

**IN THE UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>TRACTOR COMPANY d/b/a CCS,</b>	)	
<b>TRUCKING,</b>	)	
	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>TEAMSTERS LOCAL 727,</b>	)	
<b>INTERNATIONAL BROTHERHOOD</b>	)	<b>Case Nos. 13-RC-22018 &amp; 13-RC-67437</b>
<b>OF TEAMSTERS,</b>	)	
<b>Petitioner</b>	)	
	)	
<b>and</b>	)	
	)	
<b>LOCAL 707, TRUCK DRIVERS,</b>	)	
<b>CHAUFFEURS, WAREHOUSEMEN</b>	)	
<b>AND HELPERS UNION,</b>	)	
<b>Petitioner.</b>	)	
	)	

**ANSWERING BRIEF ON BEHALF OF PETITIONER TEAMSTERS LOCAL UNION  
NO. 727 IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO THE  
SUPPLEMENTAL HEARING OFFICER'S REPORT ON OBJECTIONS AND  
CHALLENGED BALLOTS**

Petitioner Teamsters Local Union No. 727, pursuant to the Rules and Regulations of the National Labor Relations Board, Section 102.69, hereby submits its Answering Brief in Opposition to the Employer's Exceptions to the Supplemental Hearing Officer's Report and states as follows:

**INTRODUCTION**

In a Supplemental Report issued on September 27, 2012, the Hearing Officer in the above-captioned matter determined, again, that the Employer's conduct "prejudiced the election in such a manner as to require a second election" and that "the only fair result is to hold a second

election that will provide the Petitioners with the ability to communicate with all of the eligible voters after the Employer has submitted an accurate and complete *Excelsior* list.” (Hereinafter "Supp. Report").<sup>1</sup> The Hearing Officer's recommendation to the Board was not in error. The undisputed evidence in this case demonstrates that the conduct of Tractor Company d/b/a/ CCS Trucking (hereinafter "Employer") during the election prejudiced the election and interfered with the employees' freedom of choice.

### **STATEMENT OF FACTS**

There have been no exceptions filed to the Hearing Officer's finding of facts in the Report issued on February 3, 2012 or the Supplemental Report issued on September 27, 2012. Accordingly, they are admitted as true and accurate by all parties.

### **ARGUMENT**

As stated in Automatic Fire Systems, 357 NLRB No. 190 (2012), and Thrifty Auto Parts, 295 NLRB 1118 (1989), the Board “presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election.” 295 NLRB at 1118. In the instant case, this presumption has not been rebutted by the Employer. Only the Employer filed exceptions to the Hearing Officer's conclusion of law and recommendation in the Supplemental Report that the election results be set aside and a re-run election held. The Employer's willful submission of a substantially incomplete *Excelsior* list to the Board and Petitioner Local 727 tainted this election, and the Hearing Officer properly held that on this basis alone, the election results must be set aside and the election rerun.

The Employer wholly fails to grasp the purpose of the *Excelsior* list. The Employer

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<sup>1</sup> References to the Hearing Officer's original Report that issued on February 3, 2012, shall be referenced as “Report.”

seems to be under the misguided perception that the *Excelsior* list is merely a means to track voter eligibility at the time the polls open. It is not. It is, instead, a fundamentally necessary tool to ensure Section 7 rights to employees. That right was willfully violated, and the Employer's excuses for the violations were properly characterized by the Hearing Officer as "disturbing," a finding reiterated in the Supplemental Report. (Report at p. 11; Supp. Report at pp. 3-4).

**I. THE EMPLOYER ADMITS THAT ELECTION OBJECTIONS 1 AND 2 SHOULD BE SUSTAINED.**

The Employer admitted from the beginning of its Exceptions to the original February 3, 2012, Report that Election Objection Nos. 1 & 2 should be sustained. Accordingly, the Employer is effectively admitting as true the following, which is the verbatim language of those Election Objections:

The Employer's conduct affected the results of the election when prior to the election, it willfully submitted a substantially inaccurate, misleading, and incomplete *Excelsior* list to the Region, which omitted employee Brian Powell, who is a regular part-time driver for the Employer and a known Local 727 referral hall member.

