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Providence Health & Services—Oregon d/b/a Providence Portland Medical Center and Service Employees International Union Local 49, Petitioner.
Case 19–RC–231425

May 13, 2020

DECISION ON REVIEW AND CERTIFICATION OF
RESULTS OF ELECTION

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The question presented in this case is whether the Regional Director erred in counting a ballot containing a diagonal line in the “No” square and an “X” in the “Yes” square as a vote in favor of the Service Employees International Union Local 49 (the Petitioner) rather than declaring it a void ballot.

On April 11, 2019, the Regional Director issued a Decision and Certification of Representative (pertinent portions of which are attached) in which he adopted the administrative law judge’s recommendation¹ to sustain the portion of the Petitioner’s Objection 15 that alleged the ballot at issue (Ballot 1) showed a clear intent to vote “yes,” and certified the Petitioner as the employees’ bargaining representative. Thereafter, in accordance with

Section 102.69(c)(2) of the National Labor Relations Board’s Rules and Regulations, the Employer filed a timely request for review. The Petitioner filed an opposition.²

Although the Regional Director’s conclusion is consistent with some Board precedent regarding dual-marked ballots (i.e., those with markings in more than one square or box)³, this precedent, discussed more fully below, is convoluted, difficult to apply, and unreliable as a means to divine voter intent. The Employer’s request for review is therefore granted as it raises a substantial issue warranting review. Upon review, we reverse the Regional Director’s Decision and Certification of Representative and overrule the Petitioner’s objection. We find that the ballot at issue was void, and consequently, the Petitioner did not receive a majority of the valid votes cast. Accordingly, we vacate the certification of representative and certify the election results.

I. FACTS

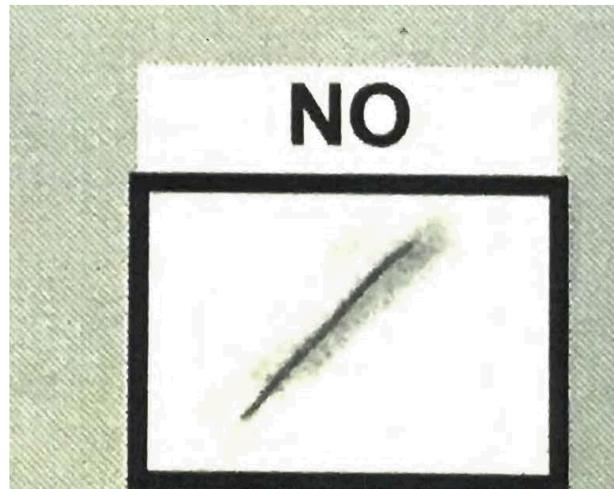
Pursuant to a Stipulated Election Agreement, an election was held on December 12 and 13, 2018. During the ballot count, the Board agent conducting the election declared three ballots void, including Ballot 1, which included an “X” in the “Yes” square and a diagonal line in the “No” square. Ballot 1 is reproduced below, with the diagonal line in the “No” square reproduced in greater detail:

¹ The judge sat as a hearing officer in this representation proceeding.

² The Regional Director also adopted the administrative law judge’s recommendation to sustain the Employer’s recommendation regarding the validity of a second ballot marked void. The Petitioner filed a timely “Conditional Request for Review” of this finding, and the Employer filed an opposition. The Petitioner’s Conditional Request for Review is denied as it raises no substantial issues warranting review.

³ Prior Board decisions have not always been precise in using these terms, but as used herein, “square” refers to the square underneath each voting option (in this case, “Yes” and “No”), and “box” refers to the rectangular shaded area surrounding each square. Our holding today applies to ballots with dual-marked squares and/or boxes.

 UNITED STATES OF AMERICA National Labor Relations Board 19-RC-231425			
OFFICIAL SECRET BALLOT For certain employees of PROVIDENCE HEALTH & SERVICES - OREGON d/b/a PROVIDENCE PORTLAND MEDICAL CENTER			
Do you wish to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49?			
MARK AN "X" IN THE SQUARE OF YOUR CHOICE			
YES <input checked="" type="checkbox"/>			NO <input type="checkbox"/>
DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one. <small>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</small>			



The void ballots were secured in challenged-ballot envelopes. The initial tally of ballots showed 374 votes for the Petitioner and 376 votes against representation, with 44 challenged ballots and the 3 void ballots. The Employer and the Petitioner thereafter filed timely objections. The Petitioner's objections alleged, inter alia, that the Board Agent erred by declaring Ballot 1 void. The Regional Director directed a hearing on challenges and the objections, but following a series of stipulations, the parties resolved all matters except for two void ballots, including Ballot 1. Following the parties' resolution of the challenges, the revised tally of ballots showed 383 votes for the Petitioner and 382 votes against representation,

rendering each of the void ballots potentially dispositive. Following the hearing, the administrative law judge recommended sustaining the Petitioner's objection, finding that Ballot 1 should be counted as a vote for the Petitioner. The Employer filed exceptions.

