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COMMENTARY

NAMES, ADDRESSES AND THE NLRB: SOME IMPLICATIONS OF THE *EXCELSIOR* CASE

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THE problem of balancing employer and union interests during a union organizational campaign is not easy. The National Labor Relations Board has wrestled with this problem, with assistance from the federal courts, in the course of interpreting and applying the National Labor Relations Act.[1] On February 4, 1966, the Board decided *Excelsior Underwear, Inc.*[2] and presented a new requirement for all election cases. Within seven days after the Regional Director has approved a consent election agreement or after the direction of an election, the employer must file an election eligibility list, containing the names and addresses of all eligible voters. This information will, in turn, be made available to all parties in the case.[3] The aim of this Article is to examine three primary implications of this Board requirement.[4] These implications deal with the right of privacy, waiver of the Board requirement, and the effect on the "captive audience" speech and the union's "right to reply."

Since the late nineteenth century, the right of privacy has been a vital area of American law.[5] In *Excelsior*, the Board stated that the main arguments presented on behalf of employers[6] in relation to the

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1 29 U.S.C. §§ 151-68 (1964). Three major acts form the present NLRA: National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935); Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959).

2 156 N.L.R.B. 1236 (1966) [hereinafter cited as *Excelsior*].

3 *Ibid.*

4 Other discussions of this case appear in Lewis, *NLRB Intrudes on the Right of Privacy*, 17 LAB. L.J. 280 (1966); 5 DUQUESNE L. REV. 77 (1966); 54 GEO. L.J. 1434 (1966); 17 SYRACUSE L. REV. 762 (1966); 19 VAND. L. REV. 1395 (1966).

5 Probably the most influential law review article ever published, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), created the initial concern for legal protection of privacy.

6 The Board invited certain interested parties, not parties to the case, to discuss the following questions:

> I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?

disclosure of names and addresses of employees were concerned with an "asserted infringement of employee rights." The legal basis of these arguments rests on the portion of Section 7 of the NLRA[7] which states that employees have the right to refrain from the union activities protected by that section. Since an employer commits an unfair labor practice when he interferes with employees in the exercise of rights protected by Section 7,[8] the question was whether an employer would interfere with the employees' right to refrain from union activity by disclosing names and addresses which the employees have chosen not to divulge.

The Board approached this problem in *Excelsior* by simply asserting that an employee's failure to disclose his name and address is not an exercise of the Section 7 right to refrain from union activity. The reason for this assertion was that the posture of the case, namely a representation election, was viewed as the context within which to evaluate the issue and the Board stated that an employee exercises Section 7 rights by voting. The Board's distinction between Section 7 rights during an organizational campaign and Section 7 rights on the day of the election is apparent.[9] However, the Board failed to recog-

II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?

III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

Excelsior 156 N.L.R.B. 1236, 1238 (Feb. 4, 1966).

7 29 U.S.C. § 157 (1964) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

8 29 U.S.C. § 158(a)(1) (1964) provides:

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

9 Mr. Lewis has noted this distinction and stated, "It would appear that the Board has said that only in an election can an employee exercise his Section 7 right." Lewis, *supra* note 4, at 281. It is obvious that the Board does not mean this since numerous forms of pre-election conduct have been protected under Section 7. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), allowing employees to solicit for the union during non-working hours and to wear union buttons.

nize that they were dealing with a requirement that involved pre-election conduct, rather than balloting in an election. That is, the requirement to disclose the names and addresses of employees eligible to vote is operative prior to the election and is analytically separate from the voting itself. As such, the Board's legalistic approach to the employees' right to refrain from exercising Section 7 activities is not convincing.

Apart from the legal basis of *Excelsior* in relation to an employee's "right to refrain," the names-and-addresses rule does involve the right of privacy. Shortly after the *Excelsior* decision, the Board was presented with a case which clearly illustrates this problem and, also, more precisely delineates the legal issue of the "right to refrain." In *British Auto Parts, Inc.*,[10] the employer entered into a consent election stipulation and then sought to comply with the *Excelsior* requirement by giving his employees the option to furnish part of the required information. The employer submitted the names of the eligible employees but did not supply their addresses. The employer then sent a letter to each employee, informing them that the Board had requested the names and addresses of the employees, advising them that this information would be available to the union, and enclosing an envelope addressed to the Regional Director for the employees' use if they desired to furnish their address. The union filed objections to the election based upon the *Excelsior* rule and the company defended its position on the ground that it was company policy not to divulge information about their employees without their consent. The Board set aside the results of the election, finding that the employer had "clearly not complied" with the *Excelsior* requirement.[11]

