United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 16, 2010

S.A.M.

TO : Timothy W. Peck, Acting Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SEIU, United Healthcare Workers – West
(UHW) & 10 Named Business Agents &
National Union of Healthcare Workers (NUHW)
Case 20-CB-13223, et al.

177-3901
536-2509-9500
536-2529
712-2500
712-5042-0100
712-5042-6733
712-5042-6783-9600

These cases arise out of the ongoing dispute between Service Employees International Union ("SEIU"), its local, United Healthcare Workers -- West ("UHW"), and National Union of Healthcare Workers ("NUHW"), a union formed by former officers of UHW after SEIU placed UHW in trusteeship in January 2009.[1] SEIU filed the charges in the instant cases against UHW, NUHW, and 10 former UHW officials, alleging that UHW (under its former leadership) and NUHW violated Sections 8(b)(3) and 8(b)(1)(A) of the Act.

We conclude that all of the allegations in the instant cases should be dismissed, absent withdrawal, as it would not effectuate the purposes and policies underlying the Act to proceed on a charge filed by SEIU against its trusteed local union UHW or against the individuals named in the instant charges, and there is insufficient evidence to establish that NUHW was in existence as a separate labor

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[1] More than half of the charges originally submitted for advice in these cases were withdrawn in early 2010, including Case 20-CB-13223. As the instant cases were submitted under that lead case number, however, we will continue to use that nominal subject heading. In all other respects, this memorandum only addresses the allegations of the cases that are still active.

organization before the arguably unlawful conduct occurred. We further conclude that the allegations involving threats, name-calling, physical and verbal intimidation, and other similar conduct after January 28 should also be dismissed because the conduct by identified NUHW agents was not unlawful and the other individuals who engaged in restraint or coercion have not been shown to be agents of NUHW.

FACTS

UHW is an SEIU-affiliated local union that has approximately 150,000 members throughout California. About 65,000 UHW members are long-term care workers in nursing homes and home care; almost all of the rest are acute care hospital workers. For many years, UHW and SEIU had significant differences over union governance. In particular, UHW and SEIU were at odds over SEIU's plan to remove the 65,000 long-term-care workers from UHW and place them in a statewide long-term-care local union. In early 2008, SEIU held jurisdictional hearings over several days. Many UHW members attended these hearings and openly protested SEIU's proposed reorganization.

In April 2008, UHW established the Patient Education Fund (PEF) as a mechanism to fund activities outside the purview of SEIU and transferred $3 million of its assets to the PEF. SEIU learned of the transaction and compelled its reversal.[2] In August 2008, SEIU sent monitors to conduct various audits of UHW and ordered a hearing to decide whether UHW should be placed under trusteeship for financial malpractice and other alleged misconduct. Former Secretary of Labor Ray Marshall conducted a trusteeship hearing in September and November 2008.

Also in November 2008, SEIU conducted a vote among all of its California local health care unions regarding where to place the 65,000 long-term care workers that were to be removed from UHW's jurisdiction. Members were given a choice of creating a new single state-wide local comprised of all long-term care workers or a new state-wide local representing all health care workers. Members were not

[2] The $3 million transferred to the PEF was half of the total amount UHW eventually intended to transfer.

allowed to choose the current UHW status quo. Many UHW members boycotted the vote in protest.

During the late summer and fall of 2008, key UHW officers developed plans to respond to a possible SEIU trusteeship.[3] Thus, in August or September 2008, UHW Hospital Division Director Barbara Lewis drafted a memorandum setting forth an operational and structural plan to continue to function as a group after any trusteeship based on the existing UHW steward structure. The memorandum outlined building a membership leadership structure and communication system, occupying the UHW offices to keep the trustees from taking possession of them, and creating an "ungovernable situation" for SEIU if it imposed a trusteeship. In September 2008, UHW Secretary-Treasurer Joan Emslie talked with UHW lawyers about the fact that any trusteeship would pull the local's charter and the officers would no longer be "UHW," so there might be a need for them to adopt a different name in the future. None of this evidence specifically references the formation of a new separate union to replace UHW, or to independently represent employees then represented by UHW, and none of it is inconsistent with the UHW leadership group merely carrying on an independent effort to retain, or ultimately to regain, control of UHW itself.

Many of UHW's collective-bargaining agreements expired in 2008. The former UHW officials claim that they engaged in a "pattern bargaining" strategy and tactics similar to those used in past years' bargaining. Such a strategy relies on the Union first reaching favorable agreements with certain selected "target" or "lead" employers, and

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[3] These developments followed earlier efforts by UHW officers to begin planning and organizing a response to a possible SEIU trusteeship. Thus, in March 2008, UHW officials developed lists of individuals prepared to occupy UHW offices if a trusteeship was ordered, and the trust provisions of the UHW Joint Employer Education Fund was amended so that the UHW "employee trustees" could not be removed by SEIU trustees. On May 10, 2010, a U.S. District Court found that the change in the trust rules "constituted a violation of defendants' fiduciary duty to the UHW" and enjoined the amendment, restoring the authority of the UHW to remove and appoint trustees.

then proceeding to bargain with the other employers. The strategy enables the union to use the executed agreements with the target employers as a bargaining tactic in negotiations with other employers. While UHW entered into successor agreements with several large hospital and nursing home employers in the summer and fall of 2008, including Kaiser Permanente, Catholic Healthcare West, Mariner/Sava, and Kindred, it was more dilatory in its bargaining and grievance activity with several other employers than in past years. In some cases, UHW failed to even designate bargaining representatives at all.