II. THE REGIONAL DIRECTOR'S DECISION

In reviewing the Employer's two exceptions concerning Ballot 1, the Regional Director adopted the administrative law judge's recommendation to count Ballot 1 as a vote in favor of the Petitioner. Applying Board precedent holding that a dual-marked ballot is void unless the voter's intent can "be ascertained from other markings on the ballot

(such as an attempt to erase or obliterate one mark),⁴ the Regional Director agreed with the judge that “the smudging along the diagonal line in the ‘no’ box is an obvious attempt at erasure of an incomplete ‘X.’” The Regional Director concluded that this distinguished Ballot 1 from the ballots held void in two cases upon which the Employer relied⁵ and instead found that the clear “X” in the “Yes” square, coupled with the “obvious attempt at erasure,” was comparable to the ballot held valid in *Brooks Brothers, Inc.*, 316 NLRB 176, 176 (1995), which had an “unmistakable ‘X’” in the “No” square and an “X” in the “Yes” square that the voter “effectively and clearly obliterated . . . by scratching over it with additional pencil markings[.]” The Regional Director therefore concluded that “it is possible to discern a clear expression of the voter’s intent based on the ballot’s irregular markings” and that Ballot 1 was a valid vote in favor of representation. Based on this conclusion, as well as his determination to count the other void ballot at issue, the Regional Director revised the tally of ballots to reflect 384 votes cast for and 383 votes cast against the Petitioner and issued a certification of representative.

III. DISCUSSION

The Employer’s request for review asserts that the Regional Director misapplied extant Board law regarding dual-marked ballots and, in the alternative, argues that the Board should modify the standard for dual-marked ballots and instead presume that such ballots are void. We find merit in the Employer’s alternative argument.

In *Daimler-Chrysler Corp.*, the Board outlined the principles guiding the Board’s treatment of irregularly marked ballots. The “primary goal in a representation election is to protect the right[s] of individual employees to choose whether or not to be represented by a union.” 338 NLRB 982, 982 (2003) (quoting *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951)). To effectuate that goal, the Board is guided by three principles: first, the Board assumes that by casting a ballot, the voter “evinces an intent to participate in the election process and to register a preference”; second, the Board gives effect to this preference whenever possible; and third, the Board avoids “speculation or inference regarding the meaning of atypical ‘X’s, stray marks, or physical

alterations.” *Daimler-Chrysler*, 338 NLRB at 982–983 (collecting cases).

With respect to the third principle, the Board in *Daimler-Chrysler* emphasized that “it is not the Board’s role to glean voter intent from ambiguous or contradictory markings on a ballot,” and, specifically addressing dual-marked ballots, stated that “when a voter has marked both squares, and neither an erasure or attempted obliteration of the second marking nor other markings on the ballot makes clear the voter’s preference . . . we do not speculate as to which mark best represents the voter’s intent and thus are unable to count the ballot.” *Id.* at 983. The Board also acknowledged, however, that “[s]o-called dual-marked ballots often present difficult decisions.” *Id.* at 983 fn. 5 (citations omitted).

In our view, the decision in *Daimler-Chrysler* failed to recognize or adequately address the Board’s complicated history with dual-marked ballots. In fact, we find it difficult to discern any consistent approach or principle guiding the Board’s decisions in this area, especially with respect to ballots that—like Ballot 1—have an “X” in one square and a diagonal line in another. Before 1975, the Board alternated between declaring such ballots void and counting them as a vote for whichever square contained an “X.”⁶

In 1975, the Board changed course. In *Caribe Industrial & Electrical Supply, Inc.*, 216 NLRB 168 (1975), the Board found that a ballot containing a vertical line in the “No” square and an “X” in the “Yes” square was void because the voter’s intent was not “clearly expressed.” In doing so, the Board declined to follow *Belmont* (describing it as “inconsistent”) and found that *Gifford-Hill* was “distinguishable on its facts as there was no attempted erasure or other attempt to obliterate one of the conflicting marks.” *Id.* at 168–169, 169 fn. 4. Later, in *TCI West, Inc.*, the Board clarified that *Caribe* had effectively overruled *Belmont*. 322 NLRB 928, 928–929 (1997), *enf. denied* 145 F.3d 1113 (9th Cir. 1998). Accordingly, the Board’s inquiry in dual-marked ballot cases examines whether the voter’s intent can “be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark),” and if not, “the ballot is void because it fails to disclose the clear intent of the voter.” *Id.* at 928.

⁴ *TCI West, Inc.*, 322 NLRB 928, 928 (1997), *enf. denied* 145 F.3d 1113 (9th Cir. 1998).

⁵ See *id.* at 928–929 (ballot void where it contained “single diagonal line” in the “Yes” square and an “X” in the “No” square); *Mercy College*, 212 NLRB 925, 925 (1974) (ballot void where it was marked with an “X” in both squares and contained “heavy overshadowing” in the “No” square).

