

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

KAISER FOUNDATION HEALTH PLAN INC.;
KAISER FOUNDATION HOSPITALS;
SOUTHERN CALIFORNIA PERMANENTE
MEDICAL GROUP;
THE PERMANENTE MEDICAL GROUP,

Employers,

and

Case 32-RC-5775

NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

and

SEIU-UHW (SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS-WEST),

Intervenor.

**INTERVENOR SEIU-UHW'S BRIEF IN OPPOSITION TO
PETITIONER NUHW'S EXCEPTIONS**

Dated: March 14, 2011

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**INTERVENOR SEIU-UHW'S BRIEF IN OPPOSITION TO
PETITIONER NUHW'S EXCEPTIONS**

The Intervenor, Service Employees International Union, United Healthcare Workers-West (“SEIU”), submits this brief in opposition to the Exceptions filed by the Petitioner, National Union of Healthcare Workers (“NUHW”), contesting certain portions of the Acting Regional Director’s January 14, 2011 Report and Recommendations on Objections (“Report”) in the above case. In particular, NUHW challenges the recommendation that certain objections be overruled without a hearing.¹ We demonstrate in this brief that the Acting Regional Director’s

¹ The election in this case was conducted by mail ballot, among approximately 43,000 eligible employees in a large, multi-facility Statewide Bargaining Unit, during the period September 13-October 4, 2010. The final Tally reflected 18,290 votes for SEIU-UHW, 11,364 votes for NUHW, and 365 votes for neither union – a nearly 7,000 vote margin of victory out of 30,019 valid votes counted. On October 14, 2010, Petitioner NUHW filed a set of 118

recommended disposition of those objections was legally sound in every respect. Accordingly, based on the rationale and authority set forth in the Report, and for all the reasons discussed below and in SEIU's previous submissions, we urge the Board to reject NUHW's arguments and sustain the Acting Regional Director's recommendations in this matter.

ARGUMENT

NUHW'S EXCEPTIONS TO THE ACTING REGIONAL DIRECTOR'S REPORT AND RECOMMENDATIONS ARE WITHOUT MERIT AND MUST BE REJECTED

The legal standards governing disposition of NUHW's election objections are not in dispute. As the Acting Regional Director observed in his Report, and as NUHW acknowledges in its Exceptions, to obtain a hearing the party contesting an election must make a *prima facie* showing of "substantial and material issues" that would warrant setting aside an election. *See* Report at 5 (citing *Newport News Shipbuilding*, 239 N.L.R.B. 82 (1978)); NUHW Exceptions at 4-5. *See also* *Affiliated Computer Servs.*, 355 NLRB No. 163, 2010 NLRB LEXIS 315, *10 n.8 (Aug. 27, 2010); *Care Enterprises*, 306 N.L.R.B. 491, 491 (1992). The objecting party must identify the nature of the conduct on which the objections are based and provide a list of witnesses, along with a brief description of the testimony of each, specifying which witnesses would address which objection. *See* Report at 5 (citing NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11392.6; *Transcare New York, Inc.*, 355 N.L.R.B. No. 56 at

objections to the election. The Region gave NUHW ample opportunity to submit supporting evidence, and the Petitioner did so through initial and supplemental offers of proof filed on November 4, November 8 and November 19, 2010. On January 14, 2011, the Acting Regional Director issued a Report and Recommendations ordering a hearing on 30 of the objections or portions thereof (Objections Nos. 1-3, 5, 7, 26-28, 33-39, 46, 50-54, 58-60, 69-71, 74, 80 and 87) and recommending that the remaining objections be overruled. *See* Report at 84. The Petitioner now takes exception to the recommended disposition of 20 of the remaining 88 objections – specifically, the recommendation to overrule all or part of Objections Nos. 1, 4, 10, 13, 15, 18, 32, 39, 41, 42, 43, 44, 45, 47, 48, 49, 62, 68, 88 and 92. For convenience, SEIU's Opposition brief addresses these objections following the same grouping and order used by NUHW in its Exceptions.

p.2 (July 29, 2010); *Builder's Insulation, Inc.*, 338 N.L.R.B. 793, 795 (2003); *The Daily Grind*, 337 N.L.R.B. 655 (2002); *Heartland of Martinsburg*, 313 N.L.R.B. 655 (1994); *Holliday Corp.*, 266 N.L.R.B. 621 (1983)).

These controlling legal requirements were applied correctly by the Acting Regional Director. In fact, the Region communicated these requirements to NUHW repeatedly during the extended period for submission of evidence, *see* Report at 5-6, and bent over backward to give NUHW the benefit of every doubt in considering the evidence proffered, *see id.* at 6. For each of the objections covered by its Exceptions, Petitioner NUHW either failed to proffer specific supporting evidence below or proffered evidence that, even if credited, would not suffice to invalidate the election in this case.

Moreover, under the Board's Rules and Regulations, the record before the Board is limited: it excludes witness statements, exhibits and other evidence purportedly relevant to NUHW's objections unless and except to the extent that NUHW appended this material to its Exceptions. *See* 29 CFR § 102.69(g)(1)(ii) (defining record contents, and confirming that "[m]aterials other than those set out above shall not be a part of the record, except as provided in paragraph (g)(3) of this section."); § 102.69(g)(3) (where no hearing on objections is held, a party filing exceptions "may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the Regional Director and which were not included in the report . . ."). As the Board explained in *Frontier Hotel*:

This procedure is fully consistent with the burden of proof to be met by the objecting party in post-election cases, including the review stage of such proceedings. The burden is on the objecting party to demonstrate to the Board that the evidence it submitted to the regional director, if credited, would warrant setting aside the election, and that the regional director in the decision overruling the objections resolved substantial and material issues of fact without conducting

a hearing. *In the absence of such a demonstration we are entitled to rely on the regional director's report or decision, for the material facts in such circumstances are undisputed.* . . . Thus, a regional director's determination that a hearing is unnecessary is a finding that there are no substantial and material issues presented, and our adoption or rejection of this determination rests solely on whether the objecting party has identified evidence to the contrary. Otherwise, the Board would be required to assume the objecting party's burden and conduct a "fishing expedition" into the investigatory file for evidence which the objecting party has failed to identify.

