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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL UNION OF HEALTHCARE WORKERS,

Petitioner,

and

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

Respondent,

and **Case** **32-RC-5774**

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST,

Intervenor.

BRIEF IN SUPPORT OF NUHW'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

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

I. INTRODUCTION

The National Union of Healthcare Workers ("NUHW"), petitioner in the above-referenced matter, hereby timely files Exceptions to the Administrative Law Judges Report and Recommendations On Objections in Case. No. 32-RC-5774, issued on July 19, 2011 (the "Report"). In the Report, the Administrative Law Judge ("ALJ") sustained objections No. 2, 3, 4 and 6 against the Intervenor Service Employees International Union, United Healthcare Workers-West ("SEIU"), the ALJ overruled Objection No. 1 against the Employer. [Report at 13]. NUHW hereby files exceptions to the Report overruling Objection No. 1.

Objections No. 1 involve Kaiser's illegal conduct in the Southern California Units represented by NUHW employees would not be entitled to wages and benefits that were part of the Coalition of Union's National Agreement and were part of the charges filed in Southern California Permanente Medical Group; Kaiser Foundation Hospitals and National Union of Healthcare Workers, 356 NLRB No. 106 (March 3, 2011). Specifically, that

> "[t]he employer , by its agents, violated Section 8(a((10 and Section 8(a)(5) by committing unlawful unilateral changes by withholding and/or cancelling scheduled across-the board raises, tuition-reimbursement benefits, and union-steward training programs for employees represented by NUHW in other units." [Report at 3].

It is NUHW's position that the ALJ made a legal error in overruling Objection 1, her conclusion that here is no legal authority establishing that conduct in a in a geographically separate unit can, without more, interfere with an election in another unit, ignores longstanding Board law. [Report at 10].

II. THE ELECTION

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

> All full-time and regular part-time Medical Social Workers employed by the Employer in positions covered by the collective bargaining agreement between the Employer and Service Employees International Union, United Healthcare Workers – West, effective October 1, 2005, including Medical Social Worker 1, Medical Social Worker II, and Medical Social Worker III; excluding any medical Social Worker assigned to the Director of Social Services at any of the Employer's facilities or to who, the Employer has given the authority to hire, promote, discipline, discharge, or otherwise change status or to effectively recommend such action, all employees represented by other unions, confidential employees, guards, and supervisors as defined in the National Labor Relations Act. [Report at 2].

The Tally of Ballots was as follows:

> Approximate number of eligible voters: 378
>
> Number of void ballots: 4
>
> Number of votes cast NUHW: 139
>
> Number of votes cast for Neither: 2
>
> Number of votes cast for SEIU-UHW: 148

Number of Valid Votes Counted: 289

Number of challenged ballots: 3

Valid votes counted plus challenged ballots: 292

[Report at 2].

III. EXCEPTIONS

1. THE NUHW EXCEPTS TO THE ALJ'S RECOMMENDATION THAT OBJECTION NO. 1 AGAINST THE EMPLOYER BE OVERRULED.

The ALJ made a legal error when she stated in overruling Objection 1, without qualification or discussion of the specific facts in this case as follows:

> "There being no authority that conduct in a in a separate unit can, without more, interfere with an election in another unit. . . ." [Report at 10].

Here, the ALJ ignored longstanding Board precedent.

In fact, the Board has not hesitated to sustain objections to the results of an election in one unit where the objectionable conduct was aimed at another unit. For example, in *Vegas Shopping Corp.* 229 NLRB 279, 280 (1977), the Board (over an exception on this exact issue) sustained objections to the result of an election in a unit of warehouse employees of an employer, even where that employer's illegal conduct was only directed toward the unit of selling and nonselling employees, because it was clear that the employer's "unlawful conduct would tend to discourage all employees in the Las Vegas area from voting for the same Union which was on the ballot for both units [and the employer's] unlawful conduct was likely to have a coercive impact on the employees in both units . . . ." 229 NLRB at 280. Similarly, in *Vencor Hospital-Los Angeles*, 324 NLRB 234 (1997), the Board sustained objections to an election because the discharge of an active union supporter in another of the employer's units would "not pass

unnoticed" in the unit subject to the election objections. *Id*. at 253-54 (citing *Vegas Shopping Corp.*, for the proposition that "[t]he Board has found employer conduct respecting employees in one bargaining unit to have a coercive impact on employees in a second unit and hence constitute objectionable conduct respecting the second unit").[2]

