UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

KAISER FOUNDATION HOSPITALS
AND THE PERMANENTE MEDICAL GROUP, INC.,

Employers, Case 32-RC-5774

and

NATIONAL UNION OF
HEALTHCARE WORKERS

Petitioner

and

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

Intervenor.

EMPLOYERS' BRIEF IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTION NO. 1

MICHAEL R. LINDSAY
mlindsay@nixonpeabody.com
NIXON PEABODY LLP
Gas Company Tower, 555 West Fifth St., 46th Floor
Los Angeles, California 90013-1010

RONALD GOLDMAN
Ronald.Goldman@kp.org
ROBERT SPAGAT
Robert.Spagat@kp.org
Kaiser Permanente Legal Department
One Kaiser Plaza, 21L
Oakland, CA 94612
Attorneys for the Employers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Kaiser Foundation Hospitals and The Permanente Medical Group (the "Employers" or "Kaiser"), Respondents in the above-referenced matter, hereby file this Brief in Support of the Report and Recommendations of the Administrative Law Judge in this matter as to Objection No. 1. As shown below, the exceptions of the National Union of Healthcare Workers (the "Petitioner" or "NUHW") to the Report and Recommendations of the Administrative Law Judge (the "Report") as to Objection No. 1 (first part only) should be overruled.[1]

FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner filed the election petition here on June 29, 2010, seeking to represent Kaiser employees in the bargaining unit[2] (the "MSW Unit" or the "Unit") that is currently represented by Intervenor, Service Employees International Union, United Healthcare Workers West ("Intervenor" or "SEIU").

The MSW Unit consists of 378 employees working in over 37 separate locations throughout the Employers' Northern California Region. The Petition for Election was filed on June 29, 2010. Pursuant to a Decision and Direction of Election issued on September 7, 2010,

---

[1] The Employers note that even if NUHW's exceptions were upheld, it would not change the outcome – the Administrative Law Judge has recommended the election results be set aside and new election ordered. In light of this simple fact, it is difficult to understand why NUHW has filed exceptions.

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

the election in the MSW Unit was conducted by mail ballot between October 18, 2010 and November 8, 2010.[3] Report at 2. In the mail balloting, 292 votes were submitted; 289 valid votes were counted. The final tally showed 148 in favor of SEIU-UHW and 139 in favor of NUHW.[4] *Id.*

NUHW filed Objections to Conduct of Election and/or to Conduct Affecting the Results of the Election on November 17, 2010. On February 23, 2011, the Regional Director issued his Report and Recommendations. The Regional Director considered Petitioner's various objections and set certain objections for hearing, while overruling the others. The Hearing was held on May 2 and 3, 2011 before the Honorable Lana J. Parke, Administrative Law Judge in Oakland. Testimony was taken from five witnesses, evidence was admitted and the parties enter a number of stipulations.

On July 19, 2011, Administrative Law Judge Parke issued the Report. In the Report,[5] she recommended that Objection No. 1 be overruled, that Objections Nos. 2, 3, 4 and 6 be sustained,

---

3 Petitions for election were also filed by NUHW on that same date in the so-called IBHS and Optical Units, and elections were conducted by mail for these two units at the same time as the election was held in the MSW Unit. NUHW won those two elections and the election results in those matters have been certified.

4 In the IBHS balloting, 806 valid votes were counted. The tally showed 196 in favor of SEIU and 603 in favor of NUHW. Intervenor's Exhibit 5. In the Optical balloting, 296 valid votes were counted. The tally showed 142 in favor of SEIU and 154 in favor of NUHW. Intervenor's Exhibit 6.

5 The Report contains certain factual omissions and typographical errors. For example, at no point anywhere in the Report does Judge Parke address (or even mention) the fact that the three percent across the board pay increase, which was the subject of so much controversy during the campaign, had actually been received by the voters in the Unit before they ever cast their ballots. So too, the Report misstates the date of the ballot count (Report at 6), and misstates the dates of the critical period (Report at 2).

that the election results should be set aside and new election ordered. Specifically, in the Report as to Objection No. 1, Judge Parke held:

> Petitioner's Objection No. asserts, essentially, that the SoCal-pro employers' unlawful conduct toward NUHW-represented employees in the SoCal pro units, in and of itself, interfered with the election. The Board holds that 8(a) violations may, a fortiori, interfere with an election unless the unlawful conduct is so de minimus that it is virtually impossible to conclude the violations could have affected the election. While it is true that one of the Kaiser employers involved in this case engaged in unlawful conduct, as detailed in *Southern California Permanente Medical Group,* [356 NLRB No. 106 (2011)], the conduct did not occur in the MSW unit but in the SoCal pro units, which are distinct and separate geographically from the MSW unit. Kaiser argues that its earlier conduct in discrete bargaining units cannot be considered objectionable in the MSW unit election, as the conduct was not directed at MSW 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 geographically separate unit can, without more, interfere with an election in another union, I recommend that Objection No. 1 be overruled.
>
> Report at 10 (footnotes and citations omitted).