The Employer's conduct affected the results of the election when prior to the election, it willfully submitted a substantially inaccurate, misleading, and incomplete *Excelsior* list to the Region, which omitted employee Ken Kendall, who is a regular part-time driver, and purposely sent Kendall out of the state for business purposes for an extended period of time, which included the date of the election.

(Election Objections 1 & 2, Exhibit 1 to Report). By not challenging the Hearing Officer's finding in his original Report that the above-referenced Election Objections should be sustained, the Employer is at the same time admitting that it willfully submitted a substantially in accurate, misleading, and incomplete *Excelsior* list to the Region and that in doing so it necessarily affected the results of this election. It is now illogical and unpersuasive for the Employer to Except to an immediate re-run of the election where it has admitted that that its willful and

misleading conduct affected the results of the first election. Accordingly, the Hearing Officer did not err in recommending in his original February 3, 2012 Report and his September 27, 2012 Supplemental Report that the results of the election be set aside and a rerun election held immediately.

**II. THE HEARING OFFICER PROPERLY APPLIED APPLICABLE BOARD LAW AND PROPERLY DETERMINED THAT THE ELECTION RESULTS HAVE BEEN TAINTED AND LOCAL 727 PREJUDICED BY THE EMPLOYER'S VIOLATION OF THE *EXCELSIOR* RULE.**

As the Board noted in Woodman's Food Markets, 332 NLRB 503 (2000), the case relied upon by the Employer in its Exceptions to the original February 3, 2012 Report, “[t]he Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee’s name [in this case Petitioner Local 727] suffers an obvious and pronounced disadvantage in communicating with that person by any means.” 332 NLRB at 503, citing Women in Crisis Counseling, 312 NLRB 589 (1993), Thrifty Auto Parts, 295 NLRB 1118 (1989). The Employer continues its misguided interpretation of case law in its Exceptions to the Supplemental Report.

In Woodman's, the Board stated that it “clearly frustrates the policies underlying the *Excelsior* rule since the union may be denied the opportunity prior to the election to inform these voters of its position on the issues raised before the election.” *Id.* The Board in Woodman's further explained that “employees have a Section 7 right to make a ‘fully-informed’ choice in an election, and . . . the purpose of the *Excelsior* rule is to protect that right.” 332 NLRB at 503. The Board continued to observe that the *Excelsior* rule is intended “to achieve important statutory goals by ensuring that all employees may be fully informed about the arguments

concerning representation and can freely and fully exercise their Section 7 rights.” *Id.*, citing Mod Interiors, inc., 324 NLRB 164 (1997), citing North Macon Health Care Facility, 315 NLRB 359, 360-61 (1994). When names are omitted from an *Excelsior* list, as is the case in the instant matter, that Section 7 right protected by the *Excelsior* list is destroyed. Furthermore, that violation of an individual’s Section 7 right is not remedied whether or not the individual votes or whether his or her vote is counted because the vote remains an uninformed vote due to the violation of the *Excelsior* rule. The only proper remedy, as directed by the Hearing Officer, is to set aside the election results and rerun the election.

**III. THE CLOSENESS OF THE REVISED TALLY SUPPORTS IMMEDIATELY SETTING ASIDE THE ELECTION RESULTS AND RERUNNING THE ELECTION.**

In the primary case relied upon by the Employer in its Exceptions to the Hearing Officer’s original February 3, 2012 Report and its Exceptions to the Supplemental Report, Woodman’s, the Board notes that it “has also long recognized that the closeness of the vote is a significant factor in *Excelsior* cases.” *Id.* at 503, citing Ben Pearson Plant, 206 NLRB 532, 533 (1973), Mod Interiors, 324 NLRB at 164.

