

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

**The Riverview Nursing Facility, LLC d/b/a The
Riverview Care Center**

Employer

and

Case 14-RC-265356

**SEIU Healthcare MO and KS, a division of SEIU
Healthcare Illinois/Indiana**

Petitioner

DECISION AND DIRECTION OF ELECTION

On August 28, 2020,¹ SEIU Healthcare MO and KS, a division of SEIU Healthcare Illinois/Indiana ("Petitioner") filed its original petition in this case with the National Labor Relations Board ("Board"). By this petition, Petitioner seeks to represent all full-time and regular part-time cooks, activity assistants, dietary aides, licensed practical nurses (LPNs), graduate practical nurses (GPNs), certified medication technicians (CMTs), restorative aides (RAs), certified nursing assistants (CNAs), housekeepers, laundry aides, and maintenance employees employed by The Riverview Nursing Facility, LLC d/b/a The Riverview Care Center ("Employer") at its facility located in St. Louis, Missouri.

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). On September 17, the parties entered into a stipulated record and shortly after, pursuant to that stipulation, they submitted their positions to me on the voting method and details of election.

Based on the stipulated record, having reviewed the parties' positions, and having considered the factors discussed below, I have determined that because of the extraordinary circumstances presented by the ongoing COVID-19 pandemic, the Board will conduct this election by mail ballot.

¹ All dates are in 2020 unless otherwise noted.

POSITIONS OF THE PARTIES²

The Petitioner maintains a mail ballot election is appropriate given the current state of the COVID-19 pandemic in Missouri, particularly Greater St. Louis. It points out that “the Employer has restricted access prohibiting all non-essential visitors – including family members of residents, entertainers, salon service providers and volunteers – stating that such restrictions are to ensure the health and well [being] of its residents and employees.” The Petitioner states that at least two of the petitioned-for employees and an unknown number of residents at the Employer’s facility have tested positive for COVID-19. It did not provide dates for any of the confirmed cases.

The Employer does not contend that COVID-19 is no longer an issue in the community. However, it asserts manual election is appropriate because none of the criteria from the Board’s decision in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), are applicable to this case. It also argues a manual election can be safely held in its facility because COVID-19 is declining in St. Louis and the Employer will abide by the procedures set forth in General Counsel Memorandum 20-10, “Suggested Manual Election Protocols” (GC 20-10). Specifically, it would comply with:

- Social distancing of 6-feet between all participants at all times;
- The election mechanics procedures, including limitation on the number of individuals present for the pre-election conference and ballot count;
- Pre-election certifications regarding individuals affected or potentially affected by COVID-19;

² In its Statement of Position, the Employer objects to the Board’s new representation rules regarding the statement of position contending they violate its due process rights, are contrary to Section 9 and 8(c) of Act, and unconstitutionally compel speech. It argues the new rule somehow “shortens” the timeframe from petition filing to pre-election hearing, precluding investigating supervisory taint in some unspecified manner. It further argues that, because of this “shortened” timeframe, the *Peerless Plywood* rule should be abolished. First, the Employer’s Statement of Position was untimely filed, being due by Noon on September 10 but not e-filed until 12:03 p.m. (Central) and served on the Petitioner after that. As it failed to timely raise the issue, I need not consider it. See Board’s Rules & Regulations, Sec. 102.66(d); *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1 fn. 1 (2017). However, I note the Board’s new representation rules extended, not shortened, the time from petition filing to hearing (8 calendar days to 14 business days) and for the non-petitioning party to submit a statement of position, from the day before the hearing (typically 7 calendar days) to 8 business days following the notice of the hearing; the shorter timeline in the Board’s previous representation rules were found not to violate the Act or the Constitution. See *University of Southern California*, 365 NLRB No. 11, slip op. at 1 fn. 1 (2016). I further note that the Board’s rules allow for a party to request an extension of time for both the hearing and its statement of position; however, the Employer failed to file such requests.

- Post-election certification of whether any individuals present for the election have been affected or potentially affected by COVID-19 since the election; and,
- Election arrangements, including use of masks and other personal protective equipment (PPE), plexiglass barriers, a spacious polling area, and floor markings, as well as provision of supplies such as disposable pencils, glue/tape, hand sanitizer, wipes, etc.

In addition, the Employer proposed screening all individuals prior to their participation in the election, using temperature readings and a health questionnaire,³ and a voter release schedule that would help maintain social distancing.

