

**Bishop Mugavero Center for Geriatric Care, Inc.
and Local 144, Hotel, Hospital, Nursing Home
& Allied Services Union, Service Employees
International Union, AFL-CIO, Petitioner.
Case 29-RC-8537-S¹**

September 27, 1996

**DECISION AND CERTIFICATION OF
REPRESENTATIVE**

**BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX**

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held January 25, 1996, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Runoff Election. The corrected tally of ballots shows 88 for and 86 against the Petitioner, with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations,² and finds that a certification of representative should be issued.

We affirm the Regional Director's recommendation that a ballot marked with an "X" in the "No" box and a diagonal line in the "Yes" box be considered void, and therefore not counted. The Regional Director's recommendation is consistent with well-established Board precedent holding that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot, the ballot is void. E.g., *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975). Contrary to our dissenting colleague, we would not overrule that precedent. Because we believe that the voter's intent in this case is not free from doubt, we conclude that the ballot must not be counted.

¹ We have added the letter "S" to the case number herein in order to distinguish this proceeding from another case currently pending before the Board with the same case name and number.

² In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendations that the Employer's Objections 3 and 4 be overruled.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, Service Employees International Union, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time nonprofessional employees employed by the Employer at its facility located at 155 Dean Street, Brooklyn, New York, but excluding all RN's, LPN's, social workers, receptionists, business office clerical employees (including admission clerk), executive secretaries to the Director of Nursing, administrative assistant to the Administrator, assistant to the Director of Personnel, physical therapist, occupational therapist, confidential employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

CHAIRMAN GOULD, dissenting.

My colleagues are adopting a Regional Director's finding that a ballot marked with an "X" in the "No" box and a single diagonal line in the "Yes" box should not be counted. In my view the voter has clearly indicated an intent to cast a "No" vote and, therefore, the ballot should be counted.

The instructions on the ballot tell the voter to "Mark an 'X' in the square of your choice." The diagonal line in the "Yes" box is not sufficient to negate the clear choice that the voter has made in marking the "No" box. Only the "No" box has a completed mark. As the Ninth Circuit found under almost identical circumstances in *NLRB v. Leonard Creations of California*, 638 F.2d 111 (9th Cir. 1981), cert. denied 452 U.S. 955 (1981), it follows that the voter intended to register a "No" vote rather than a meaningless gesture of indecision.¹

¹ I would overrule *Caribe Industrial & Electrical Power*, 216 NLRB 168 (1975), to the extent that it is inconsistent.