

3/11/69

Supreme Court of the United States

October Term, 1968

In the Matter of:

-----X

NATIONAL LABOR RELATIONS BOARD

Petitioner,

vs.

WYMAN-GORDON COMPANY

Respondent.

-----X

Docket No. 463

Office-Supreme Court, U.S.
FILED

MAR 11 1969

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
Erwin N. Griswold, Esq. on behalf of Petitioner	2
Quentin O. Young, Esq. on behalf of Respondent (resumed on pg. 34)	21

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - - x
4 National Labor Relations Board, :

5 Petitioner, :

6 v. :

No. 463

7 Wyman-Gordon Company, :

8 Respondent. :

9 - - - - - x

10 Washington, D. C.
Monday, March 3, 1969.

11 The above-entitled matter came on for argument at
12 11:10 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice
15 HUGO L. BLACK, Associate Justice
16 WILLIAM O. DOUGLAS, Associate Justice
17 JOHN M. HARLAN, Associate Justice
18 WILLIAM J. BRENNAN, JR., Associate Justice
19 POTTER STEWART, Associate Justice
20 BYRON R. WHITE, Associate Justice
21 ABE FORTAS, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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(Counsel for Petitioner)

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(Counsel for Respondent)

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1 in that case and it filed objections to the conduct of the
2 election.

3 One of the objections was, and I quote from page 13
4 of the Appendix, "The employer's conduct in refusing -- right
5 at the middle of the page -- "The employer's conduct in
6 refusing to supply the Union with a list of employees and
7 their addresses, for the purpose of allowing the Union to
8 answer the letter referred to in Objection No. 1."

9 In due course the Excelsior case and another case
10 came before the Board for a hearing and it determined, and here
11 I quote from page 14 of the Appendix, this, too, being in the
12 Excelsior opinion, that the employer's denial of the petitioner's
13 request for the names and addresses of employees eligible to
14 vote in the elections in these two cases, presented a question
15 of substantial importance in the administration of the National
16 Labor Relations Act.

17 The Board then invited further briefs on this issue
18 from the parties, and also invited other interested parties to
19 file briefs amicus and to participate in the oral argument.

20 Q Right there, Mr. Solicitor General, was it the
21 Board which selected this group which should receive invita-
22 tions?

23 A As I understand it, Mr. Justice, it was.

24 Q In other words, unlike a rule-making procedure,
25 this was not left open for anybody interested to file?

1 A It says that the Board invited certain interested
2 parties to file briefs, it was not like the rule-making pro-
3 cedure where there is a notice and whoever becomes aware of
4 that notice can participate in filing briefs.

5 Q I see, these were invitations to a somewhat
6 exclusive group?

7 A Yes, but a rather representative group. There
8 were two National Employers Associations and six labor unions
9 which participated. But I agree it is not the procedure
10 prescribed by the Administrative Procedure Act for rule-making.
11 If it had been the case would not be here.

12 Arguments were held on May 20th, 1965, and on the
13 basis of the briefs and oral arguments the Board entered its
14 decision on February 4, 1966. That appears on page 33 of the
15 Appendix.

16 In its decision the Board concluded that higher
17 standards of disclosure then we have heretofor imposed are
18 necessary and it established a requirement that will be applied
19 in all election cases, quoting from page 17 of the Appendix.

20 Q Did it apply them in that case?

21 A That is the point, Mr. Justice, it did not.

22 Under this requirement, let me state the requirement
23 and then state what is next.

24 Under this requirement, quoting, "Within seven days
25 after the Regional Director has approved a consent election

1 agreement the employer must file with the Regional Director an
2 election eligibility list containing the names and addresses
3 of all of the eligible voters and this information is then
4 made available to all of the parties in this case."

5 Now, in answer to Mr. Justice Harlan's question, I
6 refer to Footnote 5 of the Board's opinion on page 17, the
7 second paragraph of that footnote.

8 The same thing also appears later at the conclusion
9 of the opinion on page 27, but what the Board said there was,
10 "However the rule we have here announced is to be applied
11 prospectively only. It will not apply in the instant cases
12 but only in those elections that are directed or consented to
13 subsequent to 30 days from the date of this decision. We im-
14 pose this brief period of delay to insure that all parties
15 to forthcoming representation elections are fully aware of
16 their rights and obligations as here stated."

17 Q So the effect of this was to prevent any judicial
18 review of the Excelsior case itself, I suppose, because the
19 Excelsior case decided in favor of the employer, didn't it,
20 and the only way you could have -- in other words, the employer
21 then had no duty to bargain with the union.

22 A There was no opportunity for judicial review in
23 the Excelsior case.

24 Q Yes, that is what I mean.

25 A But I see no reason why there can't be judicial

1 review of the propriety of the regulation. Indeed, we have
2 briefed it and our opponents have briefed it of the order in
3 the Wyman-Gordon case or whatever other case is taken up.

4 Q My question was directed to the practical effect
5 of what the Board did in the Excelsior case by writing an
6 opinion in favor of the unions and making a decision in favor
7 of the employer.

8 The Board, in fact, deliberately or otherwise, good
9 or bad, rightly or wrongly, significantly or insignificantly,
10 did prevent judicial review of its opinion and ruling in that
11 case.

12 A It precluded review in that case. Indeed, there
13 is not generally judicial review of orders of representation
14 cases.

15 Q Well, except by refusal to bargain and here the
16 decision was that the employer had no duty to bargain.

17 A That is not the representation case. That would
18 be a subsequent unfair labor practice case which might arise
19 as a consequence of the decision in the Excelsior case, but
20 in this case there was no such subsequent unfair labor practice
21 case.

