URS Federal Services, Inc. *and* International Association of Machinists and Aerospace Workers, District Lodge 725, AFL–CIO, Petitioner. Case 20–RC–170461

December 8, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The issue presented in this case is whether the Acting Regional Director properly overruled Petitioner's Objection 1, which alleged that the Employer failed to serve the voter list on the Petitioner, as required in Section 102.62(d) of the National Labor Relations Board's Rules and Regulations, as amended.

Pursuant to a Stipulated Election Agreement, an election was held on March 15, 2016,[1] in which the Petitioner did not receive a majority of the votes cast. The Petitioner thereafter filed timely objections. On June 10, the Acting Regional Director issued a Report Regarding Objections[2] to Election and Certification of Results, overruling all of the Petitioner's objections. Thereafter, in accordance with Section 102.67 of the Rules and Regulations, the Petitioner filed a timely request for review only with respect to Objection 1. The Employer has not filed an opposition to the request.

The request for review is hereby granted as it raises a substantial issue warranting review. On review, for the reasons stated below, we reverse the Acting Regional Director's overruling of Objection 1, set aside the election, and remand the case for a second election.

The relevant facts are not in dispute. The parties entered into a Stipulated Election Agreement on Thursday, March 3. The Employer filed the voter list with the Region on Saturday, March 5, within 2 business days of the approval of the parties' election agreement, as required by the Board's Rules and as memorialized in the agreement. The Region then forwarded the list to the Petitioner on Monday, March 7, 8 days before the scheduled election. However, the Employer never served the list on the Petitioner, as further required by the Board's Rules and the parties' agreement, and has not offered any explanation for failing to do so.[3]

Section 102.62(d) of the Board's Rules and Regulations, as amended, expressly requires that the employer in a representation case "*shall* provide to the regional director *and the parties* . . . a list of the full names . . . [and other information] of all eligible voters" (emphasis added). Section 102.62(d) further requires the employer to file with the regional director a certificate of service indicating that the voter list was served on all parties. Finally, Section 102.62(d) provides that an employer's failure to file *or serve* the list "*shall* be grounds for setting aside the election *whenever* proper and timely objections are filed." Id., emphasis added.

In adopting this service requirement during its recent rulemaking on representation case procedures, the Board deliberately sought to eliminate the prior two-step process—under which the employer would file the list with the regional director, who would then forward the list to the other parties—because it had caused delay and unnecessary litigation. See 79 Fed. Reg. 74356 (Dec. 15, 2014). Moreover, the Board noted comments complaining of circumstances similar to those presented here, where "employers filed the list with the regional office after business hours on a Friday, and the regional office subsequently does not forward the list to the petitioner until the following Monday." Id.[4]

In overruling Petitioner's Objection 1, the Acting Regional Director acknowledged that Section 102.62(d) requires that the employer serve the list on the other parties, and that the employer's failure to do so constitutes grounds for setting the election aside when timely objections are filed. Nevertheless, the Acting Regional Director excused the Employer's failure to serve the list, based on the Region's provision of the list to the Petitioner within 2 business days (the timeframe provided for in the parties' Stipulated Election Agreement). As set forth above, however, the Acting Regional Director's approach conflicts with the clear language and purpose of the new service requirement.

As the Rules plainly state, service of the voter list is mandatory, and the failure to serve it will result in setting aside the election, if (as here) a proper and timely objec-

[1] All dates hereinafter are in 2016.

[2] We have treated the Acting Regional Director's "Report Regarding Objections" as a Decision on Objections. See 79 Fed. Reg. 74412 fn. 464 (Dec. 15, 2014).

[3] The Employer also failed to file a certificate of service.

