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

NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

and

**KAISER FOUNDATION HEALTH PLAN INC.;;
KAISER FOUNDATION HOSPITALS;
SOUTHERN CALIFORNIA PERMANENTE
MEDICAL GROUP;
THE PERMANENTE MEDICAL GROUP¹**

Respondent,

and

Case 32-RC-5774

**SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS-WEST,**

Intervenor.

**NUHW'S EXCEPTIONS TO THE SUPPLEMENTAL DECISION
AND NOTICE OF HEARING RE OBJECTIONS TO ELECTION**

¹ These entities will hereafter be referred to collectively as the Employers or Kaiser.

I. INTRODUCTION

The National Union of Healthcare Workers (“NUHW”), Petitioner in the above-referenced matter, hereby timely files Exceptions to the Regional Director William Baudler’s Supplemental Decision and Notice of Hearing on Petitioner’s Objections To Election in Case Number 32-RC-5774, issued on February 23, 2011 (the “Report”). In the Report, the Regional Director (“RD”) set five of the objections to hearing, Objections Nos. 1 (partial), 2, 3, 4 and 6. However, the RD also overruled other objections involving conduct by the Employers and Incumbent Union, SEIU, UHW-W (“SEIU”) impairing the free choice of the eligible voters so as to require that the election be set aside, or in the alternative, be considered in an evidentiary hearing. The NUHW hereby excepts to the RD’s failure to set for hearing Objection No. 1 (second part), 5, 12, 14 and 17 and 20 through 47 inclusive.

Objections No. 1 (second part) and 5, 12, 14 and 17 involve Kaiser’s complicity in publicizing their position that NUHW represented employees would not be entitled to wages and benefits that were part of the Coalition of Union’s National Agreement and were part of the charges filed in Southern California Permanente Medical Group; Kaiser Foundation Hospitals and National Union of Healthcare Workers, 356 NLRB No. 106 (March 3, 2011).

Objections 20 through 47, inclusive involve the Employers’ unlawful assistance including financial and access to SEIU as set forth in objections 20-31 and objections 32-47. The basis for the overruling of the objections was the fact that there was not sufficient evidence proffered to support the objections. However, NUHW disputes the decision on the basis that an unfair labor practice charge was filed in Kaiser Foundation Health Plan et al., 32-CA-25578 on January 26, 2011 and the Regional Director failed to investigate the charge and has delayed processing of the charge until the processing of post-election proceedings in cases 32-RC-5775. [Copies of Charge

in 32-CA-25578 and the Regional Director's letter delaying the investigation are filed herewith as Exhibit 1 and 2.] It is the NUHW's position that the Regions erred in holding the charge in abeyance pursuant to section 11407 of the NLRB Casehandling Manual Representation Proceedings. The NUHW was not provided the opportunity to present evidence in support of the charges. In addition, the NUHW incorporates by reference the brief submitted in 32-RC-5775. The objections should not be heard in a vacuum. The conduct complained off was at the Northern California locations of the state wide unit. The only difference was the instant objections are for the MSW unit.

Kaiser engaged in objectionable conduct in this election. Each of these parties separately, and often in combination, engaged in conduct to ensure that the incumbent would remain, and that any chance of a level playing field for the Petitioner, NUHW, would be destroyed. However, in determining which objections should go to hearing, the Regional Director erroneously overruled certain objections involving particularly egregious objectionable conduct, such as employer threats to bargaining unit employees and favorable access granted to SEIU supporters to use electronic assets for campaigning during the election

THE ELECTION

The Petition was filed on June 29, 2010. The Election was held by mail ballot between October 18 and November 8, 2011 in the following appropriate unit referred to as the MSW Unit Kaiser's medical centers in Northern California. The unit consisted of the following employees:

All full-time and regular part-time Medical Social Workers employed by the Employer in positions covered by the collective bargaining agreement between the Employer and Service Employees International Union, United Healthcare Workers – West, effective October 1, 2005, including Medical Social Worker 1,

Medical Social Worker II, and Medical Social Worker III; excluding any medical Social Worker assigned to the Director of Social Services at any of the Employer's facilities or to who, the Employer has given the authority to hire, promote, discipline, discharge, or otherwise change status or to effectively recommend such action, all employees represented by other unions, confidential employees, guards, and supervisors as defined in the National Labor Relations Act. [Report at 2].

The Tally of Ballots was as follows:

Approximate number of eligible voters: 378

Number of void ballots: 4

Number of votes cast NUHW: 139

Number of votes cast for Neither: 2

Number of votes cast for SEIU-UHW: 148

Number of Valid Votes Counted: 289

Number of challenged ballots: 3

Valid votes counted plus challenged ballots: 292

[Report at 2].

