

Southern California Permanente Medical Group and Kaiser Foundation Hospitals and National Union of Healthcare Workers. Case 21–CA–39296

March 3, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On December 13, 2010, Administrative Law Judge William L. Schmidt issued the attached decision. The Acting General Counsel filed a limited exception, to which the Union filed a “joinder.” The Respondents filed a response, and the Acting General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and other filings and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondents Southern California Permanente Medical Group, Los Angeles, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the National Union of Healthcare Workers as the exclusive representative of the employees in the following appropriate collective-bargaining units by unilaterally withholding wage increases, tuition reimbursement for continuing education courses, and paid time off for steward training for employees, or by making other unilateral changes in terms and conditions of employment:

(1) The Healthcare Professionals Unit: Included: All employees including per diems covered by collective-bargaining agreement including dietician I, dietician II, health educator I, health educator II, audiologist, audiologist level II, audiologist CFY,

¹ We adopt, in the absence of exceptions, the judge’s findings that the Respondents failed to bargain with the Union in violation of Sec. 8(a)(5) and (1) of the Act by unilaterally withholding wage increases, tuition reimbursement for continuing education courses, and paid time off for steward training for employees in three units.

The Acting General Counsel and the Union except only to the judge’s incorrect description of the Healthcare Professionals bargaining unit. The Respondents also request correction of the unit description. We shall accordingly substitute a new Order and notice, which include the correct unit description and otherwise conform to the Board’s standard remedial language.

speech pathologist, and speech pathologist CFY employed by Southern California Permanente Medical Group, and Kaiser Foundation Hospitals within the Southern California Region. Excluded: All office clerical employees, guards, and supervisors as defined in the Act.

(2) The Psych-Social Chapter Unit: All employees including per diems covered by Kaiser Psych-Social Chapter collective-bargaining agreement until February 3, 2010, including CDRC III, behavioral health nurse case manager, behavioral health case manager, psychiatric social worker, psychiatric associate, child development specialist, medical social worker III, psychosocial clinician II, psychosocial counselor II, psychosocial clinician III, psychosocial counselor III, psychologist, psychologist—San Diego, CDRC I, social worker associate, medical social worker I, associate psychosocial clinician, CDRC II, psychological assistant, educational therapist, medical social worker II, psychiatric counselor, psychosocial clinician I, psychosocial counselor, psychiatric RN, psychiatric nurse, R.N.—San Diego, clinical nurse specialist, psychiatric nurse counselor, health connect coordinator, psychosocial advice nurse, psychiatric nurse, R.N., and psychosocial counselor I employed by Southern California Permanente Group and Kaiser Foundation Hospitals within the Southern California Region, excluding all office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the National Union of Healthcare Workers as the exclusive collective-bargaining representative of employees in the above units concerning terms and conditions of employment of those employees for an added period specified in the remedy section of the judge’s decision.

(b) Restore the terms and conditions of employment applicable to the employees in the Healthcare Professionals unit and the Psych-Social Chapter unit that existed at the time those employees selected the National Union of Healthcare Workers as their exclusive representative, including the terms and conditions described above, and maintain those terms and conditions in effect until an agreement has been concluded with that labor organization or a lawful impasse in negotiations occurs.

(c) Within 14 days from the date of this Order, implement the 2-percent across-the-board wage increase with-

held from the employees in the Healthcare Professionals unit and the Psych-Social Chapter unit that had been scheduled for April 1, 2010.

(d) Within 14 days from the date of this Order, reinstate the reimbursement of employees for continuing education tuition expenses, and grant paid time off for qualified steward training.

(e) Make employees whole for all losses suffered as a result of withholding the April 2010 across-the-board wage increase and the reimbursement of tuition costs for continuing-education courses, and failing to grant paid time off to attend qualified steward training, in the manner specified in the remedy section of the judge's decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at all of their Southern California facilities where employees in the Healthcare Professionals unit and the Psych-Social Chapter unit are employed copies of the attached notice marked "Appendix A."² Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and

mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 26, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

B. Respondent Kaiser Foundation Hospitals, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the National Union of Healthcare Workers as the exclusive representative of the employees in the following appropriate collective-bargaining unit by unilaterally withholding wage increases, tuition reimbursement for continuing education courses, and paid time off for steward training for employees, or by making other unilateral changes in terms and conditions of employment:

The American Federation of Nurses Unit: All employees covered by the American Federation of Nurses collective-bargaining agreement until February 3, 2010, including all in-patient registered nurses, all home health and hospice registered nurses including level II hospital, level II step down, level III specialty unit, level III charge and PHN employed by Kaiser Foundation Hospitals at its facility located at Kaiser Los Angeles Medical Center, 1526 North Edgemont Street, Los Angeles, California, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the National Union of Healthcare Workers as the exclusive collective-bargaining representative of employees in the above unit concerning terms and conditions of employment of those employees for an added period specified in the remedy section of the judge's decision.

(b) Restore the terms and conditions of employment applicable to the employees in the American Federation of Nurses unit that existed at the time those employees selected the National Union of Healthcare Workers as their exclusive representative, including the terms and conditions described above, and maintain those terms and conditions in effect until an agreement has been con-

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

cluded with that labor organization or a lawful impasse in negotiations occurs.

(c) Within 14 days from the date of this Order, implement the 2-percent across-the-board wage increase withheld from the employees in the American Federation of Nurses Unit that had been scheduled for April 1, 2010.

(d) Within 14 days from the date of this Order, reinstate the reimbursement of employees for continuing education tuition expenses and grant paid time off for qualified steward training.

(e) Make employees whole for all losses suffered as a result of withholding the April 2010 across-the-board wage increase and the reimbursement of tuition costs for continuing-education courses, and failing to grant paid time off to attend qualified steward training, in the manner specified in the remedy section of the judge's decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2010.

³ See fn. 2, above.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the National Union of Healthcare Workers as the exclusive representative of our employees in the following appropriate collective-bargaining units by unilaterally withholding wage increases, tuition reimbursement for continuing education courses, and paid time off for steward training for employees, or by unilaterally changing other terms and conditions of employment:

(1) The Health Care Professionals (HCP) Unit: Included: All employees including per diems covered by collective-bargaining agreement including dietician I, dietician II, health educator I, health educator II, audiologist, audiologist level II, audiologist CFY, speech pathologist, and speech pathologist CFY employed by Southern California Permanente Medical Group, and Kaiser Foundation Hospitals within the Southern California Region. Excluded: All office clerical employees, guards, and supervisors as defined in the Act.

