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## **I. EXCEPTIONS**

The Petitioner National Union of Healthcare Workers (“NUHW” or “Petitioner”) pursuant to Section 102.69 of the Board’s Rules and Regulations hereby files Exceptions to Administrative Law Judge, William G. Kocol’s (“ALJ”) Recommendations and Report on Objections dated August 10, 2011 (“ALJ’s Report on Objections”). Specifically, the NUHW files Exceptions to the ALJ’s Report on Objections overruling objections 2, 3, 4, and 6 and certifying Intervenor Service Employees International Union, United Healthcare Workers West (“Intervenor” or “SEIU-UHW”) as the representative of certain employees of the Employer at Alta Bates Summit Medical Center ( “Employer” or “ABSMC”).

## **II. INTRODUCTION**

Under the General Shoe doctrine, conduct by a party that creates an atmosphere which renders free choice in the election improbable is grounds for setting aside the election.<sup>1</sup> The ALJ ignored the evidence that the Employer allowed SEIU-UHW to campaign in work areas and break rooms that were inconsistent with the SEIU-UHW contractual rights and past practice. [ALJ Report on Objections at 7, 9]. Although the ALJ found that Employer took a neutral position during the election, the evidence demonstrates that the Employer unlawfully favored the Incumbent, SEIU-UHW. The Employer issued confusing instructions to security forces and its management staff that clearly allowed the Intervenor to campaign in non- public areas on the floors and break rooms. It also allowed the Intervenor to have conference room campaign meetings during the three-week period prior to the election in order to campaign. When the Employer was informed by NUHW that the conference rooms were being used for campaign events, the Employer made a perfunctory investigation into the allegations. Furthermore, the Employer failed to take any reasonable steps to monitor or halt SEIU-UHW’s improper

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<sup>1</sup> General Shoe Corp., 77 NLRB 124 (1948)

campaigning inside its conference room after NUHW delivered formal written notification to the Employer on January 7, 2011, including copies of SEIU-UHW's electioneering leaflets distributed inside the Employer's conference rooms (Borsos email to Rick Hinshaw and Bruce Hatten dated 1-7-11). Instead, the Employer turned a blind eye to SEIU-UHW's activity. On January 14, NUHW delivered a second formal written protest to the Employer as SEIU-UHW continued to use the Employers' conference rooms to campaign (Borsos email to Rich Hinshaw, Bruce Hatten and Tom Dowdalls dated 1-14-11). Nonetheless, the ALJ found that "[w]hen NUHW made assertions that SEIU was improperly campaigning, the Employer took steps, albeit modest steps, to ascertain whether this was occurring." [ALJ Report on Objections at 9]. Here, the Employer testified that its steps were to ask SEIU if they were campaigning in the break room and to ask Employee Labor Relations Specialist, Bruce Hatten if he was aware of the campaigning. SEIU denied that it was campaigning and Hatten does not remember being asked to investigate. The ALJ's determination that the Employer took modest steps to investigate is not supported by the record. The Employer than pleads ignorance of the use of the conference rooms. It is incredible that ten months after the contract was ratified that the Employer allowed SEIU-UHW the right to hold numerous all-day meetings at three campuses in the three-week period prior to and up to the election that were allegedly contract administration events. NUHW objects to the determination by the ALJ that the Employer had no duty to monitor the events in the conference room and that as a consequence the Employer had no direct knowledge that SEIU was campaigning in the conference rooms. [ALJ Report on Objections at 6]. The ALJ completely ignored the evidence that the Employer gave preferences to SEIU to campaign in the conference rooms. On the other hand, the ALJ ignored the evidence submitted that demonstrated that every complaint made by the Intervenor regarding NUHW's alleged campaigning was fully investigated by the Employer.

Moreover, evidence submitted by NUHW proved that NUHW employee supporters were under constant surveillance by security. They were photographed and followed and harassed by security. Their conversations were interrupted or listened to. The ALJ stated that law as follows: “Photography and videotaping such activity [public union activity] clearly constitutes more than recordkeeping and tends to create fear among employees of future reprisals.” [ALJ Report on Objections at 10]. He further erroneously determined that the “Employer presented adequate justification for photographing events in and around the cafeteria.” The stated reason was to prevent non employees from distributing literature in the cafeteria. [ALJ Report on Objections at 10]. However, the ALJ ignored evidence that employee supporters of NUHW were photographed and their conversations were listened to when there was no NUHW non-employee staff in the area. Furthermore, the ALJ ignored the legal rights of NUHW non-employee staff and employee supporters to campaign in the public areas of the hospital. [ALJ Report on Objections at 11]. The ALJ determined that “[t]he Employer was not required to allow employees to occupy space in the cafeteria for hours campaigning; nor was it required to allow NUHW to solicit in its lobby or front steps especially where there was no evidence that it allowed SEIU to do so.” [ALJ Report on Objections at 11].

Finally, there was simply no legitimate reason for the Employee Labor Relations Specialist, Bruce Hatten, to be standing in view of employees going to the polling area while taking notes and dressed in a dark trench coat. The Employer does not provide security for the NLRB. In this regard, the ALJ found that “Hatten was stationed too far away from the voting area for there to be any impact on the election.” [ALJ Report on Objections at 14]. The facts are that employees going to the polls had to pass Hatten who stationed himself in an area that allowed him to observe employees going to the polling area.

By the foregoing and other unlawful conduct, the Employer destroyed the laboratory conditions necessary for a free and fair election and such conduct substantially and materially affected the outcome of the election. Accordingly the ALJ's Report and Recommendation should be overruled by the Board, the election should be set aside and the Board should issue an appropriate remedy.

### **III. STATEMENT OF FACTS**

#### **A. INTRODUCTION**

On February 2, 2010 the NUHW filed a petition seeking a representation certification of a bargaining unit of employees employed by the ABSMC. (Board Ex. 1(a) Original Petition). SEIU-UHW, the incumbent bargaining representative at the time of the representation petition, intervened. (Board Exhibit 1(b)).

