MVM, Inc., *and* International Union, Security, Police and Fire Professionals of America (SPFPA), Petitioner. Case 28–RC–288965

December 16, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

The Employer's request for review of the Regional Director's Decision and Direction of Second Election is granted as it raises substantial issues warranting review. The issue in this case is whether the Employer's failure to provide, as part of the voter list, the home phone numbers of five unit employees warranted setting aside the election and directing a second one. On review, we find that it did not.[1]

The facts here are straightforward. The Employer is a provider of security services at the border, which includes transporting unaccompanied minors to emergency influx sites and licensed care facilities. International Union, Security, Police and Fire Professionals of America (the Union) filed a petition to represent a unit of approximately 92 full-time and regular part-time child and family protection care specialists employed by the Employer in Phoenix, Arizona. The parties' Stipulated Election Agreement provided that:

> Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters.

The information required by the parties' Agreement tracks the voter list requirements in Section 102.62(d) of the Board's Rules and Regulations. Section 102.62(d) requires that, in elections conducted pursuant to an election agreement, the employer must furnish a list of the names and home addresses of eligible voters.[2] In addition, the employer must furnish "available home and personal cellular ('cell') telephone numbers of all eligible voters." Id. Failure "to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed." Id.

It is undisputed that the Employer timely provided a voter list to the Regional Director and the Union that included a full name, home address, personal email address, and cell phone number for each eligible voter. The evidence establishes that the Employer pulled the voter information included on the voter list from its internal human resources system. While that system included separate columns for "Mobile Phones" and "Home Phones," the Employer's program manager, Joseph Arabit, who compiled the voter list, testified that he did not include information from both the mobile and home columns in the voter list because he had reviewed the phone numbers listed in both columns—mobile and home—and they appeared to be the same for every voter. And in fact, the mobile and home phone numbers were the same for the vast majority of the 92 unit employees. At some unspecified time after the Employer submitted the voter list, however, Arabit learned that about five employees had additional home phone numbers in the system that were not included as part of the voter list.

Although the hearing officer did not note it, Arabit testified without contradiction that the Employer only communicates with its employees by using their cell phone numbers. He further testified that prior to completing the voter list, the Employer asked its supervisors and a site manager to contact each eligible voter to verify their cell phone number, home address, and email address.

As provided for in the parties' Stipulated Election Agreement, a mail-ballot election was conducted between February 15 and March 2, 2022, with the ballot count held on March 10, 2022. The March 10 tally of ballots showed that 15 eligible voters voted in favor of union representation and 34 against. The Union timely filed postelection objections alleging in relevant part that the Employer's omission of the five employees' home phone numbers from the voter list required that the election be set aside. Following a hearing, the Hearing Officer issued a report recommending that the objection be overruled because, despite the omissions, the Employer had substantially complied with the Board's voter list requirements. The Union excepted, and the Regional Director declined to adopt the Hearing Officer's recommendation; instead, he sustained the objection and directed a second election, reasoning that the Employer's "intentional omission of

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has exercised its discretion to read the record in this case. See Board's Rules and Regulations, Sec. 102.67(e).

[2] See also Sec. 102.67(l) (articulating the same voter list requirements for directed elections).

information on the voter list, at the least, constitutes gross negligence and precludes me from finding that the Employer substantially complied with voter list requirements set forth in Section 102.62(d) [of the Board's Rules and Regulations]."[3] For the reasons below, we disagree.

Although Section 102.62(d) was first added to the Board's Rules and Regulations as part of a 2014 final rule,[4] the requirement that an employer provide the names and home addresses of eligible voters is a codification of the longstanding *Excelsior*[5] requirement. In contrast, the requirement that an employer provide available personal cell phone numbers and home phone numbers was a creation of the 2014 final rule. In expanding *Excelsior* to include this information, however, the 2014 final rule explained that the Board "continues to agree with existing precedent on *Excelsior* compliance," including the approach established in *Woodman's Food Markets*, 332 NLRB 503 (2000).[6]

As observed in *Woodman's*, "[t]he Board's *Excelsior* policy was designed to enhance the availability of information and arguments both for and against union representation to employees so that they might render a more informed judgment at the ballot box." Id. at 504. To ensure that these channels of communication remain sufficiently open, the Board "look[s] to whether or not, under the circumstances of a particular case, the employer has substantially complied with the *Excelsior* requirements." Id. (internal quotation marks omitted). Under this "comprehensive" and "flexible approach," the Board determines substantial compliance by considering several factors, including the number of omissions as a percentage of the total number of eligible voters; 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. *Automatic Fire Systems*, 357 NLRB 2340, 2340–2341 (2012). When considering an employer's explanation for the omission of information from a voter list, the Board often examines that factor in terms of whether the omission "is the result of conduct demonstrating bad faith or gross negligence on the part of an employer." *Fountainview Care Center*, 323 NLRB 990, 990 (1997); see also *Automatic Fire Systems*, 357 NLRB at 2341 & fn. 6 (applying the *Woodman's* factors to find that an employer's noncompliance "raise[d] a serious question of bad faith, and, at the least, indicate[d] gross negligence.").