⁶ Compare *Iroquois China Co.*, 55 NLRB 290, 290–291 (1944) (Board concluded that ballot with “X” in “Yes” square and diagonal line in “No” square was void); *Bon Tool & Die Co.*, 115 NLRB 103, 104–

105 (1956) (same), with *Belmont Smelting & Refining Works, Inc.*, 115 NLRB 1481, 1481–1483 (1956) (overruling *Bon Tool* and finding ballot with a clear “X” in the square for one choice and a diagonal line in the square for a second choice was valid and that the vote counted for the first choice); *Gifford-Hill & Co.*, 181 NLRB 729, 729 (1970) (finding ballot containing “distinct ‘X’” in “No” square and diagonal line in “Yes” square was “no” vote because it was “reasonable to infer from the marking in the ‘yes’ [square] that the voter, lacking an eraser, attempted to blur with his pencil the slant mark he made”).

Although the *TCI West* Board's description of post-*Caribe* cases is generally accurate, the analysis contained in those cases was far from clear or consistent. For example, in *J.L.P. Vending Co., Inc.*, the Board considered a ballot with a single diagonal line in the "No" square "and several diagonal lines, superimposed one on top the other," in the "Yes" square. 218 NLRB 794, 794 (1975). In counting this ballot as a "yes" vote, the Board stated that it was "clear . . . from looking at the ballot . . . that an attempt was made to erase the single diagonal line" in the "No" square, and that this "attempt at erasure of the single diagonal line in the 'No' [square] and his placement of several heavy lines in the 'Yes' [square] for emphasis makes clear to us the choice he intended by his vote[.]" *Id.* Other cases involving similar variations of dual-ballot markings would follow. See, e.g., *Abtex Beverage Corp.*, 237 NLRB 1271, 1271 (1978) (counting as a "yes" vote a ballot with an "X" in both the "Yes" and "No" squares, with the "X" in the "No" square having "been scratched over with circular markings," indicating an attempt to "obliterate the mark");⁷ *Brooks Brothers*, 316 NLRB at 176 (finding voter had "effectively and clearly obliterated" an "X" marked in pencil in the "Yes" square "by scratching over it with additional pencil markings," while also making "an unmistakable 'X'" in the "No" square, indicating a "no" vote); *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 281, 300 (1995) (affirming the judge's finding that a ballot with an "X" in the "No" square that was "heavy, clear, more intense, and contains a double line on one leg of the X" was a "no" vote because the "lightly marked x" in the "Yes" square was "covered by the kind of smudges caused by an inadequate eraser[.]"); *Osram Sylvania, Inc.*, 325 NLRB 758, 758–759 (1998) (counting as "no" vote a ballot with a smudged diagonal line in "Yes" square and an "X" in "No" square accompanied by six additional "X"s in the "No" box, finding the smudged mark to be "an attempted erasure").

Although the cases discussed above demonstrate how the Board has relied on additional markings or attempted erasures on ballots to determine a voter's preference, the following cases show that the inverse is also true; that is,

the absence of such clear markings or erasures has led the Board to declare dual-marked ballots void. Thus, in *TCI West*, discussed above, the Board concluded that a ballot with a "single diagonal line" in the "Yes" square and an "X" in the "No" square was void because "the voter did not attempt to correct the markings in either box. . . ." *TCI West*, 322 NLRB at 928–929; see also *Bishop Mugavero Center*, 322 NLRB 209, 209 (1996) (Board voided ballot marked with an "X" in "No" square and a diagonal line in "Yes" square because it was unaccompanied by other markings evidencing the voter's intent). Further, in *Parts Depot, Inc.*, the Board affirmed an administrative law judge's finding that a ballot was void because although it contained an "X" in "Yes" square that was "rather faint" and possibly "the result of a brief attempt to erase the mark," the "multiple heavy dark pencil lines" that looked "similar to a rough asterisk" in the "No" square left the voter's intent ambiguous. 332 NLRB 670, 670, 729 (2000), *enfd.* 24 F. Appx. 1 (D.C. Cir. 2001) (*per curiam*).

From the foregoing survey of precedent, one can clearly see how cases applying *Caribe* illustrate a seemingly limitless variety of irregular markings that a voter may apply to a ballot and the difficulty of interpreting such markings objectively. Since at least *Caribe*, the Board's decisions in dual-ballot cases have turned on whether, in the Board's judgment, smudge marks resembled erasure marks; whether extra lines suggested obliteration attempts in the absence of an eraser; whether other extra lines indicated attempts at emphasizing the underlying vote; whether an asterisk is the same as an "X"; and similar considerations. Such variable fact patterns and nuanced analysis has led inexorably to an inconsistency in Board adjudications of dual-marked ballots that the United States Court of Appeals for the Ninth Circuit has understandably criticized.⁸ In discussing the Board's treatment of dual-marked ballot cases, including several of those described above, the court stated that "[a]n examination of NLRB decisions reveals how difficult (and how subjective) it is to enforce this 'attempted erasure' policy," because a voter's partial erasure could be so clean that the Board could not detect the erasure, or an extra mark could contain a "slight

