on April 30 and due June 11, 2001. The tally of ballots showed five voting for and five against Petitioner. There were no challenged ballots.

² Member Liebman and former Members Cowen and Bartlett.

parties also stipulated to the date, time, and location of the mixed manual and mail ballot election.³

The vessel and crew are typically at sea for several days or weeks at a time. The vessel was at sea for most of the preelection period between the filing of the petition on March 19 and the manual election on May 29, which was held aboard the vessel in San Juan, Puerto Rico.⁴ During the preelection period, the vessel was in port on three occasions: San Juan, Puerto Rico, April 5 to 8; Colon, Panama, April 12 to 13; and Balboa, Panama, May 19 to 22.

Although there is no evidence whether the vessel received U.S. mail while at sea, the crew did have access to the Employer's e-mail system aboard the vessel for personal business when they were not on watch. E-mail messages were limited in length because they were transmitted in batches four to five times a day via satellite, which is very expensive. Internal e-mail among employees on the vessel was also available to the crew.

The Petitioner is a longstanding maritime labor organization.⁵ Its campaign to organize the Employer's licensed and unlicensed crew began as early as December 2000 and continued through February 2001, while the vessel was being repaired in Tampa, Florida.

At the preelection hearing, the Petitioner requested that, in addition to providing it with the names and addresses of eligible voters as required by *Excelsior*, above, the Employer be required to provide the Petitioner with the e-mail addresses of eligible voters because of the unique circumstances of this case. In support of this request, the Petitioner made an offer of proof, emphasizing that the crew would be at sea and not at their home addresses for the duration of the preelection campaign. The hearing officer, rejecting the Petitioner's offer of proof, denied the Petitioner's request for e-mail addresses.

In the Decision and Direction of Election, the Regional Director, affirming the hearing officer, stated that "there is no Board law . . . which gives me the authority to direct the Employer to provide the Union's [sic] with the e-mail addresses of employees." The Petitioner filed a request for review. By Order dated May 9, 2001, the Board denied the Petitioner's request for review "without

³ At the same hearing, the parties stipulated that a unit consisting of licensed crew members was an appropriate unit, and an election was conducted for the licensed crew in Case 2-RC-22354. The Petitioner won the election, and the Certification of Representative for the licensed crew was issued to the Petitioner on June 20, 2001.

⁴ Nine of the 11 eligible voters were aboard the vessel, and not at their home addresses, during the entire period from April 19, the date the *Excelsior* list was due, through May 29, the date of the manual election.

⁵ See, e.g., *International Association of Masters*, 220 NLRB 164, 169-170 (1975).

prejudice to the Petitioner's right to file an objection concerning the issue raised on review." The Employer timely submitted to the Regional Director a list of the names and home addresses of eligible voters. Following the election, the Petitioner timely filed this objection, alleging that the Employer's refusal to provide the employees' e-mail addresses "thwarted the manifest purpose of the *Excelsior* rule; that is, to 'achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights'" (quoting *Mod Interiors*, 324 NLRB 164 (1997)). The Petitioner additionally relies on *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 767 (1969); and *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994); *Thrifty Auto Parts*, 295 NLRB 1118 (1989); and *Excelsior*, above.

The Regional Director found merit in the Petitioner's objection. In the Supplemental Decision and Direction of Second Election, the Regional Director found that, based on the unusual circumstances of this case, it would be inconsistent with the "animating principles" of *Excelsior* and its progeny to find that the Employer's submission of names and home addresses to the Petitioner, without the e-mail addresses, satisfied the requirements of *Excelsior*. The Regional Director reasoned that such a finding would "elevate form over substance" to the detriment of the statutory rights of the employees. The Regional Director cited the hearing officer's findings that the majority of eligible voters were not at their home addresses during the time when the Petitioner had access to the *Excelsior* list, and that therefore traditional mailings would have been futile. The Regional Director emphasized that the Petitioner did not have access to the employees' e-mail addresses during the critical period to enable the Petitioner to meaningfully communicate with employees in the proposed unit. The Regional Director acknowledged the Employer's "technical" and "literal" compliance with *Excelsior*, and that no Board precedent required the submission of e-mail addresses. The Regional Director nevertheless concluded that the manifest purpose of the *Excelsior* rule had not been met in this case and that the failure to comply with the Petitioner's request to provide the e-mail addresses constituted objectionable conduct.

The Employer has sought review of the Regional Director's Supplemental Decision, contending that it was not compelled to furnish the Petitioner with the e-mail addresses at issue in this case, under *Excelsior* or otherwise, and that requiring e-mail production here would be a retroactive modification of *Excelsior* requirements, which would deprive it of due process. The Petitioner

urges us to affirm the Regional Director's Supplemental Decision, contending that the vessel was the de facto residence of the crew during the critical period, that e-mailing was the only reasonable way to communicate with the unit employees, and that therefore the Employer did not substantially comply with the *Excelsior* requirements. For the following reasons, we find merit in the Employer's contention that it complied with extant *Excelsior* requirements.