Applying these factors, we find that the Employer here substantially complied with the voting list requirements. First, home phone numbers were omitted for only about 5 percent of eligible voters. Second, the number of voters whose home numbers were omitted—five—would not have been determinative in the election, which the Union lost by 19 votes. In addition, we emphasize that the Employer failed to provide *only* home phone numbers; even for the five voters at issue, the Union still had cell phone numbers, which—according to Arabit's testimony—were regularly used by all employees. Indeed, the Employer verified the accuracy of voters' cell phone numbers prior to compiling the voting list. Unlike other voter list cases where the Board has set aside elections, this case does not involve a situation where an employer failed to provide any phone numbers at all,[7] or omitted a significant number of voter names (and thus, all of their contact information) such that the union "may have suffered substantial prejudice by its inability to communicate" with those voters.[8] Here, where the Union had the names, home addresses, personal email addresses, and cell phone numbers of the five voters at issue, we find that the Union did not suffer substantial prejudice to its ability to inform eligible votes of its arguments for union representation as a result of the Employer's omission.

Finally, the Employer's reason for omitting the home numbers—mistakenly reading the two phone data columns to include identical phone numbers for all voters—is consistent with a finding of substantial compliance. Certainly, the Employer could have exercised more diligence in reviewing these numbers and preparing the voter list. But such an error does not constitute the type of bad faith or gross negligence—as the Regional Director characterized it—that precludes consideration of the other factors from *Woodman's Food Markets*.[9] Indeed, the Employer only communicated with its employees by cell phone and its error affected a small, non-determinative

[3] The Employer then filed this request for review , along with a motion to stay the second election and for expedited consideration. The Board denied that motion on July 12, 2022.

[4] See 79 Fed. Reg. 74308 (Dec. 15, 2014).

[5] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[6] See 79 Fed. Reg. at 74357 & fn. 249.

[7] See *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 4–5 (2017).

[8] *Woodman's Food Markets*, 332 NLRB at 505; see also *Automatic Fire Systems*, supra, where the Board directed a rerun election where the employer intentionally omitted from the list the names of 36 percent of eligible voters, whose votes were potentially outcome determinative. Contrary to the Regional Director's suggestion, that scenario bears no resemblance to the one here.

[9] See, e.g., *Days Inn*, 216 NLRB 384, 385 (1975) (finding no bad faith or gross negligence despite employer's "unconcern for complete accuracy" and "carelessness" in submitting a voter list in which 13 percent of addresses were defective); cf. *Merchants Transfer Co.*, 330 NLRB 1165, 1165–1166 (2000) (employer acted with "gross negligence or bad faith" where it admittedly had incorrect addresses for a "significant number" of voters and "did not direct anyone . . . to verify the accuracy of the addresses" before compiling an *Excelsior* list).

number of voters, which did not significantly impair the Union's ability to contact those few voters.

Our dissenting colleague contends that the Employer's omissions rose to the level of gross negligence because it failed to include employees' home phone numbers on the voter list and did not remedy the situation once the Employer became aware of it. As noted, Arabit reviewed the home and cell phone numbers for the employees on the voter list, concluded that they were the same, and provided the phone numbers from the cell phone column once rather than provide the same phone number twice for those employees.[10] Arabit's conclusion that the numbers were the same for all of the employees was mistaken as to five of them, but there is no evidence that he was aware of that at the time he provided the initial voter list. While the record does show that the Employer subsequently recognized its mistake, the Petitioner has failed to establish that the Employer did so prior to the election. On these specific facts, a finding of gross negligence based on the failure to correct the list is unwarranted.

Our colleague also contends that the Employer did not substantially comply in any event, because it was required to provide employees' home phone numbers and "did not provide home numbers as such." Again, the home and cell phone numbers were the same for the vast majority of employees. While the Employer did not provide those numbers twice, once as a home number, and then a second time under the heading cell phone numbers, no precedent supports finding a lack of substantial compliance on those facts.

For all of the foregoing reasons, we conclude that setting aside the election based on the Employer's omission is not warranted under the specific circumstances of this case.