Based on the foregoing, it is clear that the misconduct alleged interfered with the laboratory conditions required for a fair election.

II. EXCEPTIONS

1. **The NUHW Excepts To The Regional Director’s Recommendation That Objection Nos. 1 (Second Part Only) 5, 12, 14 And 17, Be Overruled; Evidence Is Sufficient To Show Employers’ *Multiple* Threats To Bargaining Unit Members.**

The NUHW excepts to the Regional Director’s recommendation to overrule Objections Nos. 1 (second part only), 5, 12, 14, and 17, regarding threats made by the Employers that the employees in the that the employees in the MSW unit would suffer the same unlawful unilateral changes applied to employees represented by NUHW in other bargaining units. All of the evidence cited below in this section related to these objections is also relevant to objections that *were* sent to hearing. In particular, this evidence is relevant to the objections sent to hearing asserting that it was objectionable and tainted this election that the Employers, by their agents, withheld and/or cancelled scheduled annual across-the-board raises, tuition-reimbursement benefits, union-steward training programs, and other benefits for employees represented by NUHW in other Kaiser units, the “Southern California Units” (conduct found to constitute an unfair labor practice in Southern California Permanente Medical Group; and Kaiser Foundation Hospitals, 356 NLRB No. 106, March 3, 2011), which conduct was disseminated throughout the subject bargaining unit of Kaiser employees who reasonably feared the same thing would happen to them if they chose NUHW, and that the SEIU committed objectionable conduct when it chose to make its principal campaign message the threat to the subject bargaining unit employees that if they chose NUHW, Kaiser would treat this bargaining unit the same as it had treated other Kaiser bargaining units who chose NUHW and deny them their scheduled annual across-the-board

raises, tuition-reimbursement benefits, and other benefits. The Regional Director erred by not finding that this same conduct, independently, *also* constituted evidence of objectionable *threats by the Employers* to the subject bargaining unit in the critical period before the election.

Petitioner has presented sufficient evidence to establish a prima facie case in support of those objections which warrants setting these objections for hearing. *See Park Chevrolet-Geo*, 308 NLRB 1010 (1992).

In order to obtain an evidentiary hearing a party must make a proffer of evidence that raises a substantial and material issue of fact that, if resolved in the party's favor, would warrant setting aside the election. *See St. Margaret*, 991 F.2d at 1152; *J-Wood*, 720 F.2d at 313-14; *Anchor Inns*, 644 F.2d at 296. When that evidence is presented, Board regulations require the Director and the Board to give consideration to the need for an evidentiary hearing. 29 C.F.R. § 102.69(d) & (f) (1981). The objecting party's right to a hearing is established by presenting prima facie evidence of substantial material factual issues. *Pinetree Transp. Co. v. NLRB*, 686 F.2d 740, 745 (9th Cir. 1982).

Dr. Ben Chu's Threats

Petitioner presented evidence that Kaiser Southern California Regional President, Dr. Ben Chu, made a statement during a conference call with employees on August 3, 2010 concerning the consequences of Kaiser employees joining NUHW. Petitioner provided audio recordings, including of a call wherein Dr. Chu states that certain benefits are only available to unions that are a part of the Coalition National Agreement and that whether or not the NUHW unit will get the benefit depends on NUHW's acceptance into the Coalition. *See* [Petitioner's Index of Audio Recordings].

The Supreme Court has identified the distinction between an unlawful threat and a

prediction in terms of invalidating an election. In NLRB v. Gissel Packing Co., 395 U.S. 575, 23 L. Ed. 2d 547, 89 S. Ct. 1918, *reh'g denied* 396 U.S. 869, 24 L. Ed. 2d 123, 90 S. Ct. 34 (1969), the Supreme Court affirmed an employer's right to freely "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618 (quoting 29 U.S.C. section 158(c)). Speech is privileged if it contains no threat or promise.

Marine World USA, 611 F.2d at 1277. At the same time, the employer's challenged statement must be evaluated in the context of the totality of the employer's conduct. *Id.* If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. Gissel Packing, 395 U.S. at 618.

In light of these principles, Kaiser may express opinions or predications, reasonably based in fact and permitted by law, about the possible effects of unionization under NUHW. Here, Dr. Chu's statement was only possible if Kaiser engaged again in the same illegal conduct it had undertaken vis-à-vis the Southern California units. Quite simply, the employees who heard this speech would reasonably understand the Employers' message to be that if they were to be represented by NUHW, they would automatically and immediately lose essential terms and conditions of employment.

