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In 1966 the National Labor Relations Board (NLRB) promulgated the "*Excelsior* rule," which requires employers to produce lists of their employees' names and addresses for use by unions during representation election campaigns.[1] There is little doubt that this rule is a permissible exercise of the NLRB's authority to control

1. Within seven days after the filing of a consent election agreement, the employer must file with the National Labor Relations Board (NLRB) a list of the names and addresses of all employees eligible to vote in the representation election. This list is then made available to union organizers for the express purpose of insuring that they possess sufficient information to allow them to inform every employee of the advantages to be gained by voting for the union in the upcoming representation election. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). *See* Lewis, *NLRB Intrudes on the Right of Privacy*, 17 LAB. L.J. 280 (1966); Comment, *Dilemma in Labor Law: The Right To Own Versus the Right To Know*, 5 DUQUESNE L. REV. 77 (1966); Recent Decision, *Labor Law—Labor Management Relations—Representation Elections —In Future Representation Elections Employer's Failure To Provide Names and Addresses of Eligible Voters Shall Be Grounds for Setting Aside Election*, 54 GEO. L.J. 1434 (1966); Recent Case, *Labor Law—Elections—Failure of Employer To Disclose Names and Addresses of Employees After Election Is Directed Is Ground for Setting Election Aside*, 80 HARV. L. REV. 459 (1966); Case Note, *Labor in Light of Mandatory Disclosure of Employee Names and Addresses the NLRB Defers Reconsideration of Board Policy in the Area of Plant Access*, 17 SYRACUSE L. REV. 762 (1966); Recent Case, *Labor Law —In Future NLRB Elections, Employer Must Furnish List of Employees' Names and Addresses*, 19 VAND. L. REV. 1395 (1966).

representation election proceedings,[2] and voluntary compliance has generally been high; however, recalcitrant employers have created enforcement problems which the NLRB has been unable to handle through its usual procedures.

The *Excelsior* rule is the NLRB's first attempt to impose upon employers a duty to perform an affirmative act as a prerequisite to a valid representation election without at the same time making failure to perform that act an unfair labor practice.[3] Of course, an unfair labor practice may be remedied by a cease and desist order which can eventually be enforced in the courts if necessary. However, an election campaign rule generally may be enforced only by

2. The legislative history indicates that Congress intended the NLRB to have broad discretion in controlling the certification process, since no direct appeal was provided from an NLRB ruling dealing with certification. Evidently, the certification of a collective bargaining agent was considered only incidental to the primary purpose of the National Labor Relations Act (NLRA), that actual collective bargaining take place. S. COMM. ON EDUC. AND LABOR, S. REP. NO. 573, 74th Cong., 1st Sess. 14 (1935); 79 CONG. REC. 7658 (1935). *See also* AFL v. NLRB, 308 U.S. 401 (1940); International Bhd. of Elec. Workers, 308 U.S. 413 (1940). Thus, the NLRB not only has broad discretion to certify a collective bargaining agent, but also can apply the rules and procedures that it feels are necessary to insure a "fair" representation election without being subject to direct court review. *See, e.g.*, NLRB v. Waterman S. S. Corp., 309 U.S. 206, 226 (1940) ("The control of the election proceeding and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone. Interference in those matters by the court constituted error on the part of the court below"); NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649, 651 (4th Cir.), *cert. denied*, 350 U.S. 914 (1955) ("Whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board."); Foreman & Clark, Inc. v. NLRB, 215 F.2d 396 (9th Cir.), *cert. denied*, 348 U.S. 887 (1954) (twenty-four hour rule held proper). Normally, the only method by which an employer may procure court review of NLRB election rulings is to refuse to bargain with the certified union in violation of § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). The employer may then allege the illegality of the election as a defense in a court proceeding instituted by the NLRB seeking an order to bargain. However, the employer may obtain direct review of an NLRB ruling in a representation proceeding if the NLRB acted in excess of its delegated authority contrary to a specific prohibition of the NLRA, or if there is a substantial showing that the NLRB's action has violated a constitutional right of a party to the proceeding. *See* Leedom v. Kyne, 358 U.S. 184 (1958); Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625 (3d Cir. 1966); Boire v. Miami Herald Publishing Co., 343 F.2d 17 (5th Cir. 1965); Bullard Co. v. NLRB, 253 F. Supp. 391 (D.D.C. 1966); Note, *Judicial Review of Preliminary Orders of National Labor Administrative Agencies After Leedom v. Kyne*, 8 BUFFALO L. REV. 372 (1959); Recent Development, *Labor Law: Judicial Review of NLRB Election Orders*, 66 COLUM. L. REV. 1546 (1966). These exceptions to the general rule have been very narrowly construed.

