UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: Case No. 06-RC-257382

S.E.I.U. HEALTHCARE PENNSYLVANIA,

Petitioner,

and

TWINBROOK HEALTH AND
REHABILITATION CENTER,

Employer.

EMPLOYER'S REQUEST FOR REVIEW AND MOTION TO STAY ELECTION

Twinbrook Health and Rehabilitation Center ("Twinbrook" or "Employer"), pursuant to Section 102.67 of the National labor Relations Board's ("NLRB" or "Board") Rules and Regulations, hereby requests review of the Regional Director's Decision and Direction of Election ("Decision") in the above-referenced case, dated May 8, 2020. A copy of the Decision is attached as Exhibit A. In addition, because of the novel issues presented in this Request for Review and the immediate and potential dire consequences effecting the eligible voters, Twinbrook requests that the Board stay the election.

More specifically, Twinbrook seeks review of the Regional Director's unsubstantiated finding that a mail ballot election is safer and appropriate in the current circumstances. Contrary to the Regional Director's conclusion, the Board maintains a well-established presumption in favor of conducting a manual election. Neither the Regional Director nor the Petitioner cited any evidence, testimony, or facts sufficient to rebut the Board's presumption to hold a manual election. The Decision is a departure from reported Board precedent and is based on clearly erroneous findings of substantial fact, speculation and conjecture which are prejudicial to Twinbrook and the voting employees. In addition, the Regional Director's refusal to permit the

parties to elicit relevant testimony and evidence (i.e., facts) during the pre-election hearing was a prejudicial error and represents a compelling reason to reevaluate any Board policy that would prohibit an appropriate evidentiary presentation in these unique circumstances. The novel issues presented in this Request for Review have immediate and potential dire consequences effecting the employees eligible to vote. As such, the Board must grant the Request, stay the election, and provide appropriate guidance.

INTRODUCTION

The NLRB has historically held that a manual election is the most effective way to protect employees' full and free right to vote in a representation election, particularly where, as here, all voting employees are present at a single site of employment. The Board has repeatedly and consistently held that a mail ballot election may be held where holding a manual election would be too difficult, such as situations where employees are widely dispersed and do not report to a single location. No such difficulty is present here. Indeed, in consideration of the current public health crisis, Twinbrook proposed reasonable options to conduct a safe voting procedure. Accordingly, a manual ballot election is appropriate and required in this case.

PROCEDURAL BACKGROUND

The Petition in this matter was filed on March 3, 2020. On March 11, 2020, Employer and Petitioner agreed to a Stipulated Election Agreement which provided for a manual, secret-ballot election to be held under the Board's Rules and Regulations under the supervision of the Regional Director on March 30, 2020 at Employer's facility located at 3805 Field Street in Erie, Pennsylvania ("Twinbrook facility"). On March 17, 2020, Employer received a formal order from the Regional Director "given the current situation" of the approved postponement of the election scheduled for March 30, 2020 until the Regional Director contacts all parties "in the near future to determine how to proceed". On March 17, 2020, the Regional Director confirmed

"mail ballot elections will be conducted only with the agreement of all parties. This is pursuant to specific guidance from the General Counsel. Absent agreement, a hearing would be necessary in order to direct a mail ballot election. All hearings are also currently postponed until at least April 1." On March 19, 2020, the Board temporarily suspended all Board-conducted elections through April 3, 2020. On April 1, 2020, the Board issued notice that beginning April 6, 2020, Regional offices would resume processing elections. On April 7, 2020, Petitioner filed a Motion to Order Mail Ballot Election. On April 10, 2020, Employer filed its Response to Motion to Order Mail Ballot Election. By email correspondence on April 15, 2020, Petitioner withdrew its then pending Motion for a Mail Ballot Election, without prejudice, and requested the Regional Director revoke her prior approval of the Stipulated Election Agreement and immediately schedule a telephonic hearing on Petitioner's Representation Petition. On April 16, 2020, Employer filed its 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. On April 16, 2020, the Regional Director issued the Order Revoking Approval of Stipulated Election Agreements and Second Notice of Representation Hearing and scheduled a hearing in this case for April 27, 2020 at 9:00 a.m. by telephone. Following the Representation Hearing on April 27, 2020, the Regional Director issued the Decision setting a mail ballot election. *See* Exhibit A.

