United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

. DATE: November 30, 2012

TO: William A. Baudler, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Kaiser Foundation Health Plans, et al.
Cases 32-CA-025578, 32-CA-064585

518-4020-0133
518-4020-5000
518-4020-8300
518-4030-4200
518-4030-5600
518-4030-8400
518-4030-9000
530-6067-4060

These cases involve the efforts of SEIU-United Healthcare Workers West (SEIU-UHW) and National Union of Healthcare Workers (NUHW) to each represent almost 43,000 bargaining unit employees at multiple Employer facilities throughout California. The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(1) and (2) by providing unlawful financial assistance to SEIU-UHW by paying the benefits of "lost-timer" employees on union leave who allegedly campaigned in favor of SEIU-UHW; paying the wages and benefits of employees serving as "contract specialists" and shop stewards who allegedly campaigned in favor of SEIU-UHW; contributing to a joint multiemployer SEIU-UHW education fund; providing SEIU-UHW with meeting space and conference rooms in which to campaign; and by discriminatorily implementing its access, solicitation, and distribution policies in favor of SEIU-UHW. We conclude, in agreement with the Region, that the Employer did not violate the Act as alleged, and that the charges should be dismissed, absent withdrawal.

1. *Payment of health, dental, and life insurance benefits and PSP bonuses and accrual of vacation, sick leave, education leave, life balance leave, and credited pension service for "lost-timer" employees on union leave.*

NUHW alleges that the Employer provided unlawful financial assistance to SEIU-UHW by making health, dental, and life insurance benefit

and PSP bonus payments and permitting accrual of vacation time, sick leave, education leave, life balance leave, and pension service credit for "lost-timer" employees on unpaid union leave who allegedly engaged in pro-SEIU-UHW campaigning. We conclude, in agreement with the Region, that the Employer did not provide unlawful financial assistance with respect to such lost-timer contributions and accruals, assuming arguendo that lost-timers engaged in pro-SEIU campaigning.

Although employers generally must remain strictly neutral in representation campaigns among two or more unions, the parties to an established bargaining relationship must be required to "continue to meet their full bargaining obligations under Section 8(a)(5)."[1] Thus, the Board has recognized that an incumbent union may have an inherent advantage over a rival union where its contract with the employer or past practice provides it with access to the employer's property and employees.[2] If a broadly-worded union access clause places no restrictions on the scope of such access, and the parties' past practice has not otherwise limited the access right, an employer will violate Section 8(a)(5) by unilaterally restricting access solely to grievance or contract administration purposes, even if the employer claims it did so to maintain neutrality between the incumbent and a rival union.[3] An employer that meets its bargaining obligations to the incumbent, and does not knowingly allow the incumbent to abuse its contractual rights so as to obtain an unfair campaigning advantage over a rival union, does not violate Section 8(a)(2).[4]

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[1] *West Lawrence Care Center*, 308 NLRB 1011, 1012 (1992) ("strict neutrality is not the sole concern where an incumbent union is challenged by a rival labor organization"), citing *RCA Del Caribe*, 262 NLRB 963, 965 (1982).

[2] *Laub Baking Co.*, 131 NLRB 869, 871 (1961) ("[u]ndoubtedly, this confers an advantage upon the incumbent union since it is presented with increased opportunities to contact the employees").

[3] *West Lawrence Care Center*, 308 NLRB at 1012 & n.3 (employer could not restrict union from accessing facility for organizational purposes where access clause placed no restriction on scope of access, but noting that parties' past practice can limit otherwise broad access clause).

[4] *Laub Baking Co.*, 131 NLRB at 871 (no Section 8(a)(2) violation when rival union requested access and employer, after learning incumbent began campaigning during its contract administration visits, took reasonable efforts to enforce its no-electioneering policy against incumbent).

