

TCI West, Inc. and its subsidiaries San Leandro Cable Television, Inc. d/b/a TCI Cablevision of Hayward, TCI Cablevision of California, Inc., and United Cable Television Corp. d/b/a TCI Cablevision of Hayward and International Brotherhood of Teamsters, Local Union 856, AFL-CIO. Case 32-CA-15727

January 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

Pursuant to a charge and first amended charge filed on October 4 and 17, 1996, respectively, the General Counsel of the National Labor Relations Board issued a complaint on October 22, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 32-RD-1237. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 13, 1996, the General Counsel filed a Motion for Summary Judgment. On November 14, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 2, 1996, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's disposition of a challenged ballot in the representation proceeding. Specifically, the Respondent contends that the Board's decision not to count as a "No" vote a ballot which was marked with a single diagonal line in the "Yes" box and an "X" in the "No" box is contrary to the Board's policy of giving effect to a ballot that clearly manifests the voter's intent.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. Nonetheless, we take this opportunity to ex-

plain more fully the Board's decision in light of the Respondent's contentions.

Contrary to the Respondent's assertion, the Board's decision 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 (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. *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975); *Bishop Mugavero Center*, 322 NLRB No. 32 (Sept. 27, 1996). In the instant case, the voter did not attempt to correct the markings in either box, nor did the voter request a new ballot, even though the ballot clearly stated, "If you spoil this ballot return it to the Board Agent for a new one." Thus, although it is possible that the voter in this case intended to vote against union representation, the Board does not engage in speculation as to voter intent, but requires that the intent of the voter in marking the ballot must be clearly and unequivocally expressed. See *Mercy College*, 212 NLRB 925 (1974). Here, because the ballot was marked in both boxes, the Board, in its judgment, was unable to ascertain the intent of the voter with the required degree of certainty, and concluded, consistent with precedent, that a ballot so marked should not be considered in determining the representation rights of the unit employees. The Respondent's suggestion that our decision is fatally flawed because it is inconsistent with precedent of the judicial circuit in which this case arises—in particular, *NLRB v. Leonard Creations of California*, 638 F.2d 111 (9th Cir. 1981), cert. denied 452 U.S. 955 (1981)—is also no basis for reconsidering our decision. As we have explained before, our duty to apply uniform policies under the Act, and the Act's venue provisions for review of our decisions, make it impractical for us to acquiesce in every contrary decision by the Federal courts of appeals.¹ In any event, it is not clear to us that the Ninth Circuit would be bound to deny enforcement in this case. We do not disagree with the Ninth Circuit statement that the underlying principle favors inclusion of a ballot in an election tally "where the voter's intent has been clearly manifested," (emphasis added), *NLRB v. Leonard Creations of California*, supra at 112. Although the court in *Leonard Creations* reached a different result in applying that principle to the facts, the court relied in part on its finding that the Board's policy has often resulted in inclusion of ballots with marks in both squares, citing, inter alia, *Belmont Smelting Works*, 115 NLRB 1481 (1956). However, in *Caribe Industrial & Electrical Supply*, supra at 169 fn. 4, the Board specifically declined to follow *Belmont Smelting Works*, in effect overruling that holding. Accordingly, we adhere

¹*Arvin Industries*, 285 NLRB 753, 757-758 (1987); *Insurance Agents International Union*, 119 NLRB 768, 773 (1957).

to our finding in the representation case that the ballot in question is void and should not be counted.

Therefore, we grant the Motion for Summary Judgment. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent TCI West, Inc., a Delaware corporation, and its subsidiaries San Leandro Cable Television, Inc. d/b/a TCI Cablevision of Hayward, a California corporation, TCI Cablevision California, Inc., a California corporation, and United Cable Television Corp. d/b/a TCI Cablevision of Hayward, a Delaware corporation, have been engaged in providing cable television installation and service to homes in Hayward, Fremont, and San Leandro, California.³

During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000. During the same period of time, the Respondent, in the course and conduct of its business operations within the State of California, transmitted programming which originated outside the State of California and has transmitted advertisements within the State of California for national distributed products.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held February 27, 1996, the Union was certified on October 4, 1996,⁴ as the exclu-

² Chairman Gould dissented in the underlying representation case and adheres to the view that the voter clearly indicated an intent to cast a "No" vote, and that the ballot should have been counted. However, he agrees with his colleagues that the Respondent has raised no new issues in this "technical" 8(a)(5) proceeding warranting a hearing.