The Southern California Regional President's statement to employees conjured up inevitable loss of benefits under NUHW, as already carried out by Kaiser against the existing three NUHW bargaining units in Southern California. It is undisputed that the Employers did

illegally take away contractual pay increases and benefits after employees selected Petitioner as their representative. Dr. Chu's statement created an obvious potential for interference with free choice. While the Regional Director in his Report states that the NUHW did not present sufficient evidence about the context of Dr. Chu's statements and its direction toward the bargaining unit (*see* Report at 9, footnotes 12, 13), in fact NUHW specifically identified multiple bargaining unit employee witnesses who could testify as having heard either the Ben Chu audio file. The witnesses stated that these audio files of Dr. Chu were disseminated through the Employer's proprietary email system by SEIU.

The ominous threat in Dr. Chu's statements, and their impact on bargaining unit members, was not lost upon the incumbent union, which extensively disseminated his statements to the bargaining unit members. Dr. Chu's threat – the subject of certain objections for which the Regional Director determined a hearing will resolve, and while NUHW agrees with the RD that this evidence is relevant to SEIU's threats, given this context, the Employers' threats that are repeated by SEIU with no counterbalance from the Employer disavowing the remarks during the critical period independently constituted objectionable conduct.

The statement by Dr. Chu and the comments combined with the context for these statements, demonstrate that this conduct constituted threats of reprisal to the MSW Unit should these employees exercise their protected section 7 rights to select NUHW as their labor organization. In sum, the evidence of these threats by the Employers was independently egregious enough to warrant setting aside the election or, in the alternative, direct an evidentiary hearing for the presentation and consideration of testimony and evidence relevant to these employer threats. If there is a factual issue as to whether these employer threats were enough to

constitute objectionable conduct, alone or in combination with other conduct sent to hearing, then resolution at the hearing for all of these objections is warranted.

2. The NUHW Excepts to the Regional Director's Error In Determining that the Employers Did Not Discriminatorily Grant SEIU Enhanced Access to Kaiser Facilities Restrict NUHW from Access and, Similarly, Granting SEIU Enhanced and Discriminatorily Favorable (versus NUHW) Use of Kaiser Electronic Assets (Email) to Campaign. (Objection Nos. 20 through 47).

The NUHW excepts to the Regional Director's error in determining that the Employers did not engage in objectionable conduct by discriminatorily granting SEIU enhanced access to employees at the facilities and through the Employers' email system. The Regional Director similarly erred when he determined that the Employers did not objectionably grant SEIU enhanced and discriminatorily favorable, versus NUHW, use of Kaiser electronic assets (email) to campaign. Here, the Regional Director erred by overruling the objections involving the Employers' conduct related to access to electronic assets as independently objectionable.

The Regional Director failed to uphold objections related to the discriminatory and enhanced access provided to SEIU for use of Kaiser facilities during the critical period. [Report at 16; 19]. The evidence included direct witness statements that SEIU held meetings at the Kaiser facilities with employees from the Southern California NUHW bargaining units that were victims of the unresolved unfair labor practices in Case 21-CA-39296, 356. NLRB No. 106 (March 3, 2011). The Petitioner included the fliers and communications regarding these events held at the Employers' facilities and letters from Petitioner's counsel informing Kaiser's counsel regarding the use of its facilities for SEIU campaign activities. Kaiser took no steps to insure that the use of its facilities by SEIU was for contract administration and was on notice that SEIU was

campaigning against NUHW based on the Employer's unresolved unfair labor practices. Thus, the NUHW specifically identified witnesses with direct rather than hearsay testimony to support its objections and as such the objections should have been set for hearing pursuant to the NLRB Casehandling Manual(part two), Section 11392.6., City Wide Insulation of Madison, 338 NLRB 793, 794-795 (2003).

The reason provided for the Regional Director's Decision was the Petitioner's failure to proffer evidence that Kaiser ratified or condoned any use of its email or other communication systems by SEIU. Here, the Petitioner presented direct witnesses that received emails form SEIU through the Kaiser email system that were for the sole purpose of campaigning against NUHW. Again these emails communicated the loss of contractual wages and benefits for NUHW represented employees in Southern California, if MSW unit members voted for NUHW. In addition, the Petitioner presented correspondence from NUHW's counsel to the Employers' counsel regarding the use of the email system by SEIU. Finally, the Petitioner presented direct evidence of NUHW employee supporters being threatened with discipline for responding to the emails sent by SEIU. Here again, the NUHW specifically identified witnesses with direct rather than hearsay testimony to support its objections and as such the objections should have been set for hearing pursuant to the NLRB Casehandling Manual(part tw0), Section 11392.6., City Wide Insulation of Madison, 338 NLRB 793, 794-795 (2003).

