

**Ridgewood Country Club and Laborers International
Union of North America, Local 78.** Case 22–
RC–013161

January 3, 2012

DECISION AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The National Labor Relations Board has considered an objection to an election held on October 29, 2010,¹ and the administrative law judge's decision recommending disposition of that objection. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots showed 16 votes in favor of the Petitioner and 20 votes against, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the judge's findings² and recommendation, and finds that the election must be set aside and a new election held.

We adopt the judge's recommendation to sustain the Petitioner's objection, which alleges that the election must be set aside based on the Regional Office's failure to timely provide the Petitioner with the *Excelsior* list of eligible voters' names and addresses. Under *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239–1240 (1966), the employer must, within 7 days after the approval of an election agreement or the issuance of a decision and direction of election, file with the Regional Office an election eligibility list containing the names and addresses of all employees who are eligible to vote in the election. *Excelsior* further provides that “[t]he Regional Director, in turn, shall make this information available to all parties in the case.” *Id.* at 1240. In a subsequent case, the Board held that it “will give the petitioner an opportunity to make use of the list for at least 10 days before conducting the election.” *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997).

Here, there is no dispute that the Employer timely provided the *Excelsior* list to the Regional Office on October 19. There is also no dispute that the Petitioner did not receive the list from the Regional Office until October 25—just 4 days before the October 29 election.³

¹ All dates are in 2010, unless otherwise indicated.

² The judge was sitting as a hearing officer in this representation proceeding.

³ A fax transmission sheet entered into evidence shows that the Board agent attempted to fax the *Excelsior* list to the Petitioner on October 19, but that the receiving line was “busy” and the fax did not go through. The record evidence does not show that any further attempt was made to transmit the list to the Petitioner or to its attorney until October 25.

Accordingly, the Petitioner had the list for 6 fewer days than the *minimum* required (absent waiver by the Petitioner) under the Board's 10-day rule. See *Mod Interiors*, supra at 164. In these circumstances, we agree with the judge that the Petitioner's late receipt of the *Excelsior* list “interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights.” *J.P. Phillips, Inc.*, 336 NLRB 1279, 1280 (2001), quoting *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998).

The Employer argues that the judge erred in finding merit in the Petitioner's objection because she failed to require the Petitioner to prove that it had been “materially prejudiced” by the Region's late delivery of the *Excelsior* list. The Employer further contends that the judge “plainly disregarded” several steps that the Petitioner could have taken “if it truly desired to receive [the list] on time,” such as sending someone to the Regional Office to pick up the list or contacting counsel for the Employer to request a copy of the list. That the Petitioner failed to take these steps, the Employer asserts, shows that it did not truly need the list before October 25, and, therefore, it was not materially prejudiced by receiving it on that date.

The Employer's arguments are without merit because the judge applied the proper standards in deciding this case. First, prejudice can be presumed when the list is not received outside the minimum 10-day period. A showing of prejudice is required only when the employer timely files the list with the Regional Office 7 days after the direction of election and the region fails to immediately make the list available to all parties as required by *Excelsior*, but does make it available at least 10 days before the election. See, e.g., *CEVA Logistics U.S., Inc.*, 357 NLRB No. 60 (2011) (although the Region did not forward the *Excelsior* list to the union until 3-1/2 days after receiving it from the employer, the union still had full use of it for 13 days before the election). When a party does not have a list of all eligible voters and their addresses for at least 10 days before the election, on the other hand, no specific showing of prejudice is required because prejudice will exist in almost every case. In *Mod Interiors*, the Board stated the rule in categorical terms: “the Board will give the petitioner an opportunity to make use of the list for at least 10 days before conducting the election.” 324 NLRB at 164. That is why the Board made clear in *Alcohol & Drug Dependency*

Services that “the Board, in comparable circumstances, has found ‘prejudice.’” 326 NLRB at 520.⁴