3. In the past, whenever the NLRB has desired to require affirmative action by an employer during an election campaign, it has made the employer's failure to perform the act an unfair labor practice under § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1964). For example, if there are no alternative means of communication available to a union, the NLRB will order the employer to allow the union access to his property in order to contact employees. Upon finding that the employer's conduct "restrains" or "coerces" the employees' exercise of their right of self-organization, the NLRB is empowered to issue a cease and desist order, which may be judicially enforced if the employer refuses to perform the required conduct. For a discussion of the possibility of finding noncompliance with the *Excelsior* rule a violation of § 8(a)(1) of the NLRA, *see* text accompanying notes 23-30 *infra*.

the NLRB's power to set aside an election and order a new one. In situations involving the *Excelsior* rule, the normal method of seeking adherence to election regulations has proved wholly ineffective when the employer is adamant in his refusal to produce the names and addresses of his employees.[4] Consequently, by administering the *Excelsior* rule as a pre-election rule, the NLRB has for the first time been forced to seek direct judicial assistance in the enforcement of its campaign regulations.[5]

The NLRB has sought such judicial assistance in almost a dozen cases, and in most of these the courts have assumed an active role in the enforcement of the *Excelsior* rule.[6] However, a few courts have not been receptive to such enforcement,[7] and the NLRB itself has experienced some difficulty in settling upon the proper grounds for requesting judicial aid. To date, the NLRB has advanced two theories as bases for court enforcement of the requirement that employers produce *Excelsior* lists: (1) it has sought—under section 1337 of the Judicial Code—to invoke the general jurisdiction of federal district courts to issue injunctions compelling employer compliance;[8] (2) it has attempted to subpoena employee lists as "evidence" under section 11(1) of the National Labor Relations Act (NLRA)[9] and to secure court enforcement of such subpoenas under

4. For a discussion of the inadequacy of the NLRB's usual procedure, *see* text accompanying notes 20-22 *infra*.

5. Until the promulgation of the *Excelsior* rule, the NLRB had always sought to keep judicial interference with its campaign regulations at a minimum. *See, e.g.*, Leedom v. Kyne, 358 U.S. 184 (1958). *See also* authorities cited in note 2 *supra*. Of course, the NLRB's interest in keeping judicial interference at a minimum does not extend to situations in which the NLRB has found that a party's conduct constitutes an unfair labor practice. A party aggrieved by a final order of the NLRB in an unfair labor practice hearing has a statutory right to judicial review in an appropriate United States court of appeals. NLRA § 10(f), 29 U.S.C. § 160(f) (1964). This right of review exists even though the finding of unfair labor practice was made in connection with a representation proceeding.

6. The *Excelsior* rule has been enforced in the following cases: NLRB v. Hanes Hosiery Div., Hanes Corp., 384 F.2d 188 (4th Cir. 1967); NLRB v. Rohlen, 385 F.2d 52 (7th Cir. 1967); NLRB v. Wolverine Indus. Div., 64 L.R.R.M. 2187 (S.D. Mich. Jan. 12, 1967); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967); NLRB v. Wyman-Gordon Co., 270 F. Supp. 280 (D. Mass. 1967); Swift & Co. v. Solien, 274 F. Supp. 953 (E.D. Mo. 1967); NLRB v. Beech-Nut Life Savers, Inc., 274 F. Supp. 432 (S.D.N.Y. 1967); NLRB v. Teledyne, Inc., 56 CCH LAB. ¶ 12,229 (N.D. Cal. Oct. 11, 1967). Enforcement has been denied in the following cases: NLRB v. Montgomery Ward & Co., 64 L.R.R.M. 2061 (M.D. Fla. Dec. 20, 1966); NLRB v. Q-T Shoe Mfg. Co., 67 L.R.R.M. 2356 (D.N.J. Jan. 19, 1968).

7. *See, e.g.*, NLRB v. Q-T Shoe Mfg. Co., 67 L.R.R.M. 2356 (D.N.J. Jan. 19, 1968).

8. 28 U.S.C. § 1337 (1964) states: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

9. 29 U.S.C. § 161(1) (1964), which states in part:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates *to any matter under investigation or in question*. The Board, or any member thereof, shall upon application of any party to such proceedings, *forthwith issue such*

the procedure in section 11(2).[10] This Note will examine these theories and the initial reception given them by the courts.

Before analyzing the propriety and desirability of making judicial enforcement of the *Excelsior* rule available to the NLRB, it is necessary to examine the purpose of the rule and the reasons for the inadequacy of the NLRB's regular enforcement procedures. A primary goal of all NLRB election rules is to assure that employees can effectively exercise their right of self-organization under section 7 of the NLRA[11] by giving them adequate opportunity to hear both sides of the issues presented in a representation election campaign. In attempting to achieve this goal, the NLRB has had to balance the employees' right to organize against employers' right to control access to, and utilization of, their business property.[12] Since the job site is usually the most effective forum for employee contact and discussion, an employer's right to control the use of his property clearly carries with it an inherent advantage in a representation election.[13] Job site control not only allows an employer to restrict

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party subpenas requiring the attendance and testimony of witnesses or *the production of any evidence* in such proceeding or investigation requested in such application. [Emphasis added.]

10. 29 U.S.C. § 161(2) (1964) states:

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States Courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

It is generally assumed, on the basis of dictum in ICC v. Brimson, 154 U.S. 447 (1894), that a federal agency could not itself constitutionally exercise contempt power. Hence, to secure a contempt sanction to compel obedience to its subpoena, the NLRB must obtain an enforcement order from an appropriate court. *See* 1 K. DAVIS, ADMINISTRATIVE LAW § 3.11, at 213 (1958); Note, *Use of Contempt Power To Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541, 1547 (1958).

