

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

S.E.I.U. HEALTHCARE PENNSYLVANIA,	:	
Petitioner	:	Case No. 06-RC-257382
	:	
and	:	
	:	
TWINBROOK HEALTH AND	:	
REHABILITATION CENTER,	:	
Employer	:	

**PETITIONER’S STATEMENT IN OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW AND MOTION TO STAY ELECTION**

INTRODUCTION

Petitioner, SEIU Healthcare Pennsylvania, a labor organization, pursuant to Section 102.67(f) of the National Labor Relations Board’s Rules and Regulations, submits this Statement in Opposition to the Employer’s Request for Review and Motion to Stay Election with respect to the mail ballot election taking place pursuant to the Regional Director’s Decision and Direction of Election dated May 8, 2020, in the above captioned case (hereinafter referred to as the “DDE”). The Employer, Twinbrook Health & Rehabilitation Center, operates a facility that provides services that include individualized post-hospital skilled nursing care, long-term care, and other related care. The Petitioner and the Employer shall hereinafter jointly be referred to as the “parties.”

STATEMENT OF THE FACTS AND PROCEDURAL POSTURE

On March 3, 2020, the Petitioner submitted a Representation Petition to Region 6 that a substantial number of the Employer’s full time and regular part-time licensed practical nurse (L.P.N.) employees wished to be represented, for the purposes of collective bargaining, by the

Petitioner pursuant to Section 9(c)(1) of the National Labor Relations Act (hereinafter referred to as the “Act”).

The Parties’ Stipulated Election Agreement

On March 11, 2020, the Regional Director approved the parties’ Stipulated Election Agreement. The Agreement provided, *inter alia*, that the parties waived their rights to a hearing (§ 1), that the Employer is engaged in commerce within the meaning of the Act (§ 2), that the Petitioner is a labor organization within the meaning of the Act (§ 3), and that the proposed bargaining unit is an appropriate unit for the purposes of collective bargaining within the meaning of the Act (§ 5). The parties’ Stipulated Election Agreement further provided for a manual election to be held under the National Labor Relations Board’s Rules and Regulations under the supervision of the Regional Director during three sessions on March 30, 2020, at the Employer’s facility at 3805 Field Street, Erie, Pennsylvania. (§ 4).

The COVID-19 Public Health Pandemic Crisis

It is undisputed by the parties that the COVID-19 public health pandemic crisis is a national, state, and municipal emergency and extraordinary circumstance. Due to the safety concerns related to the COVID-19 public health pandemic crisis, the Regional Director, by Order dated March 17, 2020, indefinitely postponed the scheduled election. On March 19, 2020, the National Labor Relations Board (hereinafter referred to as the “Board”) ordered that all elections would be temporarily suspended because of the extraordinary safety concerns related to the COVID-19 public health pandemic crisis. The Board lifted that suspension two weeks later, on April 1, 2020. The Board announced that it would resume conducting elections on April 6, 2020. Chairman John F. Ring stated that “[c]onducting representations elections is core to the NLRB’s mission, and ensuring elections are carried out safely and effectively is one of [the Board’s]

primary responsibilities.” In ending the suspension, the Board noted that appropriate measures for conducting elections in a safe and effective manner, including mail ballot elections, were available and noted that the determination as to such measures would be left to the Regional Directors. On April 17, 2020, the Board announced, in a COVID-19 Operational Status Update, that representation petitions and elections are being processed and conducted. It further noted that Regional Directors have the discretion as to when, where, and if an election can be conducted.

The Mail Ballot Election

On April 7, 2020, the Petitioner moved that the Regional Director order a mail ballot election. On April 10, 2020, the Employer opposed a mail ballot election. The Employer explained that one reason that it rejected a mail ballot election is because the vote-eligible employees would be too “distracted” by a mail ballot election to simultaneously contend with their work responsibilities associated with the COVID-19 public health pandemic crisis. (Employer’s Response to Motion to Order Mail Ballot Election, p. 3). The Employer further explained that another reason that it rejected a mail ballot election is because the vote-eligible employees are currently too “ignorant” to vote by a mail ballot election and, therefore, the Employer needed more time to campaign to the vote-eligible employees. *Id.*, p. 4. The Employer argued that employees should indefinitely not be able to exercise their right to an election, until after the COVID-19 public health pandemic crisis has completely subsided. *Id.*, p. 5 – 6. The Employer failed to articulate any testimonial or documentary evidence.

