THE NLRB'S EXCELSIOR DOCTRINE
A Critical View

by

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Preliminaries--The Rule; Immediate Effect

In 1966 the National Labor Relations Board rendered a tradition-breaking decision in Excelsior Underwear, Inc.,[1] which, on the basis of the subsequent litigation, has caused a noticeable stir in management circles. The controversial principle arising from the ruling, now known as the Excelsior Rule, requires that seven days after the Regional Director of the Board has approved a consent election agreement, or after the close of the determinative payroll period for eligibility purposes, whichever is later, the employer is required to file with the Regional Director an election eligibility list containing the names and addresses of all those eligible to vote. The Regional Director shall then make this list available to all parties in the case. Failure of the employer to timely file this Excelsior list will be grounds for setting aside the election whenever proper objections are filed.

Although the Board takes pains to indicate that all involved parties shall be entitled to this list,[2] be that party the union or an employee seeking a decertification election, it is nevertheless

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1. 156 NLRB 1237, 61 LRRM 1217 (1966). Also see the case note analysis in 19 Vand. L.R. 1395 (1966).

2. Ibid. This is also strongly emphasized in a recent U. S. District Court Case construing the Excelsior Rule, Swift & Co. v. Solien, 66 LRRM 2038 (1967).

clear that as a practical matter, it will be the union, in the great majority of cases, which will receive the benefits of the Excelsior requirements. Whether or not one endorses such a result, it must be noted that the courts have already ruled that the National Labor Relations Act, as far as the beneficiaries of its provisions are concerned, was adopted primarily for the benefit of employees, not necessarily for the benefit of labor unions.[3] It is immediately obvious that the Board will now have the power, as delineated in Excelsior, to set aside an election that in all other respects may have been eminently fair to all employees, simply because an Excelsior list was not submitted, and the proper objections were filed by the union.[4]

Board's Election Policies--Basis of Invalidation

Ostensibly, the Board's paramount consideration in determining the validity of an election is based upon the idea of fairness.[5] Using fairness as a starting point, the Board, in Excelsior, went further and assumed the burden of assuring the union the equal opportunity to reach the work force. That is to say, the Board has decided that if the union's opportunity to propagandize the work force is more limited than management's opportunity, at least insofar as the ability to carry the message to the home, then this alone shall be the basis to declare an election invalid.

Such a conclusion is rather startling, particularly when viewed in the light of prior Board pronouncements on the overturning of

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3. NLRB v. Schwartz, 146 F.2d 773 (1943).

4. Such a case was NLRB v. Teledyne, Inc., 66 LRRM 2408 (N.D. Calif. 1967), to be discussed in further detail in connection with abuses of Excelsior.

5. Fairness invariably may be cited as the reason for an NLRB decision. The Board will always, either implicitly or actually, mention fairness as the basis of a ruling. This has been particularly apparent in the long line of multiemployer bargaining cases, for example, Rayonier, Inc. 52 NLRB 1269 (1943). However, the issue is not whether fairness was a motivating factor, but rather, were the Board's conclusions in fact fair?

elections. First, this new idea of equalizing opportunity is at complete variance with the clear guidelines set forth in the case of Hollywood Ceramics Co., Inc.[6] It was determined that a representation election should be set aside only when there has been an actual misrepresentation of fact by one party, or other similar "campaign trickery" which was in fact a substantial departure from the truth and prevented the other party from making an effective reply, so that the misrepresentation could reasonably be expected to have a significant impact upon the outcome of the election. In Hollywood Ceramics, the Board found that the union's conduct had gone beyond the boundaries that could be accepted as fair and reasonable. The day before the election, union representatives had distributed handbills containing a considerable amount of false and misleading information concerning management's pay scales relative to a unionized shop. Since one party had taken affirmative steps to prejudice the election, whether deliberate or not, the Board felt it necessary to void the vote. This basically has been the traditional view.

The Excelsior decision is also called into question by a long series of Board decisions on invalidating elections. In its zeal to make equal the opportunity to present the facts to the workers, the Board seems to ignore the fact that it has always imposed clear and stringent limitations upon management so that employers are severely restricted in their statements and actions as election time approaches.