This analytical framework would apply as well to contractual union-leave clauses, which similarly involve contractual rights of the incumbent union that are not available to the rival union.[5]

Here, the relevant collective-bargaining agreements contain broadly-worded provisions regarding the duties that lost-timers perform. Thus, the National Agreement and local collective-bargaining agreements describe lost-timers' responsibilities as performing "official union business"[6] or "Union business."[7] Clearly, such language facially does not limit lost-timers to representational activities.[8] Moreover, the Region's investigation has found no past practice indicating that SEIU-UHW and the Employer ever interpreted those provisions as limiting lost-timers only to representational activities. Were the Employer to unilaterally restrict lost-timers to representational functions, it would violate Section 8(a)(5).[9] Accordingly,

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[5] We recognize that, prior to its decision in *RCA Del Caribe*, above, the Board indicated that an employer violates Section 8(a)(2) by paying wages and/or benefits to employees campaigning for an incumbent union against a rival union. See *Northern Metal Products Co.*, 171 NLRB 98, 113 (1968) (employer violated Section 8(a)(2) by granting employees paid time off and overtime to campaign for incumbent union while on working time). However, *RCA Del Caribe* changed the "neutrality" requirement vis-à-vis incumbent unions. Moreover, in *Northern Metal Products*, there was no contractual provision or past practice regarding paid time off that the employer was obligated to follow with regard to its incumbent union.

[6] National Agreement, Section 1.K.1.

[7] Northern California Local Agreement, Section 4.A.; Southern California Local Agreement, Section 4.A.

[8] We reject NUHW's argument that other language in the National Agreement limits lost-timers to representational functions. Although the National Agreement states that the Employer "will pay" employees for Union leaves of absence to participate in "grievances, issue resolution meetings, [Employer] work committee and interest-based negotiations," that language only limits which activities such employees will be *paid* for. It does not preclude lost-timers from engaging in other functions for which they will not receive payment.

[9] *West Lawrence Care Center*, 308 NLRB at 1012. We are not persuaded by NUHW's contention that *West Lawrence* is inapposite because LMRA Section

even assuming lost-timers campaigned during their work time with the Employer's knowledge and acquiescence, the Employer has not provided unlawful financial assistance by paying for lost-timers' health, dental, and life insurance benefits and permitting them to accrue vacation time, sick leave, education leave, life balance leave, and pension service credit.

Alternatively, SEIU-UHW reimbursed the Employer for the cost of the health, dental, and life insurance payments it made on behalf of the long-term lost timers.[10] This was consistent with the Employer's practice regarding employees on other kinds of long-term unpaid leave. Although the initial billing and reimbursement within the Section 10(b) period was delayed by a few weeks, the evidence indicates the delay was caused by administrative

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302(a)—which prohibits employers from paying "any money or other thing of value" to a union not excepted by Section 302(c)—would render unlawful any agreement or practice whereby the Employer provides lost-timers with employment benefits. Some federal courts have found that Section 302 permits employers to provide such benefits in circumstances similar to the instant case. See, e.g., *Communication Workers v. Bell Atlantic Network Services*, 670 F.Supp. 416, 419-23 (D.D.C.1987) (benefits granted to employees on union leaves of absence of up to 18 years acceptable under Section 302(c)(1) exception, because continuing payments constituted recompense for past services performed for the employer, and continuing payments were bargained for and included in collective-bargaining agreement); *Toth v. USX Corp.*, 883 F.2d 1297, 1300-1305 (7th Cir. 1989) (employer's leave policy, whereby employees continued to accrue pension credit until retirement whether they remained with employer or left to work for union, violated Section 302(a) only because the policy was not included in the collective-bargaining agreement). In any event, the Section 302 issue is currently the subject of a federal court lawsuit between the parties, and it is more appropriately addressed in that forum.

[10] NUHW incorrectly asserts that there was no reimbursement for Southern California long-term lost-timers. We also reject NUHW's contention that the Employer continued to pay the *wages* of some lost-timers based on an August 21 (2010) e-mail between an Employer official and an SEIU-UHW official regarding lost-timers "clocking in." The Employer official had mistakenly believed that lost-timers had clocked in and were still being paid by the Employer because they were listed as "active" in the Employer's system. Actually, they had not clocked in and were not being paid by the Employer. Rather, those individuals remained listed as "active" because their paperwork for becoming lost-timers had not been fully processed in the Employer's system.

disorganization and does not, in itself, warrant a finding of unlawful financial assistance. And although SEIU-UHW did not reimburse the Employer for the health, dental, and life insurance payments it made on behalf of the short-term lost-timers, this was consistent with the Employer's practice regarding employees on other kinds of short-term unpaid leave, as well as employees who cease employment altogether before the end of a month.