11. NLRA § 7, 29 U.S.C. § 157 (1964), states in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ."

12. Because of the rather sharply defined interests of both employer and union, the NLRB has been able to adopt fairly specific rules to be applied in common, recurring situations. For example, prohibitions of nonemployee union organizers from entering the employer's property is allowed if the union has reasonable alternative means of communication. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Similarly, union solicitation by employees may be prohibited during working hours to maintain discipline and production, Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943). However, the employees usually must be allowed to solicit on behalf of the union during such nonworking time, since the considerations of maintaining production and discipline are not often present. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

13. The advantages of job site contact are generally conceded; *see* Note, *Labor Law*

union organizational activity on the premises,[14] but also guarantees that the employer will have maximum opportunity to convey his own antiunion propaganda to his employees.[15] In *Excelsior*, the NLRB pointed out these inherent advantages and indicated that past decisions had resulted in an imbalance between employer and employee rights, forcing many employees to decide the important issue of representation with inadequate knowledge of the arguments in favor of the union position.[16] Therefore, in an attempt to narrow this information gap, the NLRB formulated the *Excelsior* rule. The rationale was that requiring the employer to provide the union with a list of employees' names and addresses would give the union an opportunity to contact each employee and thus "maximize the likelihood that all voters will be exposed to the arguments for, as well as against, union representation."[17] To assure this result, the NLRB also specified that the rule should be applied on a per se basis.[18] Such mechanical application of the *Excelsior* rule not only avoids the administrative burden of determining whether existing channels of communication available to the union are in fact sufficient[19] on a case-by-case basis—which was the situation prior to *Excelsior*—but also prevents employers from challenging application of the rule in

—*NLRB Regulation of Employer's Pre-Election Captive Audience Speeches*, 65 MICH. L. REV. 1236, 1245 (1967). *See generally* Livingston Shirt Corp., 107 N.L.R.B. 400, 412 (1953) (dissenting opinion).

14. *See generally* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Note, *Limitations on Employer Conduct During Union Organizational Campaigns—A Survey*, 19 VAND. L. REV. 438 (1966); Note, *National Labor Relations Act Elections: Post Election Objections*, 38 TEMPLE L.Q. 288 (1965).

15. In NLRB v. United Steel Workers (*NuTone*) 357 U.S. 357 (1958) the Supreme Court held that an employer may communicate his antiunion views to his employees at the job site by means of methods such as handbilling and "captive audience" speeches (addressing employee assemblies at the plant during working time), and still enforce a valid rule prohibiting the same action by the union.

16. The NLRB held that lack of information prevented the employees from exercising a "free and reasoned choice," and that, consequently, a representation election conducted under such conditions was unable to fulfill the requirements of the NLRA. Thus, failure of the employer to abide by the *Excelsior* rule would be grounds for setting aside the election. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1240-42 (1966).

17. 156 N.L.R.B. at 1241.

18. That this was the intent of the NLRB is clear from the language in *Excelsior* holding the rule applicable to "all election cases." 156 N.L.R.B. at 1239. *See also* Recent Decision, *supra* note 1, at 1438; Recent Case, *Labor Law—Elections—Failure of Employer To Disclose Names and Addresses of Employees After Election is Directed Is Grounds for Setting Election Aside*, 80 HARV. L. REV. 459, 461 (1966). The NLRB has in fact applied the rule on a per se basis, without regard to union need for the list or good faith substitute efforts made by the employer. *See, e.g.*, NLRB v. Montgomery Ward & Co., 64 L.R.R.M. 2061 (1966); Union Bleachery, 63 L.R.R.M. 1208 (Oct. 4, 1966) (decision of Regional Director R. Johnston). Apparently the only exception to the rule is the situation in which an expedited election is directed pursuant to § 8(b)(7)(C) of the NLRA. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1242 n.14 (1966).

19. *See* Recent Case, note 18 *supra*, at 461.

each case, either because they feel they may win on the merits in a full NLRB hearing or simply because the challenge provides an opportunity for delay.

Since the *Excelsior* rule tends to negate the inherent advantages of job site control, employers may tend to be uncooperative about producing employee lists in situations involving close election campaigns. Ordinarily, if the NLRB detects conduct which upsets the "laboratory conditions" necessary for a meaningful representation election, it will respond by invalidating the "tainted" election and ordering a new one.[20] This procedure attempts to remedy the wrongful conduct by allowing any effects of that conduct to dissipate before the new election is held; theoretically, the "laboratory conditions" are restored and a fair election results. However, if an employer refuses to produce an *Excelsior* list, the effects of that refusal cannot be dissipated: the employer can continue to refuse to produce the list in every subsequent election. In such a case, the NLRB's power to set aside the election is of little consequence in attempting to achieve employer compliance with the rule.[21] An employer who

20. NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649 (4th Cir.), *cert. denied*, 350 U.S. 914 (1955). *See also* authorities cited in note 2 *supra*. The NLRB's general policy of invalidating elections even though no unfair labor practices were committed was first adopted in General Shoe Corp., 77 N.L.R.B. 124, 126 (1948) [quoting in part from P.D. Gawaltney, 74 N.L.R.B. 371, 373 (1947)]:

> "When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative." Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.

See generally Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1246-57 (1963).

Pursuant to its discretion to set aside tainted elections, the NLRB has promulgated various rules to regulate the election process without making violation of these rules an unfair labor practice. Thus, for example, in Peerless Plywood Co., 107 N.L.R.B. 427 (1953), the NLRB formulated a rule which forbids "captive audience" speeches within twenty-four hours before the scheduled time of conducting an election, since such employer conduct, although not an unfair labor practice, prevents the employees from making a reasoned choice and hence destroys the necessary "laboratory" conditions. In Dal-Tex Optical Co., Inc., 137 N.L.R.B. 1782 (1962), the NLRB made it clear that conduct violative of § 8(a)(1) of the NLRA and hence an unfair labor practice is, a fortiori, conduct which invalidates an election since "the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." 137 N.L.R.B. at 1786-87.