On April 15, 2020, the Petitioner withdrew its then pending Motion to Order Mail Ballot Election, without prejudice to its position that, under the circumstances, a mail ballot election was appropriate. At the same time, the Petitioner requested that the Regional Director revoke

her prior approval of the parties' Stipulated Election Agreement due to the extenuating circumstances.

The Parties' Pre-Election Pleadings

On April 16, 2020, the Employer retained its position that employees should indefinitely not be able to exercise their right to an election, until after the COVID-19 public health pandemic crisis has completely subsided. (Employer's Response to Petitioner's Request For Regional Director To Revoke Prior Approval of the Parties' Stipulated Election Agreement and to Schedule Telephonic Hearing on Representation Petition, p. 1). The Employer explained that it did not consent to a mail ballot election because a mail ballot election would be an "unwarranted, non-essential distraction." *Id.*, p. 2. The Employer did not raise in its pleading any need for either testimonial or documentary evidence.

By Order dated April 16, 2020, in light of the ongoing uncertainty related to the COVID-19 public health pandemic crisis, the Regional Director revoked her prior approval of the parties' Stipulated Election Agreement in order to ensure the safety of all of the parties and Board personnel. As a result of the revocation, and in order to further process the representation petition, the Regional Director scheduled a telephonic pre-election hearing on April 27, 2020.

On April 22, 2020, the Employer moved to postpone the telephonic pre-election hearing until after the COVID-19 public health pandemic crisis has completely subsided and to postpone its deadline to submit its Statement of Position. The Employer described its Statement of Position, the pre-hearing conference, the telephonic pre-election hearing, and the election itself as nothing more than "unwarranted, non-essential distractions." (Employer's Emergency Motion to Postpone the Representation Hearing and to Postpone the Deadline for Submitting the

Employer's Statement of Position Form, p. 5). The Employer asserted that the vote-eligible employees were too "ignorant" and "uninformed" to vote in an election. *Id.*, p. 7.

The only legal and specific argument that the Employer made concerned whether there should be a mail ballot election or a manual election. The Employer never requested to put forward any specific testimonial or documentary evidence. On that same day, April 22, 2020, the Petitioner responded that the Regional Director should dismiss the Employer's Motion.

On April 23, 2020, the Employer amended its Emergency Motion to postpone the telephonic pre-election hearing and to postpone the submission of its Statement of Position. The Employer averred that there were efforts underway to convert the facility into a "COVID-19+ Recovery Unit." (Employer's Amended Emergency Motion to Postpone the Representation Hearing and to Postpone the Deadline for Submitting the Employer's Statement of Position Form, p. 8). The Employer did not raise in its pleading any need for either testimonial or documentary evidence. On that same day, the Petitioner supplemented its opposition to the Employer's request. By Order dated April 23, 2020, the Regional Director denied the Employer's Motion.

The Employer submitted its Statement of Position on April 24, 2020, where it opposed a mail ballot election due and claimed that the current COVID-19 public health pandemic crisis was a "bar" to an election. Instead, the Employer proposed a manual election be conducted on June 5, 2020, at the Employer's skilled nursing care facility. The Employer did not offer any alternative in particular to this on-site location.

The Telephonic Pre-Election Hearing

Prior to the telephonic pre-election hearing, and after review of the Employer's Statement of Position, the Hearing Officer notified the parties by email that: (1) the Regional Director had

determined that no litigable issues had been raised and that arguments concerning the election arrangements would be accepted but no witness testimony would be permitted; and (2) in addition to oral arguments, the parties could submit written arguments and supporting exhibits into the record in support of their positions including the mode (mail ballot vs. manual ballot) and whether the election should continue to be postponed. A copy of this email dated April 24, 2020 from Field Examiner/Hearing Officer Lynn McCarthy is attached hereto and marked as Exhibit A. The Employer did not object to this limitation.