22 Q But in the Excelsior case the employer could not
23 have been guilty of a refusal to bargain because the decision
24 in that case -- unless I have misunderstood what you said --
25 was in favor of the employer that he did not have to recognize

1 the Union.

2 A I agree, Mr. Justice, at a later time, a year
3 later for example, if the employer had been ordered to bargain
4 it could have had a review.

5 There is potential review in this case which arose six
6 months later.

7 This was the background of the present case which
8 began on July 12, 1966, about five months after the Excelsior
9 case was decided when the International Union of Boilermakers
10 filed a petition seeking to represent the employees of the
11 respondent company.

12 Another union also intervened. The Regional Director
13 determined that an election should be held and he directed that
14 the company as required by the Board's Excelsior decision
15 furnish a list of the names and addresses of the eligible
16 voters.

17 The company refused to furnish the list. The election
18 was held and the unions lost. The unions objected because of
19 the company's failure to provide the list of names and addresses
20 and this objection was sustained by the Regional Director and
21 by the Board.

22 The Regional Director again directed the company to
23 provide an employee list.

24 When the company again refused the Regional Director
25 issued a subpoena requiring the company to produce its books

1 and records showing the names and addresses of its employees,
2 or in the alternative, to furnish a list containing that
3 information.

4 The Board denied the company's motion to quash the
5 subpoena. When the company still refused to comply, the Board
6 brought an action in the United States District Court for the
7 District of Massachusetts to enforce the subpoena or in the
8 alternative for a mandatory injunction directing the company
9 to comply with the Excelsior requirement.

10 And that is this case.

11 The District Court granted an order enforcing the
12 subpoena.

13 Q Mr. Solicitor, I suppose that question is here
14 or whatever you do with the Excelsior?

15 A Yes, Mr. Justice, I think it is here.

16 Q Even if that rule had never been announced I
17 suppose in a proceeding like this that the Board issues a
18 subpoena which it thinks it is authorized and the other side
19 doesn't. But we have got to decide that question.

20 A Well, that is one argument which I hope to
21 advance that at least the Excelsior opinion is a great dictum
22 upon which the Board can rely in making a later decision,
23 which is this case.

24 In this case where it is charged with an investi-
25 gation, as a part of the process of carrying out fair

1 representative elections, it has determined that this company
2 should provide a list of names and addresses and when that
3 has not been provided it has started this proceeding in court
4 to enforce its determination which, as Mr. Justice White
5 suggests, is before this court now.

6 Q But wouldn't this power to issue a subpoena be
7 -- if you decided the same way I suppose even though the
8 Excelsior rule had never been announced?

9 A It seems to me you might well. I think the
10 warning of the Excelsior rule eliminates arguments about
11 fairness which might surprise, which might be made an answer
12 to something which came simply in this case, but I know of no
13 reason why the Board could not have made no Excelsior decision
14 but have decided in this case that Wyman-Gordon should provide
15 a list of names and addresses and have started proceedings to
16 enforce that decision.

17 Q Would it need to operate under the rule which
18 it announced by subpoena, would it just issue an order, could
19 it itself issue an order or what? Or is that what a subpoena is?

20 A I believe, Mr. Justice, that the only orders
21 that the Board can issue which are susceptible as such of
22 enforcement in the courts are orders in unfair labor practice
23 cases.

24 Beyond that it has the power to issue subpoenas,
25 it also has the power to make orders which it can seek to have

1 enforced in the District Courts under the power of the District
2 Courts to enforce orders made by agencies engaged in the
3 regulation ---

4 Q Well then, does having made a rule like in the
5 Excelsior case give them any more powers in that respect? I
6 suppose it doesn't.

7 A I think perhaps analytically it does not. It
8 certainly provides a helpful background to sustain the pro-
9 priety of the order in that people have had adequate notice.

10 But I think that we might have very much the same
11 case here without the Excelsior decision in which event we
12 would not have problems under the Administrative Procedures Act
13 and things of that sort.

14 Q If the rule had been enacted or adopted in a
15 rule-making proceeding which no one questioned, the Board would
16 still have an enforcement problem, wouldn't it?

17 A The Board would still have an enforcement prob-
18 lem ---

19 Q Just like this one.

20 A Which would be very similar to what it has here.

21 Q Mr. Solicitor General, in the other cases in-
22 volving the Excelsior rule, did the question arise similarly,
23 that is to say, as a consequence of a particularized order
24 issued in the particular case?

25 A Yes, Mr. Justice. There are five decisions of

1 Courts of Appeals sustaining the Excelsior rule and sustaining
2 orders of the District Court to enforce it and all of them are
3 cases analogous to this.

4 Q There has never been an attempt to enforce the
5 Excelsior rule as a rule, that is for example, has the Board
6 ever instituted, let us say, an unfair practice proceeding
7 for failure to comply with the rule absent an order in a
8 particular case?

9 A To the best of my knowledge there has not been
10 such a case. Certainly there has been no such case in the
11 Courts of Appeals.

12 Q As I understand it, is it your submission that
13 the failure would be an unfair labor practice?

14 A Yes, Mr. Justice, I think it would, but the
15 unfair labor practice proceeding is somewhat complicated and
16 prolonged and makes it very difficult to to carry out elections
17 promptly which is the Board's duty under Section 9 of the Act.

18 Q In cases so far, as I understood your answer
19 to Mr. Justice Fortas, have all arisen as this one did, that is
20 by and in all the other cases the District Courts enforced the
21 Board's efforts to require the employer to furnish the list.
22 Is that right?

23 A I think there is one District Court decision
24 in New Jersey which refused to enforce it. All of those which
25 have gone to the Courts of Appeals the Board's effort to enforce

1 has been sustained except for this case. This case went to
2 the Court of Appeals for the First Circuit in an opinion by
3 Chief Judge Aldrich, the District Court was reversed but Judge
4 Coffin dissented.