The Employer proposes two 2-hour sessions, from 6:00 a.m. to 8:00 a.m. and 3:00 p.m. to 5:00 p.m. on October 16, for the approximately 60 to 65 petitioned-for employees. According to the Employer, “The polling area is adequate in size to seat observers and Board Agent along with at least two (2) voters and continue to maintain the required [6-foot] distancing throughout the voting process.” The record does not contain the dimensions of the proposed polling place or any evidence of its ventilation or air circulation.

The Employer argues a mail ballot election is inappropriate, citing *Classic Valet Parking*, 363 NLRB No. 23 (2015), and *Premier Utility Services, LLC*, 363 NLRB No. 159 (2016), along with a CBS news article about changes at the United States Postal Service.

The Employer did not provide information regarding how many employees or residents or visitors to its facility have tested positive for COVID-19, or quarantined or isolated due to suspected infection or contact with COVID-19, including the dates on which they tested positive, quarantined, or isolated. It also did not provide any evidence for what safety protocols for COVID-19 are currently in place at its facility.

BOARD’S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324,

³ The record does not contain a copy of the questionnaire the Employer proposes to use or details on who would perform the health screening.

330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). “It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145.

The Board’s longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.⁴ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Ibid.* This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other “extraordinary circumstances.” *San Diego Gas*, above at 1145.

Consistent with the recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a “COVID-19 Operational Status Update,”⁵ which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

The Board recognized the COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas* starting in May. See, e.g., *Atlas*

⁴ I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel—not the Board—and is intended to provide guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *Aaron Medical Transportation, Inc.*, 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995)). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

⁵ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

Pacific Engineering Co., 27-RC-258742 (unpublished May 8, 2020) (relying on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework” to deny review of Regional Director’s decision to order a mail ballot election).

The Board has continued to affirm the ongoing COVID-19 pandemic constitutes extraordinary circumstances under *San Diego Gas*, and it will continue to consider whether manual elections should be directed “based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”⁶ See *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same).

Current State of the Pandemic in the Relevant Area

In assessing the local conditions, I must consider the state of the pandemic in Missouri and Greater St. Louis, including the City of St. Louis, where the Employer and Board agent conducting the election are located. The United States and the State of Missouri are currently in a declared state of emergency due to COVID-19.⁷ As of September 22, the United States had surpassed 200,000 deaths due to COVID-19 and

⁶ While the Board has granted review and issued a stay of directed mail ballot elections in three cases, it has not referenced factors independent of *San Diego Gas*, established a different standard for analyzing petitions filed during the COVID-19 pandemic, or issued a ruling in those cases that impacts my conclusions and findings herein. See *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014 (unpublished September 16, 2020); *Draper Valley Farms*, 370 NLRB No. 20 (September 9, 2020); *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020).

⁷ “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (March 13, 2020). The White House. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed September 23, 2020); “Executive Order 20-16” (September 15, 2020). Missouri Secretary of State. <https://www.sos.mo.gov/library/reference/orders/2020/eo16> (extending state of emergency until December 30) (accessed September 23, 2020).

approached 7 million positive cases.⁸ As of September 22, Missouri reported 115,366 COVID-19 cases, with 1,864 fatalities,⁹ and the rolling seven-day average has continued to increase over the past two weeks.¹⁰ The City of St. Louis has 6,789 confirmed cases and 195 confirmed deaths.¹¹ When counting the surrounding counties of St. Louis, St. Charles, and Jefferson in Missouri,¹² and Madison and St. Clair, Illinois,¹³ the total increases to nearly 52,000 confirmed cases and 1,500 deaths. According to the City of St. Louis, the ZIP Code where the Employer's facility is located ranks high in four of its five layers of social vulnerability to COVID-19. It is in the most vulnerable percentile for residents living with a disability and the second most vulnerable percentile for residents living below the poverty line, residents with lower English proficiency, and those with no vehicle access.¹⁴ While the ZIP Code is in the second lowest percentile for residents 65 and older, the Employer's operations as an assisted living facility suggest those residing within its walls fall overwhelmingly in this category and place it in the most vulnerable percentile.

On September 23, Dr. Robert Redfield, the Director of the United States Centers for Disease Control and Prevention (CDC), testified to Congress that the preliminary results of government studies show "a majority of our nation, more than 90% of the

⁸ "CDC COVID Data Tracker." U.S. Centers for Disease Control and Prevention. <https://covid.cdc.gov/covid-data-tracker/> (accessed September 23, 2020).

⁹ "COVID-19 Outbreak." Missouri Department of Health & Senior Services. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/> (accessed September 23, 2020).