[4] The Employer was clearly and repeatedly notified of the requirement to directly serve the voter list on the Petitioner. The service requirement, and consequences of noncompliance, were explained in the "Description of Representation Case Procedures in Certification and Decertification Cases," served on the Employer simultaneously with a copy of the petition. The requirement was revisited in the Regional Director's opening letter to the Employer accompanying the Notice of Hearing. And it was memorialized in the Stipulated Election Agreement signed by the parties. In short, the Employer could not reasonably claim ignorance of the requirement that it serve the voter list on the Petitioner, and as noted, the Employer has not offered any explanation for its failure to comply with the Board's Rules.

tion is filed. Section 102.62(d) does not allow regional directors discretion to excuse such a failure. Cf. *Aramark Uniform & Career Apparel, LLC*, 364 NLRB No. 120 (2016) (objections properly overruled due to the objecting party's failure to follow the relevant filing and service requirements of Section 102.69(a)). Similarly, in *Brunswick Bowling Products, LLC*, 364 NLRB No. 96, slip op. at 2 (2016), the Board held that the regional director erred by receiving into evidence the union's statement of position that was untimely served on the other parties, with no explanation for its late service.

Our dissenting colleague would excuse the Employer's lack of service here based in part on his contention that the amended Rules grant "substantial discretion" to regional directors in representation cases, including discretion to "interpret" the terms of a stipulated election agreement. As just explained, however, the clear language of Section 102.62(d) does not afford regional directors the discretion to excuse parties from complying with the voter-list service requirement, and it is therefore irrelevant that some other provisions of the Board's Rules and Regulations afford discretion to regional directors in other areas. In addition, given the clear language of Section 102.62(d), the parties' Stipulated Election Agreement in this case—stating that "the *Employer* must *provide* [the voter list] to the Regional Director and *all of the other parties*" within 2 business days—cannot reasonably be interpreted to mean only that the Petitioner should "receive" the list within 2 days, as our colleague mistakenly contends.[5]

Finally, we reject our dissenting colleague's misplaced accusations that we are setting aside the election lightly and creating a "double standard" under *Brunswick Bowling* in order to favor the union in this case.[6] In enacting the amended Rules, the Board deliberately created certain new bright-line provisions and consequences for noncompliance. These provisions include the service requirements for the voter list in 102.62(d) and for the statement of position in 102.66(b) and (d). Our holding in *Brunswick Bowling*, supra, slip op. at 2, creates no double standard because there we expressly found that "the Regional Director erred by receiving into evidence the Union's statement of position and by not precluding the Union from raising the contract bar issue." We thereby applied the consequences for statement of position service failure specified in 102.66(d), just as we are now applying the consequences for voter list service failure specified in 102.62(d). Although *Brunswick Bowling* went on to state that the regional director could nevertheless consider the contract bar issue, this was because Section 102.66(b) expressly grants regional directors discretion to receive evidence necessary to resolve certain preelection issues. Id., slip op. at 2–3.[7] By contrast, there is no analogous provision allowing discretion with respect to the service requirement in Section 102.62(d). In short, we expect regional directors to enforce these service requirements—whether an employer or union has failed to meet—so that *all* parties take their obligations seriously under the amended Rules. To allow parties to ignore the service requirements set forth in Section 102.62(d) without any explanation or excuse would undermine the purpose of those provisions.

Accordingly, we reverse the Acting Regional Director's overruling of Petitioner's Objection 1, set aside the election, and remand the case for a second election.[8]

[5] The Stipulated Election Agreement also clearly includes the requirement that, when feasible, the list must be "served electronically on the parties" and that the Respondent "must file with the Regional Director a certificate of service of the list on the parties." Moreover, the first provision of the agreement headed "Procedural Matters" includes that the case will be "governed by the Board's Rules and Regulations" which, as discussed above, make clear the consequences of failing to serve the list. Thus, there can be no argument that the parties stipulated to avoiding the service requirements in 102.62(d).

[6] See, e.g., *Aramark*, supra (overruling a union's election objections where it failed to follow the relevant filing and service requirements of Amended Sec. 102.69(a) without explanation).

[7] Furthermore, as we explained in *Brunswick Bowling*, the peculiar circumstances of that case justifying the Regional Director reaching the contract bar issue despite the Union's hearing preclusion included: the petitioner raising the contract bar issue on the face of the petition; the Regional Director obtaining a prehearing copy of the contract; and the Petitioner and the Employer stipulating to the existence of the contract before the opening of the hearing. Id., slip op. at 3. Our colleague cannot reasonably ignore these issues and claim inconsistency in our decisions by attempting to elevate his concurrence in *Brunswick Bowling* to the majority holding.