(2) The Psych-Social Chapter (PSC) Unit: All employees including per diems covered by the Kaiser Psych-Social Chapter collective-bargaining agreement until February 3, 2010, including CDRC III, behavioral health nurse case manager, behavioral health case manager, psychiatric social worker, psychiatric associate, child development specialist, medical social worker III, psychosocial clinician II, psychosocial counselor II, psychosocial clinician III, psychosocial counselor III, psychologist, psycholo-

gist—San Diego, CDRC I, social worker associate, medical social worker I, associate psychosocial clinician, CDRC II, psychological assistant, educational therapist, medical social worker II, psychiatric counselor, psychosocial clinician I, psychosocial counselor, psychiatric RN, psychiatric nurse, R.N.—San Diego, clinical nurse specialist, psychiatric nurse counselor, health connect coordinator, psychosocial advice nurse, psychiatric nurse, R.N., and psychosocial counselor I employed by Southern California Permanente Group and Kaiser Foundation Hospitals within the Southern California Region, excluding all office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the National Union of Healthcare Workers as the exclusive collective-bargaining representative of our employees in the Health Care Professionals and the Psych-Social Chapter units concerning terms and conditions of employment of those employees.

WE WILL, within 14 days from the date of the Board's Order, restore the terms and conditions of employment applicable to our employees in the Health Care Professionals and the Psych-Social Chapter units that existed at the time those employees selected the National Union of Healthcare Workers as their exclusive representative, including the terms and conditions described above, and WE WILL maintain those terms and conditions in effect until an agreement has been concluded with that labor organization or a lawful impasse in negotiations occurs.

WE WILL, within 14 days from the date of the Board's Order, implement the 2-percent across-the-board wage increase withheld from employees in the Health Care Professionals and the Psych-Social Chapter units previously scheduled for April 1, 2010.

WE WILL, within 14 days from the date of the Board's Order, reinstate the reimbursement of employees for continuing-education tuition expenses and grant paid time off for qualified steward training.

WE WILL make our employees whole for all losses suffered as a result of our withholding the April 2010 across-the-board wage increase and the reimbursement of tuition costs for continuing-education courses, and our failing to grant paid time off to attend qualified steward training, with interest as required by law.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the National Union of Healthcare Workers as the exclusive representative of our employees in the following appropriate collective-bargaining units by unilaterally withholding wage increases, tuition reimbursement for continuing education courses, and paid time off for steward training for employees, or by unilaterally changing other terms and conditions of employment:

The American Federation of Nurses (AFN) Unit:
All employees covered by the collective-bargaining agreement until February 3, 2010, including all in-patient registered nurses, all home health and hospice registered nurses including level II hospital, level II step down, level III specialty unit, level III charge and PHN employed by Kaiser Foundation Hospitals at its facility located at Kaiser Los Angeles Medical Center, 1526 North Edgemont Street, Los Angeles, California, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the National Union of Healthcare Workers as the exclusive collective-bargaining representative of our employees in the American Federation of Nurses unit concerning terms and conditions of employment of those employees.

WE WILL, within 14 days from the date of the Board's Order, restore the terms and conditions of employment applicable to our employees in the American Federation of Nurses unit that existed at the time those employees selected the National Union of Healthcare Workers as

their exclusive representative, including the terms and conditions described above, and WE WILL maintain those terms and conditions in effect until an agreement has been concluded with that labor organization or a lawful impasse in negotiations occurs.

WE WILL, within 14 days from the date of the Board's Order, implement the 2-percent across-the-board wage increase withheld from employees in the American Federation of Nurses unit that had been scheduled for April 1, 2010.

WE WILL, within 14 days from the date of the Board's Order, reinstate the reimbursement of employees for continuing education tuition expenses and grant paid time off for qualified steward training.

WE WILL make our employees whole for all losses suffered as a result of our withholding the April 2010 across-the-board wage increase and the reimbursement of tuition costs for continuing-education courses, and our failing to grant paid time off to attend qualified steward training, with interest as required by law.

KAISER FOUNDATION HOSPITALS

Robert Mackay and Lindsey R. Parker, Attys., for the Acting General Counsel.

Michael R. Lindsay and Seth L. Neulight, Attys., (*Nixon Peabody*), for Southern California Permanente Medical Group and Kaiser Foundation Hospitals.

Jennifer L. Goldberg, Atty., for Kaiser Foundation Health Plans, Inc.

Florice Orea Hoffman, Atty., (*Law Offices of Florice Hoffman*), for National Union of Healthcare Workers.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Los Angeles, California, on October 18 and 19, 2010. The Regional Director for Region 21 of the National Labor Relations Board (NLRB or the Board) issued the complaint on August 27, 2010, alleging that Southern California Permanente Medical Group and Kaiser Foundation Hospitals (Respondents or Kaiser) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).¹ The complaint is based on an unfair

¹ An employer engages in an unfair labor practice within the meaning of Sec. 8(a)(5) by refusing "to bargain collectively with the representatives of (its) employees." An employer who violates Sec. 8(a)(5) also derivatively violates Sec. 8(a)(1), the provision that makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7." Section 7, the core provision of the this nation's basic labor relations law, guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protec-

tion, and . . . (if they so chose) to refrain from any or all such activities."

labor practice charge filed against Kaiser on March 30, 2010 (and amended on June 14, 2010) by the National Union of Healthcare Workers (NUHW or the Charging Party). The issue presented here is whether Kaiser violated Section 8(a)(5) and (1) by withholding certain benefits (a two percent across-the-board wage increase, reimbursement for continuing education tuition costs for courses required to maintain licensure (tuition reimbursement), and paid time-off for stewards to attend union-conducted training sessions (on-the-clock steward training)) from employees in three collective bargaining units under agreements negotiated by their prior representative, the Service Employees International Union—United Healthcare Workers West (SEIU-UHW). Although Kaiser admits that many other terms and conditions of employment became inapplicable the employees in these three units because they exercised their statutory right to select a new bargaining representative (see e.g., GC Exhs. 10 and 11), I have concluded after careful consideration that the limited charge, the remarkably modest complaint, and the narrow scope of the issues the Acting General Counsel litigated at the hearing do not warrant findings and conclusions broader than I have made below.