II. ANALYSIS

It is undisputed that the Employer timely provided the Regional Director with a complete and accurate list of unit employees and their home addresses, and thus fully complied with existing Board precedent interpreting *Excelsior*. It is also undisputed that no Board case has ever held that the failure to provide the e-mail addresses of eligible voters constitutes objectionable conduct. We cannot agree, therefore, with the Petitioner or our dissenting colleague's contentions that the Employer did not "substantially comply" with *Excelsior*. As the cases cited by the dissent show, the Board has applied a "substantial compliance" standard in situations where the employer's *Excelsior* information was incomplete, inaccurate, or both.⁶ In this case, the Employer's list was both complete and accurate. The Board has not applied the "substantial compliance" standard in the manner that the Petitioner and the dissent advocate, i.e., where a union received a complete and accurate list but may have been unable to reach all unit employees on the list.⁷ To the contrary, "the Board has long held that to look beyond the issue of substantial compliance with the rule and into the additional issue of whether employees were actually informed about election issues would 'spawn an administrative monstrosity.'" *Mod Interiors, Inc.*, above at 164 (quoting *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971)).

In addition, as stated above, the Petitioner is a maritime union with vast experience and a long history of

⁶ For example, in *Rite-Care Poultry Co.*, 185 NLRB 41, 41 (1970), cited by the dissent, the Board found that the employer did not substantially comply with *Excelsior* "because the list of names and addresses which it supplied did not include information . . . as to street addresses and/or post box numbers." Similarly, in *Woodman's Food Markets*, 332 NLRB 503 (2000) and *Mod Interiors*, 324 NLRB 164 (1997), the *Excelsior* lists provided were either incomplete or incorrect.

⁷ The dissent cites *LeMaster Steel Erectors*, 271 NLRB 1391 (1984). There, the Board found that the employer substantially complied with *Excelsior* although it did not supply temporary addresses for six unit members. The dissent notes that "the Board did not find that an employer could never be required to provide employees' temporary living addresses under *Excelsior*." In fact, the Board made no finding or pronouncement at all regarding a potential obligation under *Excelsior* to provide temporary addresses, and thus *LeMaster* provides us with no useful guidance in this case.

organizing and representing employees at sea. The evidence shows that the Petitioner began organizing the licensed and unlicensed crew long before the vessel went to sea. As far back as December 2000 through early February 2001, when the vessel was docked in Tampa, Florida, the Petitioner was able to communicate freely with the unit employees. Although the Petitioner's communication with many of the eligible voters may have been limited while they were at sea, the Petitioner agreed to the election date and to the details of the election with full knowledge that the vessel would be at sea during most of the preelection period, and with full knowledge that no Board decision had ever required the production of employee e-mail addresses in the context of a Board-conducted election. In light of the Petitioner's experience with seafaring bargaining units, it clearly understood the challenges that the timing of the election presented, and it could have scheduled the election at a time when it had greater access to bargaining unit members, if such access were deemed necessary.

Finally, we note that (1) there is no evidence that the Employer used the employees' e-mail addresses to communicate with them about the election campaign,⁸ and (2) the Petitioner won the election in the licensed crew unit under the same conditions (no e-mail access) as existed in the unlicensed crew unit.

We observe that a multitude of unanswered and difficult questions exist regarding the potential ramifications, for both employers and employees, of requiring employers to furnish employee e-mail addresses. For example, what costs might be imposed on an employer if a union were able to send e-mails to employees' workplace e-mail addresses? What if electronic mailings were sufficiently voluminous to impair an employer's ability to conduct business electronically? What becomes of an employer's right not to furnish a forum, "on" its (virtual) property, for a third party to express its views? What would be the interplay, if any, between newly imposed requirements and the Board's current law relative to un-

⁸ The Employer submitted a motion to reopen and supplement the record, contending that the Regional Director erred in finding that the Employer used employees' e-mail addresses to contact employees during the preelection period. The Employer cites the Regional Director's finding that the "traditional mailing addresses supplied by the Employer were . . . less accurate than those it relied upon for its own purposes during the critical period." (Emphasis added.) The Regional Director denied the motion, finding that no specific finding was made in the Supplemental Decision or the hearing officer's report regarding the Employer's use of the e-mail system during the preelection period. In any event, we find that there is no record evidence that the Employer used the employees' e-mail addresses to communicate with them about the election campaign during the preelection period. We therefore disavow any implied finding by the Regional Director to the contrary, and we find it unnecessary to rule on the Employer's motion.

ion access to an employer's property? Could employers continue existing e-mail monitoring programs without engaging in unlawful surveillance? Are employee privacy rights at stake? Plainly, the Board's expertise does not encompass the rapidly expanding universe of information technology, and persons who know much more than we do about these matters will likely raise additional issues that we cannot even formulate without guidance. All of these issues should be fully briefed and considered before the Board departs from longstanding, well-understood precedent.