[8] In addition to considering Objection 1, the Acting Regional Director went on to find (in effect) that the Petitioner was not prejudiced by receiving the voter list from the Region only 8 days before the election, rather than the 10-day minimum period required by the Board (absent waiver). See *Ridgewood Country Club*, 357 NLRB 2247, 2247 (2012); *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997). As we have sustained Objection 1, we need not address the Acting Regional Director's reasoning on this count. The Board in Sec. 102.62(d) has articulated a prophylactic rule concerning voter list service that obviates the need for Regional Directors to delve into a showing of prejudice in order for the elections to be set aside.

Dated, Washington, D.C. December 8, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The Election Rule[1] requires an employer, within 2 business days of the approval of a Stipulated Election Agreement, to provide a list of eligible voters—commonly referred to as an "*Excelsior* list"—to both the Region and the other party or parties. Here, the Employer provided the voter list in a timely fashion to the Region, which promptly forwarded the list to the Petitioner; and the Petitioner's receipt of the voter list was also timely. However, the Employer did not serve the voter list on the Petitioner as required by the Election Rule. The Petitioner lost the election, 91 to 54, and now seeks to overturn the election because the Employer failed to serve the voter list on the Petitioner, even though the Petitioner timely received it.

The Acting Regional Director overruled the Petitioner's objection, reasoning that "[a]lthough the Employer deviated from the Rules by failing to serve the list on Petitioner, the Region's timely provision of the list to Petitioner effectively satisfied the Board's requirement that Petitioner receive the voter list within 2 business days of approval of the Agreement. To hold otherwise would exalt form over substance." Looking to precedent—which was not repudiated by the Election Rule—the Regional Director further concluded that a technical failure to comply with the Election Rule's service requirements did not frustrate the purpose of the *Excelsior* rule.[2]

My colleagues reject the Regional Director's decision, finding that the failure to fully comply with the Election Rule requires overturning an otherwise valid election, regardless of the effect (or lack thereof) such noncompliance had on the election. I dissent for three reasons. First, the Board has long held that elections should not be lightly set aside, a principle the majority does not address (other than to deny, without explanation, that their decision is at odds with it). Second, the Election Rule affords regional directors broad discretion in many areas, and the Regional Director's decision here falls well within this zone of discretion. Finally, the majority's decision appears to be in conflict with the Board's recent unanimous decision in *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016), where the Board unanimously upheld a regional director's determination in favor of a union notwithstanding its failure to effectuate timely service under the Election Rule.

1. *The Majority Lightly Sets Aside the Election, Contrary to Decades-Old Case Law.* For more than 60 years, the Board has sought to preserve the finality of Board elections by consistently repeating that representation elections will not be lightly set aside. In its seminal decision in this area, *The Liberal Market, Inc*., 108 NLRB 1481 (1954), the Board explained why elections should not be overturned merely because the circumstances surrounding them might be less than ideal:

> We seek to establish ideal conditions insofar as possible, but we appreciate the actual facts in light of realistic standards of human conduct. It follows that elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards. In this connection, we note that a realistic appraisal of the effect of antecedent conduct upon a Board election must, of course, be concerned with particular acts and their effect upon those of the voters who are directly involved; it must also be concerned, however, with the overall picture of how the totality of the conduct affects not only the voters directly involved, but any others who may or may not be indirectly affected because they are within the voting unit. In some cases, a nice balancing of these considerations may be required. *Basically, we feel that the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside.* Like any other contest in which the stakes are high, the losing party is likely to protest the result, but this Board cannot be influenced by any sub-

[1] See 79 Fed. Reg. 74308 (Dec. 15, 2014) (Election Rule). Former Member Johnson and I dissented from the Election Rule, and I adhere to the views expressed in our dissent. See id. at 74430–74460 (dissenting views of Members Miscimarra and Johnson).

[2] The Election Rule's voter list requirements codified and refined longstanding principles governing the Employer's transmittal of a list of eligible voters, which were established by the Board in *Excelsior Underwear*, *Inc.*, 156 NLRB 1236 (1966). As the Acting Regional Director observed in his decision, the fundamental purpose of the *Excelsior* rule is to ensure that employees are provided a "full opportunity to be informed of the arguments concerning representation." *Bon Appetit Management Co*., 334 NLRB 1042, 1043 (2001). Because the Petitioner was in possession of the list of eligible voters on the date prescribed by the Election Rule, this purpose was fulfilled here.