5 The basis of Judge Aldrich's opinion was that because
6 the Excelsior requirement was made prospective only it was rule-
7 making rather than decision and that it was invalid since it
8 had not been promulgated in accordance with the procedures
9 provided in the Administrative Procedure Act.

10 The Court also held that the Excelsior Rule was not
11 "procedural" in quotation marks, but was substantive and thus
12 that it did not come within an expressed exception in the
13 Administrative Procedure Act for procedural matters.

14 Judge Coffin dissented on this point, too.

15 Now, we come to consideration of the legal question
16 involved. It requires consideration of the language of the
17 National Labor Relations Act and of the Administrative
18 Procedure Act. Some portions of these two statutes are set out
19 in Appendix A of our brief on pages 55 to 60.

20 Unfortunately, despite the detail of these statutes,
21 there is nothing in them that sheds much light on the precise
22 problem now before the Court.

23 The Administrative Procedure Act does tell an agency
24 how to conduct rule-making proceedings. It does tell it what
25 procedures to follow in an adjudicatory proceeding, but it does

1 really tell when a matter is one or the other. That, it seems
2 to me, has to be determined out of more general principles.

3 Q This was never published in the Federal Register
4 was it, the Excelsior rule?

5 A No, Mr. Justice, because it didn't follow the
6 Administrative Procedure Act procedure.

7 Q Well, on this -- another alternative theory,
8 you are not contending that this is rule-making?

9 A No, Mr. Justice, we are contending that it is
10 adjudication and therefore did not need to follow the procedure.

11 Q Do you also contend that even though it is
12 adjudication and not rule-making that it has a self-contained
13 imperative in the sense that absent an order in a particular
14 case an effected party would have to comply with this?

15 A It is the background for an order in a particular
16 case with which the party, we submit, must comply.

17 Q But absent an order in the particular case you
18 would not contend that there is an obligation on an affected
19 company to comply with it, would you?

20 A Yes, Mr. Justice, I think there is, just as a
21 decision of this Court establishes the law, the decision of the
22 National Labor Relations Board in the Excelsior case established
23 ways of administering this particular statute with whose
24 administration the Board is charged and we think that all
25 employers are under a legal obligation to comply with it.

1 Q Well, then you are saying that the effect of
2 the Excelsior rule, even though it was adjudication, is the
3 same as if it were an exercise of rule-making power?

4 A I think I will say the same. I was about to
5 say much the same, but it is the same as a rule established by
6 adjudication, which is much the same as that of one established
7 by rule-making.

8 Q But you don't change or amend a rule-making rule
9 by an adjudication, do you?

10 A Were this an amendment of a rule, Mr. Justice,
11 it might be more difficult.

12 Q Yes.

13 A There is one decision of this court which in-
14 volves that to which I will refer later. This is the estab-
15 lishment of a way of dealing with election representation cases
16 as a result of the Board's experience, which in our view was
17 appropriately adjudicatory in nature.

18 The National Labor Relations Board, the National
19 Labor Relations Act gives the Board broad powers to administer
20 the Act and we know from the Chinnery case of more than 20 years
21 ago that such powers are to be construed broadly, that they
22 can be exercised by decisions of the administrative agency,
23 reached in adjudicatory proceedings, it is true that the
24 decision in the Chinnery case was applicable to that case.

25 Indeed, that was part of the problem there. It was

1 not prospective only, but there is much in this Court's opinion
2 in the Chinnery case which would suggest the result for which
3 we contend here. There was here an actual controversy in the
4 Excelsior case.

5 There was a hearing, as required by Section 9(c)(1)
6 of the National Labor Relations Act. There was extensive
7 briefing and oral argument and a full reasoned opinion by the
8 Board.

9 In its opinion the Board reached a conclusion as to
10 the appropriate rule of decision for such cases. But then held
11 because of considerations of fairness to the parties then before
12 it that rule should be applied only to subsequent cases.

13 We submit that the Board in the Excelsior case was
14 engaged in adjudication and that the result which it reached in
15 determining that controversy was validly arrived at in the
16 process of adjudication.

17 It was a real case, there was no feigned issue, no
18 effort by the Board to make rules simply because it thought
19 that would be a good idea. The matter was handled in an adjudi-
20 catory proceeding with all the care and safeguards required
21 for the appropriate consideration and resolution of a case.

22 Out of that consideration the Board came to a con-
23 clusion which it announced as its decision, with careful
24 reasoning to support it. The decision represented a departure,
25 as decisions often do, and the Board concluded that the solution

1 it reached should be applied prospectively only.

2 Q Mr. Solicitor General, is this a unique situation?

3 A No, Mr. Justice.

4 Q Is there anything else like it in Board practice?

5 A As to the National Labor Relations Board I am
6 not aware of any other thing like it.

7 Q Well, is there any other administrative agency,
8 so far as you know, that has done something like this?

9 A No, but there are many courts -- there may be
10 administrative agencies, I don't know.

11 Q Probably it may be different. I just wondered
12 if you knew of anything where the same and curious situation
13 occurred.

14 A No, I don't know of anything either in the Labor
15 Board or in other administrative agencies. Nevertheless in
16 determining what is adjudication, it seems to me not inappropriate to look to what courts do.

17
18 Decisions which are prospective only in their operation have been known in this court at least as far back as the
19 Sunburst Oil and Refining case in 287 U.S., some 35 years ago.

20
21 In recent years this Court has frequently decided
22 that certain decisions should and can be applied prospectively
23 only. No one has supposed that the Court was not adjudicating
24 and not acting as a court when it did so. Several of these
25 cases are cited on pages 22 and 23 of this brief.