⁷ In *Abtex*, *supra* at 1271 fn. 3, the Board expressly overruled *Duvall Transfer and Delivery Service*, 232 NLRB 843 (1977). In *Duvall*, the Board found that a ballot marked in pen with an "X" in the square for the Teamsters and also containing an "X" in the "Neither" box, "which had been scratched over with circular markings," was void, because it was unclear whether the markings in the "Neither" box were an attempt to obliterate or emphasize the X. *Id.* at 843–844. As then-Chairman Fanning explained in his *Duvall* dissent, the Board's exclusive focus on "erasure" as the distinguishing feature created the absurd result that those who voted with pencil could attempt to erase and cast a valid vote but those writing in ink could not. *Id.* at 844 (opining that the circular scratches in the "Neither" box were the "equivalent of an 'attempt at

erasure," because "a voter who uses ink cannot successfully erase a mistake but must scratch it out."). In overruling *Duvall*, the *Abtex* Board acknowledged that *Duvall* was "basically . . . indistinguishable" and therefore overruled it. 237 NLRB at 1271. Notably, *Abtex* relied on *J.L.P. Vending*, which *Duvall* had claimed was distinguishable. Thus, even in the wake of *Caribe*, the Board's approach in this area was not necessarily consistent, especially with regard to what types of additional markings were sufficient to demonstrate a "clear" intent.

⁸ *TCI West*, 145 F.3d at 1115–1116; *NLRB v. Leonard Creations of California*, 638 F.2d 111, 113 (9th Cir. 1981) (counting ballot as "no" vote that Board had counted as void), denying enforcement of 243 NLRB 832 (1979).

smudge,” which “the challenging party claims is an attempted erasure but the Board concludes is merely a result of sweaty hands[.]” *TCI West*, 145 F.3d at 1115–1116.⁹ Indeed, “[t]he determination of whether or not a voter has attempted erasure is just as subjective as determining the voter’s intent.” *Id.* at 1116.

We agree with the court’s conclusion in *TCI West* that attempts to determine voter intent based on additional markings, attempted erasures, smudges, or other ostensible “corrections” are impermissibly subjective. The Board has no special expertise in judging whether stray markings represent attempted erasures or obliterations, and, as a result, each of the decisions discussed above ultimately resorted to speculation as to the possible meaning of dual-marked ballots. In some instances, this speculation may have been more or less informed, but, regardless, any speculation by the Board is inconsistent with the third principle articulated in *Daimler-Chrysler*. See *Daimler-Chrysler*, 338 NLRB at 983 (stating that the Board should avoid “speculation or inference regarding the meaning of atypical ‘X’s, stray marks, or physical alterations.”).

The instant matter exemplifies the problems inherent in any attempt to try to discern a voter’s intent when reviewing a dual-marked ballot. As displayed in the reproduction of Ballot 1, above, there is no doubt that the diagonal line in the “No” square is smudged or blurred. It may well be that, as the Regional Director concluded, this represents an intentional marking, such as an attempted erasure or obliteration. But it is also possible that—consistent with the Ninth Circuit’s concern in *TCI West*—this is no more than a smudge caused by the voter’s sweaty hands or the manner in which the voter folded the ballot. Indeed, without testimony from the person who cast Ballot 1—an impossibility given that the Board is charged with conducting elections by secret ballot¹⁰—any discussion of what such ballots mean in terms of “objective” intent is, by nature, speculative. Determining voter intent based on markings that could be completely unintentional is beyond the Board’s special expertise, is susceptible to becoming a subjective inquiry, and ultimately rests on speculation of the sort the Board has otherwise committed itself to

avoiding. Moreover, it is not an efficient use of agency resources to engage in a potentially labor-intensive inquiry into whether, for example, a smudge or blur on a ballot was an attempt at erasure or an inadvertent marking caused by a sweaty hand or the manner in which a voter folded a ballot.¹¹ In short, the Board cannot objectively determine a voter’s intent under these circumstances.

In light of these concerns, and in the service of enhancing clarity and predictability in this important area of Board law, we have concluded that the Board and our stakeholders will best be served by the establishment of an objective, bright-line rule pertaining to dual-marked ballots. Accordingly, we now hold that where a ballot includes markings in more than one square or box, it is void. We overrule any cases in conflict with this principle.¹² This bright-line approach will spare the Board from engaging in necessarily speculative inquiries to ascertain voter intent, and will also preserve Board and party resources by applying a clear, objective standard that will avoid the litigation that has accompanied the Board’s prior approach to dual-marked ballots. This new approach will also permit the Board to more expeditiously certify election results and define parties’ respective rights and duties.

