

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

<b>SEIU HEALTHCARE MISSOURI-KANSAS</b>	)	
<b>A DIVISION OF SEIU HEALTHCARE</b>	)	
<b>ILLINOIS/INDIANA,</b>	)	
	)	
<b>Petitioner,</b>	)	<b>Case No. 14-RC-265356</b>
	)	
<b>and</b>	)	
	)	
<b>THE RIVERVIEW NURSING FACILITY, LLC)</b>	)	
<b>d/b/a THE RIVERVIEW CARE CENTER,</b>	)	
	)	
<b>Employer.</b>	)	

**PETITIONER’S STATEMENT IN OPPOSITION TO THE EMPLOYER’S  
EMERGENCY MOTION TO STAY MAIL-BALLOT ELECTION**

COMES NOW Petitioner SEIU Healthcare Missouri-Kansas, a Division of SEIU Healthcare Illinois/Indiana (“Union”), by and through counsel, and submits its Statement in Opposition to The Riverview Care Center’s (“Employer”) Emergency Motion to Stay the Mail-Ballot Election.

**I. INTRODUCTION**

For the reasons set forth below, and in the Union’s Statement in Opposition to the Employer’s Request for Review (attached hereto as Exhibit), the Board should deny the Employer’s Emergency Motion to Stay the Mail Ballot Election. First and foremost, the Emergency Motion relies on information not timely presented to the Acting RD in violation of Section 102.67(e) of the Board’s Rules and Regulations. The Employer so heavily relies on new information, including a new affidavit and new exhibits, that it is nearly impossible to disentangle its new arguments from its original arguments, tainting the Motion in its entirety. Second, even considering the new facts, the Employer fails to make a clear showing that emergency relief is appropriate. The Acting RD’s Decision does not depart from Board

precedent and none of the findings contained therein were “clearly erroneous.” Rather, the Acting applied precedent and looking at various factors, including COVID-19 rates in the areas, the right to vote, and the safety of Board employees, properly determined that extraordinary circumstances warrant a mail ballot election.

## **II. STATEMENT OF FACTS**

On August 28, 2020, the Union filed a RC Petition with National Labor Relations Board, Region 14, seeking to represent certain employees employed by the Employer at its nursing home facility located in St. Louis, Missouri. (Exhibit 2, para 1, Employer’s Request for Review “RFR”). The parties entered into a Stipulation of Record on September 17, 2020 with the only issue remaining being whether the election should be conducted by manual or mail ballot. (Exhibit 2, para. 8, of Employer’s RFR). On September 18, 2020, the Employer submitted its position statement in support of a manual election. (Exhibit 3, Employer’s RFR). That same day the Union submitted its position statement supporting a mail ballot election. (Exhibit A to this Statement in Opposition).<sup>1</sup> On September 24, 2020, the Acting RD issued his Decision and Direction of Election directing a mail ballot election. (Exhibit 1, Employer’s RFR).

## **III. ARGUMENT**

To support is claim that extraordinary relief is appropriate, the Employer asserts that the Acting RD ignored evidence and cherry-picked favorable information to manufacture the need

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<sup>1</sup> The Employer included an incorrect version of the Union’s position statement supporting mail ballot election to its Request for Review. The last twenty-three (23) pages of Employer’s Exhibit 4 (an NPR article dated September 17, 2020 and duplicate St. Louis Post Dispatch articles dated September 19, 2020) were not included as part of the Union’s position statement. Therefore, the Board should not take these articles into consideration when ruling on the Employer’s Request for Review as they were not part of the record before the Regional Director, and the Employer is precluded from raising new facts in its Request for Review. *See* Board’s Rules and Regulation, Section 102.67(e) (“Such request may not raise any issue or allege any facts not timely presented to the Regional Director.”). A true and accurate copy of the Union’s position statement is attached to this Statement in Opposition as Exhibit A. The Board should use the attached Exhibit A and not the incorrect version attached to the Employer’s Request for Review as Exhibit 4.

for a mail ballot election. These are the same arguments which the Employer makes in its Request for Review. Rather than repeat all the Union's responses in this pleading, the Union replies to them briefly below. For the full response, the Union refers the Board to its Statement in Opposition to the Employer's Request for Review, which is attached as Exhibit B.

The Employer's Emergency Motion to Stay the Mail Ballot Election heavily relies on new factual assertions, along with arguments based on these new factual assertions, that were not part of the record before the Acting RD. The Board can and should deny the Employer's Emergency Motion on this basis alone. For example, the Employer claims in its Emergency Motion the Acting RD ignored the safety protocols in place at its nursing home since the beginning of the pandemic, yet that information was never presented to the Acting RD. The Employer clearly possessed this information at the time it submitted its position statement. The Employer is, therefore, precluded from raising and relying upon this information in its Emergency Motion (including Exhibit 6 attached to its Request for Review which is an affidavit that outlines the Employer's safety protocols). By further example, the Employer also claims the Acting RD ignored relevant evidence related to the state of the Covid-19 pandemic in the area and related to supposed issues with mail delivery caused by the post office. To support this argument, the Employer again relies on information and exhibits that were not timely presented to the Acting RD – Exhibits 7-11 attached to its Request for Review. The Employer cannot claim the Acting RD ignored specific evidence when such evidence was never before him.

Furthermore, no compelling reasons exist for reviewing the Acting RD's Decision. The Employer argues the Acting RD ignored the Employer's proposed manual election plan to manufacture the need for a mail ballot election. To the contrary, the Acting RD looked at the rising positivity rates in the greater St. Louis area and weighed that information against the

Employer's proposed plan for a manual election and concluded that a mail ballot election was a safer alternative that would minimize the risks associated with the pandemic. The Employer's supposed ability to comply with the guidelines set forth in GC Memo 20-10 does not automatically trigger a mail ballot election. The Employer also argues the Acting RD ignored evidence relating to delays associated with the post office. However, the Acting RD addressed the one article provided by the Employer in its position statement and noted it did not demonstrate systemic problems with mail delivery.