We simply do not believe that the Board is in a position to extend *Excelsior*, as the Union asks us to do, without the benefit of amicus briefing and a fully developed record. We know too little about the potential ramifications of such a change to undertake it here. More importantly, given the Employer's undisputed compliance with its *Excelsior* obligations as they stood as of the date of the Union's request, we are unwilling, on the facts of this case, to characterize that compliance as objectionable conduct. Accordingly, we overrule the Petitioner's objection and certify the election results.

CERTIFICATION OF RESULTS

It is certified that the majority of ballots have not been cast for International Organization of Masters, Mates & Pilots, AFL-CIO, and that it is not the exclusive collective-bargaining representative of these bargaining unit employees within the meaning of Section 9(a) of the Act.

MEMBER WALSH, dissenting.

Because 9 out of 11 unit employees were scheduled to be away from home aboard the Employer's research vessel from the day the *Excelsior* list was due until the day of the election, the Petitioner requested the Employer to provide it with the employees' e-mail addresses. The Employer refused, and provided an *Excelsior* list containing only the employees' home addresses. As a result, the Petitioner was unable to contact 82 percent of the electorate using the information contained in the *Excelsior* list. Nonetheless, the majority finds that the Employer fully complied with the Board's *Excelsior* rule and that the Employer's refusal to provide the requested e-mail addresses did not prejudice the election. I disagree.

BACKGROUND

The Employer operates a research vessel, the *R/V Maurice Ewing* (the *Maurice Ewing*.) The crew of the *Maurice Ewing* is at sea for several days or weeks at a time. As the hearing officer found, the *Maurice Ewing* was either at sea or in ports-of-call from December 2000

until the election in this case on May 29, 2001.¹ From the filing of the petition on March 19 until the election on May 29, the vessel was at sea in international or foreign waters at all times with the exception of three brief periods when the vessel was at ports in Puerto Rico and Panama. Only two unit employees were at their homes at any time between the day the *Excelsior* list was due and the day of the election.

Unit employees are provided individual e-mail accounts aboard the *Maurice Ewing* for their personal use. The only limitations imposed on employees' usage of these e-mail accounts are that the employees must be off-duty and each message may be no more than 64 kilobytes in size. The employees regularly use this email system to receive personal messages, as well as general information on news, sports, and weather.

At the preelection hearing, the Petitioner asked the Employer to include the employees' offshore e-mail addresses in the *Excelsior* list, and the Employer refused. The Regional Director denied the Petitioner's request to order the Employer to provide the requested e-mail addresses, reasoning that she did not have the authority to direct the Employer to do so under current Board law. The Petitioner requested review of the Regional Director's decision, and the Board denied the Petitioner's request for review "without prejudice to the Petitioner's right to file an objection concerning the issue raised on review."²

The tally of ballots showed five votes for and five against the Petitioner. After the election, the Petitioner timely filed the instant objection alleging that the Employer's refusal to provide the employees' e-mail addresses "thwarted the manifest purpose of the *Excelsior* rule." The Regional Director found merit in the Petitioner's objection, reasoning that it would be inconsistent with the "animating principles" of the *Excelsior* rule to find that the Employer's submission of names and home addresses, without more, had satisfied the requirements of *Excelsior* under the circumstances of this case.

ANALYSIS

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 (1966). "Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available." *Id.* at 1240. Employees have a Section 7 right to make a fully-informed choice in an election, and the purpose of

the *Excelsior* rule is to protect that right. *Thiele Industries*, 325 NLRB 1122 (1998). In order to achieve this statutory goal, it is "extremely important" that the information in the *Excelsior* list is "complete and accurate so that the union may have access to all eligible voters." *Mod Interiors*, 324 NLRB 164, 164 (1997).

Although the *Excelsior* rule is not applied mechanically, it is well established that substantial compliance is required. *Thrifty Auto Parts*, 295 NLRB 1118 (1989). If the union cannot contact a substantial number of voters because of incomplete or inaccurate information in the *Excelsior* list, the election will be set aside.³ The Board has thus never squarely held that an employer will satisfy the *Excelsior* requirement in every case if it simply provides the mailing addresses at employees' permanent residences. In fact, in some cases the Board has held that permanent residential addresses might not be sufficient to satisfy the purposes of the *Excelsior* rule. In *Rite Care Poultry Co.*, 185 NLRB 41 (1970), for example, the Board found that the employer did not comply with the requirements of *Excelsior* in part because it withheld some employees' post office box numbers. In another case, *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), the *Excelsior* list did not provide the temporary living addresses of six employees who were working out of state, but provided only those employees' permanent residential addresses. The Board found that the employer had substantially complied with its *Excelsior* duty in that case because the six employees comprised only nine percent of the eligible voters and because they were at their permanent residential addresses for 10 of the 19 days between receipt of the *Excelsior* list and the election date, including the 5 days immediately preceding the election. Significantly, the Board did not find that an employer could never be required to provide employees' temporary living addresses under *Excelsior*.