In addition, upon the expiration of collective-bargaining agreements in 2008, UHW requested and entered into far shorter contract extensions than in the past. UHW negotiated multiple termination-notice periods as brief as 24 hours, whereas past years' extensions were generally for 30-60 day periods, and never for periods less than 10 days. UHW terminated many of these 24-hour contract extensions in the summer and fall of 2008. In some cases, UHW followed the terminations with a 10-day Section 8(g) strike notices and short strikes and picketing activity.

Moreover, evidence has been presented that, in the fall of 2008, UHW leaders instructed UHW representatives to cease all of their representational activities, and instead to spend all of their work time on the fight against SEIU. Thus, several UHW representatives have stated that they were expressly told by then-UHW division directors and assistant division directors that, rather than their regular grievance-handling and bargaining duties, they should spend all their time on the fight with SEIU and should only focus on organizing members against SEIU. No evidence has been presented, however, that these instructions included any steps towards forming a new union.

Evidence has also been presented that, primarily in Kaiser Hospital bargaining units, decertification petitions were circulated in November and December 2008. It is not clear whether these petitions stated that employees wanted to leave or decertify UHW and join a new union, or just stated that employees wanted to leave or decertify SEIU. There is no evidence that any of these petitions named any new union. There is also no evidence that any of these individual petitions were part of a coordinated union-wide

decertification effort or that any high-level UHW officials or anyone else outside the particular division or bargaining unit at issue initiated, authorized, or even knew about any of these decertification efforts; all of the evidence shows only the involvement of lower-lever UHW representatives working within their own division or bargaining unit.

Beginning in December 2008 or early January 2009, SEIU opened temporary offices in Alameda and Los Angeles for a contingency workforce to run UHW in the event that SEIU decided to place UHW under trusteeship.

Also in December 2008 and January 2009,[4] key UHW leaders continued their fight against SEIU and escalated their plans to operate outside of the formal UHW structure in the event of a trusteeship. Former UHW administrative vice-president John Borsos has admitted that, in December 2008, he discussed with then-UHW president Rosselli the possibility of forming a new and separate union as a contingency that might have to be considered. On January 9, a UHW division director asked one of his staff members to determine when and how each of the bargaining units within his division could be decertified. On January 14, the group's fundraising arm, the Fund for Union Democracy and Reform (FUDR),[5] signed a lease to rent an office.

Throughout this period, however, to the extent UHW officers considered attempting to decertify UHW, they did so only in private. In public, they dismissed any suggestions of decertification put forward by others, and limited their public discussions to opposing any possible SEIU trusteeship.[6] In January, the former UHW officers

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[4] All dates hereinafter are in 2009, unless otherwise noted.

[5] For a fuller factual summary regarding FUDR and its relationship with UHW and NUHW, see our memorandum in Clinton Reilly Holdings and National Union of Healthcare Workers, Cases 20-CA-34356 and 20-CB-13257, also issued today.

[6] On January 24, after Secretary Marshall issued his trusteeship recommendation, UHW leaders read a statement at membership "mega-meetings" that included language that,

publicly considered whether UHW could disaffiliate from SEIU, but then quickly rejected this possibility as, under SEIU rules, it could be blocked by the opposition of as few as seven members.

Beginning on January 21, former UHW division director Barbara Lewis and several UHW stewards asked several employers to continue dealing with them even if SEIU imposed trusteeship. These requests stated:

> We believe our local union, United Healthcare Workers (UHW) is under attack by our International Union SEIU. We believe SEIU will institute a trusteeship of UHW. We are the stewards of UHW, elected by our fellow members to represent them. We will not recognize the authority of the International Union, SEIU in negotiating contracts or enforcing our existing contract from this point forward.

The requests then named particular individuals for the employers to deal with outside of any trusteed union structure.

In addition to the above plans to avoid or resist SEIU trusteeship, pre-trusteeship UHW leadership also developed and disseminated plans to occupy UHW offices in the event of trusteeship. In addition to recruiting UHW members to occupy the offices, in at least some locations they also arranged the logistical support for them to do so,

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"members maintain the right to decertify SEIU and to immediately join a new union," and that "members maintain the right even to form a new, independent, democratic, progressive union." Even then, however, the discussion of trusteeship was preceded by language stating that "[w]e have always sought to work within SEIU and to honor our duties to the organization and our members. We remain prepared to do so," and the discussion was expressly based on what could be the response, "[i]f SEIU forces UHW into trusteeship and removes the elected leaders from office in order to carry out this forced, undemocratic transfer." The former UHW leaders made no clear recommendation in favor of decertification, and no reference was made to the formation of any new union entity.

including providing such items as sleeping bags and food. UHW's leaders conducted large steward meetings and "mega" meetings of members to recruit them to oppose trusteeship. They also distributed leaflets instructing UHW members to "throw out" trustee representatives. In at least one location, building security was falsely informed that the property was owned by someone other than UHW, and security was instructed to let no one into the building without the authorization of pre-trusteeship UHW representatives, particularly SEIU.