265 N.L.R.B. 343 (1982) (citations omitted) (emphasis added). Here, NUHW failed to append to its Exceptions any of the supposedly supporting evidence on which it now bases its demands for a hearing. Accordingly, for purposes of this proceeding, the Acting Regional Director's Report describing NUHW's inadequate evidentiary submissions remains undisputed. Any references by NUHW to other testimony or documentation not included with its Exceptions must be disregarded as outside the scope of the record in this matter.

1. The Acting Regional Director Properly Recommended Overruling Objections Nos. 1 (second part), 4, 13, 15 and 18 (Alleged Threats by Employer Representatives Ben Chu and John Nelson).

These unfounded objections alleged that the Employers made unlawful threats (in particular, loss of wages and/or benefits) to employees in the Statewide Bargaining Unit if they elected NUHW as their representative. In support of these allegations, NUHW relies on (a) an oral statement by Employer representative Dr. Ben Chu in an August 3, 2010 telephonic "town hall meeting" addressed to separate bargaining units not involved in this election (i.e., the "Southern California Bargaining Units" of professionals that were the subject of pending ULP Case 21-CA-39296); and (b) a statement by Employer representative John Nelson, quoted in a newspaper article or articles, regarding the wage dispute in the Southern California Bargaining Units at issue in Case 21-CA-39296. *See* NUHW Exceptions at 5-10. These statements, made during the critical period, referred to Kaiser's much earlier decision not to grant a raise to

employees in bargaining units not involved in this election; the statements reflected only Kaiser's legal position as to that past decision and were not addressed to bargaining unit employees who would be voting in this election.

The Acting Regional Director properly recommended overruling these objections without a hearing because NUHW failed to satisfy its burden of presenting a *prima facie* case. Most significantly, despite multiple and extended opportunities to submit its evidence over a period of more than a month, NUHW failed to identify by name any supporting witnesses who could testify that the Employers addressed these two alleged threats to employees in the Statewide Bargaining Unit. Indeed, NUHW failed to proffer the testimony of even one Statewide Bargaining Unit employee who allegedly participated in the August 3 telephone conference with Dr. Chu. *See* Report at 5-7, 13-15 (discussing repeated notification to NUHW of its obligation to identify specific witnesses who would testify regarding particular objections, and NUHW's repeated failure to state which, if any, of its approximately 182 cooperating witnesses would testify regarding the alleged threats by Dr. Chu and Mr. Nelson).²

NUHW's Exceptions and supporting arguments clearly fail to rectify this deficiency. Instead, the Petitioner relies on a generic assertion that if Dr. Chu had made his statement to members of the Statewide Bargaining Unit, those employees would have interpreted his statement as a threat. *See* NUHW Exceptions at 5-6. Given, however, that NUHW did not proffer evidence to support its underlying premise, *i.e.*, that Dr. Chu's statement was made to members of the Statewide Bargaining Unit, the Acting Regional Director properly recommended that this objection be dismissed.

² In accordance with governing authority, unchallenged by NUHW in its Exceptions, the Acting Regional Director properly concluded that NUHW could not justify a hearing based on assertions regarding potential testimony that might be compelled by subpoenas directed to non-cooperating witnesses, *e.g.*, individuals associated with the Employers or SEIU. *See* Report at 6-7, 14 and nn.13, 17.

As for Mr. Nelson’s remarks quoted in newspapers, those comments on their face and in the context of the news articles were not threats directed to bargaining unit employees, but, rather, were a truthful and lawful statement of the Employers’ legal position in a pending ULP case that became the subject of media coverage. The Petitioner presented no evidence raising a material factual dispute warranting a hearing, and the Acting Regional Director properly recommended dismissing this objection on the legal merits. Indeed, to rule otherwise would impose an unprecedented and untenable “gag rule,” prohibiting any employer charged with an Unfair Labor Practice from making any public communication defending or explaining its position while a representation election is pending among a group of its employees. The Board should reject such an invitation.³

In short, Kaiser’s statements were innocuous, reasonably based accounts of its legal position maintained in another forum, which were not addressed to the unit employees facing an

³ See *Monmouth Medical Center*, 234 N.L.R.B. 328, 330 (1978) (“We agree with the Regional Director’s recommendation to overrule Objection 1 The Petitioner did not substantially or patently mischaracterize Board documents or proceedings for partisan election purposes. Rather, as the Regional Director concluded, the Petitioner merely ‘inartfully drafted’ its comments regarding the pending unfair labor practice complaint against the Employer which could not have reasonably had an impact on the election.”)

The cases NUHW cites in its Exceptions are readily distinguishable from the present case. In *Unitec Industries*, 180 N.L.R.B. 51 (1969), the employer told *bargaining unit members*, four days before their election, that the employer had “determined what it could afford to pay, and that rather than be compelled to agree to ‘exorbitant’ demands it would close its plant ‘until hell freezes over.’” *Id.* at 52. That statement provides a stark contrast from Kaiser’s statements at issue here, which were not directed to members of the bargaining unit covered by this election, and which did not even comment on any aspect of bargaining unit members’ future compensation. In *NLRB v. Gissel*, 395 U.S. 575 (1969), itself, the Supreme Court was careful to carve out room for employers to “even make a prediction as to the precise effects he believes unionization will have on his company.” *Id.* at 580. In this case, Kaiser did not even go that far, not commenting on Statewide Bargaining Unit members’ future compensation, or even addressing them. As for NUHW’s other citation, *NLRB v. Marine World USA*, 611 F.2d 1274 (9th Cir. 1980), there the Ninth Circuit remanded the case back to the Board to reconsider its finding of a Section 8(a)(1) violation, noting, “[t]he broad language of section 8(a)(1) is not the test of whether statements violate the Act. It must first be found that the challenged material contains a threat of force or reprisal or promise of benefit by the employer.” *Id.* at 1277.