Of course, it is clear that the employer had not complied with the *Excelsior* rule since the rule requires both the names and addresses of the eligible employees and the employer had only provided the names. However, the employer's approach, to allow the employees to forward their addresses if they so desire, does preserve the right of privacy of the employees and, also, upholds their "right to refrain" from union activity guaranteed under Section 7. Every individual has a right to be left alone and the approach of the employer in *British Auto Parts* maintains this right while still granting a possibility of communication to the union. The fact that it would only be a possibility is not fatal

10 160 N.L.R.B. No. 40 (July 26, 1966) [hereinafter cited as *British Auto Parts*].

11 *Ibid.*

to the rule if one respects privacy.[12] In *Excelsior*, the Board was not concerned with the potential harassment an employee might experience. Rather, the Board stressed various analogies, such as public elections where voter registration lists are open to public inspection,[13] corporate election contests where management must either provide stockholders with the names and addresses of other stockholders or mail campaign material for them, and internal union elections where the candidate is entitled to have the union distribute his campaign literature to all union members. The difficulty with all three of these analogies is simply that the persons whose privacy is being disturbed —the voter, the stockholder, and the union member—have chosen to allow the disturbance by registering to vote, purchasing the corporate security, or joining the union. It is more difficult to say that an employee chooses to allow the union to invade his privacy by accepting employment.

The Board responded to the possibility of harassment and coercion of employees in their homes by assurances that they could provide an appropriate remedy in such cases. However, adequate protection of the right of privacy should concern itself with avoiding the possibility of invasion, rather than post-invasion remedies. If privacy is respected and the *Excelsior* rule accommodated, the conduct of the employer in *British Auto Parts* may well be the happy medium. Any concern that employers would seek to interfere with those employees that did forward their addresses to the Regional Director or seek to restrain employees from forwarding their addresses should be short-lived in view of the NLRB's experience in handling unfair labor practice cases based upon employer interference.

The second primary implication of the *Excelsior* requirement deals with waiver of the requirement. The NLRB stated that the disclosure requirement of the case would apply to all Board elections except an expedited election conducted pursuant to Section 8(b)(7)(C).[14] The

12 The Board's response to the privacy question is flavored with suspicion. They seem to fear that employers are really concerned with making the union's communication process more difficult, rather than protecting privacy. However, it is not difficult to envision a situation where an employee has made up his mind to vote for the union and simply does not want to be bothered with phone calls and home visits.

13 Mr. Lewis considers this analogy fallacious since the public inspection of registered voters is designed to "prevent election frauds, rather than to aid a political candidate in his campaign." Lewis, *supra* note 4, at 283.

14 *Excelsior*, *supra* note 2, at p. 42, n.14. An expedited election under Section 8(b)(7)(C) occurs when a representation (election) petition has been filed and recognitional or organizational picketing is concurrently being carried on. Then, a proviso to the section requires

reason for this exception is cryptically hidden away in footnote 14 of the decision, where the Board states:

> In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information.[15]

The important feature of the Board's reasoning is the concern for the union to be able to make meaningful use of the information. Obviously, a rule designed to aid a union in its communication process is useless if the union does not avail itself of the information provided as a result of the rule. In the Section 8(b)(7)(C) situation, the NLRB has determined that the short period of time between the direction and the conduct of the election makes the rule of no benefit to the union and, therefore, there is no reason to apply the rule. Given the existence and purpose of the rule, this exception makes sense. However, there is at least one other situation where the reason for the rule does not exist.

If both the union or unions involved in the organizational campaign and the employer desire a quick consent election, they should be allowed to waive the requirement. The willingness of the parties to waive the rule indicates that they do not desire the benefits which the rule grants them. If the union wants to waive the rule, either they do not intend to make meaningful use of the information, the criterion stated by the Board for the Section 8(b)(7)(C) exception, or they consider the value of an early election to outweigh the benefits derived from the list of names and addresses.

The Board was presented with a form of the waiver theory in *Formfit-Rogers Co.*[16] In this case, the employer, prior to signing a consent election stipulation, notified the Regional Director that it did not consider the *Excelsior* requirement as part of the stipulation and would only enter into the stipulation with this understanding. The

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the Board to direct an election forthwith. The expedited procedures apply when an unfair labor practice charge within the meaning of Section 8(b)(7) has been filed and the representation petition is concurrently pending. Generally, to accomplish the expedition of the proceeding, the rules of the Board eliminate the hearing before the election, give greater finality to the Regional Dirctor, reduce the time allowed for appeals, and eliminate the use of briefs. NLRB Rules & Regs., 29 C.F.R. § 102.77 (1967).

