

**Aesthetic Designs, LLC and Operative Plasterers and  
Cement Masons International Association, Local  
599.** Case 30–RC–6380

June 27, 2003

DECISION AND CERTIFICATION  
OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered determinative challenged ballots and an objection in a mail ballot election held on April 29, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 5 for and 5 against the Petitioner, with 2 challenged ballots and 1 void ballot.

The hearing officer recommended that the challenges to the ballots of Brandon Frakes and Bryant Lanting be sustained, that a vote for the Union submitted on a sample ballot be counted and that a certification of representative issue. The Employer filed exceptions to the hearing officer's report.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.<sup>1</sup>

We agree with the hearing officer that a "yes" vote, cast on the sample ballot provided with the official election kit rather than on an official ballot, should be counted.

In *Daimler-Chrysler*, 338 NLRB 982 (2003), 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." *Id.*, citing *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). To effectuate that goal, the Board is guided by three principles. First, the Board assumes that "by casting a ballot, a voter evinces an intent to participate in the election process and to register a preference." *Id.*, citing *Horton Automatics*, 286 NLRB 1413 *fn.* 3 (1987). Second, the Board will

<sup>1</sup> We agree with the hearing officer, for the reasons discussed in his report, that Lanting is a statutory supervisor and that he lacks a community of interest with other unit employees because he enjoys special working conditions and his interests are aligned with management.

In finding Bryant Lanting ineligible to vote, Member Acosta does not pass on Lanting's alleged supervisory status.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the challenge to the ballot of Brandon Frakes be sustained.

give effect to this preference whenever possible. *Id.*, citing *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982). Third, the Board will "avoid speculation or inference regarding the meaning of atypical 'X's, stray marks, or physical alterations." *Id.* at 983, citing *Kaufman's Bakery*, 264 NLRB 225 (1982).

Applying the established principles reaffirmed in *Daimler-Chrysler*, *supra*, we find that the sample ballot should be counted. Counting the ballot will give effect to the voter's exercise of his or her right to choose whether to be represented by a union. The voter clearly evinced an intention to participate in the election, by casting a vote and registering a preference. Further, because the sample ballot clearly shows the voter's intent and preference,<sup>2</sup> the Board need not engage in any speculation regarding the voter's intent. Giving effect to that intent avoids unnecessary disenfranchisement. For these reasons, counting the sample ballot is entirely consistent with the primary goal of protecting employee free choice.

The Employer and our dissenting colleague argue that the sample-ballot vote should not be counted because it was not submitted on an official ballot. They rely on *Knapp-Sherrill Co.*, 171 NLRB 1547, 1548 (1968), and *McCormick Lumber Co.*, 206 NLRB 314, 314 (1973), where the Board voided votes submitted on blank pieces of paper rather than on official ballots. We reject this argument. Here, unlike *Knapp-Sherrill* and *McCormick Lumber*, the vote at issue was submitted on an official Board form—a sample ballot—not a blank sheet of paper. Because the sample ballot is a replica of the official ballot, the intent of the voter can be readily discerned, without speculation, from the voter's markings on the sample ballot. The same arguably cannot be said of a vote submitted on a blank piece of paper.<sup>3</sup>

Our dissenting colleague also argues that because a sample ballot is "readily distinguishable from the official ballot," it "may be used to identify the voter." Contrary to the implication of the dissent, neither *Knapp-Sherrill Co.*, nor *McCormick Lumber* rely on the voter-identification rationale. Those decisions offer no rationale for not counting the ballot, other than the fact that the ballot was not official. And while it is hypothetically

<sup>2</sup> We agree with the hearing officer's finding that, "It is apparent from looking at the sample ballot that the intent of the voter was clear, a 'yes' vote . . . . The returned trimmed sample ballot, with its marking, reveals clear voter intent."