ARGUMENT AND AUTHORITIES

Employer requests review of the Decision pursuant to the Board's Rule § 102.67(d)(1), (2), (3), and (4).

A. The Regional Director's Decision Departs From Reported Board Precedent.

The Regional Director failed to apply the Board's presumption that manual ballot elections are preferred. The Board adheres to a presumption that in-person voting/manual ballots are preferable as they tend to effectuate employees Section 7 rights. *See Willamette Industries,* 322 NLRB 856 (1997); *see also San Diego Gas and Electric,* 325 NLRB 1143, 1144 (1998); *Reynolds Wheels International,* 322 NLRB 1062, 1063 (1997) ("[U]nder existing Board precedent and policy, the applicable presumption favors a manual election, not a mail ballot."). While the decision to conduct an election by mail or manual ballot is within the discretion of the regional director (*see Manchester Knitted Fashions, Inc.,* 108 NLRB 1366, 1367 (1954) (place); *San Diego Gas & Electric,* 325 NLRB at 1144 (1998) (mail ballot), elections are normally held on the employer's premises in the absence of good cause to the contrary. The Board's longstanding rule is that elections should, as a general rule, be conducted manually, unless the regional director reasonably concludes that circumstances make voting in a manual election difficult. *San Diego Gas & Electric,* 325 NLRB at 1144; NLRB Case Handling Manual, § 11301.2 ("The Board has … recognized … 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.") The Board has articulated three (3) situations that "normally suggest the propriety of using mail ballots": (1) where eligible voters are "scattered" over a wide geographic area due to their job duties; (2) where they are "scattered" in that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress. NLRB Case

Handling Manual, § 11301.2; *San Diego Gas & Electric,* 325 NLRB at 1145; *see also London's Farm Dairy, Inc.,* 323 NLRB 1057 (1997); *Reynolds Wheels International,* 323 NLRB at 1062-63.

The Board has recognized that there may be other relevant factors that a regional director may consider in making a decision regarding a mail-ballot vs. a manual election but the Board has emphasized that, *in the absence of extraordinary circumstances,* the Board will normally expect a regional director to exercise his or her discretion within the articulated guidelines. *See San Diego Gas & Electric,* 325 NLRB at 1145. Importantly, unforeseen delay in conducting a manual election has never been the basis for the Board ordering a mail ballot election. Also notable is the fact that Board reported precedent does not acknowledge that internal Agency considerations constitute extraordinary circumstances that would warrant conducting a mail ballot election outside the guidelines specified in *San Diego Gas & Electric.*

It is undisputed that no circumstances typically warranting consideration of a mail ballot election are present in this case. The petitioned-for employees are coming to work at the Twinbrook facility every day. It is undisputed that the Board prefers in-person elections because a manual election tends to maximize the employee franchise. If this election is allowed to proceed via mail-ballot election, the voting employees may be denied their statutory rights to participate in the election. *See, e.g., San Diego Gas & Electric,* 325 NLRB 1143, 1146 (1998) ("The Board's experience with representation elections has shown that the voter participation rate is generally higher in elections conducted manually than in mail ballot elections.") The purpose of the National Labor Relations Act ("Act") is to assure each employee has the fullest freedom in exercising their guaranteed rights under the Act.

B. The Regional Director Erroneously Denied the Parties the Right to Present Testimony and Evidence on the Efficacy of a Manual Ballot Election.

The Regional Director's decision to order a mail ballot election in this case was premised entirely upon her unsubstantiated conclusions regarding the impact of the COVID-19 pandemic on the voting process. While the COVID-19 pandemic undeniably presents unique circumstances, the Regional Director should not have denied the parties an opportunity to present testimony and evidence at the hearing on the issue of whether holding a manual ballot election is reasonably possible under these unique circumstances. Because the Regional Director did not allow any testimony or evidence at the hearing, and only permitted lawyer arguments, there is no record sufficient to rebut the manual ballot presumption. It is undisputed that the voting employees report to work every day, work regularly scheduled shifts, and can conveniently vote in person if a manual election is held at the Twinbrook facility. The Regional Director should not be permitted to simply rebut a presumption on her own based upon so-called "evidence" adduced outside the record in this case.