ORDER

The case is remanded to the Regional Director for further action consistent with this Decision.

Dated, Washington, D.C. December 16, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

On the facts here, I agree with the Regional Director that the Employer omitted required information from the voter list and that, under the Board's rule, the election must therefore be set aside. Contrary to my colleagues, I would not find that the Employer substantially complied with the rule, despite the omission.

Section 102.62(d) of the Board's Rules and Regulations requires that, in elections conducted pursuant to an election agreement, an employer must provide to the Regional Director and parties "a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers) of all eligible voters." This case turns on how the Board characterizes the Employer's failure to provide available home telephone numbers, based on its mistaken belief that they were identical to employees' cell phone numbers—an error that it then recognized, but did not correct.

Contrary to the majority, I would find that the Employer's conduct amounted to gross negligence that merits setting aside the election.[1] Where an employer is guilty of gross negligence (or bad faith), the issue of substantial compliance with the voter-list requirements does not come into play.[2]

Here, the majority effectively skips to the substantial-compliance analysis. I would not do so. The record evidence makes clear that the Employer failed to include voters' home telephone numbers on the list. This was a mandatory category of information under Section 102.62, and those numbers were not only readily available, but were also part of the database that the Employer was already using to produce the required information.[3] Indeed, even when the Employer became aware that some employees had separate home numbers, in addition to the cell numbers provided, it did nothing to remedy the situation.[3]

[10] The relevant testimony concerning this matter was limited and brief. On direct examination by Employer's counsel, Arabit testified that he did not include a home phone number column on the voter list simply "[b]ecause the numbers were the same." In response to Employer counsel's question, "Did you subsequently learn that a few employees listed another number in a data column," Arabit responded, "Yes." Finally, Arabit testified that "We just learned that it was an additional number . . . [w]hen we reviewed the data." Because the Petitioner chose not to cross-examine Arabit, his testimony stands uncontroverted.

[1] *Automatic Fire Systems*, 357 NLRB 2340, 2341& fn. 6 (2012).

[2] See, e.g., *Automatic Fire*, supra, 357 NLRB at 2341 (finding at least gross negligence where employer knowingly omitted the names and addresses of certain eligible voters without justification).

[3] See, e.g., *Merchants Transfer Co.*, 330 NLRB 1165 (2000) (finding gross negligence or bad faith where employer provided a list known to have significant errors "without taking a step that was readily available to [it] to correct the inaccuracies."); *Medtrans*, 326 NLRB 925,

Under the circumstance, this omission is sufficient to constitute gross negligence.

The majority views the Employer's failure as omitting only five home numbers, because for the remaining employees, they had no telephone number other than their home number. But this framing of the issue does not speak to the threshold question: whether the Employer effectively disregarded an explicit requirement under the Rules. That this gross negligence involved only a relatively small number of employees, as it turned out, is immaterial. To ensure that the Board's rules are followed regularly and completely, our first focus must be on the nature of an employer's failure to comply with the rule (whether it amounted to gross negligence or bad faith) and not on the degree to which the employer did comply.

But even assuming that the majority is correct in framing the issue as one of substantial compliance, I would still set aside the election here. The majority's rationale focuses largely on the fact that the Union had other means—namely cell phone numbers—to communicate with most voters. But the key question is not whether the Union had some plausible way to communicate with voters; it is whether the Employer substantially complied with the requirement to provide home telephone numbers for all employees. Because the employer did not provide home numbers as such, it cannot be said to have substantially complied with the requirement to do so. The majority's approach threatens to invite employers to pick and choose which required voter-list information to supply, in the hope that the Board will find substantial compliance with the rule (itself a difficult determination for the Board).[4] But Section 102.62 does not set out options for compliance; it sets out requirements, which the Board should be very reluctant to excuse.[5] Accordingly, I would deny review, because the Regional Director was correct to set aside the election.

Dated, Washington, D.C. December 16, 2022

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

925–926 (1998) (finding no substantial compliance where employer was made aware of its omission but failed to timely correct it)

[4] As the Board has explained, "to look beyond the issue of substantial compliance with the rule and into the additional issue of whether employees were actually informed about election issues would 'spawn an administrative monstrosity.'" *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997) (citation omitted).

[5] My colleagues assert that "no precedent supports finding a lack of substantial compliance" in this situation, where the Employer failed to provide separate sets of phone numbers because employees' home and cell phone numbers were the largely same. But nearly all of the precedent on this issue predates the adoption of the current version of the Board's Rules and Regulations, before which employers were not required to provide as part of the voter list either home numbers *or* cell phone numbers.