The unit was comprised of:

“All full-time and regular part-time employees employed by the Employer in Oakland and Berkeley, California, at its Alta Bates, Herrick, Merritt and providence campuses in the following job classifications ( and, where noted parenthetical, only at specific locations): Admitting/Registration Rep; Ancillary Svcs Coder; Associate Care I (Alta Bates Medical Center or ABMC”); Associate Care II-IV Certified; Associate Care II (ABMC); Billing/Scheduling Tech; Cash Adjuster; Central Processing Technician-Lead; Central Processing Technician I; Central Processing Technician II; Certified Nurse Assistant (Summit Medical Center or “SMC”); Clerk Typist; Computer Operator; Computer Operator Senior; Date Operator; Dishwasher/Potwasher; Dispatcher/Transporter (SMC); Distribution Tech; Eligibility Worker; Emergence Svc Tech (SMC); Environmental Aid; ER Unit Cleric (SMC); Financial Counselor; Food Service Aid; Head Env. Aid; Insurance Verifier; LVN; LVN Chem Dep (SMC);

Medical Records Clerk I ; Medical Records Clerk II; Medical Records Clerk III; Medical Records Specialists; Medi-Cal Review Assistants; Monitor Technician (SMC); Nurse Attendant; Office Coordinator; Oncology Data Assistant; Orthopedic Nurse Att. (SMC); Patient Account Asst. ; Patient Account Rep I; Patient Account Rep II; Patient Care Assistant (ABMC); Patient Placement Rep; Patient Transporter (SMC); PBX Operator; Perinatal Aide (SMC); Program Aide (SMC) ; Registration Rep. Lead; Rehab Svc Aide (SMC); Surgical Services Aide (SMC); Technician-Licensed Psyc (ABMC); Transcriptionist ; Unit Secretary, (SMC) Ward Clerk (ABMC); Worker-Mental Health (ABMC); excluding all office clerical and other clerical employees (ABMC), all cooks, stationary engineers, technical, administrative, managerial and professional employees guards, and supervisors as defined in the National Labor Relations Act.” (*Board Ex. 1(e) Report and Recommendations On Objections and Notice of Hearing*, at 1-2.). [ALJ Report on Objections at 2].

Pursuant to a stipulated election agreement approved on December 20, 2010, Region 32 of the NLRB held a secret ballot election on January 19th and 20th, 2011. (*Board Ex. 2(e) Report and Recommendations On Objections and Notice of Hearing*, at 1-2.) The Tally of Ballots was as follows:

Approximate number of eligible voters: 1,129

Number of void ballots: 3

Number of votes cast NUHW: 448

Number of votes cast for Neither: 21

Number of votes cast for SEIU-UHW: 510

Number of Valid Votes Counted: 979

Number of challenged ballots: 12

Valid Votes plus challenged ballots: 991

*(Board Ex. 2(e) Report and Recommendations On Objections and Notice of Hearing, at 2.)* [ALJ Report on Objections at 2].

On April 22, 2011, following NUHW's timely filing of objections to the conduct of the election and an investigation by Region 32 into those objections, William A. Baudler, Regional Director for Region 32, issued a Report and Recommendations on Objections and Notice of Hearing wherein he set NUHW Objections Nos. 2, 3, 4, 6 and 7 for hearing. *Board Ex. 2(e) Supplemental Decision and Notice of Hearing, at 1.*) The hearing was conducted by William G. Kocol, Honorable Administrative Law Judge, on May 10, 12, 13 and 17. At the hearing, NUHW withdrew Objection 7 against SEIU-UHW.

In addition, the NUHW filed an unfair labor practice charge against the Employer in Alta Bates Summit Medical Center, 32-RC-25616, alleging violations of Sections 8(a)(1), (2) and (3) of the Act regarding the access issues and favoring SEIU-UHW with regard to the access. On April 25, 2011, Region 32 administratively deferred the charge on the basis "that resolution of the objections in the representation cases is likely to provide an appropriate basis for resolving the unfair labor practice case."

The ALJ issued his Report on Objections on August 10, 2011.

## **B. RELEVANT SOLICITATION, ACCESS AND DISTRIBUTION RULES**

### **1. THE COLLECTIVE BARGAINING AGREEMENT**

Section 34 of the SEIU-UHW labor agreement governs Intervenor's access to the Employer's medical facilities. (Pet. Exhibit 1.) The following sections limit SEIU-UHW access to the facility:

Section 34.1 "The Field Representative or qualified representative of the Union shall be allowed to visit the Medical Center for the purpose of ascertaining whether or not this Agreement is being observed and to observe job conditions under which employees are employed. The privilege shall be exercised reasonably and shall be related to the representative's responsibilities for seeing that the Medical Center is in compliance with the Agreement."

Section 34.1.e "If the Medical Center determines that a non-employee Union officer(s) and /or representative(s) has engaged in a serious violation of these provisions or the access policy on more than one occasion, the Medical Center may deny access rights to the non-employee Union officer(s) and/or representative(s) for a specified period of time not to exceed two (2) years . . . . "

Section 34.2 "The Field Representative or qualified representative of the Union shall report to a designated management official when entering the Medical Center and such representative shall not interfere with the normal conduct of work in the Medical Center. The Union representative may confer with employees, including Shop Stewards, only upon their own free time and in public areas within the Medical Center such as cafeterias or coffee shops or in the designated non-work areas."

Section 34.3 "In the case of a tour to observe conditions, the Field Representatives or qualified representative shall notify the designated management official where he or she intends to go within the permitted areas of the Medical Center. The Union representative shall not engage in discussion with employees who are on duty during the course of the tour, and shall not be accompanied on the tour by anyone other than an authorized Field Representative."

Section 34.4 “In the case of grievance investigation, the Field Representative shall make an appointment in advance with the designated representative of management. Prompt and reasonable arrangements will be made so that a joint investigation of the grievance can be made.”