In the instant case, the revised tally of ballots issued on or about August 18, 2012, was four (4) votes for the Petitioner Local 727 and eight (8) votes for Petitioner 707. A change of only two votes would have changed the tally to 6 votes for Petitioner 727 and 6 votes for Petitioner 707, which would have changed the outcome of the election. Furthermore, had one of the individuals left off the *Excelsior* list—Ken Kendal, who did not vote because he was directed not to by his supervisor (Supp. Rept. pp. 3-4)—voted and cast a ballot for Petitioner Local 727, his one vote would have further changed the outcome of the election to 7 votes for

Petitioner Local 727 and 6 votes for Petitioner Local 707. However, as duly recognized by the Hearing Officer in his Supplemental Report, “[w]e cannot reconstruct the past in order to assess the harm of the omissions on Local 727, and . . . to defer to the revised tally is to defer to a moment in the past that was necessarily prejudiced by the Employer’s failure to provide a sufficiently complete *Excelsior* list.” (Supp. Report at p. 3). Accordingly, due to the closeness of the original vote and revised tally, the election results should be immediately set aside and the election rerun.

**IV. THE BOARD ONLY DECLINES TO SET ASIDE ELECTIONS WHERE THE NUMBER OF OMISSIONS CONSTITUTED ONLY A SMALL PERCENTAGE OF THE TOTAL NUMBER OF ELIGIBLE VOTERS.**

Again, as noted in the case relied upon by the Employer in support of its Exceptions to the Report and Supplemental Report, Woodman’s, only in some cases has the Board “declined to set aside the election on the ground that the number of omissions constituted only a small percentage of the total number of eligible voters.” Id. at 503. In noting this exception, the Board provided the example of Kentfield Medical Hospital, 219 NLRB 174, 175 (1975) where the omission was 5 names out of 82 eligible voters (or 6%). In the instant case, the omission rate is more than double that in Kentfield and is not consistent with the “small percentage” situation where the Board would even consider not rerunning the election. In the instant case, the Employer stated in its original Exceptions that it “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.” (ER Exceptions at p. 2). If that fact is an accepted and admitted fact, then the omission rate is also accepted and admitted as nearly 16%.<sup>2</sup> Accordingly, under well-settled

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<sup>2</sup> The rate calculated at  $2/13 = 15.384615\%$

Board law, the Hearing Officer's recommendation that the election be rerun should be adopted.<sup>3</sup>

#### **V. THE NUMBER OF OMISSIONS WAS DETERMINATIVE.**

As explained in Woodman's, the case primarily relied upon by the Employer, whether the number of omissions was determinative in an election means, "whether it equals or exceeds the number of additional votes needed by the union to prevail in the election." Id. at 504. In the instant case, the revised tally of ballots issued on or about August 18, 2012, was four (4) votes for the Petitioner Local 727 and eight (8) votes for Petitioner 707. A change of two only two votes would have changed the tally to 6 votes for Petitioner 727 and 6 votes for Petitioner 707, which would have changed the outcome of the election. Furthermore, had one of the individuals left off the *Excelsior* list—Ken Kendal, who did not vote because he was directed not to by his supervisor (Supp. Rept. pp. 3-4)—voted and cast a ballot for Petitioner Local 727, his one vote would have further changed the outcome of the election to 7 votes for Petitioner Local 727 and 6 votes for Petitioner Local 707. However, as duly recognized by the Hearing Officer in his Supplemental Report, "[w]e cannot reconstruct the past in order to assess the harm of the omissions on Local 727, and . . . to defer to the revised tally is to defer to a moment in the past that was necessarily prejudiced by the Employer's failure to provide a sufficiently complete *Excelsior* list." (Supp. Report at p. 3). Accordingly, due to the closeness of the original vote and revised tally, the election results should be immediately set aside and the election rerun. Accordingly, the omissions were determinative under Woodman's.

#### **VI. THE EMPLOYER'S EXPLANATIONS FOR THE OMISSIONS ARE NOT CONVINCING AND DO NOT REMEDY THE SECTION 7 VIOLATIONS.**

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<sup>3</sup> See, e.g., Thrifty Auto Parts, Inc., supra (9.5 percent); Avon Products, Inc., 262 NLRB 46, 48 fn. 5 (1982) (citing cases); EDM of Texas, 245 NLRB 934, 934, 940 (1979) (10.67 percent omissions and 17.9 percent inaccuracies); Sonfarrel, Inc., 188 NLRB 969, 969-970 (1971) (11 percent); Gamble Robinson Co., 180 NLRB 532, 532-533 (1970) (11 percent).