Second, even if a showing of prejudice were necessary, such a showing was made here. As detailed in the judge’s decision, the Petitioner’s 2 employee-activists and 25 of the 27 employees in the petitioned-for unit of groundskeepers only spoke Spanish, while the 9 employees added to the unit at the request of the Employer did not speak Spanish and did not work side-by-side with the groundskeepers.⁵ Thus, the task of communicating with the nine additional employees and the two groundskeepers who did not speak Spanish fell to nonemployee agents of the Petitioner who could speak a language other than Spanish. As the judge found, before the Petitioner received the *Excelsior* list, it had been unable to contact the nine employees added to the unit at the request of the Employer and the two non-Spanish-speaking groundskeepers. Even after receiving the list on October 25, the Petitioner was only able to meet with 5 of those 11 employees. Thus, despite its efforts, the Petitioner was unable to speak with six employees during the 4 days between its receipt of the list and the October 29 election. We note that a change of only 3 votes of the 36 cast would have produced a different result in the election.

The Employer contends that the Petitioner has failed to show what actions it would have taken had it received the *Excelsior* list sooner and, therefore, that the Petitioner has not established that it was truly prejudiced by the late

receipt of the list. The Board, however, has explicitly rejected the view that prejudice can only be shown through tangible evidence of specific acts that the union planned but was precluded from undertaking because of the late receipt of the list. *Alcohol & Drug Dependency Services*, supra at 520 fn. 5. Moreover, the Employer concedes that the Petitioner’s director of organizing testified that if he had received the list in a timely manner “the Union would have attempted to visit the employees over the weekend when they were more likely to be home.” The Employer’s response, that the Petitioner “presented no evidence that any of these employees was home over the previous weekend,” suggests that the Petitioner bore a burden of proving not only what actions it would have taken, but that those actions would have been successful. Imposing such a heavy burden would not be reasonable and is not supported by any prior precedent. For each of these reasons, prejudice was shown here.

Third, a party objecting to not receiving the eligibility list at least 10 days before an election does not bear a burden of proving that it took reasonable steps to obtain the list. Rather, the claim that the objector failed to do so is in the nature of a claim of laches, an affirmative defense, and the nonobjecting party properly bears the burden of proof. See *Cook v. Wikler*, 320 F.3d 431, 438 (3d Cir. 2003) (“Laches is, of course, an affirmative defense to a claim, and the party asserting it bears the burden of proof.”).⁶

There is no evidence in the record suggesting that the Petitioner did not take reasonable steps to obtain the list. Petitioner’s counsel represented at the hearing that he telephoned the Board agent handling the case on October 21, 22, and 25. Counsel indicated that he left voicemail messages stating that the Petitioner had not yet received the *Excelsior* list and requested that the Region provide the list. Counsel also represented that, on October 25, he faxed a letter to the Region making the same request,⁷ and the letter (together with a cover sheet confirming it was successfully faxed to the Regional Office) was received into evidence without objection. The letter confirms that counsel left “messages [with the Board agent] beginning last week concerning an eligibility list from the employer.” The Respondent offered no evidence contradicting the evidence or the representations.

Finally, a party that does not receive the list in a timely manner is not required to request that the election be de-

⁴ The Board’s holding in *Alcohol & Drug Dependency Services* and statement in *Mod Interiors* are, as the dissent points out, in some tension with the earlier discussions in *Red Carpet Building Maintenance Corp.*, 263 NLRB 1285 (1982), and *Sprayking, Inc.*, 226 NLRB 1044 (1976). But those earlier cases were decided before the Board established the 10-day rule in *Mod Interiors* and, thus, the Board analyzed all cases involving late-provided eligibility lists in the same manner without regard to whether all parties had the list for at least 10 days. In fact, in *Red Carpet*, the union entered into a stipulated election agreement that was not approved until April 7, making the eligibility list due on April 14, which was only 9 days before the April 23 election, a fact relied on by the Board. 263 NLRB at 1286. Moreover, in *Sprayking*, the employer sent the list directly to the petitioner’s counsel who received it in a timely manner, 13 days before the election. 226 NLRB at 1044. (We note that any employer wishing to avoid the scenario presented in this case could do the same.) Because *Alcohol & Drug Dependency Services* and *Mod Interiors* postdate *Red Carpet*, and because we believe prejudice will exist in almost every case, we follow the latter Board law.