The undisputed facts in this matter support a manual election. As an "essential" or "critical infrastructure" business, the Twinbrook facility has continued to operate during the COVID-19 pandemic pursuant to Federal, state and local directives and orders. All appropriate preventative measures have been implemented by the Twinbrook facility to mitigate the potential risk to both residents and employees of COVID-19 infection. The Twinbrook facility continues to follow guidance provided by, *inter alia,* the Centers for Disease Control and Prevention and the Department of Health with respect to preventing the spread of COVID-19 in its workplace. *Significantly, not a single case of a positive COVID-19 diagnosis has been reported at the Twinbrook facility as of the date of this filing.*

C. The Regional Director Based Her Decision on Clearly Erroneous and Prejudicial "Factual" Findings.

In reaching her conclusion to direct a mail ballot election in this case, the Regional Director went outside the record of these proceedings to make purported factual findings regarding the relative safety of mail ballot elections. For instance, the Regional Director concluded without an appropriate evidentiary record that "a manual election cannot be safely held in the lobby area in the Employer's facility as proposed by the Employer." Exhibit A, p. 4. In addition, the Regional Director simply leapt to the bold conclusion that holding an election at the Employer's facility "would unnecessarily put at risk the health and safety of voters, Agency personnel, the parties' representatives, and, particularly, patients and residents at the facility." Exhibit A, p. 4. While the Employer offered an alternative to an on-site election – namely, that the election could be held at a neutral site, the Regional Director rejected that option by simply making the factual finding that it "seems impracticable". Exhibit A, p.5. Further, the Regional Director's decision to direct a mail ballot election is premised on her conclusion that a manual election involves an "elevated risk of contracting the virus which is inherent in the person-to-person contact that will be necessary between voters, Agency personnel, and the parties' representatives." Exhibit A, p. 5. Notably, the Regional Director's decision does not mention the interpersonal interactions that occur during the NLRB's mail ballot process. *See* Exhibit A. Moreover, the Regional Director casually surmises that an election at a neutral site "will undoubtedly pose an inconvenience to voters and may disenfranchise some voters from participating in the election …." Exhibit A, p. 5. In sum, the Regional Director made a multitude of unsubstantiated findings about COVID-19, the Employer's facility, the likelihood that a manual election at Employer's facility or at a neutral location could be reasonably

conducted while maintaining all appropriate health and safety protocols, and the employees' behavior. *See* Exhibit A.

The parties and the employees are prejudiced by the Regional Director's Decision. Extraordinary circumstances only exist when a manual election is impossible to perform. The record in this case does not support a conclusion that a manual election is impossible to perform. The Decision elevates the Agency's marginal interest in expediting elections over all else. The Board's primary purpose is to ensure free and fair elections, which maximize every employee's opportunity to vote. Not permitting testimony and evidence in this case on issues critical to the determination of whether a manual ballot election could be conducted (or conversely, whether a manual ballot election is impossible to perform) prevented proper consideration of the best possible election proceedings for employees. As such, the Board should reconsider the Regional Director's Decision and direct a manual election.

CONCLUSION

For all of the reasons set forth herein, Employer respectfully requests review of the Regional Director's Decision and a stay of the election pending such review.

Respectfully submitted,

BURNS WHITE LLC

Dated: May 22, 2020

BY: /s/Mary-Jo Rebelo

Mary-Jo Rebelo, Esquire
Attorney for Employer Twinbrook Health and Rehabilitation Center

Burns White Center
48 26th Street
Pittsburgh, PA 15222
412-995-3347
mjrebelo@burnswhite.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

TWINBROOK HEALTH & REHABILITATION CENTER[1]

Employer

and **Case 06-RC-257382**

S.E.I.U. HEALTHCARE PENNSYLVANIA[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by S.E.I.U. Healthcare Pennsylvania (Petitioner) on March 3, 2020[3], under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of licensed practical nurses (LPN's) employed by Twinbrook Health & Rehabilitation Center (Employer)[4] at its Erie, Pennsylvania facility (Employer's facility). There are approximately 18 employees in the unit sought.