A few very recent examples will serve to illustrate the Board's strict stance in this area. In the case of Thomas Products Co. and United Steelworkers of America, AFL-CIO,[7] the employer was found to have interfered with an election via speeches and letters, emphasizing that union victory would result in a strike, and that existing benefits

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6. 140 NLRB 221, 51 LRRM 1600 (1962).

7. 167 NLRB 106, 66 LRRM 1147 (1967).

would be bargained away. In Intercontinental Manuf. Co., and IAM,[8] employer interference was found on the basis of interrogation of employees about union activities, surveillance of voting, and threats of loss of benefits. Similarly, the Board set aside an election by reason of an employer's veiled threats to close the plant or take alternative economic sanctions if there was a union victory.[9] In June of 1967 an employer overstepped the bounds by distributing photostatic copies of employees' testimony and union authorization cards, introduced as evidence in a prior Board proceeding.[10] Among numerous other acts of interference, one employer was condemned for asking employees to remove their union buttons, passing out "vote no" buttons, and observing those who accepted or rejected them.[11] More surprising was a finding of interference when the employer made a speech to employees in which he related an anecdote concerning his refusal to move into a vacant plant once occupied by another company that had been unionized.[12] One company was held to be practicing unfair tactics by showing an anti-union movie, "And Women Must Weep," during the orientation of new employees,[13] while still another firm

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8. 167 NLRB 105, 66 LRRM 1156 (1967).

9. Penland Paper Converting Corporation and International Brotherhood of Pulp, Sulphite & Paper Mill Workers, AFL-CIO, 167 NLRB 126, 66 LRRM 1193 (1967).

10. John S. Barnes Corp. and Lodge No. 1553 IAM, AFL-CIO, 165 NLRB 58, 65 LRRM 1364 (1967).

11. Kawneer Co. and UAW, 65 LRRM 1320 (1967).

12. Sunbeam Electronics and United Steelworkers of America, AFL-CIO, 167 NLRB 139, 66 LRRM 1193 (1967). Also note Illinois Marble Co. and Journeymen Stone Cutters Association of North America, AFL-CIO, 167 NLRB 147, 66 LRRM 1235 (1967), (Employers interference found in establishing and controlling an employee safety committee through which changes in working conditions were made.)

13. Southwire Co. and Industrial Union Dept., AFL-CIO, 164 NLRB 135, 65 LRRM 1272 (1967).

forfeited its election results by polling employees regarding their union sentiment, but failing to observe Board strictures applying to interrogation.[14]

The Issue of Union Access

Not only have the Courts and the Board formulated clear guidelines to insure that election results are not the result of coercion, so that management is very definitely constrained as to its acts at election time, but concurrently, additional rules have been developed which prevent employers from impeding the exercise of reasonable organizational techniques. A discussion of these additional rules is relevant to an analysis of Excelsior, insofar as it raises further questions as to the necessity of an Excelsior Rule.

Of primary concern is the case of NLRB v. Babcock & Wilcox Company,[15] which held that it was proper for an employer to deny the access of his property of non-employees attempting to distribute union literature, so long as the no-distribution rule did not discriminate against the union, and so long as OTHER CHANNELS OF COMMUNICATION WERE AVAILABLE TO THE UNION REASONABLY ALLOWING IT TO PRESENT ITS MESSAGE TO THE WORKERS. The effect of such a ruling is to guarantee that if a union is denied entrance to company lands (non-working areas), the rule denying access will be invalidated unless an alternative forum is reasonably to be found.

As extensively evaluated in the case of Stoddard-Quirk Manufacturing Co.,[16] there are different treatments for management's

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14. Harry F. Berggren & Son, Inc. and Laborer's Local Union No. 880, 165 NLRB 52, 65 LRRM 1346 (1967). Some of the older decisions on the particular issue of interrogation as an unacceptable coercive practice include, Blue Flash Express, Inc., 109 NLRB 591; Graber Manufacturing Co., 111 NLRB 167 (1955); Union News Company, 112 NLRB 420 (1955); Montgomery, Ward & Co., 115 NLRB 645 (1956); Mid-South Manufacturing Co., 120 NLRB 230 (1958).