⁵ The original petitioned-for unit consisted only of the Employer’s 27 groundskeepers. The Employer, however, requested the addition of nine employees (mechanics, carpenters/masons, and irrigation technicians) to the proposed unit. The Petitioner had no information about these nine added employees, not even their names. Nonetheless, it agreed to the Employer’s request, and the expanded unit described in the October 12 Stipulated Election Agreement consisted of a total of 36 employees.

⁶ In the two cases the dissent cites relating to this issue, *Sprayking* and *Red Carpet Building Maintenance*, the Board did not discuss the burden of proof.

⁷ The judge explained that Petitioner’s counsel declined Respondent’s request that he formally testify about these matters because he was not under subpoena and had no cocounsel at the hearing.

laid or else risk waiving any objection based on the late receipt of the list. The Board has made clear that “such request is not necessary to establish prejudice.” *Alcohol & Drug Dependency Services*, 326 NLRB at 520 fn. 9.⁸

In conclusion, we note that the recurring issue of delay in a petitioner’s receipt of an *Excelsior* list from our Regional Offices is addressed by the procedures set forth in the Board’s recent proposal to amend its rules and regulations governing the filing and processing of representation petitions. See *CEVA Logistics U.S., Inc.*, 357 NLRB No. 60 (2011) (discussing 76 F.R. 120 (June 22, 2011)). The proposed amendments would require that the employer serve the *Excelsior* list on the other parties electronically at the same time it is filed with the Board’s Regional Office, thus eliminating this potential source of delay and resulting litigation.⁹

[Direction of Second Election omitted from publication.]

MEMBER HAYES, dissenting.

After losing the October 29, 2010,¹ election by a margin of 16–20, the Petitioner now asks the Board to set aside the results based on the undisputed fact that it did not have the *Excelsior* list of eligible employees until 4 days prior to the election, rather than the required 10 days. This delay was not attributable to the Employer, who timely submitted the list to the Regional Office. Board precedent relevant to this situation is inconsistent. My colleagues rely on two-member plurality opinions in Board panel decisions that arguably obviate the need for specific proof of prejudice resulting from the late receipt

⁸ Again, this holding is in tension with dicta in *Red Carpet Building Maintenance*. In light of the clear later holding in *Alcohol & Drug Dependency Services*, however, we cannot hold that the Petitioner waived its objection by failing to seek a postponement of the election. The premise of the dissent’s position is that a union can waive the right to use the eligibility list for at least 10 days before the election. While we agree with that premise, we believe that *Alcohol & Drug Dependency Services* makes clear that the waiver must be clear and unequivocal and will not be found to be implicit in a failure to request a delay in the election.

⁹ Member Becker writes separately to state that he would require service of the list on all parties in this case. To err is human, even in the Board’s Regional Offices, but this unavoidable human error has led to a series of wholly avoidable cases before the Board. See, e.g., *Special Citizens Futures Unlimited*, 331 NLRB 160, 160–162 (2000); *Alcohol & Drug Dependency Services*, supra; *Red Carpet*, supra; *Sprayking*, supra. The *Excelsior* Board clearly did not foresee this issue when it required only that the list be filed with the Regional Office. Requiring service on all parties protects employers who comply with their duty and gives all other parties the access to eligible voters *Excelsior* intended. All parties benefit as does the Board and, thus, the general public. The *Excelsior* rule was adopted through adjudication and it can be refined in adjudication or via rulemaking. I would fix this wholly avoidable problem now.