Although the Employer acknowledges that SEIU-UHW did not reimburse it for lost-timers' accrual of vacation leave, sick leave, education leave, or life balance leave, we conclude that this did not constitute unlawful financial assistance. First, leave accrual is independent of the length of time or hours worked as a lost-timer. Thus, the Employer credits lost-timers (as well as its other employees) with leave allotments in advance on their anniversary date (or once per month for life balance leave), and unused leave cannot be carried over. Second, lost-timers cannot use the aforementioned leave while in lost-timer status. For example, lost-timers who are out sick do not receive payment from the Employer regardless of how much sick leave has been allotted, and lost-timers who take time off to engage in educational activities do not receive payment regardless of how much educational leave has been allotted.

Furthermore, paying PSP bonuses to lost-timers is not unlawful financial assistance even though SEIU-UHW did not reimburse the Employer. The PSP bonus is an annual payment made to employees if organizational performance targets are met. Although lost-timers (and other employees on unpaid leave) who satisfy certain criteria are eligible to receive a PSP bonus, the Employer calculates their eligibility and bonus amount solely according to the hours worked for the Employer in paid status during the year; the bonus is independent of the lost-timer's work for SEIU-UHW.

We also conclude that the Employer did not provide unlawful financial assistance by permitting lost-timers to accrue credited service for their pension benefit without reimbursement. In this respect, the Employer treats lost-timers the same as its other employees on unpaid leave. Indeed, the Employer arguably would violate Section 8(a)(3) if it precluded lost-timers from accruing service for their pension benefit but not other employees.[11] Moreover, the Employer's failure to seek reimbursement from SEIU-UHW for the "value" of lost-timers' pension accruals does not constitute unlawful financial assistance because the value is speculative, and depends on multiple

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[11] See, e.g., *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034, 1048 (1979) (finding employer violated Section 8(a)(3) by discriminatorily withholding pension benefits from employees who supported the union).

factors, including whether the employee is vested and the employee's total earnings at retirement.

We also reject NUHW's argument that the increased number of lost-timers in 2010 supports a finding of unlawful financial assistance.[12] That increase is explained by the fact that the post-trusteeship SEIU-UHW had lost most of its staff representatives, contract specialists, and stewards at the Employer's facilities. This affected SEIU-UHW's ability to timely resolve grievances and other employee issues. These factors, rather than Employer support for SEIU-UHW's campaign, sufficiently explain the need for an increase in the number of lost-timers.

2. *Payment of wages and benefits for contract specialists and shop stewards.*

NUHW alleges that the Employer provided unlawful financial assistance to SEIU-UHW by paying the wages and benefits of employees serving as "contract specialists" because they are directed by SEIU-UHW when acting in that capacity, regardless of whether they engaged in campaigning. In the alternative, NUHW alleges that the Employer provided unlawful financial assistance by paying the wages and benefits of contract specialists, as well as shop stewards who, it alleges, engaged in pro-SEIU-UHW campaigning. We conclude, in agreement with the Region, that the Employer did not provide unlawful financial assistance with respect to contract specialists' and shop stewards' wages and benefits.

Initially, we reject NUHW's argument that the payment of wages and benefits to contract specialists is unlawful merely because contract specialists are directed by SEIU-UHW while working in that position, without regard to whether they engage in campaigning. It is well settled that an employer does not violate Section 8(a)(2) by merely paying employees while they are performing functions for their union.[13]

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[12] Although the number of lost-timers increased, there were never more than 40 long-term lost timers at any one time.