1 I haven't had a chance to study the opinions, but
2 Allen against the State Board of Elections decided this morning
3 appears to be another one.

4 And perhaps the cases closest to the present situation
5 are England against the Louisiana State Board of Medical
6 Examiners, in 375 U.S., and James against the United States in
7 366 U.S., in both of which this Court announced rules.

8 In the James case it was overruling an earlier case
9 and in the England case it was clarifying a situation which
10 was uncertain somewhat as in the Excelsior case. In each case
11 the Court for one reason or another, reasons of fairness to the
12 parties in the particular case, announced that the rule would
13 not be applied in this case.

14 In the England case this Court's words were, "On the
15 record in the instant case the rule we announce today would
16 call for affirmance of the District Court's judgment but we
17 are unwilling to apply the rule against these appellants."

18 No one has ever contended that in the England case or
19 in the James case that the court was engaged in rule-making.
20 On the contrary, in both cases this court was acting as a court,
21 it was deciding the cases then before it, and articulating the
22 somewhat complicated reasons which led it to the conclusion
23 which it then reached.

24 Neither the England case nor the James case is dealt
25 with in the Respondent's brief here. I should point out,
however, that the Respondent cites one case in his brief which

1 however, that the Respondent cites one case in his brief which
2 is not dealt with in ours and which points the other way.

3 This is on page 13 of the Respondent's brief. It is
4 a per curiam decision of this Court in Chicago & North Western
5 Railway Company against Chicago, Burlington & Quincy Railroad
6 Company where this Court affirmed a judgment of a District
7 Court dismissing an effort by the Interstate Commerce Commission
8 to enforce an order because in that case the Interstate
9 Commerce Commission had made an order far broader than the
10 matters before the Commission.

11 Indeed, the Commissioner's Hearing Examiner had said
12 that these matters are not involved in this case and no con-
13 sideration has been given to them and when the matter went to
14 the Commission the Commission issued a broad order applicable
15 not only to the case but to the whole field.

16 The District Court refused to enforce an order based
17 on that and this Court affirmed it per curiam.

18 Q That case arose, I gather just from reading its
19 description in the Respondent's brief as though this we have
20 before us now, the Excelsior case itself, is that right?

21 A No, I think not, Mr. Justice.

22 Q Well, it says in that case the lower court
23 upheld the promulgation of a rule for future application, done
24 in the course of an adjudicatory proceeding.

25 A The other parties then sued to prevent the

1 enforcement of the rule in future applications. This Court
2 summarily held that ---

3 Q The issue is the same, however it arises, I
4 suppose.

5 A The issue is the same but I think the factual
6 situation is ---

7 Q Similar to this.

8 A No, well I think it is distinguishable from this
9 in that there the Interstate Commerce Commission went beyond
10 this case and decided a broad general proposition as to which
11 there had been no hearing of any sort.

12 Q I see.

13 A Indeed, the Hearing Examiner had announced that
14 the broad issue was not involved in the case.

15 Q This would strike at the theory of the Federal
16 Register Act, wouldn't it, that is to say that here the
17 Federal Register Act is a company subject to the National Labor
18 Relations Act to find out what the rules are and consult the
19 Federal Register and rely with confidence on what appears
20 there.

21 I am sure you as well as I remember the controversy
22 that led to that. And here what you are saying is that they
23 also have to consult the adjudicated cases, not merely to find
24 principles, but also to find specific and detailed rules such
25 as this Excelsior rule?

1 A Yes, Mr. Justice, I don't think the Federal
2 Register Act has anything to do with it. It hasn't been relied
3 upon by the Respondents.

4 One has to look to many things besides what is in
5 the Federal Register to learn what the law is, including the
6 decisions of this Court.

7 Moreover, the Federal Register Act expressly provides
8 that its rule that an unpublished regulation is not binding, is
9 not applicable to a person who has actual notice of the rule
10 and there isn't any doubt that Wyman-Gordon had actual notice
11 of this rule and deliberately chose not to comply with it.

12 So, I don't think the Federal Register Act has any-
13 thing to do with it. The problem of how you find out what the
14 law is, I suppose, is the lawyer's problem and I would suggest
15 that anybody involved in a labor case should look to the decisions
16 as well as to the rules because for better or for worse the
17 National Labor Relations Board has never proceeded in the
18 rule-making basis and there is no material in the Federal
19 Register on this.

20 Q Why hasn't the Board used this explicit rule-
21 making power? Has it ever given an explanation?

22 A There was a slight explanation last fall in a
23 statement made to Congress in which they said that they thought
24 they would sometime.

25 As far as I know they haven't yet. I can understand

1 why it is. The nature of their area is delicate and difficult
2 and evolving and things don't formulate in rule fashion the way
3 they do in the Treasury system where it is fairly easy to
4 make rules.

5 Q Even with respect to something like the amount
6 encountered -- I can't think of their phrase in term of art --
7 but the amount of money involved, that is a rule and they do
8 that ---

9 A They do that by press release and I don't
10 understand it. All I can say is that is not involved in this
11 case and perhaps I am glad. There are other contentions in
12 the case which are dealt with in our brief and my time is
13 expired so I will have to leave them to that.

14 MR. CHIEF JUSTICE WARREN: Mr. Young.

15 ORAL ARGUMENT OF QUENTIN O. YOUNG, ESQ.

16 ON BEHALF OF RESPONDENT

17 MR. YOUNG: Mr. Chief Justice and may it please the
18 Court, I apologize for my voice today, but I have had laryngitis
19 or something for the last week and I can't speak very well.

20 I would like to direct myself to the question that
21 you asked the Solicitor General as to why the Board does not use
22 the rule-making powers.