21. However, ordering a new election does appear to be an adequate sanction to force compliance with the "twenty-four hour rule" announced in Peerless Plywood Co., 107 N.L.R.B. 427 (1953). *See* note 20 *supra*. This contrast perhaps may be explained by the obvious differences between the twenty-four hour rule and the *Excelsior* rule. Whereas the twenty-four hour rule is a prohibition which merely restrains an employer from committing a certain act (holding a captive audience speech within twenty-four hours of an election), the *Excelsior* rule not only requires an affirmative action, but also

believes that furnishing a list of his employees' names and addresses will allow a union to win an election it might otherwise lose would be unlikely to produce the list simply because of the "threat" that the election might be set aside. If the union should win the election, his refusal has cost him nothing. However, if the union should be defeated, the worst that can happen to the employer is that the NLRB will order a new election in which he can again refuse to surrender the list. This process may be repeated until either the NLRB or the employer abandons its position, or until the union wins an election.[22]

Since the NLRB's normal election rule enforcement procedures are so ineffective in this situation, it might be asked why the NLRB has not found an employer's refusal to comply with the *Excelsior* rule to be an unfair labor practice under section 8(a)(1) of the NLRA.[23] If the NLRB determines that a particular type of conduct interferes with, restrains, or coerces an employee in the exercise of his right to join a union, it may classify that conduct as an unfair labor practice and issue a remedial cease and desist order. If an employer refuses to comply with the order and continues the practice, the NLRA provides that the NLRB may seek court enforcement of its order.[24] Although it may be argued that such a remedy is adaptable to the *Excelsior* situation, there are several aspects of the unfair labor practice procedure which render it undesirable as a method of enforcing the *Excelsior* rule. First, under the traditional unfair labor practice tests, before an employer's refusal to grant access to his employees may be deemed a section 8(a)(1) violation, the NLRB may be required to show that alternative means of communication were not available to the union.[25] Thus, it is conceivable that the NLRB would have to make this same preliminary showing in every *Excelsior* list case.[26] This requirement redefines the scope

confers obvious organizational benefits on the union. Since the twenty-four hour rule prohibits only captive audience speaking, there would seem to be little impetus to violate the rule and be assured that the election will be set aside where other effective means of communication are still open to the employer.

22. In practically all of the reported cases, the union participated in at least one election without benefit of the list. However, it usually refused to proceed in the second election on the ground that it had a right to the *Excelsior* list, and the NLRB then sought judicial aid in enforcing the rule. *See, e.g.*, NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967).

23. 29 U.S.C. § 158(a)(1) (1964).

24. NLRA § 10(e), 29 U.S.C. § 160(e) (1964).

25. *See* note 12 *supra*.

26. In *Excelsior*, the NLRB distinguished precedent of this type in order to enable it to formulate a per se rule. It pointed out first that those decisions concerned unfair labor practice charges instead of the issue of whether an election should be invalidated, and secondly that the proof principle was apposite only when the opportunity to communicate made available by the NLRB interfered with a significant employer interest. Since neither of these two elements was present when enforcing the *Excelsior* rule, it could be enforced on a per se basis. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1245

of the *Excelsior* rule, which was merely intended to insure that representation elections be conducted under conditions allowing a "free and reasoned choice" by the employees.[27] Second, it is well established that the "laboratory conditions" necessary for the exercise of this free choice may be destroyed by conduct which does not constitute "interference," "restraint," or "coercion" within the terms of section 8(a)(1).[28] Therefore, in proving a violation of section 8(a)(1), the NLRB would have to show "interference," "restraint," or "coercion" as an effect of the employer's refusal to supply the list, even though such proof is not necessary to establish that his conduct has upset the conditions needed for a valid election. Such a proof requirement would be a significant administrative burden and would of course destroy per se application of the rule. Even if additional proof were not required, the NLRB still would have to face the Supreme Court's generally unfavorable attitude toward NLRB attempts to predicate unfair labor practice charges upon per se application of mechanical rules.[29] Furthermore, assuming that the Court would permit a per se application of the *Excelsior* rule as an unfair labor practice, the amount of time spent going through standard NLRB and court procedures to obtain enforcement would subvert the congressional purpose to settle the initial question of union certification as quickly as possible.[30]

Since the unfair labor practice route seems undesirable when viewed in the context of the scope and purpose of the *Excelsior* rule, the NLRB has advanced the two theories mentioned at the beginning of this Note to secure the desired judicial enforcement. One approach, as will be recalled, is to sue in federal district court for an injunction compelling the employer to produce a list of his employees' names and addresses, predicating jurisdiction on section 1337 of the Judicial Code, which gives district courts jurisdiction over "any civil action or proceeding arising under an Act of Congress regulating commerce . . . ."[31] It is clear that an NLRB request for an injunction to enforce the *Excelsior* rule fits this statutory definition;[32] yet, there is uncertainty about whether federal courts

(1966). Whether a per se application could be justified on the second ground alone (lack of infringement of a significant employer interest) if violation of the *Excelsior* rule were made an unfair labor practice has not been decided by the courts or the NLRB.