On January 20 and 21, large groups of UHW officers and rank-and-file leaders entered the temporary SEIU offices set up in Alameda and Los Angeles. In Alameda, 30 to 50 UHW supporters pushed their way past a security guard and a human barricade of SEIU employees and entered the office shouting "let us in," "this is our union," "if you want a fight, we'll take it to the streets," "we're coming back," and "we're going to fuck you up if you don't stop trying to take us over." Two UHW officers took some papers from an SEIU employee, including work policy instructions for the incoming contingent trustee staff. A video of these events was uploaded to YouTube.

On January 21, immediately before Secretary Marshall was expected to recommended trusteeship, UHW cancelled all remaining contract extensions -- covering approximately 30 bargaining units.

That same day, Secretary Marshall issued his recommendation that SEIU should establish a trusteeship if the UHW refused to comply with several conditions, including cooperating with the SEIU decision to move all California long-term care workers into a single local union. UHW responded with a January 26 letter to SEIU President Andy Stern stating that it would not agree to the long-term care workers' jurisdictional change unless a majority of UHW's long-term care workers favored it in a secret ballot election.

On January 27, SEIU imposed trusteeship on UHW on the ground that UHW did not fully comply with the conditions set forth in the Marshall Report. SEIU removed all of the UHW officers and Executive Board members from their positions (but not from membership). All UHW employees

were placed on administrative leave and ordered to attend a meeting to discuss their employment.

Beginning January 27, a number of UHW rank-and-file members, acting upon the previous instructions of former UHW leaders, set forth above, occupied various UHW offices to prevent SEIU from "taking over" their buildings. The occupation was widely reported in newspapers and other media outlets. The UHW members left the last occupied office on February 4. At some of the offices, individuals occupying the offices removed or destroyed documents, including bargaining and grievance documents necessary for UHW's representation of unit employees. Moreover, at some point around this time,[7] several pre-trusteeship UHW officials erased all of the files on their UHW computers and/or removed bargaining and grievance documents necessary for UHW's representation of unit employees.

On January 28, former UHW President Sal Rosselli and the other removed officers held a press conference announcing that they had formed NUHW, and that NUHW would immediately begin organizing health care workers. That same day, NUHW's fundraising arm, FUDR, paid approximately $42,000 in printing costs for decertification petitions and dues checkoff authorization revocation forms. NUHW immediately began soliciting signatures on the decertification petitions, utilizing at least several hundred, and as many as several thousand, petition circulators.

SEIU has presented one individual who says that they were asked to circulate decertification petitions the day before the trusteeship, as well as a few other individuals at two Sutter facilities who say they circulated, or were asked to sign, decertification petitions in the week or two before the trusteeship. The signatures on these petitions are all dated January 29, although SEIU and the individual witnesses assert that the dates on the petitions were left blank at the time they were signed and were filled in later by someone else.

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[7] The evidence is unclear as to precisely when this conduct took place. Thus, we cannot establish that any of the document destruction occurred after January 28.

Also on January 28, SEIU filed a Complaint in U.S. District Court alleging that Rosselli and 23 other former UHW officers committed various violations of LMRDA, LMRA, and other relevant statutes by engaging in the conduct set forth here.

Meanwhile, a majority of UHW's approximately 150 employees and officers resigned from their employment by, and membership in, UHW. In addition, many of the former UHW stewards switched their support to NUHW. Some of these former UHW stewards have held themselves out as NUHW stewards in their bargaining units, despite NUHW's lack of representative status.

Since the trusteeship, several of the former UHW stewards have engaged in incidents involving threats, name-calling, physical and verbal intimidation, and other similar conduct directed at UHW supporters or other unit employees. No evidence has been adduced however, that these former UHW stewards have held any office or had any other relationship with NUHW since SEIU imposed trusteeship, or that such individuals were agents authorized to act by NUHW. While, prior to the trusteeship, former UHW officials instructed stewards and members to kick out any SEIU representatives that came to their facilities after the trusteeship, there is no evidence showing that such instructions continued after the formation of NUHW.

In addition, there have been several incidents in which NUHW officials confronted their former UHW colleagues and called them names, shouted at them, argued about their decision to stay with UHW, predicted that NUHW would win the representational fight between the two unions, took pictures of non-employee union organizers, and/or sent pro-NUHW/anti-UHW e-mails to employees. There is no evidence, however, that any of these incidents amounted to threats, or otherwise restrained or coerced employees in the exercise of their Section 7 rights.

SEIU had some initial difficulty in assuming the management of UHW in the initial period of the trusteeship, due to the almost complete departure of UHW leadership, a widespread unwillingness by stewards and rank-and-file members to cooperate with the trustees, and the missing bargaining and grievance documents. Since that time,

however, SEIU claims to have successfully asserted its control. It is undisputed that UHW has been representing unit employees in collective-bargaining and grievance-processing, and there is no contention of any general inability of UHW to represent unit employees.

Between February 2 and May 10, NUHW filed 64 representation petitions to represent approximately 68,000 employees at 13 hospitals and 51 nursing facilities. In response to each of these representation petitions, SEIU filed charges in the instant cases, blocking the elections. The representation cases concerning the two largest hospital entities, Kaiser (approximately 45,000 employees) and Catholic Healthcare West (approximately 14,000 employees), were dismissed due to contract bars. More than half of the charges were withdrawn in early 2010, and the corresponding representation cases were unblocked.