> jective considerations. Our job is to make reasonably certain that the election reflected the true sentiments of the voters. An evenhanded application of an objective test is the best protection against arbitrary administrative action.[3]

The Board strongly prefers that elections "not be lightly set aside," particularly where the result of the election is likely to reflect "the true sentiments of the voters." Id. Moreover, overturning an election that reflects the voters' will and compelling the region to conduct a rerun election needlessly necessitates the expenditure of additional Board resources. Therefore, to honor election finality and avoid unnecessary repeat elections, the Board looks to "all of the facts and circumstances to determine whether the atmosphere" surrounding the election "was so tainted as to warrant the setting aside of the election." *Delta Brands, Inc*., 344 NLRB 252, 253 (2005).

On its better days, the Board has practiced what *Liberal Market* preaches, declining to overturn elections despite evidence of wrongdoing where the Board finds that such wrongdoing was unlikely to have tainted the outcome of the election. For example, in *Newport News Shipbuilding*, 239 NLRB 82 (1978), enf. denied 594 F.2d 8 (4th Cir. 1979), the Board upheld the validity of an election involving nearly 20,000 eligible voters despite the regional director's finding of potential voter fraud. Consistent with the employer's claim, the regional director's investigation showed that there was a "discrepancy between the overall number of names checked off by the observers and the overall number of ballots cast in the election." Id. at 84. Additionally, the regional director found that one employee had voted twice (although the second ballot was cast subject to challenge), and the Board agents present during the election had not followed the procedure agreed upon by the parties for checking the identities of voters. Id. at 85, 88. Although the Board acknowledged that the election was not "error free," it nevertheless determined that given the scope of the election, the isolated nature of the objectionable incidents, and the 1500-vote margin by which it was decided, the election results were valid since the "free choice of these voters was not thwarted." Id. at 90.

Another example is *Antioch Rock & Ready Mix*, 327 NLRB 1091 (1999), where the Board likewise reaffirmed the importance of upholding elections that reflect the will of the voters even where clearly reprehensible conduct occurred. *Antioch* involved simultaneous election campaigns in two different bargaining units, a "drivers" unit and a "mechanics" unit. The Board overturned the results of the election in the drivers unit because a union adherent had made death threats to other drivers. Nevertheless, the Board decided that even death threats did not warrant overturning the election in the mechanics unit because there was no evidence that the mechanics were aware of the threats. Id. at 1092.

In short, as illustrated by *Newport News Shipbuilding* and *Antioch*, the Board takes the results of secret-ballot representation elections seriously and will decline to overturn those results unless presented with clear evidence that the results may not reflect the will of the voters. See also *Quest International*, 338 NLRB 856 (2003) (alleged voter intimidation by posting a security guard accompanied by a Rottweiler at the entrance to the employer's facility in the run-up to the election and adding a second guard the day of the election did not reasonably interfere with employee free choice); *Delta Brands*, supra (mere maintenance of an overbroad no-solicitation rule does not warrant setting aside the election).

The election objection presented in this case lacks the drama of *Newport News Shipbuilding* and *Antioch*. The Petitioner does not allege widespread voter fraud or death threats. Rather, the Board must determine whether a purely technical violation of a service requirement, timely cured by the Region, warrants overturning election results that overwhelmingly disfavored the Petitioner. The pertinent portion of the Election Rule, Section 102.62(d), requires that a voter list be provided to both the regional director and the parties named in the agreement within 2 business days of the regional director's approval of the Stipulated Election Agreement. The Regional Director approved the Stipulated Election Agreement on Thursday, March 3, 2016. The Employer filed the voter list with the Region on Saturday, March 5, and the Region sent the voter list to the Petitioner on Monday, March 7. Thus, it is undisputed that (i) the Employer timely filed the list with the Region, and (ii) the Petitioner received the list on the second business day after the date the Regional Director approved the Agreement. Yet the majority overturns the election results in this case, merely because the Petitioner received the list of eligible voters from the Region instead of the Employer. Given the Petitioner's *actual* receipt of the voter list within the time specified by the Election Rule, I agree with the Regional Director that there is no valid reason to overturn the results of the election. Contrary to well-established Board law, the majority is choosing to "lightly set aside" the election. To state the proposition differently, my colleagues have decided that when the Region and the petitioner have timely received the voter eligibility list, and when employees have overwhelmingly voted against the petitioner in a secret-ballot election, the Board should disregard one of the Agency's primary