Although the Employer contends that the access provided SEIU-UHW was governed by the labor agreement, the Employer never provided copies of the labor agreement to management employees or to security guards. (Tr. at 746). The Employer testified that it prepared Employer Exhibit 4 as the rules governing the election but believed that it was too complicated to provide management and staff and instead informed managers in three oral conference calls during the last week of December 2010 and the first two weeks of January 2011 of the rules regarding access and solicitation during the election. (Tr. at 740-742). The only written document provided security was an index card with an abbreviated Solicitation and Distribution of Literature Policy (Tr. at 865-66, 884; Er. Ex. 10).

At the hearing both the Employer and the Union provided names of the SEIU-UHW staff/field representatives during the critical period. (Pet. Ex. 11(Handwritten Staff Document submitted by Intervenor); Pet. Ex. 36; Er. Ex. 7]. SEIU identified the following named individuals as staff: Dominic Mitchell, Fola Afarigan, Val Tagawa, Mauricio Vides, Mali Woods-Drake, Betlham Michael, Rachel Zamar, Carolyn Conter, Susan Villanueva, Jake Decker, and Stephanie Arellano. The Employer includes additional staff as follows: Darnita (Garry) <sup>2</sup>(ER. Ex. 7 at email p. 2) and Jonathon Bernhardt (Pet. Ex. 36 at 1).

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<sup>2</sup> The Employer designated Darnita Garry as staff. SEIU-UHW presented no evidence on Darnita Garry.

## 2. LABOR ELECTION NEWS

The Employer takes the position that neither the NUHW nor SEIU-UHW was allowed to campaign in patient care areas and in break rooms. However, the Employer's written Labor Election News bulletins progressively enhanced the access provided to SEIU-UHW.

The December 15, 2010 edition of Labor Election News (Issue 2) (Pet. Ex. 38) provides that:

- “SEIU and NUHW non-employee representatives are not permitted to conduct election campaign activity at Alta Bates Summit. . . .”
- “Union representatives may have private conversations with staff in the cafeteria or off hospital property.” (Pet. Ex. 38).

Furthermore, earlier editions of the Employer's Labor Election News provided that:

- “SEIU representatives are permitted to tour work areas if they give notice and only to observe working conditions-not to campaign.”
- “other than authorized posting of SEIU non-campaign materials on designated bulletin boards, distribution of literature is not permitted in the medical center.” (Pet. Ex. 38).

The January 10, 2011 edition of Labor Election News (Issue 5) (Pet. Ex. 6) presumably provided clarification regarding non-employee access rules. Notably, it stated that “campaigning” can occur “during breaks, off hours, break rooms and non-patient care areas.” Notably, the Employer's security guards strictly barred NUHW non-employee staff from accessing break rooms and non-patient care areas other than the cafeterias and entrance hallways, thereby only allowing SEIU-UHW to campaign “during breaks... [in] break rooms and non-patient care areas.” The January 10, 2011 edition stated the following:

“Can someone interrupt me about the election while I'm working?”

- No. Both sides will work hard for your vote. Remind both union representatives: ‘Don’t take me away from my patients or my job.’
- Campaigning cannot occur during your working time or in patient care areas. Only during breaks, off hours, break rooms and non-patient care areas.’ (Pet. Ex. 6).

Less than a week before the election, the January 14, 2011 edition of Labor Election News (Issue 7) clearly states that SEIU-UHW representatives have the right to talk to employees presumably about the election. Notably, it states that “SEIU-UHW representatives may talk to employees on non-work time and in non-work areas” while also establishing separate solicitation rules for NUHW non-employee staff by stating: “Because they do not represent Alta Bates Summit employees, NUHW representatives are allowed only in public areas and must follow our policies regarding solicitation.”

The January 10, 2011 edition of Labor Election News Issue #7 states as follows:

**“My staff is complaining about being pressured and intimidated to vote for one side or the other how should I handle this?”**

- “No one is allowed to intimidate or harass staff at any time while working or while they are voting. This is not only prohibited by our Policies and Procedures, it is against the law and will not be tolerated. Employees can report any threats by calling Security at the number listed below. SEIU-UHW representatives may talk to employees on non-work time and in non-work areas.<sup>3</sup>
- “Because they do not represent Alta Bates Summit employees, NUHW representatives are allowed only in public areas and must follow our policies regarding solicitation.” (Pet. Ex. 7).

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<sup>3</sup> The Employer fails to state that the talking is limited to contract administration. Moreover, the labor agreement states that they can observe job conditions and that they are not to engage in discussion with employees who are on duty. (Pet. Ex. 1 Section 34 at 70-71)

This Labor Election News appears to contradict or modify the earlier communications stating that SEIU-UHW may speak with workers only in public areas of the medical center. Specifically, the December 15, 2011 edition of Labor Election News stated that “SEIU and NUHW non-employee representatives are not permitted to conduct election campaign activity at Alta Bates Summit” and that “Union representatives may have private conversations with staff in the cafeteria or off hospital property.”

Both management staff and security were under the impression from the memos that SEIU-UHW non-employee staff had the right to campaign (talk about the election to employees) on the floors and in break rooms and other non-work areas and to post campaign fliers on the floors and in break rooms.

The ALJ concluded “that the Employer did allow SEIU access to its break rooms well before the critical period and continued to do so though the election.” [ALJ Report on Objections at 7]. The AJ relied on and credited the testimony of Richard Hinshaw, the director of employee/labor relations, that “SEIU was allowed access to break rooms under certain circumstances.” [ALJ Report on Objections at 6]. However, the ALJ ignored evidence that SEIU-UHW was being permitted to campaign in break rooms during the critical period of the election. The ALJ ignored the evidence submitted by NUHW that the Employer including supervisors and security staff allowed SEIU-UHW to campaign in the break rooms, floors and work areas during the critical period.

### **3. SEIU-UHW CONFERENCE ROOM CAMPAIGN EVENTS**

The Employer permitted SEIU-UHW to have access to the non-public conference rooms in the three weeks leading up to the election for campaign events. Bruce Hatten, the labor relations specialist testified that he secured the conference rooms for the events (Tr. at 796-797).