In reality, the Acting RD took into consideration the information and arguments made by the Employer but ultimately concluded that a mail ballot election was the most prudent option considering the current state of the Covid-19 pandemic in the area. The Acting RD's Decision did not depart from established Board precedent. Rather, he followed precedent, which mandates the RD to consider a variety of factors and not solely the state of the Employer's nursing home facility as the Employer wrongfully argues. *See, e.g., Atlas Pacific Engineering Co., Case No. 27-RC-258742, Order Denying Employer's Request for Review (May 8, 2020)* (noting that Covid-19 pandemic may constitute "extraordinary circumstances" under *San Diego Gas*); *see also Sea World of Florida, LLC, Case 12-RC-257917, Order Denying Employer's Request for Review (Sept. 20, 2020)* (rejecting employer's argument about mail delivery delay). The Acting RD's Decision also was not "clearly erroneous." The Acting RD noted the greater St. Louis region has recently reported an increase in positivity rates. Furthermore, the disease has made its presence felt within the Employer's nursing home, with employees and vulnerable residents having tested positive. A mail ballot ensures that employees are not disenfranchised, if between now and election day they contract the virus or if on election day they show symptoms that prevent them from entering the Employer's facility. And, a mail ballot ensures the safety of

Board employees. While the Employer does not like the decision, and individual Board members may have reached a different decision, that does not mean that the Acting RD “clearly abused the discretion afforded him” in ordering a mail ballot election. *See National Van Lines*, 120 NLRB 1343, 1346 (1958).

#### **IV. CONCLUSION**

For the foregoing reasons, Petitioner Union respectfully requests the Board to deny the Employer’s Emergency Motion to Stay the Mail Ballot Election and order such relief as the Board deems reasonable under the circumstances. Furthermore, the Board should deny the Employer’s request to impound the ballots.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12th day of October 2020 a copy of the foregoing document was electronically filed and emailed to the following parties

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d/b/a THE RIVERVIEW CARE CENTER	)	
	)	
Employer.	)	

**PETITIONER’S POSITION STATEMENT RE: METHOD OF ELECTION**

For the reasons set forth below, Petitioner submits that the petitioned-for elections should be conducted by mail ballot. It is the only feasible option under the extraordinary circumstances created by the current pandemic that protects Board agents, employees, and observers. A mail ballot is also appropriate given the Employer’s egregious and pervasive unfair labor practices.

In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board explained that Regional Directors possess discretion to assess whether the default rule favoring manual election should give way when a mail ballot election is particularly appropriate under extraordinary circumstances. The touchstone is whether there exists “circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *Id.* at 1144. Section 11301.2 of the Board’s Casehandling Manual, Part II Representation Proceedings, provides additional guidance and emphasizes that a Regional Director may direct a mail ballot election if a manual election, “though possible, is impractical or not easily done.”

On May 8, 2020, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Co.*, Case No. 27-RC-258742, addressed a mail ballot determination in the context of the Covid-19 pandemic. In a footnote, the Board noted that *San Diego Gas* contemplated “extraordinary circumstances” and that circumstances in place at that time – federal, state and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

Here, the current public health crisis justifies a mail ballot election. To date, the City of St. Louis has reported 6,625 confirmed Covid-19 cases and 192 total deaths.<sup>1</sup> On September 4, 2020, the City of St. Louis extended Emergency Orders, that remain in effect, that direct businesses to (1) encourage employees to quarantine if they have or believe to have COVID-19, (2) reduce face-to-face contact by having employees, whenever possible, work from home, and (3) restructure employee responsibilities to minimize the number of employees present at any one time.<sup>2</sup> The most recent Emergency Order notes that “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

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<sup>1</sup> <https://www.stlouis-mo.gov/covid-19/data/>

<sup>2</sup> See COVID-19 Emergency Orders, at <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/index.cfm>.

average of COVID associated hospital admissions in the region remains high ( $\geq 40$ ).”<sup>3</sup> Statewide, the picture is equally bleak. The seven 7-day moving average of cases in Missouri as of September 17 is 1,445 per day, near the highest point recorded since the start of the pandemic.<sup>4</sup>

Recognizing the seriousness of the current pandemic, 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 first thing to appear on the Employer’s website ([www.theriverviewcarecenter.com](http://www.theriverviewcarecenter.com)) is a Covid-19 warning. (Exhibit 1).<sup>5</sup> As such, Union representatives cannot access the Employer’s facilities.

A manual election will require repeated and substantial interaction among Board personnel, observers, and voters during the election and others who choose to attend the pre-election conference and ballot count. Observers will need to see the faces of voters, requiring them to lower their face masks. Board agents are required to maintain physical control of the ballots and will come in near contact with voters when distributing them. And, voters will enter booths, touching surfaces that a previous voter just

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<sup>3</sup> See Health Commissioner’s Order No. 14, <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-14.cfm>

<sup>4</sup> CDC COVID Data Tracker, at [https://covid.cdc.gov/covid-data-tracker/index.html#trends\\_dailytrends](https://covid.cdc.gov/covid-data-tracker/index.html#trends_dailytrends)

<sup>5</sup> The Center for Disease Control similarly suggests assisting living facilities limit or restrict outside visitors. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/assisted-living.html>. Additionally, Missouri’s Department of Health & Senior Services recommends nursing homes open up under very specific circumstances and limit access to outside nonessential visitors. The Employer seems to be operating under Phase 1 as it is still restricting visits from non-essential personnel. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/missouri-guidance-on-reopening-of-long-term-care-facilities.pdf>

touched and which the next voter will touch. These interactions are each a risk of transmission. Many of those infected with COVID-19 are asymptomatic; and, although a matter of some debate, they may unknowingly pass the virus to those whom they interact with.