On April 9, 2010, after a 10-day trial, a jury found Rosselli and 15 other former UHW officials liable for $854,150 in damages, and NUHW liable for $724,000 in damages. The damages awarded were based on the amount of the individual defendants' UHW salary and benefits for periods of time they were not working for the benefit of UHW, their diversion of UHW resources, the cost of the increased security required by UHW to secure UHW office buildings following the trusteeship, and UHW's lost dues related to the January 21 cancellation of all of the remaining contract extensions.[8]

The initial charges in the instant cases allege that, prior to the imposition of the trusteeship on January 27, and under UHW's former leadership, UHW breached its duty of fair representation in violation of Section 8(b)(1)(A) and further violated Sections 8(b)(3) and 8(b)(1)(A) by failing to negotiate successor agreements in good faith. In April, SEIU amended each of the charges against UHW to specifically name Rosselli and nine other former UHW officials/employees as additional charged parties. SEIU also filed additional charges against NUHW, alleging that

[8] NUHW has filed post-verdict motions seeking to overturn the verdict, and has stated that it intends to appeal if its post-verdict motions are denied.

NUHW violated Section 8(b)(1)(A) by restraining and coercing employees.

In particular, the charges allege that: (1) after a majority of UHW contracts expired in 2008, UHW and its pre-trusteeship leadership unlawfully frustrated agreement on successor contracts by unreasonably delaying bargaining meetings, making unreasonable proposals, and other conduct, all in furtherance of a plan to enable NUHW to raid UHW members; (2) UHW breached its duty of fair representation by unlawfully failing and refusing to engage in good-faith bargaining and to process grievances, and instead devoting its energies to fighting SEIU; (3) UHW unlawfully proposed and agreed to the shorter contract extensions and, on January 21, unlawfully cancelled all of the remaining contract extensions; (4) the January 20-21 incidents when large groups of UHW staff and rank-and-file leaders marched into two temporary SEIU offices and the January 27 - February 4 sit-in occupation of UHW offices restrained and coerced employees; (5) the removal and destruction of documents necessary for UHW's subsequent representation of employees restrained and coerced employees; and (6) former UHW officers and stewards, and other individuals, restrained and coerced unit employees post-trusteeship by various threats, name-calling, physical and verbal intimidation, and other similar conduct.

ACTION

We conclude that all of the allegations in the instant cases should be dismissed, absent withdrawal, as it would not effectuate the purposes and policies underlying the Act to proceed on a charge filed by SEIU against its trusteed local union UHW or against the individuals named in the instant charges, and there is insufficient evidence to establish that NUHW was in existence as a separate labor organization prior to January 28, after the alleged unlawful conduct occurred. We further conclude that the allegations involving threats, name-calling, physical and verbal intimidation, and other similar conduct after January 28 should also be dismissed. The conduct by identified NUHW agents was not unlawful and the other individuals who engaged in restraint or coercion have not been shown to be agents of NUHW.

Charges against UHW and the 10 named pre-trusteeship UHW agents

We conclude it would not effectuate the purposes and policies underlying the Act to proceed on a charge filed by SEIU against its own trusteed local union UHW.

Initially, we note that, while SEIU may have had some difficulty in assuming the management of UHW in the initial period of the trusteeship, it claims to have successfully asserted its control since that time. Thus, it is undisputed that UHW has been representing unit employees in collective-bargaining and grievance-processing, and there is no contention of any general inability of UHW to represent unit employees. In these circumstances, it is unclear what substantial effect, if any, a finding of violation against pre-trusteeship UHW would now have, given the significant changes in circumstances since the time of the alleged unlawful conduct. Upon the imposition of trusteeship by SEIU, UHW ceased and desisted any earlier unlawful conduct by its pre-trusteeship leaders, and the imposition of the trusteeship itself may have sent a powerful signal of change -- much like a Board notice-posting.

In any case, a complaint against UHW based on a charge filed by SEIU would raise concerns akin to those raised by the Board in Shop-Rite Foods, Inc.,[9] in which the Board found that an employer violated Section 8(a)(1) of the Act by soliciting a supervisor to file a meritorious charge against the employer itself. The employer had solicited Section 8(a)(2) charges alleging that supervisors had participated in obtaining signatures on a union representation petition, and the ALJ found that the employer solicited charges against itself "not to vindicate the rights of employees, but for the purpose of delaying Board action on the union's petition."[10] The employer in Shop-Rite could have "disavowed the conduct of the store managers and assured the employees that they were free to engage in, or refrain from engaging in, union activity

[9] 205 NLRB 1076, 1076 fn. 1, 1080 (1973).

[10] Id., at 1080.

without fear of reprisal," but instead filed charges that blocked representation proceedings.[11] In doing so, the Board found that the employer engaged in unlawful collusive litigation.[12]

Similar concerns are applicable here, where SEIU's filing of charges against its own trusteed local UHW essentially constituted filing charges against itself. As in Shop-Rite, the Charging Party, SEIU, and the Charged Party, UHW, are completely aligned in interests. They share common legal representation and, importantly, both SEIU and UHW share an interest in a finding of unlawful conduct by pre-trusteeship UHW. Given this shared interest, the purposes of the Act would not be served by prosecuting UHW for conduct which it seeks to be prosecuted for, particularly as the trusteeship itself has effectively stopped the unlawful behavior. In these circumstances, protracted litigation, followed by a cease and desist order from the Board, would arguably achieve no more than the trusteeship itself has already achieved. To the extent that SEIU or UHW believes that a more direct statement is needed, they have the ability to directly communicate that to employees. Similar to the employer in Shop-Rite, they can disavow the earlier conduct and assure employees that their Section 7 rights will be protected.