The ALJ erred by ignoring these cases and unequivocally holding that conduct in a separate unit cannot interfere with an election in a different unit. The NUHW recognizes that, as with *any* unlawful conduct (whether directed at employees in the same or a different bargaining unit), the simple fact that there has been unlawful conduct does not make that conduct sufficient to overturn the results of the election. The Board always looks at the surrounding facts and circumstances to make this determination. If this is what the ALJ's meant by writing that such unlawful conduct "without more" is not objectionable, then NUHW agrees with that finding. However, in making her unequivocal holding ignoring the above cases and failing to analyze the surrounding facts and circumstances in this case that made Kaiser's unlawful conduct directed toward employees in a separate unit objectionable in this election, she erred. This will be discussed in the next section.

a. The NUHW excepts to the ALJ's Finding that the following conduct by the employer did not constitute objectionable conduct: The employer's violations of Section 8(a)(1) and Section 8(a)(5) in withholding and/or cancelling schedule across-the-board raises, tuition-reimbursement benefits, and union steward training programs for employees represented by NUHW in other units.

The ALJ erred in overruling Objection 1 and failing to find that Kaiser's un-remedied unfair labor practice directed at the Southern California units[3] who selected NUHW over SEIU UHW – whose bargaining and national contractual relationships with Kaiser was identical to that

[2]. She explicitly recognized that the Board in *Vegas Village* held that the employer's conduct directed at one bargaining unit would have discourage employees from voting for the same union that was on the ballot in multiple bargaining units and have a coercive impact on these units. (Report at 12 n.19 (citing *Vegas Village*, 220 NLRB at 280.).

[3] The Psych Social Unit in the Southern California professional union includes the same classifications that are in the MSW unit.

of the MSW Unit members – constituted objectionable conduct. It was impossible for MSW Unit employees to exercise their statutorily protected free choice to select on bargaining representatives unaffected by the taint of Kaiser's illegal conduct.

Under well-established Board law, Section 8(a)(1) conduct interferes with the free exercise of choice and is objectionable unless "it is virtually impossible to conclude that the misconduct could have affected the election result" based on the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. *See Gonzales Packing Co.*, 304 NLRB 805 (1991) (quoting *Clark Equipment, Co.*, 278 NLRB 498, 505 (1986)); *see also Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-87 (1962). The Board explained in *Playskool Mfg. Co.*, 140 NLRB 1417 (1963) that where conduct has already been found to violate section 8(a)(1) it "is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *See also IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.*, 326 NLRB 28 (1998); *Dal-Tex*, 137 NLRB at 1786.[4]

The "virtually impossible" objections standard applies to Kaiser's conduct, which was found by the Board to violate sections 8(a)(1) and 8(a)(5)[5] and was un-remedied at the time of the election. [Report at 13]. Moreover, as will be explained below, it was aimed at the Kaiser Professional Units after they chose NUHW over SEIU UHW (the same union seeking to supplant SEIU UHW in the subject bargaining unit), a unit that was identically situated to the subject bargaining unit vis-à-vis Kaiser (the same employer) in all respects material to the unfair labor practice and Kaiser's rationale for its unlawful conduct. *See Vencor Hospital*, 324 NLRB at 253 (Board applied the "virtually impossible" objections standard to election in one unit where same

[4] The Board applies this general rule "because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex*, 137 NLRB at 1786-87; *see also Overnite Transportation Co.*, 158 NLRB 879 (1966); *Excelsior Underwear*, 156 NLRB 1236 (1966).

[5] *See Southern California Permanente Medical Group et al.*, 356 NLRB No. 106, 2011 WL 757875 (March 3, 2011). The pinpoint pages cited in this brief for the *Southern California Permanente Medical Group* decision correspond to the pages in the official reporter.

employer's conduct violating the Act directed at employees in different unit with same union on ballot).