15 *Excelsior, supra* note 2, at n.14.

16 163 N.L.R.B. No. 130 (April 10, 1967).

employer contended that this notification abrogated the *Excelsior* requirement or, alternatively, required the union to refuse to sign and the Regional Director to refuse to approve the stipulation, if either were to insist on the names-and-addresses disclosure. The Board rejected the employer's theory, noted that the only exception was in an 8(b)(7)(C) election, and stated, "Nor did we provide for a unilateral, or for that matter, any modification or waiver of such rule."[17]

The result in the *Formfit-Rogers* case is proper since the employer's action was truly unilateral and only the employer desired to waive the rule. However, the Board's statement that they do not provide for any modification or waiver of the rule demonstrates the NLRB's position on a true waiver situation. Is there any policy reason why the Board should insist upon its rule when the parties themselves want to waive the rule?

In *Excelsior*, the Board stated that the primary basis for the rule was insurance of an informed electorate but, also, the Board rested its decision on the elimination of the number of challenged ballots.[18] The Board observed that the voter eligibility list frequently contains the names of employees unknown to the union and its employee supporters. This situation, in the Board's opinion, forces the union to either challenge the "unknowns" who appear at the polls or risk having ineligible employees vote. There is a serious question whether the "risk" posed by the NLRB is real. Simply because an employee is "unknown" to the union election observer does not mean the employee is more likely to be ineligible to vote. Additionally, the Board rules and regulations grant the privilege of challenge "for good cause."[19] It would appear that a challenge based solely upon the fact that the employee is "unknown" does not meet the "good cause" requirement.

Apart from the question of whether "unknowns" present any greater risk of being eligible voters is the Board's statement that they have found an increase in the number of challenges as a result of the "unknowns" and, therefore, an increase in the likelihood that the chal-

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17 *Id.*

18 A challenged ballot is the ballot of a person whose eligibility to vote is challenged by either the Board agent or an authorized observer. Such challenged voters are permitted to vote but their ballots are impounded. If the number of challenged ballots is not sufficient to affect the results of the election, they are disregarded. If the challenged ballots are determinative of the election, the Regional Director then rules on the challenges or, in certain cases, issues a report on the challenges to the Board. NLRB Rules & Regs., 29 C.F.R. § 102.69 (1967).

19 NLRB Rules & Regs., 29 C.F.R. § 102.69(a) (1967).

lenges would be determinative of the election. This situation means that the NLRB is more likely to have to expend effort to resolve the eligibility challenges.[20] Certainly, there is a public interest in the speedy resolution of questions of representation.[21] However, if the union desires to waive the *Excelsior* requirement, it would appear that they have evaluated the "excessive challenge" issue and decided that it is not a factor in the case in which they are involved.

The interest of the union in speedy resolution of representation proceedings is ample protection from the "excessive challenge" danger raised by the NLRB. Similarly, the primary basis of the *Excelsior* case, insurance of an informed electorate, is also protected by the union's waiver. The *Excelsior* requirement is designed to assist unions in their informational campaign. If a union wants to waive the rule, they clearly indicate that they do not need the organizational assistance and consider the electorate adequately informed as to their side of the issues.

In addition to the refusal to allow waiver of the *Excelsior* requirement, the Board has established a policy that the union must be in possession of the voter eligibility list at least ten days before the election.[22] This policy determination cannot be varied by the parties since the NLRB treats it as part of the *Excelsior* requirement. The effect is to seriously disregard the wishes of the parties to the election when they desire a speedy consent election. The employer must take the time to compile the eligibility list, even though the union does not want it and the union must have possession of the list for ten days, even though they do not use it. In short, the reasons for the rule do not exist when both union and employer want a speedy election and agree to waive the rule. Therefore, the rule should not exist in such a case and the Board could achieve this by allowing waiver.

On the same day the Board decided the *Excelsior* case, a decision was rendered concerning extension of the "right to reply" doctrine in a "captive audience" speech situation.[23] Presently, an employer may

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20 See note 18 *supra.*

21 See *Excelsior, supra* note 2.

22 Address by H. Stephen Gordon, Associate General Counsel of the NLRB, Atlanta Lawyers Foundation Third Annual Seminar on Labor Law, in Atlanta, Georgia, June 23, 1966.