[13] See, e.g., *Coppinger Machinery Service*, 279 NLRB 609, 610-11 (1986) (employer lawfully paid bargaining committee members' customary wages during negotiations and committee meetings preceding negotiations, as this was "cooperation of a ministerial character growing out of an amicable labor-management relationship"); *BASF Wyandotte*, 274 NLRB 978, 980 (1985), enfd. 798 F.2d 849 (5th Cir. 1986) (employer violated Section 8(a)(5) by ending practice of permitting employee to spend four hours per workday performing

Regarding NUHW's alternative argument, which emphasizes contract specialists' and shop stewards' alleged campaigning activities, we apply the same *RCA Del Caribe*- and *West Lawrence Care Center*-based legal framework that we applied to the lost-timers. Unlike the contractual provisions regarding lost-timers' duties, however, the contractual provisions setting forth contract specialists' and shop stewards' duties appear to limit them to representational functions.[14] Thus, the national agreement describes contract specialists' duties as including "contract interpretation and administration, contract education, guidance in grievance and problem resolution, improvement in shop steward capacity[,] and consistent contract application."[15] Similarly, the local agreements state that a contract specialist's primary role is to "assist stewards" in contract administration, including but not limited to "processing grievances, training stewards, attending investigatory meetings, etc."[16] As for stewards, the local agreements state that stewards "shall not lose pay because of their activities related to grievances, investigations or disciplinary meetings."[17] Moreover, the Region's investigation has found no past practice indicating that SEIU-UHW and the Employer ever interpreted those provisions as permitting contract specialists or stewards to engage in campaigning or nonrepresentational functions during their work time. Therefore, evidence that contract specialists or shop stewards campaigned during their work time with the Employer's knowledge and acquiescence could constitute unlawful financial assistance. However, as described below, the Region's investigation revealed insufficient evidence of such activity to support finding a violation.

The Region's investigation revealed, at most, 12 allegations of contract specialists engaging in campaigning. Regarding five of the 12 allegations, the

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union business, a portion of which included processing grievances; that practice did not constitute unlawful assistance).

[14] We also note that, unlike lost-timers, the Employer pays the wages, in addition to benefits and continued leave accrual, of contract specialists and shop stewards.

[15] National Agreement, Section 1.F.3.

[16] Northern California Local Agreement, Section 2.C.; Southern California Local Agreement, Section 2.C.

[17] Northern California Local Agreement, Section 1.B.3.; Southern California Local Agreement, Section 1.B.3.

evidence was insufficient to show that the Employer permitted contract specialists to campaign on work time rather than on their own time.[18] As to eight of the 12 allegations, there was no evidence that the incident was reported to the Employer or that the Employer was otherwise aware of the campaigning.[19] The Employer was made aware of four allegations of contract specialist campaigning, but handled the matter appropriately, i.e. attempting to investigate the complaint but finding the witness to be uncooperative[20]; investigating the complaint but being unable to determine that the contract specialists had campaigned during work time[21]; or advising the relevant onsite manager or contract specialist to abide by its rules.[22]

The evidence regarding work-time campaigning by shop stewards with the Employer's knowledge and acquiescence is also lacking. The Region's investigation revealed that although campaigning occurred during shop

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[18] These allegations included contract specialists campaigning at the San Francisco facility in August and September of 2010; campaigning at the Roseville facility in Summer 2010; campaigning at the Baldwin Park facility prior to and during the 2010 election; distributing leaflets at the South Bay facility in mid-February 2011, Spring or Summer 2011, and July/August 2011; and distributing flyers to employees as they entered the Walnut Creek cafeteria in July 2011.

[19] These allegations included contract specialists campaigning at the San Francisco facility in August and September 2010; campaigning prior to and during the 2010 election at Baldwin Park; campaigning in the auditorium on the main floor of the Anaheim medical center in September 2010; distributing leaflets at the South Bay facility in mid-February 2011, Spring or Summer 2011, and July/August 2011; campaigning "all day" in the San Jose cafeteria; campaigning at the Gilroy Medical Offices; electioneering in the Modesto facility cafeteria during August and September 2010; and electioneering at the San Francisco Medical Center in August and September 2010.

[20] This allegation, which was supported by hearsay testimony, involved campaigning in the Kaiser Anaheim facility during the week of September 15, 2011.

[21] These allegations included campaigning in the Antioch emergency room in September 2010 and campaigning in the San Jose cafeteria in August 2011.