Furthermore, a manual election would require any employee with COVID-19 or who believes that has COVID-19 to come into the facility and to vote in the presence of others, in contravention of the City's Emergency Orders, and at great risk to others. These employees have just as much right to vote. Requiring them to vote in person puts their health at risk, when they should be resting, and puts others at risk. This is not a hypothetical concern. Employees in the petitioned-for units are essential workers with an increased risk of infection considering that they work in a long-term care facility. It has been well documented that nursing homes and long-term care facilities in the St. Louis area have suffered from Covid-19 outbreaks.<sup>6</sup> As of August 4, 2020, "[a]ccording to DHSS, 103 facilities in St. Louis County have had at least one coronavirus infection. The city of St. Louis has had 23 care facilities with one or more cases, while Jefferson County and St. Charles County have had 10 and 29 facilities with infections, respectively."<sup>7</sup> Residents at the Employer's facility have tested positive for Covid-19 and at least two employees in the voting unit have tested positive for Covid-19. (Declaration of Paula Jones). In the days before the election, more employees could develop symptoms, could be quarantined by the Employer, or could be ordered by their

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<sup>6</sup> As of July 19, 2020, 502 residents and 7 employees have died in Missouri nursing homes. <https://apnews.com/5770311d461071910b37cc43610bffb0>

<sup>7</sup> <https://news.stlpublicradio.org/health-science-environment/2020-08-05/nursing-home-residents-make-up-nearly-two-thirds-of-all-covid-19-deaths-in-st-louis-county>

health care provider to quarantine. It would be unsafe and unfair to expect such employees to choose between their health and voting. It would also be unfair to other employees. If anything, a manual election could depress turn-out. Sick employees may stay home, and other employees may not want to risk exposure.

Simply put, a mail ballot is much safer and more practical alternative to a manual election. A mail ballot minimizes the risk of transmission and best protects all involved - employees, observers, and Board agents.<sup>8</sup> In this regard, the Centers for Disease Control and Prevention still recommends that voters consider voting alternatives to limit the number of people voters come in contact with and the amount of time voters are in contact with others to help reduce the spread of Covid-19.<sup>9</sup> Similarly, the State of Missouri passed Senate Bill 631 this summer, which authorizes mail in ballots for the November 2020 election to avoid the risk of contracting or transmitting (COVID-19).<sup>10</sup> Any registered voter may cast a mail-in ballot, if they do not want to go to a polling place on election day. Section 115.302, R.S.Mo. The Region should not force employees to go to the facility to vote. Instead, it should follow the advice of the CDC, and the lead of states allowing mail-in ballots and order a mail ballot.

Lastly, the NLRB's Case Handling Manual, Section 11302.2 states that the Regional Director may direct that an election be conducted by mail in situations where

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<sup>8</sup> On July 6, the General Counsel of the NLRB issued GC Memorandum 20-10 which suggested guidance for manual election protocols during the Covid-19 pandemic. This suggested guidance, however, only comes into play *when and if* a manual election is deemed appropriate. The General Counsel made clear that Regional Directors have authority to make initial decision about when, how and in what manner elections are conducted. The Memorandum is not binding on Regional Directors.

<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>

<sup>10</sup> Missouri Secretary of State, How to Vote, at <https://www.sos.mo.gov/elections/goVoteMissouri/howtovote>.

there “egregious or pervasive employer unfair labor practices.” Here, the Union has filed two charges against the Employer alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act, including the discharge of 9 employees over the last few weeks – Case Nos. 14-CA-265341 and 14-CA-265900.<sup>11</sup> Holding an election on the Employer’s premises would compromise the prospect that employees will be able to exercise free choice.

For the foregoing reasons, the Regional Director should direct a mail ballot election in this case, as follows: The ballots should be mailed to eligible voters, in each unit, beginning at **9:30 a.m. on October 7, 2020**, from the St. Louis office. Those employees who believe they are eligible to vote and who do not receive a ballot in the mail by **October 16, 2020**, should communicate immediately with the NLRB by calling the St. Louis office or the NLRB’s toll-free line. All ballots should be comingled and counted at the St. Louis office, on **October 28, 2020 at 10:00 a.m.** In order to be valid and counted, the returned ballots must be received in the St. Louis office prior to the counting of ballots. Finally, due to COVID-19, the regional office should conduct the ballot count by video conference platform to be determined by the Regional Director after consultation with the parties.

Respectfully submitted,

/s/ Amanda K. Hansen  
Amanda K. Hansen (64889MO)  
Schuchat, Cook & Werner  
555 Washington Ave, Ste 520  
St. Louis, Missouri 63101

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<sup>11</sup> There is a high likelihood that there will be challenged voters because the Petitioner alleges several employees were discharged in violation of Sections 8(a)(1) and 8(a)(3) of the Act. Per Casehandling Manual Section 11338.3, the Board Agent, observers, and voter must be in reasonably close proximity to each other to make the challenge and obtain information from the challenged voter to be entered by the Board Agent on the challenged ballot envelope stub. These elements of a manual election cannot be undertaken in compliance with proper social distancing requirements.

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*Attorney for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was e-filed with the National Labor Relations Board, Region 14 on this 18th day of September 2020 and that a copy was also sent via e-mail to the following:

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*Attorneys for Employer*

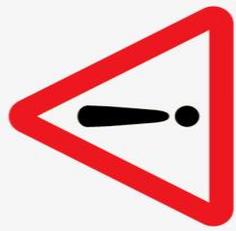
/s/ Amanda K. Hansen  
Amanda K. Hansen

Exhibit 1

The screenshot shows a web browser window with the address bar containing "http://theriverviewcarecenter.com/". The page header includes the "the Riverview" logo and a navigation menu with links for "Private Suites", "Services", "Lifestyle", "Rehab", "Photos", "Careers", and "Contact". A prominent blue banner at the top reads "ATTENTION: COVID-19 POLICIES & INFO (click to read) Call us today: 314-353-5900". The main content area features a large, semi-transparent "COVID-19" warning box. This box contains a red warning triangle icon, the heading "COVID-19", and a paragraph of text: "Our first priority at The Riverview Care Center is to ensure the health and well being of our residents and employees. In accordance with the directives of Federal, State and local government agencies our building will be access restricted until further notice prohibiting any non-essential visitors including but not limited to family members of residents not in imminent end-of-life care, entertainers, salon service providers and volunteers. Temperature checks will continue to be required of all employees and essential visitors prior to entry. We appreciate your patience and assistance as we implement these policies for everyone's safety." The name "Holler Box" is visible in the bottom right corner of the notification. The browser's taskbar at the bottom shows various application icons and the system clock indicating 1:24 PM on 9/18/2020.