Hatten testified that he normally requests the purpose of the meeting (Tr. at 798-799); but in these cases he just booked the rooms.<sup>4</sup> Although at the time of the SEIU-UHW requests the NLRB election was scheduled, the Employer failed to inquire if the rooms would be used for campaigning and failed to monitor the use of the conference rooms at all. This alleged ignorance of the conference room meetings continued after the Employer was put on notice by NUHW that the conference room events were campaign events including the distribution of SEIU-UHW electioneering literature, which NUHW provided to the Employer (Pet. Exs. 8, 9).<sup>5</sup> Richard Hinshaw, who at the time of the election served as the Director of Employee/Labor Relations (Tr. at 702), testified that he asked Hatten to follow up and he [DOES “HE” REFER TO HINSHAW OR HATTEN?] personally spoke with SEIU-UHW representative Val Tagawa, who denied that the conference room events were campaign related (Tr. at 745-746). Hatten testified that he never was told by Hinshaw to investigate the SEIU-UHW conference room events ((Tr. at 849).<sup>6</sup>

The conference room calendars provided by the Employer show that Hatten<sup>7</sup> booked conference rooms for SEIU-UHW as follows:

Summit (Pet. Ex. 37):

12/22/10	10 am to 1 pm 5 pm to 7 pm
1/4/11	5 pm to 7 pm
1/5/11	11:30 am to 1:30 pm 5 pm to 7 pm
1/7/11	11 am to 1:30 pm

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<sup>4</sup> The Employer provided the policy for use of the conference room (Pet. Ex. 35). The form actually requires information as to the type of meeting and the purpose of the meeting.

<sup>5</sup> The policy allows outside organizations use the conference rooms and would not bar NUHW from booking a room (Pet. Ex. 35).

<sup>6</sup> Hatten testified that he was not aware of the allegation even though he was copied with the emails from NUHW. (Pet. Exs. 8, 9).

<sup>7</sup> Hatten could not remember the number of events he booked for SEIU-UHW but the Employer provided the schedule of the events. (Tr. 826-831; Pet. Exs. 37, 39). An email provided by the Employer shows very short notice from Val Tagawa for the events with no indication of what the purpose the rooms were needed (Er. Ex. 12).

1/14/11	11 am to 1:30 pm 5 pm to 7 pm
1/17/11	11 am to 1:30 pm 5 pm to 7 pm
1/18/11	11 am to 1:30 pm
1/19/11	7 am to 9 am

Alta Bates and Herrick (Pet. Ex. 39):

12/29/10	11 am to 2:30 pm 5 pm to 7 pm	Maffley Auditorium (Herrick Campus) Maffley Auditorium (Herrick Campus)
1/3/11	11 am to 2:30 pm 5 pm to 7 pm	Maffley Auditorium (Herrick Campus) Maffley Auditorium (Herrick Campus)
1/7/11	2:30 pm to 5 pm	Maffley Auditorium (Herrick Campus)
1/14/11	11 am to 1:30 pm 5 pm to 7 pm	AB Auditorium (Ashby Campus) AB Auditorium (Ashby Campus) <sup>8</sup>

At the hearing numerous NUHW witnesses verified that the conference room events were not traditional meetings but rather more like an open house where employees received campaign literature, food and information about the election. The following witnesses testified that there was campaigning at the conference room events and described the literature available on the tables. (Keesha Johnson tr. 151-153; Pet. Ex. 13; Shayne Silva Tr. at 192-193; Pet. Ex. 14; Oscar Medina Tr. at 410-412; Charles Bradley Tr. at 473; DeAnn Horne Tr. at 481-495; Pet. Ex. 23-33; James Boatner Tr. 570-572; Ann Marie Willis Tr. 686). Employees who participated in the wage calculation exercises conducted by SEIU-UHW non-employee staff inside the conference rooms were told that they would lose their contractually guaranteed raises if they changed unions. (Alfred Sanders Tr. at 547; James Boatner Tr. at 600).

Moreover, the Employer alleges that the use of the conference rooms was consistent with past practice. However, the Employer failed to investigate the allegations made by NUHW that the SEIU was using the conference rooms to campaign (Pet. Ex. 8). Richard Hinshaw testified that he asked SEIU if they were campaigning and asked Hatten to investigate NUHW's claims.

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<sup>8</sup> In reviewing the schedule for Alta Bates/Herrick, an additional event marked NLRB election was scheduled on 1/8/2011 from 11 am to 1:30 pm in AB Conf Room 4 Ashby Campus). Pet. Ex. 39).

(Tr. at 745; 746). However, Hatten testified that he never was asked by Hinshaw regarding the allegation. (Tr. at 849). Hinshaw and Hatten failed to question SEIU-UHW's increased use of conference rooms just prior to the NLRB election (Tr. at 744). It is clear that the Employer was at the very least on notice that SEIU-UHW was using the conference rooms for campaign events and chose to ignore the allegation because it did not want to stop the events or provide NUHW with equal access.

#### **4. SEIU-UHW ACCESS TO BREAK ROOMS**

The ALJ determined that SEIU-UHW's access to break rooms was consistent with past practice. [ALJ Report on Objections at 6]. The ALJ did not credit John Borsos, the former director of SEIU-UHW's field representatives, who stated that the Employer for years took the position that field representatives were barred from meeting with employees in the break rooms.[ALJ Report on Objections at 6] (Tr. at 28-30; 68). However, the collective bargaining agreements in effect substantiate the testimony of Borsos. Section 34.2 was consistently interpreted by the Employer to mean that SEIU-UHW representatives could only confer with employees in the cafeteria and coffee shops and not in break rooms. During the election period the Employer changed its policy and allowed SEIU-UHW representatives free access to break rooms for the alleged purpose of policing the labor agreement. Because the SEIU-UHW representatives were allowed into break rooms during the campaign, the Employer now takes the position that it has always allowed SEIU-UHW access to break rooms under certain conditions (Tr.at 732). SEIU-UHW never presented any evidence on whether they were allowed in break rooms but only presented evidence that SEIU-UHW, prior to SEIU's trusteeship in 2009, met in break rooms. (Tr. at 948-949). However, there was no evidence submitted that the Employer had knowledge of SEIU-UHW's access to break rooms prior to the trusteeship. Moreover, none of the pre-trusteeship activities was related to a representational election in the bargaining unit

during the critical period. The Employer clearly banned non-employee access to break rooms prior to the instant NLRB election (Pet. Ex.5). Now, according to the Employer, SEIU-UHW was permitted in break rooms to confer with employees but not to campaign. Here, the Employer feigns ignorance of the fact that SEIU-UHW was campaigning in the break rooms.