¹⁰ "Missouri Coronavirus Map and Case Count." *New York Times*. <https://www.nytimes.com/interactive/2020/us/missouri-coronavirus-cases.html> (accessed September 23, 2020).

¹¹ "COVID-19 Data." (updated September 22, 2020). City of St. Louis. <https://www.stlouis-mo.gov/covid-19/data/> (accessed September 23, 2020).

¹² St. Louis County (21,972 cases, 785 deaths), St. Charles County (7,321 cases, 115 deaths), Jefferson County (3,950 cases, 53 deaths). "Missouri COVID-19 Dashboard: The Spread of COVID-19 in Missouri." Missouri Department of Health & Senior Services. <http://mophep.maps.arcgis.com/apps/MapSeries/index.html?appid=8e01a5d8d8bd4b4f85add006f9e14a9d> (accessed September 23, 2020).

¹³ Madison County (5,414 cases, 131 deaths), St. Clair County (6,339 cases, 187 deaths). "COVID-19 Statistics." Illinois Department of Public Health. <https://www.dph.illinois.gov/covid19/covid19-statistics> (accessed September 23, 2020).

¹⁴ "Social Vulnerability by Zip Code." City of St. Louis. <https://www.stlouis-mo.gov/covid-19/data/social-vulnerability.cfm> (accessed September 23, 2020).

population, remains susceptible. It varies in different geographic parts from states that have less than 1% with evidence of previous infection to ... one as high as 24%.”¹⁵

Current Federal, State, and Local Guidance and Directives

The CDC explains that COVID-19 is primarily spread from person to person.¹⁶ A person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes,” so its guidance recommends “limit[ing] in-person contact as much as possible.”¹⁷ Moreover, the CDC’s September 17 update for travelers continues to maintain: “Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**” (emphasis in original).¹⁸

Its recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, good personal hygiene, and social distancing. The CDC further states that the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes; however, “it is unlikely to be spread from domestic or international mail, products or packaging.”¹⁹ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a

¹⁵ “CDC director says more than 90% of Americans remain susceptible to the coronavirus” (September 23, 2020). CNBC. <https://www.cnbc.com/2020/09/23/cdc-director-says-more-than-90percent-of-americans-remain-susceptible-to-the-coronavirus.html> (accessed September 23, 2020).

¹⁶ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (accessed September 23, 2020).

¹⁷ “What you should know about COVID-19 to protect yourself and others” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf> (accessed September 23, 2020).

¹⁸ “Travel during the COVID-19 Pandemic” (updated September 17, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed September 23, 2020).

¹⁹ “Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?” (updated September 18). <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed September 23, 2020).

hand sanitizer with at least 60% alcohol.”²⁰ Ultimately, the CDC’s September 11 update continues to highlight: **“The best way to prevent illness is to avoid being exposed to this virus”** (emphasis in original).²¹

At the outset of the pandemic, Missouri was under stay-at-home orders from April 6 through May 3. By June 12, statewide restrictions had been lifted, in favor of local officials “put[ting] further rules, regulations, or ordinances in place.”²²

On September 4, the City of St. Louis issued Health Commissioner’s Order 14 in response to COVID-19, which continues to limit many places of public accommodation to 50% capacity and generally requires the use of a face covering. Order 14 notes, in part:²³

COVID and COVID associated hospitalizations (confirmed and suspected) remain above 300, there is sustained increase in percent positivity in the City of St. Louis and the St. Louis Metropolitan Area, and the seven-day moving average of COVID associated hospital admissions in the region remains high (\geq 40).

Election Guidance

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

²⁰ “Running Essential Errands” (updated September 11, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last accessed September 23, 2020).

²¹ “How to Protect Yourself & Others” (updated September 11, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed September 23, 2020).

²² “Governor Parson Announces Missouri Will Fully Reopen, Enter Phase 2 of Recovery Plan on June 16” (June 11, 2020). Missouri Governor Michael L. Parson. <https://governor.mo.gov/press-releases/archive/governor-parson-announces-missouri-will-fully-reopen-enter-phase-2-recovery> (accessed September 23, 2020).

²³ <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-14.cfm> (continuing Health Commissioner’s Orders 13, 11, 9, and 8) (accessed September 23, 2020).