On the entire record,² including my observation of the demeanor of the witnesses,³ and after considering the briefs filed on behalf of the Acting General Counsel, Respondents, and NUHW, I have concluded that Respondents violated the Act, as alleged, by denying the employees the benefits in question based on the following

FINDINGS OF FACT

I. JURISDICTION

Southern California Permanente Medical Group (Southern California Permanente), a California professional partnership, operates health care clinics that provide medical services for members of Kaiser Foundation Health Plan, Inc., a nonprofit health maintenance organization. Kaiser Foundation Hospitals, a California nonprofit public benefit corporation, operates various health care facilities in California, Oregon, and Hawaii that provide health care services to the Kaiser Foundation Health Plan members. Only the Southern California facilities of Kaiser Foundation Hospitals are involved in this proceeding.

tion, and . . . (if they so chose) to refrain from any or all such activities."

² In their brief (R. Br. 3–4, fn. 4), Respondents' moved to correct the transcript reference to "pharmacist field" to "Guild for Professional Pharmacists." There being no opposition, the motion is granted. This reference appears at Tr. 58: 17 of the revised transcript rather than at Tr. 62–63 cited in Respondents' brief. Respondents' transcript reference is to the original transcript version which inexplicably contained the off-the-record discussions that occurred at the hearing. The revised edition of the transcript issued after Respondents' brief was filed. References here are to the revised transcript edition. No findings in this decision have been based on off-the-record exchanges shown in the original transcript version.

³ I find Respondents' claim that certain testimony of NUHW representative Ralph Cornejo should be discredited (R. Br. 3–4, fn. 4) largely unnecessary, gratuitous shot at this witness. As to those matters that matter in this case, his testimony is significantly corroborated by Respondents' own witnesses.

During a representative 12-month period ending July 30, 2010, Southern California Permanente derived gross revenues in excess of \$250,000 from its business operations, and purchased and received at its Southern California facilities goods valued in excess of \$5000 directly from points outside the State of California. During the same period, Kaiser Foundation Hospitals derived gross revenues in excess of \$250,000 from its Southern California business operations, and purchased and received at those facilities goods valued in excess of \$5000 directly from points outside the State of California.

Based on the foregoing facts, largely admitted by Respondents, I find that Southern California Permanente and Kaiser Foundation Hospitals are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and are each health care institutions within the meaning of Section 2(14) of the Act. Respondents also admit, and I find, that NUHW is, and has been, a labor organization within the meaning of Section 2(5) of the Act at relevant times.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Relevant Facts*

This labor dispute involves three collective bargaining units located in Kaiser's Southern California region known as the Health Care Professionals (HCP) unit, the Psych-Social Chapter (PSC) unit, and the American Federation of Nurses (AFN) unit. The AFN unit is limited to employees who work at Kaiser's Los Angeles Medical Center; the other two units include employees of both Respondents who work region-wide. Historically, SEIU Local 535 represented the employees in all three units. In 2007, SEIU-UHW-West (SEIU-UHW) became the recognized representative after Local 535 merged into that larger organization.⁴

The Board certified the SEIU-UHW's affiliated predecessor as the representative of the AFN unit in the 1970s. This unit includes:

All employees covered by the collective-bargaining agreement until February 3, 2010, including all in-patient registered nurses, all home health and hospice registered nurses including level II hospital, level II step down, level III specialty unit, level III charge and PHN employed by Kaiser Foundation Hospitals at its facility located at Kaiser Los Angeles Medical Center, 1526 North Edgemont Street, Los Angeles, California, excluding all office clerical employees, guards and supervisors as defined in the Act.

By its terms, the most recent SEIU-UHW agreement applicable to AFN unit was to be effective from October 1, 2005, through April 30, 2012.

⁴ Ralph Cornejo, the director of Kaiser operations for SEIU-UHW from 2004 to 2009 and then for the NUHW after he left the SEIU-UHW in 2009, testified without contradiction that this merger occurred in 2007 and that Local 535 represented the three units involved here when the 2005 collective bargaining agreements were negotiated. Tr. 27. Presumably, the copies of the collective bargaining agreements in evidence (GC Exhs. 4, 5, and 6) are merely copies produced after this merger to reflect this changed circumstance as all three designate the SEIU-UHW as the union party.

The PSC unit resulted from the consolidation of two bargaining units, one in the Los Angeles area and the other in the San Diego area, that the Board certified in the 1980s. Following the consolidation of those two separate units, the PSC unit includes:

All employees including per diems covered by Kaiser Psych-Social Chapter collective-bargaining agreement until February 3, 2010, including CDRC III, behavioral health nurse case manager, behavioral health case manager, psychiatric social worker, psychiatric associate, child development specialist, medical social worker III, psychosocial clinician II, psychosocial counselor II, psychosocial clinician III, psychosocial counselor III, psychologist, psychologist—San Diego, CDRC I, social worker associate, medical social worker I, associate psychosocial clinician, CDRC II, psychological assistant, educational therapist, medical social worker II, psychiatric counselor, psychosocial clinician I, psychosocial counselor, psychiatric RN, psychiatric nurse, R.N.—San Diego, clinical nurse specialist, psychiatric nurse counselor, health connect coordinator, psychosocial advice nurse, psychiatric nurse, R.N., and psychosocial counselor I employed by Southern California Permanente Group and Kaiser Foundation Hospitals within the Southern California Region, excluding all office clerical employees, guards, and supervisors as defined in the Act.

By its terms, the most recent SEIU-UHW agreement applicable to PSC unit was to be effective from October 1, 2005, through February 1, 2011.

