

Kaufman's Bakery, Inc. and International Longshoremen's Association, Petitioner. Case 3-RC-8094

September 28, 1982

DECISION AND DIRECTION

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 3 on June 1, 1981, an election by secret ballot was conducted on June 23, 1981, under the direction and supervision of the Regional Director, among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 26 eligible voters 9 cast ballots for the Petitioner, 9 cast ballots against the Petitioner, and 6 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election.

On July 22, 1981, the Regional Director issued and duly served on the parties his Report on Challenged Ballots recommending that the challenges to the ballots of Bertram Quin and Leroy Roos be sustained, and that the challenges to the ballots of Phillip Palmisano and Wesley Watson and the two irregularly marked ballot challenges be overruled. He further recommended that the two irregularly marked challenged ballots be counted in favor of the Petitioner and that the challenged ballots of Palmisano and Watson be opened and counted, that a revised tally of ballots issue, and that an appropriate certification issue. Thereafter, the Employer and the Petitioner filed timely exceptions to the report. The Board has reviewed the challenges in light of the exceptions and briefs and hereby adopts the Regional Director's findings and recommendations as modified herein.

Two of the challenged ballots were marked in pencil with an "X" and additional marks within the "Yes" box. There were no markings in the "No" box or elsewhere on the ballot. The Regional Director examined the ballots in light of the Board majority's opinion in *San Joaquin Compress & Warehouse Company*, 251 NLRB 23 (1980),¹ and determined that they did not contain the type of random stray marks that led the Board in *San Joaquin* to invalidate a ballot as an inadequate manifestation of voter intent. Instead, the Regional Director concluded that the voters were attempting to emphasize "Yes" votes with additional markings.

Although we agree with the Regional Director's ultimate conclusion that the disputed ballots should be counted as valid "Yes" votes, we disagree with

his analysis. In keeping with the Board's long-established policy of attempting to give effect to voter intent whenever possible, we will hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter. When a ballot reveals a clear "X" almost entirely contained within either the "Yes" box or the "No" box and no irregular markings appear outside the marked box, there can be little doubt but that the voter intends his vote to be counted in favor of or against, respectively, the designated labor organization. To the extent that this view is inconsistent with the majority's opinion in *San Joaquin*, that decision is hereby overruled.

It is, of course, impossible to determine with absolute certainty what meaning a voter attaches to any stray marks he makes on a ballot. Fundamental to our colleague's dissent and the Board's decision in *San Joaquin* is the premise that, by drawing irregular marks over his original "X," a voter may be attempting to cancel his initial selection and cast a "no-choice" vote. Such a voter strategy is an unlikely one, however, in view of the clear ballot instructions that "[i]f you spoil this ballot return it to the Board Agent for a new one." To invalidate a ballot whenever there is the slightest variance from the normal manner of ballot marking will result in the unnecessary disenfranchisement of many voters whose ballots, though clearly indicating the voter's intent, are challenged on the basis of such variance.

Here the irregularly marked ballots indicate with reasonable certainty the employees' intent to vote for the Petitioner. The voters substantially complied with the ballot instructions and there is no suggestion from the configurations within the "Yes" boxes that the voters used their markings for identification purposes. The challenges to the two irregularly marked ballots are therefore overruled, and we find that both ballots are valid votes in favor of the Petitioner.

DIRECTION

It is hereby directed that the Regional Director for Region 3 shall, within 10 days from the date of this Decision and Direction, open and count the ballots of Phillip Palmisano and Wesley Watson and count the two "irregularly" marked ballots as valid "Yes" votes. Thereafter, it is directed that the Regional Director for Region 3 shall prepare and cause to be served upon the parties a revised tally of the ballots, including therein the count of such ballots, upon the basis of which he shall issue the appropriate certification.

¹ Member Jenkins dissented in *San Joaquin*. He joins his colleagues in their adoption of his dissenting opinion.

MEMBER FANNING, dissenting in part:

The ballots we are asked to review further illustrate the impracticality of the Board's resolution to decipher the intent of voters whose ballot markings fall short of a clear and unambiguous expression of intent. As I have stated in my concurring opinion in *Hydro Conduit Corporation*, 260 NLRB 1311 (1982), I favor, pursuant to the Board's rulemaking procedure, adopting a rule that would invalidate any ballot that is not properly marked according to the instructions on its face.

The ballots in the instant case allow an even greater role for subjective interpretation than the one reviewed in *Hydro Conduit*. Here the intent of the voters is open to at least two reasonable competing interpretations. The voters may have intended to emphasize their votes by shading in as much

space within the box as possible. Alternatively, a voter, having made a mistake or had second thoughts about his selection, may have attempted to obliterate his original mark and cast a no-choice ballot. In his hesitation to reveal error or indecision to observers and other voters, it would not be unreasonable for such a voter to disobey the ballot instructions and cancel his vote by physical alteration. As the majority noted previously in *San Joaquin*,² endorsement of either of these interpretations would be based on an unwarranted degree of speculation. Accordingly, unlike my colleagues, I would invalidate the irregularly marked ballots.

² *San Joaquin Compress & Warehouse Company*, 251 NLRB 23 (1980).