We will apply this new standard retroactively. “The Board’s usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage.” *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019) (citations and internal quotation marks omitted). Indeed, in representation cases such as this one, the Board’s established presumption is to apply a new rule retroactively unless doing so would work a manifest injustice. *Id.* In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application. *Id.* Here, the Board’s precedent in this area has been inconsistent, speculative, and subjective. Further, the parties have only relied on it in litigating this specific objection, which arose only after the ballot was cast. Retroactive application will also serve the purposes of the Act by bringing immediate clarity and

⁹ Cf. *Belmont*, 115 NLRB at 1482 (explaining that the “Neither” square was “‘darker than the surrounding area[.]’ which may have been caused by a fold in the ballot as the voter used a soft lead pencil, or an attempt on the part of the voter to smudge the box either intentionally or unintentionally, or an attempt to erase the marking with the end of a pencil which lacked an eraser,” but nevertheless determining that due to the clear “X” in the square for Edward Kramer, the ballot was a vote for Kramer rather than void) (internal quotation marks omitted).

¹⁰ See Sec. 9(c)(1) of the Act. Moreover, the Board does not allow after-the-fact testimony by voters about their voting conduct. Cf. *Pea Ridge Iron Ore Co.*, 335 NLRB 161, 161 (2001) (citation omitted).

¹¹ The actual cause of marks, smudges, and blurs is almost impossible to ascertain after a voter has cast his or her ballot. In fact, in *Mediplex*

of Connecticut, 319 NLRB at 298, the parties stipulated into evidence the pencil used during the election, but it was still not possible to pinpoint the issue with any exactitude, as it was “unknown at what point the eraser was worn down and thus when and if its defect was brought to the Board agent’s attention.”

¹² Because our holding requires that a ballot be voided if there are any markings in more than one square or box, it broadly encompasses situations such as that presented in *Thiele Industries*, where the Board counted as a “yes” vote a contested ballot containing a diagonal line in the “No” square and an “X” in the “Yes” square, as well as a hand-drawn circle around the word “Yes” above the “Yes” square. 325 NLRB 1122, 1122 fn. 1 & 1124 (1998). We therefore overrule *Thiele Industries* and similar cases.

uniformity to this area, and, because we certify the results in this decision, will not prolong the final resolution of the question of representation. Finally, the parties could not be prejudiced by their reliance on prior Board law because they do not cast ballots, and we think it highly unlikely that the employee who cast Ballot 1 did so in reliance on our dual-marked ballot precedent.¹³

Finally, we are persuaded that, in addition to the bright-line rule adopted above, a modification of the Board's official election ballot language will help to reduce or eliminate instances of dual-marked ballots.¹⁴ Currently, as shown in the reproduction of Ballot 1 above, NLRB official ballots contain the following instructions:

MARK AN "X" IN THE SQUARE OF
YOUR CHOICE

DO NOT SIGN THIS BALLOT. Fold and drop it in the ballot box.

If you spoil this ballot, return it to the Board agent for a new one.

Although this final statement is designed to encourage voters who make stray or dual marks to ask the Board agent conducting the election for another ballot, it has proved ineffective. It may be that voters unfamiliar with the Board's processes and terminology simply do not understand the word "spoil" to include a dual-marked ballot situation. Indeed, nearly 70 years ago the United States Court of Appeals for the First Circuit expressed concerns over whether a voter casting a dual-marked ballot would understand that such a ballot was "spoiled" and therefore would not be counted.¹⁵ Whatever the case, in order to provide clarity in the ballot instructions, we revise the Board's official ballot language to replace the instruction of "If you spoil this ballot, return it to the Board agent for a new one" and "Do Not Sign this Ballot," with the following language:

Do not sign or write your name or include other markings that would reveal your identity. Mark an "X" in the

square of your choice only. If you make markings inside, or anywhere around, more than one square, return your ballot to the Board Agent and ask for a new ballot. If you submit a ballot with markings inside, or anywhere around, more than one square, your ballot will not be counted.

This language will appear on both the actual ballots cast by employees in the election and the sample ballot included with the notice of election. We believe that this modification will provide voters with clearer guidance concerning what markings may result in a void ballot and when to request a new ballot. Combined with the bright-line rule holding dual-marked ballots void, this new ballot language will serve to promote uniformity in Board procedures, increase the prospect that each voter's intended choice is clearly reflected on the ballot and counted toward the final tally, reduce the likelihood of postelection litigation, and enhance the finality of Board elections.¹⁶

Accordingly, we reverse the Regional Director's Decision and Certification of Representative. We hereby overrule the Union's objections and find that Ballot 1 was void. As a result, 383 votes were cast for the Petitioner and 383 were cast against representation. We shall therefore certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for the Service Employees International Union Local 49, and that it is not the exclusive representative of the bargaining-unit employees in the unit below:

All full-time, regular part-time and per diem non-professional employees employed by the Employer at its acute care hospital located at 4805 NE Glisan St., Portland, Oregon in the following classifications: Aide Perioperative 1, Aide Perioperative 2, Aide Rehab, Assoc Mental Hlth, Asst Food Svc 2, Asst Food Svcs, Asst Imaging Tech, Asst-Resource, Asst Sterile Processing, Attend

¹³ Compare *Wal-Mart Stores, Inc.*, 351 NLRB 130, 135 (2007) (declining to retroactively apply a recent Board decision finding that non-unionized employees did not have *Weingarten* rights where discharged employee had relied upon then-extant law affording nonunionized employees *Weingarten* rights by insisting on having witness present for investigatory interview), with *SNE Enterprises*, 344 NLRB 673, 673-674 (2005) (applying *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) retroactively in absence of evidence supervisors "took pre-*Harborside* law into account before engaging in their conduct during the election campaign," and explaining that case "concern[ed] the validity of a representation election, not the resolution of an unfair labor practice or other legal liability").

¹⁴ No party has argued that the voter who cast Ballot 1 would have requested a new ballot and cast a valid vote had the ballot contained clearer instructions. Even if that were the case, it would still be inappropriate to count Ballot 1 for all the reasons stated above.

¹⁵ See *NLRB v. Whitinsville Spinning Ring Co.*, 199 F.2d 585, 588 (1st Cir. 1952) (although the Board's official secret ballot directs "the voter to obtain a new ballot if he 'spoiled' the original one, the word 'spoiled'" is not defined, "and it is difficult for us to say that the average voter would consider a ballot 'spoiled' merely because it contained a slight erasure.") The Board itself acknowledged this concern more than 40 years ago. See *J.L.P. Vending*, 218 NLRB at 794 (quoting *Whitinsville Spinning Ring*, supra at 588).

¹⁶ Naturally, this new ballot language is applicable only prospectively, and will be implemented as soon as practicable. Because the sole purpose of this change is to provide voters with better guidance so to prevent the casting of dual-marked ballots, the conduct of an election with ballots using the now-defunct "spoiled" language will not be grounds for filing objections.

Cleaning, Attend Cleaning Lead, Attend Housekeeping 2, Bed Control Coordinator, Buyer-Food, CNA 2, CNA 2 HUC, CNA 2 Med Surg, Cook, Cook Ld, Cook Prep Grill, Coord-Bed Placement, Coord-Food Svcs, Coord-Hlth Unit, Coord-Office, Coord-Pre Surg Info, Coord-Scheduler/Timekeeper, Coord-Scheduling, Coord-Scheduling LD, Coord-Specialty Scheduling, Coord-Staffing, Coord-Sterile Processing Svc, Diagnostic Imaging Support Specialist, Distributor Linen, Distributor Linen Ld, ED Support Spec, Ld-Food Nutrition, Medical Assistant Cert, Patient Escort, Patient Escort Ld, PBX Operator, Pharm-Tech/Tech-Med History Pharm, Phlebotomist, Phlebotomist 2, Qualified Mental Health Associate, Receptionist, Registrar, Scheduler-Diagnostic Imaging, Rep-Patient Relations, Scheduler-Diagnostic Imaging LD, Scheduler-Heart and Vascular, Spec-CV Scheduling, Spec-DI Support Lead, Spec-Floor Care, Spec-Mental Health, Spec-PT Dining, Spec-Surg Scheduling, Staffing/Unit Facilitator, Storekeeper-Nutrition Services, Tech Anesthesia Cert, Tech-1 -Pharm Acute OC, Tech Anesthesia Ld, Tech Anesthesia Non Cert, Tech ECG/EKG, Tech ECG/EKG Senior, Tech Endoscopy, Tech ER, Tech Hemodialysis, Tech Monitor, Tech Monitor Ld, Tech Pharmacy, Tech-Pharm Inventory/Purchaser, Tech Sterile Processing 1, Tech Sterile Processing 2, Tech Videographer Equipment, Tech 1Pharm Acute, Tech 2 Pharm Acute and Tech 3 Pharm Acute, but excluding all other non-professional employees, Supply Chain Tech I, Coord-Pharm Pyxis, professional employees, physicians, registered nurses, technical employees, business office clerical employees, skilled maintenance employees, managerial employees and guards and supervisors as defined by the Act.

Dated, Washington, D.C. May 13, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

¹ The following abbreviations will be used to refer to relevant documents and evidence, if applicable. The Employer’s Exceptions are “Exc.,” the Employer’s Exceptions Brief is “Exc. Brf.,” the Petitioner’s Answering Brief is “Ans. Brf.,” the Hearing Officers Report is “Report,”

(SEAL) NATIONAL LABOR RELATIONS BOARD

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on December 12 and 13, 2018, in a unit of non-professional employees of Providence Health and Services—Oregon d/b/a Providence Portland Medical Center (“Employer”). The tally of ballots showed that of the approximately 838 eligible voters, 374 cast ballots for Service Employees International Union Local 49 (“Petitioner”), and 376 cast ballots against representation. Further, there were three ballots declared void by the Board Agent and 44 challenged ballots determinative to the election results. Both parties filed subsequently filed objections.