On March 11, 2020, I approved a Stipulated Election Agreement in the instant case, in which the parties agreed that a Board-conducted manual election be held at the Employer's facility on March 30[5]. Thereafter, on March 17, the Region postponed the scheduled election due to the safety concerns related to the COVID-19 pandemic in the United States. On April 7, the Petitioner filed a motion requesting that the election be conducted by mail ballot. On April 10, the Employer filed a motion opposing a mail ballot election. Following unsuccessful efforts to secure the agreement of the parties to conduct the election by mail ballot, on April 15, the Petitioner filed a motion withdrawing its request for a mail ballot election and requesting that I revoke my approval of the Stipulated Election Agreement and conduct a hearing. On April 16, the Employer filed a response to the Petitioner's motion and argued that further processing of the petition should be stayed in view of the impact of the COVID-19 pandemic on its business operations. On April 16, I issued an Order Revoking Approval of Stipulated Election Agreements and Second Notice of Representation Hearing in order to fully address the issues raised by the parties. A telephonic

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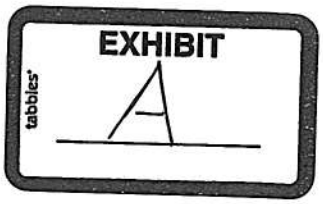
[1] The Employer's name appears here as amended at the hearing.

[2] The Petitioner's name appears here as amended at the hearing.

[3] All dates herein are in 2020, unless specified otherwise.

[4] The parties stipulated that the Employer is a Pennsylvania corporation engaged in the operation of a post-hospital skilled nursing care facility in the Commonwealth of Pennsylvania. During the past twelve-month period, the Employer derived gross revenues in excess of $250,000 from the operation of its business and purchased and received goods and materials valued in excess of $5,000 directly from points located outside of the Commonwealth of Pennsylvania.

[5] A separate petition was filed by the Petitioner in Case 06-RC-257392 for a unit of service and maintenance employees and the parties entered into a Stipulated Election Agreement which provided for the same voting arrangements as this case. Thus, the elections would be conducted simultaneously and accommodating two voting units totaling about 80 employees.



hearing was held on April 27, before a hearing officer of the National Labor Relations Board (the Board).

I. ISSUES AND POSITIONS OF THE PARTIES

The only matter in contention is whether to conduct a manual or mail ballot election. The determination of the method of the election is within the sole discretion of the Regional Director, and generally it is not an issue subject to litigation. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2. However, I am mindful that my decision regarding the election arrangements is subject to review by the Board. For that reason, the parties' positions concerning the election arrangements were solicited during the hearing.

The parties are not in agreement concerning the type of election that is appropriate in the instant situation. The Petitioner's position is that, because of the COVID-19 pandemic, currently it is not safe to conduct in-person manual elections. Additionally, it avers that current restrictions on visitors at nursing facilities precludes holding a manual election at the Employer's facility and there is no reliable information at this time to establish with certainty when those restrictions will be lifted. The Employer, on the other hand, argues that a mail ballot election is not appropriate because (1) mail ballots are particularly vulnerable to certain problems and issues, (2) there is a potential of transmission of COVID-19 through the handling of mail ballots, (3) the Employer has not enjoyed a sufficient opportunity to effectively communicate with employees about the election, and (4) beginning an election at this time will disrupt employees from their work responsibilities. In this regard, the Employer proposes to hold a manual election on June 5, 2020 during three different polling periods covering the early morning, mid-to- late afternoon and early evening hours. It proposes that the polling be held in the first-floor lobby of the Employer's facility inside the front door of its facility. In the event that an election cannot be held at the Employer's facility, the Employer proposes to secure a neutral location to hold the election.

II. FACTS

At the outset, I take administrative notice of the pandemic health situation that currently exists in the United States, and that continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. The virus that causes COVID-19 is infecting people and spreading easily from person-to-person. On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. On March 13, President Donald Trump proclaimed that the COVID-19 outbreak in the United States constituted a national emergency. This situation poses a serious public health risk.