On April 27, 2020, the parties appeared and made arguments before a Hearing Officer at the previously scheduled telephonic pre-election hearing. A court reporter was on the conference line to make a transcript of the hearing. The ruling announced in the prior email concerning the nature of the hearing was repeated. Again, the Employer did not object to that ruling, nor did it make any offer of proof or move for the admission of any testimonial or documentary evidence (with the exception of its written Employer's Argument to Hold Elections in Abeyance with its exhibits that was admitted into the record). Further, the Employer did not seek any appeal of that ruling. In addition to making oral arguments, both parties submitted extensive written position statements with exhibits that were received into evidence on the record.

The Decision and Direction of Election

By the DDE dated May 8, 2020, the Regional Director determined that, under the circumstances, a mail ballot election was appropriate, as it would better protect the health and safety of all parties involved during the current COVID-19 public health pandemic crisis and it would enfranchise employees on the earliest date practicable. The Employer filed an eligible voter list. Notices of Election were posted announcing the mail ballot election. The Region mailed

voter kits to eligible employees on May 15, 2020. The Region is scheduled to count all mail ballots on June 8, 2020.

On May 22, 2020, the Employer requested the Board review the Regional Director's DDE and to stay the ongoing election. The Petitioner opposes the Employer's Request for Review and Motion to Stay the Election for the reasons set forth below.

STANDARD OF REVIEW

The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of: (i) the absence of; or (ii) a departure from, officially reported Board precedent.
2. That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
3. That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. That there are compelling reasons for reconsideration of an important Board rule or policy.

The Board's Rules and Regulations § 102.67(d). Without any legitimate basis, the Employer asserts that all four grounds exist.

A request for review may not raise any issue or allege any facts not timely presented to the Regional Director. *Id.*, § 102.67(e). Failure to request review shall preclude relitigation of any issue which could have been raised in the representation proceeding. *Id.*, § 102.67(g).

ARGUMENT

The present circumstance, a public health pandemic crisis, is extraordinary and presents many relevant factors supporting the Regional Director's exercise of discretion to order a mail

ballot election. The DDE properly applies Board precedent, did not prejudicially deny the parties of any rights, and is not based on any erroneous factual issues.

A. The Decision and Direction of Election Properly Applies Board Precedent and Policy

The Act vests the Board with broad discretion to establish the mechanics of an election. *Ceva Logistics, U.S. Inc.*, 357 NLRB 628 (2011); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The Board, in turn, has delegated this discretion to determine the manner of conducting an election to the Regional Directors. The Board has long held that a Regional Director has broad discretion and authority to decide issues of representation election conduct, so long as this discretion is not abused or exercised arbitrarily, capriciously, or unreasonably. This discretion specifically includes the authority to decide whether an election should be conducted manually, by mail, or by a combination of the two. *San Diego Gas & Electric*, supra at 1144 and cases cited therein; *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998). See also, e.g., *Fedders Manufacturing Company*, 7 NLRB 817, 822 (1938); *Postex Cotton Mills, Inc.*, 73 NLRB 673, 677 (1947); *E.I. Dupont du Nemours*, 79 NLRB 345, 346 (1948); *North American Plastics Corp.*, 326 NLRB 198 (1998); and *California Pacific Medical Center*, 357 NLRB 197, 198 (2011); and *Superior of Missouri, Inc.*, 327 NLRB 248, 248 (1998), citing *Alladin Plastics, Inc.*, 182 NLRB 64 (1970) (“...a Regional Director may, in his discretion, reschedule an election if the originally scheduled election did not take place”).

Additional guidance for Regional Directors reasonably exercising their discretion when ordering a mail ballot election are provided in the NLRB Casehandling Manual, Part Two, Representation Proceedings, § 11301.2:

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however,

that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

...

Under extraordinary circumstances, other relevant factors may also be considered by the regional director.

The Board also set forth certain policy criteria for when a Regional Director should order a mail ballot election in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Those factors largely center around 1) the difficulty in establishing polling places and voting times to enable employees to get to the polls and vote while the polls are open and 2) circumstances that would temporarily prevent or delay a manual election for an indefinite time.

San Diego Gas & Electric, supra, mentions one such condition – a strike – in which a mail ballot election would be appropriate. Presumably, a manual election could be held at someone time after the strike had ended. However, the Board recognized that this was at least one example of a situation that would delay an election and would be grounds for conducting a mail ballot election rather than delaying for an indefinite time for a manual election.

