

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

BRINK'S GLOBAL SERVICES USA, INC.,

Employer,

and

Case No. 29-RC-260969

**LAW ENFORCEMENT SECURITY
OFFICERS UNIONS (LEOSU),
LAW ENFORCEMENT OFFICERS
SECURITY AND POLICE BENEVOLENT
ASSOCIATION (LEOS-PBA),**

Petitioner

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.67(f) of the Board's Rules and Regulations, Petitioner Law Enforcement Security Officers Unions (LEOSU), Law Enforcement Officers Security and Police Benevolent Association (LEOS-PBA), by its undersigned counsel, submits this Opposition to the Employer's Request for Review.

Brinks' Request for Review raises two issues: (a) counting the challenged ballot cast on the "sample" ballot destroys the secrecy of the mail ballot election; and (b) the Board should overrule *Aesthetic Designs*, 339 NLRB 395 (2003), to the extent that it permits counting of a vote cast on a sample ballot. Neither issue warrants Review by the Board.

A. Ballot Secrecy

The Board commingles and counts the unchallenged ballots to determine whether challenged ballots will be determinative. Then the Board determines whether to count each challenged ballot. The challenged ballots the Board determines should be counted are then commingled and counted. The Employer's position on the secrecy of the votes of challenged voters will wreak havoc on the Board's challenged ballot procedure.

Suppose a representation election, either manual or mail, resulted in a tie vote, with one voter challenged for any reason, such as unit placement or supervisory status issues. If that dispositive challenged ballot is counted, everyone will know the identity of the voter and how he/she voted. The Board has never held that an otherwise valid challenged ballot cannot be counted simply because it cannot be commingled with other challenged ballots to ensure the secrecy of the voter.

In the instant case, the Petitioner won by two votes, with five challenged ballots. The Report on Objections [Attachment 1] identifies four of the five challenged voters by name, preserving the identity only of the “Marked Sample Ballot: Anonymous Voter.” As the Employer asserts, because of the Board’s procedure for counting mail ballots, everyone who watched the Zoom ballot count may know the identity of the voter who cast the sample ballot. Despite the Regional Director’s attempt to conceal the identity of the “Anonymous Voter,” the identity is known. If the Anonymous Voter’s sample ballot and one other are commingled and counted, everyone will know the identity of both voters. If any combination of two voters survive the challenges and had voted the same way – “yes” or “no” – everyone will know how they voted even if both ballots are commingled. Indeed, even if all five are commingled and counted and all voted the same way, how each person voted will be known.

In sum, only if multiple challenged ballots are commingled and are not unanimous will each person’s ballot be truly secret. The Board cannot adopt the Employer’s proposed policy for counting challenged ballots.

B. *Aesthetic Designs*

In *Aesthetic Designs, LLC*, 339 NLRB 395 (2003), the Board permitted to be counted as a vote cast in a mail-ballot on a sample ballot provided with the official election kit rather than on an

official ballot. The ballot clearly indicated the voter's intent and giving effect to that intent avoided unnecessary disenfranchisement. A careful analysis of *Reliable Trucking, Inc.*, 349 NLRB 812, 816 (2007), reveals that the Administrative Law Judge would have applied *Aesthetic Designs* except for

the unusual coincidence of the rare casting of a sample ballot with the even more rare unexplained discovery of such a ballot belatedly discovered by a Board agent away from the counting area in a ballot box already determined and shown to the parties to be empty. ... I am reluctant to disenfranchise any voter and do not do so here because of the fact the ballot was a sample ballot.

Indeed, the Judge discussed at length how the sample ballot was found and the allegations of misconduct by the Board agent performing the ballot count.

There is no controversy surrounding the discovery of the Anonymous Voter's sample ballot. Because the voter clearly expressed his/her choice on the sample ballot, there is no reason to reverse or otherwise limit *Aesthetic Designs*.

C. Conclusion

For the reasons stated herein, the Board should reject the Employer's Request for Review.

Respectfully submitted,

/s/ Jonathan Axelrod
Jonathan G. Axelrod
Beins Axelrod, P.C.
1717 K Street N.W. Suite 1120
Washington, DC 20006
telephone: (202) 328-7222
telecopier: (202) 328-7030
jaxelrod@beinsaxelrod.com

Counsel for the Petitioner

Dated October 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of October 2020, I caused the foregoing Petitioner's Opposition to the Employer's Request for Review to be electronically filed with the NLRB and have emailed it to the following counsel for the Employer and to the Regional Director:

Mark M. Stublely, Esq.
Eric Stuart, Esq.
Ethan Picone, Esq.
Kathy Drew King, Regional Director

/s/ Jonathan Axelrod