¹ All dates are in 2010.

of the list. Moreover, they contend in any event that there is specific proof of prejudice here. I believe the better view, based on prior cases that have never been expressly overruled by the affirmative vote of three Board members, is that a petitioner must show that it was materially prejudiced in its ability to communicate with unit employees, thus interfering with the purpose behind the *Excelsior* rule. Inasmuch as I would find that the Petitioner failed to make such a showing here, I would reverse the judge, overrule the Petitioner’s objection, and certify the election results.

The Petitioner initially sought a unit of 27 groundskeepers at the Ridgewood Country Club. Thereafter, the parties agreed the unit should include an additional 9 mechanics, carpenters/masons, and irrigation technicians, resulting in a unit of 36 employees. The Employer timely submitted the *Excelsior* list to the Region on October 19. The Region attempted to fax the list to the Petitioner on that day, but the transmission was not successful. The list was successfully faxed on October 25, after the Region received a faxed letter from the Petitioner’s attorney that same day indicating the list had not yet been received.

The Petitioner concedes that it was not prevented from contacting 25 of the groundskeepers because the list was late. However, the Petitioner does assert prejudice as to the 11 remaining employees—the 9 nongroundskeepers and 2 groundskeepers, all of whom did not speak Spanish, the apparent primary language of the Petitioner’s 2 organizers. In this regard, the Petitioner notes that it did not have the list during the weekend prior to the election and thus could not contact the employees at their homes at that time, when the Petitioner believed they were most likely to be present. Nevertheless, after receiving the *Excelsior* list, the Petitioner held a group meeting on October 27, but it did not invite any of the nine nongroundskeepers to that meeting. Its organizers did, however, make personal contact with 5 of the 11 eligible voters not previously contacted.

I agree with my colleagues that “the relevant inquiry is whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights.” *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998). I disagree with them as to the evidentiary burden imposed on the objecting party seek to prove such interference. As a general matter, it is beyond cavil that the Board does not easily set aside its elections and that the burden on a party seeking to do so is a “heavy” one. E.g., *Safeway, Inc.*, 338 NLRB 525 (2002). I would

therefore not automatically presume prejudice from the fact that the *Excelsior* list is not received 10 days before the election.

Although the plurality opinion in *Alcohol & Drug Dependency Services* arguably supports such a presumption,² other precedent is to the contrary. In particular, in *Sprayking, Inc.*, 226 NLRB 1044 fn. 8 (1976), a unanimous Board panel rejected a mechanical application of the *Excelsior* rule in cases where, as here, the employer timely submits the list to the Region but it is received by a party less than 10 days before the election. Based on the circumstances of that case, the Board reversed the regional director and found that the petitioning union failed to show that its delayed receipt of the list only 4 to 5 days before the election was not a basis for setting aside the election. Likewise, in *Red Carpet*, 263 NLRB 1285, 1286 (1982), another unanimous Board panel reversed the regional director and found, under circumstances cited there, that the petitioning union failed to show that its delayed receipt of the list 6 days before the election was not a basis for setting aside the election.³

Applying the aforementioned precedent, and cases cited therein, I would find that the Petitioner has failed to meet its ultimate burden of proving objectionable interference with its ability to communicate with employees prior to the election, and I would make this finding regardless of whether or not the Petitioner should benefit from an initial presumption of prejudice due to its late receipt of the list. First, there is no legitimate record evidence that the Petitioner took any affirmative steps to procure the list prior to October 25, the day it was provided. *Red Carpet*, supra at 1286 (union took no affirmative steps to obtain the list until 7 days before election); *Sprayking*, supra at 1044 (union's "failure to seek the list earlier, even though it knew its receipt was overdue, indicates that it did not really need the list prior to the time it actually received the list from its attorney"). In this regard, I note that the Petitioner's attorney represented at the hearing that he also left voicemail messages on October 21, 22, and 25 informing the Region that he had not received the list. However, he refused to be sworn or cross-examined on that representation. Unlike the judge and my colleagues, I do not accept the unsworn representation as record evidence, much less as fact.⁴

² 326 NLRB at 520 fn. 8.