During the relevant election period, it is clear that management and security personnel alike believed that SEIU-UHW had the right to not only access the break rooms, but also was free to campaign in the break rooms. Fran Kidd, the Director of Environmental Services and Support Service (Tr. at 343), instructed employees who wanted SEIU-UHW staff to leave the break room that SEIU-UHW had the right as their union to speak with employees about the election and post campaign materials. (Lawana Williams Tr. at 342-343; Pet. Ex. 18 and Marcus Patrick Tr. at 381-382).<sup>9</sup> John Borsos also testified that he was told by Ali Aman, the transportation supervisor, that SEIU-UHW was authorized to campaign in the break rooms but NUHW was prohibited (Tr. at 46). Iesha Epton, the CDP sterile processing manager, informed Jamie Cosio that SEIU-UHW has permission to enter the break rooms to post campaign materials but NUHW literature was not allowed to be posted (Tr. 647-652). Cosio testified that his manager was aware that fliers were being posted by Mauricio, a non-employee staff member of SEIU-UHW. (Tr. at 652; Pet. Ex. 40).<sup>10</sup> Finally, Sal Rosselli testified that he was told by the nurse manager<sup>11</sup> in the sixth floor break room at Alta Bates that SEIU-UHW is allowed to campaign in the break room and not NUHW (tr. at 663-664). The Employer failed to present any managers to testify in order to dispute the NUHW witnesses' testimony.

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<sup>9</sup> Here again Lawana Williams put the Employer on notice of the use of the break rooms for campaigning and the Employer presented no evidence that it investigated the claims. John Borsos also informed the Employer that the Intervenor was campaigning in break rooms (Pet. 8, 9).

<sup>10</sup> Borsos email also made the Employer aware the campaign literature was posted on SEIU-UHW bulletin boards (Pet. Ex. 8).

<sup>11</sup> The manger was identified by DeAnn Horne as Darby Brandli (tr. at 496).

Thus, the record establishes that the Employer changed its longtime position that SEIU-UHW was banned from break rooms under the labor agreement in order to assist SEIU-UHW in the NLRB election. In addition, managers allowed SEIU-UHW staff in the break rooms to campaign and to post campaign material and not for the alleged limited purpose of conferring with employees for representation. The ALJ failed to determine whether the past use of the break rooms was consistent with its use by SEIU during the critical period just prior to the representational election.

#### **5. SEIU-UHW CAMPAIGNED ON PATIENT FLOORS**

The ALJ found that “SEIU engaged in campaigning on patient floors.” [ALJ Report on Objections at 8]. However, the ALJ concluded that “there was no evidence that anyone reported these specific incidents of SEIU election campaigning to the Employer or that the Employer knew about them.” [ALJ Report on Objections at 8]. The Employer conceded that SEIU-UHW was prohibited from campaigning on patient care floors or distributing literature of any kind. However, the Employer’s directives to management, which clearly indicated that field representatives were allowed to talk to employees, differ from the Employer’s stated policy.<sup>12</sup> The following employees testified regarding SEIU-UHW’s campaigning in patient care areas:

- Keesha Johnson testified that SEIU was roaming the floors (Tr. at 183).
- Maria Hernandez testified that she observed both Dominic Mitchell and Mauricio campaigning on the floors (Tr. at 268-269).
- Andrea Garcia saw Felipe Garcia, Betelhem Michael and Dominic Mitchell campaigning in patient care areas (Tr. at 271; 281-284).
- Lawana William testified that she saw Betelhem Michael campaigning on patient floors. (Tr. at 345; pet. Ex. 19).

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<sup>12</sup> Labor Election News (Issue #7) (Pet. Ex. 7) is confusing as the Employer’s policies.

- Kenneth Hill testified that he saw Fola Afariogun in his work area campaigning on numerous occasions (Tr. at 656-657).

Although the ALJ credits some of the testimony, he once again shields the Employer by ignoring the Employer's failure to monitor SEIU-UHW's activities on the floors, thus allowing SEIU-UHW to campaign in patient areas. In addition, the ALJ ignored management's role in allowing SEIU-UHW's electioneering on the floors to occur.

## **6. EMPLOYER SURVEILLANCE**

The NUHW presented numerous witnesses regarding employee and non-employee surveillance in public and non-public areas of the medical center. With little or no written instructions by the Employer, security guards followed NUHW employee-supporters, photographed them, eavesdropped on their conversations and generally engaged in contact that chills employees' section 7 rights.

The following employees testified regarding surveillance conducted by the Employer:

- Yolanda Alley testified that security guard sat next to her close enough to hear her while she was meeting with employees in the cafeteria during the critical period. (Tr. 117-120). Alley testified that a security guard followed a CNA representative onto the floor because he was wearing a red shirt (NUHW color). (Tr. at 117).
- Keesha Johnson was told by security not to distribute literature in the cafeteria (Tr. at 149). In addition, she testified that security would sit in close proximity to her when she was in the cafeteria campaigning for NUHW. (Tr. 184-186).
- Shayne Silva testified and produced a photograph of a security guard who told her that she had to leave the facility to speak with NUHW staff and proceeded to follow her out of the facility and watched her as she spoke to NUHW staff. (Pet. Ex. 15; Tr. at 197-198). Thereafter the guard followed her back into the facility,

interfering with her attempt to procure employee signatures on a petition. (Tr. at 198).

