

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DOUGLAS EMMETT MANAGEMENT, LLC

Employer-Petitioner

and

Case 31-RM-264449

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 501¹**

Union

DECISION AND DIRECTION OF ELECTION

On August 11, 2020,² Douglas Emmett Management, LLC (Employer or Petitioner) filed a petition (the Petition) under Section 9(c) of the National Labor Relations Act (the Act) based on a good faith uncertainty about majority support for the existing representative of its employees, International Union of Operating Engineers, Local 501 (Union). The Union has been the certified exclusive collective bargaining representative of a bargaining unit consisting of approximately four maintenance engineers employed at multiple facilities located in Santa Monica, California (Unit) since 2018.

On August 11, Region 31 of the National Labor Relations Board (the Region) served a copy of the Petition in this case on the Union and notified the Union of its obligation to file a Statement of Position, serve that Statement of Position on all parties, and to do so in a timely manner by noon on Friday, August 21. On the same date, the Region issued a Notice of Representation Hearing setting a videoconference hearing for Monday, August 31. The Union filed its Statement of Position with the Region on August 21, raising multiple procedural and substantive issues, including that the Employer included statutory supervisors and/or managers in the bargaining unit at issue and – citing Section 101.27 of the Rules and Regulations of the National Labor Relations Board (the Board’s Rules) – that the Petition should be dismissed because it is a re-filing of an RM petition previously filed and withdrawn by the Employer. However, the Union failed to timely serve the Statement of Petition on the Employer.

The hearing on the Petition was held on August 31 before a Hearing Officer of the National Labor Relations Board (Board). At the hearing, the Union did not dispute that it failed to serve its Statement of Position on the Employer in a timely manner. Thus, pursuant to Section 102.63(b)(2) and 102.66(d) of the Board’s Rules, I instructed the Hearing Officer to preclude the Union from litigating issues contained in its Statement of Position because it failed to timely

¹ At the hearing, the parties made a joint motion to amend the Petition and other formal documents to correct the name of the parties as captioned herein, and I approved that motion.

² All dates hereinafter are in 2020 unless otherwise noted.

serve a copy of it on the Employer. Nonetheless, the Union was allowed to make an offer of proof regarding its position, over the Employer's objection.

Section 102.63(b)(2) of the Board's Rules states a labor organization named in an RM petition "shall" file a Statement of Position with the Regional Director and serve a copy of that Statement of Position on the other parties named in the petition. Section 102.66(d) of the Board's Rules, "Preclusion," states, in relevant part:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response...

The Board addressed preclusion and the operation of Section 102.66(d) in *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1, fn.1 (2017). In that case, which involved an RC petition but is otherwise similar to the instant case, the Board concluded that the Regional Director was correct to preclude the employer from litigating the appropriateness of the petitioned-for unit based on the employer's failure to timely serve its statement of position on the petitioner. *Id.*

The Union argues that preclusion in the instant case will allow the Employer to prevail on the issues raised by its Statement of Position and that this contradicts the Board's obligation and duty to enforce the policies of the Act. I disagree. While a procedural rule will at times prevent a substantive issue from being addressed, that is not an unintended consequence of a preclusion rule but the intent. Sections 102.63(b)(2) and 102.66(d) of the Board's Rules are clear in their operation, and nothing in the Union's offer of proof articulated at the hearing provides a valid basis for ignoring the preclusion dictated by the Board's Rules in this case or, as requested by the Union, for dismissing the Petition. Thus, I hereby affirm the preclusion of the issues raised in the Union's Statement of Position.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. At the hearing, the Employer and the Union stipulated that the election would be conducted by mail, among other issues. Accordingly, having affirmed the preclusion of the issues raised by the Union in its Statement of Position and given that there are no other issues in dispute, I shall direct a mail ballot election commencing on the earliest practicable date.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³
2. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated and I find that the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full time, regular and part-time, temporary or extra maintenance engineers employed by the Employer at Douglas Emmett buildings: 120 N Broadway, Santa Monica, CA 90401; 201 Santa Monica Blvd., Santa Monica, CA 90401; 1333 2nd Street, Santa Monica, CA 90401; and 429 Santa Monica Blvd., Santa Monica, CA 90401.

Excluded: All other employees, janitorial, porters, office clerical, guards and supervisors defined in the Act, as amended.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately four employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501**.

A. Election Details

Pursuant to the parties' agreement thereto, the election will be conducted by mail.

³ The Employer, Douglas Emmett Management, LLC, is a Maryland corporation with offices and places of business in Woodland Hills, California, and has been engaged in the business of management and operation of office buildings. During the past 12 months, the Employer derived gross revenue in excess of \$100,000, and performed services valued in excess of \$50,000 in States other than the State of California.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on Friday, September 25, 2020**. Ballots will be mailed to voters by the National Labor Relations Board, Region 31. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, October 2, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at (844) 762-NLRB ((844) 762-6572).

The returned ballots must be received by the Region 31 office by **5:00 p.m. on Friday, October 16, 2020**. All ballots will be commingled and counted by the Region 31 office at **2:00 p.m. on Tuesday, October 20, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 31 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Friday, September 4, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as described above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses,

available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Monday, September 14, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. English and Spanish-language versions of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Los Angeles, California this 10th day of September 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
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