election, and which differ substantially in character from those employer statements to voters that have been construed as unlawful threats. Moreover, even if Dr. Chu's and Mr. Nelson's statements *had been* addressed to bargaining unit employees, the statements would at most constitute misrepresentations to be analyzed under *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982) (announcing a *per se* rule that the Board will "no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements," but will only "intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is"). *Accord, Air La Carte*, 284 N.L.R.B. 471, 474 (1987) (statements about whether the employer would be obligated to provide wage increases specified in the existing contract "at most, constituted misrepresentations that do not warrant setting the election aside.").⁴

⁴ In assessing whether employer statements merit setting aside an election the Board is primarily concerned with statements *directed at and calculated to deceive* employees, not innocuous statements about past positions that employees would be able to reasonably assess in light of other factors and campaign materials when exercising their free choice to select a representative. Thus, the Board has made clear that the *Midland National* misrepresentation analysis applies in the context of statements about the potential for loss of expected wage increases under an existing contract. *See Air La Carte*, 284 N.L.R.B. at 474 (applying *Midland National* rationale as an additional basis for overruling election objections based on misleading statements about whether the employer would be obligated to provide wage increases specified in the existing contract). *Id.* at 474 (*citing*).

The Board expanded on its analysis of campaign statements about prior contract guarantees in *More Truck Lines*, 336 N.L.R.B. 772 (2001), *enforced*, 324 F.3d 725 (D.C. Cir. 2003). In that case a Teamsters' local challenged the transportation company's incumbent union. During the three week period between the second election and a run-off election, the employer distributed leaflets to its drivers asserting that if the incumbent union lost the election, (1) the existing union contract would be null and void; (2) the company "by law" could no longer give annual wage increases in the existing contract; and (3) "the law would require" that all wages and benefits be "frozen" until a new agreement or impasse were reached. 324 F.3d at 737. The Board found that unlike *Air La Carte*, where the union had asserted that employees "could" lose certain benefits, the comments by the trucking company went too far. 336 N.L.R.B. at 773 (disagreeing that it was lawful for the employer to tell "its employees they *would not, and could not*, receive the promised wage increases if the Teamsters' certification came to pass" and comparing this statement to that in *Air La Carte*, where a union representative "told employees that, if they 'voted in' a challenging union or went nonunion, they would lose their current

Even though an Administrative Law Judge later rejected Kaiser's legal position,⁵ the Kaiser officials' statements were at worst good-faith misstatements of the law that would not constitute objectionable conduct. *See More Truck Lines v. NLRB*, 324 F.3d at 738 (“[A]n employer may in some circumstances avoid liability imposed for actions undertaken in good-faith reliance upon Board precedents....” (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc)). Here, as it has argued in litigation, Kaiser was openly relying on prior Board precedent – the case of *Neighborhood House Association*, 347 N.L.R.B. 553 (2006) – for its legal position that rather than “terms and conditions” of employment to be maintained in the absence of a contract, future pay increases are “discrete recurring events” that, if scheduled to arise during initial bargaining, the employer may change the obligation if it announces its position to do so and offers to bargain over the decision. *See*

contract and, during the interim period of no contract, the employees ‘could’ lose” certain benefits (emphasis added)). Rather than potential misrepresentations about what *could* happen, the D.C. Circuit and the Board found that the employer's statements in *More Truck Lines* both misstated the law and cloaked the potential wage freeze as a legal mandate, thus constituting a threat in violation of section 8(a)(1) of the Act and providing grounds for a setting aside the election. *Id.*; *More Truck Lines v. NLRB*, 324 F.3d at 739.

There is a major difference between the employer conduct in *More Truck Lines* and the conduct complained of here that is dispositive of any objections related to Kaiser's statements: namely, that Kaiser never made *any* comments directed at bargaining unit employees who would be voting in the election that it would withhold a future pay raise if NUHW were selected as their bargaining representative. *See* Report at 5-7, 13-15 (unrefuted by NUHW in its Exceptions). Even if the statements had been addressed to bargaining unit employees broadly, what Kaiser said cannot be compared with the overblown statements at issue in *More Truck Lines*, which were cloaked in authoritative legal language about the consequences of a rival union victory. At the very most, Kaiser explained its belief that it was legally entitled not to grant the wage increase to the Southern California professionals unit. There is a clear difference between the good-faith assertion of a reasonable legal position, and a deliberate misstatement of the law designed to deceive. *See Midland National*, 263 N.L.R.B. at 133 (“[W]e will set an election aside not because of the substance of the representation, but because of the *deceptive manner in which it was made*, a manner which renders employees unable to evaluate the forgery for what it is.” (emphasis added)).

⁵ The ALJ's award was recently upheld by the Board. *See Southern California Permanente Medical Group*, 356 N.L.R.B. No. 106 (March 3, 2011).

347 N.L.R.B. at 554 (“Under this exception, if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice.” (citing *Stone Container Corp.*, 313 N.L.R.B. 336 (1993) and *TXU Electric Co.*, 343 N.L.R.B. 1404 (2004)). Kaiser’s argument was thus a reasonable position grounded in prior case law – *Neighborhood House Association* and its antecedents – and was far from the type of untenable assertion at issue in *More Truck Lines*.

Moreover, Kaiser’s position as taken in bargaining must not be confused with employer campaign statements addressed to employees voting in the election.⁶ The limited statements that Kaiser made can only be characterized as innocuous, as they were never made directly to employees, contained no indication of future action, much less any element of threat, and hewed to careful legal language. In the case of *Kokomo Tube Co.*, 280 N.L.R.B. 357 (1986), the Board found that similarly-mundane statements about a prior wage increase were not objectionable. In *Kokomo Tube*, the employer had announced a wage increase that deviated from past practice, on the same day as the first meeting of a union that would later file a representation petition. *Id.* at 357. Even though the Board determined that this increase was an unfair labor practice, it refused to consider its impact on the later election, because the increase was “both announced and

⁶ It must be emphasized with equal force that even though an Administrative Law Judge later rejected Kaiser’s arguments (subsequently upheld by the Board, *see supra* note 5) and found that its withholding of the previously-bargained annual wage increase was an unfair labor practice, that decision does not mean that Kaiser’s reiteration during the critical period of the legal position it took, as made in public forums and never directly to the unit employees here, was an impermissible threat constituting objectionable conduct. Nothing in the ALJ decision regarding Kaiser’s action bears on the propriety of Kaiser’s later statements defending its position.

effective” prior to the critical period. *Id.* at 358. The company did make references to the wage increase, however, during the critical period, having distributed to employees a letter listing past wage increases including the current one. *Id.* at 358 n.8. The Board, overruling the administrative law judge, determined that such a communication could not be the basis for setting aside the election. As stated by the Board, “we do not believe a different result is required simply because the Respondent referred to the wage increase in a postpetition letter to the employees,” because “[t]he letter on its face is innocuous.” *Id.* Here, just as in *Kokomo Tube*, Kaiser’s limited post-petition references to the wage increase denial in the Southern California Units was also “innocuous,” as it consisted simply of an objective explanation of a past position, and did not contain any threat about the future.