In any event, even if the "virtually impossible" standard did not apply, Kaiser's un-remedied unlawful conduct would be objectionable under the orthodox standard. As a general matter, conduct warrants setting aside when taken as a whole it has "the tendency to interfere with the employees' freedom of choice" and could have affected the election's outcome. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). In evaluating whether a party's conduct had "the tendency to interfere with employees' freedom of choice," the Board may consider multiple factors. These factors include (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). Under that standard as well, Kaiser's un-remedied ULP objectionably interfered with free choice in the election.[6]

Here, the ALJ's concluded in finding the Intervenor's conduct to objectionable that "when weighed against the pending litigation of indeterminate outcome and un-remedied

[6] Notably, while the closeness of the final vote is a factor the Board will consider, it is one of many factors discussed above and where the objectionable conduct was disseminated to all the unit employees (as in this case), and could have affected their free choice, the Board has set aside elections and held that widespread dissemination could account for a large victory margin. *See, e.g., In re Freund Baking Co.*, 336 NLRB 847, 848 n.5 (2001). In that same case, the Board went further: "In any event, '[t]he Board has consistently held that whether an election should be invalidated based on alleged misconduct does not turn on election results but rather upon an analysis of the character and circumstances of the alleged objectionable conduct.'" *Id.* (quoting *May Department Stores Co. v. NLRB*, 707 F.2d 430, 434 (9th Cir. 1983) (citations and quotation marks omitted)); *accord Westside Hospital*, 218 NLRB 96 (1975).

ULPs…[t]he unavoidable inference to be drawn from these circumstances is that the MSW unit employees voted objectively reasonable, albeit inaccurate and ULP-induced, apprehensions that a vote for the Petitioner was a vote for benefit reduction." [Report at 13]. The same inference and facts should have determined that Kaiser's un-remedied ULP's tainted the election.

b. Kaiser's Unlawful Conduct Tainted this Election – It is Not Impossible, Indeed the Conclusion is Inescapable, that this Coercive Conduct Interfered with Free Choice and Affected the Election Result

It is undisputed that Kaiser violated Sections 8(a)(1) and 8(a)(5) of the Act when it withheld and/or canceled scheduled across-the-board raises, tuition-reimbursement benefits, and union steward training programs for Kaiser employees in the "Professional Units" after they selected NUHW over SEIU, as described in the ALJ's Report at pages 4-6. That conduct was plainly coercive of free choice. The ALJ stated that "Kaiser's ULPs figured as concrete, menacing reminders that Kaiser had unilaterally withheld benefits from employees in the SoCal-pro units' when they chose to be represented by NUHW." [Report at 11].

The severity of Kaiser's illegal conduct, and its likelihood to affect how employees voted in this election, is underscored by the fact that it was aimed at key terms and conditions of employment, including the core wage rates for all employees and the important benefits associated with Kaiser employment. Here, the potential loss of monetary compensation if a bargaining unit changes representatives hits employees at one of their "most vulnerable spots." *Lake Mary Health & Rehabilitation*, 245 NLRB 544, 544-45 (2005). In many other cases, the Board has held that changes to the terms and conditions of employment by employers prior to an election constitute objectionable conduct. *See, e.g., STAR, Inc.*, 337 NLRB 962 (2002) (employer interfered with the election by announcing and distributing a fiscal year-end cash bonus to the employees before the election (44 to 74 vote total)); *Ameraglass Co.*, 323 NLRB 701 (1997) (employer improperly accelerated benefits before election). Indeed, the Board held in *Pearson Educ., Inc.*, 336 NLRB 979 (2001) that a leaflet which said "'promised wage increase[s]

will be put in jeopardy if the employees choose the Union' . . . 'clearly interfered with the [employees'] exercise of free choice." That was so because the "'threatened withdrawal of [a] promised wage increase 'is a heavy suppression' of Sec. 7 rights.'" (*Id.* (quoting *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), *enfd. in pertinent part* 148 F.3d 1166 (D.C. Cir. 1998) (emphasis added).)[7] Here, Kaiser did not merely threaten to withdraw a promised wage increase, but rather actually took away a promised wage increase from the similarly-situated Kaiser employees in the Professional Units.

Knowledge of Kaiser's un-remedied ULP was spread throughout the MSW Unit. Moreover, the Kaiser "Professional Units" – consisting of the Health Care Professionals unit, the Psych-Social Chapter unit, and the American Federation of Nurses unit (the Southern California pro-units) – are employed by Kaiser Foundation Hospitals and Southern California Permanente Medical Group, one of the employers of the MSW Unit. [Report at 10]. Here, the same employer that withheld wages and benefits from the Professionals when they chose NUHW is the Employer of the MSW Unit.

