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**KMS Commercial Painting, LLC and International Union of Painters and Allied Trades, Local Union No. 109, District Council No. 81.** Case 14–RC–281302

February 16, 2022

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

The Employer’s Request for Review of the Acting Regional Director’s Decision on Challenged Ballots is denied as it raises no substantial issues warranting review.

In denying review, we reaffirm the longstanding principle that “[i]n mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office.” *Dredge Operators, Inc.*, 306 NLRB 924, 924 (1992) (internal citations omitted); see *Plymouth Towing Co.*, 178 NLRB 651, 651 (1969). The well-settled law in *Dredge Operators* has effectively provided a bright-line rule for decades for resolving voter eligibility in mail ballot elections. And it has proven well-suited to the increased use of mail balloting during the extraordinary circumstances presented by the Covid 19 pandemic.<sup>1</sup> More generally, during the pandemic, the Board’s mail ballot procedures have served the Board’s mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process. As our colleague notes, as of January 29, 2022, the Board has conducted 304 mail ballot elections in Fiscal Year 2022. These elections have resulted in proportionally few difficulties. However, we are willing to review current procedures where problems are identified. We acknowledge that the standard eligibility language included on Form NLRB-652 may not fully articulate the controlling Board law with respect to mail-ballot elections. We have therefore advised the Division of Operations to ensure that, going forward, the eligibility language used in stipulated election agreements for mail-ballot elections will be adapted to reflect the *Dredge Operators* principles we are reaffirming today.

<sup>1</sup> See *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) (in which the Board unanimously held that the Covid-19 pandemic warranted the use of mail balloting).

Dated, Washington, D.C. February 16, 2022

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, concurring:

The parties to this case stipulated to a mail ballot election, with the ballots mailed on September 13, 2021, and due in the regional office by October 12, 2021, the date set for the ballots to be tallied.<sup>1</sup> The Acting Regional Director found that, during the 29-day period of the election, employees Camilo Escobar and Dennis Escobar mailed ballots that were postmarked September 22 and received in the Regional Office on September 28. The Acting Regional Director also found that both employees voluntarily quit their employment about September 28. The Employer challenged their ballots on the grounds that they were not employed in the unit on the date of the count. I agree with my colleagues that, under current precedent, these employees were eligible voters, and I join them in applying that precedent for the purpose of deciding this case. See, e.g., *Dredge Operators, Inc.*, 306 NLRB 924, 924 (1992) (“In mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office.”) (internal citations omitted).<sup>2</sup>

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually, either at the employees’ workplace or some other appropriate location. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). In *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), the Board recognized that the Covid-19 pandemic presents extraordinary circumstances warranting the use of mail ballots under the standards set forth in that case. The result has been a massive expansion in the use of mail ballots.<sup>3</sup> The greater use of mail ballots has revealed problems with existing mail ballot

<sup>1</sup> All dates hereafter are in 2021 unless otherwise noted.

<sup>2</sup> I also agree with my colleagues that the standard eligibility language included on Form NLRB-652 should be revised to reflect current precedent in this regard.

<sup>3</sup> Internal agency statistics show that, as of January 29, 2022, 304 of the 378 elections conducted by the Board in Fiscal Year 2022 were held by mail ballot.

procedures.<sup>4</sup> Those challenges have been exacerbated by the recent decline in Postal Service mail delivery standards.<sup>5</sup> In response to those delays, some regional directors have appropriately extended the balloting period in mail ballot elections.<sup>6</sup>

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<sup>4</sup> *College Bound Dorchester*, Case 01–RC–261667 (6/25/2021) (verifying signature on mail ballot envelope); *Stericycle, Inc.*, Case 04–RC–260851 (2/22/2021) (technical difficulties with video count of mail ballots); *Promowest Productions, Inc.*, Case 09–RC–261089 (11/25/2020) (employees mailed ballots that did not arrive in time to be counted). The Board has also recently addressed the issue of parties to a mail ballot election offering to collect an employee’s mail ballot. *Professional Transportation, Inc.*, 370 NLRB No. 132 (2021). This issue only affects mail ballot elections, inasmuch as manual elections by design “ensure[] that no person handles a ballot before, during, or after the election other than the Board agent and the employee who marks and casts that ballot.” *Id.*, slip op. at 2.

<sup>5</sup> See, e.g., USPS Inspector General Report 21-120-R21, Nationwide Service Performance, <https://www.uspsoig.gov/sites/default/files/document-library-files/2021/21-120-R21.pdf> (last visited 2/2/2022).

<sup>6</sup> In this case, for example, the stipulated election agreement provides for a 29-day deadline for the return of mail ballots, whereas the Board’s Case Handling Manual states that “[t]he deadline for return of the ballots depends on the circumstances. Usually two weeks should be allowed from the date of mailing to date of return. Slightly more time may be needed around holiday periods.” See Case Handling Manual Sec. 11336.2(d). In my view, the default time period for mail ballots should be adjusted to reflect current mail delivery circumstances.

These difficulties reinforce the Board’s long-standing policy in favor of manual elections.<sup>7</sup> They also warrant reviewing existing mail ballot procedures to ensure that they continue to effectuate employee free choice and protect the integrity of mail ballot elections under current circumstances. This includes whether the eligibility standards specified in *Dredge Operators* continue to be appropriate in light of the expanded voting periods discussed above. Accordingly, I would be open to reviewing mail ballot procedures generally, including *Dredge Operators*, in a future appropriate case.

Dated, Washington, D.C. February 16, 2022

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John F Ring,

Member

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<sup>7</sup> That policy also finds further support in the significantly lower participation rate and higher void ballot rate for mail ballot elections. Internal agency statistics show that, as of January 29, 2022, the mail ballot participation rate for Fiscal Year 2022 mail ballot elections was 67.8 percent, while the manual ballot participation rate was 85.9 percent. During the same period, 3 percent of the ballots cast in mail ballot elections were voided, while the void rate was only one percent for manual elections.