Although the Board has never required an employer to provide employees' e-mail addresses in order to fulfill its *Excelsior* duty, there is "nothing in *Excelsior* which would require the rule stated therein to be mechanically applied." *Telonic Instruments*, 173 NLRB 588, 589 (1968). Ordinarily, an employer substantially complies with the *Excelsior* requirement by timely filing a list containing the names and home addresses of all eligible voters. Such information is typically sufficient to ensure

¹ All dates hereafter are in 2001.

² Member Liebman and former Members Cowen and Bartlett.

³ See, e.g., *Woodman's Food Markets*, 332 NLRB 503 (2000) (setting aside election where the *Excelsior* list omitted the names of 6.8 percent of the eligible voters); *Mod Interiors*, 324 NLRB 164 (1997) (setting aside election where petitioner was unable to communicate with nearly half the unit employees for a week after the *Excelsior* list was due because the list contained incorrect addresses, preventing employees from obtaining information necessary for the exercise of their Sec. 7 rights).

that the goals of *Excelsior* are fulfilled by giving the union an opportunity to communicate its message to all eligible voters before the election. In the particular circumstances of this case, however, a list of employees' home addresses failed to effectuate the purposes of the *Excelsior* rule: to facilitate an informed electorate by "giving unions the right of access to employees that employers already have." *Special Citizens Futures Unlimited*, 331 NLRB 160, 161 (2000). As the Regional Director found, mailings or visits to the employees' home addresses would have been futile. Because the Petitioner could not contact the employees using the information contained in the *Excelsior* list, the employees were prevented from receiving information with respect to one of their choices, and thereby prevented from exercising their Section 7 rights. Accordingly, the Employer has not substantially complied with the *Excelsior* requirement under the facts of this case. Moreover, in an election decided by such a close margin, this lack of information may have affected the outcome of the election.

Contrary to my colleagues' suggestion, the *Excelsior* rule would not have to be "extended" in order to find that e-mail addresses are required under the unusual circumstances of this case. Protecting employees' Section 7 right to make a fully informed election choice would not require the provision of e-mail addresses in every case, or even in most cases. It is the particular circumstances of this case, where the employees were simply unavailable for contact at their home addresses, that makes the e-mail addresses necessary to effectuate substantial compliance with the *Excelsior* rule.

The majority's argument that the Petitioner agreed to the timing of the election knowing that it would be limited in its ability to communicate with the unit employees, lacks merit. This argument essentially amounts to a contention that by agreeing to the election date, the Petitioner waived its right to communicate with the voters during the preelection period. Although it is true that the Petitioner agreed to the timing of the election, the Petitioner did not know that the Employer would refuse to provide it with the employees' e-mail addresses. And, given the nature of the Employer's business, it is by no means clear that the parties could have easily scheduled the election at a time when the unit employees would not be at sea for at least a significant portion of the critical period. Furthermore, waiting for such an opportunity would have delayed the election. There is no reason why the Petitioner should be forced to choose between a prompt election or an informed electorate. See *Mod Interiors*, 324 NLRB 164 (1997) (petitioner should not have to choose between a prompt election or an accurate *Ex-*

celsior list when the employer's compliance would have avoided the problem).

Finally, there is no merit to the Employer's claim that it would be denied due process if the Board ordered a second election in this case. The Employer argues that it relied on current Board law when it provided an *Excelsior* list containing only mailing addresses, and the Regional Director expressly relied on extant Board law when she refused to order the Employer to provide the e-mail addresses prior to the election. In denying the Petitioner's request for review of the Regional Director's decision, however, the Board specifically provided for the reconsideration of this matter as the subject of a timely filed objection.⁴ The Employer was accordingly aware that the Board would reconsider this matter if the Employer did not provide the e-mail addresses and the Petitioner lost the election. Furthermore, directing a second election and requiring the Employer to provide the Petitioner with a list of the employees' e-mail addresses would not place any significant burden on the Employer. As the Board stated in *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994):

It would be anomalous for the Board to certify results of elections conducted without compliance with the *Excelsior* rule as set forth herein, after the Board has found that such elections do not ensure that employees are fully informed about the arguments concerning representation and thus are not able to exercise fully their Section 7 rights.

Because the Petitioner was not able to communicate with the eligible voters using the information contained in the *Excelsior* list, and, accordingly, the employees were not fully informed about the arguments concerning representation, I would sustain the Petitioner's objection and direct a second election.

