UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

TRACTOR COMPANY d/b/a CCS TRUCKING,	)	13-RC-22018
Employer,	)	13-RC-67437
and	)	
TEAMSTERS LOCAL UNION NO. 727, INTL.	)	
BROTHERHOOD OF TEAMSTERS,	)	
Petitioner,	)	
add	)	
LOCAL 707, TRUCK DRIVERS, CHAUFFEURS,	)	
WAREHOUSEMEN AND HELPERS UNION,	)	
Petitioner.	)	

EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

NOW COMES Tractor Company d/b/a CCS Trucking, Employer, by and through its attorneys of record, Law Offices of Rory K. McGinty, P.C., and for its Exceptions to the Hearing Officer's Report on Objections and Challenged Ballots, states as follows:

I. SCOPE OF EXCEPTIONS

Tractor Company does not take Exception to the Hearing Officer's Recommendations that:

a. Objection Nos. 1 & 2, relating to the eligibility of Brian Powell and Ken Kendal, be sustained.
b. Objection No. 3, relating to the eligibility of James Livsey, Sr., James Livsey, Jr., Kyle Harris, Sergio Barajas and Mike Rizzi, be overruled; or
c. Objection No. 4, relating to the allegation of intimidating behavior, be overruled.

II. EXCEPTION TO RECOMMENDATION THAT A SECOND ELECTION BE CONDUCTED: THE HEARING OFFICER FAILED TO PROPERLY CONSIDER *WOODMAN'S FOOD MARKETS* FACTORS.

The Hearing Officer found that: (a) the *Excelsior* list contained 11 names; (b) adding the number on the *Excelsior* list and the omissions of Powell and Kendal results in a sum total of 13

eligible voters; (c) dividing the number of omissions by the total number of eligible voters produces an omission rate is 15.4%; and (d) the omission rate thus calculated is higher than the 9.5% found in *Thrifty Auto Parts*, 295 NLRB 1118 (1989). (Report, 10).

Tractor Company accepts the Hearing Officer's findings of fact that there were 13 eligible voters, of which 2, Powell and Kendal, were omitted from the *Excelsior* list.

Tractor Company nevertheless respectfully takes Exception to the Hearing Officer's Recommendation that a second election be conducted, for the following reasons:

A. THE BOARD WILL NOT APPLY THE *EXCELSIOR* LIST RULE "MECHANICALLY" AND GENERALLY "THE BOARD WILL NOT SET AN ELECTION ASIDE BECAUSE OF AN INSUBSTANTIAL FAILURE TO COMPLY WITH THE RULE AS LONG AS THE EMPLOYER HAS NOT BEEN GROSSLY NEGLIGENT AND HAS ACTED IN GOOD FAITH."

This was the settled law upon which the Board based its holding in *Texas Christian University*, 220 NLRB 396, 397-398 (1975), cited by the Hearing Officer at Page 10 of his Report. The Board held, in *Texas Christian University, supra*, that an omission rate of 4% did not compel the holding of a second election.

B. THE BOARD HAS REJECTED THE APPROACH OF CONSIDERING ONLY THE PERCENTAGE OF OMISSIONS AND HAS OVERRULED PRIOR CASES WHICH USED THIS APPROACH.

In *Woodman's Food Markets, Inc.*, 332 NLRB 503 (2000), the Board enunciated a new approach which required consideration of whether omissions were potentially determinative, along with any other factors:

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

> done so and hold that *whether the omissions involve a determinative number of names must be considered in determining whether to set aside the election.*" (Italics added)

Woodman's Food Markets, Inc., 332 NLRB at 504. In that case, the union lost the election by 13 votes and there were 12 omissions from the *Excelsior* list. *Id.* at 505. The Board found that:

> "... the Union may have suffered substantial prejudice by its inability to communicate with these 12 employees ..."

and ordered a second election. *Id.* at 505.

C. THE DECISION IN *THRIFTY AUTO PARTS, SUPRA* WAS ENTERED IN 1989. THIS PREDATED THE HOLDING IN *WOODMAN'S FOOD MARKETS.* HOWEVER, THE HOLDING IN *THRIFTY AUTO PARTS* CAN BE READ AS CONSISTENT WITH THE APPROACH ENUNCIATED IN *WOODMAN'S FOOD MARKETS.*

In *Thrifty Auto Parts, supra*, the Board found that:

> "The tally of ballots shows eight votes against and seven votes in favor of the Petitioner with no void or challenged ballots."