On other occasions, security sat in close proximity to her while she was campaigning in the public areas of the hospital (Tr. 200-201). Silva also testified that Hatten told her to leave the cafeteria because she had been there for too long campaigning for NUHW on her day off. (Tr. at 201).

- Oscar Medina testified to several instances of being followed around the hospital when engaged in activities perceived to be in support of NUHW (Tr. 243-252).
- Ron Jackson testified that a security guard cautioned him to be quiet when he was talking to employees in the public area of the hospital when he was wearing a red suit (Tr. at 338).
- Marcus Patrick testified that he was observed in the cafeteria by security when he was campaigning for NUHW. (Tr. at 383-386).
- DeAnn Horn testified that a security guard escorted her out of the break room when she went with Rosselli to the break room (Tr. at 496). In addition, she testified that Security Guard Hayward McClain took her picture in the cafeteria (Tr. at 505).
- Marcia Boyd testified that she was under scrutiny whenever she spoke with NUHW staff member Beverly Griffith in the public areas of the hospital near the elevators (Tr. at 533).
- Andrea Garcia testified that she was followed to the bathroom on her day off when she was campaigning for NUHW (Tr. at 316-317).
- Elisabeth Troy testified that she was followed by security on her day off and told she could not visit employees in the break room (Tr. at 551).

- James Boatner testified that security guards listened to his conversations with co-workers when he was wearing red in support of NUHW (Tr. at 573). He was told by security he could only talk to his co-workers in the cafeteria (Tr.at 580).  
Finally. Security would not allow him to access the EVS break room on his day off (Tr. at 595).

The ALJ concedes that NUHW employee supporters were photographed. However, the ALJ concludes that the photographing was necessary “to maintain order.” [ALJ Report on Objections at 10]. There was absolutely no evidence provided that the employees who were photographed were either violating any alleged Employer policy or were accompanied by disorderly NUHW staff violating Employer policies, except for one debate in a cafeteria regarding employees’ placement of a tablecloth on a cafeteria table. Richard Sanders acknowledged that he had to repeatedly instruct security guards to only take pictures of NUHW staff and not employees (Tr. at 887). The following employees testified that they were photographed by security:

- Jamale Burke was photographed in the cafeteria (Tr. at 689-690).
- DeAnn Horne was photographed in the cafeteria (Tr. 505-506).
- Ron Jackson was photographed by the elevators (Tr. at 334-336).
- Alfred Sanders photographed while in the cafeteria (Tr. at 550).
- Paul Delehanty testified that he observed security photographing employees in the cafeteria on at least two occasions (Tr. at 211-214).

Here, the ALJ determined that the “isolated instances of photo taking in public areas...could not reasonably have affected the outcome of the election.” [ALJ’s Report on Objections at 13].

## IV. ARGUMENT

### A. Election Conduct Standard of Review

The standard to overturn an election is an objective one, requiring a demonstration that the conduct, taken as a whole, warrants setting aside the election because it had “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); *accord Metaldyne Corp.*, 339 NLRB 352 (2003); *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004); *Baja’s Place, Inc.*, 268 NLRB 868 (1984) (standard applies to conduct by union agents). The test to determine whether conduct was objectionable is an objective test. *Petrochem Insulation, Inc.*, 341 NLRB 473, 473 (2004).

As a general matter, 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).

In light of the narrow margin of difference in the election outcome (62 votes out of 979 ballots cast by bargaining-unit members), the ALJ’s determination that the vote margin was

overwhelming in favor of SEIU-UHW is clearly not supported by the record. [ALJ Report on Objections at 13].

**1. NUHW EXCEPTS TO THE ALJ FINDING THAT THERE WAS NO EVIDENCE THAT THE EMPLOYER’S GRANTED ENHANCED ACCESS/ DISTRIBUTION AND SOLICITATION RIGHTS TO SEIU-UHW.**

The ALJ overruled objections 2 and 3 on the basis that the Employer merely granted access to SEIU-UHW “consistent with its contractual obligations and past practice.” [ALJ Report on Objections at 9]. In addition, the ALJ found that the Employer had no knowledge of SEIU-UHW campaigning in non-public areas of the hospital and when NUHW made assertions that SEIU-UHW was improperly campaigning that “the Employer took steps, albeit modest steps, to ascertain whether this was occurring .” [ALJ Report on Objections at 10]. In fact, NUHW presented substantial evidence that the Employer’s management and security knew that Intervenor’s non-employee representatives were engaging in nonpublic area campaigning and overtly indicated to bargaining unit members that their conduct was permitted (or was legal or could not be stopped), and the knowledge and actions of these managers must be imputed to the employer. *See, e.g., Dobbs International Services, Inc.*, 335 NLRB 972, 972-73 (2001).

Board law holds that during a representation campaign between an incumbent and rival union, even where the incumbent has a contractual right of access to work areas *to administer the contract and conduct grievances*, the employer acts illegally when it does not make “reasonable efforts” to restrict the incumbent from going *beyond* these limited access rights to campaign in work areas, while the employer correspondingly denies rival union(s) similar rights to campaign in work areas. *Laub Baking Co.*, 131 NLRB 869, 871 (1961).<sup>13</sup> That type of unlawful support is grounds to set aside an election, particularly where, as here, the employer has knowledge of the

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<sup>13</sup> *See also H & F. Binch Co.*, 168 NLRB 929, 930, 936-37, 937 n.27 (disparity in treatment accorded incumbent and rival was illegal, particularly where conduct ran counter to CBA between employer and incumbent).

campaigning and permits it to continue. *See, e.g., Raley's, Inc.*, 256 NLRB 946, 956-57 (1981) (such conduct illegal and objectionable), *aff'd on reconsideration to constitute objectionable conduct*, 272 NLRB 1136, 1136 & 1136 n.2 (1984).<sup>14</sup>