Specifically, the CDC instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “**[c]onsider voting alternatives available in your jurisdiction that minimize contact.**” Voting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19” (emphasis in original).²⁴ The Board has a longstanding and well-established alternative to in-person voting, a mail ballot election. Following the CDC’s guidance, on June 4, Missouri passed a law allowing absentee voting for those who have contracted or are simply in an at-risk category for contracting, COVID-19 without notarization.²⁵

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols, while specifically noting that it is not binding on Regional Directors because the Board—not the General Counsel—has authority over matters of representation. In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer’s certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel’s suggestions also include the Employer’s self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting

²⁴ “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed September 23, 2020).

²⁵ “Governor Parson Takes Security Measures To Safeguard Election Process, Protect Missouri Voters During Covid-19” (June 4, 2020). Missouri Governor Michael L. Parson. <https://governor.mo.gov/press-releases/archive/governor-parson-takes-security-measures-safeguard-election-process-protect> (accessed September 23, 2020).

symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state “symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath.” Similarly, the City of St. Louis only lists fever, cough, and difficulty breathing.²⁶ However, the CDC’s “Symptoms of Coronavirus” and Missouri’s “Prevention, Symptoms, Treatment, and Transmission” include additional symptoms:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC and Missouri also notes: “This list does not include all possible symptoms.”²⁷

Moreover, following issuance of GC 20-10,²⁸ the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission). The CDC’s “current best estimate” is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic²⁹ and would neither be identified nor have sought testing. Similarly, the CDC’s September 17 update for “Travel during the COVID-19 Pandemic” continues to warn travelers: “You may feel

²⁶ “Frequently Asked Questions, What are the symptoms?” City of St. Louis. <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/index.cfm> (accessed September 23, 2020).

²⁷ “Symptoms of Coronavirus.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed September 23, 2020); “Prevention, Symptoms, Treatment, and Transmission.” Missouri Department of Health & Senior Services. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/prevention.php> (accessed September 23, 2020).

²⁸ Most recently, on September 21, the CDC updated its considerations for holiday celebrations, including Halloween. The CDC categorizes traditional “trick-or-treating where treats are handed to children who go door to door,” a process not unlike voters being handed ballots, as a “higher risk activity.” “Holiday Celebrations.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/holidays.html> (accessed September 23, 2020).

²⁹ “COVID-19 Pandemic Planning Scenarios” (updated September 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed September 23, 2020).

well and not have any symptoms, but you can still spread COVID-19 to others.”³⁰ Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns.

A MAIL BALLOT ELECTION IS APPROPRIATE

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. The Employer correctly notes manual elections are the preference of the Board, and I recognize the potential problems associated with mail ballot elections referenced by the Employer are some of the reasons the Board has traditionally preferred manual elections.³¹ I do not discount those concerns.

Although I do not discount the concern regarding potential voter participation issues³² and acknowledge the potential risks of mail delivery procedures on the outcome of a mail ballot election, there is no indication that the United States Postal Service in Greater St. Louis is unable to deliver mail, that the petitioned-for employees would be unable to understand the mail balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any impediments to voter participation.³³ Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate, and the return date for mail ballots can be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.

³⁰ “Travel during the COVID-19 Pandemic” (updated September 17, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed September 23, 2020).

³¹ The Board’s general preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees’ representational desires. See, e.g., *London’s Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (showing the Board has conducted mail ballot elections since its earliest days).

³² I note the Board upheld the mail ballot elections in cases cited by the Employer. *Classic Valet Parking*, 363 NLRB No. 23 (2015); *Premier Utility Services, LLC*, 363 NLRB No. 159 (2016). While it is regrettably true that laboratory conditions are occasionally destroyed during mail ballot elections, they are also occasionally destroyed during manual elections, resulting in objections and rerun elections. Any party is, of course, free to present evidence of any actual disenfranchisement of voters in postelection objections. See, e.g., *Daylight Transport*, 31-RC-262633 (unpublished August 19, 2020).

³³ The article cited by the Employer is speculative at best, referencing only one couple’s issues with mail in one St. Louis neighborhood. The record does not contain any evidence employees are not timely receiving their mail or expressed concerns about timely receipt of mail.

Absent the present pandemic, a manual election would almost certainly be held in this case. The employees are neither “scattered,” in the sense of worktime or workplace, nor is there a strike, lockout, or picketing. Prior to the current pandemic the Board regularly conducted manual elections under similar circumstances, and the location and polling period proposed by the Employer are consistent with how the Board would typically schedule such an election.