Id. at 1118. The Board concurred with the Hearing Officer's finding that:

> "... the Employer erroneously omitted the names of 2 out of a total of 21, or 9.5%, of the eligible voters' names from the eligibility list."

Id. at 1118. The 2 omitted names were potentially determinative of the election. In consideration of the omission rate and the fact that the eligible voters whose names had been omitted from the *Excelsior* list were potentially determinative of the election, the Board ordered a second election.

D. THE TWO OMITTED VOTERS IN THE INSTANT CASE, POWELL AND KENDAL, WOULD NOT HAVE BEEN DETERMINATIVE UNDER THE APPROACH UTILIZED BY THE BOARD.

Under the approach utilized by the Board, it is assumed that the 6 challenged voters were eligible to vote, and that they would have voted for the objecting party, in this case Local 727.

Harborside Healthcare, Inc., 343 NLRB 906 (2004), 913; *Chinese Daily News*, 344 NLRB 1071, 1072 (2005). This would change the tally in the instant case from a 3-3 tie to 8-3 in favor of Local 727[1]. Thus, Powell and Kendal would not have been determinative of the outcome of the election.

E. POWELL SHOULD NOT BE CONSIDERED IN CALCULATING THE OMISSION PERCENTAGE BECAUSE HIS OMISSION DOES NOT INVOKE THE CONCERNS ADDRESSED BY THE BOARD IN *TEXAS CHRISTIAN UNIVERSITY, SUPRA; THRIFTY AUTO PARTS, SUPRA; WOODMAN'S FOOD MARKETS, SUPRA; OR AUTOMATIC FIRE SYSTEMS, SUPRA.*

The dual concerns which arise from omission of an eligible voter from the *Excelsior* list are that his/her vote may not be counted and also that omission could "prejudice the union's ability to communicate with voters." *Automatic Fire Systems*, 357 NLRB No. 190 at 2; See also *Woodman's Food Markets*, 332 NLRB at 504.

These concerns are not invoked in the case of Powell. Powell did cast a ballot, which was not challenged by Tractor Company or either of the involved unions, and which can be counted. (Tr. 12). Moreover, Powell was already a member of Local 727 by reason of his employment in the movie industry. (Tr. 16, 103). Consequently, no such prejudice to the ability of Local 727 to communicate with him, or through him to other voters, would have occurred. Rather than determining the omission percentage "mechanically," the Board should consider these other factors in determining the true omission rate, consistent with *Woodman's Food Markets, supra.*

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[1]Arguably, Powell should also be counted as a vote for Local 727, since he is already a Local 727 member. That would increase the margin to 9 in favor of Local 727 and 3 in favor of Local 707.

If Powell is disregarded, the omission rate is 1 in 13 or 7.7%. This is well under the percentage found to require a second election in *Thrifty Auto Parts, supra*, cited by the Hearing Officer as part of his justification for conducting a second election. (Report, 10).

F. *AUTOMATIC FIRE SYSTEMS* IS DISTINGUISHABLE ON ITS FACTS FROM THE INSTANT CASE AND DOES NOT COMPEL THE CONDUCT OF A SECOND ELECTION WITHOUT COUNTING BALLOTS TO ASCERTAIN WHETHER THE OMISSIONS COULD BE DETERMINATIVE OF THE OUTCOME OF THE ELECTION.

The Board, in *Automatic Fire Systems*, 357 NLRB No. 190 (2012), cited 3 factors which warranted its decision to hold a second election without first counting the challenged ballots:

> "First, we have a high percentage of omissions, 36 percent, far higher than many of the cases in which elections were re-run under the percentage-only rule...
>
> "Second, as the hearing officer found, the Stipulated Election Agreement unambiguously stated that employees meeting the *Steiny/Daniel* formula were eligible to vote. Thus the Employer, by failing to include these voters on the *Excelsior* list, breached a binding agreement[2]...
>
> "Finally, while this is not a case that requires inquiry into whether the omitted employees votes were potentially outcome determinative, we note that, under our normal approach to calculating margins of victory in election objections cases, we view the facts in the light most favorable to the objecting party, in this case the Petitioner. Accordingly, we assume that the five employees whose ballots were challenged were eligible to vote, and that they would have voted in favor of the objecting party ... The election results reflected eight votes against representation, zero votes for the Union, and five challenged ballots. Adding the assumed results of the challenged ballots would change the margin of victory to eight votes against and five votes in favor of representation, even before consideration of the omitted voters."