[22] This allegation involved campaigning at the Roseville facility in Summer 2010.

steward council meetings, the Employer was not aware of it.[23] Also, to the extent there was evidence that some shop stewards prematurely departed steward council meetings to campaign in other areas of an Employer facility, the evidence did not reveal that the campaigning occurred during actual meeting/work times as opposed to break times and/or there is no evidence that the Employer was aware of this conduct.[24] And, in the few instances where the evidence indicated that stewards campaigned during work time and the misconduct was reported to the Employer, the Employer responded appropriately, i.e. telling the witness that the wrongdoers would be dealt with or spoken to.[25] There is no evidence that the Employer failed to do so.

NUHW contends that Employer knowledge and condonation of campaigning by contract specialists or shop stewards during work time is irrelevant to a financial assistance violation, i.e. it asserts that payment of wages and benefits is *per se* unlawful. However, the Board has regularly assessed employer knowledge about campaigning when analyzing whether Section 8(a)(2) unlawful assistance has been provided.[26] Accordingly, we

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[23] At one meeting where campaigning occurred, there were heated exchanges between supporters of SEIU-UHW and supporters of NUHW. Two Employer managers overheard the commotion and entered the conference room to try to calm the situation. The evidence does not indicate, however, that the managers were notified that campaigning had occurred.

[24] These allegations included steward council members campaigning in the Panama City facility in August 2010; stewards asking pharmacy counter employees at Antioch Medical Center to sign a pledge of support for SEIU-UHW on September 8, 2011; stewards electioneering at the Redwood City facility on July 30 and August 4, 2010; and campaigning by stewards at the San Francisco facility.

[25] These allegations included a steward abandoning work duties to electioneer at the Walnut Creek facility on August 27 and 29, 2010; and a steward entering the Walnut Creek radiology department on August 19, 2011 and approaching employees to sign a form for a speedy election.

[26] See, e.g., *Raley's*, 348 NLRB 382, 384-86 (2006) (finding no Section 8(a)(2) violation where employer did not "knowingly permit" or was not "contemporaneously aware of" union's campaigning activities at its premises); *Laub Baking Co.*, 131 NLRB at 171 (no Section 8(a)(2) violation where employer sought to curtail incumbent union's electioneering, which violated employer's no-campaigning rule, "when it was brought to its attention" by rival union). See also *California Pacific Medical Center*, Cases 20-CA-34859,

reject NUHW's argument that the Employer's knowledge and condonation of contract specialist and shop steward campaigning is irrelevant.

3. *Payments into the contractual education fund.*

NUHW contends that the Employer provided unlawful financial assistance to SEIU-UHW by contributing to the contractual education trust fund because, it alleges, trust fund officials participated in pro-SEIU-UHW campaigning. We conclude, in agreement with the Region, that the Employer did not provide unlawful financial assistance with respect to its education trust fund contributions.

The Region's investigation revealed that education fund representatives had a long-time practice of participating in outreach events in Employer cafeterias and other public facilities by setting up tables in the vicinity of SEIU-UHW tables. The education fund instructed its representatives not to engage in pro-SEIU-UHW campaigning and to refer campaign-related questions to SEIU-UHW or NUHW, and efforts were made to prevent commingling of education fund and SEIU-UHW literature. Although isolated exceptions occurred, the Employer had no knowledge of them.

Therefore, the Employer's financial contributions to the education fund did not constitute unlawful financial assistance. The Employer was contractually required to make fund contributions, and the Board presumes that trust fund representatives are acting in the interest of the education fund and not SEIU-UHW.[27] Based on the Region's investigation—particularly the fund's efforts to disassociate from SEIU-UHW campaigning and the lack of Employer knowledge regarding isolated exceptions—we conclude that the Employer's fund contributions did not constitute unlawful financial assistance.

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et al., Advice Memorandum dated July 30, 2010 (no Section 8(a)(2) violation where employer granted access rights to incumbent union SEIU-UHW beyond those rights given in the parties' contractual access clause, where there was no evidence that the employer "knowingly allowed" SEIU-UHW to use its access rights to campaign).

[27] *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981) (finding that employer-selected trustees of Section 302(c)(5) jointly administered trust fund were not representatives of the employer for purposes of Section 8(b)(1)(B)). See also *Commercial Property Services*, 304 NLRB 134, 134 (1991) ("[w]e simply proceed from the premise that a trustee is not acting for the union or the employer unless contrary evidence shows otherwise").