15. 351 US 105, 100 LEd 975, 76 SupCt 679 (1956).

16. 138 NLRB 75, 51 LRRM 1110 (1962).

attempts to discourage solicitation and for those efforts to halt distribution of literature. The company is within its rights in banning solicitation during working hours,[17] but it may not prohibit it during non-working time.[18] As to the distribution of literature, non-employees may be barred from the premises.[19] Employees are also prohibited from distributing within the plant proper, even during non-work time; but absent a showing of special circumstances, distribution by employees in peripheral areas, such as parking lots and plant gates, is permitted.[20] In addition, all the cases indicate that any no-solicitation or no-distribution rule which, although valid by the aforementioned tests, discriminates against unions in general, or favors one particular union, will not be enforceable.[21]

The combined effect of these various doctrines which are implemented by the Courts and the Board, is to protect the vitality of the Labor Management Relations Act in protecting certain management rights, while still providing the forces of labor organization with an opportunity to present its views in a reasonable manner. Given this practical guaranty of access, why did the Board suddenly decide in 1966 that many of its previous formulations in this area were inadequate to promote the transmission of the union message?

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17. Peyton Packing Company, 49 NLRB 828, 12 LRRM 183 (1943).

18. Republic Aviation v. NLRB, 324 US 793, 89 LEd 1372, 65 SupCt 982 (1945). Note that even during non-work time, solicitation may be prohibited under extraordinary circumstances, as in retail department stores. Marshall Field & Co. v. NLRB, 200 F.2d 375 (CA7, 1952).

19. NLRB v. Babcock & Wilcox Company, op. cit., at note 15.

20. LeTourneau Company of Georgia, 54 NLRB 1253, 13 LRRM 227. If the employer is audacious enough to interfere with union organizers outside the plant gates, distributing union literature on a public highway, he will be deemed in violation of the LMRA. It was so held in March 1968 in the case of Monogram Models Inc., 67 LRRM 1470.

21. Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 43 LRRM 2661 (C.A. 7).

Board's Rationale For Excelsior

First, the Board laments the fact that unions cannot at all times be guaranteed with certainty, a method whereby it may propagandize the entire work force. On this basis, it would require management to affirmatively aid the union cause with an Excelsior List. Although it is probably true that there are elements of uncertainty involved, the Board fails to explain, aside from one unusual example, the statistical grounds for such an assertion. It does dismiss the broad attempts which the Board and the judiciary have made to insure reasonable access to the work force. It also ignores the restrictions upon management as to statements and actions at election time which would negate a need for total blanket coverage of the work force by union organizers. More importantly, the Board ignores its own previous pronouncements in this area, neglecting to delineate the rationale for its change of heart. It was in 1953 that the Board itself handed down the ruling in the case of the Livingston Shirt Corporation,[22] holding that a noncoercive captive audience speech was privileged and did not entitle the union to a reply under similar conditions because

> ...there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises (absent, of course, a privileged broad no-solicitation rule), solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have conducted their organizational campaigns, and EXPERIENCE SHOWS THAT THEY ARE FULLY ADEQUATE TO ACCOMPLISH UNIONIZATION AND ACCORD EMPLOYEES THEIR RIGHTS UNDER THE ACT TO FREELY CHOOSE A BARGAINING AGENT...(Emphasis supplied).[23]

The Board stated in addition to Livingston:

> We believe that the equality of opportunity which the parties have a right to enjoy is that which

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22. 107 NLRB 400 (1953).

23. Ibid.

> comes from the lawful use of both the union and the employer of the customary fora and media available to each of them.[24]

Clearly, the Board in 1953 felt that unions were given all the necessary opportunities to publicize their views. Yet in 1966, the Board chose not to explain why what was accepted by them as fact in 1953 was no longer valid.

Perhaps the Board was attempting to answer Livingston at page 1218 of Excelsior where the Board noted that, even though previously there had been no requirement that addresses be produced,

> the rules governing representation elections are not...'fixed and immutable.' They have been changed and refined, generally, in the direction of higher standards.