Id. at 2-3. Thus, the 8 voters omitted by the Employer would have been potentially outcome determinative by a wide margin. In its holding, the Board made clear that these distinguishing

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[2]The Board also noted that the Hearing Officer had found that the Employer's counsel acted in "reckless disregard" of the Stipulated Election Agreement."

factors were the essential reasons it ordered a second election rather than remanding the case to have the challenged ballots counted:

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

Id. at 3. The "usual practice" of the Board, as explained in Footnote 8, is to not open challenged ballots after "a substantial *Excelsior* violation" has been found. *Id.* at 3.

The instant case is distinguishable from *Automatic Fire Systems* in regard to all three of the factors cited by the Board therein. The percentage of omitted voters in *Automatic Fire Systems* was nearly 2 ½ times the percentage in the instant case. If Powell is disregarded for reasons set forth above, the omission rate in *Automatic Fire Systems* is nearly 5 times the percentage in the instant case. There was no unambiguous violation of a Stipulated Election Agreement in the instant case comparable to the one found, and not disputed by the parties, in *Automatic Fire Systems*. There was also none of the reckless disregard found in *Automatic Fire Systems*. Unlike the omissions in *Automatic Fire Systems*, the omissions of Powell and Kendal would not have been potentially outcome determinative by a wide margin.

It has not been the "usual practice" of the Board to order a second election absent a finding of a substantial violation of the *Excelsior* rule using the approach enunciated in *Woodman's Food Markets*, *supra*. Moreover, the holding in *Automatic Fire Systems, supra*, does not compel the conduct of a second election in the instant case because there has not been a substantial violation of the *Excelsior* rule under the approach enunciated in *Woodman's Food Markets*, *supra*. Tractor Company urges that, absent a substantial violation, the members of the

bargaining unit who voted should have their votes counted and the result certified.

It is worth noting that the instant case is not the kind of scenario which has given rise to the Board's "usual practice," where an anti-union employer knowingly omits eligible voters from the *Excelsior* list in order to defeat a petition for union certification. In the instant case, the Employer has not opposed unionization. The competing parties are two independent unions, not an employer and one or more unions.

G. THE HEARING OFFICER DID NOT FIND THAT TRACTOR COMPANY HAD BEEN GROSSLY NEGLIGENT OR HAD ACTED IN BAD FAITH.

The Report of the Hearing Examiner contains no finding that Tractor Company was grossly negligent or that it acted in bad faith.

The facts found by the Hearing Officer in fact tend to show that, in general, Tractor Company acted in good faith. Tractor Company needed to send 2 drivers to deliver loads to Florida. Tractor Company's principal, James Haasl, contacted the Board Agent to inquire whether there was an absentee ballot process so that their votes could be counted. Upon being informed by the Board Agent that no such process existed, Haasl assigned a new hire and an employee he believed was temporary and not eligible to vote. (Report, 12; Tr. 108).

H. TRACTOR COMPANY'S EXPLANATIONS FOR THE OMISSIONS DO NOT MITIGATE IN FAVOR OF A SECOND ELECTION.

The Board held, in *Woodman's Food Markets, supra*, that one of the factors to be considered in deciding whether to order a new election is:

> "... the employer's explanation for the omissions ..."

Woodman's Food Markets, supra at 504.

The Hearing Officer mistakenly construes this language to mean that the employer's

reasoning must be legally sufficient. The Hearing Officer states in his Report that:

> "The other factors include the percentage of omissions and whether the Employer's explanation for the omissions is *legally sufficient*. In the instant case the percentage of omissions is higher than those in *Thrifty Auto Parts*, and the Employer's reasoning for omitting Powell and Kendal does not hold up to legal scrutiny." (Italics added).