Finally, it must be noted that even under the more exacting standard for assessing misrepresentations that the Board followed before *Midland National*, Dr. Chu’s and Mr. Nelson’s statements would not be deemed cause to overturn this election. Under the prior *Hollywood Ceramics* standard, “an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.” *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962). As demonstrated above, Kaiser’s statements neither involved “trickery” nor were “substantial departure[s] from the truth.” Even more importantly, however, nothing stopped NUHW from mounting an effective response to Kaiser’s assertion of its legal position, and in fact NUHW vigorously contested the matter in its propaganda.

Rather than being “duped” by strongly-worded employer statements about what the law requires, workers in this election were party to extensive discussion about the types of contracts they might achieve under either union on the ballot. *Cf. Midland National*, 263 N.L.R.B. at 132 (noting that employees, understanding the opposing views of parties in an election campaign, “greet the various claims made during a campaign with natural skepticism,” and accordingly stating that “we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it”). And, of course, NUHW supporters disputed Kaiser’s position regarding the wage increase and made clear that it was subject to legal challenge by NUHW. In fact, NUHW broadly disseminated its own view of the matter in a mailer sent in late August to bargaining unit employees. The mailer, whose outside envelope states in imposing type in the upper left hand-corner where return address information is normally placed, “Notice to Kaiser Employees: OPEN IMMEDIATELY,” consisted of a terse and official-looking letter informing the recipient as follows:

*** NOTICE ***

[address information]

On August 27, 2010 the National Labor Relations Board General Counsel took legal action in Case #21-CA-39296 to protect Kaiser Professionals who have joined NUHW and are entitled to all of their previously scheduled raises and tuition reimbursements.

All past SEIU materials to the contrary are invalid.

Kaiser employees who vote for NUHW shall have all of the wages and benefits in their current contract protected under federal law.

Any future SEIU materials making contrary claims are false.

See Exhibit 1. With this mailer, NUHW arguably was able to counteract any opposing statements made by SEIU-UHW or Kaiser on the matter of whether the Southern California Professionals were entitled to the annual wage increase.⁷

2. The Acting Regional Director Properly Recommended Overruling Objections Nos. 10, 32, 39 (in part), 41, 47, 48, 49, 62, 68, 88 and 92 (Miscellaneous Isolated Incidents).

The Petitioner's second Exception contests the recommended dismissal of eleven miscellaneous objections, alleging various individual incidents of improper conduct by SEIU and the Employers. The Acting Regional Director found that the alleged conduct underlying these objections was either lawful or could not have affected the election outcome, whether considered individually or together.⁸

The Petitioner's brief in support of its Exceptions presents no legal or factual basis for rejecting that recommendation. Specifically, *the Petitioner agrees with the controlling legal standards applied by the Acting Regional Director, and the Petitioner identifies no factual disputes requiring a hearing.*⁹ Instead, NUHW merely insists that these few incidents should have been viewed, in context, as sufficiently "severe" and extensive as to have affected the

⁷ Just as in *Air La Carte*, where employees disputed the truth of the union statements about the legal effect of choosing a rival union, in these circumstances Kaiser's statements can be treated as no more than misrepresentations – contested by opposing materials – that are not grounds for setting aside the election. *See Air La Carte, Inc.*, 284 N.L.R.B. at 473 (noting that various employees had disputed the shop steward's statements, "arguing that the Employer could not reduce benefits and suggesting that the employees might get a better contract under Local 996 or without a union," and accordingly finding the shop steward's statements not to be "coercive or to tend to interfere with the employees' freedom of choice in the upcoming election").

⁸ See Report at 23-26 (discussing Objection No. 10); 31-32 (Objection No. 32); 38-39 (Objection No. 39); 40 (Objection No. 41); 43-44 (Objection No. 47); 44-45 (Objection No. 48); 45 (Objection No. 49); 52 (Objection No. 62); 83-84 (Objections Nos. 68, 88 and 92).

⁹ Indeed, in NUHW's brief in support of its Exceptions, it does not discuss these individual objections at all.

outcome of this election – an election held among more than 40,000 employees, in which over 30,000 ballots were cast and the margin of victory exceeded 6,500 votes.¹⁰

But, here, the only “context” invoked by the Petitioner is simply the pendency of other, *unresolved allegations* of objectionable conduct. In effect, the Petitioner argues that because some of its numerous objections have been referred to a hearing, the Agency cannot rationally overrule any other allegations as *de minimis*. The Board should reject this all-or-nothing approach. Given the circumstances of this case, the Acting Regional Director’s recommendation concerning this handful of alleged incidents is eminently reasonable and sensible: if the objections that were referred to hearing prove sufficient to warrant setting aside the election, these additional miscellaneous allegations would be superfluous, adding nothing to the case or the remedy. On the other hand, if the objections sent to hearing are ultimately found inadequate to overturn the election, then it is clear that these remaining allegations could not suffice, even crediting every accusation. The cases cited by NUHW in its Exceptions certainly do not support the notion that setting *any* objections for hearing precludes the Regional Director from dismissing any other objections as *de minimis*. Indeed, such a position is insupportable.