On January 30, 2019, the parties reached a stipulation resolving all matters except their objections to two of the ballots the Board Agent declared void. Pursuant to the stipulation, 15 previously-challenged ballots were opened and counted on January 30, 2019, resulting in a revised tally of ballots showing that of the approximately 838 eligible voters, 383 cast ballots for the Petitioner and 382 cast ballots against representation. The two ballots declared void by the Board Agent remained potentially determinative to the election results and a hearing on objections was held on January 31, 2019, before a Hearing Officer. On February 21, 2019, the Hearing Officer issued a report in which she recommended sustaining both the Petitioner’s and Employer’s objections to the void ballots and issuing a certification of representation. Both parties filed exceptions to the Hearing Officer’s recommendations.¹

The Hearing Officer’s rulings made at hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that the Petitioner’s objection regarding the validity of one ballot marked as void should be sustained. I also agree with the Hearing Officer that the Employer’s objection regarding the validity of the other ballot marked as void should be sustained. I further find that the Hearing Officer did not err in finding that the Employer timely objected to the ballot it sought to contest. Accordingly, I am issuing a Certification of Representation.

I. BACKGROUND

As described in the Report, the initial tally of ballots dated December 13, 2018, showed 44 challenged ballots

the Hearing Transcript is “Tr.,” Board Exhibits are “Bd. Ex.,” the Employer’s Exhibits are “Er. Ex.,” the Petitioner’s Exhibits were marked as “Union exhibits” and so are “U. Ex.”

and three ballots declared void by the Board Agent. The ballots declared void were secured in challenged ballot envelopes. The void ballots were secured in challenged ballot envelopes and the Report title mistakenly references challenged ballots. The two ballots at issue were void ballots and the Report, as well as this decision, address, the parties' objections to the Board Agent's decision to void those ballots and their exceptions.

The void ballots are accurately described in the Report. The first void ballot, hereinafter referred to as "Ballot 1," contains an "X" in the "yes" box and a smudged diagonal line in the "no" box. (Bd. Ex. 2.) The second void ballot, hereinafter referred to as "Ballot 2," contains an "X" in the "no" box and additional markings in the shape of ovals on the "no" box, some of which go outside the outline of the box. There are no markings in or around the "yes" box of Ballot 2 and there is scribbling on the back of the ballot. (Bd. Ex. 3.)

The record reflects that the Board Agent wrote the parties' positions on the challenged ballot envelope used to secure Ballot 1. (Er. Ex. 1.) The Petitioner's position was that it was a valid ballot and the Employer's position was that it was an invalid ballot. The record does not indicate what, if anything, was written on the challenged ballot envelope used to secure Ballot 2.

On December 20, 2018, the Petitioner timely filed objections numbered 1–16 with the Board. The Petitioner's objection identified as Objection 15 raises several objections, including an objection to the Board Agent's voiding of Ballot 1. (Bd. Ex. 1(b).) On December 20, 2018, the Employer timely filed its objections numbered 1–4 and 7–11. (Bd. Ex. 1(b).) None of the Employer's objections addressed the void ballots. However, on the same date, the Employer also timely filed a position statement with the Board, which addressed its position on the 44 determinative challenged ballots and the void ballots, stating the following:

The Board Agent declared three ballots "void." PPMC's position is that one of those ballots—which clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot—should have been counted.

PPMC agrees with the Board Agent's determination that the other two ballots were "void" because the voter's intent was not clear.

(Er. Ex. 2.)

² What the Hearing Officer designated as "Ballot 1" in her Report, and what I also refer to as "Ballot 1" in this decision, was identified in the hearing transcript as "void ballot 2 of 3" and entered into the record

On January 30, 2019, I allowed the Employer to amend its objections to include an objection regarding the void ballots. The additional Objection 12 states in its entirety:

Without waiving any argument that it was not required to file, or that it has properly amended its Objections, the Employer objects to the consideration of a ballot the Board Agent initially and properly declared void. The Board Agent appropriately determined that the ballot was void because the voter's intent was unclear under the Board's established policy and case law.

The Employer immediately challenged the ballot as void, and preserved its position at the time of the count. The Employer's contemporaneous challenge and objection is clearly noted on the challenged ballot envelope provided by the Agency for just that purpose. Further, because the Board Agent properly treated the ballot as a challenged ballot, the Employer reiterated the basis for its challenge in its Statement of Position regarding the challenged ballots.

The basis for the Board Agent's determination, that the ballot was void because—like another ballot the parties stipulate is void—the voter marked both the "YES" and "NO" boxes of his or her ballot. That determination should be affirmed. As void, the ballot should not be counted.

(Bd. Ex. 1(d).)