Finally, information about the Kaiser's ULP was *widely disseminated to unit members* by SEIU UHW during the critical period. [Report at 6-8]. As the ALJ explained at length in her Report, during the critical period SEIU UHW made it a central theme of their campaign to inform MSW Unit members about the details of Kaiser's un-remedied unlawful conduct, and how it threatened the terms and conditions of the MSW Unit members' employment [Report 6-8].Here are just a few examples: "If [NUHW replaces SEIU-UHW as our union] our new contract and everything in it is gone has to be re-bargained. . . . In January, a small group of 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." [Report at 6]. A

[7] The coercive nature of Kaiser's conduct was emphasized in the Board decision on the Kaiser ULP, which held that permitting Kaiser to withhold terms and conditions of the national agreement "would give primacy to the contractual relationships that existed before the unit employees selected a new representative and would seriously impair, if not virtually eliminate as a practical matter, the fundamental right of employees under Section 7 to change their bargaining representative." *Southern California Permanente Medical Group*, 356 NLRB No. 106, at 10-11.

second example: "Southern California Kaiser pros who voted for NUHW in January still don't have the 2% raises that SEIU-UHW members got in April . . . [quoting a statewide-unit member]: 'NUHW can't even get the 2% that we've seen in our paychecks for three months now." [Report at 6.] A third example, "To date, because the S. CA professionals voted for NUHW, they are now at least 5% behind us in raises." [Report at 6]. The ALJ properly held that these SEIU's campaign communications, in the context of Kaiser's un-remedied ULP, were themselves coercive and objectionable. However, this evidence also demonstrates that Kaiser's ULP, which is coercive as explained above, was sufficient to overturn the results of the election. This is so because of the wide extent of knowledge and dissemination of Kaiser's unlawful conduct among the MSW Unit is relevant to both the "virtually impossible" standard, as well as more orthodox *Taylor Wharton* objections standard, as explained above.

c. Kaiser's Unlawful, Un-remedied Conduct Directed Toward the Professionals Coerced Voting Decisions

The above analysis is wholly consistent with the ALJ's Report, which emphasized time and time again the "menace" of Kaiser's un-remedied ULP to the MSW Unit members' free choice. Indeed, ALJ apparently based her conclusion that the Kaiser's unlawful conduct was not objectionable entirely on the fact that it was directed at employees in the Professional Units, rather than the MSW Unit. However, as explained in Exception 1, contrary to the ALJ's legal finding, in similar circumstances the Board has not hesitated to sustain objections to the results of an election in one unit where objectionable conduct was aimed at another unit. *See supra* at Exception 1 (discussing *Vegas Shopping Corp.* 229 NLRB 279, 280 (1977) and *Vencor Hospital-Los Angeles*, 324 NLRB 234 (1997).)

The analysis and conclusions of those cases control here because (1) Kaiser's illegal conduct would "not passed unnoticed," *Vencor Hospital*, 324 NLRB at 234-35, in the MSW Unit for the reasons explained *supra* in the preceding subsection; (2) as in *Vencor Hospital* and *Vegas Shopping Corp.*, it was done by the same employer; and (3) the members of the Professional

Units and the MSW Unit were identically situated in all material respects vis-à-vis Kaiser's illegal conduct.

This last point is worth discussing in detail. It shows the highly coercive nature of Kaiser's conduct, the likelihood that could have affected the outcome of the election in the MSW Unit, and why the fact that Kaiser's unlawful conduct was aimed at the Professionals simply does not matter under these circumstances.

Indeed, with respect to the terms and conditions that were denied the Professionals after they selected NUHW, the Professional Unit and the MSW Unit members were in effect the same bargaining unit. Prior to the Professional Units selecting NUHW as their bargaining representative, the Professional Units and the MSW Unit were both part of the SEIU locals in the Coalition of Kaiser Permanente Unions ("Coalition") that bargained together for the 2005 National Agreement. [Report at 4]. (discussing development of the Coalition bargaining process and Labor Management Partnership). That National Agreement – incorporated identically in the collective bargaining agreements for all units – provided the same terms and conditions of employment for all Coalition members that Kaiser withheld from the Professional Units after they voted to join NUHW. [Report 4-5]. [8] The Coalition members (no longer including the Professional Units after they selected NUHW over SEIU UHW) continued that same Coalition bargaining and contractual relationship with Kaiser in the 2010 successor National Agreement – establishing terms and conditions of employment, including wage increases (*e.g.*, the October 2010 3% wage increase) and benefits.