³ I note that the plurality in *Alcohol & Drug Dependency Services* purported to distinguish *Red Carpet*, not to overrule it. 326 NLRB at 520 fn. 9. Thus, the judge in this case erred when stating that *Red Carpet* "does not seem to be regarded as good law."

⁴ The Petitioner attorney's unsworn representations that he made earlier attempts were inadmissible as evidence under the Federal Rules of Evidence and the Board's own Rules and Regulations because the attorney refused to be sworn or cross-examined. See FRE 603 (before

Second, the Petitioner made no effort to postpone the election once it received the list. *Red Carpet*, 263 NLRB at 1286.⁵ Compare *American Laundry Machinery Div.*, 234 NLRB 630, 632 (1978) (union's request for postponement of election when *Excelsior* list was late "indicates that the list was of great importance" to its campaign plans).

Finally, actions taken by the Petitioner after it received the list fail to establish that the late receipt of the list had any significant impact on its ability to communicate with eligible voters. The Petitioner conceded that it was ultimately able to reach 30 of the 36 eligible voters, including 5 of 11 whom it had not contacted prior to receiving the list. It is also undisputed that it conducted an organizational meeting on October 27, 2 days after it received the list, but still failed to invite any of the 9 non-groundskeepers to that meeting, further undercutting any claim that it was prejudiced by its inability to contact these employees earlier in the campaign.

Viewed as a whole, then, the record evidence fails to meet the Petitioner's heavy burden of proving that its delayed receipt of the *Excelsior* list so interfered with its ability to communicate with employees as to require setting aside the election results. My colleague's contrary view unfortunately encourages gamesmanship by placing a union in a no-lose situation whenever the *Excelsior* list is even a day late. Either it wins the election or it gets a rerun election. No valid purpose is served by allowing a

testifying witness shall be required to declare that he or she will testify truthfully); Sec. 102.30 of the Board's Rules and Regulations ("Witnesses shall be examined orally under oath."). As such, the attorney's representations cannot be used as substantive evidence of efforts by the Petitioner to secure the list. *U.S. v. Hawkins*, 76 F.3d 545, 551-552 (4th Cir. 1996) (unsworn representation of prosecutor as to defendant's identity inadmissible); *U.S. v. Fiore*, 443 F.2d 112, 114-115 (2d Cir. 1971), appeal after remand 467 F.2d 86 (2d Cir. 1972), cert. denied 410 U.S. 984 (1973) (testimony inadmissible when witness refused to be sworn). The judge incorrectly stated that the Employer either should have questioned Petitioner's witness Kent about his communications with his attorney or should have subpoenaed the attorney's testimony. Had the Employer done the former, and assuming Kent would have waived any attorney-client privilege that might apply, any testimony about what the attorney claimed said to him about attempted communications with the Region would be uncorroborated hearsay. As for the Employer's failure to subpoena the attorney's testimony, that inaction cannot convert inadmissible, unsworn representations into admissible record evidence.

Because the Petitioner has the burden of establishing objectionable conduct, I would find that it had the burden of proving that it took affirmative steps to obtain the list, and I note that my colleagues cite no Board precedent in support of their contrary position. Such evidence is obviously known to the petitioner but not to the employer, who, as this case demonstrates, is likely to face significant difficulty in making the showing the majority demands.

⁵ In light of the Board's reliance on the absence of such a request in *Red Carpet*, I respectfully disagree with the majority's characterization of that analysis as dicta.

union to sit on its rights when minimal due diligence by it could avoid this result without sacrificing the important Board policy that the *Excelsior* rule seeks to assure.

In sum, for the foregoing reasons, I would overrule the Petitioner's objection and certify the results of the election.