APPENDIX

SUPPLEMENTAL DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to a Decision and Direction of Election issued in the above-captioned case on April 12, 2001,¹ an election by secret-ballot was conducted in the following unit of employees:

Included: All regular unlicensed employees employed as crew by the Employer on the R/V Maurice Ewing, including oilers/wipers, able-bodies seamen (ABs), ordinary seamen (OSs), stewards/messmen and galley personnel

⁴ The Board issued its Order denying review on May 9, 20 days before the May 29 election.

¹ All dates hereafter are in 2001, unless otherwise specified.

Excluded: All other employees including all licensed employees,² employees who are already represented by any labor organization, and guards, professional employees and supervisors as defined in the Act.

The election was conducted as a mixed manual and mail ballot election. Employees voting manually did so on May 29. For those employees voting by mail ballot, the ballots were mailed from Region 2 on April 30. To be eligible for counting, ballots had to be received at Region 2 by the close of business on June 11.

The tally of ballots, which was prepared and made available to the parties at the conclusion of the election, on June 12, showed the following results:

Approximate number of eligible voters.....	16
Void ballots.....	0
Number of votes cast for Petitioner.....	5
Votes cast against participating labor organization.....	5
Valid votes counted.....	10
Number of challenged ballots.....	0
Valid votes counted plus challenged ballots.....	10
Challenges are not sufficient in number to ...affect the results of the election.....	
A majority of the valid votes counted plus challenged ballots has not been cast for Petitioner.	

On July 15, the Petitioner filed an objection to the election. The objection is attached hereto.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the objection was conducted. After duly considering the matter, and the positions of the parties, a Notice of Hearing on Objections was issued in this matter on July 17, in which it was ordered that a hearing be conducted before a duly designated hearing officer for the purpose of receiving testimony to resolve the issues of fact and credibility raised by the objection. Accordingly, a hearing concerning the objection was held before Hearing Officer Gregory B. Davis on August 28. At the hearing the parties were afforded a full and complete opportunity to be heard, to examine and cross examine witnesses, and to present evidence pertinent to the issues.

On December 5, the hearing officer issued a Report on Objection and Recommendations (the Report), a copy of which is attached hereto. In the Report, the hearing officer found that, by failing to provide the Petitioner with the at-sea e-mail addresses of unit employees, the Employer engaged in objectionable conduct. The hearing officer recommended that the Petitioner's objection be sustained, that the results of the election be set aside and that a new election be directed. On December 19, the Employer filed exceptions to the Report. The Employer contends that the hearing officer erred in failing to grant its motion, made at hearing and renewed in its brief in support of its exceptions, to dismiss Petitioner's objection as legally insufficient. The basis for this motion is that the Petitioner's objection relies

² An election was also directed and simultaneously conducted in Case No. 2-RC-22354, in a unit of the Employer's licensed employees. A Certification of Representative was issued to the Petitioner in that case on June 20.

exclusively upon the Employer's alleged failure to comply with *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). The Employer argues that, inasmuch as there exists no obligation under *Excelsior Underwear*, or its progeny, to provide the e-mail addresses of employees, the objection must be dismissed. In this regard, the Employer notes that, in the Decision and Direction of Election issued in this matter, I found that I was not authorized under Board law to require the Employer to provide the e-mail addresses of eligible voters as part of the *Excelsior* requirement.³

The Employer additionally contends that there is no generally applicable obligation on employers to provide unions with e-mail addresses of eligible voters and that it acted in full compliance with all *Excelsior* requirements. The Employer further submits that any additional obligations thereunder must be applied prospectively. The Employer argues that the Petitioner could have availed itself of other means of communication with employees, as discussed in further detail below, and Petitioner failed to carry its burden of showing that its failure to provide the e-mail addresses of employees interfered with the election.

The Petitioner⁴ contends that under the facts of this case, the Employer should be required to provide the e-mail addresses of unit employees. The Petitioner further contends that the R/V Maurice Ewing was the de facto temporary residence of the vast majority of unit employees during the preelection critical period and the Employer's refusals to provide the e-mail addresses of these employees was tantamount to the knowing submission of an incorrect *Excelsior* list. The Petitioner further contends that a consideration of whether alternate means of communication with employees were available to it is neither necessary nor relevant to a determination of whether the Employer has met its obligations under *Excelsior Underwear*.