The Employer is a post-hospital skilled nursing facility. As recognized by the Center for Disease Control (CDC), nursing home populations, given their congregate nature and resident population served, are at higher risk of being infected by COVID-19. If infected, residents at these facilities are at increased risk of serious illness.[6] Furthermore, caregiving staff at these facilities,

[6] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#people-in-nursing-homes-or-LTC-facilities

are at elevated risk from COVID-19. According to the CDC, many cases of COVID-19 in the U.S. have occurred among older adults living in nursing homes or long-term care facilities. Therefore, it has established recommendations that are specific for nursing homes, including skilled nursing facilities.[7] The guidance focuses on several priorities, one of which is keeping unrecognized COVID-19 from entering these facilities. In this regard, the CDC cautions that visitors and healthcare personnel continue to be potential sources of introduction of COVID-19 into nursing homes. Thus, to protect the vulnerable nursing home populations, aggressive efforts toward visitor restrictions are recommended.

The Centers for Medicare and Medicaid Services (CMS) is a federal agency within the United States Department of Health and Human Services (HHS) responsible, among other things, for establishing the quality standards in long-term care facilities, more commonly referred to as nursing homes. In response to the COVID-19 pandemic, the CMS issued guidance, last revised on March 13, for limiting the transmission of COVID-19 for nursing homes. The guidance provides that all facilities nationwide "should restrict access of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation. In those cases, visitors will be limited to a specific room only. Facilities are expected to notify potential visitors to defer visitation until further notice (through signage, calls, letters, etc.)."[8]

In the Commonwealth of Pennsylvania, on March 6, Governor Tom Wolf issued a Proclamation of Disaster Emergency due to the emergence of COVID-19 in the United States and the Commonwealth of Pennsylvania. On March 18, the Pennsylvania Department of Health (PA DOH) also issued guidance for nursing facilities on COVID-19 mitigation, requiring the restriction of all visitors, with exceptions of compassionate care. On March 19, the Governor and Secretary of Health issued Orders directing the closure of non-life sustaining businesses because these present the opportunity for unnecessary gatherings, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19. On March 23, Governor Wolf announced a statewide Stay-at-Home order to protect Pennsylvanians and mitigate the spread of COVID-19 by decreasing the opportunities for the transmission of the virus and decrease the risk of community spread. The order was extended several times and currently most Pennsylvania counties are under the Stay-at-Home order. On April 20, Governor Wolf announced a target date of May 8 for the beginning of phased reopening and easing of restrictions. Effective 12:01 a.m. May 8, 2020, the county of Erie will be in the yellow phase in which some restrictions on work and social interaction will ease. As previously mentioned, the Employer's facility is in Erie. Notwithstanding the easing of restrictions for some counties, restrictions on nursing and healthcare facilities remain unchanged.

There is still a lot that is unknown about COVID-19 and how it spreads, but the CDC has expressed that coronaviruses are thought to be spread most often by respiratory droplets and although the virus can survive for a short period on some surfaces, it is unlikely to be spread from domestic or international mail products or packaging.[9] Finally, as states, including the

[7] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#people-in-nursing-homes-or-LTC-facilities
[8] QSO-20-14-NH.
[9] https://www.cdc.gov/coronavirus/2019-ncov/faq.html

Commonwealth of Pennsylvania, begin to loosen restrictions and businesses begin to open, the CDC guidelines for social distancing, wearing of facial masks and frequent handwashing remain in place.

III. ANALYSIS

The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.,* 357 NLRB 628 (2011). The Board has specifically found that the Regional Director has the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998) (stressing that the Regional Director has broad discretion in determining the method by which an election is conducted and that such a decision should not be overturned unless clear abuse of discretion can be demonstrated).

In *San Diego Gas & Electric*, the Board noted that it had invested its Regional Directors with broad discretion to determine the method by which elections are conducted. *San Diego Gas & Electric*, 325 NLRB at 1144. The Board has, however, recognized that such discretion was not unfettered, and it set forth certain guidelines over that discretion. *Id.* In doing so, the Board stated that its policy was that elections should, generally, be conducted manually, but that there were some instances in which a mail ballot would be appropriate because "of circumstances that would tend to make it difficult for eligible employees to vote in a manual election." *Id.* In clarifying the guidelines for a Regional Director's discretion to order a mail ballot election, the Board directed that a Regional Director should consider "at least" where employees are geographically or temporally scattered, or where there is a strike, lockout, or picketing in progress. *Id.* at 1145. In *San Diego Gas & Electric*, the Board also recognized that there may be other relevant factors to consider, and that extraordinary circumstances may warrant a departure from the stated guidelines in the exercise of discretion. *Id.* at 1145. see also NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2. Extraordinary circumstances are those unusual and unforeseen deviations from the range of circumstances already considered. A pandemic of a respiratory disease spreading from person to person caused by a novel coronavirus (COVID-19) that poses a serious public health risk could not have been anticipated by the Board at the time it issued its decision in *San Diego Gas & Electric.* This is exactly the type of extraordinary circumstances in which a Regional Director may exercise his or her discretion to take into consideration other factors.