Thus, the evidence proffered supports a hearing on the issue of whether the Employers objectionably granted SEIU enhanced and discriminatorily access to its facilities during the critical period use of Kaiser electronic assets (email) to campaign. NUHW also presented a great deal of evidence that NUHW supporters had been, including prior to the election, threatened with discipline (and disciplined) for using Kaiser's electronic assets in a manner inconsistent with

Kaiser's electronic usage policy. And it was plainly inconsistent with that policy for SEIU non-employee and employee supporters to overwhelm Kaiser's proprietary email system with campaign messages. Kaiser failed to prevent use of its electronic assets for campaigning by SEIU. The RD does not deny that this occurred, but says on page 21 that the Employer attempted to discourage such communications by SEIU based on previous charges filed by SEIU and "that the Employer was under no obligation to allow such use" for the Petitioner. [Report at 21]. Therefore according to the RD, the denial of access to the Petitioner was not objectionable conduct. But NUHW presented numerous witnesses who would testify to complaining about SEIU's use of electronic assets for campaigning, and about Kaiser's feeble response. Moreover, this conduct is part and parcel of Kaiser's generally objectionable conduct related to taking insufficient to no reasonable means to prevent SEIU representatives from accessing non-public physical areas of Kaiser facilities for campaigning, and providing unlawful assistance to SEIU by furnishing the incumbent with things of value, including but not limited to Kaiser facilities, for campaigning against NUHW.

3. The Regional Director Erred In Failing To Investigate The Petitioner's Charge Alleging That Kaiser Violated Sections 8(A)(1) And 8(A)(2) Of The Act By Providing Unlawful Financial Assistance To SEIU Supporters Against NUHW In Organizing Campaigns.

Finally, the RD was clearly in error when he chose to not process and investigate the charge filed against Kaiser in Case 32-CA-25578. The RD chose in his discretion to hold the

charge in abeyance pending the post- election proceeding in Case 32-RC-5775. This charge was filed on behalf of the employees in the MSW unit as well as the employees in the State wide unit.

Section 11407 states as follows:

“in the event there are determinative challenged voters who are involved in a related unfair labor practice charge, or who are also alleged discriminates in an unfair labor practice charge, or there are objections to an election and an unfair labor practice charge, both of which encompass in whole or in part the same conduct, then the investigation of the challenges and/or objections and the charge should be coordinated.”

Importantly, the section states that if “the unfair labor practice allegations are filed around the time of the objections, with which they are partially or totally coextensive, an initial investigation must be commenced.” The Regional Director has the option if the objecting party does not withdraw the charge, to hold the charge in abeyance and process the objections if the objections hearing would resolve the underlying issue. Section 11407(b).

Here, the Regional Director decided to hold the charge in abeyance based on the objections scheduled for hearing in Case 32-RC-5775. However, the Regional Director failed to sustain similar objections in this case and therefore; it was incumbent on the Region to investigate the underlying charge. In fact case 32-RC-5775 was transferred from Region 21 by the Acting General Counsel so that Region 32 could coordinate the filings regarding this Employer. Therefore, the Region erred in holding the charge in 32-CA-25578 in abeyance and should have investigated the charge prior to overruling NUHW’s objections in the MSW unit.

CONCLUSION

For all these reasons, NUHW respectfully excepts to the Regional Director’s recommendations concerning Objection Nos. 1 (second part only), 5, 12, 14, 17 and 20 through

47 inclusive. By overruling these objections, without holding a hearing on them, the Regional Director prejudicially affected Petitioner's rights under the Act.

Based on the foregoing, NUHW respectfully requests that the Board overrule the Regional Director's recommendations as to the objections and that this election be set aside, or in the alternative, that these objections be considered in a hearing.

DATED: March 16, 2011

LAW OFFICE OF FLORICE HOFFMAN

By: /S/ _____
Florice Hoffman

Attorneys for Petitioner NUHW

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I am employed in the County of Orange, State of California. I am over the age of 18, and not a party to the within action. My business address and place of employment is 8502 East Chapman Avenue, Suite 353, Orange, CA 92869

On the date set forth below, I served the document(s) described as NUHW'S Exceptions To The Supplemental Decision And Notice Of Election Re: Objections To Election on the interested parties in this action

Via Facsimile

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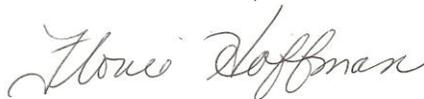
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Executed on March 16, 2011 at Orange, California.



Florice Hoffman