<sup>3</sup> Our colleague argues that, in *Knapp-Sherrill*, "the only fact of significance to the Board was the failure to use an official ballot." That is true, but not dispositive. The Board in *Knapp-Sherrill* was faced with deciding whether to count a vote that had been submitted on a blank sheet of paper, not on a sample ballot. As the Board's decision lacks any rationale, we cannot infer that it would have reached the same result on the facts of this case.

possible that a sample ballot could be used in order to permit identification of the voter, we see no reason to invalidate a vote submitted on a sample ballot simply because such a possibility exists. After all, as our colleague concedes, it might also be possible, in some circumstances, to identify a voter from irregular markings on an official ballot, yet the Board does not void all official ballots containing irregular markings.<sup>4</sup> Moreover, in contrast to other irregular markings, a sample ballot seems inherently less likely to be used as a personal identifier, because it is not a unique mark.

We think that, in the absence of evidence indicating that a sample ballot was used to identify a voter, it is inappropriate to void the ballot and thereby disenfranchise the voter. Whatever prophylactic benefit may result would be greatly outweighed by the harm done to the election process by frustrating the voter's clearly expressed preference. Here, there is no evidence, and no contention, that the sample ballot was used in order to identify the voter who submitted it. Indeed, the hearing officer adopted the Regional Director's finding that the secrecy of the voter's identity had been preserved, and neither the Employer nor the dissent argues to the contrary.<sup>5</sup>

In support of invalidating any vote not cast on an official ballot, our dissenting colleague points out that "[e]lection rules requiring the voter to use the official ballot . . . are not peculiar to the Board," citing several State election statutes and cases that prohibit the counting of sample ballots. This argument misses the mark.

State electoral law prohibitions on voting with sample ballots result, in large part, from concerns about ballot-box stuffing. See, e.g., *Sparks v. State Election Board*, 392 P.2d 711, 713 (Okla. 1964) (holding the State's statutory prohibition on the use of sample ballots "was undoubtedly adopted for the purpose of preventing the 'stuffing' of ballot boxes with unauthorized ballots"). Because ballot box stuffing is not an issue in Board mail ballot elections (the use of yellow return envelopes bear-

<sup>4</sup> See, e.g., *Daimler-Chrysler Corp.*, supra (counting as a "YES" vote a ballot with "X" in the "YES" square and a handwritten question mark ("??") immediately adjacent to the "YES" square); *Thiele Industries*, 325 NLRB 1122, 1122 (1998) (counting as a "YES" vote a ballot on which an "X" was placed in the "YES" box, a diagonal line was placed in the "NO" box, and the word "YES" above the "YES" box was circled); *Horton Automatics*, 286 NLRB at 1413 (counting as a "NO" vote a ballot with "NON" extending across the "YES" and "NO" boxes).

<sup>5</sup> Our colleague also contends that the voter might have received the sample ballot, with the vote indicated, from a third party, and that the integrity of the vote would have been impugned in that event. This is sheer speculation. For the reasons discussed, we are unwilling to disenfranchise a voter simply because it is theoretically possible that some misconduct occurred, absent some credible indication that it did occur.

ing the key number of the addressee-voter prevents repeated voting), the use of official ballots is less important. See NLRB Casehandling Manual (Part Two), Representation Proceedings Section 11336.2(c).

Further, in State election law, as in Board representation election law, the policy preference for official ballots has been balanced against avoidance of unnecessary disenfranchisement. In *Sparks* (cited by our dissenting colleague), the Oklahoma Supreme Court counted votes cast on sample ballots that were distributed after officials ran out of official ballots, because the "right to vote outweighs the form of the ballot." 392 P.2d at 714. See also *DeSantis v. Pedone*, 61 A.D.2d 1136 (N.Y.A.D. 1978) (counting a facsimile sample ballot which was furnished to a voter after the voting machine broke down).