Notably, to show that its objections, even if credited, require the Board to overturn this election, NUHW must satisfy an extraordinarily high burden, considering the decisive, nearly 7,000-vote margin by which this election was won. *See Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989) (“[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a ‘heavy one.’”); *Hopkins Nursing Care Center*, 309 N.L.R.B. 958, 959 n.8 (“The Board gives great weight to the closeness of the election in deciding whether conduct is

¹⁰ In *Cambridge Tool & Mfg. Co.*, 316 N.L.R.B. 716 (1995), cited by NUHW in its Exceptions, the Board stressed that “[i]n making its determination as to whether the conduct has the tendency to interfere with employees’ freedom of choice, the Board will consider, *inter alia*, the closeness of the election. *Id.* at 716 (citing *Hopkins Nursing Care Center*, 309 N.L.R.B. 958 (1992)).

objectionable.”); *Trump Plaza Associates*, 352 N.L.R.B. 628, 629-30 (2008) (“The party seeking to set aside an election also bears a heavier burden where the vote margin is large.” (citing *Avis Rent-A-Car System*, 280 N.L.R.B. 580, 581-82 (1986))). In such circumstances, the Acting Regional Director’s recommendation – that scattered incidents of the kind advanced by NUHW here are, even if credited, *de minimis* as a legal matter – is unquestionably correct.

NUHW’s reliance on *Waste Automation*, 314 N.L.R.B. 376 (1994), is unavailing and, indeed, only serves to highlight the *de minimis* nature of the allegations underlying these miscellaneous objections. In *Waste Automation*, the vote tally was 56 votes for and 69 votes against the union. 314 N.L.R.B. at 376. The union’s objection in that case was based on the employer’s threat of plant closing at a meeting of 25 employees. *Id.* In deciding that the election should be overturned, the Board explained that “the threat was made to 25 employees, nearly one-fifth of the unit. We regard this factor as particularly significant when viewed in light of another relevant factor, *i.e.*, that the election was decided by fewer than 25 votes.” *Id.* The election in the present case stands in stark contrast, with an electoral margin of nearly 7,000 votes.

NUHW’s reliance on *Mercy General Hospital*, 334 N.L.R.B. 100 (2001), is equally misplaced. The Board stressed that the record in that case “demonstrate[ed] that a large number of employees, from both units, were told of or witnessed [the] conduct.” 334 N.L.R.B. at 108. The Board went on to feature the fact that the vote margins in the two units were 52 and 57 votes and summed up its decision by writing, “[w]e conclude, therefore that, in light of the potentially large number of employees *directly affected* by the objectionable conduct, *the voting margins in both [cases]* hardly preclude a determination that the Employer’s conduct affected the election

results.” *Id.* (emphasis added).¹¹ Again, the circumstances of the present case could not differ more.

Finally, we note that in addition to numbering more than 43,000, this bargaining unit is made up of sophisticated consumers of information who have weathered nearly three years of constant politicking and propaganda. In the year before SEIU’s imposition of trusteeship on UHW for financial misconduct and abuse of the memberships’ constitutional rights, this unit was subject to a nearly daily barrage of propaganda and electoral recruitment against the International Union and the impending trusteeship. Since the trusteeship, this unit’s members have had a front-row seat to the arguments between NUHW and SEIU-UHW regarding the wisdom of SEIU’s trusteeship and an accurate account of the activities of NUHW’s leadership in its final year in office at UHW. Then, after those years of emotional, highly-charged internal debate, this bargaining unit witnessed nearly three months of campaigning leading up to the three-week mail ballot election.

In sum, it would be hard to identify a more sophisticated and experienced Board voter population. *See Owens-Corning Fiberglass Corp.*, 179 N.L.R.B. 219, 222-23 (1969) (stating that the fact that a bargaining unit of more than 1800 had “witnessed vigorous displays of emotional involvement among individuals of differing views” compelled the Board to dismiss allegations of objectionable conduct – including threats of physical harm – given that “the employees themselves became accustomed to such partisanship and knew how to react to it.”); *Cf. Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) (“A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election”); *American Wholesalers, Inc.*, 218 N.L.R.B. 292, n.6 (1975), enforced, 546 F.2d 574 (4th Cir. 1976) (Board

¹¹ In its Exceptions, NUHW also cites *Metaldyne Corp.*, 339 N.L.R.B. 352 (2003), which, in distinct contrast to the present case, involved a total of 164 votes cast. 339 N.L.R.B. at 352.

concluded that “employees recognized the statements by prounion supporters . . . as overzealous partisanship rather than meaningful threats,” noting that “the Board’s standard for permissible employee comment during an election campaign has never been limited to rational debate”); *The Lamar Co.*, 340 N.L.R.B. 979, 981 (2003) (“Viewed objectively, a threat by one employee to another to ‘kick ass,’ *without more*, is mere bravado that is unlikely to intimidate the listener”); *NLRB v. Bostik Division U.S.M. Corp.*, 517 F.2d 971, 973-74 (6th Cir. 1975) (agreeing with the Board that threats to “kick ass” were not objectionable and observing that “[s]uch irresponsible threats are almost inevitable in the course of a heated campaign and most employees doubtless expect such exchanges”).

3. The Acting Regional Director Properly Recommended Overruling Objections Nos. 42, 43, 44, 45 (Alleged Unlawful SEIU Access to Bulletin Boards and Email).

NUHW’s Objections Nos. 42-44 alleged that the Employers unlawfully assisted SEIU and discriminated against NUHW by giving SEIU access and/or “enhanced” access to bulletin boards inside certain facilities (on which SEIU posted campaign literature). The Acting Regional Director properly recommended overruling these objections because, even crediting all the allegations and NUHW’s proffered supporting evidence, the Employer did no more than comply with lawful, explicit provisions of the existing Collective Bargaining Agreement in granting bulletin board access to SEIU (and in refraining from content-based censorship). *See* Report at 40-41 and n.31.

The Petitioner’s Exceptions fail to identify any evidence refuting the SEIU’s bulletin board access under the CBA or raising other material factual disputes warranting a hearing. Instead, NUHW merely complains that SEIU exercised its CBA access rights vigorously during the “critical period,” to the disadvantage of an outside rival union that had no contractual

relationship providing for bulletin board access.¹² As described below, the Acting Regional Director’s recommendation accords with controlling law and must be sustained.