27. 156 N.L.R.B. at 1240-41.

28. *See* note 20 *supra*.

29. *See* Note, *supra* note 13, at 1243-44.

30. S. REP. No. 573, COMM. ON EDUC. AND LABOR, 74th Cong., 1st Sess., at 14 (1935). *See* Leedom v. Kyne, 358 U.S. 184, 191-93 (1958) (dissenting opinion); NLRB v. International Bhd. of Elec. Workers, 308 U.S. 413 (1940); AFL v. NLRB, 308 U.S. 401 (1939).

31. 28 U.S.C. § 1337 (1964). *See* note 8 *supra*.

32. Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954); Q-T Shoe Mfg. Co., 67 L.R.R.M. 2356 (D.N.J. Jan. 19, 1968).

are impliedly precluded from taking jurisdiction under this general statute to enforce an NLRB order, since Congress has provided specific procedures in the NLRA for enforcement of NLRB orders.

Several courts have indicated that such an exercise of jurisdiction may be appropriate,[33] but the only court actually to consider this question emphatically refused to take jurisdiction. In *NLRB v. Q-T Shoe Mfg. Co.*,[34] the federal district court for New Jersey reasoned that since the NLRA specifically authorizes federal courts to enforce NLRA orders only if they are predicated on a finding of an unfair labor practice, courts are impliedly precluded from taking jurisdiction in other situations. The court indicated that this conclusion is especially true when the NLRB seeks enforcement of an election rule, as in *Excelsior*, since the control of elections is thought to reside in the NLRB alone.[35] The court concluded that "enforcement of the Excelsior rule can only occur after it has been properly determined by the Board that the refusal by the defendant to provide the Union with a list of its employees' names and addresses constitutes an unfair labor practice under Section 8(a)(1) . . . ."[36]

Q-T Shoe is subject to criticism because it ignores a body of authority developed in analogous situations which indicates that the mere failure of Congress to grant specific authority to seek certain judicial relief does not necessarily preclude an administrative agency from petitioning for such relief.[37] In fact, the NLRB itself has been permitted to seek an injunction in federal court to preserve its exclusive jurisdiction under the NLRA despite the absence of express statutory authorization to procure such relief. In *NLRB v. New York State Labor Relations Board*,[38] the NLRB sought to enjoin a state labor board from asserting jurisdiction over a dispute which had been

33. NLRB v. Wolverine Indus., 64 L.R.R.M., 2187 (E.D. Mich. Jan. 12, 1967); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967); Swift & Co. v. Solien, 274 F. Supp. 953 (E.D. Mo. 1967). None of these courts considered the questions raised by this mode of enforcement.

34. 67 L.R.R.M. 2356 (D.N.J. Jan. 19, 1968).

35. 67 L.R.R.M. at 2361. *See also* note 2 *supra;* NLRB v. Waterman S. S. Corp., 309 U.S. 206; Foreman & Clark, Inc. v. NLRB, 215 F.2d 346 (9th Cir.), *cert. denied*, 348 U.S. 887 (1954); NLRB v. Ideal Laundry & Dry Cleaning Co., 372 F.2d 307 (10th Cir. 1967).

36. 67 L.R.R.M. at 2361.

37. *See, e.g.*, Federal Maritime Comm'n v. Atlantic & Gulf Panama Canal Zone, 241 F. Supp. 766, 775 (S.D.N.Y. 1965) ("[T]here is ample authority that mere failure of Congress to grant specific authorization to seek injunctive relief does not manifest an intent thereby to preclude resort to that remedy."); NLRB v. New York State Labor Rel. Bd., 106 F. Supp. 749, 752 (S.D.N.Y. 1952) (In answer to defendant's contention that the NLRB had no authority to bring an action not expressly authorized by the NLRA, the court stated: "The power of an administrative agency to bring actions may be implied. . . . The court is of the opinion that the National Board has implied authority to bring this action [seeking to enjoin the state Board's proceedings] to protect its exclusive jurisdiction."); NLRB v. Killoren, 122 F.2d 609 (8th Cir. 1941); NLRB v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942).

38. 106 F. Supp. 749 (S.D.N.Y. 1952). *See also* NLRB v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942).

made the subject of an unfair labor practice charge pending before the NLRB. The state labor board argued that Congress had impliedly precluded the NLRB from seeking this particular type of injunction by specifying in the NLRA two situations where such injunctions were appropriate.[39] The Court of Appeals for the Ninth Circuit rejected this argument and held that the NLRB's authority to seek an injunction to protect its jurisdiction could be implied in this case. Similarly, the fact that Congress has provided the unfair labor practice route as one method of enforcing NLRB orders should not preclude the use of other convenient means of obtaining enforcement. Thus, although the NLRB *could* enforce the *Excelsior* election campaign rule in accordance with the statutory unfair labor practice procedures, it should not be restricted to this method of enforcement.[40]

Moreover, the reasoning in *Q-T Shoe* that only unfair labor practice orders can be enforced in court does not take cognizance of the NLRB's established functions under the NLRA. The legislative history indicates that Congress intended to grant broad powers to the NLRB to determine questions of representation, and the courts have consistently recognized that the NLRB has a wide degree of discretion in controlling representation proceedings.[41] In exercising this discretion, it is clear that the NLRB may find a representation election invalid without finding that an unfair labor practice has been committed.[42] If the NLRB can overturn an election tainted by conduct which is not an unfair labor practice, it would seem, as a policy matter, that it should also have the right to enforce a rule which prevents such conduct before an election, and to obtain judicial assistance in that enforcement if necessary.