Likewise in Board elections, the Board's general preference for the official ballot form<sup>6</sup> must be balanced by policy concerns that voters who wish to participate should not unnecessarily be disenfranchised. Here, the voter evinced an intention to participate in the election and register a preference. That intent was clearly manifested on a sample ballot form, which is a close facsimile of an official ballot, thereby avoiding the need for any speculation concerning that voter's preference. Because ballot-box stuffing is not a concern, and because there is no evidence (nor even a contention) that voter identification occurred here, we find no persuasive reason not to count the sample ballot. Consistent with the principles outlined in *Daimler-Chrysler*, then, we hold that the sample ballot should be counted.

#### ORDER

The National Labor Relations Board orders that the challenge to the ballot of Bryant Lanting is sustained and that the vote cast on a sample ballot be counted and included in the tally.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Operative Plasterers and Cement Masons International Association, Local 599, and that it is the

<sup>6</sup> As further support for his position, our colleague cites the Board's Casehandling Manual, which calls for an instruction to voters in mail-ballot elections not to mark and return the sample ballot. See NLRB Casehandling Manual (Part Two), Representation Proceedings Sec. 11336.2(c). Here, no such instruction was included, and so the voter can hardly be faulted for not following instructions. The Casehandling Manual, in any event, does not suggest that a sample ballot cast in the circumstances present here should not be counted. Finally, the manual itself explains that its guidelines "are not intended to be and should not be viewed as binding procedural rules." *Id.*, Introduction, Purpose of the Manual (unpaginated).

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

All full-time and regular part-time journeyman and apprentice plasterers employed by the Employer in the State of Wisconsin; excluding office clerical employees, employees covered by other collective-bargaining agreements, professional employees, guards, and supervisors as defined in the Act.

MEMBER SCHAUMBER, dissenting.

Today, the Board, apparently for the first time since it began holding elections, accepts as valid a ballot—the determinative ballot in this election—that was not cast using the official, Board-provided ballot. The ballot used was a sample ballot cut from a copy of a notice of election. Because the new course the majority takes is inconsistent with longstanding Board precedent and policy premised on preserving the secrecy of the ballot and the integrity of the election, and the majority offers no reason for ignoring this precedent and these policies, I respectfully dissent.

#### Facts

The relevant facts are straightforward and undisputed. This was a mail ballot election. Consistent with the Board's usual practice, the Regional Director mailed to each eligible voter an election kit.<sup>1</sup> The election kit included a copy of the notice of election poster, which contains a sample ballot for the information of voters. Instead of marking and then sending in the official ballot, one voter cut out the sample ballot from a notice of election, marked the ballot, and mailed it in using the envelopes provided in the election kit.<sup>2</sup> The revised tally of ballots in the election was 5 for and 5 against the Petitioner with two challenged ballots and one void ballot—the ballot cast using the sample ballot from a notice of election.<sup>3</sup>

<sup>1</sup> Casehandling Manual (Part Two), Sec. 11336.2(c) provides that election kits should include instructions describing how to vote by mail, an official ballot, a blue mail ballot envelope, and a yellow postage-paid return envelope.

<sup>2</sup> There is no indication in the record of what happened to the official ballot which, presumably, also was included in the election kit. Also unknown is whether the sample ballot used in this case was from the notice of election mailed to the voter or from another copy of the notice of election.

<sup>3</sup> I agree with the majority that the challenges to the ballots cast by Brandon Frakes and Bryant Lanting should be sustained. With regard to Lanting, I agree that he is a statutory supervisor. Accordingly, I find it unnecessary to pass on the hearing officer's alternate finding that Lanting should also be found ineligible on the grounds that he is a close relative of management who has received special benefits and lacks a community of interest with unit employees.

#### Analysis

My colleagues recognize, as they must, that the ballot used was not the official ballot form provided by the Board, and that the Board has refused to count such ballots in the past. See *Knapp-Sherrill Co.*, 171 NLRB 1547, 1548 (1968), and *McCormick Lumber Co.*, 206 NLRB 314 (1973). They view these cases as distinguishable, however, because they involved ballots cast on blank pieces of paper, whereas here the sample ballot, from the notice of election, is part of an official Board form, and includes the same language as the official ballot. They conclude, in agreement with the hearing officer and the Regional Director, citing *Daimler-Chrysler*, 338 NLRB 982, that this ballot should be counted because it clearly indicates the intent of the voter.