That rule is consistent with longstanding Board precedent in the rival union context that employers are not permitted to grant wide-ranging access to one union's non-employee supporters to conduct organizational activities, while denying supporters of the rival union comparable access. For example, in *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), the Board held that an employer violated the Act by "provid[ing] acts of assistance to UNITE . . . in contravention of its own no-solicitation policy, while denying equal access to ATC representatives." *Accord Katz's Deli*, 316 NLRB 318, 333 (1995); *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993); *General Iron Corp.*, 224 NLRB 1180 (1980); *Price Crusher Food Warehouse*, 249 NLRB 433, 439 (1964). The goal of this rule is to prevent employers from "coerc[ing] employees in the exercise of their free choice in selecting a bargaining representative." *See Duane Read*, 338 NLRB at 994.<sup>15</sup>

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<sup>14</sup> *See also Nat'l Container Corp.*, 103 NLRB 1544, 1546, 1562 (1953) (disparate electioneering privileges given to two unions by employer was objectionable conduct); *Monfort of Colorado, Inc.*, 256 NLRB 612, 618-19 (1981) (in reaching conclusion adopted by the Board on other grounds, the ALJ held in a portion of his opinion not reached by the Board: "[The employer] argues in its brief that in permitting greater access to the facility to [the putative incumbent - NMU] than to [the rival - UFCW] it was merely complying with article 25 of the collective-bargaining agreement which was valid and, in any event, [the employer] was not aware of any conduct by NMU's agents inconsistent with its right of access to the facility. This argument has several flaws. . . . Finally, the NMU organizers were not on the premises to inspect working conditions nor to carry out the terms of the agreement. They were there to get cards signed and in so doing they [acted contrary to the agreement between the employer and NMU]. In addition, the testimony at the hearing showed several examples of NMU work time solicitation occurring in the presence of and, on one occasion, with the express permission of [the employer's] supervisors. Therefore, this defense must be rejected." (footnotes omitted)).

<sup>15</sup> *See also Lake City Foundry Co.*, 173 NLRB 1081, 1089, 1099-1100 (1968), *enforcement denied*, 432 F.3d 1162 (7th Cir. 1970). In *Lake City*, the Board held that allowing one of two competing unions to conduct organizing meetings on company premises during company time, even where the second union did not request access, was an unfair labor practice and supported setting aside the election. The Seventh Circuit refused to enforce the Board's order on this aspect of the case because meetings on company property were not uncommon and, unlike under our facts, the second union did not request to meet with employees on company property.

The Board decisions in *RCA Del Caribe*, 262 NLRB 963 (1982) and *West Lawrence Care Center Inc.*, 308 NLRB 1011 (1992) support adherence to the *Laub Baking/ Raley's* rule. In *RCA Del Caribe*, the Board overruled *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945) and held that the filing of a representation petition by an outside union does not require an employer to withdraw from bargaining with an incumbent union. The Board discussed the importance of the “stability of collective bargaining relationships,” and *reaffirmed* the importance of “employer neutrality” in rival union situations to “facilitat[e] employee free choice.” 262 NLRB at 965. It held that the maintenance of the status quo ante collective bargaining rights of the incumbent should not be disturbed after a rival union has filed a representation petition because that is the best way to approximate employer neutrality and employee free choice while furthering stability in industrial relations. (*Id.*) Relying on *RCA Del Caribe*, and consistent with that decision, the Board in *West Lawrence* held that an employer could not depart from the status quo ante and limit an incumbent union’s access rights to organize during a rival union campaign when *the employer’s negotiated access provision with the union permitted organizing activity in the employer’s facility*. In reaching its decision, the Board was careful to note that there was no contractual or historical limitation on what non-employees could do when in work areas. *See West Lawrence*, 308 NLRB at 1011, 1012 n.3. These decisions reaffirmed the importance of employer neutrality and the promotion of employee free choice in incumbent-rival union situations, but held that employers cannot depart from the status quo to achieve these objectives.<sup>16</sup> Importantly, the follow-up 1984 decision in *Raley’s Inc.*, 272 NLRB 1136, which came two years after *RCA Del Caribe*, reaffirmed the Board’s earlier decision that the employer committed objectionable conduct because it did not

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<sup>16</sup> Indeed, the Board in *RCA Del Caribe* in support of its rule that the status quo should be maintained held that “if an employer withdraws from bargaining, particularly when agreement is imminent, this withdrawal may . . . emphatically signal repudiation of the incumbent and preference for the rival.” *Id.* at 965.

stop the incumbent's representatives from campaigning among employees in work areas, while it simultaneously prevented the rival from doing the same. In the underlying decision, the Board explained that, as in this case, there was a contractual clause granting limited incumbent access to employees in the employer's stores "for the purpose of observing working conditions, making inquiries from the employees concerning working conditions, complaints of members of the Association and/or any violations of this Agreement," but not for other purposes. *See Raley's Inc.*, 256 NLRB at 948. The fact-intensive analysis in the ALJ's Board-adopted decision demonstrated that the employer actions and inaction enabled the incumbent's representatives to go well beyond those status quo access rights to campaign in the stores, while at the same time, the employer prevented the rival union's representatives from in-store campaigning. Thus, the election had to be set aside. *Id.* at 957-58.

Here, the Employer granted SEIU-UHW enhanced access during the weeks just prior to the election, undermining the Employer's claim of neutrality in the election. The Employer provided SEIU-UHW unprecedented access to its employees.<sup>17</sup> Under the Section 34.3 of the labor agreement, SEIU-UHW was prohibited from engaging in discussion with on-duty employees. Article 34.2 provided that field representatives could not confer with employees in the non-public areas of the hospital and, until the instant election, the Employer's position was this section prohibited SEIU-UHW non-employee representatives from accessing the break rooms. Grievance investigations are joint activities with management under Section 34.4. It is clear that the Employer provided SEIU-UHW virtually unlimited and autonomous use of the conference rooms in the private areas of the hospital. In addition, union bulletin boards no longer required management approval as set forth in Section 31 of the labor agreement. (Pet. Ex. 1 at

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<sup>17</sup> The arbitration award (Pet. Ex. 7) demonstrates that in the past the Employer interpreted SEIU-UHW's access very restrictively and in fact the successor labor agreement (Pet. Ex. 1) incorporated more serious remedies for alleged violations of the access provisions.