[8] To emphasize the last point, the terms and conditions illegally withheld from the Professional Units were all from the National Agreement negotiated jointly on behalf of the Professionals, the MSW Unit, and the other Coalition members. For example, raises for employees represented by Coalition unions were negotiated through the 2005 National Agreement and the reopener provision in that National Agreement. The 2005 National Agreement applicable to all members of the Bargaining Group also provided "across-the-board wage increases that [would be] effective in the pay period closest to October 1 each year," which were paid to the Professionals in October 2009 *before* they selected NUHW. *Southern California Permanente Medical Group*, 356 NLRB No. 106, at 9.) The tuition reimbursement and steward training benefits that were part of Judge Schmidt's decision were also located in part in the National Agreement that applied to all Bargaining Group members. (provisions related to tuition reimbursements); (provisions related to steward training benefits).

Critically, the fact that the Professionals were no longer part of the Coalition after they selected NUHW provided *the very rationale* for Kaiser's withholding of the national agreement's raises and benefits to them. [Report at 5]. [9] This is why Kaiser provided the 2% wage increases to the MSW Unit in April 2010, but not to the Professional Units. [Report at 5]. Thus, it would be impossible for MSW Unit members' free choice in this election *not* to be affected by the reasonable conclusion that if they selected NUHW, which was not part of the Coalition, Kaiser would refuse to apply the terms and conditions of 2010 National Agreement to them, including the October 2010 3% wage increase due just after the vote count in the MSW Unit election (analogous to the 2% withheld from the Professionals), and certain benefits (analogous to the benefits withheld from the Professionals), using the exact same (later found to be) illegal rationale that Kaiser employed to deny the terms and conditions of the national agreement to the Professional Units.[10]

In sum, it was inescapable for MSW Unit members to conclude that if they chose NUHW like the Professionals, they too would be denied the terms and conditions of that agreement just like the Professionals. Kaiser's rationale applied with equal force to the MSW Unit. Indeed, any other conduct by Kaiser would have been inconsistent with its stance *throughout the entire critical period* – Kaiser continued to deny the Professional Units the terms and conditions of the

[9] In a letter accompanying a March 18, 2010 meeting between Kaiser and NUHW after NUHW was certified as the Professionals' bargaining representative, "Kaiser specifically asserted that participation in the 'Coalition and the LMP' was a pre-condition to the application of the National Agreement to these bargaining units[, and thus,] 'This means that if a bargaining unit no longer is a part of the Coalition (NUHW is not, and almost certainly never will be, a member of the Coalition), the provisions of the National Agreement no longer apply to those employees.'" *Southern California Permanente Medical Group et al.*, 356 NLRB No. 106, at 9 (quoting March 18, 2010 letter (emphasis added)).

[10] This point was reinforced in Section 3.B of the 2010 National Agreement, Scope of the Agreement: The National Agreement and Local Agreements, drafted jointly between Kaiser and the Coalition unions, which provides, "The provisions of this National Agreement only apply as an addendum to [] local agreements if employees in these bargaining unit are represented by a Coalition Union. If a bargaining unit is not represented by a Coalition Union, then the provisions of the National Agreement **will not apply**[.]" (Er. Ex. 3 at 108(emphasis added).) Moreover, the quoted section from the 2010 National Agreement is a new addition to the terms of the National Agreement, which reinforce Kaiser's message that only members of Coalition unions are entitled to the terms of the National Agreement. (*See Er. Ex. 2 section 3(b) at 104*.)

2005 National Agreement throughout the critical period (including the wage increases and benefits). That unlawful stance, which loomed over the election in the MSW Unit, was not rejected the Administrative Law Judge William Schmidt until *after* the vote count. [Report at 6]. Thus, for the many reasons discussed above, as in *Vegas Village*, Kaiser's unlawful conduct was very likely to have a coercive impact on the employees in the MSW Unit.[11]

d. That Kaiser Initially Withheld Wage Increases and Benefits Before the Instant Representation Petition Does Not Matter

The ALJ did not overrule Objection 1 on the basis that Kaiser initially withheld the wage increases from the Professional Units before the date of the instant representation petition. However, Kaiser made this argument in its post-hearing brief, so NUHW will address it here.