Assuming that a section 1337 injunction is a proper method of enforcing the *Excelsior* rule, it would appear that the NLRB could avoid the disadvantages inherent in the unfair labor practice route to enforcement—the time consumed and the additional proof required.[43] Despite this advantage, however, the equitable nature of

39. 29 U.S.C. §§ 160(j), (*l*) (1964).

40. The court in NLRB v. Q-T Shoe Mfg. Co., 67 L.R.R.M. 2356 (D.N.J. Jan. 19, 1968), unlike the court in NLRB v. New York State Labor Rel. Bd., 106 F. Supp. 749 (S.D.N.Y. 1952), did not phrase the question of whether an injunction could be granted to enforce the *Excelsior* rule in terms of the fact that the NLRA specified that injunctions could be sought only in certain situations. Rather, the *Q-T Shoe* court viewed the injunction as another method of enforcing "Board orders." 67 L.R.R.M. at 2359-61.

41. *See* note 2 *supra*.

42. *See* note 20 *supra*.

43. Issuance of a section 1337 injunction turns on whether it is reasonably necessary to aid the NLRB in the administration of its statutory duty. Walling v. Brooklyn Braid Co., Inc., 152 F.2d 938, 941 (2d Cir. 1945). Since the *Excelsior* rule was designed to aid the NLRB in conducting representation proceedings, the only proof needed is substantiation of the NLRB's contention that a valid election could not be held without union possession of the *Excelsior* list. For a discussion of the different proof needed in the unfair labor practice mode of enforcement, *see* text accompanying notes 25-30 *supra*.

the judicial relief sought may render the section 1337 mode of enforcement undesirable in an *Excelsior* situation. A district court is free under section 1337 to determine whether the injunction is "reasonably necessary" to aid in the administration of the agency's statutory duty; thus, per se application of the rule could again be thwarted. Although a court's inquiry into this question would probably be somewhat limited out of deference to the NLRB's acknowledged discretion to control representation elections, a court could easily hold that the facts of a given case do not establish a sufficient need for the name and address list.[44] Given the possibility that a court may attempt an independent evaluation of the applicability of *Excelsior* rule in a particular case, recalcitrant employers may choose to disregard the NLRB's order in hopes of winning in court.

Because of these legal and practical difficulties, the NLRB has generally relied on the second theory mentioned above: judicial enforcement of the *Excelsior* rule through the NLRA's subpoena procedure. The NLRB's preference for this method is readily understandable. Once a court has determined that issuance of the subpoena is within the NLRB's statutory authority its discretion in passing upon the enforceability of the subpoena is limited.[45] Unless the material sought is plainly incompetent or irrelevant to any lawful purpose of the agency seeking disclosure, the subpoena will be enforced.[46] A party opposing enforcement may not raise defenses related to the merits of the administrative proceeding,[47] although he may assert that enforcement of the subpoena will violate his constitutional rights[48] or place an oppressive burden upon

44. *See* NLRB v. Montgomery Ward & Co., 64 L.R.R.M. 2061 (M.D. Fla. 1966), in which the court felt that since the union already knew the names and addresses of sixty-four of the seventy employees eligible to vote in the election there was no need to resort to the court's equity power.

45. *See generally* 1 K. DAVIS, *supra* note 10, at § 3.12 (1958); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 MICH. L. REV. 187 (1961); Note, *Use of Contempt To Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541 (1958); Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum: Another Look at CAB v. Hermann*, 69 YALE L.J. 131 (1959).

46. O. T. Link v. NLRB, 330 F.2d 437 (4th Cir. 1964) (NLRB's subpoena power limited only by the requirement that the information sought must be relevant to the inquiry); NLRB v. United Aircraft Corp., 200 F. Supp. 48 (D. Conn. 1961), *aff'd mem.*, 300 F.2d 442 (2d Cir. 1962) (only limit on NLRB's subpoena power is that it may not exceed the NLRB's statutory authority and the information sought may not be so irrelevant as to make the subpoena arbitrary. *See also* Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1942); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). *But cf.* Goodyear Tire & Rubber Co. v. NLRB, 122 F.2d 450, 453 (6th Cir. 1941) (enforcement of the subpoena remains within the complete discretion of the district court).

47. NLRB v. C.C.C. Associates, Inc., 306 F.2d 534, 538 (2d Cir. 1962).

48. *See, e.g.*, FCC v. Schreiber, 381 U.S. 279 (1965) (right of privacy); Shapiro v. United States, 335 U.S. 1 (1948) (right against self-incrimination); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (unlawful search and seizure).

Employers have attempted various attacks on the validity of the *Excelsior* rule itself and on the burden caused by supplying the names and addresses in individual cases. However, in recognition of the broad power granted the NLRB in regulating

him.[49] Therefore, if the subpoena is within the NLRB's statutory authority, and if it appears on the face of the subpoena that the material sought is relevant, the enforcement proceeding should be summary in nature; this factor makes the subpoena enforcement technique well suited for per se application of the *Excelsior* rule.