In its original Exceptions, the Employer stated that it “does not take Exception to the Hearing Examiner’s recommended finding that Powell and Kendal should have been included on the *Excelsior* list.” (Exceptions at p. 10). In other words, the Employer admits that—legally—Powell and Kendal should have been on the *Excelsior* list. If names should have been on the *Excelsior* list as a matter of law, then it is logically impossible to claim there was a legally sufficient reason for omitting names that—admittedly— should have legally included on the *Excelsior* list.

Assuming arguendo that the Employer did not act in bad faith, the analysis does not end as suggested by the Employer in its original Exceptions and Exceptions to the Supplemental Report. (ER Exceptions at p.7-10; ER Supp. Exceptions at pp. 5-6). The Board notes in Woodman’s that “absent bad faith, an employer’s explanation will be considered as a factor in the analysis.” 332 NLRB at 504, fn12 (emphasis added). According to well settled Board law, this “factor” is analyzed under a “legally sufficient” standard. In Woodman’s, the Board found that the Employer’s explanation of “incorrectly interpret[ing] the payroll eligibility requirement” and that the “payroll department may have committed errors” were not legally sufficient and demonstrated “a lack of diligence and due care by the Employer.” Id. at 504. In the instant case, the Employer omitted Powell from the *Excelsior* list despite including individuals with similar work schedules and patterns. (Supp. Report at pp. 2-4; Report at p. 11).<sup>4</sup> The Employer’s defense that there was no harm in omitting Powell from the *Excelsior* list because Powell seasonally works in the movie industry, which is under the jurisdiction of Petitioner Local 727, is equally unpersuasive and does not cure the *Excelsior* violation. Without notification of

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<sup>4</sup> Neither the Employer nor Petitioner Local 707 have excepted to the Hearing Officer’s findings of fact.

Powell's employment at CCS via the *Excelsior* list, Petitioner Local 727 had no knowledge that Powell (one out of almost 7000 union members) should be contacted regarding the election at CCS. The Employer's argument further assumes that because an individual is a union member, he or she is fully knowledgeable about the union and the union's role as a bargaining representative at this particular location. By willfully omitting Powell's name from the *Excelsior* list, his Section 7 rights were, nevertheless, violated and not corrected because he occasionally works in the movie industry covered by contracts within Petitioner Local 727's jurisdiction. Accordingly, the Hearing Officer properly determined that, while perhaps not bad faith, the reason for this omission was not legally sufficient and even "disturbing." (Supp. Report at pp. 2-4; Report at p. 11).

The Employer's reasons for omitting Kendal from the list were, likewise, legally insufficient and "equally disturbing." (Report at p. 11). The Hearing Officer properly found the Employer's alleged reasons for omitting Kendal from the *Excelsior* list are undercut by its own evidence it presented at hearing: "The Employer's own payroll records run counter to their argument as these records show that when Livsey Sr., returned to work in November 2011, Kendal continued to work as well." (Report at p. 11; Supp. Report at pp. 2-3). This omission was willful by the Employer as demonstrated by Kendal's unrebutted testimony:

He [Jeff Rizzi] asked if I would do him a favor and go to Florida, yes, because one of the other drivers, Jesse, needed to vote, and I wasn't going to get, I wasn't voting, I wasn't going to get to vote, so he asked me if I would do him a favor and go to Florida. . . .

(Tr. 31). Accordingly, because the record evidence (presented by the Employer) undercuts its own alleged reasons for omitting Kendal's name from the *Excelsior* list, and this omission was willful by the Employer, the alleged reasons appear pretextual. Pretextual reasons for Employer

conduct are not a “legally sufficient” explanations for an *Excelsior* rule violation. Accordingly, the Hearing Officer did not err in finding that “[b]ased on the record testimony and evidence, the Employer failed to provide sufficient grounds for Kendal’s omission from the *Excelsior* list,” a finding reiterated in his Supplemental Report. (Report at p. 11; Supp. Report at pp. 3-4).