The underlying relevant facts are set forth in the hearing officer's report and are generally not in dispute. The hearing officer found that during the period from December 2000 through the date of the election, the R/V Maurice Ewing was either in ports-of-call in Tampa, Florida, Charleston, South Carolina, San Juan, Puerto Rico and Panama, or in transit between these various points. Specifically, the hearing officer found that on April 8, the vessel left the port of San Juan, Puerto Rico embarking on a 4-day voyage to Panama. On April 14, the vessel commenced a 36-day voyage, returning to Panama for the period from May 19 through 23. On May 25, the ship left for Puerto Rico, arriving on the day of the election. The hearing

³ As discussed more fully in the Report, in preelection proceedings, the Petitioner submitted an offer of proof in support of its request that the Employer be directed to provide the e-mail addresses of its employees as part of its obligation under *Excelsior Underwear*. In the Decision and Direction of Election (the Decision) issued in this matter, I affirmed the Hearing Officer's ruling rejecting Petitioner's offer of proof, noting that "there is no Board law . . . which gives me the authority to direct the Employer to provide the Union with e-mail addresses of employees." The Petitioner filed a request for review of the Decision, which was denied by the Board on May 9, "without prejudice to the Petitioner's right to file an objection concerning the issue raised on review."

⁴ On December 21, the Petitioner filed an answering brief to the Employer's exceptions.

officer found that nine out of eleven eligible voters were not at their home addresses at any time during the period from April 19, the date the *Excelsior* list was due for submission, through May 29, the date of the election. The hearing officer additionally noted the record evidence, relied upon by the Employer, that the Petitioner conducted the bulk of its organizational activities among employees during a lengthy layover in Tampa, that the Union's authorization cards request that the signer provide his or her e-mail addresses among other information, and that the majority of card signers did not supply this information. The record further established that the Petitioner did, in fact, have the at-sea e-mail addresses of two employees in the unlicensed unit,⁵ and while it utilized this information to contact employees on the vessel while it was at sea, the Petitioner did not request that these employees make available the e-mail addresses of their coworkers or ask them to distribute campaign materials to other employees.

The hearing officer concluded that, under the circumstances of the case, where a majority of bargaining unit members were not at their home addresses at any time during the critical period, the failure of the Employer to provide the e-mail addresses of unit employees frustrated the manifest purpose of the *Excelsior* rule. In doing so, the hearing officer examined Board precedent setting forth both the rationale for the rule, as well as the changes adopted by the Board in the years since *Excelsior Underwear* was first decided.

Initially, the Employer argues that there is no obligation under *Excelsior* to supply anything other than the names and mailing addresses of employees. The Employer maintains that the Board, in denying the Petitioner's request for review of my finding that there is no Board law authorizing me to direct the production of e-mail addresses, has ruled on the matter. I note however, that the Board specifically provided for a reconsideration of this matter as the subject of timely filed objections. Moreover, the matters presented in connection with the underlying representation proceeding, which concerned itself with issues relating to the existence of a question concerning representation, are not those contemplated by the instant proceedings, which entail a determination of whether the Employer engaged in conduct which reasonably could have tended to interfere with the election. I note that such matters are not litigable in preelection representation proceedings. Thus, I find that both procedurally and substantively, I am not precluded from addressing the issue of whether the Employer's failure to provide at-sea e-mail addresses of employees constitutes objectionable conduct, and that it is appropriate for me to do so.

In support of its argument that the Board has never required that the *Excelsior* list include any information other than the names and addresses of employees, the Employer relies upon *Lockheed Martin Skunk Works*, 331 NLRB 852 (2000). In that case, which arose in the context of a decertification petition filed by a unit employee, the Board held that alleged discriminatory nonenforcement of no-solicitation rules in favor of the decertification petitioner did not constitute objectionable conduct. Rather, the Board found that under the circumstances of

that case, the union was not placed at a disadvantage relative to the petitioner, based solely upon the petitioner's greater use of the employer's e-mail system. In so holding, the Board stressed the fact that the disparity in use resulted to some degree from the union's failure to make full use of the access granted to it by the employer, that the record evidenced the union's preference for traditional methods of communication, and that there was no evidence of dissemination regarding the employer's alleged discriminatory nonenforcement of its no-solicitation rules. With respect to any general requirement regarding access to e-mail addresses, the Board noted:

There is no per se rule that an employer must allow the parties to an election to use its e-mail system comparable to the *Excelsior* list requirement discussed above, and there is, accordingly, no basis for presuming that an employer's failure to provide such access constitutes objectionable conduct.

331 NLRB 854 at fn. 12.

As the hearing officer noted, both parties claim that this language supports their contentions in the instant matter. The Employer relies upon this observation in arguing that there is no obligation under *Excelsior Underwear* to provide employee e-mail addresses. The Petitioner, contrary to the Employer, submits that this language supports a finding that under some circumstances an employer may be required to provide e-mail addresses.

Lockheed Martin, however, did not involve an alleged breach of the employer's obligations under *Excelsior Underwear*. Thus, the fact that the incumbent union had access to employees via interoffice mail, union bulletin boards and traditional mailings was of significance. Noting that those circumstances are clearly not analogous to those presented by the instant matter, I find that the above statement by the Board is not dispositive of the issues raised by the objection and renders the issue of whether, under certain circumstances, the failure to provide e-mail addresses of employees may constitute objectionable conduct, to be open to further consideration.