The Board has also upheld the use of mail ballot elections during the off-season for seasonal employees. *Sitka Sound Seafoods*, 325 NLRB 685 (1998); *Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017).

The Board has rejected implied limitations that suggest that mail ballot elections are only proper if manual elections are “infeasible.” *San Diego Gas & Electric* at 1145, fn. 6, 10. As well, the Board rejected suggestions that a mail ballot election should never be held where it would be possible to conduct a manual election. *Id.*

The Board, in *San Diego Gas*, clarified that the use of mail ballot elections is not limited to enumerated circumstances, but that “other relevant factors,” especially in “extraordinary circumstances” that may be considered by a Regional Director. *Id.*

While the Board may have a general preference for manual elections under normal circumstances, the present public health pandemic crisis is far from a normal situation. *San Diego* articulates three situations that normally suggest using mail ballots. At the same time, this list is more illustrative than exhaustive. This is shown through the Board’s recognition that there are “other relevant factors” that make a mail ballot election proper. *Id.* This includes “extraordinary circumstances” that could permit a Regional Director to exercise her discretion in ordering a mail ballot election. *Id.*

This public health pandemic crisis is the very type of difficult and extraordinary circumstance under which a Regional Director may reasonably conclude that a mail ballot election is proper. The Board agreed with this when it recently denied requests for review of Regional Directors’ decisions ordering mail ballot elections because of this public health pandemic crisis. E.g., *Atlas Pacific Engineering Co.* 27-RC-248742 (May 8, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867 (May 18, 2020); *Johnson Controls, Inc.*, 16-RC-256972 (May 18, 2020); and *Roseland Community Hospital*, 13-RC-256995 (May 26, 2020). In *Atlas Pacific*, the Regional Director directed a mail ballot election due to the safety concern of Board personnel conducting a manual election at an employer’s facility that remained open as it was deemed to be an essential business. This Board found that was not an abuse of discretion. *Id.*

In *Touchpoint Support*, the Board also denied a request for review of a Regional Director’s decision to conduct a mail ballot election. This Board noted that the mandatory telework in the regional office, based on the assessment that the public health pandemic crisis, is

an “extraordinary” circumstance that supported the Regional Director’s exercise of discretion outside the guidelines in *San Diego Gas & Electric*.

In *Johnson Controls*, a Regional Director again directed a mail ballot election due to the mandatory telework in the regional office due to the “extraordinary” public health pandemic crisis circumstances. This Board found that this was not an abuse of discretion. *Accord, Roseland Community Hospital, supra*.

In *Crozer-Chester Medical Center*, 04-RC-257107 (April 23, 2020), this Board acknowledged that conducting a mail ballot election of employees of an acute-care hospital raises significant challenges for the employees, the parties, and the Region, but held that those challenges did not warrant a stay of the election.

The Regional Director’s Decision in this case is fully consistent with and supported by these precedents. Indeed, given the nature of the Employer’s operation as a skilled nursing care facility and the governmental directives, which uniquely apply to it, a decision to conduct a manual election would be an abuse of discretion.

Here, the Regional Director considered the Employer’s proposal to conduct a manual election at the Employer’s skilled nursing care facility. Nevertheless, the Regional Director properly concluded that conducting a manual election at a skilled nursing care facility during a public health pandemic crisis would not be safe and “would unnecessarily put at risk the health and safety of voters, Agency personnel, the parties’ representatives, and particularly, patients and residents at the facility.” DDE at p. 4.

Holding a manual election at the Employer’s skilled nursing care facility is not feasible or possible because, under present COVID-19 directives, visitors and non-essential individuals are not permitted in such facilities. The Employer concedes that the COVID-19 public health

pandemic crisis presents an undeniably unique circumstance. (Employer’s Request For Review and Motion to Stay Election, p. 6).