Respondents voluntarily recognized to the SEIU-UHW as the exclusive representative of the HCP unit in 2003. That unit includes:

All employees including per diems that had been covered by the Southern California Health Care Professionals collective-bargaining agreement until February 3, 2010, including CDRC III, behavioral health nurse case manager, behavioral health case manager, psychiatric social worker, psychiatric associate, child development specialist, medical social worker III, psychosocial clinician II, psychosocial counselor II, psychosocial clinician III, psychosocial counselor III, psychologist, psychologist—San Diego, CDRC I, social worker associate, medical social worker I, associate psychosocial clinician, CDRC II, psychological assistant, educational therapist, medical social worker II, psychiatric counselor, psychosocial clinician I, psychosocial counselor, psychiatric RN, psychiatric nurse, R.N.—San Diego, clinical nurse specialist, psychiatric nurse counselor, health connect coordinator, psychosocial advice nurse, psychiatric nurse, R.N., and psychosocial counselor I employed by Southern California Permanente Group and Kaiser Foundation Hospitals within the Southern California Region but excluding all office clerical employees, guards, and supervisors as defined in the Act.

By its terms, the most recent SEIU-UHW agreement applicable to this unit was to be effective from October 1, 2005, through January 31, 2012.

Over the years the scope of the bargaining that occurred between various Kaiser entities and the labor organizations that

represent Kaiser employees, including those in the three bargaining units involved here, evolved into a complex system of national, cross-regional, and local negotiations. The following all-party stipulation at the representation hearing that preceded the election and certification of the NUHW for these three Southern California Kaiser units describes this evolution.

From the outset of these bargaining relationships and continuing to date, the employers have negotiated collective-bargaining agreements covering each one of those bargaining units in separate negotiations.

In 1996, Kaiser Permanente organizations nationwide and an organization known as the Coalition of Kaiser Permanente Unions entered into what has been termed a national partnership agreement.

The coalition consists of local and international unions that represent employees of Kaiser Permanente organizations in each of (its) geographic regions. The coalition was formed for the purpose of facilitating collective bargaining with the employer.

And (SEIU-UHWW) . . . or its predecessor unions participated in the coalition, continue to participate in the coalition, and have participated since 1996.

In 2000, the coalition unions and Kaiser Permanente organizations agreed to engage in a process of national bargaining. The national bargaining took place during the summer of 2000 and was followed by local bargaining involving each of the coalition bargaining units and the appropriate Kaiser Permanente employers.

At the conclusion of the bargaining process, what was ratified was both the local agreement and the National Agreement as an addendum to those local agreements.

In 2005, the parties, that is the coalition and its constituent local unions and the Kaiser Permanente organizations, engaged in a similar process of national bargaining. There had been no national or local contract negotiations in the intervening five years.

The difference between 2000 bargaining and 2005 bargaining was that in addition to national and local bargaining there was a third set of negotiations involving Kaiser Permanente organizations and each of the SEIU Locals that represented Kaiser Permanente employees. This was called cross regional bargaining and included the three bargaining units that are the subjects of the petitions in these matters as well as a statewide UHW bargaining unit consisting of the former SEIU Locals 250 and 399 and SEIU Local 105 from Colorado and SEIU Local 49 from the Portland area.

Again, at the conclusion of bargaining, the National Agreement and the local agreement as well as the cross regional agreements were ratified together and the National Agreement again became an addendum to the local agreements.

Thereafter, SEIU Local 535 merged with UHW. In 2008, pursuant to the terms of the National Agreement, the coalition, its constituent unions, and Kaiser Permanente organizations engaged in bargaining over a contract reopener which included topics designated in the contract including wages and one benefit. Those negotiations concluded with an agreement which was thereafter ratified by employees in each of the constituent bargaining units.

(See GC Exh. 2.) Not all of the unions Kaiser recognizes as an employee bargaining agent participate in the coalition referred to in the above stipulation. For example, the California Nurses Association, the Guild for Professional Pharmacists, and Operating Engineers Local 150 all represent units of Kaiser employees but do not participate in the coalition bargaining.

The contractual documents reflect the complex bargaining that produced them. In all three agreements, the applicable National Agreement is appended at the end of the local and the master agreements, the latter resulting from the cross-regional negotiations. The portion of the local/master agreement in each contractual document that constitutes the master agreement portion is identified by shaded text. (GC Exhs. 4, 5, and 6.)

Each agreement contains the basic wage structure and a variety of fringe benefits. Two fringe benefits, the tuition reimbursement and paid time off for stewards to attend union-sponsored steward training sessions are set out partly in the local portion of the comprehensive collective-bargaining agreements and partly in the National Agreement. The across-the-board wage increase at issue resulted from provisions in the National Agreements and national negotiations.

Apropos the tuition reimbursement, the benefit is actually established and described within the framework of a region-wide policy, Policy No. SCR-HR-3.03. This policy provides for the reimbursement of eligible employees⁵ for tuition costs they incur for taking courses for credit at accredited educational institutions described in the policy and that relate to “an employee’s work assignment” or “to obviously improve the employee’s potential for reasonable career advancement and employability.” However, the policy provides that employees represented by a union in the Labor Management Partnership (LMP) may receive reimbursement for continuing education courses, to wit:

Employees represented by LMP unions are also eligible for courses (including for basic skills programs, e.g., computer, basic math, second language and medical terminology courses) provided by an accredited institution, professional society or government agency for Continuing Education and/or to obtain or maintain licensure, degrees and certification. This includes courses, workshops, seminars, professional conferences, educational meetings, and special events taken/attended for Continuing Education and/or to attain or maintain licensure or certification.

The National Agreements applicable to the three units involved here contained identical language vaguely alluding to a tuition reimbursement benefit as a part of a workforce development concept. (GC Exh. 4, 5, and 6, National Agreement section 1. D 3 c, a, p. 29.) That language, which makes no reference to any existing tuition reimbursement policy, provides:

⁵ This policy defines eligible employees as “All regular full-time, part-time and Local 7600 on-call employees scheduled 20 or more hours per week who have been in an active status for at least six consecutive months prior to term start date are considered eligible employees. [NOTE: Certain provisions of this policy only apply to employees represented by a union in the Labor Management Partnership.]” R. Exh. 3.

The workforce development education and training objectives are to:

- prepare individuals to engage in learning processes and skills training;
- support employees in meeting their professional and continuing educational needs;
- train professional and technical employees for specialty classifications;
- provide education and training in new careers and career upgrades;
- support employees in adapting to technological changes; and
- ensure alignment with the needs of the organization.