Both NUHW and SEIU have filed exceptions to the Report. (Because the exceptions filed by SEIU relate to the substance and nature of SEIU's campaigning, and because the Employers have consistently not taken a position on any of the individual messages presented by either union during the election period, the Employers do not address SEIU's exceptions.) By contrast, however, NUHW's exceptions relate solely to the Report's recommendations as to Objection No. 1 and directly implicate the Employers' actions. Accordingly, the Employers submit this brief in support of the Report as to Objection No. 1.

In short, because Judge Parke was correct in her recommendations as to Objection No. 1, the National Labor Relations Board ("NLRB" or the "Board") should overrule NUHW's exceptions.

ARGUMENT

"It is well settled that '(r)epresentation elections are not lightly set aside.' *Safeway, Inc.*, 338 N.L.R.B. 525 (2002) (quotation marks and citations omitted)." *Trump Plaza Associates,* 352 N.L.R.B. 628, 629 (2008), *adopted and incorporated* in *Trump Plaza,* 355 N.L.R.B. No. 202 (2010). The party attacking the election results bears a "heavy burden of demonstrating that the alleged objectionable conduct reasonably tended to interfere with employees' free and uncoerced choice in the election." *Id. at* 630. Absent unfair labor practices in the unit,[6] the Board applies an objective standard to determine whether a new election is warranted. *See Cambridge Tool & Mfg. Co.*, 316 N.L.R.B. 716 (1995); *NYES Corp.*, 343 N.L.R.B. 791 (2004); *Lake Mary Health Care Assocs.*, LLC, 345 N.L.R.B. 544, 545 (2005) (all applying an "objective standard").

There were no unfair labor practice complaints issued in connection with this election. Further, there is no question that the Employers never made any threats of reprisal or otherwise to members of the MSW Unit. Indeed, not only did Judge Parke so find (Report at 10), but the Regional Director expressly rejected many such claims in his Report as well. Report of the Regional Director at 8-10.

Thus, Objection No. 1 (as set for hearing) claimed in essence that the effect of the unfair labor practice committed by one of the Employers and certain related entities in connection with three bargaining units in Southern California that had selected NUHW as their bargaining representative in early 2010[7] somehow tainted this election. Contrary to the arguments raised in

---

[6] And indeed no such unfair labor practices are present.

[7] That unfair labor practice resulted in a decision from the Board in Kaiser Foundation Hospitals, 356 N.L.R.B. No. 106 (March 3, 2011). In that matter, the complaint was issued on August 30, 2010. On September 30, 2010, the NLRB authorized the Acting General Counsel to seek relief under Section 10(j) of the National Labor Relations Act, (the "Act").

(Footnote continued on next page)

NUHW's Brief in support of its exceptions, controlling Board law does not support this Objection.

First, despite all of the efforts of NUHW to confound the issues, there is no question that the MSW Unit is not part of the Southern California professional units in which the unfair labor practice arose.[8] NUHW's suggestions to the contrary are absolutely false. (*See especially* NUHW's Brief, at 11: "Indeed, with respect to the terms and conditions that were denied the Professionals after they selected NUHW, the Professional Units and the MSW Unit were in effect the same bargaining unit. [Emphasis in original.]")

In truth, not only are they legally separate units, but the members of the MSW Unit are employed at locations far removed from those of the employees which were the subject of the unfair labor practice complaint. So too, the election in the Southern California professional units was certified over nine months prior to the election here. The charge alleging the unfair labor practice with respect to the Southern California Professionals had been on file for several months

---

(Footnote continued from previous page)

The Acting General Counsel filed a Petition for Temporary Injunction Under Section 10(j) of the Act in the United States District Court for the Central District of California on October 4, 2010. The unfair labor practice complaint was heard by Administrative Law Judge William L. Schmidt on October 18 and 19, 2010. Thus prior to the close of balloting in this election, the Board had already issued an unfair labor practice complaint, conducted a hearing and sought relief under Section 10(j) of the Act in connection with the Southern California unfair labor practice.