23 I think one of the reasons is explicit here because
24 they developed the Excelsior rule in a fashion and in a manner
25 which it was not directly subject to court review either by the

1 Excelsior Company or by any other company in the country that
2 was involved in the various Excelsior cases.

3 The Solicitor General has indicated that the Wyman-
4 Gordon Company refused and refused and refused as though we were
5 doing something illegal in not complying with the Board's
6 Excelsior rule.

7 Actually we were doing the only thing which we could
8 do in order to test the Excelsior rule because of the way the
9 Board had promulgated it.

10 I think that the Administrative Procedure Act, and
11 the National Labor Relations Act, make it very clear that the
12 Board should and must follow the Administrative Procedure Act
13 in promulgating its rules, even though it has arbitrarily for
14 the last 30-odd years refused to follow this position.

15 You asked a question as to whether an attorney
16 representing a client could look to the Federal Register and
17 find out what the Board's rules were or whether it would be
18 necessary for him to go into the cases.

19 Well actually, I have found across the years that
20 when I advise a client on Friday of what he can do under the
21 National Labor Relations Act, I must also advise him that on
22 Monday morning I may change my opinion and tell him what he
23 could do on Friday he couldn't do on Monday.

24 I think the Board, and now I am getting away from my
25 argument, the Board should be required to follow the Administrat.

1 Procedure Act because it is the duty of the Board to stabilize
2 labor relations in this nation.

3 Actually what they have done by proceeding on an
4 ad hoc basis, they have unstabilized labor relations. The
5 point that lawyers advise their client at their peril and I
6 think that if the Board would make extensive use of the rule-
7 making power all of this confusion would be ---

8 Q An order was issued against you in this specific
9 case.

10 A I am sorry, I didn't ---

11 Q I say an order was issued against you in this
12 specific case, an order commanding you to comply with the
13 Excelsior procedure.

14 A Well, that order, if you call it that, sir ---

15 Q Well, wasn't it an order?

16 A Well, it was in effect that when the Board sends
17 notice that a petition for election has been filed it also sends
18 notification in regard to the Excelsior list so that the only
19 way we could test Excelsior is by refusing to give the Excelsior
20 list to the Board.

21 Q And I suppose you would agree that you really
22 have to contest two things here; one, you hope you can contest
23 the Excelsior order as improper rule-making, but you have also
24 got to contest the validity of the order issued in this par-
25 ticular case even if it had never appeared in the Excelsior

1 litigation?

2 A I would say we would have to do exactly that.

3 I would like to get back here to my argument.

4 In Section 6 the National Labor Relations Board is
5 specifically directed to use, to make from time to time amend
6 and rescind in a manner prescribed by the Administrative
7 Procedure Act such rules and regulations as may be necessary to
8 carry out the provisions of this subcontract.

9 This is what we contend the Board did in Excelsior
10 and it has not followed the rule established in the Administrative
11 Procedure Act in Sections 4 and 5 whereby all agencies' rules
12 and regulations of a general policy nature must be published and
13 a hearing held in accordance with the provisions of the
14 Administrative Procedure Act.

15 I think that what is most important ---

16 Q Mr. Young, is it your suggestion that this is
17 the only way the Board could proceed ---

18 A No, that is not my position, but it is my posi-
19 tion that this is a rule of the nature that should have been
20 published following the Administrative Procedure Act.

21 Q You say no it isn't the only way ---

22 A I recognize the fact that the agency has a right
23 to make rules in an adjudicatory fashion.

24 Q Could it make this one in adjudicatory contacts
25 without purporting to ---

1 A It is our contention that it is improper
2 adjudicatory rule-making here because they decided the case one
3 way between Excelsior and the Board. They said so far as
4 Excelsior is concerned ---

5 Q I suppose that they certainly have decided
6 yours against you?

7 A Well, they have made no decision as such. The
8 Board hasn't made any decision against me.

9 Q Why not?

10 A Because they haven't. I refused to give them
11 the list when the soul purpose is to turn around and hand it to
12 the Union.

13 Q And then what did the Board do?

14 A Then the Board issued a subpoena. The District
15 Court upheld the subpoena.

16 Q So the Board in this case, this concrete case
17 now before us said that in connection with this election you
18 must furnish the list and you said no we don't. And so they
19 got out a subpoena and we had the validity of that subpoena
20 this year.

21 A That is correct.

22 Q Now assume that subpoena is valid. Just assume
23 that for the moment. Is there anything left of the case?

24 A No. If the subpoena is valid I have to give up
25 the list.

1 Q And you say part of the reason the subpoena is
2 invalid is because of the Excelsior rule?

3 A We claim that the Excelsior rule is invalid,
4 that the list is not subject to subpoena powers of the District
5 Court because it is not evidence and it is not to be used to
6 resolve any investigation.

7 Q That would be the same question whether Excelsior
8 had been adopted?

9 A It would be the same whether Excelsior existed
10 or not.

11 Q How is the rule itself involved?

12 A Pardon?

13 Q How is the rule itself involved in it?

14 A Well, the subpoena is issued on the basis of the
15 rule.

16 Q Well, it is also issued just on the basis of
17 the Board's decision in this case that we want the list?

18 A No, sir, the way the Board's order reads, it is
19 based solely upon Excelsior, and they have proceeded to seek
20 the subpoena on the basis of Excelsior, that the list con-
21 stitutes evidence.

22 It is our contention that the lists are not evidence
23 and are not subject to subpoena powers of the District Courts.

24 Q I suppose even if their rule they adopted was
25 not valid they might in this case have said, "Well, we think in

1 the context of this case the employer should furnish a list of
2 employees.