4. *SEIU-UHW's reservation of the Employer's nonpublic conference rooms.*

NUHW contends that the Employer provided unlawful financial assistance to SEIU-UHW by permitting it to reserve nonpublic conference rooms for campaigning. We conclude, in agreement with the Region, that the Employer did not provide unlawful financial assistance to SEIU-UHW with respect to its nonpublic conference rooms.

The Region's investigation revealed that the Employer's policy prohibits campaigning in nonpublic conference rooms and that the Employer made this clear by sending letters to both unions. SEIU-UHW reserved nonpublic conference rooms for three types of meetings: membership meetings, contract ratification meetings, and steward council meetings. These reservations were made pursuant to the contractual access clauses. The evidence did not show that these meetings focused on campaigning. And, although campaigning occurred at particular meetings, there is no evidence that the Employer was aware of it.[28] Based on the above, the Employer did not provide SEIU-UHW with unlawful financial assistance by permitting it to reserve nonpublic conference rooms.

5. *The Employer's implementation of its access, solicitation, and distribution policies.*

NUHW alleges that the Employer violated Section 8(a)(1) and (2) by discriminatorily implementing its access, solicitation, and distribution policies in favor of SEIU-UHW campaigning activity.[29] We conclude, in agreement

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[28] As described above, at one steward council meeting held in a reserved conference room, campaigning occurred and there were heated exchanges between supporters of SEIU-UHW and supporters of NUHW. Two Employer managers overheard the commotion and entered the conference room to try to defuse the situation, but the evidence does not indicate that the managers were aware that campaigning had occurred.

[29] The Employer's solicitation/distribution policy prohibits employee solicitation during work time, employee distribution in work areas at any time, and employee distribution in nonwork areas during work time. The policy also prohibits nonemployee solicitation and distribution on its premises, although the Employer has permitted nonemployee campaigning by both SEIU-UHW and NUHW representatives in cafeterias and other common-use locations.

with the Region, that the Employer did not violate Section 8(a)(1) and (2) in this regard.

In *Raley's*,[30] the Board analyzed whether a multi-location employer violated Section 8(a)(1) and (2) when two unions were competing to replace an incumbent union that had disclaimed interest in representing unit employees. The Board engaged in a two-tier analysis, examining allegations of disparate enforcement of its solicitation/distribution policy at particular stores and allegations that, as a matter of unit-wide policy, the employer provided access or support to the union it favored but not to its competitor. At the facility level, the Board found no evidence that particular managers were "contemporaneously aware" of in-store campaigning by the favored union that violated its access, solicitation, and distribution policies, except for a few isolated incidents.[31] Regarding the isolated incidents where the employer's policies were violated, the store manager warned and disciplined the offending employee.[32] Other isolated violations of Section 8(a)(1)—a manager removed the disfavored union's materials from a breakroom table and bulletin board, and a manager at another store suggested that employees should sign an unspecified union's petition—did not warrant finding a Section 8(a)(2) unlawful assistance violation.[33] At the corporate level, the Board found no evidence of any "policy or pattern of activity" to support the favored union by unlawful means.[34] Management was not shown to have "permitted or been contemporaneously aware" of preferential treatment for employee supporters of the favored union.[35] And, in view of the divergent practices of local managers from store to store, the Board noted that an occasional discrepancy among individual stores that constituted Section 8(a)(1) violations did not establish a pattern of unitwide disparate enforcement.[36]

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[30] 348 NLRB at 382.

[31] *Id.* at 384-86.

[32] *Id.* at 384.

[33] *Id.* at 385-86.

[34] *Id.* at 386.

[35] *Id.*

[36] *Id.* at 386 n.19.

Here, the Region's investigation revealed that the Employer has emphasized its neutrality in the dispute between SEIU-UHW and NUHW.[37] The Employer has also set forth its expectations to both unions that they will honor its solicitation/distribution rules, although it has permitted access to both unions for campaigning activities in public areas such as cafeterias.[38] The Employer has also conducted multiple training sessions for human resources personnel and managers covering, *inter alia*, access, solicitation, and distribution rules.

The Region also investigated numerous NUHW allegations that the Employer permitted SEIU-UHW supporters—employees and nonemployees—to campaign on its premises in violation of its solicitation/distribution policy and/or discriminatorily denied NUHW representatives and supporters that right. Those allegations do not support a finding of unlawful assistance for the reasons described below.