The majority's reliance on *Daimler-Chrysler* is misplaced. In *Daimler-Chrysler*, the issue was whether the voter's intent expressed on an official ballot was clear or ambiguous.<sup>4</sup> As explained below, the Board's rule invalidating votes cast on something other than the official Board-provided ballot does not concern itself with whether the ballot may or may not reflect the voter's intent. Indeed, the Board specifically recognized in *Daimler-Chrysler* that the goal of giving effect to voter intent is not absolute.<sup>5</sup> Consequently, *Daimler-Chrysler* does not support my colleagues' position.

*Knapp-Sherrill Co.*, supra, and *McCormick Lumber Co.*, supra, cannot be distinguished on the ground that the votes sought to be cast were on blank pieces of paper while the disputed ballot in this case was cast by cutting out a sample ballot from the official notice of election and from which the intent of the voter could therefore be determined. In *Knapp-Sherrill*, the Board voided a ballot cast on a blank piece of paper, the same size, color, and type used for the ballots in the election, on which the word "No" was written. In ruling on the ballot, the Board stated:

The Hearing Officer found that the Board agent properly declared this to be a void ballot since there was no other writing or printing on the ballot and an examina-

<sup>4</sup> In *Daimler-Chrysler*, the three-member majority held that a ballot cast on an official ballot form should be counted where the voter had placed an "X" in the "YES" square and a handwritten question mark immediately adjacent to it, asserting that the intent of the voter was clear. Chairman Battista and I dissented from that holding because the intent of the voter was not clear but was called into question by the question mark. Here, I do not doubt that the ballot evidences a clear intent. That is not the issue. The ballot must still be voided for the other reasons described herein.

<sup>5</sup> "Identifying marks provide an exception to the general rule of giving effect to voter intent. A ballot that clearly expresses voter preference will still be rejected if the mark clearly identifies the voter." *Daimler-Chrysler*, supra at 984 fn. 8.

tion of the ballot itself did not disclose the voter's intent. In agreeing that this is a void ballot we rely *solely* on the fact that a blank sheet of paper *is not an official ballot.*" [Emphasis added.]<sup>6</sup>

Because the Board explicitly rejected any reliance on an intent of the voter inquiry in voiding the ballot, *Knapp-Sherrill* cannot be distinguished, as my colleagues suggest, on the grounds that the intent of the voter could not be ascertained in that case but can be ascertained here. Rather, as the Board's decision makes clear, the only fact of significance to the Board was the failure to use an official ballot. The sample ballot used in this case, while part of a larger Board form, was not an official ballot. Accordingly, it should not be counted.

Election rules requiring the voter to use the official ballot by the election officials are not peculiar to the Board.<sup>7</sup> The reason for the Board's rule is that a vote cast on a blank piece of paper or one using a sample ballot cut from the notice of election is readily distinguishable from the official ballot. As a result, it may be used to identify the voter. In addition, the sample ballot form may have been provided the voter by a third party with the vote indicated; a circumstance that would impugn the integrity of the vote itself.

Indeed, even when an official ballot is made distinguishable with an identifying mark the Board has voided it because counting such ballots "clearly would open the door to the exertion of influences such as to prevent the exercise of a voter's free choice."<sup>8</sup> In *Ebco Mfg. Co.*, supra, the Board invalidated a ballot marked with capital letter "R" with a circle around it because the mark could serve to reveal the identify of the voter. In *George K. Garrett Co.*, 120 NLRB 484 (1958), the Board declared as void a ballot signed by the voter. These ballots were voided for purposes of Board policy without regard to

<sup>6</sup> *Knapp-Sherrill*, supra at 1548. Similarly, in *McCormick Lumber Co.*, the Board held that a ballot cast on a blank piece of paper was a void ballot under established Board policy. *McCormick Lumber Co.*, supra at 314.