Objection No. 45 alleged that SEIU agents (apparently employees of the Employers) used the Employer’s email system to send messages with campaigning and electioneering content. NUHW’s proffer on this objection alleged that this email usage took place on 19 or more occasions, but NUHW cited only five instances attributed to named individuals alleged to be “SEIU agents.” The remaining instances involved unidentified persons allegedly communicating pro-SEIU messages; and there is no evidence that those persons were “agents” of SEIU – indeed, there is nothing to suggest that these unknown persons were anything other than rank and file employees who supported SEIU. *See* Report at 42-43. The Acting Regional Director properly recommended overruling this objection because the alleged conduct would not provide grounds for setting aside this election – whether the conduct is attributed to actual SEIU agents or employee SEIU supporters – and because there was no evidence that the Employers ratified or condoned the alleged conduct. *See* Report at 42-43. This recommendation, too, is fully consistent with Board precedent, and the Petitioner’s Exceptions fail to establish any factual or legal grounds for disturbing it.

¹² Article 20 of the collective bargaining agreement between Kaiser and SEIU-UHW (attached as Exhibit 2) provided the following regarding SEIU-UHW’s bulletin board access:

SECTION 3 – BULLETIN BOARDS

The Employer will provide adequate space at each facility for posting Union communications. In the event the Union demonstrates the need for a glass enclosed, locked bulletin board, such shall be provided for the Union’s use.

Collective Bargaining Agreement Between Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Southern California Permanente Medical Group, The Permanente Medical Group, Inc., and United Healthcare Workers – West (Effective October 1, 2005).

The Board's current authoritative statement of the controlling law can be found in *RCA Del Caribe*, 262 N.L.R.B. 963 (1982), which addressed what "neutrality" requires in cases where an incumbent union is challenged by an outside union (as opposed to cases where two unions compete for initial representative status). 262 N.L.R.B. at 965-66. In *RCA del Caribe*, the Board held that, where an incumbent union is challenged by an outside union, the "better way to approximate employer neutrality" is to "preserve the status quo" by requiring the employer to bargain with the incumbent union rather than prohibit the employer and incumbent union from continuing their bargaining responsibilities. 262 N.L.R.B. at 965.¹³

The Board held that "having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge." *Id.* at 965. Therefore, where an outside union challenges an incumbent union, "an employer in an existing collective bargaining relationship cannot observe strict neutrality." *Id.* As acknowledged by the dissent in *RCA del Caribe*, the Board well understands that incumbent unions have "certain inherent advantages over an outside challenger" that do not violate the Board's neutrality requirement or interfere with employee choice: representatives of an incumbent union are "present in the plant, involved in the day-to-day workplace and worklives of the employees," while an outside challenger is not. *Id.* at 967 (M. Van de Water, dissenting). "An incumbent enjoys an accessibility to employees and a visibility [in the work place] which are not similarly available to a challenger." *Id.*

¹³ Under *Midwest Piping and Supply Co.*, 63 N.L.R.B. 1060 (1945), prior to 1982, an employer was required to refuse to bargain with a union during the pendency of a representation dispute between unions in order to remain "neutral" and refrain from interfering in employee choice., which is no longer the case after *RCA Del Caribe*. Nevertheless, the Board's analysis in *Midwest Piping* and its progeny focuses on whether an employer's actions interfere with employee choice, and not on whether the access of two competing unions is identical. Indeed, the Board has long found that employer neutrality between incumbent and rival unions does not require the employer to provide equal access to the two unions.

As the Board emphasized in *RCA Del Caribe*, in addition to the inherent advantages an incumbent union enjoys in regard to access and visibility, an incumbent union's continuing right and duty to bargain with an employer must be honored during an election campaign *despite any accompanying advantage such bargaining might give to the incumbent union*. As the Board explained, if employers were allowed or required to strip certified incumbent unions of their rights as bargaining representatives, unit employees would then be presented with "a distorted choice between an incumbent artificially deprived of the attributes of its office and a rival union artificially placed on an equal footing with the incumbent." *Id.* at 966. Such changes to the status quo are contrary to maintaining neutrality because they can "emphatically signal [the employer's] repudiation of the incumbent and preference for the rival." *Id.* at 965.

Following *RCA Del Caribe*, the Board next considered, in *West Lawrence Care Center*, 308 N.L.R.B. 1011 (1992), the question whether the inherent advantages of incumbency in regard to contractual site access constituted unlawful employer support. There, in the run-up to a Board election between an incumbent union and a rival union, the employer cut off the incumbent union's contractually-authorized site access on the ground that the employer wanted to maintain "strict neutrality." The employer contended that because it barred the rival union from its site, its "strict neutrality" policy required it also to rescind the incumbent union's site access. The Board held that the employer's failure to maintain the incumbent union's site access during the campaign, regardless of its decision to exclude the outside union, violated the Act.¹⁴

¹⁴ In *West Lawrence Care Center*, the union had contractual rights to come onto the employer's property "to discharge his duties as representative of the Union The union shall be permitted to conduct union meetings on the premises." 308 N.L.R.B. at 1013. The Board held that this language encompassed the right to conduct any union business on the premises and allowed the union to use its contractual access for campaign purposes.

As noted above, the Board has long held that the inherent advantages enjoyed by incumbent unions in representation disputes do not constitute unlawful assistance or interfere with employee free choice:

Admittedly, [incumbent union] officials...were permitted to enter plant premises and investigate grievance problems in the plant proper while [outside union] officials were denied access to the plant. It is, however, too well established to require citation of cases that an incumbent union with a contractual right may lawfully exercise that right despite denial of the same right to an outside union with no representative status.

Halo Lighting Div. of McGraw Edison Co., 259 N.L.R.B. 702, 717 (1981).

The requirement of neutrality does not create new statutory rights or allow an outside union to demand the benefits of contractual provisions for which they did not bargain. Most significant here, it is clear that "a provision in a collective bargaining agreement which gives an incumbent union exclusive use of a bulletin board for the posting of union notices to unit employees does not obligate the employer to give similar access to supporters of a rival union."