Although such a statement is correct, it does not, in and of itself provide any explanation for what has been done, nor does it suitably explain how its conclusions are "higher standards."

Reliance is placed by the Board upon the requirement in elections for political office that candidates be given equal time. Such an analogy is inapposite, because the conditions attendant to a political vote are different from those in a union election. The political situation involves an established position to be filled by the election, with an additional distinguishing factor in that the interests of only one group (albeit a heterogeneous one), the voters, are to be represented. In the union representation situation, the interests of both management and the workers are at issue.

Furthermore, as the Board indicates, it is true that men on layoff or sick leave may be unknown to the union, and when they vote, there may be a time-consuming challenge resulting. This problem, however, is easily solved by placing a list of eligible voters into the custody of the Board. This then cannot be a valid reason to demand that an Excelsior list be turned over to the union.

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24. Ibid. The underlying rationale of Livingston Shirt has been affirmed most recently in Forest Industries Co. and Communications Workers of America, 164 NLRB 145, 65 LRRM 1339 (1967).

The Concept of Fairness and The Rejection of Babcock

The basic thread of the Board's reasoning in Excelsior is that its decision is the most fair and equitable conclusion under the circumstances as it views them. It might be expected that the Board, in its quest for fairness, would be quick to apply its concept of fairness to all election situations, particularly those in which management's opposition to the union is especially vigorous. However, the cases indicate that the Board's attempts to inject equality into labor relations in this area have been undertaken unevenly.

In 1967, one year after Excelsior, the Board learned that an employer had unilaterally announced to employees, during the pendency of a representation election, the confering of a wage increase.[25] Although the Board acted against the employer, it did not feel that the company's unfair labor practices were of such a degree of seriousness as to warrant the employer's reading the resultant Board notice to the assembled employees in the plant or mailing a copy of the notice to the homes of the employees. Management's attempts to thwart the union's organizational efforts were patently hostile not only to the union, but to the rights of the workers to be free of coercion. This is not to say that an Excelsior type remedy would have been appropriate here, particularly since there are various psychological factors which make other remedies quite potent. However, the reasons for such an action are certainly more compelling in this case than in the typical Excelsior situation where management often has acted with propriety towards the union. The result observed is that the Board acts to compel "fairness" before the fact, as in the usual Excelsior case, but will neglect fairness after the fact, i.e., it fails to call for an Excelsior-type remedy when specific employer conduct provides some justification therefore.

In Excelsior, the main obstacle the Board had to overcome was the Supreme Court decision in NLRB v. Babcock & Wilcox Company, supra,

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25. Gotham Industries, Inc., 167 NLRB 91, 66 LRRM 1127 (1967).

at note 15, holding in essence that certain ostensibly reasonable organizational methods (distribution on company property) must be denied if they conflicted with a superior management right, provided that reasonable alternatives were available to the union. Of course, such a rule would preclude any logical justification for Excelsior, if in fact the union could approach the workers through other means. Hence, the Board found it necessary to attack Babcock.

First, the Board dismisses the basis of Babcock (even though it later deems it advisable to distinguish that which it has already categorically rejected) by saying that even if other forums are available to the union,

> ...we may properly require employer disclosure (of the names and addresses)...so as to insure the opportunity for all employees to be reached...[26]

Second, the Board notes that the question of alternative channels of communication

> is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest--such as controlling the use of property owned by him.[27]

The Board refused to consider the issue of alternative channels of communication because, in its reading of Babcock,[28] the idea of some employer interest, in the form of a property right, was an essential factor -- a factor not to be found, it thought, in the Excelsior fact pattern. To be sure, Babcock dealt with the right of an employer to deny entrance to his premises, but as the Board explained in its discussion of this type of case in Stoddard-Quirk,

> ...what is involved basically in each case arising in this area is the necessity of striking a proper adjustment between conflicting rights against the background of particular fact situations.[29]

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26. Excelsior Underwear Inc., op. cit., at p. 1220.