The parties recognize the need to raise awareness of the availability of tuition reimbursement opportunities. By April 2006, each Regional Team will complete a study to determine the current utilization of tuition reimbursement, education leave (including Continuing Education Units) and other allocated budgeted resources. The teams should then determine how to remove barriers to access, (e.g., degree requirements), and increase participation in these programs. This may require amendment of local collective bargaining agreements and/or policies. After the regional studies have been completed, the National Team, working with the Regional Teams, will develop a communications strategy to raise the awareness levels in each region. Tuition reimbursement may be used in conjunction with education leave by employees for courses to obtain or maintain licensure, degrees and certification. Tuition reimbursement dollars may also be used for basic skills programs (e.g., computer, basic math, second language and medical terminology courses).

However, in all three instances the local agreements contain provisions, though not identical, related to employee participation in the in the Respondent's tuition reimbursement regional policy. Thus, the HCP agreement states: "Eligible employees shall be entitled to participate in the Kaiser Permanente Program as set forth in the Employer's policy." (GC Exh. 4, p. 43.) The relevant provision in the AFN agreement provides: "The Employer's tuition reimbursement program will apply to Registered Nurses who successfully complete approved courses." (GC Exh. 5, p. 30.) The PSC agreement provides: "Full-time and part-time employees shall be entitled to participate in the Kaiser Permanente Tuition Reimbursement Program as set forth in the policy." (GC Exh. 6, pp. 52-53.) Regardless of the contractual vagueness and ambiguities, the parties stipulated that Respondents provided the tuition reimbursement benefit to the employees involved here pursuant to section 1.D.3.c of the National Agreements until February 3, 2010. (Tr. 34.)

Similarly, the National Agreements each contain identical language in a section devoted to "Education and Training" that contains broad concepts and goals for employee development including steward training. (GC Exh. 4, 5, 6, National Agreement section E, 3 at p. 31.) This provision provides:

3. STEWARD EDUCATION, TRAINING AND DEVELOPMENT

The CIC (Common Issues Committee) agreed to support union steward training and education and recommended that stewards have time available each month to participate in training and development activities. The parties agree to support stewards in training and development such as:

- education and training programs;
- Steward's Council;
- Labor Management Partnership Council;
- Partnership sponsored activities; and Partnership environment.

Training programs for stewards may be developed in the following areas:

- foundations of Unit Based Teams;
- improvement in Partnership principles;
- contract training on the National Agreement;
- fundamentals of Just Cause;
- leadership skills;
- effective problem solving; and
- consistency and practice.

Labor and management will work jointly on steward development. Accountability will rest with senior operational and union leaders on the Labor Management Partnership Council (or equivalent) in each region.

The local portion of the PSC agreement contains the following provision in article IX providing explicitly for paid time off for steward training. That provision (section 3-Steward Training) provides:

Pursuant to the terms of the National Agreement, stewards will receive four paid hours per month to participate in training and development. As outlined in the CIC memorandum dated August 22, 2005, these hours should be aggregated to allow flexibility when more than four (4) hours is needed at one time.

(GC Exh. 6, p. 6.) Neither the HCP nor the AFN agreements contain a similar local provision providing for paid time off for steward training. Nevertheless, no contention is made that paid time off for steward training was not provided for stewards employed in those two units.

Section 2.A.1 of the three National Agreements provides for across the board wage increases applicable to the employees involved here. (GC Exh. 4,5, 6, at p. 46-47.) That provision provides that across the board increases will be effective in the pay period closest to October 1 each year. However, section 3.D. 2 of the National Agreement incorporates a limited re-opener provision that pertains only to across the board wage adjustments and retiree medical benefits." (GC Exh. 4, 5, 6, National Agreement, p. 61.) In 2008, the agreements were reopened pursuant to this provision and an agreement was reached that provided for across-the-board wage adjustments for the employees in the units involved here in the pay periods closest to October 1, 2008 and 2009 as well as a further adjustment of two percent that was to be effective in the pay period

closest to April 1, 2010. (GC Exh. 7.) It is undisputed that the unit employees here received the October 2008 and 2009 across the board adjustments but did not receive the April 2010 adjustment.

On February 27, 2009, the NUHW filed representation petitions with the Board seeking certification as the exclusive collective bargaining representative for the three collective bargaining units described above.⁶ Following a hearing on those petitions, the Regional Director for NLRB Region 21 issued a decision and direction of election in which he scheduled an election to resolve the question concerning representation. An extensive campaign ensued after which the employees selected the NUHW as their bargaining representative by overwhelming margins.⁷ On February 3, 2010, the NLRB certified the NUHW as the exclusive bargaining representative for the three units.

Following the certification, representatives of Respondent and the NUHW met on February 12, February 26, and March 18 that are relevant here. It is undisputed that NUHW agent Cornejo requested at the February 12 meeting that Respondent's continue the terms of the SEIU-UHW agreements in effect until October 1, 2010. Cornejo also made specific requests that Respondents continue to apply the existing the tuition reimbursement program for the employees in the three units as well as the paid time off for steward training arrangement. Respondents representatives who came to the meeting prepared only for a "get acquainted" session promised to review Cornejo's requests.

At the February 26 meeting, Kaiser's representatives admittedly told the NUHW representatives that the agreement would not be extended as requested, that the employees would not receive the 2-percent pay increase that had been negotiated in the 2008 reopener of the National Agreements because that was a "future event", that the employees would not receive be receiving further tuition reimbursements because the NUHW was not a part of the coalition and that benefit only applied to members of the Labor Management Partnership, and that the NUHW stewards would not receive paid time off for steward training for the same reason. From that time through the date

⁶ By now NUHW's origins are well know. Briefly summarized and perhaps oversimplified, the SEIU president at the time, motivated by long-festering policy differences with the officers of the SEIU-UHW, established a trusteeship over that subordinate affiliate in late January 2009, and simultaneously removed several, if not all, of its officers. Almost immediately, those former officers and several SEIU-UHW professional organizers formed the NUHW, and commenced raiding units represented by the SEIU-UHW (as occurred here) and initiated organizing efforts at other locations where they had previously engaged in organizing while serving with the SEIU-UHW. See e.g., *Service Employees v. National Union of Healthcare Workers*, 598 F.3d 1061 (9th Cir. 2010); *Santa Rosa Memorial Hospital*, 20-CA-18241 (JD(SF)-18-10). In this case, the very people who participated in the negotiation of the terms of the SEIU-UHW collective-bargaining agreements previously applicable to these three units are now agents of the NUHW.