As noted by the Board, there have been extraordinary federal, state, and local government directives that have limited nonessential business. *Atlas Pacific*, supra, fn. 1; *Touchpoint Support Services*, supra, fn. 1; *Johnson Controls*, supra, fn. 1; and *Roseland Community Hospital*, supra, fn.1. In this case, those directives include ones from the federal Department of Health and Human Services – Centers for Medicare & Medicaid Services, the Center for Disease Control and Prevention, Pennsylvania Governor Wolf, and the Pennsylvania Department of Health. DDE at pp. 2 – 4. Guidance has been issued for skilled nursing care facilities, such as the Employer’s facility, to immediately restrict **all** visitors and non-essential healthcare personnel from entering facilities. These visitors would include the Board’s personnel and the parties’ representatives. It is undisputed that, as of April 20, 2020, the Employer restricted visitors of all kind to its facility, except for a resident’s end-of-life situations, when an individual is determined to be essential for a resident’s emotional well-being, and as otherwise required by a resident’s plan of care. This situation will exist for the indefinite future. Based on her review of the governmental restrictions applicable to skilled nursing care facilities such as the Employer, the Regional Director noted that Board agents and Union officials would not be permitted in the facility and that would apply even to the lobby area that was suggested by the Employer. Holding a manual election at the facility therefore would violate federal and state directives. DDE at p. 4. The dissent in *San Diego Gas & Electric* argued that mail ballots should only be ordered when manual elections “are not feasible.” 325 NLRB at 1153. More recently, Board Member Emanuel has argued for the adoption of this “not feasible” standard. e.g., *Audio Visual Services Group*, Case No. 05-RC-232347, 2020 WL 1182454 (Order Denying Review, Feb. 26,

2020). Even under the more restrictive “not feasible” standard, a mail ballot election is appropriate here.

Furthermore, a mail ballot election has the advantage of significantly reducing social interactions. Under the current circumstances of the COVID-19 public health pandemic crisis, conducting a manual election cannot be held without risking infection and endangering the health and safety of the residents, employees, the Board Agents conducting a manual election, the parties’ Representatives, as well as jeopardizing the health and safety of everyone’s families, and the general public at-large.

Although individuals may appear to be infection free, epidemiologic studies have demonstrated that coronavirus may be transmitted by pre-symptomatic and asymptomatic individuals. A manual election would involve the participation of dozens of individuals, including voting employees, Board Agents, Employer representatives, and Petitioner representatives. The Board’s manual election procedures require close proximity for the duration of the election between Board Agents, Election Observers, and eligible employee voters. Employees use the same pens or pencils while voting in an enclosed booth before placing their ballots in a sealed box. Each of these ballots is individually handled by the Board Agent conducting the election and each of these ballots are available for inspection by either of the parties’ Representatives. These procedures carry the risk of exposure for employees at the skilled nursing care facility, the Board Agent, and the parties’ Representatives.

Other individuals who may come into contact with these participants would risk being exposed to the coronavirus and spreading it to their families and the general public at-large. Therefore, the number of individuals placed at risk for exposure is much greater than just the number of employees eligible to vote. It is not feasible or possible to safely conduct a manual

election at this time. As noted above, the Board has affirmed the authority of the Regional Directors to order mail ballot elections, generally, and specifically under the extraordinary circumstances existing here.

B. The Employer's Argument Regarding the Pre-Election Hearing Must be Rejected

The conduct of the hearing and the rulings made in connection with the proceeding did not result in any prejudicial error. In its Request for Review and Motion to Stay, the Employer wrongfully asserts that the Regional Director should have permitted a hearing at which the parties could elicit evidence and witness testimony. This new argument is simply part of this Employer's continuous efforts to delay and stymie the right of employees to vote in a Board conducted election. This argument is without merit for multiple reasons.

First, the details of an election, including whether the location will be at a physical site, such as the Employer's premises or conducted as a mail ballot election, are not litigable issues. Under the Board's Rules and Regulations, the purpose of a pre-election hearing pursuant to Section 9(c) of the Act is to determine if a question of representation exists. See, Rules and Regulations § 102.64. If so, the Regional Director is to direct an election. Rules and Regulations § 102.67(a). In addition, the election is to be scheduled for the "earliest date practicable". Rules and Regulations §102.67(b).