**VII. *AUTOMATIC FIRE SYSTEMS* IS ENTIRELY ON POINT TO THE INSTANT MATTER AND SHOULD BE FOLLOWED BY THE BOARD.**

The Employer’s argument in its Exceptions to the original Report that Automatic Fire Systems, 357 NLRB No. 190 (2012), is distinguishable from the instant case is without merit. To the contrary Automatic Fire Systems is wholly on point and should be followed by the Board in the consideration of the instant matter.

As a threshold matter, the Employer’s argument regarding Automatic Fire Systems implies that there is a three part test in *Excelsior* rule omission cases. However, the Automatic Board states, instead,

Woodman’s did not establish a three-part test under which each part must be satisfied for an election to be set aside. Rather, the Woodman’s Board adopted a more flexible approach under which other factors “including whether the number of omissions is determinative” would be considered. The Board’s adoption of that approach was motivated by concern over instances in which the number of names omitted from an *Excelsior* list was small, but nonetheless those employees were potentially determinative.

357 NLRB No. 190 at \*6 (emphasis in original)(citations omitted). In the instant case, the number of names omitted from the *Excelsior* list is not small—it was, as admitted by the Employer, almost 16%.<sup>5</sup> Accordingly, considering the determinative nature of the omissions is not necessary in this case because this is not an instance in which the number of names omitted

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<sup>5</sup> See, e.g., Thrifty Auto Parts, Inc., supra (9.5 percent); Avon Products, Inc., 262 NLRB 46, 48 fn. 5 (1982) (citing cases); EDM of Texas, 245 NLRB 934, 934, 940 (1979) (10.67 percent omissions and 17.9 percent inaccuracies); Sonfarrel, Inc., 188 NLRB 969, 969-970 (1971) (11 percent); Gamble Robinson Co., 180 NLRB 532, 532-533 (1970) (11 percent).

from the *Excelsior* list was small.

Furthermore, as stated in Automatic Fire Systems, “there is no basis to conclude,” as the Employer does, “that the Board intended its new approach to bar setting aside elections where the percentage of omitted employees is high and where the employer’s explanation for the omissions is not legally sufficient.” Id. As in Automatic Fire Systems, “[t]hat is the situation here.” Id. The instant case is one where there is a high percentage of omitted employees (as admitted by the Employer—ER original Exceptions to the Report at p. 2), and, as argued supra., the Employer’s explanations for the omissions are not legally sufficient. Even assuming arguendo that this was a case where the determinative nature of the omissions would be considered, under Automatic Fire Systems, they were determinative. In that case, the Board found that “the number of omitted employees and challenged voters combined was potentially outcome determinative.” In the instant case, the revised tally vote was 4 votes for Petitioner Local 727 and 8 votes for Petitioner Local 707. As previously noted, a change in two votes would have tied the vote at 6 to 6, and Ken Kendal’s one vote for Petitioner Local 727, which he was denied, would have changed the vote to 7 for Petition Local 727 and 6 for Local 707.

Clearly, the Employer’s argument fails under Automatic Fire Systems and settled Board law considering *Excelsior* list omissions. Accordingly, the Hearing Officer did not err when he recommended that the election results be set aside and a rerun election conducted immediately. As the Board in Automatic Fire Systems decided, the Board in this case should “agree with the hearing officer’s primary recommendation to set aside the election.” 357 NLRB No. 190 at \*2.

### **CONCLUSION**

For all of the foregoing reasons, the Board should deny of the Employer’s exceptions to

the Hearing Officer's Report and its exceptions to the Hearing Officer's Supplemental Report and adopt the Hearing Officer's recommendation to set aside the election results and rerun the election immediately.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Brinson', written in a cursive style.

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Stephanie K. Brinson  
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<b>Petitioner.</b>	)	
	)	

**CERTIFICATE OF SERVICE**

The undersigned attorney, Stephanie K. Brinson, hereby certifies under penalty of perjury under the laws of the State of Illinois that on October 18, 2012, she caused to be served upon the person(s) listed below in the manner shown Petitioner Teamsters Local 727's Answering Brief in Opposition to the Employer's Exceptions to the Supplemental Hearing Officer's Report was served on the following parties via the method(s) indicated:

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