The Employer notes that in *Excelsior Underwear* the Board adopted a per se rule to require employers to produce the names and addresses of employees in all cases, and that this rule was adopted prospectively. In that particular instance, the elections were not set aside. The Employer argues that to set aside the election in the instant case, on the basis of its failure to provide the Petitioner with e-mail addresses of employees, would not be consistent with *Excelsior Underwear* or the requirements of due process.

Contrary to the Employer, I find support in Board law to overturn the election in the instant case. Initially, I note that the matter before me involves objections to the conduct of one specific election under a particular, and unusual, set of circumstances. At the post-election stage, my authority is limited to a consideration of whether, under the facts of this case, the manifest purpose of the *Excelsior* rule has been achieved and whether the Employer's actions tended to interfere in the election so as to warrant that it be set aside and another election be directed. Further, the Employer's contention that any change in

⁵ In addition, Petitioner was in possession of the e-mail addresses of two employees in the licensed unit.

obligations under *Excelsior* must be applied prospectively is not supported by Board law.

In *North Macon Health Care Facility*, 315 NLRB 359 (1994), the Board considered a situation where the employer had provided the union with a list of eligible voters containing incorrect addresses for 33 out of 144 employees, and the employees' first initials and last names, rather than their full names. Payroll records submitted by the employer during the hearing included employees' addresses as well as their complete first and last names. The hearing officer recommended that the petitioner's objection be overruled, finding that the employer's use of the voter's first initial rather than full name did not rise to the level of a substantial failure to comply with the *Excelsior* rule's requirements.

The Board found that, insofar as the employer had failed to provide employees' first and last names, the petitioner's objection had merit, and directed that a second election be conducted.⁶ In doing so, the Board announced an expansion of the *Excelsior* rule applicable to that case and all other cases involving the issue retroactively. In explaining its decision to apply the rule in that manner, the Board held:

Based upon our administrative experience in the areas of representation elections, retroactive application of our clarification of the *Excelsior* rule will further the purposes of the Act. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958) (“the judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, we believe, the wiser course to follow”) . . . we find no circumstances here sufficient to overcome the Board's presumption in favor of retroactivity. As discussed above, the application of the rule that an *Excelsior* list must include employees' full names serves important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation. It would be anomalous for the Board to certify results of elections conducted without compliance with the *Excelsior* rule as set forth herein, after the Board has found that such elections do not ensure that employees are fully informed about the arguments concerning representation and thus are not able to exercise fully their Section 7 rights.

315 NLRB at 361.

The Board went on to note that although a second election might result in a certification of representative, whereas the first did not, it did not find that there was prejudice to the employer on that basis, stating that “[it] would be inconsistent with the Act's animating principles to find that an employer is prejudiced by the Board's recognition of employee choice under these circumstances.” *Id.*

Additionally, I note that by the terms of the Board's ruling on Petitioner's Request for Review, the Employer was fully on notice that its asserted obligation to provide employee e-mail

⁶ As Member Cohen noted in his dissent, two Board members, Chairman Gould and Member Devaney, would have set the election aside on the additional basis of incorrect addresses. However, there was no majority for doing so. 315 NLRB 362 fn. 2.

addresses could, and might, be subsequently litigated and re-considered. Under all the circumstances, therefore, I do not find it violative of Board law or the requirements of due process to set the instant election aside.

In agreement with the hearing officer, I do not find the evidence that the Petitioner had alternate means of access to employees to be either compelling or to warrant a different result herein. The Employer relies upon the fact that the Petitioner could have, and should have, made greater use of the limited number of e-mail addresses of unit employees it did have. The Employer suggests that these employees should have been asked to provide e-mail addresses for, and send union communications to, their coworkers. The Employer offered no evidence, and there is no suggestion in the record, that these employees were invested with either actual or apparent authority to act as agents of Petitioner and campaign on its behalf. Such a proposal would have the result of effectively placing the responsibility for a union's organizing in the hands of employees. There may be many reasons why employees may choose not to openly campaign for or against union representation. The *Excelsior* rule allows unions to have access directly to employees precisely so that they may consider their options and make an informed choice, by secret ballot, consistent with the protections of Section 7 of the Act.⁷ Further, the Board specifically held in *Excelsior* that the availability of alternate means of communication is not a factor which would obviate against disclosure, where a question concerning representation exists. (156 NLRB at 1245.) Moreover, in situations where the Board has considered objections based upon noncompliance with the rule, it has consistently declined to render a determination on the basis of whether the union ultimately had access to employees. *Id.* at 1241; *North Macon*, supra at 360 fn. 9; *Mod Interiors*, 324 NLRB 164 (1997) (quoting *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971)) (to look into the issue of whether employees were actually informed about election issues would “spawn an administrative monstrosity.”)