⁷ The NUHW received about 95 percent of the votes cast in the AFN unit, 84 to 85 percent of the votes cast in the PSC unit, and about 86 percent of the votes cast in the HCP unit. Tr. 58.

of the hearing, Kaiser maintained the same position as to these three matters involved here with one exception.⁸

In fact, at the March 18 bargaining session, Kaiser presented the NUHW negotiators with a detailed listing of the provisions of the former collective bargaining agreements which it planned to continue and those it would not for each of the three units. (GC Exh. 10.) In an accompanying letter, Kaiser specifically asserted that participation in the "Coalition and the LMP" was a pre-condition to the application of the National Agreement to these bargaining units. Thus, the letter states, "This means that if a bargaining unit no longer is a part of the Coalition (NUHW is not, and almost certainly never will be, a member of the Coalition), the provisions of the National Agreement no longer apply to those employees." (GC Exh. 11.)

B. Argument and Analysis

The Acting General Counsel argues that Respondent's duty to maintain the status quo pending the negotiation of a new agreement required it continue applying many of the terms of the previously existing collective-bargaining agreements applicable to the HCP, PSC and the AFN units prior to the February 3, 2010 certification of the NUHW.⁹ The Acting General Counsel analogizes the situation here to that which occurs when a collective-bargaining agreement expires before a new agreement is negotiated. The Acting General Counsel's brief asserts succinctly, that the "terms survive not only the expiration of a contract . . . but also the nullification of a contract because of a change in bargaining representative." (GC Br., p. 12.) In support, the Acting General Counsel relies on the prior Board and court decisions in *Arizona Portland Cement Co.*, 302 NLRB 36 (1991), and *More Truck Lines, Inc.*, 336 NLRB 772, 772-773 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003).

By contrast, Respondents analogize this case to the circumstances in *Neighborhood House Assn.*, 347 NLRB 553 (2006) and argues that, at least as to the April wage increase, a discrete event arose requiring only notification and an opportunity for NUHW to bargain about the April 2010 wage increase. Respondents further argue that it met that it met its notice obligation but the NUHW failed to avail itself of the opportunity to bargain over that wage increase. Alternatively, Respondents argue that it would have violated the Act granting the wage increase to the employees in the HCP, SPC, and AFN units based on the Board's decision in *Consolidated Fiberglass Products Co.*, 242 NLRB 10 (1979).

Finally, Respondents argue that all three items (the April 2010 wage increase, the tuition reimbursement, and the stewards training benefit) are creatures of the National Agreement that ceased to apply when the employees selected a bargaining

⁸ At the February 26 meeting the NUHW requested that the tuition reimbursement be applied to applications approved up to that date. After consideration, Kaiser agreed to continue tuition reimbursements only to applications approved through March 1, 2010. (GC Exh. 8.)

⁹ The Acting General Counsel carefully notes that this case only involves Respondent's refusal to apply the April 2010 wage increase, the tuition reimbursement program, and the steward training arrangement rather than terms typically excludable from the statutory duty to bargain such as union-security requirements, arbitration, no-strike provisions, and any waiver of bargaining rights. GC Br., p. 12.

agent, such as the NUHW, that is not a part of the Coalition of Unions.

I agree with the Acting General Counsel's argument that the outcome here is controlled by *Arizona Portland Cement and More Truck Lines*. In *Arizona Portland Cement*, after the unit employees selected a new bargaining representative, the employer unilaterally changed certain specific arrangements established under its agreement with the predecessor union during negotiations with the new union. The unilateral changes included: (1) eliminating the existing grievance procedure and substituting a dispute resolution policy which did not include involvement of the new union, (2) discontinuing the policy of permitting stewards to conduct union business during worktime with compensation, (3) abolishing the union bulletin boards, and (4) disparately prohibiting use of the Respondent's bulletin boards by the new union, while permitting other organizations and employees to use its bulletin boards for nonwork-related purposes. The Board held that the employer failed to bargain in good faith under Section 8(a)(5) by making these particular changes before reaching an overall impasse in negotiations with the new union.

Even though *More Truck Lines* did not arise under Section 8(a)(5), the Board's dicta in that case strongly reaffirmed the key bargaining duty principles applied in *Arizona Portland Cement*, to wit, where employees select a new bargaining agent, an employer cannot unilaterally change their existing terms and conditions of employment while negotiations with the successor representative for a new agreement are underway. The Board affirmed its ALJ's conclusion in *More Truck Lines* that the respondent violated Section 8(a)(1) of the Act by telling its employees otherwise. In its decision, the Board used the occasion to give the following explanation for its use of the phrase "null and void" as applied to a predecessor's agreement in an earlier case that the employer advanced as a defense to the unlawful interference charge:¹⁰

It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment, such as their wages. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). This duty to maintain the status quo imposes an obligation upon the employer not only to maintain what he has already given his employees, but also to "implement benefits which have become conditions of employment by virtue of prior commitment or practice." *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), *enfd. mem.* 718 F.2d 1088 (4th Cir. 1983). Accord: *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer unlawfully told employees "wages and benefits

would be frozen at current levels for the period of negotiation" and unlawfully withheld annual wage increases for this reason). As the judge explained, once promised, future nondiscretionary wage increases are such existing terms and conditions of employment. See *Liberty Telephone & Communications*, 204 NLRB 317, 318 (1973) (a promised wage raise that induces employees to accept or continue their employment is an "established" condition of employment); cf. *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391 fn. 2 (1998).

Applying these principles to the instant case, we find that the Respondent's reading of *RCA Del Caribe* goes too far. Thus, contrary to the Respondent's contention, the phrase "null and void" in *RCA Del Caribe* cannot be read literally to mean that an employer may treat the terms and conditions of employment established under an agreement with a defeated incumbent union as if they never existed. To do so would allow, or arguably compel, an employer to reset employees' then existing conditions of employment to those that were in effect prior to the final employer-incumbent agreement. In agreement with the judge, we are convinced that the Board in *RCA Del Caribe* only intended the phrase "null and void" to mean that a successful intervening union must be afforded an opportunity to negotiate a new contract, rather than be saddled with the one entered into by the defeated incumbent. Thus, if a challenging union is certified, then the contract between the employer and the incumbent becomes void, but, as usual, the employer must abide by the then existing terms and conditions of employment until such time as it reaches an agreement with the new union or a lawful impasse occurs. See *NLRB v. Katz*, *supra*; *R.E.C. Corp.*, 296 NLRB 1293 (1989).

