UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KAISER FOUNDATION HEALTH PLAN, INC.;
KAISER FOUNDATION HOSPITALS;
SOUTHERN CALIFORNIA PERMANENTE
MEDICAL GROUP; THE PERMANENTE MEDICAL
GROUP, INC.[1]
Employers

and Case 32–RC–5775

NATIONAL UNION OF HEALTHCARE WORKERS
Petitioner

and

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

For the Petitioner: Jonathan H. Siegel, Benjamin J. Siegel, Latika Malkani, Attys., Siegel & LeWitter, Oakland, CA.
For the Intervenor: Glen Rothner and Eli Naduris-Weissman, Attys., Rothner, Segall & Greenstone, Pasadena, CA; Michael Hunter, Atty., Hunter, Carnahan, Shoub & Byard, Columbus, OH; Bruce A. Harland, Atty., Weinberg, Roger & Rosenfeld, Alameda, CA.
For the Employers: Ronald E. Goldman, Bob Spagat, and Cheryl L. Kopitzke, Attys., Kaiser Permanente, Oakland, CA; Michael R. Lindsay, Atty., Nixon Peabody, LLP, Los Angeles, CA.
For the [Education Fund]: Christian J. Rowley, Atty., Seyfarth Shaw, LLP, San Francisco, CA.
For Region 32: Valerie Hardy-Mahoney, Atty., Oakland, CA.

[1] Kaiser Foundation Health Plan, Inc. is a nonprofit health maintenance organization. Kaiser Foundation Hospitals is a California nonprofit public benefit corporation engaged in the operation of various health care facilities in California, Oregon and Hawaii. Southern California Permanente Medical Group and The Permanente Medical Group, Inc. are engaged in the provision of medical services to health plan members and the operation of health care clinics in Southern California and Northern California, respectively. For the purpose of this report, those entities will hereinafter be referred to collectively as Employers or Kaiser. Larger groupings of Kaiser entities, including Kaiser Permanente nationwide, will be referred to collectively as Kaiser Permanente.

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

LANA PARKE, Administrative Law Judge. Following a petition filed on June 29, 2010,[2] by National Union of Healthcare Workers (Petitioner or NUHW) seeking representation of the Employers' employees in the statewide service and technical employees bargaining unit then represented by Service Employees International Union, United Healthcare Workers–West (Intervenor or SEIU–UHW), the parties entered into a stipulated election agreement. An election by mail ballot was conducted between September 13 and October 4 under the direction and supervision of the Regional Director of Region 32 of the National Labor Relations Board (NLRB or the Board) covering employees of the Employers at facilities[3] located throughout the state of California (the statewide unit). The unit of employees involved in the election consisted of the following employee classifications:

> All full-time, regular part-time, limited part-time and on-call service, maintenance, technical, clerical and professional employees employed by the Employers in the job classifications set forth in the 2005 collective-bargaining agreement between the Employers and SEIUUHW–West and described in Attachment 1 thereof (identified in the Table of Contents as Attachment A) as SEIU–UHW–West (North) and SEIU–UHW-West (South), and located in the Employers' Northern and Southern California regions.[4]

The election resulted in the following final tally of ballots:

Approximate number of eligible voters	42,977
Number of void ballots	1,222
Number of votes cast for NUHW	11,364
Number of votes cast for NEITHER	365
Number of votes cast for SEIU - UHW	18,290
Number of valid votes counted	30,019
Number, of challenged ballots	276
Valid votes counted plus challenged ballots	30,295

[2] All dates refer to 2010 unless otherwise indicated.

[3] The relevant Employer's facilities included approximately 27 major medical centers anchored by a hospital, medical office buildings (MOB) that encompassed various clinics, customer service/appointment/advice call centers, warehouses, laboratories, pharmacy distribution centers, and administrative offices. Approximately 16,000 Statewide Unit employees were located in Southern California, an area south of Bakersfield, California, excluding the San Diego and Inland Empire areas and 26,000 in Northern California.

[4] Pursuant to established Board procedure, professional employees initially voted in a "self-determination election" on the question of whether or not they wanted to be included in the broader statewide bargaining unit along with the nonprofessional employees, and chose inclusion.

Following the election, the Petitioner filed 118 timely objections to the election on October 14. On January 14, 2011, the Regional Director issued Report and Recommendations on Objections and Notice of Hearing (report on objections), recommending that Petitioner's Objections. 4, 6, 8–25, 29–32, 40–45, 47–49, 55–57, 61–68, 72, 73, 75–79, 81–86, and 88–118, be overruled in their entirety and setting for hearing, as limited in the report on objections, Objections 1–3, 5, 7, 26–28, 33–39, 46, 50–54, 58–60, 69–71, 74, 80, and 87. Hearing on Objections 1–3, 5, 7, 26–28, 33–39, 46, 50–54, 58–60, 69–71, 74, 80, and 87, as limited by the report on objections, commenced in Oakland, California on February 14, 2011 and continued for 23 days.[5] By its posthearing brief, Petitioner withdrew the following objections to the extent each was set for hearing: Objections Nos. 58, 59, 60, 69, 70, 71, 74 and 80.

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, uncontroverted relevant testimony, and findings of fact made by Administrative Law Judge William L. Schmidt in Case 21–CA39296 on December 13 and adopted by the Board (with minor modification of unit description) at *Southern California Permanente Medical Group; and Kaiser Foundation Hospitals,* 356 NLRB No. 106 (2011). On the entire record, including my observation of the demeanor of witnesses, and after considering the briefs filed by Petitioner, Intervenor, and Employers, I find the following events occurred in the circumstances described during the critical period.

FINDINGS OF FACT AND DISCUSSION

A. Legal Overview

The critical period during which conduct allegedly affecting the results of a representation election must be examined "commences at the filing of the representation petition and extends through the election. *E.L.C. Electric, Inc.,* 344 NLRB 1200, 1201 fn. 6 (2005). Here, the critical period is June 29 through October 4.

The Board does not lightly set aside representation elections.[6] "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). The burden of proving a Board-supervised election should be set aside is a "heavy one."[7] The burden is even heavier where the vote margin is large." *Trump Plaza*

[5] A portion of the hearing was conducted in Los Angeles, California, March 1 through 4, 2011. In May 2011, the record was reopened to receive, by agreement of all parties, Int. Exh. 41 and to identify correctly the exhibits described in the first paragraph of Jt. Exh. 1 as Intervenor Exh. 38(a); thereafter, hearing closed on May 23, 2011.

[6] *Quest International,* 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)).

[7] *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974).

Associates, 352 NLRB 628, 629-630 *(citing Avis Rent-A-Car System,* 280 NLRB 580, 581-582 (1986)). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Petitioner has the burden of proving interference with the election. See *Jensen Pre-Cast,* 290 NLRB 547 (1988). The test, applied objectively, is whether election conduct has the tendency to interfere with employees' freedom of choice.[8] Petitioner must show the conduct in question had a reasonable tendency to interfere with employees' free and uncoerced choice in the election to such an extent that it materially affected the results of the election.[9]

B. Petitioner's Objections

Objections 1–3, 5, 7, 26–28, 33–39, 46, 50–54, and 87, remaining in issue, are addressed herein. Where objections overlap or relate to the same course of events, they are considered together.

1. Objections 1, 2, 3, and 5

(1) The employer, by its agents, violated Section 8(a)(1) and Section 8(a)(5) by committing unlawful unilateral changes by withholding and/or cancelling scheduled annual across-the-board raises, tuition-reimbursement benefits, and union-steward training programs for employees represented by NUHW in other units (first part).[10]

(2) The SEIU, by its agents, widely disseminated to employees the threat that if NUHW won this election, the employer would not pay contractually bargained-for wage increases including but not limited to threats that the employer would not provide employees with an upcoming salary increase due in or around October 2010.

(3) The SEIU, by its agents, widely disseminated to employees the threat that if NUHW won this election, the employer would not pay an already bargained-for Performance Sharing Program (PSP) bonus.

(5) The SEIU, by its agents, widely disseminated to employees…threats, including but not limited to the SEIU's threat that Kaiser had "confirmed that NUHW members at Kaiser are not automatically eligible to receive Performance Sharing Program (PSP) bonuses" and that employees would not get such bargained-for bonuses if NUHW won.

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[8] *Taylor Wharton Division,* 336 NLRB 157, 158 (2001); *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004); *Baja's Place*, 268 NLRB 868 (1984).

[9] *Madison Square Garden CT., LLC,* 350 NLRB 117, 119 (2007) (internal quotations and citations omitted); *Quest International,* 338 NLRB 856, 857 (2003).

[10] The Regional Director overruled the second part of Objection 1.

a. Facts Underlying Objections 1, 2, 3, and 5

(1) Unfair Labor Practices (ULPs) in the Southern California Professional Units

Years ago, labor organizations representing various units of Kaiser Permanente employees formed a Coalition of Kaiser Permanente Unions (the Coalition). The Coalition was comprised of local and international unions representing Kaiser Permanente employees in defined geographic regions and existed for the purpose of facilitating collective bargaining with Kaiser Permanente entities.[11] The Coalition's rules and bylaws determine eligibility for membership. In pertinent part, the Coalition bars from membership labor organization that obtain representative status by "raiding" a unit of a Coalition member.

In 1996, Kaiser Permanente and the Coalition entered into a national labor management partnership agreement (the LMP). Thereafter, local, regional, and national negotiations were conducted under auspices of the LMP. The negotiations have resulted in successive national collective-bargaining agreements between Kaiser Permanente and SEIU-UHW, the last of which was effective by its terms from October 1, 2005 through September 30, 2010 with attendant reopener provisions (the national agreement). The national agreement supplemented local agreements and addressed across-the-board wage increases and other benefits of the statewide unit. Additionally, SEIU–UHW and the Employers have been parties to a local collective-bargaining agreement (local CBA) covering the statewide unit.

In addition to structuring negotiations, the LMP provided individual employee growth and development opportunities such as a performance sharing plan (the PSP). The stated purpose of the PSP was to recognize the value of national agreement-covered employees' contributions to Kaiser Permanente by permitting them to share in the company's performance gains. The PSP was, in short, a bonus incentive program, the amounts of which were annually agreed upon between the Coalition and Kaiser Permanente. Historically, the PSP was calculated in January and February based on performance in the preceding year and paid to employees in March.[12]

In 2007, following a merger of labor organizations, SEIU–UHW became the recognized representative for three professional collective bargaining units in Southern California—the Health Care Professionals unit, the Psych-Social Chapter unit, and the American Federation of Nurses unit (the Southern California pro-units)—comprised within the workforces of Southern California Permanente Medical Group and Kaiser Foundation Hospitals (collectively, Kaiser or the Southern-California-pro employers), two of the employers involved herein.[13]

[11] Not all unions representing Kaiser employees participate in the Coalition.

[12] Non-Coalition negotiated contracts may contain bonus incentive programs, but they do not necessarily have the same terms as, and are not designated as a PSP program.

[13] The Southern California pro-units are separate and distinct from the statewide unit.

SEIU-UHW and Kaiser were, at all material times, parties to collective-bargaining agreements covering each of the Southern California pro-units, i.e., the national agreement as well as local agreements, each of which incorporated the national agreement. The interrelated national and local agreements provided for a basic wage structure and a variety of fringe benefits, including provisions for tuition reimbursement, paid time-off for stewards to attend union-sponsored steward training sessions, PSP bonuses, and across-the-board wage increases. In 2008, an agreement among the parties to these agreements provided for across-the-board wage adjustments for, inter alia, employees in the Southern California pro-units in the pay periods closest to October 1, 2008 and 2009 as well as a further adjustment of 2 percent that was to be effective in the pay period closest to April 1. The PSP bonus provisions of the national agreement applied to each of the Southern California prounits.

In late January 2009, certain former SEIU-UHW officers and professional organizers formed NUHW and commenced raiding units represented by SEIU-UHW. On February 27, 2009, NUHW filed representation petitions with the Board seeking certification as the collective-bargaining representative for the Southern California pro-units. During the election campaigns that followed, employees in the Southern California pro-units received the October 2009 across-the-board adjustment, as they had in 2008.

On February 3, the Board certified NUHW as the exclusive bargaining representative of the Southern California pro-units, and Kaiser and NUHW commenced bargaining. At the initial bargaining meeting, NUHW agent Ralph Cornejo (Cornejo) requested that Kaiser continue in effect until October 1 the terms of its agreements with SEIU–UHW. At a bargaining meeting held February 26, Kaiser's representatives told the NUHW representatives that Kaiser would not continue the terms of the agreements with SEIU–UHW, that the employees would not receive the 2-percent pay increase that had been negotiated in 2008, that the employees would not receive further tuition reimbursements, and that the NUHW stewards would not receive paid time off for steward training. Thereafter, the following sequence of events occurred:

March Employees in the Southern California pro-units received the PSP bonuses based on calculations of Kaiser's 2009 performance.

March 18—At the March 18 bargaining session, Kaiser presented NUHW negotiators with a letter stating that participation in the Coalition was a precondition to applying agreement terms to the NUHW-represented units, a participation NUHW would be unlikely ever to realize.

March 30—NUHW filed ULP charges against Kaiser in Case 21–CA–39296 (March 30 ULP charges), alleging that by unilaterally withholding certain benefits from employees in the Southern California pro-units, Kaiser had violated Section 8(a)(5) and (1) of the Act.

April—Kaiser refused to pay the Southern California pro-unit employees the contractually projected two-percent April adjustment. Kaiser paid the adjustment to employees in the statewide unit represented by the Intervenor.

End May—Negotiations on the national agreement concluded.

June 14 through June 23—Contract ratification vote held among statewide unit employees.

June 29—NUHW filed the instant representation petition, beginning the critical period.
August 27—Based on the March 30 ULP charges, the Regional Director issued a complaint and notice of hearing.
September 13 to October 4—the Regional Director conducted the mail ballot election among employees in the statewide Unit.
October 4—Region 21 in Los Angeles filed with the U.S. Central District Court a petition for temporary injunction against Kaiser seeking to enjoin the commission of ULPs in the Southern California pro-units.
October 6—Mail ballot count commenced.
October 18 and 19—Judge Schmidt held hearing on the March 30 ULP charges.
December 13—Judge Schmidt issued his decision on the March 30 ULP charges, finding that Kaiser violated Section 8(a)(5) and (1) of the Act by unilaterally withholding an April 2010 wage increase, tuition reimbursement for continuing education courses, and paid steward-training time off from employees in the Southern California pro-units.[14]
March 3, 2011—The Board, in the absence of exceptions, with a slight unit-description modification, adopted Judge Schmidt's findings and conclusions at *Southern California Permanente Medical Group; and Kaiser Foundation Hospitals,* 356 NLRB No. 106 (2011)

(2) Intervenor's campaign in the statewide unit

During the critical period, the Intervenor widely disseminated throughout the statewide unit written campaign materials. Many of these materials referred, explicitly and implicitly, to Kaiser's unilateral actions detailed in Judge Schmidt's decision, as well as to prospective nonpayment to the Southern California pro-units of the PSP incentive bonus. The following statements are representative excerpts from the Intervenor's campaign materials disseminated widely during the critical period: [15]

- On a conference call with Kaiser employees on August 3, Kaiser Southern California President Ben Chu confirmed that NUHW members at Kaiser are not automatically eligible to receive [PSP] bonuses. The PSP adds thousands of dollars to Kaiser workers' income each year…Chu made it clear that only members of unions in the Coalition of Kaiser Permanente Unions-like SEIU-UHW-are guaranteed the bonus as part of the national agreement *we* just approved by a 94% vote. NUHW could try to negotiate a bonus, but they are unlikely to succeed because it is a function of the Partnership and Coalition which they are not a part of.

- If [NUHW replaces SEIU-UHW as our union] our new contract and everything in it is gone and has to be re-bargained…In January, a small group of

[14] Nonpayment of PSP bonuses was not an issue in the March 30 ULP charges.
[15] More than 500 pages of the Intervenor's disseminated campaign mailers and leaflets from April through the election were introduced by stipulation (Int. Exh. 10). The representative excerpts are taken only from disseminations made during the critical period.

Kaiser pros in So Cal voted to join NUHW and they lost their contract, the 2% raise that SEIU-UHW members got in April, continuing education reimbursement, and more.[16]

- When [NUHW] shows up at Kaiser…ask…"If everything will stay the same if we vote for NUHW and give up SEIU-UHW, then why were you forced to file a charge against Kaiser because…they 'have refused to maintain the status quo' for the pros who voted for NUHW in January.

- [Quoting a statewide-unit member]: [NUHW] had no answer for me about why NUHW members in Southern California haven't gotten their 2% raises. Why would we take that kind of risk?"

- Southern California Kaiser pros who voted for NUHW in January still don't have the 2% pay raises that SEIU-UHW members got in April…[quoting a statewide-unit member]: "NUHW can't even get the 2% raise that we've seen in our paychecks for three months now."

- With NUHW, we'd have to start bargaining all over again, just like the Kaiser pros in Southern California who voted for NUHW in January…LOST RAISES: NUHW is in an ugly legal battle with Kaiser over the 2% raises DEIU-UHW members got in April but they didn't. LOST CEU'S: Continuing Education Units no longer reimbursed.

- After Southern California RNs and pros voted to join NUHW, here's what happened: They lost their 2% raise in April. That means a loss of more than $1,600 a year for some pros and RNs…They are no longer eligible for up to $2,000 a year in tuition reimbursement for Continuing Education Units.[17]

- NUHW and SEIU-UHW at Kaiser…*The Difference is Clear*... Southern California RNs and pros in NUHW lost their 2% April raise.

- [Quoting a Southern California pro-unit member]: "In January our unit in Southern California went to NUHW…I've lost a significant amount of my benefits and job protections under NUHW…"

- Kaiser has told [NUHW] that—unlike what [NUHW] promised the pros and nurses—[NUHW] ha[s] to re-bargain the whole contract…[Kaiser] won't give NUHW workers the 2% raise we got in April.

- [Quoting a Southern California pro-unit member]: "It's bad enough that we lost our 2% raise in April and our continuing education reimbursements. Now we just found out that we're losing our PSP bonuses too."

[16] More than 30 disseminations of this statement were made in as many Kaiser facilities.

[17] More than 25 disseminations of this statement were made in as many Kaiser facilities.

- [Quoting a statewide-unit member]: " First the employees who left our union lost their 2% raise. Now they've lost their PSP bonuses."

- "Don't make the same mistake we did."…In January 2010, a group of Kaiser RNs and Professions in Southern California left SEIU-UHW and joined NUHW…we lost our scheduled 2% raises, our guaranteed PSP Bonus, [and] our CEU reimbursements.

- Kaiser Workers Who Joined NUHW Say…Our 2% April Pay Raises? GONE. Our Guaranteed PSP Bonuses? GONE. Our guaranteed PSP Bonuses? GONE. Our Continuing Education Units [CEUs]? GONE.

- In October, NUHW goes to a judge to beg for the chance to win back the 2% raise their Kaiser members lost in April. The judge may or may not rule in favor of NUHW members—and the process could take years. Meanwhile, SEIU-UHW members got our 2% raise…NUHW members have finally gotten their guarantee-NO RAISES THIS YEAR.

- [S]ix months after SEIU-UHW members got their 2% raise, NUHW members at Kaiser are facing years of legal fighting to maybe get the same raise. And the Southern RNs and pros are reporting that Kaiser has said NUHW members will also lose their 3% raise that all SEIU-UHW members will get in October.

By email SEIU also provided statewide unit employees with a video link to an Intervenor-generated video in which three members of the Southern California pro-units said that after selecting NUHW, they lost their 2% April raises and anticipated losing another 3 percent in the coming fall. One individual estimated that over the next 3 years, he would lose $20,000 by changing representatives. The three professionals cautioned viewers not to make the same mistake they did but to vote for SEIU.

During the critical period, the Intervenor utilized the services of Cleante Stain (Stain), a psychiatric social worker employed by Kaiser Permanente in one of its Southern California facilities and a member of the psych-social Southern California pro-unit. Beginning in July, SEIU arranged for Stain to visit various Kaiser Permanente facilities and speak to statewide unit employees.[18] In the course of her visits, Stain told statewide unit employees that the Southern California pro-units did not get their 2-percent raise after selecting NUHW as their bargaining representative, and suggested employees ask themselves it they could afford to live without the 2 percent. Beginning in August, Stain told statewide unit employees that selecting NUHW might put at risk the 3-percent raise scheduled for October. Stain also told the statewide unit employees she met with that the Southern California pro-units had been told they would not get the PSP bonus in March because they were not a part of the Coalition.

[18] SEIU paid Stain's travel expenses and an amount comparable to her hourly pay rate for the time she expended.

During approximately 60 days[19] of the critical period, Stain spoke to approximately 200[20] statewide unit employees at facilities in the following California areas: in Southern California—Baldwin Park, West L.A., Lakeview, Anaheim, Orange, and two additional facilities; in Northern California—Santa Rosa, several in Oakland and Sacramento, San Francisco, the San Joaquin Valley, Fresno, Stockton, Antioch, Modesto, Marin, and others Stain could not recall. Stain usually met statewide unit employees in the cafeterias of the respective facilities, but she also met employees 5 to 10 times in employee break rooms not accessible to the public, to which she was accompanied by an SEIU representative. Stain spoke three times to employees in large "meeting places" in Kaiser facilities in Oakland and Lakeview.

SEIU widely disseminated campaign leaflets bearing Stain's photograph and the following statements, each of which points Stain discussed with the Statewide Unit employees she met:

I WANT <u>OUT</u> OF NUHW

NUHW lied to Healthcare Professionals like me and now we've lost a lot…Earlier this year NUHW told my colleagues and [me] that we would lose nothing if we voted to join them. NUHW won that election, but Southern California healthcare professionals LOST.

- We lost our 2% SEIU-UHW guaranteed raise in April. YOU could lose your 3% SEIU-UHW guaranteed raise this October.
- We lost our SEIU-UHW Continuing Education reimbursements.
  You could lose your SEIU-UHW Healthcare Benefits
- We have been without a contract for almost 8 months with no end in sight.
  You would be without a contract, too.

NUHW is now telling [the Statewide Unit] workers the same lies they told us. Don't fall for it! Vote SEIU-UHW

SEIU also widely disseminated by mail leaflets bearing Stain's photograph along with those of four other Southern California unit employees. Under the heading: IN NUHW, WE LOST OUR RAISES AND GUARANTEED PSP BONUS[;] DON'T MAKE THE SAME MISTAKE WE DID, the mailer stated: In January 2010, a group of Kaiser RNs and Professionals in Southern California left SEIU-UHW and joined NUHW. NUHW promised we would keep our contract standards intact. In reality, we lost our scheduled 2% raise, our guaranteed PSP Bonus, our CEU reimbursements, and our job security protections. The mailer quoted Stain: "We gambled and took a huge hit. We bet our future on NUHW, and we lost big. It was a mistake to put our raises and PSP at risk. I urge you not to take the same chance we did."

[19] The estimation of 60 days is derived from Stain's testimony that she was paid her daily shift rate for each day she campaigned for SEIU for a total of $36,000. However, during an unknown number of those days, Stain campaigned for SEIU in units other than the statewide unit.

[20] Stain testified that 200 was a likely overstated number—at best, it represented the outside number of employees she spoke to.

(3) Petitioner's campaign in the statewide unit

During the critical period, Petitioner widely disseminated throughout the statewide unit written campaign materials countering Intervenor's campaign communications. The following are relevant, representative excerpts from Petitioner's campaign materials:

- SEIU kept saying over and over that we would lose our contract…SEIU wasn't telling the truth. The General Counsel of the National Labor Relations Board made that clear.

- On August 27, 2010 that 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.

- FREEDOM from FEAR…SEIU's fear campaign has been exposed. [It is] clear that the federal government is taking action to protect our contract wages, raises, and benefits if we support NUHW. SEIU has been lying to us. We can vote for NUHW. We have nothing to fear.

- SEIU's agreement and 3% raises will become the starting point for our new contract. Federal law* locks in all of our raises and benefits while we bargain for more…*Read the law for yourself: http://nuhw.org/thelaw

- SEIU lied—the law's on our side!...The federal government has announced it will issue a complaint against Kaiser for breaking the law by trying to deny NUHW member the 2% raise we won in the last Kaiser National Agreement…The complaint covers all other benefits in the National Agreement that NUHW members are entitled to, including but not limited to tuition reimbursement…

- [Excerpt from an email dated June 14 to legal counsel of the Southern California pro-units from a Region 21 field attorney]: The Region has carefully reviewed the facts…in [Case 21–CA–39296] and has decided to authorize complaint as to [Kaiser's] alleged unilateral changes to (1) the tuition reimbursement policy;…(3) the planned wage April 2010 wage increase.

- What happens to our contract when we change unions? Do we keep our raises? All of our raises and benefits are protected by law when we change unions. The federal government confirmed last month that this law protects us at Kaiser, when the labor board announced they would issue a complaint against Kaiser for trying to deny a raise to 2,300 Kaiser workers who voted NUHW in January. When we change unions, we keep our promised raises and benefits, and bargain a new contract starting from what we have now.

- Read…for yourself [the Board-published informational notice dated August 27 reporting issuance of complaint in Case 21–CA–39296 and monetary remedy sought]: On Aug. 26, the federal government officially charged Kaiser management with violating the law for trying to take back raises from [the Southern California pro-units]. The said our raises and benefits are protected by law, and they'll make management pay up. [Quoting a Southern California unit member]: "SEIU lied to us about our raises and benefits because they wanted us to be stuck with them. But we all have the right to join NUHW, and our raises and benefits are guaranteed by law."

- Anatomy of a Lie…SEIU is lying to us. [Referring to the Board's 2001 decision in *More Truck Lines,* 336 NLRB 772 (2001)]: The employer must keep everything the same while we negotiate for improvements.

- [Quoting a member of the Southern California pro-units]: SEIU told us we'd lose our PSP bonuses—but they were wrong. We voted overwhelmingly for NUHW in January and received our PSP bonus in March. We saw through SEIU's lies…our PSP is just another benefit that we'll keep when we vote to join NUHW.

- For months, SEIU has lied to us that we will lose the raises and benefits in our contract if we join NUHW. To finally put this lie to rest, we asked Professor Julius G. Getman, one of the nation's leading labor law experts, to examine the facts and tell us the truth. [Quoting Professor Getman]: "Previously negotiated benefits remain in place when a new union is selected…They become part of the existing wages, hours and conditions of employment. The legal situation is the same whether the workers chose to continue the incumbent union or to replace it."

- [Quoting from *More Truck Lines*]: "It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment, such as their wages…This duty to maintain the status quo imposes an obligation upon an employer not only to maintain what he has give to employees but also to 'implement benefits which have become conditions of employment by virtue of prior commitments [in a contract]'…Thus, if a challenging union is certified, then the contract between an employer and the incumbent union becomes void, but, as usual, the employer must abide by the then existing terms and conditions of employment until such time as it reaches an agreement with the new union or a lawful impasse occurs."

- [Quote from a unit member]: When SEIU says we'll lose wages and benefits for switching unions, SEIU IS LYING. How do I know? I called the National Labor Relations Board myself. They told me that when we vote to switch unions: All of our wages and benefits stay in place and, Cannot be changed until we exhaust the process of bargaining a new contract.

(4) NLRB Regional Office information

During the critical period, NLRB regional staff responded to public inquiries about the campaign by reading the following script:

> In general, an employer' is required to maintain existing contract terms when a new union is selected to represent bargaining unit employees, subject to further bargaining…the Regional Director in Region 21 (Los Angeles)…issued a complaint alleging, among other things, that Kaiser violated the National Labor Relations Act by refusing to grant a wage increase that had been scheduled to go into effect on April 1, 2010…That matter will go to hearing before an administrative law judge if the parties are unable to settle the case.
>
> The outcome of every case filed before the NLRB depends on the particular facts applicable to that case. Because every situation may have unique facts, it cannot be stated with certainty what Kaiser's obligation would be if NUHW became the bargaining representative of the unit employees scheduled to vote in the mail ballot representation election that will begin on September 13, 2010.

b. Discussion of Objections 1, 2, 3, and 5

Petitioner's Objection 1 asserts, essentially, that Kaiser's unlawful conduct toward NUHW-represented employees in the Southern California pro-units constituted objectionable conduct and, in and of itself, interfered with the election. The Board holds that 8(a)(1) violations may, a fortiori, interfere with an election unless the unlawful conduct is so de minimis that it is virtually impossible to conclude the violations could have affected the results of the election.[21] While it is true that two of the Kaiser employers involved herein engaged in unlawful conduct, as detailed in *Southern California Permanente Medical Group,* supra, the conduct did not occur in the instant unit but in the Southern California pro-units, and Kaiser argues that its earlier conduct in discrete bargaining units cannot be considered objectionable in the statewide unit election, as the conduct was not directed at statewide unit employees. Essentially, Kaiser maintains that conduct affecting one bargaining unit cannot be applied to a separate bargaining unit as a fortiori conduct. There being no authority establishing that conduct in a separate unit can, without more, interfere with an election in another unit, I recommend that Objection 1 be overruled.

A determination that Kaiser's ULPs, a fortiori, did not interfere with the election so as to justify setting it aside, does not undercut Objections 2, 3, and 5, however. Intervenor's campaign repeatedly correlated the unlawful conduct to the statewide unit, emphasizing the benefit risk the ULPs portended. The crucial question, then, is whether Intervenor's campaign coercively emphasized Kaiser's ULPs so as to unfairly interfere

[21] See *Perdue Farms, ,* 323 NLRB 345 (1997);; *Airstream, Inc.,* 304 NLRB 151, 152 (1991). In assessing whether unfair labor practices could have affected the results of the election, the Board considers "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." *Enola Super Thrift*, 233 NLRB 409 (1977).

with employees' election choice. Also to be considered is whether pronouncements that statewide unit employees would be ineligible for PSP incentive bonuses and education fund services if they selected NUHW interfered with the election.

Intervenor argues that its campaign statements during the critical period (1) were "neither threatening nor untruthful, but were responsible statements relevant to employees' decision about union representation;" (2) were factual predictions or statements of risk, protected under Section 8(c) of the Act, rather than "unanswerable threats that employees fear because they know the speaker…can carry them out;" (3) were "objective references to employer behavior elsewhere and measured statements about the risk that employees could lose benefits guaranteed in their contract should they not vote to select SEIU–UHW;" (4) were not to blame for employee fear of NUHW-representation consequences, rather employee doubts reflected "employees' own reasoned choices based on all the available information, in a campaign in which each union had the ability to present its version of the facts;" (5) "at most suggest[ed] what could happen if employees select[ed] another union…[and fit] squarely within a long line of Board precedent requiring that the employees' clearly expressed will at the ballot box not be disregarded based on misrepresentations or incomplete statements of the law;" (6) were not objectionable even assuming they could be interpreted as unequivocal statements of loss, "because SEIU-UHW neither had, nor implied that it had, the power to make the statements a reality;" (7) do not warrant setting aside an election, given SEIU–UHW's inability to control Kaiser's actions, citing *More Truck Lines, Inc.,* supra; *Air La Carte, Inc.,* 284 NLRB 471 (1987); (8) were countered by Petitioner's widely disseminated statements, which permitted employees a fair and reasonable opportunity to evaluate conflicting claims; (9) in employees' minds, carried no additional threat beyond the underlying facts they represented.

It is true that Intervenor had no control over or involvement in Kaiser's ULPs and that Intervenor could not control Kaiser's future actions regarding statewide unit benefits. Rather, Intervenor's self-assumed role was to forewarn employees that they jeopardized one of their "most vulnerable spots,"[22] i.e. monetary compensation, if they changed representatives. In Intervenor's communications about potential benefit losses, Kaiser's ULPs figured as silent, menacing reminders that Kaiser not only could, but already had, unilaterally withheld benefits when other employees had chosen to be represented by NUHW. Intervenor's communications invited, if not provoked, the obvious inference that Kaiser's conduct would be repeated as to statewide unit benefits if employees voted for Petitioner. While, as Intervenor points out, its statements were objective references to Kaiser's actions in units separate from the statewide unit, the references were to unlawfully executed and continuing behavior not to speculative, future behavior, and Intervenor's "measured statements about the risk that employees could lose benefits guaranteed in their contract" specifically linked the risk to extant ULPs. The interconnection of unlawful conduct with campaign rhetoric undermines Intervenor's position. It may be true, as Intervenor argues, that in employees' minds its communications carried no additional threat beyond the underlying facts they represented. However, viewed objectively, the underlying facts must have signified the likelihood that Kaiser would, consistent with past action, unlawfully eliminate certain

[22] *Lake Mary Health and Rehabilitation*, 345 NLRB 544, 544–545 (2005).

statewide unit benefits if employees chose NUHW. Under those circumstances, dissemination of the underlying facts had, at the very least, the tendency to interfere with the employees' freedom of choice.[23]

Prospective curtailment of PSP incentive bonuses to employees in the Southern California pro-units was not at issue in *Southern California Permanente Medical Group,* supra, but Judge Schmidt's reasoning can be applied to that benefit as well. Employee entitlement to PSP incentive bonuses was the product of the national agreement, as were the benefits Kaiser had unlawfully, unilaterally changed. Judge Schmidt rejected Kaiser's arguments that (1) participation in the Coalition and the LMP was a pre-condition to the application of the national agreement to the Southern California pro-units and (2) that benefits therein were "creatures of the National Agreement that ceased to apply when the employees selected a [non-Coalition] bargaining agent, such as the NUHW." Rather, as Judge Schmidt explained, "the terms of each [applicable] agreement as a whole—local, cross-regional, and national— [made] up the terms and conditions of employment encompassed by the statutory duty to bargain under Section 8(a)(5)."

Under Judge Schmidt's reasoning, Kaiser was required to maintain and continue conditions of employment that came into being "by virtue of prior commitment or practice,"[24] i.e., the prior commitments memorialized by the terms of the applicable agreements. Although the precise incentive bonus design entitled "Performance Sharing Plan," the payouts of which required an annual agreement between the Coalition and Kaiser, might not have survived a change of bargaining representative, the granting of incentive bonuses constituted a term and condition of employment that Kaiser was required to maintain and continue in substance if not in specific form, unless altered through collective bargaining.

Intervenor's widely disseminated warnings that the PSP incentive bonuses could be lost if employees selected NUHW were, by explicatory omission, erroneous since Kaiser's practice of granting incentive bonuses was subject to change only through collective bargaining. Further, Intervenor was joined in its warnings by Kaiser's President Chu, who informed employees that only members of coalition unions were guaranteed PSP incentive bonuses. Intervenor widely disseminated Chu's statement, giving weight to Intervenor's repeated forewarnings that representational change might endanger PSP incentive bonuses. In these circumstances, widely disseminated warnings that the PSP incentive bonuses would not survive a change of representative must also have tended to interfere with employees' freedom of choice.

Both Kaiser and Intervenor argue that Petitioner engaged in an aggressively thorough campaign that adequately laid relevant facts before "mature [voters] who [were] capable of recognizing campaign propaganda for what it is and discounting it,"[25] thereby vitiating potentially coercive communications. It is true Petitioner cried foul widely and frequently in a vigorous counter-campaign, accusing Intervenor of lying and assuring unit

[23] See *Taylor Wharton*, supra.

[24] *Alpha Cellulose Corp*., 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983).

[25] *Shopping Kart Food Mkt.,* 228 NLRB 1311, 1313 (1977), cited by Kaiser.

employees that Kaiser's benefit changes could not lawfully be repeated as to them. While the NLRB's ULP complaint against Kaiser supported Petitioner's assurances, since Kaiser actively disputed the charges, employees must have realized that only litigation would resolve the issues. Indeed NLRB responses to public inquiries emphasized the uncertainty of what "Kaiser's obligation would be if NUHW became the bargaining representative of the [statewide] unit employees." The ULP hearing did not open until two weeks after the election, and Judge Schmidt's decision did not issue for an additional three months. Petitioner's counter-campaign could not, when weighed against pending litigation of indeterminate outcome and unremedied ULPs, be reasonably expected to persuade voters that Intervenor's warnings were mere campaign propaganda. The unavoidable inference I must draw from these circumstances is that statewide unit employees voted with objectively reasonable, albeit inaccurate and ULP-induced, apprehensions that a vote for Petitioner was a vote for benefit reduction.

Intervenor's widely disseminated, consistent warnings that Kaiser was likely to repeat its 2009 unlawful conduct in the statewide unit if unit employees selected Petitioner as their collective-bargaining representative tended to stoke unwarranted and coercive voter fears. Notwithstanding Intervenor's large margin of victory, Intervenor's conduct, viewed objectively, had a reasonable tendency to interfere with unit employees' free and uncoerced choice in the election. Accordingly, I recommend that Objections Nos. 2, 3, and 5, in the circumstances described in Objection 1, be sustained.

2. Objection 7, 26, and 87 [EDUCATION FUND]

(7) The SEIU, by its agents, including but not limited to the "SEIU UHW–West and Joint Employer Education Fund," threatened employees with reprisal and/or loss of benefits if NUHW won the election, including but not limited to sending a letter to NUHW represented employees announcing that they would lose their Education Fund benefits in the coming months because the employees had joined NUHW, and also widely disseminating this letter among employees within the bargaining unit in this election, and threatening employees with similar reprisal and/or loss of benefits if NUHW won this election.

(26) The employer, by its agents, made payments and/or financial contributions to the Education Fund whose staff and resources were used to campaign against NUHW and/or in support of SEIU.[26]

(87) [Insofar as it encompasses improper Kaiser assistance to Intervenor, through payments to the Ed Fund, in an effort to encourage votes for Intervenor].

[26] The Regional Director overruled objections relating to alleged threats by Education Fund staff and restricted consideration of Objection 26 to the issue of whether pro-SEIU-UHW campaigning by Education Fund staff constituted improper employer-rendered assistance to SEIU-UHW.

a. Underlying Facts

The SEIU-UHW and Joint Employer Education Fund (Ed Fund) Is a Taft-Hartley education trust established in 2004 by SEIU–UHW and Kaiser, offering career development and training programs to employees of member employers, including the statewide unit employees.[27] Approximately 30 employers, including Kaiser Permanente Northern California Region and Kaiser Southern California, being considered two separate employers, participated in the Ed Fund. Participant employers contributed a percentage of the gross payroll of employees eligible for fund services. The Ed Fund received about 46 percent of its 2010 gross revenues from Kaiser Permanente Northern California Region and Kaiser Southern California. The trust is funded by member-employer contributions, pursuant to the terms of their respective collective-bargaining agreements. Kaiser is the major contributor. Trustees appointed equally by SEIU–UHW and participating employers direct Ed Fund programs; the Ed Fund employed 70–80 administrative personnel whose salaries were paid from employer-contributions to the fund.

Prior to and during the critical period, some of the employer-participants of the Ed Fund raised concerns about their employees' under-utilization of the education programs offered. In response, the Ed Fund worked with its labor and management partners to ensure that eligible employees knew about the benefits.[28]

When the Southern California pro-units selected the Petitioner as their collective-bargaining representative, the Ed Fund, over the signature of Beth Marcus, Interim Executive Director, mailed to employees of the Southern California pro-units a letter stating the unit employees were no longer eligible to receive services from the Ed Fund because they were no longer part of the collective-bargaining agreement (the Marcus letter). As to the instant election, Beth Marcus told Elizabeth Toups, associate director of the Ed Fund during the critical period, that the future of the Ed Fund depended on the results of the election.

The Ed Fund regularly engaged in employee-outreach to promote its programs, including facility walk-throughs, as well as participation in education and career fairs and in union-organized events. In the month before the election, approximately 25 to 30 Ed Fund staff participated in a "couple of dozen" employee-outreach activities called tabling at Kaiser facilities throughout the state.[29] Ed Fund tabling was generally conducted at

[27] Ed Fund benefits are unrelated to the tuition reimbursement obligations at issue in *Southern California Permanente Medical Group; and Kaiser Foundation Hospitals,* supra.

[28] Although Elizabeth Toups (Toups), Associate director of the Education Fund during the critical period, testified that the Ed Fund was, itself, particularly keen to make materials available to employees at education/career fairs and labor-organized events, she also testified that the Ed Fund's presence at SEIU campaign events was requested by SEIU–UHW.

[29] Tabling consisted of placing education fund and related literature on a table in an area commonly used by unit employees, such as a cafeteria, and making available education fund staff to answer questions and distribute literature during staff work hours.

the same time and in the same place as SEIU–UHW campaign tabling in order to maximize employee participation. Ed Fund outreach participants utilized tables either connected to or adjacent to those used by SEIU-UHW campaigners.

The Ed Fund supplied its outreach participants with talking points to the effect that the Education Fund had been created and maintained through the SEIU-UHW collective bargaining agreement with Kaiser. The Ed Fund directed participating staff to tell inquiring employees that it was uncertain what would happen to the program if SEIU–UHW lost the election but that its supporting funds were authorized by the current contract between the Employers and SEIU.

Michelle Busey (Busey), director of education and training, tabled for the Ed Fund at Kaiser facilities in Redwood City, Oakland, and San Francisco. When SEIU-UHW representatives brought employees to her table, she told them that if SEIU–UHW ceased to be their collective-bargaining representative, the Ed Fund would be unable to provide them with services. Busey made available to employees a flyer that incorporated the Marcus letter.

b. Discussion

Trustees of the Ed Fund are drawn from multiple employers, as well as SEIU–UHW, and are not representatives of Kaiser or Intervenor. Rather, the trustees are fiduciaries "whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party which appointed [the trustees]." *NLRB v. Amax Coal Co.,* 453 U.S. 322, 334 (1981). As the Regional Director concluded in the report on objections, Ed Fund staff did not act as agents of either Kaiser or Intervenor during the critical period. Further, the simple fact that Kaiser was the primary financial contributor to the Ed Fund does not provide a nexus between Ed Fund staff conduct and Kaiser. There is no evidence Kaiser sponsored or promoted the content of Ed Fund communications during the Ed Fund's employee-outreach activities. Accordingly, I recommend Objection 26 be overruled.

Objection 87, detailed later, encompasses alleged improper Kaiser assistance to Intervenor through payments to the Ed Fund, the staff of which allegedly campaigned for Intervenor. Consistent with my recommendation as to Objection 26, insofar as Objection 87 touches on payments to the Ed Fund, I recommend it also be overruled.

Objection 7 alleges, essentially, that Ed Fund employees served as agents of Intervenor in threatening employees with loss of Ed Fund benefits if NUHW won the election. As noted above, Ed Fund staffers were not intrinsically agents of Intervenor. They could only be so considered if the trustees violated their fiduciary duty in order to further Intervenor's collective-bargaining aims. See *ibid.* The only evidence presented that might arguably show such a fiduciary breach was (1) testimony that Ed Fund tabling occurred at tables adjacent to or shared with Intervenor election campaigners, and (2) Toups' testimony that SEIU–UHW requested Ed Fund presence at SEIU–UHW campaign events during the critical period. That evidence alone does not prove agency. Underutilization of Ed Fund programs concerned trustees, making them eager to conduct outreach at high profile events such as labor-organized activities where significant

employee participation might be expected. No evidence justifies an inference that the Ed Fund's motive in tabling near or with the organizers of high profile events was to further Intervenor's collective-bargaining aims rather than simply to further the Ed Fund's legitimate goal of boosting employee interest. The evidence is insufficient, therefore, to establish that the Ed Fund served as Intervenor's agent during any outreach activity or so intertwined itself with Intervenor's campaign as to merge its interests with Intervenor's. Accordingly, the Ed Fund staff's conduct and communications must be examined as discrete from Intervenor's.

Determining the Ed Fund did not serve as Intervenor's agent at any time during the critical period does not, however, dispose of Objection 7. The objection reasonably encompasses alleged threats of reprisal and/or loss of benefits by the Ed Fund, acting in its own capacity and not as agent of any other entity. In addressing that aspect of Objection 7, Ed Fund communications during the critical period must be examined as nonagent or third-party conduct.

In objections cases, the Board applies a third-party analysis to discrete conduct related to an election. *Independence Residences, Inc.,* 355 NLRB No. 153 (2010); see also *Westwood Horizons Hotel*, 270 NLRB 802 (1984) (setting aside an election based on threats of physical harm made by nonagent, prounion employees); *Saint-Gobain Abrasives, Inc.*, 337 NLRB 82 (2001) (rejecting an employer's objection based on a congressman's statements of support and campaigning for the union); *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765 (1958) (setting aside an election where the local police arrested the union's lead organizer at the preelection conference).[30] In the case of third-party threats, the Board will not overturn election results unless the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* supra at 803. In third-party cases not involving threats, the Board's standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Mgt. Service,* 342 NLRB 556, 558 (2004), citing *Rheem Mfg. Co.,* 309 NLRB 459, 463 (1992) and *Southeastern Mills,* 227 NLRB 57, 58 (1976).

Prospective loss of the Southern California pro-units' Ed Fund eligibility was not at issue in *Southern California Permanente Medical Group,* supra, and there is no legal finding that Ed Fund eligibility survives a collective-bargaining agreement. After the Southern California pro-units' selection of NUHW, the Ed Fund's Marcus letter informed employees they were no longer eligible to receive services from the Ed Fund because they were no longer part of the SEIU–UHW collective-bargaining agreement. Even assuming the Marcus letter conveyed inaccurate information or even, as Petitioner contends, threatened unlawful, unilateral elimination of Ed Fund benefits, it does not appear that either of the Board's third-party standards has been met. Viewed objectively, the Ed Fund's conduct was not "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible,"[31] or "so substantially [harmful to] the

[30] "The heightened standard for objections based on third-party conduct reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control." *Independence Residences, Inc.,* at slip op. 8.

[31] *Westwood Horizons Hotel*, supra at 803.

employees' exercise of free choice as to require that the election be set aside."[32] Unlike wage increases and incentive bonuses, which affect fundamentally potent employee interests, there is no evidence Ed Fund benefits so significantly impacted employees that their endangerment could negatively influence an appreciable number of votes. Indeed, employer-participant concern about underutilization of the Ed Fund programs suggests otherwise. Moreover, although the Ed Fund participated in perhaps 24 employee-outreach activities at Kaiser facilities throughout the state, there is no evidence as to how many employees received the Ed Fund message and no evidence as to whether, or to what extent, those employees thereafter disseminated Ed Fund communications to other employees. Since wide dissemination cannot reasonably be inferred, and since the vote gap was nearly 7000, I cannot find the Ed Fund conduct was either "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible," [33]or "so substantially impaired the employees' exercise of free choice as to require that the election be set aside."[34] Accordingly, I recommend Objection 7 be overruled.

3. Objection Nos. 27, 28, and 87 [Discriminatory Provision of Facilities for Campaigning]

(27) The employer, by its agents, provided unlawful financial assistance to the SEIU campaign by furnishing the SEIU with things of value, including but not limited to Kaiser facilities, to conduct the SEIU's campaign against NUHW.

(28) The SEIU, by its agents, accepted unlawful financial assistance from the employer by accepting things of value, including but not limited to the use of Kaiser facilities, which the SEIU used to conduct its campaign against NUHW.

(87) The employer, by its agents, restrained and coerced employees in the exercise of their Section 7 rights by rendering improper assistance to the SEIU in an effort to encourage votes for the SEIU and against the petitioner.

a. Underlying Facts

Prior to and during the critical period, nearly 43,000 eligible statewide-unit voters were employed in over 230 separate Kaiser locations.[35] Both Petitioner and Intervenor campaigned extensively at most of the 31 major facilities listed below. Eligible voters at the 31 major facilities numbered more than 31,000.

Major Medical Facilities and Respective Eligible Voter Count

[32] *Hollingsworth Mgt. Service*, supra at 558.
[33] *Westwood Horizons Hotel*, supra at 803.
[34] *Hollingsworth Mgt. Service*, supra, at 558.
[35] Many of the locations numbered fewer than 100 voters. Only facilities with more than 150 voters are hereafter named.

Anaheim Medical Center—619
Antioch Medical Center—797
Baldwin Park Medical Center—1,459
Bellflower Medical Center—1,164
Downey Medical Center—195
Fresno Medical Center—153
Fremont Medical Center—504
Hayward Medical Center—852
Irvine Medical Center—482
Los Angeles Medical Center—2,318
Manteca Medical Center—331
Modesto Medical Center—720
Oakland Medical Center—989
Panorama City Medical Center—1,269
Redwood City Medical Center—770
Richmond Medical Center—347
Roseville Medical Center—989
Sacramento Medical Center—1,980
S. Sacramento Medical Center—1,201
San Francisco Medical Center—1,437
S. San Francisco Medical Center—743
San Jose Medical Center—1,622
San Rafael Medical Center—643
Santa Clara Medical Center—1,511
Santa Rosa Medical Center—1,029
South Bay Medical Center—1,232
Vacaville Medical Center—529
Vallejo Medical Center—1,772
Walnut Creek Medical Center—1,259
W. Los Angeles Medical Center—1,020
Woodland Hills Medical Center—1,284

In late January 2009 SEIU International (the International) established a trusteeship over Intervenor, resulting in the resignation of a number of Intervenor's officers, who then formed Petitioner. In the following months, many of Intervenor's stewards at various Kaiser facilities resigned their positions en masse, the last of which occurred in the Santa Rosa facility in July. In the resultant turmoil, employee grievance resolutions were delayed. Kaiser labor relations managers in Northern and Southern California reported to Jose Simoes, Intervenor's Kaiser Division Director as of September 2009, their feelings that Intervenor did not have enough experienced staff and stewards to cope with ongoing employee issues. Thereafter, Simoes directed an effort to recruit and train new stewards and took action to rebuild the grievance-processing structure, efforts that continued through the critical period.

In August 2009, Kaiser and various Coalition members finalized agreement on a workforce reduction plan called the Affordability and Transition Plan (ATP), affecting 22 classifications and 1200 positions throughout the state during an implementation period ending August 10 and involving preferential bidding that permitted impacted workers to bid into other positions. Orderly implementation required SEIU–UHW representatives to talk to workers about the impending reductions, bidding rights, and changes to work performance under the ATP. Additionally Kaiser planned comprehensive restructuring in the Environmental Services (EVS) department, affecting approximately 95 percent of Kaiser facilities statewide commencing February and continuing through the critical period.[36] Implementation involved redeployment of workers and rebalancing of work assignments, in the expedition and explanation of which Intervenor was closely involved through informational employee meetings. Negotiation of the national agreement concluded at the end of May and was followed by employee contract ratification voting, which was completed on June 23. Thereafter, Intervenor representatives held numerous

[36] The restructure changed the way work was done and was intended to produce a balanced schedule of shifts tailored to the work.

contract education meetings in numerous facilities to educate statewide unit employees about the terms of their most recent collective-bargaining agreement.

At many of its major facilities, Kaiser maintained non-public meeting rooms such as conference rooms or auditoriums, the use of which had to be preapproved and scheduled through Kaiser (reserved rooms). Kaiser's policy permitted recognized collective bargaining representatives to use the rooms for purposes directly related to administration of and communication about extant collective-bargaining agreements. As to the statewide unit election, Kaiser's stated policy was not to schedule facility use for election campaigning sponsored or supported by either Petitioner or Intervenor.

Petitioner contends that Kaiser prohibited Petitioner's use of reserved meeting rooms during the critical period while knowingly permitting Intervenor to violate Kaiser's policy against election campaigning in the rooms. Petitioner argues that Kaiser's conduct, overtly discriminatory in favor of Intervenor and widely known to statewide unit employees, profoundly and improperly impacted the election.

Although complete documentation of Kaiser's reserved room reservations was not available to permit comparative analysis of Intervenor's pre and post-critical-period use, the documentary evidence Petitioner presented coupled with witness testimony shows that during the critical period, Intervenor greatly increased its use of Kaiser's reserved rooms. Insofar as documented, the stated reservation-purposes included steward council and membership meetings. During much of the critical period, Intervenor held numerous "contract education" meetings in most of the facilities; Intervenor instructed representatives holding the meetings that campaign materials should not be disseminated. Notwithstanding instructions, Intervenor's representatives campaigned in at least some contract education or membership meetings. The following examples, although not comprehensive, illustrate such campaigning:

> At an Intervenor-arranged conference-room meeting of employees at Mountain View MOB in Northern California, an Intervenor representative gave out flyers highlighting an August 31 *San Francisco Chronicle* article which quoted a Kaiser spokesman: "since NUHW is not part of [the Coalition], its new NUHW members are not eligible to receive [raises negotiated in the national contract]."[37]
>
> At an Antioch MOB Intervenor-arranged conference-room assembly of employees where copies of the national agreement were distributed, Intervenor spokespersons noted that the rights and privileges of the national agreement were only for employees represented by coalition members.
>
> At some contract education meetings, campaign materials were available and Intervenor representatives encouraged voting against NUHW. Cleante Stain attended some contract education meetings, and it is reasonable to infer that, as she did in other contexts, she warned employees that selecting NUHW might jeopardize the October raise and that the Southern California pro-units had been

[37] The article noted NUHW disagreed with the statement.

told they would not get the PSP bonus in March because they were not a part of the Coalition.

At some meetings close to the election, Intervenor representatives displayed sample ballots and told employees they should mark the SEIU–UHW box.[38]

At various times, NUHW representatives or supporters complained to Kaiser about Intervenor's campaigning in conference rooms and auditoriums and about Kaiser's discriminatory reservation room policy. There is little evidence Kaiser took responsive action or limited Petitioner's reserved room use. There is no evidence Kaiser encouraged Intervenor use of reserved rooms, participated in any reserved room campaigning, or promoted employee attendance at such events.[39]

b. Discussion

Petitioner essentially asks me to infer from the increased reserved-room scheduling coupled with evidence of reserved-room campaigning that Kaiser provided Intervenor with widespread improper election assistance, which must have been known to unit employees generally and which conferred an inherent and improper election advantage on Intervenor. Kaiser argues that aside from campaign materials dissemination, Petitioner's evidence regarding Intervenor campaigning, was "scattered, anecdotal and isolated." Kaiser points out that of the major facilities, Petitioner introduced testimony as to Intervenor's conduct at fewer than 20 while testimony about reserved-room campaigning concerned even fewer. Kaiser submits that unit-wide reserved-room campaigning cannot be presumed from such few discrete events. Kaiser's argument is persuasive; because campaigning occurred in some Kaiser-approved meeting rooms, it does not follow that Intervenor's representatives campaigned in all or even most reserved-room meetings. Nevertheless, the evidence of campaigning in specific reserved-room meetings raises the issue of whether Intervenor's reserved-room campaigning communicated to employees the impression that Kaiser had a clear preference for SEIU-UHW over NUHW, which tended to interfere with employees' free choice.

When one union is the incumbent, an employer must continue to honor established or contractual access privileges.[40] It was Kaiser's established practice to make available reserved rooms to collective-bargaining representatives for contract-related purposes, a practice of which employees must have been generally aware. There is no evidence Kaiser historically investigated the purpose a recognized bargaining representative gave for its use of a reserved room or monitored the activities conducted by the representative in the reserved room. Further, during the critical period, Intervenor

[38] An example of one such meeting is the September 14 Intervenor-sponsored meeting in a conference room at Los Angeles Medical Center attended by 15–20 employees, where employees were shown how to mark the ballot in favor of SEIU–UHW.

[39] The non-public room use was not entirely one-sided. Although apparently facilitated by employee sympathizers and unsanctioned by Kaiser, NUHW campaigned in the Kaiser Woodland Hills auditorium during the critical period.

[40] *Laub Baking Co.,* 131 NLRB 869, 871 (1961).

faced significant employee issues, known to Kaiser, each of which justified additional and enhanced employee outreach. I cannot therefore find that Kaiser, merely by approving Intervenor's reserved-room requests on an expanded scale, granted improper assistance or that employees could have inferred as much.

Petitioner argues that, irrespective of Kaiser's complicity, Intervenor's campaigning in reserved rooms demonstrated to employees who observed the campaigning an employer preference for Intervenor so blatant as to interfere with the election. Petitioner properly focuses on the objectively reasonable inferences employees were likely to draw from seeing Intervenor campaigning in reserved rooms. Intervenor contends the objective significance to the election of any such campaigning was negligible. The question is whether the campaigning that occurred in reserved rooms could reasonably be expected to induce employees who knew of it to support one union over another because they inferred from it that potential employer retaliation or preferential treatment would follow their selection of the obviously disfavored union. The Board's decision in *Harborside Healthcare, Inc.,* 343 NLRB 906, 907 (2004) provides an appropriate analytical framework under which the question may be considered. [41]

In determining whether prounion employer conduct breached the requisite laboratory conditions of a fair election, the Board in *Harborside* looked, in pertinent part, to two factors. The Board first looked at whether the prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This initial inquiry included the nature, extent, and context of the conduct in question. The Board then looked to whether the conduct materially affected the outcome of the election, based on such factors as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. *Ibid* at 909.

In the absence of any overt employer involvement in Intervenor's reserved-room campaigning, it is questionable whether unit employees could reasonably infer from the campaigning alone that Kaiser favored Intervenor over Petitioner. Assuming employees could draw such an inference, I find the nature, extent, and context of the reserved-room campaigning did not reasonably tend to interfere with unit employees' exercise of free choice in the election. It is clear that in addition to its normal representational responsibilities, Intervenor had significant bargaining issues to address with unit employees during the critical period and a valid basis for obtaining reserved rooms in which to address them, which employees would likely have understood. No evidence exists that the reserved-room meetings focused solely on campaigning or that they did not mainly comprehend valid representational concerns. I find no evidence to support an objective finding that reasonable employees would have perceived the meetings as "thinly disguised campaign events," as Petitioner argues, and consequently presumed that Kaiser so favored Intervenor as to portend postelection employer retaliation or

[41] While *Harborside* did not involve competing unions and dealt with individual supervisory conduct as opposed to general employer policy implementation, the Board's analysis can appropriately be applied here.

preferential treatment. Accordingly, I find the Board's first *Harborside* factor, i.e., whether the prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, has not been met.[42]

Even supposing the first *Harborside* factor has been met, the second factor has not, as the evidence does not show that Intervenor's reserved-room campaigning materially affected the outcome of the election. The following facts demonstrate absence of materiality: the number of Kaiser facilities where reserved-room campaigning occurred was relatively few; there is little evidence that information about reserved-room campaigning was widely disseminated to employees even within the facility where it took place, and there is no evidence that information about reserved-room campaigning was disseminated beyond the specific facility. The lack of evidence that significant numbers of unit employees knew Intervenor campaigned in preferentially reserved rooms coupled with the wide margin of Intervenor's election victory all militate against a finding that the outcome of the election was materially affected either by Kaiser's having permitted Intervenor to use facilities denied to Petitioner or by Intervenor's abuse of Kaiser's permission.[43] Accordingly, I recommend that Objections 27, 28, and 87 be overruled.

4. Objections 33–39, 46, and 50–54
[Preferential Access and Improper Badge Issuance][44]

> (33) The employer, by its agents, unlawfully granted SEIU nonemployee representatives superior and enhanced access to its facilities, including but not limited to Kaiser's issuing special status badges to hundreds, if not more, of SEIU staffers whose sole and/or primary act at the facilities was to campaign against the NUHW and in support of the SEIU.
>
> (34) The employer, by its agents, unlawfully communicated to employees that it favored SEIU and disfavored NUHW, by conduct including but not limited to Kaiser's issuing special status badges to hundreds, if not more, of SEIU staffers whose sole and/or primary act at the facilities was to campaign against the NUHW and in support of the SEIU.

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[42] Cases cited by Petitioner are inapposite, as they involve active and explicit employer favoritism for one of two competing unions. See, e.g., *Raley's, Inc.,* 256 NLRB 946, 956–957 (1981) affd. on reconsideration, 272 NLRB 1136 (1984) (involves employer's active implementation of disparate campaigning policies as well as unlawful 8(a)(1) conduct); *Monfort of Colorado, Inc.,* 256 NLRB 612 (1981) (in addition to extraordinary and unfettered facility access to one union, employer explicitly coerced employees to select favored union, thereby violating Section 8(a)(1) and (2)); *Duane Reade, Inc.,* 338 NLRB 943, 944 (2003) (despite no soliciting policy, employer directed employees to meet with favored union representatives where supervisors were present).

[43] Petitioner's argument that Kaiser's knowledge of and failure to stop the campaigning must reasonably have interfered with the election suffers from a similar finding that such conduct, even if demonstrated, was relatively isolated and unpublicized.

[44] This set of objections focuses on Intervenor's nonpublic-area campaigning other than in reserved rooms, which is considered above.

(35) The employer, by its agents, unlawfully discriminated against the NUHW and/or communicated to employees the employer's dislike of the NUHW, by refusing to issue to the NUHW even a single special status badge that conferred upon the authorized badge-holder superior enhanced access to the employer's facilities, even in facilities where NUHW is the duly authorized collective-bargaining agent for employees.[45]

(36) The employer, by its agents, unlawfully granted SEIU nonemployee representatives superior and enhanced access to its facilities, including but not limited to Kaiser's knowingly allowing SEIU campaign staffers to engage in anti-NUHW and pro-SEIU campaign solicitation and distribution on nursing floors, in break rooms, in hallways, and in areas other than public areas.

(37) The employer, by its agents, unlawfully granted SEIU supporters superior and enhanced access to its facilities, including but not limited to Kaiser's knowingly allowing SEIU supporters, including but not limited to SEIU campaign staffers, to engage in anti-NUHW and pro-SEIU campaign solicitation and distribution in patient care and other work areas.

(38) The employer, by its agents, unlawfully granted SEIU supporters superior and enhanced access to its facilities, including but not limited to Kaiser's knowingly allowing SEIU supporters, including but not limited to SEIU campaign staffers, to engage in anti-NUHW and pro-SEIU campaign solicitation and distribution to employees who were working and/or were on time, even when many of these employees complained to management that SEIU representatives had repeatedly disrupted workflow and/or had interfered with the provision of patient care.

(39) The employer, by its agents, unlawfully restricted the access of NUHW supporters, including but not limited to employer agents escorting, removing and/or threatening to remove NUHW supporters even from Kaiser cafeterias and Kaiser public areas.

(46) The employer, by its agents, unlawfully favored SEIU by affording access to Kaiser facilities, including private patient care areas, to SEIU representatives conducting no legitimate collective-bargaining work, and for purely campaign purposes, while NUHW representatives were denied the same.

(50) The employer, by its agents, imposed discriminatory access, solicitation, and distribution policies designed to coerce employees in the exercise of their protected Section 7 rights, encourage voting for SEID, and discourage voting for NUHW, and which interfered with the conduct of a fair election.

[45] The Regional Director recommended that Objection 35 be overruled as to alleged denial of access to Petitioner as the collective-bargaining representative of employees in any of the Southern California pro-units.

(51) The employer, by its agents, implemented its access, distribution, and solicitation policies in a manner which coerced employees in the exercise of their protected Section 7 rights encouraged voting for SEIU discouraged voting for NUHW, and which interfered with the conduct of a fair election.

(52) The employer, by its agents, provided non-employee supporters of SEIU greater access to conduct electioneering activities in the employer's facilities than the access granted to NUHW non-employee supporters to conduct electioneering activities in the employer's facilities.

(53) The employer, by its agents, provided employee supporters of SEIU greater access to conduct electioneering activities in the employer's facilities than the access granted to NUHW employee supporters to conduct electioneering activities in the employer's facilities.

(54) The employer, by its agents, imposed a discriminatory, no-solicitation and/or discriminatory no-distribution rule on employees in a manner designed to interfere with the conduct of a fair election.

a. Underlying Facts

Kaiser's official policy was to prohibit election campaigning by nonemployees in nonpublic areas of its facilities. However, the collective-bargaining agreement between Kaiser and Intervenor provided that Intervenor's nonemployee representatives could access those Kaiser facilities where represented employees were employed in order to provide contract-related services to unit employees. Specifically the Agreements permitted facility access to bargaining representatives "for the purpose of observing working conditions, monitoring [contract] compliance or following-up on inquiries and concerns of bargaining unit employees…[which representatives] have access rights beyond those of the public and other non-Employees." Historically, when SEIU–UHW assigned a nonemployee representative to a facility to provide unit employees with contract-related services, it informed Kaiser of the representative's name, and Kaiser issued the representative an identification badge permitting access to nonpublic areas of the facility.

During the critical period, consistent with its preelection practice, Kaiser permitted SEIU–UHW nonemployee representatives access to nonpublic areas of its facilities for contractually-mandated purposes, a privilege it also afforded Petitioner as to those facilities where Petitioner represented bargaining units. There is no evidence that Kaiser's pre-election practice varied from its policy of barring organizational activities from nonpublic areas. In most facilities, regardless of representative status, Kaiser permitted nonemployee campaign access to public areas such as cafeterias and other common-use locations. Kaiser permitted employee campaigning in nonpublic areas.

During the latter part of the critical period, Intervenor greatly increased its nonemployee representational complement for the statewide unit. Kaiser issued badges to many of the added representatives, which permitted them to access nonpublic areas of

the Kaiser facilities where statewide unit employees were employed. Kaiser refused to issue similar badges to Petitioner representatives.[46]

It is clear that some SEIU–UHW representatives overstepped Kaiser's contractual-access parameters in some facilities and openly campaigned in nonpublic areas without notable employer suppression. Neither contractual provisions nor past practice sanctioned nonpublic area campaign efforts. The question is whether the conduct reasonably communicated to unit employees an employer preference for SEIU-UHW that materially interfered with employees' free choice in the election. Petitioner presented a number of employee witnesses who testified to nonemployee Intervenor campaigning in nonpublic areas of various Kaiser facilities, including those listed below.[47] The campaigning that Petitioner's witnesses observed included, variously, distribution of campaign leaflets[48] and oral vote solicitation.[49]

Facility and Department	Facility Voter Count[50]
Anaheim Kraemer MOB	74
Anaheim Medical Center	619
Antioch Medical Center	797
Baldwin Park Call Center	237
Bellflower MOB	24
Lakeview Medical Offices	108
Mira Loma Call Center[52	199

[46] Kaiser management noticed that SEIU–UHW's designated nonemployee representative list increased significantly and concluded that Kaiser management needed to be observant as to what the additional representatives did when they were at the facilities. However, since Intervenor had represented to Kaiser that the representatives would provide contract-specified representational services, management decided Kaiser had no basis for objecting to the increased numbers.

[47] I have omitted Los Angeles Medical Center from the list. Although witness Douglas Aberg saw nonemployee SEIU–UHW representatives in nonpublic areas of the medical center, he only observed campaigning in the cafeteria, a public area, and in a reserved conference room, as detailed above.

[48] It is not always clear from some witnesses' testimony whether distributed leaflets contained campaign material as opposed merely to contract-related information. For purposes of this discussion, I have assumed, unless otherwise indicated, that distributed leaflets included at least some campaign propaganda.

[49] Some SEIU-UHW representatives electronically calculated employees' annual wage and bonus increments under the newly bargained agreements. Petitioner characterizes this as campaigning. Although the calculations were undoubtedly made in the hope that employees would thereafter be reluctant to abandon the new contract, making calculations was not, in and of itself, clearly devoid of contract education value, and I cannot call it campaigning.

[50] The voter count listed is that of the overall facility; it should be noted that testimony generally went to specific departments within the respective facility, the voter count of which was less.

Mountain View MOB	3
Redwood City medical Center	770
Roseville Medical Center	989
San Francisco Medical Center	1,437
San Jose Call Center[53]	116
Santa Clara MOB[54]	82
Santa Fe Springs Storage Facility[55]	10-60
South San Francisco Medical Center	743
Stockton Call Center	166
Vallejo Call Center	456
Walnut Creek Medical Center	1,259

The EVS departments of some facilities held daily preshift worker meetings, called huddles. Because of Kaiser's proposed EVS restructuring, Kaiser management permitted SEIU–UHW representatives to meet frequently with employees in the huddles to discuss restructuring. In addition to presenting representational matters, some representatives campaigned. Testimony of EVS huddle campaigning encompassed the medical centers of Baldwin Park, San Francisco, South San Francisco, Walnut Creek, and Woodland Hills, and the Santa Clara MOB.

Petitioner presented evidence that various employees complained to Kaiser management about Intervenor's campaigning in nonpublic areas. Although the evidence shows, at least from the employees' points of view, that Kaiser was not generally responsive to their complaints, I cannot find that Kaiser never investigated complaints or took action. At Anaheim Kraemer, a supervisor responded to an employee complaint of improper campaigning by stating, "They're not supposed to be doing that." Thereafter campaigning in that employee's area ceased, inviting an inference that Kaiser took some action. At Antioch Medical Center, a supervisor told a complaining employee that Kaiser would address the complaint. The fact that the witness was not thereafter notified of the

[52] When management told Sean Schow that SEIU–UHW could pass out literature in nonpublic areas because it was the current representative, it is not clear management had reason to believe the complained-of SEIU–UHW literature was other than contract-related information. As to a mid-September pizza event, I credit Elaine Barajas' testimony that the only leaflet distributed there discussed "the Power of Partnership," a representational matter.

[53] As to the San Jose Call Center, one instance of alleged campaigning involved an SEIU–UHW representative's discussion of representation quality, which may arguably fit within representational activity, while the other involved a confrontation among NUHW and SEIU-UHW employees in which a nonemployee SEIU–UHW representative vigorously contrasted the two unions' merits, which constitutes campaigning.

[54] I do not accept the testimony of Margaret Northall as evidence of SEIU–UHW nonemployee campaigning in nonpublic areas, as she did not distinguish nonemployee from employee campaigning.

[55] SEIU–UHW representative Ray Hernandez performed contract wage-increase calculations with employees, accompanying them with advice that employees stick with SEIU-UHW. In doing so, he went beyond representation activities, as did distribution of campaign paraphernalia such as tee shirts and candy bars.

results of any investigation does not mean that Kaiser did not undertake one. At the Walnut Creek Medical Center, management did not respond to Margaret Northall's complaints, but it is not clear she gave management sufficient information to justify intervention, as she could not recall if her complaints distinguishing between nonemployee and employee conduct.[56] There is no evidence Kaiser overtly indicated to unit employees its approval of Intervenor's nonpublic-area campaigning.

b. Discussion

In reviewing Objections 33–39, 46, and 50–52, I consider only the question of whether Intervenor's employer-sanctioned possession of official badges and its campaigning in nonpublic areas, irrespective of campaign content, tended to interfere with the election.[57] Petitioner contends that during the critical period Kaiser issued official badges to large numbers of SEIU–UHW representatives, thereby provided SEIU–UHW representatives with unprecedented access to nonpublic areas of its facilities and enabling SEIU–UHW to campaign effectively against Petitioner, while denying equivalent access and effectiveness to Petitioner's campaign.

Petitioner points out that during the critical period the number of SEIU–UHW representatives, including nonemployee organizers and representatives, contract specialists,[58] and lost-timers[59] increased dramatically at many bargaining-unit facilities throughout the state, each of whom wore official hospital credentials (badges) allowing them to enter areas normally restricted to nonemployees. Petitioner further asserts that Kaiser's permissive or indifferent response to employee complaints of nonemployee SEIU–UHW campaigning in nonpublic areas created the coercive impression that Kaiser favored SEIU–UHW.

As noted above, an employer must continue to honor established or contractual access privileges to an incumbent union. As with SEIU–UHW's reserved-room use, there is no evidence Kaiser historically questioned union-representative badge issuance or monitored union representatives' interaction with represented employees in nonpublic areas of its facilities. In light of Intervenor's particular representational issues, discussed above, which arguably justified expanded representational activity, I cannot find that Kaiser, by issuing badges to a larger than usual cadre of designated representatives or by permitting the larger cadre access to employees in nonpublic areas, improperly

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[56] I find it unnecessary to consider in extensive detail evidence relating to whether Kaiser ignored employee complaints of improper campaigning. There is little evidence that information about Kaiser's responses, or nonresponses, to complaints were disseminated to unit employees to any material extent.

[57] The issue of campaign content was discussed at Objections 1, 2, 3, and 5.

[58] The position of contract specialist was a union-appointed, employer-paid position, the responsibilities of which included facilitation of LMP activities, grievance processing, and steward training.

[59] Lost-timers were Kaiser employees who were permitted to take time off work to perform services for the bargaining representative. During their "lost time," which could be brief or extended, the bargaining representative paid their salary while Kaiser paid for other contractual benefits.

discriminated against NUHW. A finding that Kaiser did not engage in improper discriminatory conduct does not, however, dispose of these objections.

Objections 33–39, 46, and 50–54 comprehend a broader question, i.e., whether Kaiser's apparent acceptance of inflated numbers of SEIU–UHW representatives into its facilities' nonpublic areas communicated to employees an employer dislike of NUHW, so as to coerce employees in the exercise of Section 7 rights, encourage voting for SEIU–UHW, discourage voting for NUHW, and thereby interfere with the conduct of a fair election. Similar to the issue of Intervenor's campaigning in reserved rooms, discussed above, the question is whether pervasive representational presence and concomitant campaigning in nonpublic areas could reasonably be expected to induce employees who knew of it to support one union over another because they inferred from it that potential employer retaliation or preferential treatment would follow their selection of the disfavored union.

Petitioner asks me to infer from Intervenor's staffing increases at many Kaiser facilities, coupled with SEIU–UHW nonemployee, nonpublic-area campaigning in some facilities, that Intervenor flooded all major Kaiser facilities with short-term, nonemployee organizers who thereafter campaigned in nonpublic areas. I cannot draw such an inference from the evidence. The fact that SEIU–UHW nonemployee, nonpublic-area campaigning occurred in some facilities does not justify the inductive leap that it occurred in all or even most facilities. Limiting the scope of targeted campaigning to only those facilities about which testimony was taken does not, however, dispose of the issues posed by these objections. It remains to consider whether the nonemployee, nonpublic-area campaigning, as specifically evidenced, interfered with the election

Petitioner argues that by campaigning in nonpublic areas under Kaiser aegis, Intervenor created an impression that Kaiser favored Intervenor, which impression was so invidious as to interfere with free choice in the election. Utilizing the analytical framework of *Harborside Healthcare, Inc*, supra, I cannot find that unit employees would reasonably infer from Intervenor's nonpublic-area campaigning alone that Kaiser favored Intervenor over Petitioner. Intervenor had, for many years represented unit employees. During that time, in accordance with past practice, SEIU–UHW representatives commonly accessed nonpublic areas to carry out contractual duties while wearing Kaiser-issued badges. Although during the critical period, there was a significant increase in SEIU–UHW representative presence in nonpublic areas, no evidence exists that Intervenor's representatives focused solely on campaigning or that they did not also address valid concerns generated by the workplace issues facing the unit. Moreover, not only did Intervenor have significant pending representational issues that justified increased manpower, it is reasonable that in defending itself against incursion by another union, Intervenor would wish to demonstrate to unit employees its interest and diligence in addressing contract issues. While enhanced representational service might well persuade unit employees to vote for SEIU–UHW, no authority exists for finding improved representation objectionable.

I also cannot find persuasive Petitioner's argument that Kaiser's failure to police the activities of the SEIU–UHW representatives to whom it issued badges, without more, coercively communicated to employees that it favored Petitioner.[60] While Kaiser was obliged to maintain neutrality between the competing unions, it could not abrogate the access provisions of the Agreements.[61] Kaiser reasonably met its neutrality obligations by permitting employee supporters of NUHW the same degree of campaign access to nonpublic areas as it permitted employee supporters of SEIU–UHW and by permitting nonemployee NUHW supporters the same degree of campaign access to public areas as it permitted nonemployee SEIU–UHW supporters.

Finally, no basis exists for finding that unit employees, confronted with a major influx of contract representatives who delivered campaign propaganda along with contract services, would reasonably conclude that Kaiser was abetting Intervenor's campaign, and from that perceive a need to align themselves with the favored union. The evidence shows that Petitioner conducted a vigorous, high profile nonemployee campaign in public areas of Kaiser's facilities along with an employee campaign in nonpublic areas, without employer opposition or interference, which must have been apparent to unit employees. It is likely that employees were capable of recognizing that in overstepping Kaiser's access policies, Intervenor was simply taking advantage of its bargaining-representative status. Notwithstanding Intervenor's access advantages, unit employees must, objectively, have been able to assess the union propaganda proffered them by both unions without significant concern for employer preferences or attitudes. Inasmuch as employees could not rationally infer from Intervenor's nonpublic area campaigning that Kaiser favored Intervenor over Petitioner, I cannot find the nonpublic-area campaigning materially affected the outcome of the election.[62] Accordingly, I recommend that Objections 33–39, 46, and 50–52 be overruled.

RECOMMENDATION

Based on the above, I recommend that Objections 2, 3, and 5 be sustained and that Objections Nos. 1, 7, 26–28, 33–39, 46, 50–54, 58–60, 69–71, 74, 80, and 87 be overruled. Accordingly, I recommend that the Board election in Case 32–RC–5775 be

[60] The evidence does not clearly establish Kaiser's tacit acceptance of nonpublic area campaigning. For example, Petitioner's flyer inviting employees to a September 2 meeting in the nonpublic break room of the second floor of the Mountain View facility, noted its purpose was to review gains achieved by the "strong new National Agreement," an aim that, while undoubtedly encouraging votes for Intervenor, was also connected with contract education. When an NUHW supporter complained to a Kaiser manager that oral invitations to the meeting were accompanied by overt campaign flyers, although the manager did not respond directly to the complaint, the meeting was changed to a public room on the third floor.

[61] See *West Lawrence Care Center Inc.*, 308 NLRB 1011 (1992).

[62] It is unnecessary to address the materiality of this evidence to the election outcome. However, I note the evidence does not show that awareness of public-area campaigning extended beyond a relatively small group of employees.

set aside and a new election be held.[63] Inasmuch as I have recommended that Objections 2, 3, and 5 be sustained, I recommend that the mail ballot election held between September 13 and October 4, 2010 in Case 32–RC5775 be set aside and that the representation proceeding be remanded to the Regional Director of Region 32 for the purpose of conducting a second election.

Further, and in accordance with *Lufkin Rule Co.*, and *Fieldcrest Cannon, Inc.*, 327 NLRB 109 Fn. 3 (1998), I recommend that the following notice be issued in the Notice of Second Election in Case. 32–RC–5775:

NOTICE TO ALL VOTERS

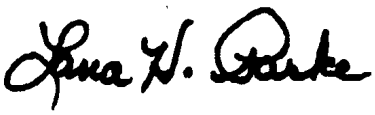
The mail ballot election held between September 13 and October 4 was set aside because the National Labor Relations Board found that certain conduct of SEIU–UHW–West in the circumstances of unfair labor practices committed by Kaiser Foundation Hospitals and Southern California Permanente Medical Group among three professional collective-bargaining units of Kaiser employees in southern California interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

> All full-time, regular part-time, limited part-time and on-call service, maintenance, technical, clerical and professional employees employed by the Employers in the job classifications set forth in the 2005 collective-bargaining agreement between the Employers and SEIU–UHW–West and described in Attachment 1 thereof (identified in the Table of Contents as Attachment A) as SEIU–UHW–West (North) and SEIU–UHW–West (South), and located in the Employers' Northern and Southern California regions.

[63] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.[64]

Dated at Washington, DC: July 14, 2011



Lana H. Parke
Administrative Law Judge

[64] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by July 28, 2011.