First, this argument must be rejected because Kaiser unlawful conduct was not a singular unlawful action (or series of actions), which ended prior to the beginning of the critical period. From the beginning of the critical period on June 29, 2010 and continuing throughout that the critical period until after the vote count on November 10, 2010, Professional Unit members were denied wages that reflected the increases due to them under the terms and conditions of the 2005 National Agreement. [Report at 4]. Similarly, no Professional Unit members received tuition reimbursement or steward training through the National Agreement, *distinct* illegal denials of benefits that should have been available for receipt at any time during the critical period. Thus, Kaiser continued its illegal conduct throughout the critical period, which coerced employee free

[11] In fact, the cases where the Board has held – based on a fact-intensive analysis, not a bright-line rule – that conduct in a separate union did not require the overturning of an election in another unit, support NUHW's position. *See Food Fair Stores of Florida*, 120 NLRB 1669 (1958); *Seafood Wholesalers, Ltd.*, 354 NLRB No. 53 (2009). In *Seafood Wholesalers*, for example, where the ALJ relied on *Food Fair Stores*, the ALJ said that conduct in one unit was not objectionable in a second unit of the same employer because there was no evidence that the second unit's employees were aware of the allegedly objectionable conduct. On that specific basis, the ALJ distinguished *Vegas Village Shopping Corp.* and *Vencor Hospital-Los Angeles*. *See Seafood Wholesalers, Ltd.*, 354 NLRB at *16. There can be no dispute that Statewide Unit members knew what happened to the Professionals.

choice and could have affected the election result for the reasons discussed above. For those reasons, the election should be set aside.

Second, Kaiser's initial pre-critical period denials of raises and benefits to the Professional Units, at the least, provided "meaning and dimension" to Kaiser's continued illegal conduct in the critical period. The general rule is that the Board will not set aside an election based solely on conduct occurring before the filing of the representation petition. *Harborside Healthcare, Inc.*, 343 NLRB 906, 912 n.18 (2004) (citing *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961) and *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962), commonly referred to as the "*Ideal Electric* rule"). However, the Board has long held that pre-petition conduct should be considered where it gives "meaning and dimension" to post-petition conduct. *See, e.g.*, *BCI Coca-Cola Bottling Co.*, 339 NLRB 67 (2003); *Fruehoff Corp.*, 274 NLRB 403 (1985); *Dresser Indus., Inc.*, 242 NLRB 74 (1979). In this case, Kaiser's initial denials of wage increases and benefits to the Professional Units, and its reasons for the same (the Professional Units no longer being a member of the Coalition because they chose NUHW), gave "meaning and dimension" to the illegal conduct which continued unabated until the end of the critical period. Indeed, as discussed above, a Kaiser spokesman repeated during the critical period Kaiser's earlier stance that NUHW-represented employees were not getting their raises because they were not part of the Coalition.

Third, in this case, Kaiser's pre-petition conduct, even standing alone, is sufficient to overturn this election. In *Harborside Healthcare*, the Board reaffirmed that "*Ideal Electric* notwithstanding, the Board will consider prepetition conduct that is sufficiently serious to have affected the results of the election." 161 NLRB at 912 n.21; *see, e.g.*, *Weather Seal Inc.*, 161 NLRB 1226 (1966) (holding that, although the employer's unlawful conduct favoring one of two competing unions occurred prior to petition's filing date, the unlawful conduct was un-remedied on the date of the election, and the employer's misconduct was an appropriate basis to set aside the election because "it cannot be said that the election was fairly and properly conducted or that the result of election represents the freely expressed desires of the employees"). In other cases,

the Board has repeatedly held that particularly egregious conduct prior to the petition's filing date is grounds to set aside an election. *See Baker Machine & Gear, Inc.*, 220 N.L.R.B. 194 (1975) (discharge of leading union adherents prior to filing date sufficient basis for setting election aside); *Willis Shaw Frozen Express, Inc.*, 209 NLRB 267 (1974) (violence creating atmosphere of coercion prior to filing date required that election be set aside); *see also Servomation of Columbus*, 219 NLRB 504, 506 (1975) ("Of course, if threats or violence generates an atmosphere of fear and coercion which persists to the date of the election and taints the conditions under which it is conducted, the election will be set aside regardless of the time when the misconduct occurred, the end to which it was directed, or the persons responsible for its perpetration.").[12]

Although the Board should not ignore Kaiser's coercive post-petition conduct, even if one looked exclusively at Kaiser's pre-petition conduct, it would sufficient to set aside the election. Kaiser's devastating illegal conduct is exactly the type of "sufficiently serious" pre-petition conduct that could have affected the election results. *See Harborside Healthcare*, 161 NLRB at 912 n.21. As NUHW discussed above, the ALJ recognized in her Report that a potential loss of monetary compensation if a bargaining unit changes representatives hits employees at one of their "most vulnerable spots." (ALJR 14:35-36 & n.22 (quoting *Lake Mary Health & Rehabilitation*, 245 NLRB 544, 544-45 (2005).) Such a conclusion is reinforced by the fact that similar actions by Kaiser directed toward the MSW Unit would have affected each and every bargaining unit members' terms and conditions of employment, and important ones – the