<sup>7</sup> See West's Annotated Code of West Va. § 3-5-12 ("no sample ballot shall be voted or counted in any election."); Vernon's Texas Statutes and Codes Annotated § 52.008 ("A sample ballot may not be cast or counted in an election."); Iowa Code Annotated § 43.30 (sample ballots "shall not be voted, received, or counted."); Oregon Revised Statutes § 254.195 ("A sample ballot shall not be voted or counted."). While some courts have allowed the counting of ballots originally printed as sample ballots, they have done so where the ballots were designated by the appropriate State authority as official ballots, prior to their use, after a precinct ran out of official ballots. See *Sparks v. State Election Board*, 392 P. 2d 711 (Sct. Ok. 1964); *Gibson v. Bower*, 73 S.E. 2d 817 (Sct. App. W.Va. 1952). No such designation was made in this case. To the contrary, as discussed below, the Board's Casehandling Manual indicates that a sample ballot is not the equivalent of an official ballot.

<sup>8</sup> *Ebco Mfg. Co.*, 88 NLRB 983, 984 (1950).

the fact that they may have reflected the voter's clear choice.<sup>9</sup> The Board has stressed:

This policy of secrecy [of the ballot] is regarded as a matter of public concern rather than a personal privilege subject to waiver by the individual voter, and, thus, *the secrecy of the ballot is viewed as outweighing the voter's intent.* Therefore, the voter's motivation is not considered and, hence, even in situations where the [identifying] mark may have been placed innocently, the ballot is voided and the voter is effectively disenfranchised. [Emphasis added.]<sup>10</sup>

Consistent with this longstanding Board policy, the Board's Casehandling Manual does not regard the sample ballot from the notice of election as an acceptable substitute for the official ballot. Section 11336.2(c) provides the following instructions for mail ballot elections:

Voters should *not* ordinarily be sent the Notice of Election Form NLRB-4910 (Sec. 11314) posted by the employer in mail ballot elections, unless the considerations in Sec. 11314.7(b) entitled "Additional Distribution of Notices" are present. In the event a Notice of Election is sent to a voter, an additional Instruction should be included in the kit advising the voter to mark and return the enclosed ballot, *not* the sample ballot in the Notice of Election. [Emphasis in original.]

The clear import of these procedures is that voters are not to use the sample ballot from the notice of election, and that the sample ballot is not to be considered the equivalent of the official ballot form.<sup>11</sup> Therefore, I cannot agree with my colleagues that their decision today, which does exactly that, is consistent with the Casehandling Manual.

It can be argued that even when an official ballot is used a vote may be cast in such a way that it distinguishes the ballot. This is evident from the cases cited by my colleagues. In each of these cases, however, it was the manner in which the vote was cast on the official ballot that made it distinguishable, not the ballot form itself. This is far less apt to identify the voter and it also does not raise the issue of the possible involvement of

<sup>9</sup> See also *Sorenson Lighted Controls*, 286 NLRB 969 (1987) (employee handed marked, unfolded ballot to another employee, who glanced at it before placing it in the ballot box). See also *Anken Industries*, 242 NLRB 1371 (1979) (ballot cast by voter who openly displayed how it had been marked held void).

<sup>10</sup> *Anken Industries*, supra.

<sup>11</sup> Unfortunately, this procedure was not followed in this case. The hearing officer found that voters received in their election kits copies of the notice of election without the appropriate instruction not to vote using the sample ballot form. The Region's failure to include the instruction, however, does not lessen the need to require use of the official Board-provided ballot.

third parties in the vote cast as does the use of an entirely different ballot form.

In sum, where, as in this case, a document other than the official ballot is used, the Board has, until today, uniformly invalidated the ballot regardless of whether the

voter's intent could be discerned from the document used. I believe this longstanding policy is a reasonable one and it should not be easily cast aside.