27. Id., p. 1220-21.

28. And its reading of NLRB v. United Steelworkers of America (Nutone), 357 US 357, 42 LRRM 2324 (1958).

29. Stoddard Quirk Manufacturing Co., op. cit., note 2, p. 1111.

Thus, if the analysis in Stoddard-Quirk is to be accepted, it appears to be a balancing of legitimate rights in general, and not necessarily property rights as such. But even if a property right is the controlling fact, it is arguable, and the employers did argue the point in Excelsior, that an employer has a property interest in the names and addresses of his employees, at least to the extent that he fears commercial or competitive exploitation of the list should it leave the union's hands.

Further efforts are made by the Board in Excelsior to minimize the impact of the ruling in Babcock. It tries to distinguish the two by stating that the latter was decided before an election was granted, while the former was conceived after the union's interest had become substantial.[30] Although this difference exists, it is of no substance in relation to Babcock which had nothing whatsoever to do with the extent of the union's interest. Along the same lines, the Board found a basis of distinction in that Babcock dealt with an unfair labor practice charge, whereas Excelsior revolved around the circumstances under which the Board may set aside an election. Again, although it is true that Babcock was originally an unfair labor practice case, and indeed the Board had found the company guilty of an unfair labor practice, the real question nevertheless was: does the employer have a right to limit union access to his premises? The answer under the circumstances of alternative methods was, of course, yes, and the unfair labor practice was a factor only inasmuch as it was the reason the problem reached the Court.[31]

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30. Excelsior Underwear Inc., op. cit., p. 1221.

31. Although the Board claims to reject the alternative means of access concept in Babcock, in fact, there are a number of instances before and after Excelsior in which it endorses such an idea. Such an interpretation arises from the group of cases known as the J.P. Stevens Trilogy, J.P. Stevens and Co. Inc., and Industrial Union Department AFL-CIO, 157 NLRB 90, 61 LRRM 1437 (1963); 163 NLRB 24, 64 LRRM 1289 (1966); 167 NLRB 37, 66 LRRM 1024 (1967); augmented by a Federal Court decision to be examined later in the study. In J.P. Stevens I, the company greeted a union organization drive with a massive and deliberate anti-union campaign, prompting the Board to demand that the company rescind

Excelsior In The Courts

Inasmuch as the Excelsior Doctrine requires that the company aid the union cause, it is not surprising that its reception in management circles has been cool. This was particularly so in a case where the employer refused to produce an Excelsior list while providing the union with numerous opportunities to present its views, won the election, and then had to face the Board's invalidation of the vote for failure to produce the list. In light of this kind of result, management has resisted the production of the list and has attempted to challenge the Excelsior Doctrine.

When the employer does refuse to produce the list of names and addresses, the Board issues a subpoena duces tecum requiring the company to give the Board a payroll list, or in lieu thereof, the originally requested Excelsior list. The question then before the court

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its tactics by posting notices to that effect on all the bulletin boards. In addition, the notices were to be mailed to the homes of the workers BY THE COMPANY, but not by the union. The Board did not see fit to give the union access to the mailing lists, despite the overt violations of the act, reasoning that all that was necessary here was fair access to the workers, which of course is reminiscent of the Babcock theory. (Of course, this is an unfair labor practice situation which is not the subject of the Excelsior Rule. But the question remains as to why an Excelsior type remedy was not necessary here. One answer is that it is more effective to have the company humble itself through its own mailing. But does this really take away the elements of fear and coercion instilled by the company's prior tactics? It would appear that it does not. Consequently, this would be a much more appropriate occasion, if indeed any occasion is appropriate, to give a mailing list to the union so that they might regain the initiative.)