In noting the collusive nature of the current charges against UHW, we do not thereby suggest that SEIU acted improperly or unlawfully by filing these charges in the circumstances of these cases. SEIU and UHW are separate legal persons, and SEIU has standing to file unfair labor practice charges against UHW as the Board's Rules and Regulations provide that "any person" may file a charge.[13]

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[11] Ibid.

[12] Id., at 1076 fn.1 ("Collusive litigation has long been frowned upon by all judiciaries, and it is difficult to imagine a clearer instance of collusive litigation than that of a company instituting proceedings against itself").

[13] Section 102.9 ("a charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person").

Further, unlike in Shop-Rite, where the Employer had always had control over its supervisors, SEIU did not have control over the conduct of UHW's pre-trusteeship leadership during the period of alleged unlawful conduct prior to the trusteeship. Thus, it was not relying on its own wrongdoing when it filed charges asserting that parties to the election had engaged in unlawful conduct that interfered with the laboratory conditions necessary for the conduct of a fair election. Rather, it was challenging the conduct of individuals that it reasonably believed now sought to capitalize on their earlier unlawful conduct to benefit a rival union entity. Nonetheless, given the control SEIU has asserted over its own trusteed local union UHW, the identity of interests between SEIU and UHW, and the ability of SEIU to remedy the conduct directly through communications with the workers, it would not promote the purposes and policies of the Act to use the Board's processes to issue a complaint against UHW based on charges filed by SEIU.[14]

We further conclude that the charges against the 10 named pre-trusteeship UHW agents also should be dismissed, absent withdrawal. Significantly, we are aware of no Board cases finding individual liability for union agents where the union itself is not named as a respondent, and the Charging Party here has cited none. The instant cases

[14] We are also mindful that, although there is "no procedural impediment" to finding a refusal to bargain violation on a charge filed by someone other than the Section 9(a) representative itself (Vee Cee Provisions, 256 NLRB 758, 758 (1981), enfd. mem. 688 F.2d 827 (3d Cir.1982)), "the General Counsel has been reluctant to authorize complaints alleging a refusal to bargain when the charge is filed by a party other than the Section 9(a) bargaining representative." See, e.g., ITT Continental Baking Co., Case No. 25-CA-11118, Advice Memorandum dated January 24, 1980, at pp. 3-4. See also, e.g., National Steel & Shipbuilding Co., Case 21-CA-30245, Advice Memorandum dated May 2, 1995, at p. 2 ("we traditionally have refused to issue a Section 8(a)(5) complaint on individually filed Section 8(a)(5) charges," unless the union actively assists the individual or the charge-filer is a third-party beneficiary of the contractual agreement at issue).

would be particularly inapt for such a novel approach, as most of the allegations here flow from UHW's bargaining obligation and duty of fair representation, both of which arise solely from UHW's Section 9(a) representative status as an organization.

Even assuming, arguendo, that the 10 named pre-trusteeship UHW agents could be found individually liable in these circumstances, we conclude that such novel proceedings against them as individuals would not effectuate the purposes and policies underlying the Act, particularly given SEIU's present control over its own trusteed local union UHW, the absence of proceedings against UHW itself, and SEIU's civil lawsuit, which has already addressed much of the conduct at issue here in terms of individual liability. Given these considerations, we conclude that the charges against the 10 named pre-trusteeship UHW agents should be dismissed, absent withdrawal.

Finally, we note SEIU's argument that a Board finding of an unfair labor practice would be more meaningful to employees than itself informing employees of pre-trusteeship UHW's conduct directly and giving them reassurances of future lawful conduct. Significantly, the ALJ in Shop-Rite, affirmed by the Board, indicated that disavowing the unlawful conduct and reassuring employees could have rectified the wrongdoing there.[15] Thus, the Board has suggested that a finding of an unfair labor practice is not appropriate where the charging party and the charged party are acting in concert and can address the unlawful conduct themselves.

Moreover, the results of the federal trial, finding former UHW officials and NUHW liable, have already provided a formal finding of wrongdoing. Indeed, many of the same allegations at issue here were put forth in that action. Thus, the federal court jury found former UHW President Rosselli and 15 other former UHW officials liable for $854,150 in damages, and found NUHW itself liable for $724,000 in damages. The damages awarded were based on the amount of the individual defendants' UHW salary and benefits, their diversion of UHW resources, the cost of

[15] 205 NLRB at 1080.

the increased security required by UHW, and UHW's lost dues. It is not clear what more would be accomplished by proceeding against UHW in the instant cases, particularly as all of UHW's former leadership during the conduct at issue left UHW at the onset of the trusteeship. Thus, in all of these circumstances, we would not proceed here on charges filed by SEIU against UHW or the 10 named pre-trusteeship UHW agents.