## Covid-19



Our first priority at The Riverview Care Center is to ensure the health and well being of our residents and employees. In accordance with the directives of Federal, State and local government agencies our building will be access restricted until further notice prohibiting any non-essential visitors including but not limited to family members of residents not in imminent end-of-life care, entertainers, salon service providers and volunteers. Temperature checks will continue to be required of all employees and essential visitors prior to entry. We appreciate your patience and assistance as we implement these policies for everyone's safety.



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**PETITIONER’S STATEMENT IN OPPOSITION TO THE EMPLOYER’S REQUEST  
FOR BOARD REVIEW OF ACTING REGIONAL DIRECTOR’S ORDER FOR MAIL-  
BALLOT ELECTION**

COMES NOW Petitioner SEIU Healthcare Missouri-Kansas, a Division of SEIU Healthcare Illinois/Indiana (“Union”), by and through counsel, and submits its Statement in Opposition to The Riverview Care Center’s (“Employer”) Request for Review. The Board should deny the Employer’s request for two, independent reasons.

First, the Employer’s Request violates Section 102.67(e) by including exhibits and factual assertions along with arguments based on those exhibits and assertions that are not in the record and that it did not timely present to the Regional Director. These new facts and new arguments are the foundation of the Employer’s Request and taint it in its entirety.

Second, even considering the Employer’s new facts and arguments, no compelling reason exists for reviewing the Acting RD’s Decision. The Acting RD properly exercised his authority in determining that extraordinary circumstances presented by the COVID-19 pandemic warrant a mail ballot election, including the real possibility of unit employees contracting the virus before the election and the safety of NLRB employees. The Acting RD’s concerns were not based on

irrelevant evidence or speculation. The Acting RD noted the greater St. Louis region has recently reported an increase in positivity rate and noted the relatively recent presence of the virus in the Employer's nursing home, with employees and vulnerable residents having tested positive. The Acting RD's Decision was also in line with federal, state and local guidance and in line with Board precedent.

## **I. STATEMENT OF FACTS**

On August 28, 2020, the Union filed a RC Petition with National Labor Relations Board, Region 14, seeking to represent certain employees employed by the Employer at its nursing home facility located in St. Louis, Missouri. (Exhibit 2, para 1, Employer's Request for Review "RFR"). The parties entered into a Stipulation of Record on September 17, 2020 with the only issue remaining being whether the election should be conducted by manual or mail ballot. (Exhibit 2, para. 8, of Employer's RFR). On September 18, 2020, the Employer submitted its position statement in support of a manual election. (Exhibit 3, Employer's RFR). That same day the Union submitted its position statement supporting a mail ballot election. (Exhibit A to this Statement in Opposition).<sup>1</sup> On September 24, 2020, the Acting RD issued his Decision and Direction of Election directing a mail ballot election. (Exhibit 1, Employer's RFR).

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<sup>1</sup> The Employer included an incorrect version of the Union's position statement supporting mail ballot election to its Request for Review. The last twenty-three (23) pages of Employer's Exhibit 4 (an NPR article dated September 17, 2020 and duplicate St. Louis Post Dispatch articles dated September 19, 2020) were not included as part of the Union's position statement. Therefore, the Board should not take these articles into consideration when ruling on the Employer's Request for Review as they were not part of the record before the Regional Director, and the Employer is precluded from raising new facts in its Request for Review. *See* Board's Rules and Regulation, Section 102.67(e) ("Such request may not raise any issue or allege any facts not timely presented to the Regional Director."). A true and accurate copy of the Union's position statement is attached to this Statement in Opposition as Exhibit A. The Board should use the attached Exhibit A and not the incorrect version attached to the Employer's Request for Review as Exhibit 4.

## II. ARGUMENT

### A. The Employer's Request for Review does not comply with Section 102.67(e) of the Board's Rules and Regulations.

Section 102.67(e) of the Board's Rules and Regulations provides that a party's request for review cannot "raise any issue or allege any facts not timely presented before the Regional Director." *See Pulau Corp.*, 363 NLRB No. 8 at fn. 1 (2015) (denying employer's request for review and noting the employer improperly raised new facts and arguments based on those new facts for the first time in its request for review); *CEVA Logistics U.S., Inc.*, 357 NLRB 628, 629 (2011) ("[T]he Board has long held that a party's request for review may not raise any issue or allege any facts not timely presented to the Regional Director."). Explained in the paragraphs below, the Employer's Request for Review violates Section 102.67(e), because it improperly includes exhibits and factual assertions not presented to the Acting RD and improperly includes several arguments based on these new exhibits and factual assertions.

The Employer included for the first time in its Request for Review Exhibit 6 which is the Affidavit of Nancy Stevens and Exhibit A attached to that Affidavit. Exhibit 6 was not part of the record before the Acting RD, yet the Employer exclusively relies upon Exhibit 6 as the basis for all factual assertions made in Section III.A. of its Request for Review (pgs. 3-7). Importantly, a review of Nancy Stevens' Affidavit makes clear that all the information contained therein was available to and known by the Employer at the time it filed its position statement on September 18, 2020. (Exhibit 3 of Employer's RFR). The Employer, however, did not include this information with its position statement. Nor did it seek to reopen the record under Rule 102.65. Either way the Employer's Covid-19 safety and testing protocols have admittedly been in place for months. The number of staff and residents who have tested positive for Covid-19 was also available to the Employer at the time it submitted its position statement. And,

information about Missouri’s updated visitation guidance – with the actual guidance attached to the Affidavit as Exhibit A – was announced on September 16, 2020 as admitted by Nancy Stevens (Exhibit 6, para 13, Employer’s RFR). Having failed to include this affidavit, and the information contained in the affidavit, in its position statement, the Employer cannot now rely on it.