In J.P. Stevens II, the logic of Excelsior occurred to the Board and the rule, along with its rejection of Babcock, was imposed. But then in J.P. Stevens III, the Board refused to grant the union's request for access to company parking lots and time to answer management speeches because, in part, the Board felt the union did not need these approaches because it already had fair access in the form of the Excelsior list!

is the enforcement of the subpoena, or concurrently, the validity of the rule itself. As of January 1968, there have been eleven Federal Court decisions directly in point on the enforcement of the Excelsior Rule, and nine have favored enforcement, while two have rejected it.[32]

Unfortunately, most of the Federal cases analyzing Excelsior add little that is of value to the problems of its merit. Rather, these cases seem to parrot the conclusions of the Board, or effectively skirt the issues and become sidetracked elsewhere. In Swift and Co. v. Solien, supra, at note 32, the company had won the representation election, but had neglected to file the Excelsior list. In the face of a union attempt to set aside the election, the company sought to have the results certified. Arguing under Section 9(c)(1) of the NLRA, the employer reasoned that it was the mandatory duty of the Board to certify the first valid election. Citing the narrow doctrine of Leedom v. Kyne,[33] the District Court concluded that the

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32. The following decisions have supported the enforcement of Excelsior: NLRB v. Wolverine Industries, 64 LRRM 2187 (E.D. Mich. 1966); Swift and Co. v. Solien, 66 LRRM 2038 (E.D. Mo. 1967); NLRB v. Beech Nut Life Savers, Inc., 66 LRRM 2327 (S.D.N.Y. 1967); NLRB v. Wyman Gordon Company, 65 LRRM 2763 (D.C. Mass. 1967); NLRB v. British Auto Parts, 64 LRRM 2786 (D.C. Calif. 1967); NLRB v. Rohlen (Crane), 64 LRRM 2169 (D.C. Ill. 1967); NLRB v. Teledyne, Inc., 66 LRRM 2408 (N.D. Calif. 1967); NLRB v. Duncan Foundry & Machine Works, 67 LRRM 2515 (S.D. Ill. 1967); NLRB v. Hanes Corp., 66 LRRM 2264 (C.A. 4th Cir. 1967), reversing the rejection of Excelsior in NLRB v. Hanes Corp., 63 LRRM 2513 (D.C. N.Car. 1966). The Supreme Court of the United States has denied certiorari in the Fourth Circuit Hanes decision. The cases refusing the enforcement of the subpoena duces tecum were, NLRB v. Montgomery Ward Co., 64 LRRM 2061 (D.C. Fla. 1966); NLRB v. Q-T Shoe Mfg. Co., 67 LRRM 2356 (D.C.N.J. 1968). Note, in another J.P. Stevens Company case, Textile Workers Union v. NLRB, 67 LRRM 2055 (C.A. 2nd Cir. 1967), the Court refused to grant an Excelsior remedy in a union organizing campaign noting, at page 2063, "...the problem is nonemployee access to an employer's list of employees, and we think that considerations similar to those governing nonemployee access to an employer's property must govern."

33. 358 U.S. 184 (1958).

proper conditions to confer jurisdiction upon it to review the Board's failure to certify were not present. The Court then gave a mere tacit approval of Excelsior and dropped the entire controversy by informing the company that it might obtain a court test of the Board's action by refusing to bargain if the union won the rerun election!

The Court in the Wyman Gordon case supra, note 32, faced the issue in responding to the company's contention that the Excelsior list was valuable, and giving the list would cause it to violate Section 302(a) of the NLRA, 29 U.S.C. 186(a) which makes it a crime for any employer to deliver a thing of value to anyone seeking to represent his employees. The Court admits, as well it should, that the list does indeed have some value as a mailing list, and yet manages to dismiss the merits of such an argument, characterizing it as patently contrary to the intent of Congress in enacting the statute. The obvious purpose of the statute, observes the Court, was to protect the employees from harm, not from help. Although this interpretation of Congressional intent is no doubt accurate, the Court could cite no authority to support its conclusion that unionization is presumptively helpful to the employee.

One of the most pervasive considerations is dealt with in the case of NLRB v. Hanes Corp., 66 LRRM 2264 (C.A. 4th Cir. 1967). The NLRB was seeking enforcement of its subpoena duces tecum to compel the employer to produce an Excelsior list. This was sought pursuant to Section 11(1) of the NLRA, 29 U.S.C. 161(1). In the previous decision, overruled here, the employer had relied upon Section 11(2) of the Act, 29 U.S.C. 161(2).[34]

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34. 29 U.S.C. 161: "For the purpose of all hearings and investigations, which in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Sections 159 (certification of representatives) and 160 of this title- (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof shall upon application of any party to such proceedings, forthwith issue to such party subpoena's requiring

The major concern here, as it was in many of the cases involving the Excelsior Rule, was the question of whether or not the list was to be classified as evidence and thus available for being called into court. The District Court, in the prior adjudication, ruled that the list of names requested by the Board was not the form of "evidence" directly touching the certification of a representative as contemplated by the Act. The appeals tribunal here, using logic that would still leave room for debate, deemed the list to be evidence of the variety called for in the statute.