Charges against NUHW for pre-trusteeship conduct

We also conclude that the charges in the instant cases against NUHW for conduct that occurred prior to January 28 should be dismissed, absent withdrawal, as there is insufficient evidence to establish that NUHW was in existence as a separate labor organization prior to that date.

Section 2(5) of the Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with an employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." In determining whether a group of employees is a labor organization, the Board has consistently held that no particular formalities are required and that the Board's broad definition of labor organizations includes inchoate unions still in the process of forming.[16]

[16] See, e.g., Coinmach Laundry Corp., 337 NLRB 1286, 1286-97 (2002); Yale New Haven Hospital, 309 NLRB 363, 364 (1992) ("structural formalities are not prerequisites to labor organization status," and it is immaterial that a labor organization has no constitution, bylaws or filings with the Department of Labor); Betances Health Unit, 283 NLRB 369, 375 (1987) (staff association was a labor organization despite not having formal membership or actually representing employees).

In Stewart Die Casting Division (Bridgeport), Etc.,[17] for example, the Board found an informal committee to constitute a labor organization under Section 2(5), where that committee was organized for the purpose of bargaining collectively and was empowered to take whatever steps were necessary to form a new independent union. Similarly, in Sawyer Industrial Sheet Metal Fabricators,[18] an employee group designated simply as the "Committee," which was formed for the purpose of negotiating with an employer and handling grievances during a period of disaffection with an incumbent union, was determined to be a "labor organization" within the meaning of § 2(5) of the Act.

In contrast, in Comite de Empleados de Simmons, Inc.,[19] the Board held that a group of employees who engaged in a one-day strike seeking to have an employee committee included in bargaining between the employer and their Section 9(a) representative union did not become a separate labor organization. The Board noted that the Act's legislative history shows that the definition of labor organization "was a broad one to extend the protection and limitations of Sections 7 and 8 to inchoate or informal groups as well as established or traditional unions," but found that, as the committee members did not seek exclusive representative status, the committee did not become a separate labor organization.[20] Rather, the Board was satisfied that the committee was at all material times "an internal and integral functioning part" of the union with which the employees were dissatisfied.[21] The Board found that, while some evidence could be given "a lawful or an unlawful connotation," the evidence as a whole indicated that the committee was formed not to "supersede" the certified union and become the exclusive bargaining

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[17] 123 NLRB 447, 448 (1959).

[18] 103 NLRB 997, 1002 (1953).

[19] 127 NLRB 1179 (1960), vacated and remanded 287 F.2d 628, 631 (1st Cir. 1961), on remand 132 NLRB 242, 243 (1961).

[20] Id., at 1187.

[21] Ibid.

representative, but to demand inclusion in the committee on contract negotiations.[22]

Similarly here, while the former UHW leadership were part of an identifiable group, employees participated in the group with them, and there is some evidence that the group sought to deal with employers regarding terms and conditions of employment prior to January 28, there is insufficient evidence that pre-trusteeship UHW sought recognition as a separate labor organization, as opposed to being a faction within UHW struggling internally against SEIU. In other words, it is not sufficient to establish that Rosselli and the other pre-trusteeship UHW officials acted as an identifiable group within UHW, even if they were acting on their own behalf. Instead, it must be shown that they sought exclusive representation as a separate labor organization, rather than as an internal faction within UHW.

While the former UHW leadership was considering the possibility of forming a new union well before SEIU imposed trusteeship, the actual formation of NUHW was contingent upon the trusteeship being imposed, and no definitive affirmative steps towards the formation of NUHW were taken prior to that time. The imposition of trusteeship on January 27 was the condition precedent that led the former leadership of UHW to take the steps to create NUHW as a rival labor organization, transforming one of their "contingency" plans into a reality.

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[22] Id. at 1186-87. The First Circuit vacated the Board's order, based on its factual finding that the committee's action constituted its "declaring its independence." 287 F.2d at 631. As to the legal principles, however, the First Circuit did not disagree with the Board, stating that, "[w]e will assume with the Board, without deciding, that a demand to be recognized as a joint bargaining arm of a certified labor organization does not violate section 8(b)(4)(C), and that this is so even when the certified organization and its 'arm' apparently represent somewhat divergent views." Ibid. Although the Board "respectfully disagreed" with the court's factual findings, the Board accepted the remand decision as the law of the case, noting that it did not appear appropriate to seek certiorari in that case. 132 NLRB at 243.

We recognize that many of the earlier actions taken by the former UHW leadership were arguably consistent with the formation of a new union. Indeed, the former UHW leadership began taking steps to create an independent structure within UHW almost a year before the SEIU trusteeship. Thus, the former UHW leadership established independent communication systems; had plans to create an "ungovernable situation;" considered and discussed decertification as a possibility, at least internally; signed a lease for a new office; and requested employers to continue to deal with them even if SEIU imposed trusteeship. But these actions, and the insurgent factional structure that arose out of them, can also be reasonably viewed as internal union activity from a group engaged in a fight with SEIU -- one that could be carried out from within the current union, rather than through a separate entity. It was only after the trusteeship was imposed that it can be concluded that the former UHW leadership actually decided, and took the affirmative steps necessary, to create a new and separate union.