The Employer also includes for the first time in its Request for Review Exhibits 9, 10 and 11 which were not a part of its position statement in support of a manual election. Exhibit 9 is a news article related to the United States Postal Service (“USPS”) dated August 14, 2020. Exhibit 10 is a second news article related to the USPS dated June 15, 2020.<sup>2</sup> Exhibit 11 is a third news article related to the USPS dated August 21, 2020. All three exhibits and the information therein were available at the time the Employer submitted its position statement. While the Employer made an argument about mail delivery, it did not include these exhibits.

Finally, the Employer’s Request for Review includes Exhibits 7 and 8 which contain information that post-dates the Acting RD’s September 24, 2020 Decision. Exhibit 7 is a news article related to Missouri’s number of Covid-19 cases dated October 1, 2020. Exhibit 8 is a second news article related to Missouri’s number of Covid-19 cases dated October 5, 2020. Notably, if the Employer wanted the Acting RD to consider this new information and these new exhibits, Section 102.65(e)(1) contains such a mechanism. The Employer could have filed a motion to reopen the record and for reconsideration based on the new information, yet it did not. The Employer is now precluded from including the information in its Request for Review.

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<sup>2</sup> The Exhibit 10 news article did not include a date. However, an internet search revealed it was published on July 15, 2020 by the Federal News Network. <https://federalnewsnetwork.com/management/2020/07/usps-warns-staff-of-temporary-mail-delays-as-it-cuts-soaring-delivery-costs/>

The Employer so heavily relies upon new information as grounds for the Request for Review that the Board should reject the Request in its entirety. The Employer uses this new information to argue the Acting RD departed from Board precedent and to argue various ways as to why the Acting RD's Decision was erroneous. *See* Employer's RFR at pgs. 14-15, 17-19, 21-22. The Employer weaves and cites this new information throughout its Request for Review, on most pages, making it very difficult, if not impossible, to untangle the improper new information from the allegations it presented to the Acting RD. Having made this strategic choice, the Employer has effectively founded its entire Request on all new facts and arguments, in violation of Section 102.67(e). Alternatively, and at minimum, the Board should disregard this new information – Exhibits 6-11 and all factual assertions based on these exhibits – and disregard the arguments based upon this new information when considering the merits of the Employer's Request.

**B. No compelling reasons exist for granting the Employer's Request for Review.**

The Employer's Request for Review is limited to Sections 102.67(d)(1) and (d)(2). The only questions to be decided are (1) whether a substantial question of law or policy is raised because of the absence or departure from officially reported Board precedent, and (2) whether the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the Employer. As will be shown below, the answers to both questions is an emphatic no.

1. The Acting Regional Director's Decision does not depart from officially reported Board precedent.

The Acting RD's decision was centered in long-standing precedent regarding a Regional Director's discretion in deciding whether to direct a manual or mail ballot election. In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the NLRB recognized that, while Board elections

should, as a general rule, be conducted through manual elections and specifies well-settled guidelines for determining whether a mail ballot election would normally be appropriate, “there may be other relevant factors that the Regional Director may consider in making this decision.” The Board noted that “extraordinary circumstances” could permit a Regional Director to exercise his or her discretion outside of the guidelines set forth in that decision. *Id.*

The Employer argues that the Acting RD departed from Board precedent because he summarily ordered a mail ballot election though no actual “extraordinary circumstances” existed at the Employer’s nursing home facility such that a manual election was unsafe or not feasible due to the Covid-19 pandemic.<sup>3</sup> The Employer provides no authority to support this extremely narrow interpretation of *San Diego Gas*. To the contrary, that Board has made clear in other cases that Regional Directors can and should take into consideration a variety of factors, relating to COVID-19, in making their decision. *See, e.g., Atlas Pacific Engineering Co., Case No. 27-RC-258742, Order Denying Employer’s Request for Review (May 8, 2020)* (noting that Covid-19 pandemic may constitute an extraordinary circumstance under *San Diego Gas*). As also noted by the Acting RD, GC Memorandum 20-10 states a Regional Director should consider “numerous variables, including, but not limited to, the safety of Board Agents, and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of the pandemic outbreak in the election locality.” (GC Memo. 20-10 pg. 1). Similarly, the Board’s COVID-19 Operational Status Update explains that when determining the method of election, Regional Directors “will

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<sup>3</sup> The Employer solely relies upon the safety protocols that have been put in place since March 2020 to support its position that the pandemic no longer presents a risk at its nursing home facility creating no “extraordinary circumstances.” However, as explained in an earlier section, the Employer failed to timely present this information to the Acting RD though it was known to the Employer at the time it submitted its position statement. The Board cannot not rely on this new information raised for the first time in the Employer’s Request for Review to support the argument that the Board departed from long standing precedent.

consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.” DDE pg. 4. Finally, the Board has regularly stated it will continue to consider whether a manual or mail ballot election 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.” DDE pg. 5 (citing Board cases).

There can be no doubt that the Acting RD’s Decision was made in full accord with existing precedent taking into consideration a variety of variables. The Acting RD correctly took into consideration: the state of the pandemic in the relevant area citing the recent increase in positive cases in the greater St. Louis Area; current health guidance and directives from federal, state and local authorities specifically noting St. Louis’ Health Commissioner’s Order still in effect; current election guidance from federal and state authorities; the very real potential of employees not being able to vote if they test positive or develop Covid-19 symptoms or come into contact with someone who tested positive for Covid-19 thus depriving them of their ability to vote; the fact that the Employer runs a nursing home whose vulnerable residents have tested positive; and, the Employer’s proposed plans for a manual election. That the Employer does not agree with the Acting RD’s Decision does not mean that the decision was not based on precedent. The Employer does not determine which factors should favor or disfavor a mail ballot election, rather precedent does, and the Acting RD properly followed the variables established by precedent.