[3] Id. at 1482 (emphasis added).

statutory functions—to certify the results of the election[4]—if the voter eligibility list was received by everyone at the right time but, in one instance, from the wrong party. As the Regional Director aptly stated, overturning the election for this reason "exalt[s] form over substance."[5]

2. *Overturning the Election Improperly Fails to Defer to Discretion Properly Exercised by the Acting Regional Director*. In concluding that the Employer's service error did not frustrate the purpose of the Election Rule, the Acting Regional Director appropriately exercised the discretion provided him by the Election Rule itself. The Election Rule grants regional directors substantial discretion in representation cases. A regional director conducts an investigation and then determines whether a question concerning representation exists and whether to direct a hearing regarding that question. Section 102.63(a). A regional director then controls the content of the hearing, identifying for hearing officers which matters should be litigated. Section 102.66(c). Once a hearing is complete, a regional director determines whether additional argument on brief will be allowed. Section 102.66(h). These provisions amply illustrate the broad discretion given to regional directors throughout the Rule in connection with representation elections. More specific to this case, a regional director also has the authority to approve stipulated election agreements like the one that governed the election here. Section 102.62(b). Inherent in approval of such an election agreement is the ability to interpret the agreement approved, consistent with the Election Rule and its purpose. Here, as the Rule requires, the Employer *provided* the Regional Director with the voter list, and the Petitioner *received* the list within 2 business days after the approval of the Agreement. See Sec. 102.62(d) ("[T]he employer shall provide" the voter list within 2 business days, and the list must be received by the parties within that time "[i]n order to be timely filed and served.").[6] Although the Employer's service was incomplete, the Employer's actions nevertheless gave effect to the purpose of the Rule and the Agreement, as it is undisputed that the Petitioner received the voter list within the 2 business days the Election Rule and the Agreement required. Under these circumstances, I would uphold the Acting Regional Director's exercise of discretion and overrule the Petitioner's objection.

3. *Overturning the Election Creates a Double Standard, Contrary to the Board's Recent Unanimous Decision in* Brunswick Bowling. The majority's decision here is at odds with a diametrically opposite result reached by a unanimous Board in *Brunswick Bowling*, supra. In contrast to the instant case, where an *employer* failed to satisfy a service requirement mandated by the Election Rule, in *Brunswick Bowling* the *union* failed to satisfy the Election Rule's service requirement, and the Board upheld the regional director's ruling in favor of the noncomplying union.[7] I was part of the unanimous Board panel that decided *Brunswick Bowling*, and I explained the outcome in that case as follows:

> It is most important in election cases that Regional Directors apply their expertise when investigating, considering, and resolving all relevant election issues. It is equally important, of course, for the Board's resolution to turn on relevant facts and the proper application of legal principles. Although the Election Rule can be read to state otherwise, *the Board in today's decision rightly places substance over form*. We uphold the Regional Director's decision *to reach and decide an outcome-determinative issue, even though the party in whose favor the Regional Director ruled failed to timely serve its Statement of Position in conformity with the Election Rule*.[8]

Obviously, the Board should not decide election issues differently when the noncomplying party happens to be an employer (which is the case here) rather than a union (which was the case in *Brunswick Bowling*). Indeed, the Election Rule properly emphasizes that the same compli-

[4] Sec. 9(c)(1)(B) (instructing the Board, if it finds following a hearing that a question concerning representation exists, to "direct an election by secret ballot and . . . certify the results thereof").

[5] Contrary to my colleagues' suggestion, I do not "interpret" Sec. 102.62(d) to state that the petitioner must "receive" the voter list by a stated date. I recognize that Sec. 102.62(d) says what it says. I simply agree with the Acting Regional Director that under the circumstances presented here, applying the letter of Sec. 102.62(d) elevates form over substance and sacrifices common sense on the altar of rigid devotion to a rule.