It is unclear, however, whether Congress has delegated sufficient authority to the NLRB to enable it to subpoena a list of employees' names and addresses for the express purpose of making the information available to the union. The answer to this question turns upon construction of section 11(1) of the NLRA, which grants the NLRB power to subpoena "evidence" relating to "any matter under investigation or in question."[50] "Evidence" has normally been defined as any material which "tends to prove or disprove the existence of something."[51] One court has suggested that an employee group

representation proceedings, the courts have rather summarily dismissed these arguments.

Attacks on the validity of the *Excelsior* rule are most frequently based on the argument that disclosure of the names and addresses infringes the employees' constitutional right of privacy and their right under section 7 of the NLRA not to engage in union activity. Apart from the question of whether the employer has standing to raise these defenses, the courts have dismissed the first contention on the ground that the list merely provides a means by which the union may attempt to communicate with the employees and in no way impairs the employees' right to disregard these attempts. *But cf.* Lewis, *NLRB Intrudes on the Right of Privacy*, 17 LAB. L.J. 280 (1966). Similarly, the second contention has been dismissed on the grounds that expression of the employee's section 7 right to engage in or abstain from union activity will take place upon the casting of his ballot for or against union representation, and obtaining information can hardly be considered engaging in union activity.

A more imaginative contention has been that requiring the employer to provide material which will eventually be used by the union to further its organizational efforts is forcing the employer to violate the NLRA. Section 302(a) of the NLRA does make it a crime for an employer to deliver a "thing of value" to anyone seeking to represent his employees, but, as indicated by the one court which has considered this question, it may safely be assumed that Congress in providing this section did not intend to cover the situation where the NLRB has determined that production of a "thing of value" is necessary to effectuate its policy.

Probably the most serious argument that has been advanced by an employer is that it is operating in a "tight" labor market and disclosure of its employees' names and addresses will result in pirating of valuable employees by its competitors. The courts have generally dismissed this argument by pointing to the fact that the NLRB will make the information available only to the unions involved in the representation election, thus making it unlikely that a rival employer will ever obtain the information. Moreover, no employer has shown that if the names and addresses did leak out the possibility of "pirating" would be more than mere speculation. In addition to these proof difficulties, the employer would also encounter formidable obstacles in attempting to show that his interest in maintaining his work force intact outweighs the public interest in seeing the policies of the NLRA effectuated through disclosure of the list. However, the possible merit of this defense in exceptional circumstances indicates that it should not be precluded in all cases, and the courts' history of strict scrutiny of similar defenses suggests that recognition of such an exception would not be a threat to the NLRB's attempt to apply the rule on a per se basis.

49. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

50. NLRA § 11(1), 29 U.S.C. § 161(1) (1964) (quoted more fully in note 9 *supra*). *See also* NLRA § 11(2), 29 U.S.C. § 161(2) (1964). Quoted at note 10 *supra*.

51. NLRB v. Wyman-Gordon Co., 270 F. Supp. 280, 284 (D. Mass. 1967).

preference is "something in issue" which must be proved or disproved in a representation election proceeding.[52] Since the union's use of the *Excelsior* list to disseminate campaign propaganda helps to provide a more fully informed electorate, which in turn helps to reflect accurately employee group preference, the NLRB is arguably using the subpoenaed material to prove or disprove "something in issue." The weakness of this rationale would seem to be that a name and address list has no value in and of itself in proving employee preference while it is in the NLRB's hands. It is only the subsequent use of the list *by the union* to contact employees, and the employees' reaction to the union's arguments, which provides an indication of group preference. Therefore, an *Excelsior* list can hardly be considered "evidence" in the traditional sense of the word.

Perhaps recognizing that the traditional definition is inapplicable, several courts have enforced *Excelsior* list subpoenas by expanding the definition of "evidence" to include any information necessary or helpful to the NLRB in carrying out its statutory duties.[53] Since an *Excelsior* list assists the NLRB in performing its duty of conducting meaningful representation elections, these courts have concluded that subpoenas of the lists are enforceable. Conceding that the broader definition of "evidence" permits enforcement, it is questionable whether the courts engaged in the redefinition have precedent for their actions. These courts have generally relied upon several older cases in which subpoenas for similar material were enforced.[54] However, a review of these past cases indicates that the material subpoenaed was in each case evidence even under the traditional definition; therefore, these cases do not support the broad proposition for which they are presently being cited.[55] Nevertheless,

52. NLRB v. Rohlen, 385 F.2d 52 (7th Cir. 1967).

53. *See, e.g.*, NLRB v. Beech-Nut Life Savers, Inc., 274 F. Supp. 432 (S.D.N.Y. 1967); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967); NLRB v. Hanes Hosiery Div., Hanes Corp., 384 F.2d 188 (4th Cir. 1967); NLRB v. Teledyne, Inc., 4 CCH Lab. Cas. 20,071 (N.D. Cal. Oct. 11, 1967); NLRB v. Wolverine Indus. Div., 64 L.R.R.M. 2187 (E.D. Mich. Jan. 12, 1967); NLRB v. Wyman-Gordon Co., 270 F. Supp. 280 (D. Mass. 1967); Swift & Co. v. Solien, 274 F. Supp. 953 (E.D. Mo. 1967).

54. For example, in NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967), the court stated at 372:

> The term "evidence" is not limited to formal proof of disputed facts presented in a trial-type hearing. Rather, Section 11(1) permits the Board to subpena records containing information necessary or helpful to carrying out its statutory duties at the investigative, as well as at the hearing stage of its proceedings. Cudahy Packing Co. v. NLRB, 117 F.2d 692, 693 (10th Cir. 1941); NLRB v. Northern Trust Co., 56 F. Supp. 335 (N.D. Ill. 1944), *aff'd*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 . . . (1945).