United Parcel Service, Inc., Case 8-CA-16737, General Counsel Advice Memorandum (Sept. 27, 1983) (citing *Armco Steel Corp.*, 148 N.L.R.B. 1179, 1186 (1964)). Such access is not a statutory right, but rather a contractual right resulting from the "quid pro quo" of bargaining. *Id.*

An employer who contracts with a certified union to allow access while denying the same to outside parties is therefore not violating statutory rights, provided it does not allow access to "other individuals or groups outside of the collective bargaining process." *Id.*¹⁵

¹⁵ Similarly, in the context of neutrality agreements, the Board has held that contractual agreements for access, even in the absence of a collective bargaining relationship, do not require an employer to provide the same access to others. *See Tenet Healthcare Corp. and Hahnemann University Hospital*, Cases 4-CA-36588 et al., General Counsel Advice Memorandum (June 25, 2009). ("The Union received access rights to the Employer's property, to which it was not otherwise entitled, as a quid pro quo for ceasing a corporate campaign." Where the employer's past practice prohibited employees from inviting non-employees into break rooms, the employer did not violate the Act by continuing this practice while allowing non-employee union

Finally, an outside union clearly has the "the opportunity to make its case to the unit employees" even when an incumbent union has the advantage of access to the employees by virtue of its duty to process grievances and otherwise act as the exclusive representative of employees. *See RCA Del Caribe*, 262 N.L.R.B. at 965.¹⁶ In fact, as the Board has explained, in situations in which nonemployee representatives of both incumbent and rival union are allowed access to facilities, even if the access granted is not identical or the rival union representatives' visits are "less frequent," the fact that both parties were granted any type of access "negative[s] any conclusion of discrimination as between the two unions in regard to the admission of 'outsiders.'" *Nat'l Container Corp.*, 103 N.L.R.B. 1544, 1556 (1953).¹⁷

representatives limited access pursuant to a neutrality agreement.) *See also Tenet Healthcare Corp. and Los Gatos Cmty. Hosp.*, Cases 32-CA-21266-1 et al., General Counsel Advice Memorandum (February 23, 2005).

¹⁶ This was especially evident in this case, as NUHW was given broad access to the cafeterias and public areas at Kaiser, with widespread reports during the campaign that NUHW actually was repeatedly granted access to many patient care areas.

¹⁷ Further, even in the absence of explicit contract language granting access, an employer may grant different means of access to an incumbent union and outside union without violating its requirement of neutrality. For example, in *X-Ray Manufacturing Corp. of America*, 143 N.L.R.B. 247 (1963), an employer did not violate the Act by permitting an incumbent union to hold a lunch time campaign meeting inside the plant, while denying the same access to an outside union, because the outside union was allowed to solicit and to distribute campaign literature to employees at a loading platform on company property. *Id.* at 249. The outside union was thus "able generally to bring its cause to the employees without Employer obstruction." *Id.* at 250. "It cannot be said that the mere denial of equality in one of the available means of communication created such an imbalance as would warrant our setting aside the election." *Id.* at 251. Likewise, the Board found no grounds to overturn an election where an employer allowed both incumbent and rival unions to campaign at pier entrances on public property, but restricted private property pier access to allow only the incumbent union's representatives, consistent with its past practice. *Seaboard Terminal and Refrigeration Co.*, 114 N.L.R.B. 754, 754-56 (1955). "[I]t is undisputed that the [incumbent union], by virtue of its status as representative of the employees involved, had a right of access to all of the [employer's] piers in order to administer its contract, while the [rival union] had no such right." *Id.* at 755.

We emphasize again that NUHW has made *no* showing that would give rise to a triable issue as to whether Kaiser condoned use of e-mail related to the election. *See Report* at 42-43. However, even if it had, as a matter of law such alleged condonation of the relatively few emails

As the above discussion makes clear, even had NUHW proffered more evidence than it did, it could not rely on the thin gruel of differential access to bulletin boards by an incumbent union or *de minimis* communication using the Employers' electronic mail to overturn this election, and the Acting Regional Director properly recommended dismissing these objections.¹⁸

CONCLUSION

For all the foregoing reasons, and based on the arguments and circumstances addressed in the underlying investigation, SEIU urges the Board to sustain the Acting Regional Director's Report and Recommendations in this case.

at issue here would not support overturning the election. "Minor concessions" regarding use of facilities, including allowing employees to hold monthly union meetings on paid time and on company premises, *even in the absence of contractual requirements to do so*, "are of a type not at all unusual where affiliated unions are involved and are not inherently coercive since they serve to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than might otherwise be the case." *Sunnen Prods.*, 189 N.L.R.B. 826, 828 (1971) (finding no unlawful assistance or interference where employer allowed incumbent labor organization to hold monthly meetings, on paid company time and premises); *see also B.M. Reeves Co.*, 128 N.L.R.B. 320, 322-23 (1960) (finding no unlawful assistance or interference where the employer allowed employees to "use . . . company time and property . . . to meet and to solicit employee signatures in approval of the [incumbent union's] contract," in response to an outside union's organizing campaign). Indeed, in *Seaboard Terminal* the Board refused to set aside an election even though the employer "permitted, by condonation" the incumbent union's campaign activities. 114 N.L.R.B. at 759. Here, by contrast, the Acting Regional Director's unchallenged finding is that NUHW proffered no evidence that the Employers condoned any alleged unequal use of its facilities, in this case e-mail communication. *See Report* at 42-43.

¹⁸ NUHW cites *Raley's, Inc.*, 256 N.L.R.B. 946 (1981), in its Exceptions. NUHW Exceptions at 14. In *Raley's*, however, the employer not only permitted the incumbent to hold meetings on working time at the worksite, but management representatives actively coerced employees into attending. 256 N.L.R.B. at 955. Such activity is strikingly absent from this case, and NUHW's reliance on *Raley's* avails it nothing.