NUHW's exceptions fundamentally urge, erroneously to be sure, that the Board's remedial efforts must always be considered a nullity until final compliance. See NUHW Brief, page 5.

[8] So too, NUHW utterly ignores that voters in the two other units in Northern California in elections at this exact same time, selected NUHW, and in one case by a significant margin of victory. Intervenor's Exhibits 5 and 6.

prior to the filing of the petition for election here.[9] Thus the Report is completely correct in observing that the cases involve geographically separate (and legally separate) units. NUHW's factually incorrect arguments to the contrary should be summarily rejected.

NUHW's efforts to confuse the facts by claiming that the separate units "were in effect the same bargaining unit [emphasis in original]" can be readily understood when the Board precedent governing the effect of an unfair labor practice in another geographically remote unit is considered. Specifically, the Board has held that "it is difficult to see how" an unfair labor practice in connection with one bargaining unit would affect employees in an election that does not involve that unit. *Wayne County Neighborhood Legal Services, Inc.*, 333 N.L.R.B. 146, 148 (2001). *See also Antioch Rock*, 327 N.L.R.B. 1091 (1999) (threats made to members of one bargaining unit did not just setting aside election involving another bargaining unit). The Employers cited both of these cases in their Brief to Judge Parke, but NUHW has not seen fit to address them at all in its exceptions.

Instead, NUHW's exceptions are all based on a single argument, that Judge Parke was wrong that there in asserting that: "There being no authority establishing that conduct in a geographically separate unit can, without more, interfere with an election in another unit . . ."[10] Report at 10. Ignoring itself *Wayne County, supra,* and *Antioch Rock, supra,* NUHW claims that in making her legal conclusion, Judge Parke "ignored longstanding Board precedent." *Id.*

---

[9] Thus had NUHW really been sufficiently concerned about the effect of the incident in Southern California, it could have easily requested that its charge there serve as a blocking charge which would have readily addressed the situation. NLRB Case Handling Manual §11730. NUHW did not seek to delay or postpone the election; instead, it made a calculated decision that if it lost, it would claim foul and ask for a redo.

[10] It is unknown why in its Brief, NUHW omitted the word "geographically" from its quotation of Judge Parke's Report. See NUHW Brief at 4.

NUHW cites two earlier cases, *Vegas Village Shopping Corp.,* 229 NLRB 279 (1977) and *Vencor Hospital-Los Angeles,* 324 NLRB 234 (1997)(ALJ opinion) suggesting they somehow resolve "this exact issue."

To the contrary, these cases do not provide NUHW the support that NUHW claims. For example, in *Vegas Village* the NLRB held that an unfair labor practice in one unit (one involving store employees) could be sufficient to taint the outcome of an election in another unit (one involving warehouse and non-store employees) when the elections were conducted at the same time and in the same city. Thus, while claiming that *Vegas Village* presents the "exact issue," what NUHW fails to address, of course, are the numerous and highly distinguishing factors between *Vegas Village* and the instant matter. Specifically, the unfair labor practice here was well outside the critical period, while in *Vegas Village,* it arose in the other unit during the same campaign period. Also, in *Vegas Village,* the elections in both the unit in which the unfair labor practice charge was committed and the other unit occurred at the same time, and the employer was completely identical in both of those elections. Finally the two units were operationally and geographically linked; all of the voters were in Las Vegas. By contrast here, the unfair labor practice in Southern California arose months before the petition for the election here was ever filed. So too, the election campaign in the MSW Unit did not involve in any way the units in which the unfair labor practice arose. The employers are not identical in the two matters, and there is a significant geographic separation between the two units.

Vencor Hospital provides even less support for NUHW's arguments. There the case involved two separate units at a single hospital. The employer was plainly the same. So too, the elections were held on the same day, the petitions were filed at the same time, and the campaign was conducted in both units exactly the same time. There too, the ALJ found factually that the

discharge of an active union supported in one unit caused confusion throughout the hospital and "specifically considering the entire context including several unusual elements presented" ordered a new election. Plainly no such factual findings were made here, nor were they even sought by NUHW.