However, the main objection to the decision is the reliance by the Court upon 29 U.S.C. 161(2), wherein the Court is empowered to order the production of the so-called evidence. Even if it is to be conceded that an Excelsior list is properly categorized as evidence under the Act, nowhere in the statute does it provide that the Board may in turn take the evidence set before it and convey it in its entirety to another party in the dispute. It would appear that the purpose of 29 U.S.C 161(1) and (2) is to aid the Board in its evaluation of the difficult and highly complex situations with which it must concern itself. It is not the purpose of the statute to requisition confidential material in the possession of one party and transfer it to the custody of a second, and opposing, party.

A similar, and equally unsubstantiated result was reached in the case of NLRB v. Beech Nut Life Savers, Inc., supra, at note 32. As in Hanes, the Court here cited the case of NLRB v. Waterman S.S. Corp.[35]

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the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

(2) In case of ... refusal to obey a subpoena issued to any person any district court of the United States ... upon application of the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question..."

35. 309 U.S. 206, 5 LRRM 682 (1940).

as some authority for allowing the Board to give the subpoenaed lists to the union. Both courts quote the following language from Waterman:

> The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone.[36]

It is one thing to say that a statute allows the Board to obtain certain confidential information, and quite another to conclude on that basis that a broad judicial interpretation of the Board's latitude in conducting an election gives blanket authority for the Board to proceed at will. In fact, the courts fail to note another point made by Mr. Justice Black in the Waterman decision.

> As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board ... ultimately to the traditional review of the judiciary.[37]

That the broad statement of Board discretion in elections is not enough to give the Board absolute freedom, particularly when they are trying to interpret a statute, raises questions of law specifically reserved by Waterman to judicial review.

In January of 1968, a Federal District Court in New Jersey, in NLRB v. Q-T Shoe Mfg. Co., supra, at note 32, refused to enforce the Excelsior rule on two grounds, one being that nothing empowers the Board to convey a subpoenaed address list to the union. They explain at page 2358,

> Nowhere do Sections 11(1) and 11(2) of the Act authorize the Board to use its investigatory and subpoena powers for the sole purpose of transmitting information to certain parties to a representation proceeding, as required by the Excelsior rule. The plain language of Section 11(1) of the Act would appear to indicate that there must be some independent use made by the Board itself of evidence obtained pursuant to its investigatory powers under that section.

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36. Id. p. 226.

37. NLRB v. Q-T Shoe Mfg. Co., supra, note 32, at page 2361.

Continuing, the judges state that

> Although the court is of the opinion that it is proper for the Board to have the names of all employees of Q-T Shoe (employer), so that those entitled to vote be properly identified, judicial enforcement of the Board's subpoena in the present case would effectively result in the enforcement of the Excelsior rule itself; it was certainly not the intention of Congress under Section 11(2) to confer jurisdiction upon federal courts for the disguised purpose of enforcing the Board's rules of decision.

Alternatively, the court here refused enforcement saying

> One can only conclude, in attempting to glean congressional intent in the case of a thoroughly written and far-reaching statute such as the National Labor Relations Act, that Congress meant what it said, and only what it said, and intended to exclude what it did not say. Thus, enforcement of the Excelsior rule can only occur after it has properly been determined by the Board that the refusal by the defendant to provide the Union with a list of its employees' names and addresses constitutes an unfair labor practice...[37]