Here, Respondents argue that the employees in these three units effectively forfeited any claim to the terms and conditions set out in the National Agreement when they exercised their fundamental Section 7 right to choose a new bargaining representative. I reject the Respondents' rationale that the terms of the National Agreement did not apply to the unit employees because their new representative, the NUHW, did not belong to the Coalition of Unions. Instead, I find that the terms of each agreement as a whole—local, cross-regional, and national—make up the terms and conditions of employment encompassed by the statutory duty to bargain under Section 8(a)(5). The statutory duty to bargain does not, and should not, concern itself with the particular bargaining structures and arrangements that the prior representative utilized in concluding its agreements. Rather, the statutory duty to maintain the status quo encompasses only the outcome produced by the prior representative's bargaining arrangements regardless of what they were. The Respondents' claim that the three terms at issue—the April 2010 wage increase, the tuition reimbursement program, and steward training benefit—do not constitute terms and conditions applicable to the unit employees because they are derived from the National Agreement negotiated by the Coalition of Unions to which the NUHW does not belong is incompatible with the Respondents' statutory duty to bargain. To

¹⁰ See *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), where the Board rejected a claim that the employer rendered unlawful assistance to an incumbent union in violations of Sec. 8(a)(2) by executing a new collective-bargaining agreement with the incumbent union after it learned another, unfavored labor organization had filed a representation petition with the NLRB seeking to be certified as the bargaining agent for employees in the unit covered by the new agreement. In that case the Board noted that if employees chose a new representative, the recently executed agreement would be "null and void."

hold otherwise would give primacy to the contractual relationships that existed before the unit employees selected a new representative and would seriously impair, if not virtually eliminate as a practical matter, the fundamental right of employees under Section 7 to change their bargaining representative.

The relevant examination under *Arizona Portland Cement* and *More Truck Lines* required Respondents to assess their statutory bargaining duty in terms of those matter applicable to the unit employees immediately prior to the date they changed representatives rather than from whence any particular terms came. By doing the latter, Respondents went astray. The position they took that the terms of the National Agreements ceased to apply to the employees in these three units as of the date their new representative was certified is indefensible. Moreover, I also reject the claim Respondent's make that the NUHW was provided with an opportunity to bargain over the three terms at issue here. Even though some minor concession occurred with respect to the tuition reimbursement benefit, I agree with the Acting General Counsel's assertion that Respondents presented their response that the benefits at issue were inapplicable to the unit employees as a *fait accompli* at the February 26 meeting.

The Respondents' claim that the April 2010 wage increase is a discrete event that constitutes an exception to the general rule of no changes until an new agreement or an overall impasse is reached also lacks merit. In the *Neighborhood House* case cited by Respondents, a Board panel majority reversed the ALJ's conclusion that the employer violated Section 8(a)(5) by withholding a regularly scheduled cost-of-living increase (COLA) from its unit employees. In doing so, the *Neighborhood House* majority applied the principle addressed in *Stone Container Corp.*, 313 NLRB 336 (1993). I find Respondents' reliance on the *Neighborhood House* case is misplaced because the facts here, unlike those in *Neighborhood House*, do not implicate the *Stone Container* principle.

As explained in *Neighborhood House*, where the parties are engaged in negotiations for a collective-bargaining agreement, the employer, as a general rule, must maintain the status quo as to all mandatory bargaining subjects absent an overall impasse. 347 NLRB 554. The *Stone Container* case established an exception to this general principle intended to apply to a so-called "discrete recurring event" affecting the employees terms and conditions of employment that occur during the negotiations for a complete agreement. The *Stone Container* exception sought to accommodate the dynamic of the work place while the often laborious process of bargaining a new agreement (in effect a new shop constitution) is underway.

To simplify and illustrate the purpose of the *Stone Container* principle, one need only imagine for a moment that two recently unionized employers had a long history of paying their employees an anniversary bonus to recognize their continued loyalty. Suppose further, that one employer's anniversary bonus policy provided for the payment of \$2000 on the employee's anniversary date while the other employer's policy provided for a bonus of "up to 2%" of the employee's annual salary depending on the "profitability of the company."

In the example of the pre-determined \$2000 anniversary bonus, the *Stone Container* principle does not apply. In this in-

stance, no mandatory subject of bargaining arises. To maintain the status quo, the employer must continue paying the fixed bonus when an employee's anniversary dates occurs absent an overall impasse in negotiations for a complete agreement. Any change to this policy of paying that fixed amount simply becomes a part of the overall negotiations until a complete agreement is reached or an impasse occurs.

But as to the other employer, the Board's *Stone Container* principle triggers side-table negotiations about undetermined matters rationally separable from the overall negotiations for a collective bargaining agreement. As a result, the employer need only notify the bargaining agent and provide it with an opportunity to bargain about the mandatory subjects encompassed in the particular policy. The employer is free to implement if the bargaining agent fails to respond or an impasse is reached as to that individual subject. Hence, if the employer and the union come to a total impasse as to whether the employer had been "profitable" or whether the employee should receive a one or two percent bonus or somewhere between, the *Stone Container* principle provides the employer with the latitude to reward to the employee without waiting for an overall agreement. *Brannan Sand & Gravel*, 314 NLRB 282 (1994).

In this case, Respondents negotiated an agreement in 2008 applicable to three units that required it to provide a fixed two percent wage increase to the employees in the three units involved on or about April 1, 2010. This agreement left no matters to later determination that would trigger side-table discussions in order to comply with the overall duty to maintain the status quo. The statutory duty in this situation did not encompass the question as to whether to grant the increase or not; that would have been a matter for the main-table negotiations. The agreement reached during the 2008 reopener negotiations foreclosed Respondents from arguing that an April 2008 wage increase should or should not be granted. When that agreement to increase employee wages by a fixed amount on a fixed date, it became a part of the employees' terms of employment that Respondent was obliged to honor as a part of its statutory duty to maintain the status quo for the unit employees.