[12] The courts have also held that in certain circumstances pre-petition conduct must be considered when determining whether to set aside an election. *See NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359 (9th Cir.1981) (consideration of pre-petition conduct appropriate); *NLRB v. R. Dakin and Company*, 477 F.2d 492, 494 (9th Cir. 1973) ("In a proper case such a rule [precluding reliance on pre-petition conduct as objectionable] undoubtedly serves a worthwhile purpose. But if its predicate is lacking [that the conduct is 'too remote' to have interfered with employee free choice], then an indiscriminate application [improperly] serves as a blanket exclusion of all evidence from consideration without regard to materiality."); *NLRB v. L&J Equipment Co., Inc.*, 745 F.2d 224, 237 (3d Cir. 1984) (remanding for consideration of pre-petition conduct and holding that the "*Ideal Electric* rule should not be applied woodenly").

employees' wage rates, benefits, and potential bonuses. Just as in *Weather Seal Inc.*, 161 NLRB 1226 (1966), Kaiser's unfair labor practice that gave a distinct advantage to SEIU UHW during the campaign, was un-remedied during the entire campaign, and "it cannot be said that the election was fairly and properly conducted or that the result of election represent the freely expressed desires of the employees." The un-remedied ULP did not allow for free choice in this election untainted by this overriding atmosphere of coercion, which persisted until the vote count, and on that basis alone, the election should be aside.

e. Board Law in Other Contexts Supports the Conclusion that Kaiser's Un-remedied ULP Requires that this Election be Set Aside

Cases applying Board law in other contexts supports the conclusion that this conduct was objectionable. In *Master Slack Corporation*, 271 NLRB 78 (1984), the Board examined whether there was the requisite "causal relationship" – between the alleged unfair labor practices and employee dissatisfaction which led to signing a decertification petition – needed to show taint sufficient to lead to dismissal of the petition. The factors examined in that circumstances are "(1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effects on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Id.* at 84. In general terms, these factors can be summed up as: the time between the illegal conduct and the "event" (in *Master Slack*, the signing of the disaffection petition, here, the election) allegedly tainted by that conduct and the nature of the conduct, i.e., on a substantive basis its likely impact on the employees' section 7 rights.

Using these factors to assess the impact of Kaiser's illegal conduct on the free and fair choice of employees in the election shows the objective likelihood that the change objectionably tainted the election. First, in terms of timing, Kaiser illegally denied employees in the Professional Units their bonuses in spring 2010, just before the subject petition and the campaign

leading up to the October 2010 election. And this conduct was not remedied at the time of the election. *Cf. Master Slack Corp*., 271 NLRB at 78 n.1 (ALJ's finding of a lack of a causal relationship was supported by the fact that the illegal conduct occurred "many years before the petition's circulation, and that the Respondent has complied with the ordered remedies in many significant respects well before the petition's circulation; [t]hus, the Respondent had bargained in good faith and, indeed, had executed a collective-bargaining agreement with the Union, had offered reinstatement to all eligible discriminatees, and had posted a notice to employees agreeing to take the action ordered by the Board; [i]n this context, we find no basis to disturb the judge's reliance on the unambiguous testimony of the petition's signers that the matters raised in the prior and pending Board litigation had no impact whatsoever on their signing of the petition").[13] Second, in terms of the conduct itself, the likely chilling effect on the free and fair choice of unit employees, was significant. The potential impact of Kaiser's threatened conduct was to the entire unit. Moreover, the threatened changes themselves – including a potential denial of a 3% wage increase – went to the heart of the terms and conditions of employment, particularly relevant for workers in this difficult economy. In sum, Kaiser un-remedied illegal conduct was plainly objectionable. The ALJ erred by finding that it was not.

IV. CONCLUSION

For all these reasons, NUHW respectfully files exceptions to the ALJ's recommendations overruling Objection No. 1.

DATED: August 17, 2011

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[13] In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board held that the *Master Slack* test "is an objective one . . . . The relevant inquiry at the hearing does not ask employees *why* they chose to reject the Union." *Id.* at 434 n.2.