Here, it was properly determined that a question of representation exists. There were no disputes as to the scope of the bargaining unit or the eligibility of any of the employees in the proposed unit. The only issue upon which the parties differed was with respect to the type of election to be conducted, i.e., manual versus mail ballot. On that issue, upon due notice, a telephonic pre-election hearing was scheduled and conducted, at which the parties were permitted to submit, both in writing and orally, their position and the basis of their position, on

the type, dates, times, and locations of the election and the eligibility period. However, based upon Rule and Regulation § 102.66(g)(1), the Hearing Officer, both before and at the hearing, ruled that there would not be litigation on those issues. The Employer here is asking the Board to override and nullify this existing principle and precedent. Nevertheless, this Board has recently affirmed this particular regulation. In *Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020), the Board, in discussing whether a hearing should be conducted through videoconference, as opposed to telephonic conference, stated the following:

In the representation case context, preelection hearings may not always involve witness testimony: for example, Regional Directors may hold hearings in which the parties merely state their positions on nonlitigable matters such as election details. (Slip Opinion at p. 2)

In its recent order of May 8, 2020, in *Atlas Pacific, supra*, the Board denied an employer's Request for Review challenging the decision of a Regional Director to order a mail ballot election. In doing so, it noted the "longstanding Board precedent holding that election details – including the type of election to be held – are nonlitigable matters left to the discretion of the Regional Director." Order at p. 2, fn. 2. Thus, in that case, the Board found that there was no merit to the employer's contention that the Regional Director improperly denied the parties the opportunity to present evidence on the propriety of a manual election. Accord, *Roseland Community Hospital, supra* fn1.

In sum, the Employer's argument here, presented without authority, that the Regional Director erred in denying the Employer the right to present testimony and evidence on the issue of the election details must be rejected.

Secondly, the Employer has waived this argument. At no time did the Employer object to the Hearing Officer's ruling that a telephonic pre-election hearing would be conducted to

solicit the position of the parties on the type of election, but that no witness testimony would be permitted. That ruling was initially made in an email communication from the Hearing Officer to the parties, prior to the telephonic pre-hearing conference that was held on April 24, 2020. (See Exhibit A attached hereto.) It was repeated at the pre-election hearing on April 27, 2020. In the face of that ruling, the Employer failed to make any objection to the conduct of the hearing pursuant to Rules and Regulations §102.66(d). It made no offer of proof about its intended evidence or testimony pursuant to Section 102.66(c). It did not appeal or request to appeal the Hearing Officer's ruling concerning the nature of the hearing pursuant to Section 102.65(c). Finally, after the Regional Director's issuance of the DDE, the Employer made no request for reopening or reconsideration of that decision pursuant to Section 102.65(e) of the Rules and Regulations. During the telephonic pre-election hearing, the Employer was represented by outside labor counsel as well as the Employer's general counsel. Given this absence of an objection, or other method of preserving its position that witness testimony and evidence was requested, the Employer is now precluded from raising this issue in its Request for Review. Rules and Regulations §102.67(e); *Pulau Corp.*, 363 NLRB No. 8, Slip Opinion at p. 1 fn. 1 (2015); see Rules and Regulations §102.66(d).

As the Employer has waived this issue, the Board need not even address whether the Employer was entitled to present witnesses and testimony at the pre-election hearing. On either ground, this argument must be rejected.

C. The Employer’s Challenge to the “Factual” Findings of the Regional Director Must be Rejected

In its Request for Review, the Employer challenges the Regional Director’s DDE on the grounds that it is allegedly premised on clearly erroneous factual findings on a substantial issue and such error prejudicially affects its rights.

This argument is also without merit. First, the Board’s Rules and Regulations are clear with respect to a request for review filed under Section 102.67(d)(2) that the request must contain a summary of all evidence and rulings bearing on the issue raised. This specific requirement is in addition to the general requirement that a request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. Rules and Regulations §102.67(e). The Employer has ignored that Rule. The only document attached to its Request for a Review is the DDE. None of the exhibits entered into evidence at the pre-election hearing have been presented. Those exhibits included written arguments submitted by both parties. The Petitioner’s Position Statement included various government directives addressing the impact of the pandemic on skilled nursing care facilities that documented the need for a mail ballot election. Had those documents and exhibits been produced by the Employer as part of its Request for Review, then the Board would see that there was an overwhelming record that, as the Regional Director properly determined, a manual election could not safely be held on the Employer’s premises. As discussed in Part A of this Statement, there are multiple orders or guidances from regulatory authorities that preclude outsiders, such as a NLRB Agent and representatives of the Union, from entering the premises of a skilled nursing care facility. Moreover, these are matters of public record, such as the public

health pandemic crisis itself, of which the Regional Director was entitled to take administrative notice.