3 A They could have done that but they did not.

4 Q So you agree they could have done that?

5 A I agree that they could possibly have done it
6 and we would have had to solve

7 Q Solve this specific case.

8 A We would have had to follow the same procedure
9 in order to contest it.

10 I think one of the most important things here is that
11 as cited by the Solicitor General, and set forth in our brief,
12 on April 2nd, in 1965, and this is a quote, direct quote from
13 the Excelsior decision, the Board decided, "These two cases
14 presented the question of substantial importance in the adminis-
15 tration of the National Labor Relations Act."

16 Now, if they can make a statement like that in their
17 own decision, I don't see how they can avoid the rule-making
18 requirements of Section 6.

19 The Board, in effect, in inviting certain parties to
20 file briefs, was giving lip service to the Administrative
21 Procedure Act. I think it is interesting to review the invitees
22 who were asked to participate as amicus in the Excelsior
23 decision. The Board invited, as interested parties, the
24 Chamber of Commerce of the United States, the AFL-CIO, the
25 IUE, the National Association of Manufacturers, Retail Clerks,

1 Textile Workers Union and Teamsters Union.

2 I submit even on the basis of the interested parties
3 that the Board invited to file amicus briefs, that the cards
4 were stacked against the employers.

5 The Board in its brief on page 15 argues that it is
6 impractical for the Board to follow the Administrative Procedure
7 Act because the procedure is too rigid and too inflexible for
8 it to proceed in the industrial relations field.

9 Actually this statement in the Board's brief on page
10 15 is a gross misstatement of the law, because the Board under
11 Section 6 has specific and explicit authority to make any rule
12 and any regulation that it wishes.

13 The argument that the APA procedure is too inflexible
14 just will not stand up under scrutiny of Section 6 of the Act.
15 The Board has placed a great deal of emphasis in its brief and
16 its argument on the Chenery case.

17 But it is this exact case that Judge Aldrich in the
18 First Circuit found distinguishable and upon which he was able
19 to strike down the Excelsior rule. The Chenery case was a
20 decision between an agency and an individual group.

21 The decision was applicable to that group and to that
22 case and also for future operation. Excelsior, however, the
23 Board decided the case in one way, in an adjudicatory pro-
24 ceeding, and then used that as a vehicle for announcing an
25 absolutely free new rule which had never been applied in any

1 of the N.L.R.B. election procedures.

2 Q Supposing they had applied it in the original
3 Excelsior case, not perspective but to that case?

4 A I would have had a very much more difficult time
5 of arguing the case, sir.

6 Q How do you draw the line between the character
7 of the rules that is subject to the rule-making process than
8 those which ---

9 A Well, I think that anything that is of a general
10 purpose affects the policy of the administrative agency that is
11 involved should be using rule-making powers rather than
12 adjudicatory powers because this stabilizes the state of law
13 for the individual practitioners.

14 If all agencies were to follow it we would have at
15 least a 30 day notice that there is going to be a change in the
16 law and we could accommodate ourselves to it.

17 This way we have to read the Monday morning papers to
18 know what the Board has done on Friday. This is one of the
19 pleas that I am making here that is collateral to the actual
20 Wyman-Gordon case.

21 Q Do you have to do that with Supreme Court
22 decisions?

23 A It is not quite that bad, sir.

24 Q Mr. Young, if that had been litigated at least
25 five times, six times through the Court of Appeals, right?

1 A Yes, sir.

2 Q Is that notice?

3 A Pardon?

4 Q Is that notice to a labor ---

5 A We are not claiming lack of notice in this
6 particular case because we did have notice. What I am claiming,
7 if we had the orderly use of the Administrative Procedures Act
8 practitioners in this field would have a great deal more
9 stabilized area in which to operate.

10 Q Well, has the NLRB ever varied from the Excelsior
11 rule since they set it down?

12 A In some slight instances where there has been a
13 mistake, an innocent mistake let us say.

14 Q Is that an innocent mistake ---

15 A No, they have overlooked it. What I am saying
16 is an innocent mistake is that several names were misspelled,
17 several addresses were incorrect, and then again they do not
18 apply under Section 7 in the construction industry where you
19 can have a very early election.

20 Q Isn't that notice?

21 A Isn't what notice?

22 Q The fact that they have uniformly followed it
23 since the day they promulgated it?

24 A Oh, yes.

25 Q Just the same as if it had been a rule?

1 A That is correct.

2 Q What is your complaint?

3 A My complaint is that they have no authority
4 under the Act to issue this rule. They did it in an illegal
5 manner.

6 Q You say it is a rule. They say it is an adjudi-
7 cation.

8 A Yes, sir.

9 Q You want us to make the differential?

10 A No, I think that where they decide a case one
11 way in regard to the party, here Excelsior, and then they use
12 that as a vehicle to set down a rule ---

13 Q If they published it in the Federal Register
14 would you be satisfied?

15 A No, sir. I think we should ---

16 Q Sir, would you?

17 A No, sir. I think under the terms of the
18 Administrative Procedures Act I think we have a right to be
19 heard before a rule becomes effective.

20 Q Weren't you heard in the District Court, in the
21 Court of Appeals and are you not now being heard?

22 A This is after the fact, sir.

23 Q Well, I mean you haven't given up your list yet?

24 A No, sir.

25 Q Well, how is it after the fact?

1 A Pardon?

2 Q How is it after the fact?

3 A It is after the fact of Excelsior.

4 Q But you haven't given your list up yet?

5 A That is correct.

6 Q And you are not going to give it up?

7 A Unless you say I am.

8 Q So aren't you getting all the hearing you would
9 get anyplace?

10 A Well, I would like to have the decision in my
11 favor, though.

12 Q Oh, that is your complaint. I can understand
13 now.

14 A In discussing their failure to follow the
15 Administrative Procedure Act, the Board said on page 27 of
16 their brief, it is extremely unlikely that it would have
17 obtained more enlightenment on the problem if it had followed
18 the Administrative Procedure Act.