Further, the truly applicable (and more recent) Board law in the area was ignored by NUHW (or relegated to footnotes). As noted above, NUHW ignored the Board's express holding that "it is difficult to see how" an unfair labor practice in connection with one bargaining unit would affect employees in an election that does not involve that unit. *Wayne County Neighborhood Legal Services, Inc.*, 333 N.L.R.B. 146, 148 (2001).[11] *See also Antioch Rock*, 327 N.L.R.B. 1091 (1999) (threats made to members of one bargaining unit did not just setting aside election involving another bargaining unit). Further, the Board has held that conduct with different bargaining units cannot be considered objectionable unless it was directed at the unit employees who voted in the election at issue. *Food Fair Stores of Florida, Inc.*, 120 N.L.R.B. 1669, 1673 (1958); *Seafood Wholesalers, Ltd.*, 354 N.L.R.B. No. 53 (2009) (with two units undergoing elections at the same time, conduct interfering with the freedom of choice as to one unit cannot be presumed to have had the same effect on the other unit).

---

[11] The facts in *Wayne County* make clear its applicability and why NUHW chose not to discuss it. There the Region had conducted an election with a new union challenging the incumbent union at a single location. The employer committed an unfair labor practice as to one of the unions. Objections were filed as to the results in a run-off election based on this unfair labor practice. (The union that had been subjected to the unfair labor practice was eliminated in the first election.) The Board rejected the unfair labor practice as a basis to challenge the election results specifically holding that "it is difficult to see how" an unfair labor practice in connection with one bargaining unit would affect employees in an election that does not involve that bargaining unit.

In addition to omitting a critical and highly relevant word from its quote of Judge Parke's Report in order to bolster its exceptions, as well as misconstruing Board precedent in the area, NUHW seeks to have the Board establish in this case that whenever an employer commits an unfair labor practice anywhere in any of its operations, no election results can be certified until that unfair labor practice has been fully resolved and some completely unspecified amount of time has passed. NUHW cannot be serious. Such a ruling would mean that there will never again be a need to file an unfair labor practice charge as a blocking charge, despite the provisions of the Case Handling Manual § 11730, because under the position advocated by NUHW, all unfair labor practices automatically mean a new election every single time, regardless of separation of the units, temporal or geographic separation of the workers and the conduct. Such an interpretation would essentially mean that employers with multiple units and a geographically diverse workforce as well as the unions seeking to represent the workers can never rely on the outcome of an election because there might be somewhere in the organization a pending unfair labor practice hundreds of miles away in a totally different unit that will automatically serve to invalidate the election results. The law is plainly to the contrary.

NUHW's exceptions to the Report on Objection No. 1 should be overruled.

CONCLUSION

Accordingly, for the foregoing reasons, NUHW's exceptions to the Administrative Law Judge's Report and Recommendations on Objection No. 1 should be overruled.

DATED: August 25, 2011

Respectfully submitted,

By: _____

MICHAEL LINDSAY

Attorneys for Employers, KAISER FOUNDATION HOSPITALS AND THE PERMANENTE MEDICAL GROUP, INC.

STATEMENT OF SERVICE

CASE NO. Case Case 32-RC-5774

I hereby certify that a copy of **EMPLOYERS' BRIEF IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTION NO. 1** was submitted for E-Filing to the National Labor Relations Board on August 25, 2011.

The following parties were served with a copy of said document by electronic mail on August 25, 2011.

William A. Baudler, Regional Director National Labor Relations Board, Region 32 1301 Clay Street, Room 300-N Oakland, CA 94612-5211 Email: NLRBRegion32@nlrb.gov	Shelley Coppock, Assistant Regional Director National Labor Relations Board, Region 32 1301 Clay Street, Room 300-N Oakland, CA 94612-5211 Email: Shelley.coppock@nlrb.gov
Ronald E. Goldman Robert Spagat Kaiser Foundation Health Plan Inc. One Kaiser Plaza, 21st Floor Oakland, CA 94612 Fax: 510-267-21238 Email: Ronald.Goldman@kp.org Robert.Spagat@kp.org	Florice O. Hoffman, Attorney At Law Law Offices of Florice Hoffman 8502 East Chapman Avenue Suite 353 Orange, CA 92869E-mail: fhoffman@socal.rr.com
Bruce Harland Weinberg Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091 Email:bharland@unioncounsel.net	

Respectfully submitted,

Michael R. Lindsay

Dated at Los Angeles, California, this 25th day of August, 2011.