2. The Acting RD Decision correctly considered the state of the pandemic in the greater St. Louis area.

The Employer takes issue that the Acting RD examined the state of the pandemic throughout the counties which comprise the greater St. Louis area instead of solely focusing on

St. Louis City. But, the virus does not recognize zip codes and county lines, which means it is important for the Board to look at the region. In this regard, the participants of a manual election are not confined to just the City of St. Louis. According to the Excelsior list provided by the Employer, some eligible employees live in surrounding counties including counties across the Mississippi River in Illinois and in St. Louis County and Jefferson County in Missouri. Nor do the Board Agents in Region 14 who would run and monitor a manual election all live in the City of St. Louis. As such the Regional Director did not error by taking into consideration the state of the pandemic in communities surrounding the Employer's nursing home.

Furthermore, contrary to the Employer's claims, the Acting RD did take into consideration the most recent statistics.<sup>4</sup> The picture is not as rosy as the Employer attempts to paint. A few days before the Acting RD's Decision, the greater St. Louis area reported an increase in positivity ratings, including the City of St. Louis. DDE pg. 12 n. 34. The Employer complains that the most recent Order from the City of St. Louis, citing hospitalizations in the area and a rise in positive cases in people under 40, is dated. But, that Order, directing business to reduce face to face contact, is still in effect because conditions have not sufficiently improved. Moreover, a Covid-19 warning is still the first thing to appear on the Employer's website, stating that the Employer continues to restrict 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 wellbeing of its residents and employees.<sup>5</sup> It is

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<sup>4</sup> The Employer relies upon Exhibits 7 and 8 to support its position that the Acting RD failed to rely on the most recent pandemic statistics in making his decision. The Board should disregard the Employer's reliance on these new exhibits. Explained earlier, presenting this new information for the first time in its Request for Review violates Section 102.67(e) and it was not timely presented to the Acting RD.

<sup>5</sup> [www.theriverviewcarecenter.com](http://www.theriverviewcarecenter.com) (last accessed 10/12/20)

clear, then, that the Acting RD did not distort the state of the pandemic in the area but accurately reported it.

3. The Acting RD's Decision does not ignore the safety protocols in place at the Employer's nursing home facility.

The Employer next argues the Acting RD's Decision is erroneous because he failed to take into consideration the safety protocols in place at the Employer's facility and wholly ignored the Employer's proposed protocols for a manual election in conformity with GC Memo 20-10. The Employer's argument that the Acting RD ignored this information is inaccurate. As explained in prior paragraphs, the Employer did not provide the Acting RD with information relating to the safety protocols in place at its facility since the beginning of the pandemic. The Employer is, therefore, precluded from making this argument as it is based on new information in violation of Section 102.67(e). Additionally, as stated earlier, whether the Covid-19 pandemic currently presents an "extraordinary circumstance" to warrant a mail ballot election does not solely turn on the conditions at the Employer's facility but on a multitude of variables.

That said, the Acting RD did take into consideration the Employer's proposed plan for a manual election but ultimately concluded that a mail ballot election was safer considering the extraordinary circumstances presented by the pandemic in the greater St. Louis area. DDE pg. 13. What the Employer seems to forget is that GC Memo 20-10, as the Acting RD correctly noted, merely provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate – it does not purport to mandate manual elections under certain conditions. DDE pg. 9. ("[GC Memo 20-10] is not a checklist whereby a manual election is mandated if the protocols are met"). Certain precautions may minimize risk, but they cannot eliminate it. That is why the General Counsel's suggested election protocols emphasize that these

decisions are to be made on a case-by-case basis. The Acting RD was entirely within his discretion to determine it was more appropriate to avoid the risk altogether than to minimize it.

The Employer also takes issue that the Acting RD took into consideration CDC guidance when ordering a mail ballot election. While the Employer may have its own ideas and opinions about the risks associated with the COVID-19 pandemic, the Acting RD chose to rely upon the specific guidance from governmental agencies charged with the task of protecting the health and safety of US citizens. Such reliance is not erroneous; the Board has stated Regional Directors should take this information into consideration when deciding method of election. DDE pg. 4.

4. The Acting RD's Decision does not ignore the Employer's argument relating to mail delivery and voter participation.

Lastly, the Employer argues the Acting RD's Decision is erroneous because he ignored evidence that delays in postal delivery could result in ballots not being received in time thus reducing voter turnout. The Employer raised this argument in its position statement to the Acting RD and included an article about one couple's issue with mail in one neighborhood.<sup>6</sup> The Acting RD considered but rejected the Employer's argument, explaining one article is not sufficient to prove systemic problems with postal delivery. DDE pg. 11. This was correct. The US mail service is currently handling hundreds of thousands of mail ballots. It can handle the 60 or so related to this election. Moreover, the Employer ignores that the ballots in this case will not be counted until 10 days after the election, on November 13, 2020, giving extra time for mail delivery after the election. The Employer also ignores one of the most important aspects of a mail ballot. It ensures that employees who are positive for Covid-19 (or simply showing

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<sup>6</sup> The Employer also relies on Exhibits 9-11 to argue that a mail ballot election is not appropriate. Explained earlier, these Exhibits were not included in the Employer's position statement and were not a part of the record before the Acting RD. The Employer is precluded from relying upon this improper new information to make its argument that the Acting RD's Decision is erroneous.

symptoms) are not disenfranchised by no fault of their own. This is not a speculative concern. The Employer admits that employees have tested positive and are not allowed at the facility without testing negative twice and also states that its screens visitors for symptoms. That means, in a manual election, employees could be denied the right to vote, because they cannot access the premises. By contrast, a mail ballot election preserves every employee's right to vote.