19 I think this is a complete misstatement of their
20 obligations under the Act to Congress. Congress has directed
21 the Board in Section 6 to establish rules and to amend rules
22 and to rescind rules through the use of the Administrative
23 Procedure Act and yet the Board arbitrarily over the years has
24 taken no notice of its obligations under Section 6.

25 The Board again tries to say that there was no

1 disadvantage to Excelsior because of the application of the
2 rule in the future rather than in the past.

3 But it is our argument here that all other employers
4 who happen to participate in an Excelsior rule are at a dis-
5 advantage because the only way Excelsior can be challenged is
6 by the means that we have adopted here.

7 I think I would like to get back to Excelsior itself
8 and the purposes of it.

9 The Board claims that the purpose of Excelsior is
10 twofold. One is to improve communications between unions and
11 employees who may be prospective union members, and to minimize
12 the challenges that may follow a Board-conducted election.

13 I think this is a false statement.

14 MR. CHIEF JUSTICE WARREN: We will recess now,
15 Mr. Young.

16 (Whereupon, at 12 o'clock noon the Court recessed, to
17 reconvene at 12:30 p.m. the same day.)

1 AFTERNOON SESSION

2 (The oral argument in the above-entitled matter was
3 resumed at 12:30 p.m.)

4 MR. CHIEF JUSTICE WARREN: Mr. Young, you may
5 continue your argument.

6 ORAL ARGUMENT OF QUENTIN O. YOUNG, ESQ.

7 ON BEHALF OF RESPONDENT

8 MR. YOUNG: I would like to discuss briefly the
9 Excelsior decision itself and what it purports to be and in
10 effect what it does.

11 The Board states that there is a twofold purpose in
12 deciding Excelsior. One is to improve communications between
13 union business agents and prospective union members; and two,
14 it is to minimize challenges to voters after an election has
15 been held.

16 And yet when you analyze it the Board has adopted
17 what I consider a per se rule here and it says that only in
18 this manner can unions properly inform the electors of the
19 issues involved.

20 Yet the Board in holding to Excelsior has refused to
21 admit any other means of communication. In one case, which is
22 currently pending, petition for certiorari, Teledyne, the
23 Board refused to permit the mailing of notices or solicitations
24 by a disinterested third party.

25 In Teledyne, for example, at first Teledyne Corporation

1 stated there would be no prohibition of solicitation of union
2 membership in the plant and on working time. The Board refused
3 to accept this as sufficient form of communication.

4 Teledyne then offered to send each employee a
5 stamped envelope addressed to the Regional Director of the
6 National Labor Relations Board and telling the Regional Director
7 that he had the right to give his name and address to the unions

8 Finally, Teledyne offered, through the use of the
9 American Arbitration Association, offered at its own expense,
10 Teledyne's expense, to mail to the union any communications
11 that the unions wished.

12 None of these were sufficient for the Board. I think
13 that their argument that this is to favor communications is not
14 exactly truthful. I think what they are actually trying to do
15 is to encourage union business agents, union officials to
16 visit these employees in their homes and this is the sole
17 reason why they are doing it.

18 Yet, at the same time it has long been established
19 that if an employer during an election campaign visits the
20 employee's home to discuss union matters with him he auto-
21 matically commits unfair labor practice.

22 I think this dual standard strikes at the heart of
23 the Excelsior decision itself.

24 Q By the same reasoning are you saying that they
25 should not permit this rule to be effective so that the union

1 officials would be prevented from seeing the men in their homes?

2 A No, I am saying this is an extension of the law
3 beyond anything that this Court has ever upheld. It permits and
4 encourages visitation in the homes by union organizers.

5 Q You feel that that is contrary to the Act?

6 A I don't think it is necessary to the Act or if
7 you are going to permit union organizers into the homes then
8 I think you ought to permit the employers into the homes. I
9 think it constitutes a dual standard.

10 Q Would there be anything that prohibits the
11 employers from coming?

12 A Pardon, sir?

13 Q Is it your idea that the rule bars the employers
14 but permits union men to come into the home?

15 A The Excelsior rule permits union men to visit
16 the homes.

17 Q Yes.

18 A By a long series of cases, other cases, it has
19 been held that if an employer does the same thing -- this goes
20 back well before Excelsior -- that if the employer visits the
21 home for the purpose of discussing union activities and union
22 organization, that it is an automatic, per se, unfair labor
23 practice.

24 The second purpose that the Board has stated for the
25 justification of Excelsior is that it minimizes and reduces

1 challenges to voters after an election.

2 I think the facts in our Wyman-Gordon case ---

3 Q Are there cases that say union visitation in the
4 home is not an unfair labor practice?

5 A I can't cite you a specific case but I know
6 there has never been a case that says a union organizer cannot
7 visit the home.

8 I think that the fallacy of lessening of challenges
9 by the use of the Excelsior lists is clearly demonstrated in our
10 brief at page 4 where approximately 1750 voters there were
11 exactly six challenges.

12 I don't know what percentage figure that works out to
13 but it certainly indicates that challenges had no real place in
14 the Wyman-Gordon election in 1966.

15 Further, I have analyzed the 30th Annual Report of
16 the Labor Board, which is for the fiscal year 1965, and the
17 Annual Report for Fiscal Year '67, and these are the full year
18 prior to Excelsior and the full year after Excelsior.

19 In 1965 there were some 7,776 elections. In its
20 Annual Report they have a table 11 which lists the cases in
21 which challenges have been involved. They list under the heading
22 of challenges only, there are 312 elections out of the 7,000
23 involving challenges.

24 Thus, only 4.01 percent of all the election cases held
25 the year prior to Excelsior involved challenges. Turning then

1 to the 32nd Annual Report it shows that in fiscal year 1967,
2 8,116 elections were held, and in Table 11 it indicates that
3 under challenges only there were 371 elections in which
4 challenges were held.