In determining that the election herein should be set aside, I acknowledge, as the Employer argues, that there is no Board case which has specifically dealt with this issue. The Board has held, however, that in discharging the trust placed in it to determine the steps necessary to ensure that elections are conducted fairly, its function includes not only conducting elections free from interference, restraint or coercion violative of the Act, but,

also from other elements that prevent and impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments con-

⁷ I similarly reject the Employer's contention that the Petitioner should have adjusted the timing of its organizational activities to coincide more closely to those periods of time when it would be able to communicate to employees in ports-of-call. As the Petitioner notes, the fact that union officials may have access to employees outside of or adjacent to the workplace fails to excuse employers from compliance with the *Excelsior* rule.

cerning representation is in a better position to make a more fully informed and reasonable choice.

Excelsior Underwear, supra, at 136.

The fundamental purpose of the *Excelsior* rule was noted with approval in *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 767 (1969):

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses.

Over the years, the Board has consistently affirmed the rationale informing its decisions in this area; see e.g. *Sonfarrel*, 188 NLRB at 970 (1971) (*Excelsior* requirement rooted in hope of insuring a “fair and informed” electorate); *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989) (purpose of *Excelsior* rule is “to further the fair and free choice of bargaining representatives . . . by encouraging an informed employee electorate and by allowing unions the right to access to employees that management already possesses); *Mod Interiors*, supra (*Excelsior* rule intended to “achieve important statutory goals by ensuring that all employees are full informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.”). It is well-settled, moreover, that the information contained in an *Excelsior* list must be “complete and accurate so that the union may have access to all eligible voters,” in order “to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can fully and freely exercise their Section 7 rights.” *Id.* Thus, the Board has found that objectionable conduct has occurred when there are substantial inaccuracies in the addresses provided in an *Excelsior* list. For example, in *Medtrans*, 326 NLRB 925 (1998), the Board set aside an election where the intervenor union reported that the *Excelsior* list contained numerous incorrect addresses and requested updated information from the employer. Despite a policy that required employees to report any change of address within seven days, the employer failed to provide further information to the union or to enforce this policy among its employees. The Board found that the employer’s “disregard for the [i]ntervenor’s request for a corrected list [was] incompatible with [the] *Excelsior* requirements.” In *Merchants Transfer Co.*, 330 NLRB 1165 (2000), the Board set an election aside where the employer assembled the *Excelsior* list using addresses it knew to be incorrect and where no effort was made to verify the accuracy of the information provided.⁸ In doing so, the

Board noted that “the [e]mployer here provided the [u]nion with addresses that were “less accurate than it used for its own purposes.” (citation omitted). In both of the above-noted cases, a common thread is that the employers therein could have and should have taken further action to provide accurate information to the unions.

Moreover, the Board has held that even in situations where an employer has fully met the requirements of the rule, an election may be set aside when there is substantial interference with the essential function the rule is meant to serve. As the hearing officer noted in his report, the proper focus in determining whether there has been observance of the requirements of *Excelsior* should be on “the degree of prejudice to the channels of communication.” *Avon Products*, 262 NLRB 46 (1982). While it is true, as the Employer argues, that none of the cases cited by the hearing officer involve the failure of an employer to provide employee e-mail addresses, it is also proper to conclude that these cases stand for the general proposition that, under particular circumstances, objectionable conduct will be found to exist notwithstanding technical compliance with the parameters of the *Excelsior* rule. Under such circumstances, the Board has made clear that it is appropriate to find in favor of a free and unfettered exercise of employees’ Section 7 rights.

In the instant case I find it would be inconsistent with the “animating principles” of *Excelsior Underwear*, and its progeny, as well as those of the Act, to find that the Employer’s submission of the names and mailing addresses of employees, absent more, has satisfied the requirements of the *Excelsior* rule. Clearly, such a finding would elevate form over substance to the detriment of the statutory rights of employees. As the hearing officer found, the predominant majority of eligible voters were not at their home addresses during the period in which the Petitioner had access to the *Excelsior* list. It stands to reason, therefore, that traditional mailings to their home addresses would have been futile.

The Petitioner did not have access to employee addresses during the critical period, which would enable it to, in any meaningful sense, communicate with most of the employees in the proposed unit. The traditional mailing addresses supplied by the Employer were, therefore, less accurate than those it relied upon for its own purposes during the critical period. Under these circumstances, in agreement with the hearing officer, I find that the manifest purpose of the *Excelsior* rule has not been met in this instance. I further find that the Employer’s failure to comply with the Petitioner’s request to provide it with such information, constituted objectionable conduct. Accordingly, I adopt the hearing officer’s report and recommendations and sustain Petitioner’s objection. I further direct that the election previously conducted be set aside and a second election be held in Case 2–RC–22355.

⁸ In this instance the Board found that the employer’s knowing submission of incorrect addresses demonstrated gross negligence or bad faith.