(Report, 11). If the Employer's explanation was legally sufficient, the omission would not be an error under the *Excelsior* rule and would not be a consideration in deciding whether to order a new election. Each of the Board decisions cited in the Hearing Officer's Report considered the omission of eligible voters only. *Texas Christian University*, 220 NLRB 396 at 397 (referring to the omission of "eligible voters"); *Thrifty Auto Parts*, 295 NLRB at 1118; *Woodman's Food Markets*, 332 NLRB at 503; and *Automatic Fire Systems*, 357 NLRB No, 190 at 1 each referred to the omission of "eligible voters." The *Woodman's Food Markets* factors necessarily apply only where the Employer's explanation was not legally sufficient because. If the Employer's explanations were legally sufficient, the omissions would not have been eligible voters and would not be relevant to a determination whether to order a second election. The Board's inquiry in the instant case is not whether Haasl's explanations were legally sufficient; rather, it is whether bad faith, reckless disregard of the type found in *Automatic Fire Systems*, or any other aspect of the explanations would warrant the conduct of a second election.

According to Haasl, Powell was omitted from the *Excelsior* list because he is available to work for Tractor Company only when he was not working in the movie industry. If there was work for him in the movie industry, he would refuse to work for Tractor Company. (Tr. 17, 23, 26-27). Powell worked three times as much in the movie industry as for Tractor Company. (Tr. 27). He was not regularly scheduled to work for Tractor Company. (Tr. 27, 106). Haasl

considered that fact to make Powell other than a "regular" employee. (Tr. 103). While the Hearing Officer may disagree with Haasl's reasoning, and may in the Board's view be correct in going so under applicable law, Haasl acted pro se and in good faith and without disregard for Tractor Company's obligations under the *Excelsior* rule. Nothing about this explanation suggests that Powell's omission mitigates in favor of a second election.

According to Haasl, Kendal was omitted from the *Excelsior* list because he was considered a temporary replacement for James Livsey, Sr., who was on medical leave at the time Kendal was hired. (Tr. 110-111; 128). Although Haasl considered Kendal a temporary employee, Mike Heraty, who told Kendal he had been hired by Haasl, did not convey this information to Kendal. (Tr. 128-129, 132). Neither the fact that Livsey was on medical leave nor that Kendal was hired by Haasl after Livsey went on medical leave is disputed in the record. Kendal testified that he was not told that he was a temporary replacement, and that he had quit another job to work for Tractor Company. That is not surprising, given that the date of Livsey's return was not known. (Tr. 125). The record does not show that Kendal told Haasl he had quit another job to come to work for Tractor Company, or that Haasl was otherwise aware of this. The Hearing Officer correctly notes that Kendal continued to work for Tractor Company when Livsey briefly returned to work in November, 2011. (Report, 11). Livsey's return was short-lived, as he had to return to Arizona to care for his father shortly thereafter. (Tr. 111-112). Haasl considered these facts to make Kendal other than a "regular" employee. (Tr. 105). Again, while the Hearing Officer may disagree with Haasl's reasoning, and may in the Board's view be correct in going so under applicable law, Haasl acted pro se and in good faith and without disregard for Tractor Company's obligations under the *Excelsior* rule. Nothing about this

explanation suggests that Kendal's omission mitigates in favor of a second election.

Tractor Company does not take Exception to the Hearing Examiner's recommended findings that Powell and Kendal should have been included on the *Excelsior* list. Tractor Company offered the Employer's explanations for these omissions at hearing. The Hearing Officer was not persuaded.

Tractor Company does take Exception to the Hearing Examiner's conclusion that, because Tractor Company mistakenly believed Powell and Kendal did not belong on the *Excelsior* list:

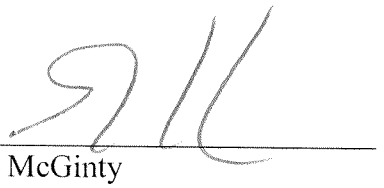
> "... the Employer did not substantially comply with the *Excelsior* list requirement by its omission of Powell and Kendal from the list."

(Report, 11).

III. PRAYER FOR RELIEF

For the reasons set forth above, Tractor Company urges that the Board uphold the recommendations of the Hearing Officer, except inasmuch as he recommends that a second election be conducted; that the challenged ballots be opened and counted; and that the results of the election be certified based on the ballots cast.

Respectfully,



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CERTIFICATE OF SERVICE

I certify that a copy of the within instrument was served on all parties of record, at the address(es) shown below, by depositing same with the U.S. Postal Service, postage prepaid, at Downers Grove, Illinois, at or before 5:00 p.m. this 9th of February, 2012.

Rory K. McGinty

Served On:

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