5 This results in a 4.5 percent of the elections held
6 by the Board in fiscal '57 involving challenges. The improve-
7 ment factor, after the Excelsior requirement was put into
8 effect, is a minus .56 percent.

9 So the Board by its own records clearly shows that
10 the Excelsior rule has no bearing whatsoever on minimizing
11 challenges after the election.

12 Another thing that I would like to point out is that
13 this per se rule applies to all elections. I can see no justi-
14 fication in the application of the Excelsior rule with elections
15 with 2, 3, 4 and 5 people involved in the unit.

16 I would like briefly to go forward ---

17 Q They probably wouldn't be asking for it there,
18 would they?

19 A The Board requires that you may not have an
20 election except you comply with Excelsior. This is one of my
21 complaints about it. There is no need for it.

22 Q As a matter practicality if there were only four
23 or five people they would know where their homes were, wouldn't
24 they?

25 A Of course they are.

1 Q Do they know where all your people live?

2 A They can find out.

3 Q How do they find out?

4 A We have in the city of Worcester, greater city of
5 Worcester a directory which lists all employees in the greater
6 Worcester area showing that they are employees of Wyman-Gordon.
7 This I suggested as an alternate of means for the union con-
8 tacting.

9 Anybody who wants to find out Wyman-Gordon employees
10 can go to the Worcester Public Library and get the Worcester
11 directory and they will find every one of our employees names.

12 Q How often is that directory changed?

13 A On my recollection it is once every two years.

14 Q Every two years?

15 A Yes.

16 Q How much of a turnover do you have in your plant?

17 A We have a relatively minor turnover.

18 Q Some of them have a great turnover don't they?

19 A Oh, yes, indeed, but we are the biggest employer
20 in the area and we have a relatively small turnover.

21 I would like to turn now to the question of whether
22 these lists constitute evidence and I believe they do not. The
23 purpose of these lists is solely for the Board to take the list
24 in one hand and then hand it right over to the union. It is
25 not used to prove anything, it is not used to disprove anything.

1 I submit that under the ordinary definition of
2 evidence the Excelsior lists do not come within those terms.

3 In actual practice the Board requests the lists when
4 everything has been done in an election proceeding except the
5 actual voting itself. So that there is no evidentiary matter
6 that is under investigation, there is no question open other
7 than the final results of the election.

8 I think that the Excelsior list does not come within
9 the common accepted definition of what evidence is. Corpus juris
10 31(c)(j)(s) evidences a demonstration of a fact that signifies
11 that which demonstrates, makes clear, ascertains the truth of
12 a fact or a point in issue, either on one side or another.

13 In legal acceptance the term evidence includes all
14 the means by which any alleged matter of fact, the truth of
15 which is submitted to investigation is established or disproved.
16 I don't see how anybody can hold that taking a list of employees
17 and turning them over without even looking at it so far as the
18 Board is concerned constitutes evidence.

19 Q What harm do you think it does?

20 A I think it greatly enhances the union's right
21 to approach employees.

22 Q Do you say that they shouldn't have the right to
23 have the addresses?

24 A This is my contention because I think that
25 violates a right of privacy.

1 Q Whose right of privacy?

2 A The right of privacy of the employees.

3 Q Doesn't the company have a right to raise that?

4 Do you think the company has a right to raise that?

5 A I do, indeed. I think this is an invasion of the
6 employee's right of privacy and I cover this in my brief. I
7 don't think any employer should have the to give a list of
8 names and addresses of his employees to anybody outside of the
9 Federal Government for their purposes, but not to be turned over
10 to an outside agency.

11 Q Mr. Young, I understood you to say that you do
12 turn them over to some publication that puts them in the public
13 library.

14 A We do not give our employees names.

15 Q How would they get them?

16 A I do not know. It is R. L. Polk Company from
17 Cleveland or Cincinnati who puts it out. I know that much but
18 I don't know how they obtain them. They don't obtain them
19 from the company. Because the company has had a long policy
20 of not giving the names and addresses.

21 Q What provision of the Act do you think would
22 support that view?

23 A Support what?

24 Q The view that the company somehow goes contrary
25 to the Act if it has to give out the names of the employees

1 to the Board so they can let the Union see them?

2 A I take that as an assistance to the union and a
3 violation of Section 8(a)(2) and a violation of Section 302
4 in regard to giving a thing of value to the Board that can be
5 turned over to the unions.

6 Further, I don't think that if you compare the
7 language of Section 11 of the National Labor Relations Act, and
8 the language of the Railway Labor Act giving the Board authority
9 to investigate, you will find that there is any authority for
10 the Labor Board to obtain these lists and turn them over to the
11 union.

12 In the Railway Labor Act the Board is empowered to
13 issue subpoenas for such information as may be deemed necessary
14 by it to carry out the purposes of the Act. No such authority
15 is granted to the Labor Board in the National Labor Relations
16 Act.

17 MR. GRISWOLD: Mr. Chief Justice, may I make a correc-
18 tion in one of my answers to a question?

19 MR. CHIEF JUSTICE WARREN: Yes, you may.

20 MR. GRISWOLD: I was asked whether there were other
21 instances where the Labor Board or other agencies had made
22 prospective determinations in adjudicatory proceedings and I
23 said I was unaware of them. This was a clear slip.

24 On page 14 of our brief and footnote 11 there are
25 listed several other instances, both involving the Board and

1 involving other agencies. This is not a unique situation.

2 MR. CHIEF JUSTICE WARREN: Very well.

3 (Whereupon, at 12:47 p.m. the oral argument in the
4 above-entitled matter was concluded.)
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