In short, the Employer's challenge to the Regional Director's factual findings should be rejected because its Request for Review did not conform to the Board's Rules and Regulations. Moreover, as previously stated, the Employer did not preserve the argument that it should have been permitted to introduce witness testimony at the hearing.

Finally, the DDE's findings concerning the extraordinary circumstances that justify a mail ballot election are more than amply supported by the facts. The assertion by the Employer that the risk of transmission of the virus during a mail ballot election is somehow comparable to that in a manual election is preposterous on its face. It ignores the science on this public health pandemic, the particular and heightened risk of infection at skilled nursing care facilities, or any other indoor locations where people may gather. This Board has had no difficulty in taking notice of, and relying upon, what it termed the "extraordinary federal, state and local government directives" with respect to the pandemic. *Atlas Specific*, supra; *Touchpoint Support Services*, supra; and *Johnson Controls*, supra. Moreover, as a result, the Board has found no merit to the contention that a Regional Director inappropriately considered those governmental resources even if not in the record. *Atlas Pacific at p.2,fn.1*. For the same reasons, the Employer's argument here challenging the Regional Director's exercise of discretion and reliance upon governmental directives must be rejected.

CONCLUSION

The Board has delegated the authority to the Regional Directors to decide the mechanics of an election, including whether a mail ballot election should be conducted. The present circumstance, a public health pandemic crisis, is extraordinary and presents many relevant

factors whereby the DDE appropriately ordered a mail ballot election. The Decision and Direction of Election properly applied Board precedent did not prejudicially deny the parties of any rights, and is not based on any erroneous factual issues. The Employer has waived most of its arguments and has offered no credible reasons for delaying the election. Therefore, the Request for Review and Motion to Stay should be denied.

Respectfully submitted
By Attorneys for Petitioner

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Dated: May 27, 2020

Exhibit A

Bruce M. Ludwig

From: McCarthy, Lynn J <Lynn.McCarthy@nrlb.gov>
Sent: Friday, April 24, 2020 12:53 PM
To: Bruce M. Ludwig; Rebelo, Mary-Jo; 'Steven Grubbs'
Subject: 06-RC-257382 & 06-RC-257392, Twinbrook Healthcare and Rehabilitation Center
Attachments: 06-RC-257382 Board Exhibit 1a-1s.pdf; 06-RC-257392 Board Exhibit 1a-1s.pdf

I am providing the parties with the attached Board Exhibits and additional information in advance of our conference call this afternoon.

- The hearings will be conducted consecutively starting with 06-CA-257382. After we close the record in 06-CA-257382 we will open a new record for 06-CA-257392.
- As no litigable issues have been raised, the Regional Director has determined that arguments concerning election arrangements and the issue of whether the election should remain postponed will be accepted, but no witness testimony will be permitted.
- We will, however, allow the parties, if they so choose, to enter written arguments and supporting exhibits into the record in support of their positions regarding the election arrangements, including the mode (mail vs. manual) and whether the election should continue to be postponed. The parties can do this in addition to, or in lieu of, making oral arguments on the record.

Lynn McCarthy

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Go Green! Do not print this email unless it's necessary!

Pursuant to General Counsel Memorandum Electronic Filing of Documents ([GC 20-01](#)), parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and other evidence, by electronically submitting (e-filing) them through the Agency's web site (www.nld.gov). Submissions via other means must be accompanied by a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. General Counsel Peter Robb has directed Regional Offices to reject submissions not e-filed absent the written explanation referred to above.

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TWINBROOK HEALTH AND	:	
REHABILITATION CENTER,	:	
Employer	:	

PETITIONER’S CERTIFICATE OF SERVICE

The undersigned certifies that the Petitioner’s Statement in Opposition to Employer’s Request for Review and Motion to Stay was E-Filed through the Agency’s website and served on the following:

By E-Filing through the Agency’s website on:

By email on Counsel for the Employer:

Nancy Wilson
Regional Director
National Labor Relations Board
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