Initially, the witnesses proffered in support of six NUHW allegations were uncooperative with the Region and did not provide affidavits. Those allegations included nonemployee SEIU-UHW representatives asking employees at a Walnut Creek EVS department huddle to sign a petition supporting SEIU-UHW; a nonemployee SEIU-UHW organizer and a contract specialist soliciting on-duty employees at the Roseville Surgery Clinic to support SEIU-UHW; a nonemployee SEIU-UHW organizer campaigning in the Baldwin Park FANS department; a nonemployee SEIU-UHW organizer campaigning in the Modesto employee break room; a manager at the Redwood City Medical Center instructing employees that they should tell NUHW

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[37] For example, in a letter dated January 5, 2010, the Employer reminded both unions that it had repeatedly advised their respective representatives of its neutrality since January 2009, but stated it had received an escalating number of complaints that nonemployee representatives from both unions had violated its solicitation/distribution policies. The Employer sent similar letters to both unions on May 24, 2010, August 26, 2010, and September 1, 2011.

[38] On September 16, 2011, the Employer sent NUHW a letter stating that it had initiated investigations regarding NUHW's allegations of ongoing violations of its solicitation/distribution rules. On October 5, 2011, the Employer sent a letter to SEIU-UHW, stating that NUHW had complained that SEIU-UHW was violating the Employer's solicitation/distribution policy in order to campaign, and that it would revoke SEIU-UHW's access privileges upon substantiating violations of its policies following a warning or prior to any warning if a pattern of violations had been established.

members who talk to them to leave and that they can only speak to SEIU-UHW representatives; and a contract specialist and nonemployee SEIU-UHW organizers campaigning among on-duty employees in the Modesto Emergency Department and in the Modesto Bangs Clinic break room.

The witnesses proffered in support of several other allegations only presented hearsay reports from other employees. Those allegations included a nonemployee SEIU-UHW representative campaigning during a Walnut Creek EVS department huddle; a steward asking a pharmacy employee at the Antioch Medical Center to sign an SEIU-UHW bargaining survey; an SEIU-UHW representative campaigning in a Roseville conference room adjacent to the cafeteria; a supervisor at the Santa Rosa facility instructing employees to complete SEIU-UHW's bargaining survey while on the clock; a nonemployee SEIU-UHW organizer soliciting signatures on SEIU-UHW's bargaining survey at the Santa Rosa facility during a "unit-based team" meeting; multiple incidents involving nonemployee organizers at the Baldwin Park facility; multiple incidents of nonemployee SEIU-UHW representatives distributing campaign materials in the Sacramento optical department; and a nonemployee SEIU-UHW organizer campaigning at Union City and Livermore facility work areas.[39]

Some witnesses provided conclusory testimony, failed to provide details to establish that campaigning had occurred, or otherwise failed to corroborate the offer of proof. Those allegations included a nonemployee SEIU-UHW representative asking employees to sign a bargaining survey at the Walnut Creek Adult Medicine Department; nonemployee SEIU-UHW organizers and a shop steward/lost-timer asking employees to sign pledges in support of SEIU-UHW in work areas of the Oakland Radiology Department; a lost-timer from the Martinez facility and a nonemployee SEIU-UHW staffer campaigning in the Antioch Cardiology Department; a nonemployee SEIU-UHW organizer campaigning in the Baldwin Park outpatient medical records department; nonemployee SEIU-UHW organizers campaigning in the Anaheim General Surgery Department; a lost-timer soliciting the signature of an employee in a patient-care area of the West Los Angeles Women's Health Center; multiple incidents involving nonemployee organizers at the Baldwin Park facility; and SEIU-UHW representatives campaigning in working areas of the Berkeley Regional Lab.

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[39] The majority of these allegations would not have supported a violation even had they not constituted hearsay, due to lack of evidence demonstrating Employer knowledge of the incident or evidence that the Employer was informed of the incident, conducted an investigation, and responded appropriately where it determined its policy had been violated.