Finally, the Employer argues that mail ballots result in reduced voter turnout. But, as this Board has observed, concerns about voter disenfranchisement may be addressed through the election objection process if either party believes that actual disenfranchisement has occurred. *See TDS Metrocom, LLC*, Case No. 18-RC-260318 (June 23, 2020) (rejecting Request for Review of mail ballot election directed as a result of COVID-19, noting that "any party is free to present evidence of any actual disenfranchisement of voters, if applicable, in post-election objections.").

#### **IV. CONCLUSION**

For the foregoing reasons, Petitioner Union respectfully requests the Board to deny the Employer's Request for Review the Acting RD's Decision and order such relief as the Board deems reasonable under the circumstances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12th day of October 2020 a copy of the foregoing document was electronically filed and emailed to the following parties

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

SEIU HEALTHCARE MISSOURI-KANSAS,	)	
A DIVISION OF SEIU HEALTHCARE	)	
ILLINOIS/INDIANA,	)	
	)	Case Nos.: 14-RC-265356
Petitioner,	)	
	)	
and	)	
	)	
THE RIVERVIEW NURSING FACILITY, LLC	)	
d/b/a THE RIVERVIEW CARE CENTER	)	
	)	
Employer.	)	

**PETITIONER’S POSITION STATEMENT RE: METHOD OF ELECTION**

For the reasons set forth below, Petitioner submits that the petitioned-for elections should be conducted by mail ballot. It is the only feasible option under the extraordinary circumstances created by the current pandemic that protects Board agents, employees, and observers. A mail ballot is also appropriate given the Employer’s egregious and pervasive unfair labor practices.

In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board explained that Regional Directors possess discretion to assess whether the default rule favoring manual election should give way when a mail ballot election is particularly appropriate under extraordinary circumstances. The touchstone is whether there exists “circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *Id.* at 1144. Section 11301.2 of the Board’s Casehandling Manual, Part II Representation Proceedings, provides additional guidance and emphasizes that a Regional Director may direct a mail ballot election if a manual election, “though possible, is impractical or not easily done.”

On May 8, 2020, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Co.*, Case No. 27-RC-258742, addressed a mail ballot determination in the context of the Covid-19 pandemic. In a footnote, the Board noted that *San Diego Gas* contemplated “extraordinary circumstances” and that circumstances in place at that time – federal, state and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

Here, the current public health crisis justifies a mail ballot election. To date, the City of St. Louis has reported 6,625 confirmed Covid-19 cases and 192 total deaths.<sup>1</sup> On September 4, 2020, the City of St. Louis extended Emergency Orders, that remain in effect, that direct businesses to (1) encourage employees to quarantine if they have or believe to have COVID-19, (2) reduce face-to-face contact by having employees, whenever possible, work from home, and (3) restructure employee responsibilities to minimize the number of employees present at any one time.<sup>2</sup> The most recent Emergency Order notes that “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

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<sup>1</sup> <https://www.stlouis-mo.gov/covid-19/data/>

<sup>2</sup> See COVID-19 Emergency Orders, at <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/index.cfm>.

average of COVID associated hospital admissions in the region remains high ( $\geq 40$ ).”<sup>3</sup> Statewide, the picture is equally bleak. The seven 7-day moving average of cases in Missouri as of September 17 is 1,445 per day, near the highest point recorded since the start of the pandemic.<sup>4</sup>

Recognizing the seriousness of the current pandemic, 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 first thing to appear on the Employer’s website ([www.theriverviewcarecenter.com](http://www.theriverviewcarecenter.com)) is a Covid-19 warning. (Exhibit 1).<sup>5</sup> As such, Union representatives cannot access the Employer’s facilities.

A manual election will require repeated and substantial interaction among Board personnel, observers, and voters during the election and others who choose to attend the pre-election conference and ballot count. Observers will need to see the faces of voters, requiring them to lower their face masks. Board agents are required to maintain physical control of the ballots and will come in near contact with voters when distributing them. And, voters will enter booths, touching surfaces that a previous voter just

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<sup>3</sup> See Health Commissioner’s Order No. 14, <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-14.cfm>

<sup>4</sup> CDC COVID Data Tracker, at [https://covid.cdc.gov/covid-data-tracker/index.html#trends\\_dailytrends](https://covid.cdc.gov/covid-data-tracker/index.html#trends_dailytrends)

<sup>5</sup> The Center for Disease Control similarly suggests assisting living facilities limit or restrict outside visitors. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/assisted-living.html>. Additionally, Missouri’s Department of Health & Senior Services recommends nursing homes open up under very specific circumstances and limit access to outside nonessential visitors. The Employer seems to be operating under Phase 1 as it is still restricting visits from non-essential personnel. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/missouri-guidance-on-reopening-of-long-term-care-facilities.pdf>

touched and which the next voter will touch. These interactions are each a risk of transmission. Many of those infected with COVID-19 are asymptomatic; and, although a matter of some debate, they may unknowingly pass the virus to those whom they interact with.

Furthermore, a manual election would require any employee with COVID-19 or who believes that has COVID-19 to come into the facility and to vote in the presence of others, in contravention of the City's Emergency Orders, and at great risk to others. These employees have just as much right to vote. Requiring them to vote in person puts their health at risk, when they should be resting, and puts others at risk. This is not a hypothetical concern. Employees in the petitioned-for units are essential workers with an increased risk of infection considering that they work in a long-term care facility. It has been well documented that nursing homes and long-term care facilities in the St. Louis area have suffered from Covid-19 outbreaks.<sup>6</sup> As of August 4, 2020, "[a]ccording to DHSS, 103 facilities in St. Louis County have had at least one coronavirus infection. The city of St. Louis has had 23 care facilities with one or more cases, while Jefferson County and St. Charles County have had 10 and 29 facilities with infections, respectively."<sup>7</sup> Residents at the Employer's facility have tested positive for Covid-19 and at least two employees in the voting unit have tested positive for Covid-19. (Declaration of Paula Jones). In the days before the election, more employees could develop symptoms, could be quarantined by the Employer, or could be ordered by their

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<sup>6</sup> As of July 19, 2020, 502 residents and 7 employees have died in Missouri nursing homes. <https://apnews.com/5770311d461071910b37cc43610bffb0>

<sup>7</sup> <https://news.stlpublicradio.org/health-science-environment/2020-08-05/nursing-home-residents-make-up-nearly-two-thirds-of-all-covid-19-deaths-in-st-louis-county>

health care provider to quarantine. It would be unsafe and unfair to expect such employees to choose between their health and voting. It would also be unfair to other employees. If anything, a manual election could depress turn-out. Sick employees may stay home, and other employees may not want to risk exposure.