23 When employees are required to stop work and assemble to hear an employer speech on company time and premises, they are a captive audience. See American Tube Bending Co., 44 N.L.R.B. 121 (1942), *enforcement denied,* 134 F.2d 993 (2d Cir.), *cert. denied,* 320 U.S. 768 (1943). Usually, such speeches are given prior to a union representation election.

deliver a captive audience speech on company time and premises and deny the union's request to reply unless the employer enforces an unlawful broad no-solicitation rule or a privileged no-solicitation rule.[24] In *General Electric Co.*,[25] the employer's no-solicitation rule was valid, the union requested an opportunity to reply to the employer's captive audience speech under similar circumstances—on company premises with employees paid by the employer for time spent in attendance—and its request was denied. The union argued that existing law in the captive audience situation was inadequate and that the union should always have the "right to reply" to an employer's captive audience speech, without regard to the scope of the employer's no-solicitation rule. The union contended that the anti-union captive audience speech combined with a denial of a union request to reply, should be grounds for setting aside a subsequent election and, also, an unfair labor practice. The NLRB specifically deferred reconsideration of the captive audience-reply issue until the effects of the *Excelsior* requirement were known.[26] Thus, the third major implication of *Excelsior* is its effect on the captive audience-right to reply question.

The purpose of both the union reply to the employer's speech and the names and addresses requirement is to open avenues of communication for the union. The Board's approach to the captive audience doctrine and the mechanical application of the reply remedy has been

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The Board has wrestled with the problem of the captive audience for many years and numerous articles have been written on the subject. See *e.g.*, Heinsma, *Employer Free Speech: The Captive Audience, the Right to Reply, and Decisional Policy*, 2 GA. S.B.J. 447 (1966); Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960), both of which historically trace employer free speech. Representative samplings of articles and notes are collected in AARON, EMPLOYER FREE SPEECH: THE SEARCH FOR A POLICY, IN PUBLIC POLICY AND COLLECTIVE BARGAINING 28, 56 n.4 (Shister, Aaron & Summers ed. 1962); *Selected Bibliography of NLRB and Related Labor Law Material*, 29 GEO. WASH. L. REV. app. II at XXXII, following p. 494 (1960).

24 Livingston Shirt Corp., 107 N.L.R.B. 400, 409 (1953). An unlawful broad no-solicitation rule prohibits union access to company premises on other than working time. A privileged no-solicitation rule does the same thing but is not unlawful due to the character of the business. *Ibid.* This privilege is applied in retail stores where non-working time solicitation would disrupt activities due to the presence of customers in the sales area. May Dept. Stores Co., 59 N.L.R.B. 976, *enforced as modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946). No-solicitation rules are not valid or invalid. Rather they are presumptively valid or invalid. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804 (1945).

25 156 N.L.R.B. 1247 (1966).

26 *Id.* at 1251.

criticized.[27] If the *Excelsior* requirement achieves the results desired by the Board, it would appear that the Board's reconsideration of the captive audience doctrine should be directed toward elimination of the right to reply, rather than extension of the doctrine. This approach would place Board law more in line with Supreme Court pronouncements in the area. The Court has rejected the idea that employees are entitled to use a medium of communication simply because the employer uses such medium[28] and this is precisely the "right to reply" position. In rejecting the same-medium-of-communication approach, the Supreme Court found this approach to be mechanical and urged the Board to look for relevant alternative channels available for effectively reaching the employees with the union message.[29] The Board has followed the Supreme Court's advice concerning alternative channels by instituting the *Excelsior* requirement. It is now time for the Board to also follow the Court's reasoning by abandoning the right to reply in the captive audience situation.

[While this issue of the *Review* was in the process of publication, *Excelsior* was given judicial recognition in NLRB v. Hanes Hosiery Div. — F.2d — (4th Cir. 1967). In that case, the employer was required to furnish the union with a list of names and addresses of employees well in advance of the election. In answer to the employer's fears that the union could dispose of the information for commercial exploitation, the court stated that the Board could be relied upon to adopt adequate preventative measures and penalties.—*Ed.*]

27 It has been suggested that since a captive audience speech and denial of a union reply is lawful if the solicitation rule is valid, the presence of a privileged no-solicitation rule should not create an unfair labor practice in view of the independent justification for the privileged rule. Heinsma, *supra* note 23, at 468-69. Also, if the solicitation rule is unlawfully broad, there is no reason to examine the captive audience concept for an unfair labor practice because the unfair labor practice exists in the unlawful rule, which can be independently remedied. *Ibid.*

28 NLRB v. United Steelworkers, 357 U.S. 357, 364 (1958).

29 *Ibid.*

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