Here, a manual election cannot be safely held at the lobby area in the Employer's facility as proposed by the Employer. Under the current pandemic, in deciding the method of election I need to consider factors such as safety, federal, state and local laws and guidance. In this regard, there are restrictions in place by the CMS and PA DOH, in addition to recommendations by the CDC, that call for the restriction of all visitors and non-essential healthcare personnel, except for certain compassionate care situations, in skilled nursing facilities. Board agents and union officials are covered by these restrictions. Additionally, holding an election at the Employer's facility at this time would unnecessarily put at risk the health and safety of voters, Agency personnel, the parties' representatives, and, particularly, patients and residents at the facility.

The Employer also suggested holding the election at a neutral site. Holding the election at a location other than the Employer's facility seems impracticable. At first instance, it will call for employees to make a trip to a site other than their workplace during non-work hours. This would undoubtedly pose an inconvenience to voters and may disenfranchise some voters from participating in the election if they are unavailable during non-work hours. Furthermore, holding the election at a different site does not remove the elevated risk of contracting the virus which is inherent in the person-to-person contact that will be necessary between voters, Agency personnel, and the parties' representatives. As previously mentioned, healthcare personnel continue to be the source of introduction of COVID-19 into nursing homes and holding a manual election at a different site with the participation of party representatives and Board agents puts these employees unnecessarily at risk of potential further exposure to COVID-19, which would undoubtedly have a detrimental impact on the vulnerable nursing home population. Additionally, it is unknown whether under the current circumstances an appropriate location can be secured to hold a manual election in the foreseeable future.

Under the extant conditions presented in this case, I find that a mail ballot election better ensures the safety of all participants. While the Employer avers in general terms that mail ballots are particularly vulnerable to problems and issues, and the Board has a long tradition and a strong general preference of conducting manual elections, it also has a long history of conducting elections by mail. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." See *London Farm Dairy*, 323 NLRB 1057 (1997) and cases cited therein. In this instance, a mail ballot election is the preferable method in order to avoid all risks of exposure and transmission present in group gatherings. Whereas the Employer suggests that there is potential of transmission of COVID-19 by mail, that potential is negligible compared to the potential of spread from group gatherings and close contact between election participants as a manual ballot election would require. Mail ballots may not eliminate all risks, but certainly minimizes the risks involved with the spread of COVID-19.

Additionally, considering that there is an ongoing uncertainty as to when this health crisis will ease, a manual ballot election cannot be directed at a date certain without the potential of additional significant delay. The first wave of this virus has not been completely ameliorated, and many medical experts and government officials have forecasted the realistic potential of a, possibly more severe, second wave, especially as restrictions begin to ease. In that there is not yet an approved medical treatment for the virus or a vaccine it is not possible at this time to accurately predict when it will be possible to safely conduct a manual election at this facility.

The Employer further contends that it has not enjoyed an appropriate opportunity to effectively communicate with employees about the election, and therefore, proposes that the election be held on June 5, or any day thereafter. The current rules governing representation cases recognize the employees' rights to have their votes in a Board-conducted election on questions concerning representation, "recorded accurately, efficiently and speedily." NLRB Final Rule, Representation Case Procedures, 79 FR 74307 (December 15, 2014); NLRB Final Rule, Representation Case Procedures, 85 FR 18366 (April 1, 2020); See also *NLRB v. A.J. Tower Co.*329 U.S. 324, 331 (1946). Thus, conducting Board elections "on the earliest date practicable" is of crucial importance in any representation case.