The Abuse of Excelsior

The Excelsior rule, for all the wisdom attributed to it by the Board, is susceptible to serious abuse. Even were we, arguendo, to concede the fairness or even the enforcibility of the doctrime, it is clear from the decision in NLRB v. Teledyne, Inc., supra, at note 32, that the basic concepts of the doctrine may become self defeating, in that it becomes patently unfair and unreasonable.[38] In Teledyne, the company attempted to cooperate in good faith with the Board insofar as it complied with the spirit of the Excelsior rule, maintaining only minor reservations thereon. When the union petitioned for an election, the company gave the Board a list of all employees and their job classifications so that the Board might determine if the requisite number of employees favored an election. When the appropriate number was tallied, the company advised its workers that they could freely discuss all aspects of unionism and solicit for the union on working

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38. A similarly unreasonable result, as that reached in Teledyne, is found in a decision of the Board, Montgomery Ward and Company, 160 NLRB 88, 63 LRRM 1107 (1966).

time, so long as production did not suffer. Literature was permitted to be distributed in non-working areas of the plant. In response to a request for an Excelsior list, the company gave each employee a stamped envelope addressed to the Board so that each worker could submit his address as he chose. This was done because, as the company related to its employees, management did not give out addresses without the consent of the parties involved. The employer even offered to select, at its own expense, a neutral third party such as the American Arbitration Association to act as a go-between and distribute union literature to each employee through the mails. At election time, the company submitted to the Board a list of names of employees to assist in the election process. The union campaigned vigorously and was afforded extensive contact with the employees, but was nevertheless defeated in the election. Claiming failure to submit an Excelsior list as the basis for their request, the union moved to set aside the election, and the Board and this court concurred and so granted the request! The Court cited the usual reasons of fairness as its motive. The question that arises here is: why, if the idea of the Excelsior rule, as indeed it is so stated in Excelsior, is to give the union a fair opportunity to present its views, thus creating an informed electorate, was the company offer of a neutral party to use the mails rejected? The acceptance of such a proposal would have, as the Board so fervently desires, insured an informed electorate. And even though it was not accepted, it appeared from the facts that the employees did, in actuality, get the union message. By overturning this election, the Board and the Court have preserved the rule for its own sake, but not for the sake of the result it is intended to produce.

Conclusion

Philosophically, there would seem to be firm grounds upon which a rejection of the Excelsior Doctrine could be based. Mr. Justice Reed

stated in Babcock that

> The union may not always insist that the employer aid organization.[39]

Similarly, the Board itself observed in Livingston Shirt,

> ...we do not think one party must be so strongly openhearted as to underwrite the campaign of the other.[40]

But more important are the practical issues raised by the rule. As this study has attempted to indicate, the need for an Excelsior list at election time is far from clear. In addition, there are very serious doubts as to whether it can be enforced, and we will have to await the appeal on the Q-T Shoe case before this aspect of the problem can approach a conclusion. Still more important is the rigid dogmatic approach assumed by the Board in its insistence upon enforcement of the rule, regardless of the facts extant. In the area of balancing rights at election time, the Board presented the following statement at page 1112 of its decision in Stoddard-Quirk Mfg. Co., supra, page 8,

> ...we believe, that the formulation of generalized rules in this area must be undertaken with caution for, patently, differing fact situations call for differing accommodations. The Supreme Court in the most recent of its utterances in this field pointedly reminded us in a closely related context that 'mechanical answers' will not avail 'for the solution of this non-mechanical complex problem in labor management relations.'

The point is that even if all of the Board's assumptions in Excelsior are correct, and it is enforceable, that still would not make the imposition of the rule correct or appropriate in all cases.

If there were such a case where all the safeguards for guaranteeing union access to the work force somehow collapsed and became ineffective in the face of a clever and hostile management, and in fact, a reasonably informed electorate was impossible, then an

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39. NLRB v. Babcock & Wilcox Company, op. cit., p. 684.

40. Livingston Shirt Corporation, supra, p. 10, at page 401.

Excelsior remedy might be in order as a final alternative to grant the work force the rights to which they are entitled. However, until such a situation is clearly found to exist in a particular case, the Board's policy of requiring an Excelsior list in all cases is unreasonable. The total evaluation reveals that the key to future contemplation of Excelsior should be flexibility.