However, my decision in this case is ultimately based on the “extraordinary circumstances” presented by this public health emergency. I recognize a degree of reopening has begun, in the United States generally and in St. Louis specifically. At the same time, it is not disputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is not an easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains. The difficulty in trying to find a metric on which to base such a decision is demonstrated by the opposing evidence of the rising number of cases in Greater St. Louis but the lowered governmental restrictions.

Ultimately, as the Board has made clear, this is a question of discretion. While the Employer has offered to abide by the suggested manual election protocols in GC 20-10, along with screening election participants, I find the circumstances of this case make it appropriate to hold a mail ballot election. I find that the extraordinary circumstances presented by the COVID-19 pandemic remain present here for several reasons. First, my decision is based on the number of COVID-19 cases in Missouri, the undisputed continued presence of the virus in Greater St. Louis, and the severity of the COVID-19 risk. In relying on these considerations, I note the level of new cases and the recent increase cases in the area.³⁴ It is not possible for me to know if this represents an increasing number of infections, a reflection of more widespread testing, better reporting, or simply a momentary spike in cases. However, it does raise the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. In any manual election voters will still physically come together in a single location, even if dispersed over time and socially distanced. Moreover, nursing home populations like those at the Employer’s

³⁴ In Missouri alone, as of September 22, there was a 7-day relative percent increase in St. Louis City (3%), St. Louis County (4%), St. Charles County (6%), and Jefferson County (9%). “Missouri COVID-19 Dashboard: The Spread of COVID-19 in Missouri,” above. See also, “Health Commissioner’s Order 14,” above.

facility are at high risk of being affected by COVID-19.³⁵ This represents an increased risk of some degree to all those participating. A mail ballot election avoids this risk.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms,³⁶ has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election “at the earliest date practicable” consistent with Section 102.67(b) of the Board’s Rules and Regulations.

Again, the Employer’s plan to address these risks attempts to place as many barriers as possible between participants. I find, ultimately, a safer manual election still involves physical interactions, congregating, and as such increased risk to Board agents, parties, voters, and residents. Here, the Board has an established process that avoids these risks, its mail ballot procedure. While mail balloting may not be the Board’s general preference, it is one of the ways in which the Board conducts an election when circumstances dictate. Under the present circumstances I find it prudent to order a mail ballot election.

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

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³⁷

³⁵ “Preparing for COVID-19 in Nursing Homes.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html> (accessed September 23, 2020).

³⁶ The potential for voter disenfranchisement increases when using all symptoms for COVID-19 established by the CDC and State of Missouri.

³⁷ The parties stipulated to the following commerce facts:

The Employer, The Riverview Nursing Facility, LLC d/b/a The Riverview Care Center, a Missouri corporation with a facility located at 5500 S. Broadway, St. Louis, Missouri, the only facility involved, is engaged in the operation of a an assisted living and long-term nursing home. During the past 12 months, a representative period of time, the Employer derived gross revenue in excess of \$100,000 and purchased and received goods valued in excess of \$5,000, which were shipped directly to the Employer’s St. Louis, Missouri facility from points located outside the State of Missouri.

2. The labor organization involved claims to represent certain employees of the Employer.

3. 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.

4. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time cooks, activity assistants, dietary aides, licensed practical nurses (LPNs), graduate practical nurses (GPNs), certified medication technicians (CMTs), restorative aides (RAs), certified nursing assistants (CNAs), housekeepers, laundry aides, and maintenance employees employed by the Employer at its facility located at 5500 South Broadway, St. Louis, Missouri, but excludes all registered nurses (RNs), receptionists, medical records secretary/central supply clerk, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The 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 **SEIU Healthcare MO and KS, a division of SEIU Healthcare Illinois/Indiana**.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Friday, October 16, 2020**, from the office of the National Labor Relations Board, Subregional Office 17 - 8600 Farley Street, Suite 100 Overland Park, Kansas 66212-4677. 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. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregional office by close of business on Thursday, November 12, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, October 23, 2020**, or otherwise require a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at (913) 275-6525.

The ballots will be commingled and counted by the Subregion 17 office at 2:00 p.m. CDT on **Friday, November 13, 2020**. In order to be valid and counted, the returned ballots must be received by the Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be 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 **September 13, 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.

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(I) 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 28, 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 Subregion and served electronically on the other parties named in this decision. The list must be electronically filed with the Subregion 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 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 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. 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.

The Riverview Nursing Facility, LLC
d/b/a The Riverview Care Center
Case 16-RC-265356

September 24, 2020

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 at St. Louis, Missouri, this 24th day of September 2020.



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103-2829