Other allegations were not supported by evidence that the activity was reported to the Employer or that the Employer was otherwise aware of it. Those allegations include nonemployee SEIU-UHW representatives distributing campaign materials in the Sacramento optical department; four SEIU-UHW supporters asking on-duty employees at the Walnut Creek Cardiology/Pulmonology Department to fill out a bargaining survey; a lost-timer asking an off-duty employee visiting her grandfather's hospital room at the Walnut Creek facility to leave the room and sign an SEIU-UHW form; nonemployee SEIU-UHW representatives distributing a bargaining survey during working time in a working area of the San Francisco OR department; and SEIU-UHW representatives distributing bargaining surveys over the course of two months at the Baldwin Park facility.

Additional allegations involved conduct that the Employer permitted (or denied) equally as to representatives of both unions (e.g., in cafeterias or other common-use locations). Those allegations included an SEIU-UHW official soliciting signatures from employees in the Walnut Creek cafeteria; nonemployee SEIU-UHW representatives campaigning in the San Francisco cafeteria; an Employer representative instructing an employee to remove an NUHW poster board display from a table in the Sacramento cafeteria; disparately permitting SEIU-UHW supporters to establish multiple campaign tables in the Sacramento cafeteria; Employer representatives telling an employee that she could not campaign for NUHW in the Sacramento EVS break room; a contract specialist and lost-timer offering cupcakes and asking employees to complete SEIU-UHW's bargaining survey in the San Jose cafeteria; and Employer representatives requiring NUHW employee supporters to remove a magnet with an NUHW logo from the NUHW campaign table in the Anaheim cafeteria; and a manager restricting an NUHW-supporting employee's access to the basement area of the Antioch Medical Center.

With respect to the remainder of the allegations, the Employer investigated and either admonished the wrongdoers for campaigning or other conduct that violated its solicitation/distribution policy or was unable to confirm that the reported misconduct had occurred. Such allegations included a manager instructing an employee at the Santa Clara facility to go home during working time to retrieve a partially signed SEIU-UHW petition[40]; a nonemployee SEIU-UHW organizer distributing electioneering leaflets to on-duty employees in the South Sacramento Eye Services Department; two nonemployee SEIU-UHW organizers distributing electioneering literature to on-duty Certified Nursing Assistants and Environmental Services workers in

[40] We would also find this allegation to be unmeritorious under Section 8(a)(1).

the South Bay facility; Walnut Creek employees receiving recorded messages from SEIU-UHW on their work phone numbers; shop stewards soliciting on-duty employees in the Walnut Creek Radiology and Adult Medicine departments; a lost-timer distributing campaign materials in working areas of the Walnut Creek Radiology department; nonemployee SEIU-UHW organizers distributing campaign materials outside the Walnut Creek facility; a nonemployee SEIU-UHW representative campaigning in working areas of the fifth floor at the Sacramento facility; nonemployee SEIU-UHW representatives distributing campaign materials in the Sacramento optical department; SEIU-UHW officials distributing campaign materials in conference rooms at the San Jose facility; and a manager informing an employee at Antioch Medical Center that he would always remove NUHW materials from a shared break room bulletin board.

Applying *Raley's*, we agree with the Region that the Employer did not provide unlawful assistance—at the facility level or on a unit-wide basis—by disparately enforcing its solicitation/distribution rules in favor of SEIU-UHW. The relatively small number of NUHW allegations based on first-hand witness knowledge and involving conduct known by Employer officials was appropriately investigated and addressed by the Employer. But even assuming the Employer could not successfully refute each of those allegations, a small number of deviations from the solicitation/distribution policy in favor of SEIU-UHW at a few facilities would not be sufficient to find a pattern of unitwide disparate enforcement, considering that the unit consists of almost 43,000 employees spread out over 200 locations, especially given the Employer's efforts to remain neutral to the extent permitted by its collective-bargaining obligations.[41] Accordingly, we agree with the Region that NUHW's disparate enforcement allegations lack merit.

For the foregoing reasons, we conclude, in agreement with the Region, that the charges should be dismissed, absent withdrawal.

/s/
B.J.K.

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[41] *Raley's*, 348 NLRB at 386 (finding isolated incidents of disparate treatment at a few stores insufficient to demonstrate an overall "policy or pattern of activity" to support favored union by unlawful means).