On January 30, 2019, the parties entered into a stipulation resolving all challenges and objections other than Petitioner Objection 15 and Employer Objection 12. (Bd. Ex. 1(e).) These objections were the only remaining issues before the Hearing Officer.

At the January 31, 2019 hearing before the Hearing Officer, the Petitioner withdrew all parts of Objection 15 other than its objection to the decision to invalidate as void Ballot 1, which was entered into the record as Board Exhibit 2.2.² (Tr. 10:13–24.) Therefore, the two outstanding objections before the Hearing Officer were the Employer's Objection 12, and the Petitioner's Objection 15, limited to the decision to invalidate as void Ballot 1.

II. THE OBJECTIONS AND EXCEPTIONS TO THE HEARING OFFICER'S REPORT

A. THE EMPLOYER'S EXCEPTIONS

The Employer filed two timely exceptions to the Hearing Officer's Report, contending that: (1) the Hearing Officer failed to apply the Board's requirement "that the

as Board Exhibit 2. The Hearing Officer helpfully clarified for the record that Board Exhibit 2 is the ballot that has an "X" in the "yes" box and a mark in the "no" box. (Tr. 10:19–24.)

intent of the voter in marking the ballot must be clearly and unequivocally expressed and (2) the Hearing Officer erred by concluding that Ballot 1 should be counted as a vote in favor of unionization.

I find that the Hearing Officer did not fail to apply the appropriate Board standards in analyzing the ballots. I agree with the Hearing Officer that Ballot 1 shows clear intent to vote “yes” and therefore uphold the Hearing Officer’s decision to sustain the Petitioner’s objection, find that the Ballot 1 is not void, and count it as a “yes” vote in favor of the Petitioner.

The Board’s primary purpose in representation elections is to protect the right of individual employees to choose whether to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). To accomplish that goal, the Board has developed principles concerning irregularly marked ballots. In *re Daimler-Chrysler Corp.*, 338 NLRB 982, 982 (2003). First, the Board assumes that by casting a ballot, a voter evinces an intent to participate in the election process and register a preference. Second, this preference must be given effect whenever possible. Third, the Board avoids speculation or inferences regarding the meaning of atypical “Xs,” stray marks, or physical alterations.” See *Daimler-Chrysler*, 338 NLRB at 982–983, and cases cited therein.

In attempting to give effect to voter intent whenever possible, the Board will count irregularly marked ballots that show any unambiguous expression of voter intent. *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982). Ballots that are signed or otherwise identify the voter are invalid. See *Standard-Coosa-Thatcher Company*, 115 NLRB 1790 (1956); *Ebco Mfg., Co.*, 88 NLRB 983, 985 (1950). When a voter “marks both boxes on a ballot and the voter’s intent cannot be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark), the ballot is void because it fails to disclose the clear intent of the voter.” *TCI West, Inc.*, 322 NLRB 928 (1997); see also *Caribe Industrial & Electrical Supply*,

216 NLRB 168 (1975); *Bishop Mugavero Center*, 322 NLRB 209 (1996).

The Employer compares the Ballot 1 with the ballot in *TCI West, Inc.* While Ballot 1 is similar in its markings to those in *TCI West, Inc.*, it is critically different in that it has an additional erasure that was not present in *TCI West, Inc.* The Employer also argues that *Mercy College*, 212 NLRB 925 (1974), is instructive. In *Mercy College*, the challenged ballot had an “X” in the “yes” box but also had a discernable “X” in the “no” box that was heavily shaded over. The Board found that the ballot was not “free from doubt” because “the markings in either of the designated squares, absent the marking in the other square, would be considered a clear indication of the intent of the voter” and that the shading was inadequate to show that an attempt to obliterate that choice had occurred. *Id.* at 925; *Brooks Brothers, Inc.*, 316 NLRB 176, 176 (1995).

However, the Board in *Brooks Brothers, Inc.* found that a ballot with an “X” in the “no” box but also an apparent “X” in the “yes” box scratched over with additional markings was valid. 316 NLRB at 176. The Board found that these markings were sufficient to provide a clear indication of the voter’s intent because the voter clearly obliterated the “X” in the “yes” box and left an “unmistakable ‘X’ in the ‘no’ box.” *Id.* In determining the validity of the ballot, the Board considered the *Mercy College* case and distinguished it as an instance in which “the Board found that the shading added to one side of the ballot was inadequate to show that an attempt to obliterate that choice had occurred.” *Id.* Like the Board in *Brooks Brothers, Inc.*, I find *Mercy College* distinguishable from the situation at hand, and I agree with the Hearing Officer that the smudging along the diagonal line in the “no” box is an obvious attempt at erasure of an incomplete X. The ballot also contains an unmistakable “X” in the “yes” box. Therefore, it is possible to discern a clear expression of the voter’s intent based on the ballot’s irregular markings, and the Hearing Officer properly applied Board standards in determining the ballot to be a valid “yes” vote for representation.