Respondent's arguments about the tuition reimbursement and steward training benefit suffer from a similar miscalculation as these benefits are equally fixed. They are exactly the same as those that continue to be granted to the other unit employees in the units that belong to the Coalition of Unions to which these employees formerly belonged, nothing more, nothing less. As explained before, the fact that the NUHW does not belong to the Coalition is irrelevant to Respondents' fundamental statutory obligation to maintain the status quo during negotiations.

Respondents' justification for their conduct on the ground that they would have violated the Act by granting the disputed wage increase and benefits also lacks merit. Their reliance on the *Consolidated Fiberglass* case to support this contention is misplaced. The outcome in *Consolidated Fiberglass* turns entirely on its very peculiar facts and provides almost no basis for any general conclusion. In that case, the Board found that the employer violated Section 8(a)(5) by granting a pay increase alluded to in a comprehensive strike settlement memorandum it concluded with a predecessor representative two

years earlier without providing the current employee representative notice or an opportunity to bargain about the increase. Clearly, the case is factually distinguishable from the situation here. As the findings by the Board and the administrative law judge in *Consolidated Fiberglass* clearly show, the terms of the strike settlement contemplated further bargaining so that, by inference, the employer never actually reached any agreement with either the predecessor or successor representative about the wage increase at issue. For these reasons, the *Consolidated Fiberglass* case largely amounts to nothing more than an ordinary unilateral change case.

But more importantly, the Board concluded that even if the strike settlement had amounted to a full, binding agreement, the successor representative was not a party to it, so that, based on the *American Seating* doctrine,¹¹ a complete agreement on all mandatory subjects of bargaining between the employer and the current representative would be required in order for the employer to satisfy its bargaining obligation under the Act. It is on this point that this contention by Respondents collapses completely. In the *Consolidated Fiberglass* case, the current representative obviously objected to the employer's unilateral pay increase while negotiations were underway. In stark contrast, the NUHW not only consented to the implementation of the April 2010 fully agreed-upon increase negotiated under the 2008 reopener, it insisted that it be granted even during the ongoing negotiations. By consenting to an employer's change in the terms and conditions of employment of the represented employees, either before or after the fact, a bargaining representative is precluded from claiming logically that the employer is guilty of violating the Act by unilateral action as Respondents argue here.

A subsidiary case cited by Respondents for this claim, *Koenig Iron Works, Inc.*, 276 NLRB 811 (1985) fares even worse. There the employer relied on the terms of a collective bargaining agreement providing for the wage increase it granted that was contained in an agreement with an unlawfully assisted predecessor union as a defense against a claim by the subsequent, lawfully-selected union that the employer violated Section 8(a)(5) when it granted that increase before an overall impasse in negotiations. The Board rejected the employer's defense on the ground that it would require that it resurrect the contract abrogated in a prior unfair labor practice proceeding and would undermine the employees' right to be represented exclusively by the union they lawfully selected. Accordingly, Respondents' contention here that it would have violated the Act by implementing the April 2010 wage increase is without any legal foundation, particularly in view of the NUHW's insistence that it be given to the unit employees.

For the foregoing reasons, I conclude that Respondents violated Section 8(a)(5) and (1) as alleged.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act.

2. The NUHW is a labor organization within the meaning of

Section 2(5) of the Act and the exclusive collective-bargaining representative under Section 9(a) of the Act of the Respondents employees employed in the Health Care Professionals, Psych-Social, and the AFN units, described above at page 3-4, each of which are appropriate units for collective bargaining purposes under Section 9(a) of the Act.

3. By unilaterally withholding the April 2010 wage increase, tuition reimbursement for continuing education courses, and paid time off for steward training, for employees in the Health Care Professionals, Psych-Social, and the AFN units, Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that Respondents unlawfully altered the terms and conditions of employment for its employees in the HCP, PSC, and the AFN units, Respondents will be required to restore and maintain, absent the consent of the NUHW or a lawful impasse, the previously existing terms and conditions of employment applicable to those employees while negotiations proceed for a new collective-bargaining agreement. Specifically, Respondents must immediately restore and apply the across the board wage increase scheduled for April 1, 2010, the pre-existing tuition reimbursement benefit, and the previous steward training benefit previously applicable to the employees in the three aforementioned units when they were represented by the SEIU-UHW. As provided in *Ogle Protection Service*, 183 NLRB 682 (1970), Respondents must reimburse those who suffered losses because it unlawfully withheld the April 1 wage increase, continuing education tuition reimbursements, and paid time off for steward training from employees in the Health Care Professionals, Psych-Social Unit, and AFN units with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Acting General Counsel seeks to have the certification year extended by six months based on the Board's decision in *Mar-Jac, Poultry Co.*, 136 NLRB 785 (1962). His brief cites four reasons for this requested extension. First, the changes diverted the union's attention away from bargaining toward lengthy discussions about the propriety of the changes found unlawful here. Second, this initial dispute caused a bargaining hiatus of nearly 3 months. Third, the unlawful changes put the Union in a disadvantaged position. And finally, the withholding of the expected wage increase and two standard benefits undermined the Union and caused it to lose support. Clearly, Cornejo's testimony supports the Acting General Counsel's claims about the significant adverse employee reaction to Respondents' withholding of the wage increase in particular. Because Respondents' conduct here, or any similar conduct by others in a similar situation, is so inherently destructive of the basic employee right under Section 7 to freely choose a bargaining representative, this minor, almost absurdly insignifi-

¹¹ *American Seating Co.*, 106 NLRB 250 (1953).

cant, relief sought by the Acting General Counsel will be granted.

But frankly, in circumstances such as this, I am at a loss to understand why the certification year should not be tolled entirely until the status quo is completely restored by compliance however long that process may take. The kind of time-period computation suggested by the Acting General Counsel here bears all the elements of an arbitrary computation unrelated to the massive damage done and the potential intransigence of noncompliant respondents who choose to appeal and appeal in order to avoid their duty to bargain under the Act until, finally, support for the employee representative is totally dissipated.

Finally, Respondents will be required post the standard hard

copy notice to employees attached here as appendices and post the notices electronically as provided in *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

[Recommended Order omitted from publication.]

¹² Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.