55. An investigation of the two cases cited by the court in NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967), points out the fact that the material subpoenaed was evidence in the traditional sense. In determining whether the NLRB had jurisdiction in NLRB v. Northern Trust Co., 56 F. Supp. 335 (N.D. Ill. 1944), *aff'd*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945), the subpoenaed

the broad definition of evidence seems desirable in this context, and the departure from precedent may be justifiable in light of the novelty of the situation facing the courts in *Excelsior* list cases.

However, assuming that the broader definition of evidence is acceptable, the *use* of the lists once they have been subpoenaed may well preclude resort to the subpoena approach. Employers have regularly contested enforcement of *Excelsior* list subpoenas by arguing that the NLRB is not empowered to obtain material solely for use by a union, but the courts have rejected this defense until quite recently. Courts rejecting this defense have generally relied upon *NLRB v. Friedman*,[56] where the Court of Appeals for the Third Circuit permitted the NLRB to accept assistance from union economists in analyzing records subpoenaed from an employer in the prosecution of an unfair labor practice charge. However, this case is readily distinguishable from the *Excelsior* situation in that the material was not subpoenaed for the *sole* purpose of making it available to the union; indeed, union access to the material was allowed only as an incident to the NLRB's use of the information.

The court in *Q-T Shoe* recognized this distinction in refusing to enforce the NLRB's *Excelsior* list subpoena and stated that:

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information was used to establish the disputed fact that the employer's operations affected interstate commerce within the meaning of the NLRA. Cudahy Packing Co. v. NLRB, 117 F.2d 692 (10th Cir. 1941), the employees' names were used by the NLRB only to determine which employees were eligible to vote, a fact which the NLRB clearly had power to investigate. Two other cases frequently cited to support a broad definition of evidence also seem inappropriate. NLRB v. New England Transp. Co., 14 F. Supp. 497 (D. Conn. 1936) (payroll data used to determine the disputed fact of whether the employees belonged in a bargaining unit); NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958) (subpoenaed documents used to determine disputed issue of whether the employer's business affected interstate commerce for purposes of establishing jurisdiction).

It may be that the courts are engaging in the time-honored practice of finding an administrative agency's subpoena power "ambiguous" in order to allow an "interpretation" which will produce a desirable result; *see* Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 MICH. L. REV. 187, 188-89 (1961). However, only one case has openly taken this approach. In NLRB v. Rohlen, 385 F.2d 52 (7th Cir. 1967), the court seemed to realize that the authority cited by other courts did not apply and that the only method through which an expanded definition of "evidence" could be obtained was through a proper "interpretation" of the language of the NLRA. Thus, the court in *Rohlen* reasoned that in construing the NLRB's power to issue subpoenas "to produce evidence . . . or . . . give testimony touching the matter under investigation or in question," primary emphasis should be placed on the phrase "under investigation." Since the traditional purpose of an "investigation" is to gather all of the relevant facts and information, restricting the kind of material which can be subpoenaed to "evidence" in the traditional sense would be equivalent to reading the phrase "under investigation" out of the NLRA. Consequently, the court concluded that whether the material subpoenaed was within the normal definition of "evidence" was irrelevant as long as it "touched a matter under investigation." *Id.* at 57. However, in arriving at this "interpretation," the *Rohlen* court seems to read the limiting term "evidence" out of the statute.

56. 352 F.2d 545 (3d Cir. 1965).

> Nowhere do Sections (11)(1) and (11)(2) of the Act authorize the Board to use its investigatory and subpoena powers for the sole purpose of transmitting information to certain parties to a representation proceeding, as required by the Excelsior rule. The plain language of Section 11(1) of the Act would appear to indicate that there must be some *independent use* made by the Board itself of evidence obtained pursuant to its investigatory powers under that section.[57]

An "independent use" requirement, if followed by other courts, would probably preclude use of the subpoena power to enforce the *Excelsior* rule, whatever definition of "evidence" is established.

Thus, it is apparent that neither of the theories which the NLRB has advanced provides a completely satisfactory rationale for judicial enforcement of the *Excelsior* rule. Of course, the underlying difficulty is the failure of Congress to provide the NLRB with appropriate sanctions to insure compliance with the election rules which the NLRB feels are necessary to determine accurately the important question of whether a particular union should be certified as the exclusive bargaining agent for a group of employees. This deficiency is curious in light of the clear congressional purpose to make the initial certification of unions the exclusive province of the NLRB[58] and to have certification questions determined quickly.[59] The problems considered in this Note suggest that a statutory scheme providing for a summary proceeding in which the NLRB could obtain prompt judicial enforcement of its election rules would be desirable. Presumably, the availability of such a device would increase voluntary compliance by the parties with rules like the *Excelsior* rule. However, until Congress takes the necessary steps to remedy the general problems in this area, it is apparent that many courts will strain—as several courts already have in enforcing subpoenas under the NLRB's second theory—to assist the NLRB in enforcing the *Excelsior* rule.

57. NLRB v. Q-T Shoe Mfg. Co., 67 L.R.R.M. 2356, 2360 (D.N.J. Jan. 19, 1968) (emphasis added).

58. *See* note 2 *supra*.

59. *See* authorities cited note 30 *supra*.