

**Abtex Beverage Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local #47, Petitioner. Case 16-RC-7573**

August 25, 1978

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

The Board has considered a single determinative challenge in an election held November 5, 1977,<sup>1</sup> and the Regional Director's report<sup>2</sup> recommending disposition of same. It has reviewed the record in light of the Employer's exceptions and brief and hereby adopts the Regional Director's findings and recommendation.

The single challenge was to a ballot marked with an "X" in both boxes. The "X" in the "No" box had been scratched over with circular markings. At the count of the ballots, the Board agent in charge of the election ruled the ballot to be a "Yes" vote. Employer's counsel objected to that ruling and the ballot was tallied as a challenged ballot.

The Regional Director recommended that the challenged ballot be counted as a "Yes" vote on the grounds that a clear "X" was marked in the "Yes" square and "[i]t is reasonable to infer from the marking in the "No" box that the voter, having used a pen, could not erase his mark and attempted to obliterate the mark therein (footnote citation omitted [sic])." We agree.<sup>3</sup>

Our dissenting colleagues, however, contend that the ballot does not indicate which of the marks represents the intent of the voter. A reference to the ballot quickly demonstrates the fallacy of that view. It is readily apparent that the voter was attempting to obliterate the "X" mark, which had been placed in the "No" square, and thus there is no doubt that the voter intended to cast a "Yes" vote.

In effect, our dissenting colleagues penalize the voter for marking his ballot with a pen. In *J. L. P. Vending Co., Inc.*, 218 NLRB 794 (1975), the Board, including then-Chairman Murphy and Member Jenkins, found a ballot valid and cast for the union where there had been an "attempt at erasure" in the

"No" square and a number of lines placed in the "Yes" square. Here, the voter, having used a pen, appears to have been unable to erase the "X" in the "No" square and therefore attempted to obliterate that mark. The fruits of this attempt are unambiguous and we do not think this Board should be drawing distinctions between attempts at erasure and obliterations by pen, which is the net effect of the dissenting position. Thus, while we share our colleagues' concern that only ballots which clearly reveal the voter's choice should be deemed valid, we are constrained to find that here the voter's choice is clearly revealed and that the ballot here clearly reflects the voter's intent to vote "Yes."<sup>4</sup> Accordingly, inasmuch as the revised tally of ballots shows that Petitioner has received a conclusive majority of the valid votes cast in the election, we shall issue a certification of representative.

**CERTIFICATION OF REPRESENTATIVE**

It is hereby certified that a majority of the valid ballots have been cast for Chauffeurs, Warehousemen and Helpers, International Brotherhood of Teamsters, Local #47 and that, pursuant to Section 9(a) of the Act the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

INCLUDED: All road drivers employed by the Employer at its facility in Abilene, Texas.

EXCLUDED: All mechanics, production and maintenance employees, office clerical employees, salesmen, professional employees, guards, watchmen and supervisors as defined in the Act.

MEMBERS JENKINS and MURPHY, dissenting:

The facts herein are identical to those in *Duvall Transfer and Delivery Service*, 232 NLRB 843 (1977),<sup>5</sup> wherein the Board found a ballot marked in the "Yes" and "neither" squares void, as it did not clear-

<sup>4</sup> *Caribe Industrial and Electrical Supply, Inc.*, 216 NLRB 168 (1975), relied on by our dissenting colleagues is distinguishable. In that case there is no explanation for the vertical line in the box other than that it indicated a selection of that alternative. Thus, the ballot showed two choices as having been selected. Here the voter used markings to cover one of the "X" 's of a nature commonly used to delete material. Thus, it is quite clear that the voter was seeking to remove the "X" from the "No" box by making the circular markings thereby leaving only one choice standing.

<sup>5</sup> Citing *Mercy College*, 212 NLRB 925 (1974). In *Caribe Industrial and Electrical Supply Inc.*, 216 NLRB 168 (1975), the Board panel including Member Penello reached a similar result. There the voter marked a vertical line in the "No" square and a complete "X" in the "Yes" square. The Board, citing *Mercy College*, found the marks cancelled each other and therefore that the ballot failed to disclose the clear intent of the voter.

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 8 for, and 8 against, the Petitioner; There was 1 challenged ballot.

<sup>2</sup> A copy of the ballot is attached hereto. [Omitted from publication.]

<sup>3</sup> We recognize that the facts in this case basically are indistinguishable from those in *Duvall Transfer and Delivery Service*, 232 NLRB 843 (1977), in which a panel consisting of Members Jenkins and Murphy with Chairman Fanning dissenting sustained the challenge to a similarly marked ballot. Accordingly, that Decision is hereby overruled to the extent it is inconsistent herewith.

ly reveal the intent of the voter.<sup>6</sup> We would adhere to that decision.

We conclude that it is not clear here that the voter was attempting to obliterate or erase the mark in the "No" square as the marking is also susceptible to being interpreted as emphasizing a "No" vote. Thus, it is unduly speculative in these circumstances to infer, as did the Regional Director, that the voter was attempting to scratch over and thus obliterate the marking in the "No" square. The Board traditionally declines to engage in such speculation as to what probably occurred in the voting booth and to do so here would be unwarranted.

Our colleagues accuse us of, in effect, penalizing the voter for marking his ballot with a pen, and point

to a case<sup>7</sup> wherein the Board found valid a ballot containing an erasure of a pencil marking in one square of the ballot. In doing so, they fail to understand fully the distinction between cases involving erasure and the situation herein. In the erasure case the mark which had been erased would not constitute a valid indication of choice under any circumstances including the one where the other square or squares remain unmarked. To the contrary, in such a case a mark made in another square unmistakably would indicate the voter's choice. In cases like the instant one, however, either of the designated squares, absent the marking in the other square, would be considered a clear indication of the intent of the voter. We are therefore unwilling to speculate as to the voter's choice by choosing between two valid designations.<sup>8</sup>

<sup>7</sup> *J. L. P. Vending Co.*, 218 NLRB 794 (1975).

<sup>8</sup> We note that the voter here should have avoided the confusion created by his marking both choices by returning the unmarked ballot to the Board Agent conducting the election and obtaining from said agent another ballot as the clear instructions at the bottom of the ballot direct.

<sup>6</sup> A comparison of the copy of ballot here with the copy of the ballot attached to the *Duvall* decision reveals that both contain X's in two squares with one of the X's in one square scratched over with circular markings.