Respectfully Submitted,

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Dated: March 14, 2011

CERTIFICATE OF SERVICE

This certifies that the foregoing Intervenor's SEIU-United Healthcare Worker-West's Brief in Opposition to Petitioner NUHW's Exceptions was served this 14th day of March, 2011, by electronic transmission upon:

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T7 P133



On August 27, 2010 the National Labor Relations Board General Counsel took legal action in Case #21-CA-39296 to protect Kaiser Professionals who have joined NUHW and are entitled to all of their previously scheduled raises and tuition reimbursements.

All past SEIU materials to the contrary are invalid.

Kaiser employees who vote for NUHW shall have all of the wages and benefits in their current contract protected under federal law.

Any future SEIU materials making contrary claims are false.

UNITED HEALTHCARE WORKERS – WEST



COLLECTIVE BARGAINING AGREEMENT



KAISER PERMANENTE®

NORTHERN AND SOUTHERN CALIFORNIA

**KAISER FOUNDATION HEALTH PLAN, INC.
KAISER FOUNDATION HOSPITALS
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP
THE PERMANENTE MEDICAL GROUP, INC.**

EFFECTIVE OCTOBER 1, 2005

1044 **ARTICLE XX – UNION STAFF REPRESENTATIVES AND SHOP STEWARDS**

1045 **SECTION 1 – UNION STAFF REPRESENTATIVES AND SHOP STEWARDS**

1046 A. **Union Staff Representatives.**

1047 1. **Access At Any Operational Time.**

A duly authorized Union Staff Representative shall have access to the facility at any operational time for the purpose of observing working conditions, monitoring compliance with this Agreement or following-up on inquiries and concerns of bargaining unit Employees.

1048 2. **Additional Right of Access.**

It is understood by the parties that Union Staff Representatives have legal obligations as Employee representatives and, as such, have access rights beyond those of the public and other non-Employees.

1049 3. **Obligations of Union Staff Representatives.**

Union Staff Representatives will abide by patient confidentiality, infection control, and other Employer policies applicable to Employees when using their access rights.

1050 4. **Union Representative Badge.**

When entering any of the Employer's facilities, Union Staff Representatives will wear their Union Representative badge issued by the Employer or the Union.

1051 5. **Conferring With Employees.**

Union Staff Representatives may confer with an Employee and/or his/her supervisor or an Employer representative on Employer time in connection with a complaint or problem concerning the Employee, but such conference should not interfere with the work of the Employee or the delivery of patient care.

1052 B. **Union Shop Stewards.**

1053 1. **Notice of Names of Authorized Stewards.**

Periodically, the Union will notify the Employer in writing the names of the duly authorized Union Shop Stewards.

1054 2. **No Discrimination.**

The Employer agrees that there will be no discrimination against the Shop Steward because of Union activity.

- 1055 3. **Leaving Work Area to Conduct Union Business.**
Shop Stewards will obtain permission from their immediate supervisor before leaving their work area to conduct Union business. Stewards shall not lose pay because of their participation in activities related to grievances, investigations or disciplinary meetings.

1056 **SECTION 2 – CONTRACT SPECIALIST**

- 1057 A. **Implementation of Position.**
In conformance with the criteria, procedures and timelines established by the National Agreement, the Employer will implement the Contract Specialist position.
- 1058 B. **Appointment by Union.**
Contract Specialists are appointed and directed by the Union's Director of the Kaiser Division. The Employer may provide input in the selection process but the decision as to who is appointed will rest with the Union's Director of the Kaiser Division.
- 1059 C. **Role of Contract Specialist.**
Primarily, the role of the Contract Specialist is to assist stewards in the administration of the Collective Bargaining Agreement at the direction of the Union, including but not limited to processing grievances, training stewards, attending investigatory meetings etc., thus assisting stewards to participate more fully in Labor/Management Partnership activities. The position of Contract Specialist is not intended to replace the role of the stewards.
- 1060 D. **Pay and Term of Service.**
The Contract Specialist is paid by the Employer at straight time for lost time at his/her current rate of pay and continues to be eligible for all benefits and wage increases, but will not receive overtime for work related to Union activities. In order to provide as many stewards the opportunity to participate in this program during the term of the current Collective Bargaining Agreement, a Contract Specialist will serve in this capacity up to a maximum of one (1) un-renewable term of twelve (12) months and then must return to his/her former position.

1061 **SECTION 3 – BULLETIN BOARDS**

- 1062 The Employer will provide adequate space at each facility for posting Union communications. In the event the Union demonstrates the need for a glass-enclosed, locked bulletin board, such shall be provided for the Union's use.

1063 **SECTION 4 – UNION LEAVE**

1064 A. **Unpaid Leave.**

An Employee who becomes a paid staff member of the Union or works for the Union on paid lost time may request and receive an unpaid leave of absence for up to one (1) year for Union business. Upon completion of the leave of absence, the Employee will be returned to his/her former job. The Employer will provide backfill for the duration of the leave.

1065 B. **Notice.**

A one (1) month notice, whenever possible, will be given in order to secure a leave and two (2) weeks' notice to return from a Union leave.

1066 C. **Benefits While on Union Leave.**

All Employer-paid benefits, including Performance Sharing Program (PSP), and paid time off accruals will be continued during a Union Leave of Absence. During such leave the Employee will continue to accrue seniority.

1067 **ARTICLE XXI – DISCIPLINE AND DISCHARGE**

1068 **SECTION 1 – GENERAL PRINCIPLES**

1069 A. **Just Cause.**

No Employee shall be disciplined or discharged without just cause. Any Employee who is discharged shall be informed in writing at the time of the discharge of the reason(s) for the discharge.

1070 B. **Request for Representation.**

Supervisors shall ask Employees if they wish the presence of a Union Steward and/or Union Representative in any meeting or investigation that may result in discipline. The selection of a Union Representative shall not unduly delay the proceeding.

1071 C. **Progressive Discipline.**

It is the Employer's intent normally to make use of progressive discipline in accordance with established practices and policy.

1072 D. **Furnishing of Documentation.**

In the event the Employer disciplines or discharges an Employee, the Employer will, at the request of the Employee and/or Union, furnish copies of necessary and/or relevant documents or written statements used by the Employer as a basis for the disciplinary action.