[6] Sec. 102.62(d) does not address the Regional Director's discretion or lack thereof to address service irregularities and therefore cannot be said to curtail it.

[7] *Brunswick Bowling* involved the application of Section 102.66(d) of the Election Rule, which precludes a party from raising any issue that it failed to raise in a timely Statement of Position. In *Brunswick Bowling*, the union timely served its Statement of Position on the Region, but it neglected to timely serve its Statement of Position on the employer. Under perfectly clear language of the Election Rule, the union was supposed to be precluded from litigating a "contract bar" defense that was identified only in the Statement of Position. Despite this clear violation of the Rule, the Regional Director considered and ruled for the noncomplying union, dismissing the decertification petition on contract-bar grounds. A unanimous Board upheld the Regional Director's decision, finding that the regional director properly exercised her discretion to investigate and resolve relevant issues. 364 NLRB No. 96, slip op. at 3.

[8] Id., slip op. at 3 (Member Miscimarra, concurring in part and dissenting in part) (emphasis added).

ance standards should apply regardless of whether the noncomplying party is an employer or a union.[9]

The Employer here, like the union in *Brunswick Bowling*, timely filed with the Region, but did not timely serve on the other party. Justice would seem to require congruent results. Indeed, one would expect the Board to apply greater leniency in the instant case than in *Brunswick Bowling*, for two reasons.

First, in this case, the Petitioner received the voter list *on time*, and the only deviation from the Election Rule was that the list was transmitted to the Petitioner by the Region rather than the Employer. Cf. *General Motors Corp*., 237 NLRB 1509, 1517 fn. 11 (1978) (timely service of charge is not rendered deficient by the fact that service was effectuated by the region rather than the charging party); *General Marine Transport Corp.*, 238 NLRB 1372, 1375–1376 (1978) (same). By comparison, in *Brunswick Bowling*, the noncomplying union transmitted its Statement of Position to the employer 3 hours late, contrary to the Election Rule's strict requirement that all parties receive the Statement of Position no later than noon on the business day preceding the hearing.[10]

Second, the Board for decades has required only "substantial compliance" with the *Excelsior* list requirements and has tolerated deviations from those requirements so long as they do not interfere with employees' "full opportunity to be informed of the arguments concerning representation, 'by giving unions the right of access to employees that employers already have, thus enabling employees to hear not just the employer's views, but also the union's arguments in support of unionization.'"[11] There is no such history of leniency regarding the Statement of Position requirements established in the Election Rule, which articulated an inflexible preclusion principle stating that noncompliance will preclude noncomplying parties "from litigating issues as to which they have failed to take positions required . . . as part of [the] Statement of Position."[12] Again, in spite of the Election Rule's inflexible preclusion principle, and despite the union's failure to provide timely service of its Statement of Position in *Brunswick Bowling*, the Board unanimously upheld the Regional Director's exercise of discretion that resulted in a ruling in the noncomplying union's favor.[13]

My final disagreement with the majority relates to their claim that I ignore the "peculiar circumstances" of *Brunswick Bowling*. My colleagues contend that "peculiar circumstances" in *Brunswick Bowling* justified the outcome in that case, and they suggest that the absence of such circumstances warrants a different result here.[14] With all due respect to the majority, their attempt to draw a distinction between these two cases does not withstand

[9] For example, regarding the Statement of Position requirements applicable to nonpetitioning parties, the Election Rule states: "The Statements of Position to be completed by labor organizations [when they are nonpetitioning parties] . . . are similar to the Statements of Position that employers must complete [when they are nonpetitioning parties]. . . . [T]he important point is that the final rule treats nonpetitioning employers the same as nonpetitioning labor organizations." 79 Fed. Reg. at 74425 fn. 519 (emphasis added). The Election Rule is equally explicit when discussing the preclusion principle that ostensibly applies when a nonpetitioning party fails to comply with the Statement of Position requirements:

> The preclusion provisions *do not just apply . . . where the employer is the nonpetitioner* and must complete the Statement of Position form. Rather, . . . *the preclusion provisions apply in all cases, without distinction, including . . . [cases] where the individual or labor organization . . . is the nonpetitioner and is responsible for completing a Statement of Position form*.