I cannot accept the Employer's premise that the circumstances of this case warrant prioritizing the Employer's right to campaign at the expense of employee free choice. While both rights find its basis in the Act itself, I am required to balance the Employer's rights against the statutory responsibility to give effect to employees' wishes concerning representation. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-620 (1969), established the standards for "balancing" an employer's Section 8(c) right, to express "any views, argument, or opinion" in communicating his views to his employees, with the employees' right to self-organization, holding (emphasis added, footnotes omitted):

> [A]n employer's rights cannot outweigh the equal rights of the employee to associate freely, as those rights are embodied in §7 and protected by § 8(a)(1) and the proviso to § 8(c).

The Petition in this case was filed on March 3, thus, the Employer has enjoyed ample time to communicate with its employees about its opinion on unionization. Postponing the election an additional month in order to afford the Employer additional time to campaign, conflicts with one of the fundamental purposes of the Act: the protection and promotion of employee freedom of choice.

Finally, the Employer argues that holding an election will disrupt employees from their work responsibilities. At the outset, I must point out that even when Board elections are held under normal circumstances, employees are still required to attend to their work responsibilities. The fact that the Employer and its employees currently have increased work responsibilities as a result of the pandemic must be balanced against the fact that nine weeks have already elapsed since the filing of the petition. Moreover, the Employer's argument concerning increased job responsibilities actually supports the direction of a mail ballot election, which will further avoid the distraction of employees from their duties at the facility by allowing them to cast their ballots while off duty.

IV. DETERMINATION:

I conclude that, under the circumstances, a mail ballot election is appropriate, as it will better protect the health and safety of all parties involved during the current health crisis and it will enfranchise employees on the earliest date practicable.

V. CONCLUSIONS AND FINDINGS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Based on the facts set forth in footnote 4 of this Decision, the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) and a health care institution within the meaning of Section 2(14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. There is no contractual bar, or any other bar, to conducting an election in this matter.

5. The Petitioner claims to represent certain employees of the Employer.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   Included: All full-time and regular part-time Licensed Practical Nurses (LPN's) employed by the Employer at its facility located at 3805 Field Street, Erie, PA.

   Excluded: All Registered Nurses, Service and Maintenance, Office Clerical employees, Managerial employees, confidential employees, and guards, and professional employees and Supervisors as defined in the Act.

7. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

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 S.E.I.U. Healthcare Pennsylvania.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit at 5:00 p.m. on Friday, May 15 2020, ballots will be mailed to voters by National Labor Relations Board, Region 06, from its office at 1000 Liberty Ave. Room 904 Pittsburgh, PA 15222-4111.[10] Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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, May 22, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 06 Office at (412) 395-4400 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

[10] At the hearing, the Petitioner waived its 10-day entitlement to the voter list.

All ballots will be comingled and counted at the Pittsburgh Regional Office on Monday, June 8, 2020, at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Pittsburgh Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities included but not limited to Stay at Home orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending April 25, 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 if they appear in person at the polls.

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 May 12, 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.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 accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. 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 14 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.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.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. 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.

Dated: May 8, 2020

Nancy Wilson
Regional Director
National Labor Relations Board
Region 06
1000 Liberty Ave Rm 904
Pittsburgh, PA 15222-4111

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of: Case No. 06-RC-257382

S.E.I.U. HEALTHCARE PENNSYLVANIA,

Petitioner,

and

TWINBROOK HEALTH AND
REHABILITATION CENTER,

Employer.

EMPLOYER'S CERTIFICATE OF SERVICE OF EMPLOYER'S REQUEST FOR REVIEW AND MOTION TO STAY ELECTION

The undersigned certifies that Employer's Request for Review and Motion to Stay Election in Case No. 06-RC-257382 was electronically served on Regional Director Nancy Wilson and the National Labor Relations Board via the National Labor Relations Board's official e-file system and, on May 22, 2020, a copy was served on the following via email:

Bruce M. Ludwig, Esquire
Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia PA 19103
bludwig@wwdlaw.com

Steven Grubbs, Esquire
S.E.I.U. Healthcare Pennsylvania
1500 North 2nd Street
Harrisburg, PA 17102
717-433-8010
steven.grubbs@seiuhcpa.org

BURNS WHITE LLC

Dated: May 22, 2020

BY: /s/Mary-Jo Rebelo
Mary-Jo Rebelo, Esquire
Attorney for Employer Twinbrook
Health and Rehabilitation Center
Burns White Center
48 26th Street
Pittsburgh, PA 15222
mjrebelo@burnswhite.com