³ The jurisdictional facts, based on admissions in the Respondent's answer, differ slightly from those alleged in the complaint.

⁴ The Board issued a Decision and Certification of Representative on April 15, 1996, which was rescinded on April 18, 1996. On September 27, 1996, the Board issued a second Decision and Certification of Representative in which it adopted the Regional Director's recommended disposition of the challenged ballot and certified the Union. On October 4, 1996, the Board issued an order vacating the Decision and Certification of Representative and issued a new Decision and Certification of Representative which was alike in all respects except that it also overruled the challenged ballot in issue, tallied it as "void" and revised the tally of ballots to show that there were 63 votes for and 62 against the Union.

sive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time installers, installer trainees, advanced installers, installer technicians, technical trainees, service technicians, system technicians, advanced technicians, bench repair persons and trainees, construction trainees, construction person B's, construction person A's, construction field coordinators, dispatchers and dispatcher trainees, warehouse persons and warehouse trainees, accounts payable employees and accounts receivable employees and accounts receivable trainees, data entry operators and trainees, sales data entry operators and trainees, customer service representatives (CSRs) and customer service representative (CSR) trainees, counter representatives and counter representative trainees, computer operators and trainees, and receptionists and receptionist trainees employed by Respondent at its facilities in Hayward, San Leandro, Fremont, and Foster City, California; excluding all other employees, including sales and marketing employees, payroll employees, professional employees, engineering employees, local origination employees, community access personnel, drafting and design employees, vehicle maintenance employees and mechanics, programmers, auditors, Chief Technicians, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since on or about September 30, 1996, the Union, by letter, has requested the Respondent to recognize and bargain, and, since October 8, 1996, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after October 8, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf. 350 F.2d 57 (10th Cir. 1965).⁵

ORDER

The National Labor Relations Board orders that the Respondent, TCI West Inc., and its subsidiaries San Leandro Cable Television, Inc. d/b/a TCI Cablevision of Hayward, TCI Cablevision of California, Inc., and United Cable Television Corp. d/b/a TCI Cablevision of Hayward, Hayward, San Leandro, Fremont, and Foster City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Local Union 856, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time installers, installer trainees, advanced installers, installer technicians, technical trainees, service technicians, system technicians, advanced technicians, bench repair persons and trainees, construction trainees, construction person B's, construction person A's, construction field coordinators, dispatchers and dispatcher trainees, warehouse persons and warehouse trainees, accounts payable employees and accounts payable trainees, accounts receivable employees and accounts receivable trainees, data entry operators and trainees, sales data entry operators and trainees, customer service representatives (CSRs) and customer service representative (CSR) trainees, counter representatives and counter representative trainees, computer operators and trainees, and receptionists and receptionist

⁵The Union's request for attorney's fees is denied as we do not find the Respondent's defenses to be "frivolous" within the meaning of *Frontier Hotel & Casino*, 318 NLRB 857 (1995).

trainees employed by Respondent at its facilities in Hayward, San Leandro, Fremont, and Foster City, California; excluding all other employees, including sales and marketing employees, payroll employees, professional employees, engineering employees, local origination employees, community access personnel, drafting and design employees, vehicle maintenance employees and mechanics, programmers, auditors, Chief Technicians, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in, Hayward, San Leandro, Fremont, and Foster City, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Local Union 856, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time installers, installer trainees, advanced installers, installer technicians, technical trainees, service technicians, system technicians, advanced technicians, bench repair persons and trainees, construction trainees, construction person B's, construction person A's, construction field coordinators, dispatchers and dispatcher trainees, warehouse persons and warehouse trainees, accounts payable employees and accounts payable trainees, accounts receivable employees and accounts receivable trainees, data entry operators and trainees, sales data entry operators and trainees, customer service representatives (CSRs) and customer service representative

(CSR) trainees, counter representatives and counter representative trainees, computer operators and trainees, and receptionists and receptionist trainees employed by us at our facilities in Hayward, San Leandro, Fremont, and Foster City, California; excluding all other employees, including sales and marketing employees, payroll employees, professional employees, engineering employees, local origination employees, community access personnel, drafting and design employees, vehicle maintenance employees and mechanics, programmers, auditors, Chief Technicians, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

TCI WEST, INC., AND ITS SUBSIDIARIES SAN LEANDRO CABLE TELEVISION, INC. D/B/A TCI CABLEVISION OF HAYWARD, TCI CABLEVISION OF CALIFORNIA, INC., AND UNITED CABLE TELEVISION CORP. D/B/A TCI CABLEVISION OF HAYWARD