Id. at 74400 (emphasis added).

[10] See Board's Rules and Regulations Sec. 102.63(b)(3).

[11] *Bon Appetit Management Co.*, supra, 334 NLRB at 1043 (quoting *Special Citizens Futures Unlimited*, *Inc.*, 331 NLRB 160 (2000)); see also, e.g., *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1222 (2004) (overruling objection where 28 percent of the addresses on the *Excelsior* list were incorrect); *Women in Crisis Counseling*, 312 NLRB 589 (1993) (overruling objection where 30 percent of the addresses on the *Excelsior* list were incorrect); *Texas Christian University*, 220 NLRB 396, 397–398 (1975) (overruling objection where 18 percent of the addresses on the *Excelsior* list were incorrect and 3 percent of eligible voters' names were omitted); *Telonic Instruments*, 173 NLRB 588, 588–589 (1968) (overruling objection where names of 4 eligible voters were omitted from the *Excelsior* list); *Program Aids Co.*, *Inc.*, 163 NLRB 145 (1967) (overruling objection where employer filed *Excelsior* list 4 days late).

[12] 79 Fed. Reg. at 74394. See also id. ("[T]he requirements of the Statement of Position and responses, permitting identification of the issues in dispute, together with the preclusion of evidence of issues not timely raised, substantially improves the Board's procedures by saving the parties and the Board the time and expense of wasteful litigation."); id. at 74361, 74363 (The Statement of Position has a "binding nature," and there are "consequences [for] failing to complete it."); id. at 74399 (preclusion appropriate even where relevant issues are omitted inadvertently).

[13] The Board has a longstanding practice of refraining from taking action inconsistent with existing precedent unless three Board members support overruling it. I believe *Brunswick Bowling* establishes a precedent that my colleagues do not persuasively distinguish, nor can fewer than three members properly overrule it.

[14] My colleagues attempt to equate the outcome in *Brunswick Bowling* and the outcome in this case by saying that just as there are "consequences" here for the Employer's service error, there were "consequences" in *Brunswick Bowling* for the union's failure to timely serve the Statement of Position—namely, the union was precluded from raising the contract-bar issue. However, that so-called consequence was inconsequential, since the Regional Director dismissed the petition on contract-bar grounds anyway, and the Board upheld her decision. Here, by contrast, the consequence of the Employer's service error is that a lopsided election is set aside, even though the service error could not have affected the election results because the Union received the voter list on the same day it would have received the list had no service error been committed. Equating the result in *Brunswick Bowling* with the result in this case on the basis that there were "consequences" for noncompliance in both cases is singularly unconvincing.

scrutiny. In *Brunswick Bowling*, the Board concluded that the Regional Director properly exercised her discretion to find merit in a contract-bar defense, even though the union's Statement of Position raising the defense was not timely served. Notwithstanding this defect, the Regional Director in *Brunswick Bowling* concluded—and the Board unanimously agreed—that noncompliance with the service requirement should not prevent the Board from appropriately addressing an outcome-determinative election issue. Likewise, the Acting Regional Director here reasonably concluded that technical noncompliance with a service requirement (pertaining to a voter list that the Union timely received anyway) should not cause the Board to overturn the election itself. The Board should uphold both decisions.

CONCLUSION

My colleagues here reach a result at odds with *Brunswick Bowling*, a unanimous Board decision issued a mere 3 months ago. My colleagues also abandon a cornerstone principle that has well served employees, unions and employers alike—that the "the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside." *The Liberal Market*, 108 NLRB at 1482. There is not a scintilla of evidence that the Union's timely receipt of the voter list from the Region, rather than from the Employer, affected the results of the election. To the contrary, because the Union was in possession of the voter list for the same number of days as would have been the case had the Employer timely served the list on the Union, the Employer's service error had no impact whatsoever on achievement of the purpose of the *Excelsior* rule: to ensure that employees have "full opportunity to be informed of the arguments concerning representation." *Bon Appetit Management Co.*, supra, 334 NLRB at 1043. Under these circumstances, I would uphold the results of the election.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 8, 2016

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Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD