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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

KAISER FOUNDATION HEALTH PLAN, INC.; KAISER FOUNDATION HOSPITALS; SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP; THE PERMANENTE MEDICAL GROUP, INC., Employer, and NATIONAL UNION OF HEALTHCARE WORKERS, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS – WEST Intervenor/Incumbent.	Case No. 32-RC-5774 **SEIU-UHW – WEST'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS**

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Federal Cases

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I. INTRODUCTION

Intervenor, SEIU-UHW, submits this brief in support of its exceptions, requesting that the Board reject Administrative Law Judge ("ALJ") Lana Parke's recommendations, dismiss Petitioner's objections, and certify the election results. None of the Petitioner's allegations have merit, and, as a matter of law, do not constitute threats or grounds to set aside the results of the instant election. A finding that the allegations raised in Petitioner's objections should set aside the results in this matter would overturn and disturb decades of legal precedent and would have far reaching policy implications with respect to election contests between two or more labor organizations.

II. STATEMENT OF FACTS AND PROCEURAL HISTORY

A. PRE-CRITICAL PERIOD.

1. The Certification of NUHW in the Southern California Professional Units and Bargaining With Kaiser For a First Contract.

On February 3, 2010, the Board certified NUHW as the exclusive bargaining representative for three bargaining units of professional Kaiser employees located in Southern California. The three units, which were previously represented by SEIU-UHW, are the Health-Care Professionals ("HCP") unit, the Psych-Social unit, and the American Federation of Nurses ("AFN") unit (hereinafter referred to collectively as the "Southern California Pro Units"). Shortly thereafter, NUHW and Kaiser began negotiations for their first collective bargaining agreement.

Beginning in late February 2010, NUHW and Kaiser held a series of bargaining sessions. During these sessions, NUHW representatives demanded that Kaiser continue the terms of the SEIU-UHW and Kaiser collective bargaining agreement and apply those terms to the NUHW certified Southern California Pro Units. At a February 26, 2010 meeting, Kaiser representatives stated that (1) Kaiser would not extend the agreement; (2) that employees in the Southern California Pro Units "would not receive the two percent pay increase that had been negotiated in the 2008 reopener of the National Agreements because that was a 'future event'," and (3) that employees in the Southern California Pro Units "would not be receiving further tuition

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reimbursements because the NUHW was not a part of the coalition and that benefit only applied to members of the Labor Management Partnership." *Southern California Permanente Medical Group*, 356 NLRB No. 106, at 9 (2011).

SEIU-UHW did not participate or have an involvement in the negotiating sessions between NUHW and Kaiser; and, therefore, did not have any first hand information or knowledge regarding these negotiations.

2. <u>NUHW Files An Unfair Labor Practice Against Kaiser in March 2010.</u>

On March 30, 2010, approximately three months prior to the critical period in the instant matter, NUHW filed an unfair labor practice charge against Kaiser, alleging that Kaiser violated Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally withholding certain benefits from employees in the Southern California Pro Units.[1] ALJ Rept. & Recs. on Objs. at p. 5 (July 19, 2011). At the time that the charges were filed, there is no evidence in the record that would indicate that SEIU-UHW, with any degree of certainty, was able to evaluate whether or not such charges had any merit.

B. THE CRITICAL PERIOD.

1. <u>NUHW Files Its Petition and Region 21 Issues a Complaint Against Kaiser.</u>

On June 29, 2010, NUHW filed a representation petition, seeking to represent employees in the MSW unit. In addition, NUHW filed representation petitions seeking to represent employees in a statewide unit as well as two other Northern California professional units, known as the Optical unit and the Integrated Behavioral Health Systems ("IBHS") unit.

Two months later, on August 27, 2010, the Regional Director for Region 21 issued a complaint against Kaiser, alleging the following:

> [Kaiser] failed to maintain the established terms and conditions of employment for employees in the Southern California [Pro] Units in or about March [2010] by refusing to provide them with tuition-reimbursement benefits and time for monthly shop-steward training and development, and in April [2010], by refusing to grant a scheduled wage increase. The

[1] As ALJ Parke noted, the "[p]rospective curtailment of PSP incentive bonuses to employees in the SoCal-pro units was not at issue in *Southern California Permanente Medical Group*, supra . . . ." ALJ Rept. & Recs. On Objs. at p. 12 (July 19, 2011).

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> Complaint further alleges that [Kaiser was] obligated to pay these wage increases and benefits to the employees in the Southern California [Pro] Units under the terms of the 2005-2010 National Agreement with SEIU, and that the [Kaiser] took this action because NUHW was certified as the representative of these employees, thereby supplanting SEIU as the certified representative.

Reg'l Dirs. Rep. & Recs. on Objs. ("RD's Rep.") at pp. 8-9.

After receiving the complaint, NUHW widely disseminated this information to the MSW unit. Kaiser vigorously defended its actions publicly. And the news media widely covered the issue as well. The NLRB's four California Regional offices responded to public inquiries regarding this specific issue by reading from the same prepared script:

> In general, an employer is required to maintain existing contact terms when a new union is selected to represent bargaining unit employees, subject to further bargaining. Applying this principle to a recent case involving two units of employees employed by Kaiser Permanente in Southern California, the Regional Director in Region 21, on behalf of the Acting General Counsel of the NLRB, 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. In the Southern California case, the unit employees had voted to be represented by NUHW after having been previously represented by SEIU-UHW. 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 obligations would be if NUHW became the bargaining representative of the unit of employees scheduled to vote in the mail ballot representation election that will begin on September 13, 2010.

Intervenor's Exh. 2; ALJ Rept. & Recs. on Objs. at p. 10. There is no evidence in the record that SEIU-UHW, let alone the NLRB's four Regional offices, could state with any certainty what Kaiser's obligations would be to the MSW unit if employees in that unit selected NUHW as their representative.

2. <u>The MSW Campaign</u>

a) The Parties Engage in a Spirited Debate About Which Union Is More Capable of Delivering for Kaiser Employees.

The record documents the spirited debate between the two labor organizations. From SEIU-UHW's perspective, the question for voters was whether or not they wanted to risk the

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guarantees in their new Collective Bargaining Agreement by voting for a new, less powerful labor organization – a completely legitimate question, given that Petitioner, at the time, could not point to a single collective bargaining agreement that it negotiated for any of its members, including the Kaiser employees that it represented. The primary way for SEIU-UHW to distinguish itself from NUHW was to compare its record with NUHW's record – that is, compare what the two Unions had succeeded in obtaining for their respective members.

The debate over which Union would best serve the interest of employees in the MSW unit occurred throughout the facilities. For example, Holly Paquette, a Medical Social Worker III at Santa Clara Hospital, testified that she met with SEIU-UHW representatives and supporters on a monthly basis during the critical period to discuss various issues concerning medical social workers, including the election. These meetings took place in the quad, outside of the facility, during lunchtime and were open to anyone and everyone. Tr. 129:13-21. A SEIU-UHW Union Steward would set up these voluntary meetings so that an SEIU-UHW representative could "[t]alk about the vote; talk about what was going on with the union; talk about what we needed as social workers. Tr. 127:4-6. According to Paquette, during the meetings, "[m]any times there were question and answer periods where they were presenting their view point [sic]." Tr. 128:19-20.

At one of these meetings, which Paquette believes occurred in mid-July, she met Cleante Stain, a professional employee in the Southern California Kaiser unit, which is represented by NUHW. There were about six medical social workers at this meeting. Tr. 127:7-8. As Ms. Paquette recalls, Stain stated that "if we voted for NUHW that they would not be part of the Coalition." Tr. 120:12-13. According to Paquette, Stain "also talked about Southern California not getting their two percent. And that we were in jeopardy if we decided to vote other than SEIU." Tr. 120:12-15.

The meeting with Stain was an opportunity for Northern California Medical Social Workers, like Paquette, to ask Stain any question they wanted to about her experience with NUHW – an opportunity that Paquette took full advantage of. Indeed, one of the questions that Paquette asked Stain was whether "all of the social workers in the unit in southern California agreed with

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her viewpoint." Tr. 134:17-18. Stain candidly responded "no." Tr. 134:19-20. Paquette asked Stain about the Coalition letter – a reference to the December 2009 letter from the Coalition of Kaiser Permanente Unions regarding its policy of not admitting labor organizations into the Coalition if they raid Coalition Unions – and Stain stated that NUHW would be on its own without any real power to bargain. *See* Tr. 135:1-3.

b) Region 21 Seeks 10(j) relief in Federal Court.

Two weeks prior to the date that the ballots were mailed out to eligible voters, the Regional Director for Region 21 filed a petition for a temporary injunction in the United States Central District Court, seeking to enjoin Kaiser from withholding wages and certain benefits from NUHW-represented employees in the Southern California Professional unit. This fact was widely disseminated by NUHW to eligible voters.

In addition, on the same day that ballots were mailed out to eligible voters in the MSW, IBHS and Optical units, ALJ William A. Schmidt presided over a hearing to determine whether or not Kaiser violated the Act when it withheld wages and certain benefits from NUHW-represented employees in the Southern California Professional unit. This fact too was widely disseminated by NUHW to eligible voters.

At no time before or during the critical period did NUHW request or seek to "block" the election based on any unfair labor practice charge.

3. <u>Region 32 Conducts A Mail Ballot Election Between October 18 and November 8, 2010.</u>

Ballots were mailed to eligible voters in the MSW, IBHS and Optical units beginning on October 18, 2010. A Tally of Ballots issued on November 10, 2010, showing that a majority of eligible voters in the MSW unit cast ballots for SEIU-UHW. Although employees in the IBHS and Optical units experienced the same campaign rhetoric from both Unions, a majority of workers in the IBHS and Optical units cast ballots for NUHW. Intervenor's Exhs. 5 & 6.

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C. POST-CRITICAL PERIOD.

1. NUHW Files Objections to the Conduct of the Election.

Following the Tally of Ballots, NUHW filed 71 objections to the election. On February 23, 2011, after fully investigating NUHW's allegations, the Regional Director dismissed 66 of the 71 objections filed by NUHW, but set Objections 1 (first part only), 2-4 and 6 for hearing.

The objections set for hearing by the Regional Director were limited in scope and nature. The objections focused on two issues: (1) whether the employer's unfair labor practices – which were committed outside of the critical period, in another geographical region of the state, and in another unit – constituted objectionable conduct in the instant matter;[2] and (2) whether SEIU-UHW, by and through its agents, threatened eligible voters that the employer would not pay contractually bargained-for wage increases, including a wage increase that was due in October 2010 if NUHW won the election;[3] threatened that the employer would not pay the Performance Sharing Program ("PSP") if NUHW won the election;[4] threatened eligible voters that they would lose the benefit of the Coalition of Kaiser Permanente Unions ("CKPU" or the "Coalition") as well as National Agreements, because SEIU-UHW would forever bar NUHW from participating in national bargaining;[5] and, finally, threatened eligible voters that the employer confirmed that NUHW members at Kaiser are not automatically eligible to receive PSP or other such bonuses if NUHW won the election.[6]

A hearing on these objections took place on May 2 and 3, 2011 before ALJ Lana Parke. Judge Parke recommended that Objection 1 be overruled, but that Objections 2-4, and 6 be sustained.

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[2] Objection 1 (first part only).

[3] Objection 2.

[4] Objection 3.

[5] Objection 4.

[6] Objection 6.

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III. SUMMARY OF ARGUMENT

The ALJ's decision not only ignored relevant evidence but also ignored well-established Board precedent. There is very little discussion of critical testimonial evidence in the ALJ's decision. The testimonial evidence presented by NUHW does not support the ALJ's findings that employees in the MSW unit voted in an atmosphere of coercion and fear. On the contrary, the testimonial evidence demonstrates that MSW employees openly debated the issues.

A blatant example of the ALJ ignoring relevant and significant evidence is the fact that every MSW unit employee received their October 2010 wage increase three days before the mail ballots were mailed out to eligible voters. The parties stipulated to this fact at the hearing. The ALJ did not even mention this fact in her decision. Despite the fact that MSW unit employees received their wage increase in October 2010, the ALJ sustained Petitioner's Objection 2, which alleged that SEIU-UHW "threaten[ed] that the employer would not provide employees with an upcoming salary increase due in or around October 2010." RD's Rep. at p. 10.

The ALJ's decision completely ignored the fact that two other Northern California Professional units, which voted at the same time as the MSW unit and were subjected to the same campaign statements, chose NUHW as their representative. The IBHS unit, in fact, chose NUHW over UHW by a large margin. This evidence certainly undercuts any theory that when "viewed objectively" Intervenor's statements were coercive and threatening.

The ALJ's decision also ignored well-established Board precedent. Without citing a single case on point, the ALJ ignored the holdings in *Air La Carte*, 284 NLRB 471 (1987) and *Midland National Life Ins. Co.*, 263 NLRB 127 (1982). Even though the ALJ conceded "that Intervenor had no control over or involvement in Kaiser's ULPs and that Intervenor could not control Kaiser's future actions regarding MSW unit benefits" and that Intervenor's statements were "factually accurate," she, nevertheless, held that the election should be set aside. The irony, of course, is that under the ALJ's rationale, the election would not be overturned if the Intervenor simply lied about a campaign issue; but, in this case, because the Intervenor chose to truthfully address a significant campaign issue, which involved the uncertainty and risk of selecting a new bargaining

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representative, the ALJ recommended setting aside the election results. The ALJ's decision, therefore, encourages campaigns based on deception rather than truth.

Finally, even though the Petitioner did not ask for *Lufkin*[7] notice, the ALJ recommended one. There was no necessity in this case for a *Lufkin* notice. However, even if the Board believes that a *Lufkin* notice was appropriate in this case, the ALJ deviated from the standard notice.

IV. LEGAL ARGUMENT

A. THE ALJ'S DECISION IGNORED THE EVIDENCE IN THE RECORD.

To a large degree, the ALJ's decision ignores significant and relevant evidence. The most blatant example of this is the ALJ's recommendation that Petitioner's Objection 2 be sustained. Objection 2 alleges that SEIU-UHW threatened that if employees voted for NUHW "the employer ***would*** not pay contractually bargained-for wage increase including but not limited to threats that the employer would not provide employees with an upcoming salary increase due in or around October 2010." RD's Rep. at p. 10 (emphasis added).

Although there is no evidence that SEIU-UHW ever stated that employees ***would*** lose wage increases, the ALJ, nevertheless, sustained Objection 2. The SEIU-UHW campaign statements quoted in the ALJ's decision do not even support this finding. Moreover, the ALJ completely ignored the stipulation by the parties that MSW unit employees, in fact, received their October 2010 wage increase three days before the ballots were mailed to eligible voters. Certainly, no reasonable eligible voter who cast a ballot in this election would believe that they would not receive their October 2010 wage increase, because they had already received it prior to receiving their ballot.

Similarly, with respect to Objection 3 and 6, there was no evidence in the record that SEIU-UHW threatened employees that "the employer ***would*** not pay the already bargained-for Performance Sharing Program (PSP) bonus." *Id.* (Emphasis added). The SEIU-UHW campaign statements quoted in the ALJ's decision do not support this finding. In fact, NUHW never filed a

[7] *Lufkin Rule*, 147 NLRB 341 (1964).

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ULP against Kaiser related to the PSP bonus. Thus, even under the ALJ's rational and legal analysis, SEIU-UHW "predictions or risk-warnings" – at least with respect to the PSP bonus – were not linked "to existing and ongoing Kaiser ULPs" involving the PSP bonus.[8]

Finally, the ALJ's decision also fails to cite any evidence in support of Objection 4 that SEIU-UHW told employees in the MSW unit that they "***would*** lose the benefits of the Coalition of Kaiser Permanente [sic] Unions and the benefits of the National Agreements because SEIU would forever bar NUHW participation in such bargaining." *Id.* (Emphasis added). Again, there is no evidence in the record that SEIU-UHW stated to MSW unit employees that they ***would*** lose benefits of the Coalition or the National Agreement.

Holly Paquette, for example, testified that she asked Cleante Stain,[9] a NUHW member who supported SEIU-UHW, about a reference to the December 2009 letter from the Coalition of Kaiser Permanente Unions regarding its policy of not admitting labor organizations into the Coalition if they raid Coalition Unions. Rather than stating that NUHW members would lose benefits, Stain stated that NUHW would be on its own without any real power to bargain. (*See* Tr. 135:1-3).

Only because the ALJ ignored significant and relevant evidence in the record was she able to make the inferences, conclusions and recommendations that she did. Had the ALJ actually addressed and dealt with the relevant facts, even assuming for the sake of argument that her legal analysis is correct, she would have determined that NUHW failed to carry its heavy burden. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989) ("[T]he burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'").

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[8] The ALJ concedes that Judge Schmidt's decision does not deal with the PSP bonus. After conceding this point, the ALJ attempts to get around this fact by improperly applying Judge Schmidt's legal analysis to Objection 3 and determining that he would have found the "prospective curtailment" of the PSP bonus to be a ULP if it were before him. *See* ALJ Rep. & Recs. on Objs. at p. 12.

[9] The ALJ noted that "[i]t is not clear from Stain's testimony what, specifically, she told MSW unit employees." Nevertheless, the ALJ improperly "infer[red] that Stain delivered essentially the same message to the MSW unit employees [as she did to statewide unit employees] in Oakland." There is no evidence in the record as to how many MSW unit employees that Stain spoke with during the critical period. *See* ALJ Rep. & Recs. on Objs. at p. 8.

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B. THE ALJ'S DECISION IGNORED WELL-ESTABLISHED BOARD PRECEDENT.

1. The Board Has Consistently Held that To Constitute An Objectionable Threat, the Speaker Must Have the Power to Carry Out Its Prediction.

In *Air La Carte, Inc.*, 284 NLRB 471 (1987), the Board addressed the issue of unlawful threats in circumstances remarkably similar to those here – statements made by an incumbent union in a decertification election about what an employer might do if employees select the challenger seeking to replace the incumbent. Remarkably, the ALJ failed to distinguish – let alone even mention – *Air La Carte* in her decision.

Air La Carte concerned objections filed by a Teamsters Local 996, seeking to represent employees already represented by the Hotel Employees and Restaurant Employees, Local 5. 284 NLRB at 474. At issue in the case were statements by a Local 5 shop steward, who told fellow employees that "if the employees voted in the Teamsters or went nonunion, the employees would lose the benefits of the contract that they had and that, during the interim period of no contract, the employees could lose their health benefits and suffer a reduction in pay" and that without a contract, "the Employer could hire new employees to handle the Philippine Airlines catering business that it had, and the employees could lose all seniority." *Id.* at 473.

The Board held that the statements by the Union steward were not coercive and did not tend to interfere with the employees' freedom of choice in the election, and thus were not objectionable. *Id.* First, as to the statement that the contract would be lost if employees chose to stop being represented by Local 5, the Board held this was an accurate statement. *See id.* ("Had Local 5 not prevailed in the representation election, its contract with Air La Carte would have become null and void."). But beyond the issue of how accurate the statement was, the Board also held that "these statements could not constitute threats by Local 5, for it had no control over what action Air La Carte might take if Local 5 lost the election." *Id.* at 473-74 (footnote omitted).

In the next major case addressing election campaign statements about prior contract guarantees, the Board cited this "control"-test as a major factor distinguishing the case. *See More Truck Lines*, 336 NLRB 772, 773 (2001) ("The Board [in *Air La Carte*] found that these statements

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'could not constitute threats by [the incumbent union], for it had no control over what action [the employer] might take if [the incumbent union] lost the election." (quoting *Air La Carte*, all but first brackets in original)), *enforced*, 324 F.3d 725 (D.C. Cir. 2003). Thus, in *More Truck Lines* the Board held that statements by *the employer* regarding future wage increases were of a different nature, and indeed amounted to "threaten[ing] employees' [sic] with the loss of the annual wage increases if they selected representation by the [Union seeking to challenge the incumbent]." *Id.* at 774. These threats warranted setting aside the election. *Id.*

This distinction between *Air La Carte* and *More Truck Lines* was also recognized by the General Counsel in the Advice Memo on the So Cal Professionals:

> We conclude, as in Air La Carte, that these statements are not threats, because the UHW had no control over what action the Employer might take if UHW lost the election, and the UHW did not indicate that it had the control to cause the employees to lose the benefits.
>
> For that reason, we reject the NUHW's argument that the Board's decision in More Truck Lines commands a different result. In that case, the Board found an unlawful threat where the employer informed employees that if they voted out the incumbent union and replaced it with another, the existing collective-bargaining agreement would be "null and void," and the law would require the employer to freeze their wages. In that case, the statement was in fact not only a misstatement of the law, but it was also a threat. Unlike the employer in More that informed employees that it would not give them their contractually scheduled wage increases if they certified the rival union, ***the UHW neither stated nor implied that it would deprive the employees of any benefit if they decertified UHW and certified NUHW. Instead, their statement was more in the nature of a prediction of what the Employer might do.*** Accordingly, because the UHW's statements cannot reasonably be interpreted as threats to employees, it cannot be said that More requires the conclusion that the UHW's statements violated the Act.

SEIU-UHW West (Kaiser Foundation Hospitals), Case 21-CB-14867, Advice Memorandum, at 8-9 (July 16, 2010), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d45803f7e40 ("NUHW Advice Memo") (emphasis added).

Just as in *Air La Carte* and in Case 21-CB-14867 concerning the Southern California Pros, SEIU-UHW had no power in the instant case to deprive employees of the contract or any of its benefits if the employees in the MSW unit had selected NUHW as their bargaining representative. Nor does the record establish that SEIU-UHW ever implied that it did have that power. As such,

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these cases are controlling and the statements in the record regarding the fate of future pay increases, other benefits, and the PSP bonus cannot be called threats and do not constitute objectionable conduct as a matter of law.

2. Threats Are Objectionable Only If the Party Making the Threat Has the Power to Follow Through With the Threat

a) There Is A Significant Legal Difference Between Union and Employer Statements.

As nearly goes without saying, a Union's statements to employees in an election are fundamentally different in character than an employer's statements, because the former lacks the power to directly affect employees' terms and conditions of employment. *Cf. NLRB v. Flomatic Corp.*, 347 F.2d 74, 77 (2d Cir. 1965) (discussing "the fundamental difference between a union's election promises and those of an employer[:] A union can effectively promise only that it will try to gain certain benefits in bargaining sessions. In contrast, an employer appears as one who can fulfill any pledges he makes which seem to be reasonably within his means. *The differing nature of these promises is not likely to be overlooked by the employees in deciding how to cast their ballots.*" (emphasis added)).

On the other hand, where a Union threatens employees that they will lose benefits over which the Union has some control, the Board may find an unlawful threat. *See Condiotti Enterprises*, 328 NLRB 947 (1999) (unlawful threat in violation of Section 8(b)(1) where Union told employees that "We can lock up your pension. We can lock up your annuity."); *Sans Point Nursing Home*, 321 NLRB 399 (1996); *Wilkinson Manufacturing Co. v. NLRB*, 456 F.2d 298, 302 (8th Cir.1972) (objectionable where Union field representative stated to an anti-union employee "that if the union got in it 'had ways' of getting rid of non-union employees"). In these cases, the threatening nature of the Union's statement is based on some future action that the employee has reason to fear the Union may take. *Cf., NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 281 (1973) ("The failure to sign a recognition slip may well seem ominous to nonunionists who fear that, if they do not sign, they will face a wrathful union regime should the union win.").

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SEIU-UHW's campaign statements about future pay increases, bonuses, or other benefits emphatically did not concern any action that the Union could possibly take, or give employees any reason to believe that SEIU-UHW had the power to withhold such increase, bonuses, or other benefits.

b) SEIU-UHW's Statements About the Contract and the Southern California Professionals Were Well Within the Bounds of Legitimate Campaign Speech In a Decertification Election Between Union Rivals.

On the contrary, SEIU-UHW's campaign statements relaying the risk to the contract and the experience of the Southern California Professionals were responsible messages based on facts that were well-known to the unit and out of the Union's control. Indeed, in a pitched Union battle of these proportions, it is unrealistic to assume that the Union could have avoided speaking about what happened to other employees who selected its rival (and it may have even been irresponsible to do so). At the same time, SEIU-UHW had no special knowledge about Kaiser's bargaining conduct, and no reason to believe that its conduct was illegal– as the Board later determined.

SEIU-UHW ran a responsible campaign focused on drawing a contrast between itself and its rival, NUHW. This involved touting the benefits of staying with SEIU-UHW, and highlighting – based on objective facts – the risks of going another way. *See Dart Container*, 277 NLRB 1369, 1370 (1985) ("Just as an employer can call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits its members currently enjoy"). *Cf. Smithfield Foods, Inc.*, 347 NLRB 1225, 1226 (2006) ("Employers have the right to point to a union's past failures and to use them to encourage employees to vote against the union, just as a union may use its past success to encourage employees to support it.").

To hold that SEIU-UHW committed objectionable conduct by commenting on well-known facts about Kaiser's past conduct with respect to a different unit of employees, would amount to a gag order on the union's campaign that would be deeply at odds with the Act and a serious abridgement of Union speech.

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3. In Any Event, SEIU-UHW's Campaign Statements Were Factual, Good-Faith Statements About the Risk of What *May* Happen That, At Most, Were Misrepresentations That Do Not Constitute Objectionable Conduct.

During the campaign, employees in the MSW unit were exposed to a wide variety of campaign statements about the benefits of SEIU-UHW and the risk of choosing a new Union. As we show in this section, these statements were measured in tone and reported information in an objective, good-faith manner.

For the most part, SEIU-UHW's campaign message was about the benefits of the recently ratified National Agreement. At issue in this case are a smaller subset of SEIU-UHW's campaign statements that are either descriptions of Kaiser's past behavior with respect to other employees, or characterizations of an employer's legal obligations in the event an incumbent Union is replaced.

It is helpful here to set out what the law requires and what could be predicted with certainty during the time of the campaign. On at least one point, the law is very clear: if employees replaced SEIU-UHW with the NUHW, at that moment the contract between SEIU-UHW and Kaiser would be "null and void." *See More Truck Lines*, 336 NLRB 772, 772 (2001); *Wayne County Neighborhood Legal Services, Inc.*, 333 NLRB at 148 n. 10; *City Markets, Inc.*, 273 NLRB 469, 470-471 (1984) ("If the incumbent union prevails in the election held, any contract executed with the employer will be valid and binding; but if the union loses, the contract will be null and void."); *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982). While there is a general employer duty to maintain the status quo, there was some legal uncertainty about whether Kaiser would be required to maintain all the benefits of the National Agreement in the event that NUHW won the election during the interim period before a new contract or impasse is reached.

Indeed, even the National Labor Relations Board, itself, expressed uncertainty on the issue of whether Kaiser was required to maintain all the benefits of the National Agreement in the event that NUHW won the election. As Shelley Coppock, the Assistant to the Regional Director for NLRB Region 32, testified, from August 31 until the end of the critical period, each of the regions in California was provided with a script that agents were directed to read from in response to inquiries "regarding the question of what happens to the contractual wages and benefits" in the

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Kaiser election. Intervenor's Exh. 2; (Tr. 111:8-12). That script, which was received in evidence as Intervenor's Exhibit 2, is quoted in full below:

> 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. Applying this principle to a recent case involving two units of employees employed by Kaiser Permanente in Southern California, the Regional Director in Region 21, on behalf of the Acting General Counsel of the NLRB, 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. In the Southern California case, the unit employees had voted to be represented by NUHW after having been previously represented by SEIU-UHW. 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.

Intervenor's Exh.2 (emphasis added). Thus, even after August 27, 2010, when the Acting General Counsel issued his complaint, the consequences for the MSW unit could not be stated with any certainty.

4. <u>As a General Matter, the Board Does Not Evaluate the Truth or Falsity of Campaign Statements.</u>

Given that the campaign statements by SEIU-UHW cannot be characterized as threats, the normal standard for evaluating campaign statements must apply. That law is provided by *Midland National Life Insurance, Co.*, in which the Board announced that it will "no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements," but will only "intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." 263 NLRB 127, 133 (1982).

In both *Air La Carte* and *More Truck Lines*, the Board made clear that the *Midland National* standard applies to non-threat statements about the potential for loss of benefits under an existing agreement. *See Air La Carte*, 284 NLRB at 474 (finding that Union agent's "statements,

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at most, constituted misrepresentations that do not warrant setting the election aside.");*More Truck Lines*, 336 NLRB at 773 (approving Board's statement in *Air La Carte* that "incumbent union's statements about the loss of existing terms and conditions of employment 'at most... constituted misrepresentations'"). Application of this standard is sufficient on its own to dismiss the threat-related objections, as there are no campaign statements in the record that can be characterized as "more than" anything but misrepresentations.

While the Board has applied the *Midland National* standard since 1982, prior to that time the law changed frequently and at times the Board showed a greater willingness to overturn the results of an election based on campaign misrepresentations. *See* Developing Labor Law, at 483-88 (5th ed.). Even under the more exacting standards applied at times by the Board and Courts of Appeal, adjudicators have paid careful consideration to the nature and certainty of the underlying issues that are the subject of campaign statements. Thus, in *Hollywood Ceramics*, the Board stated that "the mere fact that a message is inartistically or vaguely worded and *subject to different interpretations* will not suffice to establish such misrepresentation as would lead us to set the election aside." *Hollywood Ceramics*, 140 NLRB 221, 224 (1962) (emphasis added); *see also NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983) ("The alleged misrepresentation concerning the union's solvency was the kind of statement *not easily categorized as being either true or false*," and thus not grounds for setting aside the election (emphasis added)). Based on these precedents, even if the Board were to apply a stricter pre-*Midland* approach to campaign propaganda, SEIU-UHW's campaign statements would not be grounds for setting aside this election.

5. In the Context of Threats, the Board Has Long Distinguished Statements of Risk, and Descriptions of Past Events, From Statements of Certain Loss.

a) References To the Past and Elsewhere.

Campaign statements that refer to the performance of the Union at other sites, or *even in the same location in the past*, have also been found to be lawful so long as they are not considered threats. *See Smithfield Foods, Inc.*, 347 N.L.R.B. 1225 (2006) (finding that employer's constant

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reminders that three Union-represented companies at its location had closed were not unlawful threats but "*relevant, factual information about the Union's history at the facility*" that were not grounds for setting aside an election (emphasis added)), *enf'd by*, 506 F.3d 1078 (D.C. Cir. 2007).

The same principle holds when the employer uses employee spokespeople to describe their negative experiences of being members of the union seeking to represent the company's employees. For example, in *Stanadyne Auto Corp.*, the Board found that the employer did not commit objectionable conduct when, in meetings with employees, it displayed signs with photographs of union facilities marked "closed" and shared experiences of employees who had experienced such events. *Stanadyne Auto Corp.*, 345 NLRB 85 (2005), *enf'd in relevant part*, 520 F.3d 192 (2d. Cir. 2008). Rather than finding that the employer made unlawful predictions, the Board held that the employer was merely "supplying the perspective of employees who had experienced some of those events," and as such the speeches and the closed sign "merely attempted to inform employees of the potential negative effects of their upcoming vote." *Id.* at 89. Indeed, the Board also found that discussions of the past are not the same as predictions of the future:

> By providing "concrete example[s] of a negative outcome for employees who were represented by the same union that seeks to represent" the Respondent's employees, the Respondent "made no prediction at all."

Id.

b) Incomplete or Incorrect Statements of the Law.

The Board has also made clear that in an election campaign a party that makes a truthful statement about employee rights does not have an affirmative obligation to fully inform employees of all the protections of the Act. *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988) (nothing that "the mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election"); NUHW Advice Memo at p. 5. By the same token, a misstatement of the law is not objectionable unless it constitutes a threat. *Id.* (citing *Woodbridge Foam Fabricating, Inc.*, 329 NLRB 841, 841-842 (1999)).

For example, in *In re Virginia Concrete Corp., Inc.*, the Board overturned the ALJ's decision to set aside an election based on campaign literature in which the Employer described the

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Union's filing of unfair labor practice charges as "an attempt[] to take away" a 50-cent wage increase the employer granted in between the initial and rerun decertification vote. 338 NLRB 1182, 1186 (2003). While the ALJ found the employer's statement to be an objectionable misstatement of the law, because the Union's ULP would not necessarily lead to a rescission of the wage increase, the Board disagreed, stating: "At most, the Employer misstated Board law and possible future Board action." *Id.*

6. Setting Aside the Election on the Basis of SEIU-UHW's Campaign Statements Would Be a Drastic Expansion of the Law, Would Effect a Grave Distortion of Employee Free Choice, and Would Be Unfair to Intervenor Based on the Equities of the Case.

Notwithstanding the consistent strands of Board law discussed above, there are additional equitable and policy reasons arguing against setting aside an election in this case. First, the facts that Kaiser withheld from the Southern California Professionals the annual wage increase and other benefits in the National Agreement were all well known "facts on the ground." To find objectionable SEIU-UHW's campaign states further disseminating those facts would be the equivalent of a complete *gag order* on any reference, mention, debate or discussion related to the Southern California Professionals who selected NUHW. In the absence of collusion between Kaiser and SEIU-UHW, this be a serious restriction of Union speech that would set up unrealistic and unfeasible constraints on Union's who are facing decertification by a rival Union.

The far reaching implications of such a ruling must be considered. What if, rather than withholding the raise, after several bargaining sessions Kaiser declared impasse, and made unilateral changes actually *lowering* the wage rate? Even if the Board later determined – perhaps years later – that the employer's declaration of impasse was premature, would SEIU-UHW be required to remain silent about the fact that workers who decided to vote for NUHW in that ended up with *much worse* terms and conditions? Would an incumbent Union, in this situation, be unable to share with its members its observation of that choosing the rival Union entailed serious risk?

In effect, what NUHW is claiming is that the very *timing* of the election was untenable – because the influence of Kaiser's actions in Southern California on the MSW unit was ongoing.

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However, such an argument should be foreclosed to NUHW as an equitable matter for the simple reason that when NUHW filed its election petition on June 29, 2010, it was well aware that the circumstance of Case No. 21-CA-39296 formed part of the backdrop in which the election to place. NUHW chose to proceed with the election – that is, at no time did it request that the Region block the instant election pending the resolution of Case No. 21-CA-39296. In other words, NUHW knew that unremedied ULPs would be a topic of debate, rhetoric, and campaign propaganda in the MSW unit.

Indeed, NUHW, itself, widely disseminated flyers to the MSW unit purportedly from Southern California Professionals in the Psych-Social Chapter proclaiming that "NUHW members received our PSP in March." Petitioner's Exhs. 51 & 52. The flyer quoted a Southern California Professional employee as stating, "SEIU told us we'd lose our PSP bonuses – but they were wrong. **We vote overwhelmingly for NUHW in January, and received our PSP bonus in March.** We saw through SEIU's lies. **Now we're bargaining with NUHW, a strong union, to win back what SEIU gave away.**" *Id.* at Exh. 51 (emphasis in original)). On the other side of the flyer, was a copy of a pay stub showing the payment of the PSP bonus in March 2010. Not only did NUHW decide not to request to block the instant election, but affirmatively introduced the issue of the PSP into the election, claiming that SEIU-UHW had lied about the fact that Psych-Social workers had not received their PSP bonuses. Surely, SEIU-UHW should have been allowed to respond to such a claim by NUHW, but if the Hearing Officer were to accept the novel legal theory put forth by NUHW and the Regional Director, SEIU-UHW would be prevented from responding to such a statement.

Finally, members in two other professional bargaining units, who worked side by side with MSW members and voted at the same time as them, selected NUHW as their collective bargaining representative. Intervenor's Exhibits 5 & 6. In the case of IBHS members, they did so by a wide margin. Although not conclusive, these results certainly give us a picture of the election environment so that an objective analysis can be done. In other words, if IBHS and Optical workers chose NUHW, it suggests that the conduct in question did not have a reasonable tendency

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to interfere with the employees' free and uncoerced choice in the election.

7. The ALJ Cites No Legal Support For the Proposition That SEIU-UHW's Dissemination of Underlying Facts Interfered With Employee Free Choice.

Although the ALJ's decision turns on a legal issue, there is little, if any, legal support cited in her decision. The ALJ relies indirectly on two board decisions. The ALJ cites *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157 (2001) and *Vegas Village Shopping Corp.*, 229 NLRB 279 (1997). Both cases are inapposite.

In *Taylor Wharton,* the employer distributed a cartoon which portrayed a Union organizer announcing that the company had closed. The Board held that because the cartoon "was not based on objective fact," it constituted "an unsupported prediction of strikes and plant closure should employees select the Union as their bargaining representative." The election was decided by one vote.

The facts of this case are easily distinguishable. First, *Taylor Wharton* involved employer statements, not Union statements. Second, the Board found that the employer's statements in *Taylor Wharton* were not based on objective facts and, therefore, constituted an "unsupported prediction." By contrast, the ALJ concedes in her decision that SEIU-UHW's statements in the instant matter were, in fact, based on objective facts; and its statements and predictions were based on what could lawfully happen if workers switched bargaining representatives. Finally, unlike the election in the instant matter, the election in *Taylor Wharton* was decided by a single vote.

The ALJ also cites *Vegas Village Shopping Corp.*, 229 NLRB 279 (1997). In *Vegas Village*, during an election in two separate bargaining units of the same employer, which involved the same labor organization, the employer engaged in certain unfair labor practices in one bargaining unit. The Board set aside the elections in both units, even though the unfair labor practices occurred in only one of the units, because the employer's "unlawful conduct was likely to have a coercive impact on employees in both units in the Las Vegas area." 229 NLRB at 280.

Here, the elections in the MSW unit and Southern California Professional units took place at different times – approximately 10 months apart – and did not occur in the same geographical

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area. The Board in *Vegas Village* specifically found that the employer's ULPs had a coercive effect on the election in both units because both elections occurred at the same time in the same geographical location. Moreover, unlike the instant matter, *Vegas Village* involves employer conduct, not Union conduct.

Simply put, the ALJ's reliance on *Taylor Wharton* and *Vegas Village* is misplaced. The ALJ's failure to even distinguish – let alone discuss – the Board's decisions in *Air La Carte* or *Midland National* indicates that her decision was driven by a result-orientated approach rather than a vigorous legal analysis.

V. CONCLUSION

For the forgoing reasons, SEIU-UHW requests that the Board reject the ALJ's recommendations, overrule Petitioner's objections, and certify the results of the election.

Dated: August 18, 2011

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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 18, 2011, I served upon the following parties in this action:

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copies of the document(s) described as:

SEIU-UHW – WEST'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS; AND SEIU-UHW – WEST'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[X] **BY EMAIL** I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on August 18, 2011.

Rhonda Fortier-Bourne

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