We note that SEIU has presented evidence that, primarily in Kaiser Hospital bargaining units, decertification petitions were circulated in particular divisions or bargaining units in November and December 2008, although it is not clear whether the asserted petitions stated that employees wanted to leave or decertify UHW and join a new union, or just stated that employees wanted to leave or decertify SEIU. There is no evidence that any of these petitions named any new union. There is also no evidence that any of these individual petitions were part of a coordinated union-wide decertification effort or that any high-level UHW officials or anyone else outside the particular division or bargaining unit at issue initiated, authorized, or even knew about any of these decertification efforts; all of the evidence presented shows only the involvement of lower-lever UHW representatives working within their own division or bargaining unit. Thus, in the absence of evidence that links these asserted petitions to NUHW, there is no basis for concluding that they demonstrate the establishment of NUHW in that earlier time period.

In addition, SEIU has presented one individual who says that they were asked to circulate decertification

petitions the day before the trusteeship, and a few other individuals at two Sutter facilities who say they circulated, or were asked to sign, decertification petitions in the week or two before the trusteeship. On the other hand, the investigation revealed that FUDR, on NUHW's behalf, paid approximately $42,000 in printing costs for decertification petitions and dues checkoff authorization revocation forms on January 28, that these petitions were immediately distributed by NUHW to at least several hundred, and as many as several thousand, petition circulators for the gathering of employee signatures after that date, and that the date listed on all of the relevant petitions next to the signatures is January 29. As to the individual SEIU witnesses who assert that they circulated NUHW petitions prior to January 28 and that the dates on the petitions were left blank at the time they were signed and were filled in later by someone else, these assertions are not supported by the weight of the evidence. The investigation revealed that the NUHW petitions were not available until January 28 and were distributed to thousands of petition signers that day. Thus, the January 29 date that appears on the petitions circulated or signed by the relevant SEIU witnesses is consistent with the other evidence of the January 28 preparation and distribution of the petitions, despite the witnesses' contrary recollections. Given these circumstances, we conclude that it would be impossible to demonstrate that any decertification activity was undertaken by NUHW prior to January 28, particularly as there is no other evidence of any such activity and there is otherwise consistent evidence that the future leadership of NUHW went to great lengths in the pre-trusteeship period to ensure that they were not tied to any public conduct that would be demonstrably disloyal to UHW. In the absence of evidence demonstrating an intent to form NUHW earlier, as opposed to considering such a step as a contingency, we conclude that the charges in the instant cases against NUHW for any conduct that occurred prior to January 28 should be dismissed, absent withdrawal.

This includes the allegations of UHW's bargaining and grievance-handling that took place in Summer and Fall of 2008, the cancellation of all remaining contract extensions on January 21, the January 20-21 incidents when large groups of UHW staff and rank-and-file leaders marched into two temporary SEIU offices, the January 27 -- February 4

sit-in occupation of UHW offices and the removal and destruction of documents necessary for UHW's representation of employees. All of these events took place, or were authorized and set in motion, prior to the January 28 formation of NUHW. As to the office occupations and the document removal and destruction in particular, we recognize that some of these events actually occurred after NUHW was formed. The authorization and planning of the occupations, however, along with the dissemination of these plans, the recruitment of UHW members to occupy the offices, the arranging of logistical support, and the distribution of leaflets instructing UHW members to "throw out" trustee representatives, all occurred prior to the formation of NUHW. Even as to the erasure or removal of bargaining and grievance documents by pre-trusteeship UHW officials, the evidence is unclear as to precisely when this conduct took place. Thus, we cannot establish that any of the document destruction occurred after the formation of NUHW. Therefore, we conclude that all of these allegations against NUHW should be dismissed, absent withdrawal.

Allegations of Post-Trusteeship Restrain and Coercion

Finally, we conclude that all of the post-trusteeship 8(b)(1)(A) restraint and coercion allegations should also be dismissed, absent withdrawal. The test for determining restraint and coercion is whether the conduct, under all the circumstances, may reasonably tend to coerce or restrain employees in the exercise of their Section 7 rights.[23] No such conduct by NUHW agents has been demonstrated here.

The allegations here involve alleged threats, name-calling, physical and verbal intimidation, and other similar conduct. The conduct alleged to have been committed by known NUHW agents, however, was in fact not unlawful -- mere name-calling is not an unfair labor

[23] See, e.g., Longshoremen ILA Local 333 (ITO Corp.), 267 NLRB 1320, 1321 (1983); Laborers Local 496 (Newport News of Ohio), 258 NLRB 1105 fn. 2 (1981); Steelworkers Local 1397 (U.S. Steel Corp.), 240 NLRB 848, 849 (1979).

practice.[24] Thus, while NUHW officials confronted their former UHW colleagues and called them names, shouted at them, argued about their decision to stay with UHW, predicted that NUHW would win the representational fight between the two unions, took pictures of non-employee union organizers, and/or sent pro-NUHW/anti-UHW e-mails to employees, the officials did not violate the Act because the evidence does not establish that any of these incidents amounted to unlawful threats, or otherwise restrained or coerced employees in the exercise of their Section 7 rights.