Simply put, a mail ballot is much safer and more practical alternative to a manual election. A mail ballot minimizes the risk of transmission and best protects all involved - employees, observers, and Board agents.<sup>8</sup> In this regard, the Centers for Disease Control and Prevention still recommends that voters consider voting alternatives to limit the number of people voters come in contact with and the amount of time voters are in contact with others to help reduce the spread of Covid-19.<sup>9</sup> Similarly, the State of Missouri passed Senate Bill 631 this summer, which authorizes mail in ballots for the November 2020 election to avoid the risk of contracting or transmitting (COVID-19).<sup>10</sup> Any registered voter may cast a mail-in ballot, if they do not want to go to a polling place on election day. Section 115.302, R.S.Mo. The Region should not force employees to go to the facility to vote. Instead, it should follow the advice of the CDC, and the lead of states allowing mail-in ballots and order a mail ballot.

Lastly, the NLRB's Case Handling Manual, Section 11302.2 states that the Regional Director may direct that an election be conducted by mail in situations where

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<sup>8</sup> On July 6, the General Counsel of the NLRB issued GC Memorandum 20-10 which suggested guidance for manual election protocols during the Covid-19 pandemic. This suggested guidance, however, only comes into play *when and if* a manual election is deemed appropriate. The General Counsel made clear that Regional Directors have authority to make initial decision about when, how and in what manner elections are conducted. The Memorandum is not binding on Regional Directors.

<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>

<sup>10</sup> Missouri Secretary of State, How to Vote, at <https://www.sos.mo.gov/elections/goVoteMissouri/howtovote>.

there “egregious or pervasive employer unfair labor practices.” Here, the Union has filed two charges against the Employer alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act, including the discharge of 9 employees over the last few weeks – Case Nos. 14-CA-265341 and 14-CA-265900.<sup>11</sup> Holding an election on the Employer’s premises would compromise the prospect that employees will be able to exercise free choice.

For the foregoing reasons, the Regional Director should direct a mail ballot election in this case, as follows: The ballots should be mailed to eligible voters, in each unit, beginning at **9:30 a.m. on October 7, 2020**, from the St. Louis office. Those employees who believe they are eligible to vote and who do not receive a ballot in the mail by **October 16, 2020**, should communicate immediately with the NLRB by calling the St. Louis office or the NLRB’s toll-free line. All ballots should be comingled and counted at the St. Louis office, on **October 28, 2020 at 10:00 a.m.** In order to be valid and counted, the returned ballots must be received in the St. Louis office prior to the counting of ballots. Finally, due to COVID-19, the regional office should conduct the ballot count by video conference platform to be determined by the Regional Director after consultation with the parties.

Respectfully submitted,

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<sup>11</sup> There is a high likelihood that there will be challenged voters because the Petitioner alleges several employees were discharged in violation of Sections 8(a)(1) and 8(a)(3) of the Act. Per Casehandling Manual Section 11338.3, the Board Agent, observers, and voter must be in reasonably close proximity to each other to make the challenge and obtain information from the challenged voter to be entered by the Board Agent on the challenged ballot envelope stub. These elements of a manual election cannot be undertaken in compliance with proper social distancing requirements.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was e-filed with the National Labor Relations Board, Region 14 on this 18th day of September 2020 and that a copy was also sent via e-mail to the following:

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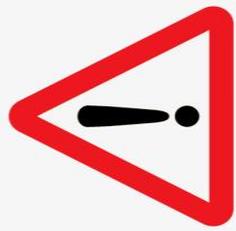
/s/ Amanda K. Hansen  
Amanda K. Hansen

Exhibit 1

The screenshot shows a web browser window with the address bar containing "http://www.riverviewcarecenter.com/". The page header includes the "the Riverview" logo and a navigation menu with links for "Private Suites", "Services", "Lifestyle", "Rehab", "Photos", "Careers", and "Contact". A prominent blue banner at the top reads "ATTENTION: COVID-19 POLICIES & INFO (click to read) Call us today: 314-353-5900". The main content area features a large, semi-transparent "COVID-19" warning box. This box contains a red warning triangle icon, the heading "COVID-19", and a paragraph of text: "Our first priority at The Riverview Care Center is to ensure the health and well being of our residents and employees. In accordance with the directives of Federal, State and local government agencies our building will be access restricted until further notice prohibiting any non-essential visitors including but not limited to family members of residents not in imminent end-of-life care, entertainers, salon service providers and volunteers. Temperature checks will continue to be required of all employees and essential visitors prior to entry. We appreciate your patience and assistance as we implement these policies for everyone's safety." The name "Holler Box" is visible in the bottom right corner of the notification. The browser's taskbar at the bottom shows various application icons and the system clock indicating 1:24 PM on 9/18/2020.



## Covid-19



Our first priority at The Riverview Care Center is to ensure the health and well being of our residents and employees. In accordance with the directives of Federal, State and local government agencies our building will be access restricted until further notice prohibiting any non-essential visitors including but not limited to family members of residents not in imminent end-of-life care, entertainers, salon service providers and volunteers. Temperature checks will continue to be required of all employees and essential visitors prior to entry. We appreciate your patience and assistance as we implement these policies for everyone's safety.