68). Furthermore, the ALJ chose to ignore that the past practice of the Employer did not support a finding that electioneering in the break rooms was permitted. Finally, the Employer failed to adequately investigate complaints by NUHW or NUHW employee supporters regarding SEIU-UHW's campaigning in break rooms, as well as its improper use of conference rooms and bulletin boards for electioneering. The Employer simply asked an SEIU representative if they were campaigning in the conference rooms and the SEIU responded that the claims were false. Hinshaw testified that he instructed Hatten to investigate the complaints whereas Hatten does not remember being questioned by Hinshaw. [ALJ Report on Objections at 8 and note 5].

Based on the foregoing, NUHW excepts to the ALJ's findings and requests that Objections 2 and 3 be sustained.

**2. NUHW EXCEPTS TO THE ALJ'S FINDING THAT THE EMPLOYER DID NOT ENGAGE IN SUFFICIENT UNLAWFUL SURVEILLANCE OF EMPLOYEE SUPPORTERS OF NUHW TO WARRANT OVERTURNING THE ELECTION.**

NUHW excepts to the ALJ's determination that based upon the margin of difference of 6% in the vote total, that the evidence failed to demonstrate that the actions of the security guards in photographing and otherwise engaging in surveillance of NUHW supporters was sufficient to warrant overturning the election. [ALJ Report on Objections at 13]. In fact, if only 32 voters – or 3% of the bargaining-unit members casting ballots – had instead marked their ballots for NUHW, then the outcome of the representation election would have been reversed. The record shows that the conduct of the security guards was severe and warrants overturning the election result.

The Employer engaged in unlawful surveillance of supporters of NUHW. It has long been Board law that it is unlawful to engage in surveillance of legal employee and non-employee union activity. The question of surveillance arises when employees and non-employees are engaged in legal conduct. The NUHW witnesses testified that the Employer and security

observed their activities in close proximity to protected activity in the cafeteria. Apparently security was documenting all activity in the cafeteria and in other public areas of the Employer's facilities without regard to whether the activity was lawful or in violation of any alleged hospital policy. When, as in this case, the observation goes beyond mere observance, *Arrow Automotive Industries*, 258 NLRB 860, 863 (1981). factors to be considered are the frequency and timing of the employer's observation, the duration of the observation and the proximity to the employees. *Brown Transport Corp.*, 294 NLRB 969, 971-2 (1989).

Here, the Employer followed employees in the public areas of the hospital and outside the facility when they were engaging in lawful union activity. In addition, the Employer surveilled NUHW non-employee staffers John Borsos, Sal Rosselli and Beverly Griffith in the public areas of the hospital and also followed them off-site to their cars parked on public streets. Under these circumstances, the Employer engaged in unlawful surveillance and objection 4 to the election should be sustained.

**3. NUHW EXCEPTS TO THE ALJ'S FINDING THAT THE EMPLOYER DID NOT UNLAWFULLY PHOTOGRAPH EMPLOYEES ENGAGED IN PROTECTED ACTIVITY.**

The evidence demonstrates that employees were photographed when perceived to be engaged in activity on behalf of NUHW, including the wearing of the color red. The Employer and security personnel concede that on occasion employees may have been photographed but it was incidental to the photographing of NUHW staff. The arguments presented by the Employer involve cases where there is criminal trespass and mass picketing.

The Board has found, with court approval, that, absent proper justification, *employer* photographing or videotaping of employees engaged in protected activities is unlawful "because

it has a tendency to intimidate." *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (employer photographing and videotaping of employees handing out leaflets front of store unlawful).

Here, the ALJ determined that the photographing and surveillance were relatively few in number and thus the 62 vote margin was overwhelming enough to outweigh the conduct of a few security guards. [ALJ report on Objections at 13]. The evidence submitted in the record was not isolated and clearly undermined the laboratory conditions necessary for a fair election.

Accordingly, objection 4 should be sustained.

**4. NUHW EXCEPTS TO THE ALJ'S FINDING THAT THE EMPLOYER DID NOT UNLAWFULLY MONITOR THE POLLING.**

The NUHW presented un rebutted evidence that Bruce Hatten stationed himself on January 20, 2011 during the evening polling for approximately 30 minutes in view of employees entering and exiting the polling area. The explanation provided by the Employer was that he was investigating a complaint that an employee was taking pictures of co-workers. Hatten, as the labor relations specialist, was taking notes and wearing a trench coat. In addition, two additional witnesses observed Hatten in the polling areas on January 19 (Tr. 627-628, 690-691).

The ALJ's determination that Hatten was stationed too far from the voting area for too short a period of time ignores the fact that Hatten was stationed in an area where employees on the way to vote believed he was monitoring the vote. [ALJ Report on Objections at 14]. The activities of Hatten conveyed to these employees the impression that they were being watched. This conduct is found to have destroyed the laboratory conditions necessary for the conduct of a free and fair election. See *Ravenswood Electronics Corporation*, 232 NLRB 609 (1977); *Shrewsbury Nursing Home, Inc.*, 227 NLRB 47 (1976); and *Woodland Molded Plastics Corp.*, 250 NLRB No. 20 (1980).

Based on the foregoing, objection 6 should be sustained.

**V. CONCLUSION**

For the foregoing reasons, NUHW respectfully requests that the Board grant its Exceptions to the ALJ's Report on Objections sustain NUHW's Objections Nos. 2, 3, 4 and 6 and order that the election in this matter be set aside.

Respectfully submitted,

DATED: September 7, 2011

LAW OFFICE OF FLORICE HOFFMAN

By:

/s/ \_\_\_\_\_

Florice Hoffman

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