As for the rest of the allegations, particularly those involving conduct by former UHW stewards now loyal to NUHW, such conduct can only be found unlawful if the individuals who engaged in it are shown to be agents of NUHW. The party asserting an agency relationship must establish its existence under common law agency principles, under which an agent's authority may be actual or apparent, and the principal may create either type of authority expressly or by implication.[25] As the Board explained in Communications Workers Local 9431 (Pacific Bell):

> [A]ctual authority refers to the power of an agent to act on his principal's behalf when that

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[24] See, e.g., Masters, Mates & Pilots (Marine Transport Lines), 301 NLRB 526, 531-532 (1991), enfd. in pertinent part 955 F.2d 212 (4th Cir. 1992) (in absence of threat of bodily harm, picketers did not violate Section 8(b)(1)(A) by calling employees "finks" and "scabs"); Machinists (General Dynamics), 284 NLRB 1101, 1106 (1987) (calling strike-breaker "pile of shit" did not violate Section 8(b)(1)(A)); Longview Furniture Co., 100 NLRB 301, 304 fn. 38 (1952), enfd. as modified 206 F.2d 274 (4th Cir. 1953) (picket-line name-calling such as "trash, low-down trash, damn woman, scabs, damn scabs, low-down scabs, yellow scabs, crummy scabs, damn bitch, son of a bitch, damn son of a bitch, scabby son of a bitch" held to be protected activity).

[25] See Corner Furniture Discount Center, Inc., 339 NLRB 1122 (2003); Pan-Olston Co., 336 NLRB 305 (2001); Shen Automotive Dealership Group, 321 NLRB 586, 593 (1996).

> power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.[26]

Here, there is no evidence that the former UHW stewards or other relevant individuals have any formal office or other relationship with NUHW, even if they hold themselves out as NUHW stewards (despite NUHW's lack of representative status), and no other basis for establishing agency has been presented.[27] Moreover, these events occurred after SEIU had taken control of UHW -- in some cases long after that time. While, prior to the trusteeship, UHW officers may have instructed stewards and members to "throw out" trustee representatives, we cannot impute to NUHW this earlier conduct carried out under the aegis of UHW. Therefore, in the absence of evidence of agency or NUHW involvement in the alleged unfair labor practices, there is no basis for issuing complaint

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[26] 304 NLRB 446 fn. 4 (1991).

[27] Other incidents have been alleged for whom the individual responsible could not be identified. In the absence of identifying evidence, there is no basis here for finding such individuals to be agents of NUHW. See, e.g., Local 248, Meat & Allied Food Workers (Service Food Stores, Inc.), 230 NLRB 189 fn. 2 (1977) (insufficient evidence that threats made by two unidentified individuals were made by agents of respondent union); Central Massachusetts Joint Board (Chas. Weinstein Company, Inc.), 123 NLRB 590, 608 (1959) (in the absence of probative evidence connecting four individuals with the respondent union, or a showing that their activities took place in the course of picketing or related activity sponsored by the union, union found not responsible for the individuals' conduct).

regarding the allegations of post-trusteeship restraint and coercion against NUHW.

Conclusion

We acknowledge that this resolution has the result of dismissing the instant charges, despite clear evidence of what otherwise appears to be unlawful conduct by a group of union leaders and others that restrained and coerced employees in the exercise of their Section 7 rights. Thus, the evidence indicates that the former UHW leadership made a conscious decision to abdicate its representative responsibilities with regard to grievances and bargaining in favor of carrying on an ongoing fight with SEIU and creating an "ungovernable" situation for any trusteeship imposed. Unit employees' collective-bargaining agreements were cancelled, apparently to further this fight, SEIU's pre-trusteeship offices were invaded, non-employees were threatened and harassed, UHW offices were unlawfully occupied, documents necessary for UHW to represent unit employees after trusteeship were stolen or destroyed, and unit employees were restrained and coerced in the exercise of their Section 7 rights by individuals loyal to NUHW, including former UHW stewards. As noted above, however, SEIU is now in control of UHW, which has been representing unit employees in collective-bargaining in the period since trusteeship. Issuing complaint against UHW on a charge filed by SEIU would not effectuate the policies of the Act here where: the charging and charged parties interests are aligned; the charging and charged party can both reassure employees of their rights; there is no legal precedent for proceeding against Union officials alone, particularly as those officials are no longer in office; and the evidence does not establish that NUHW came into existence as a separate labor organization prior to January 28, 2009.

We therefore conclude that all of the charges in the instant cases should be dismissed, absent withdrawal.[28]

B.J.K.

[28] In dismissing the charges in the instant cases, we note that we are not relying on the Board's decision in Office Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417 (2000), to find that even alleged coercive or threatening conduct was not unlawful because it was protected intraunion conduct. In Sandia, the Board limited its previous reach in union discipline cases, holding that "Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act." Id., at 1418. Since Sandia, the Board has reiterated that its holding in that case only applied to cases involving union discipline, and not to threats of physical violence or other types of unlawful union restraint or coercion. See Painters Local 466 (Skidmore College), 332 NLRB 445, 446 (2000) (observing that Sandia reaffirmed "longstanding precedent holding that Section 8(b)(1)(A) proscribes threats of economic reprisals and physical violence by unions against employees" and finding that threats of reprisal made against employees because of their protected intraunion activity were unlawful); Food & Commercial Workers Local 7R (Longmont Foods), 347 NLRB 1016, 1016 (2006) ("such threats go beyond internal union disciplinary action and are unlawful").