

1966

Labor Law: Unions Are Entitled to Names and Addresses of Employees Eligible to Vote in a Representation Election Ordered or Approved by a Regional Director

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Recommended Citation

Bill York, *Labor Law: Unions Are Entitled to Names and Addresses of Employees Eligible to Vote in a Representation Election Ordered or Approved by a Regional Director*, 3 Tulsa L. J. 200 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol3/iss2/11>

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ings are consistent with those made by it in other cases, is clearly beyond our {the Supreme Court} province."²³

Judicial review of opinions of administrative agencies is provided to assure that due process will be followed and that no arbitrary or unfounded decisions will be made. Once the court oversteps these bounds, it is acting outside its realm of authority and invading an area set aside by Congress to be decided by an administrative agency acting in a quasi-legislative capacity.

Casey Cooper

LABOR LAW: UNIONS ARE ENTITLED TO NAMES AND
ADDRESSES OF EMPLOYEES ELIGIBLE TO VOTE IN
A REPRESENTATION ELECTION ORDERED OR
APPROVED BY A REGIONAL DIRECTOR

In two separate instances, prior to representation elections, employers sent anti-union letters to their employees, and denied the unions' requests for employees' names and addresses so that they might answer the employers' letters and mail campaign material to the employees.¹ After losing the elections, the unions sought to have the elections set aside on the ground that the employers' refusals to furnish employee names and addresses interfered with the elections.² The National Labor Relations Board ruled that an employer must file the names and addresses of all employees eligible to vote in the election with the Regional Director within seven days after a representation election is ordered or approved. The Regional Director shall then make such information available to all parties involved. Failure to comply with this requirement will be grounds for setting aside an election whenever proper objections are filed.³

The rationale for the Board's ruling was the "laboratory conditions" principle of *General Shoe Corporation*,⁴ in which the Board stated:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under

²³ 272 U.S. 658, 663 (1926).

¹ The first case, *Excelsior Underwear, Inc.*, and the second case, *K. L. Kellogg & Sons*, were consolidated and heard together, 5 CCH LAB. L. REP. (1966 CCH Lab. Cas.) ¶ 20180 (N.L.R.B. 1966) (hereinafter referred to as *Excelsior*).

² The unions also charged that the letters contained false and coercive material in violation of § 8(a)(1) of the NATIONAL LABOR RELATIONS ACT. The Board found the letters to be legitimate campaign propaganda.

³ The ruling has the following limitations: first, it is inapplicable to cases occurring thirty days from the date of the present decision, *Excelsior*, *supra* note 1, n.5; second, disclosure is excluded in expedited elections, *Excelsior*, *supra* note 1, n.14.

⁴ 77 N.L.R.B. 124 (1948).

conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to *establish* those conditions; it is also our duty to determine whether they have been fulfilled.⁵ (Emphasis added.)

In reaffirming this principle in the present case the Board said:

[W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.⁶

Before this ruling, non-employee⁷ organizers' access to all employees was limited by an employer's lawful no-solicitation rule and no-distribution rule, provided that alternate channels of communication were reasonably adequate to reach the employees.⁸ Although alternate channels of communication exist, peculiar geographic circumstances⁹ must be considered to determine if the normal contacts are adequate. Furthermore, the rule preventing union solicitation or distribution of literature must be the result of the employer's desire to protect his legitimate property interest and not an attempt to obstruct the employees' statutory right of self-organization.¹⁰ There is a conscious effort to balance the conflicting interests of the employees' right to organize and the employer's right to control the use of his property.¹¹

The alternate channels of communication rule has been criticized because it prevents employees from hearing all arguments for and against unionization which, in turn, prevents the employees from making an

⁵ *Id.* at 127.

⁶ *Excelsior*, *supra* note 1, p.25404.

⁷ Employees and nonemployees are distinguished when considering no-solicitation and no-distribution rules. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

⁸ *Ibid.*, *Walton Mfg. Co.*, 126 N.L.R.B. 697 (1960).

⁹ *NLRB v. Lake Superior Lumber Co.*, 167 F.2d 147 (6th Cir. 1948); *NLRB v. Cities Serv. Oil Co.*, 122 F.2d 149 (2d Cir. 1941).

¹⁰ *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1948).

¹¹ *NLRB v. Babcock & Wilcox.*, *supra* note 7; *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

informed and reasoned choice whether they desire union representation.¹² A further argument is that channels of communication available to the employer are more effective in persuading employees than alternate channels of communication left to the union,¹³ and that such inequality impedes an informed and reasoned choice.¹⁴

In the present cases, the Board held the alternate channels of communication were ineffective to insure adequate contact with all employees. The Board considered access to all employees essential to expose them to all arguments concerning unionization and to insure a more informed and reasoned employee choice for or against union representation. To insure this complete exposure, the Board took the position that it properly could require disclosure although other channels of communication were available to the union. Alternate channels of communication were held "relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest,"¹⁵ such as control of the use of property.

Continuing, the Board held that secrecy of employee names and addresses is not a significant employer interest.

Perhaps the Board's ruling was most significant in making the distinction that:

Even assuming that there is some legitimate employer interest in non-disclosure, we think it relevant that the subordination of that interest which we here required is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the precondition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact.⁶¹

This test of substantial employee interest might be extended to further subordinate employer interests since the Board has indicated that future doctrine in the area of plant access may depend upon the effectiveness of the present disclosure ruling.¹⁷ Depending upon their evaluation of the effectiveness of the disclosure requirement, the Board could possibly

¹² Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Comment, 72 YALE L. J. 1243 (1963).

¹³ *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953) (dissent).

¹⁴ The Board apparently shares these opinions to some extent, since, in a prior case, it described alternate channels of communication available to one union as "catch-as-catch-can." *The May Co.*, 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963).

¹⁵ *Excelsior*, *supra* note 1, p. 25407.

¹⁶ *Excelsior*, *supra* note 1, p. 25407.

¹⁷ *General Electric Co.*, 5 CCH LAB. L. REP. (1966 CCH Lab. Cas.) ¶ 20181 (Feb. 4, 1966).