

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-7395 GAF (FMOx) Date December 15, 2010

Title James F. Small v. Southern California Permanente Medical Group et al

Present: The Honorable <u>GARY ALLEN FEES</u>		
<u>Michele Murray</u>	<u>None</u>	<u>N/A</u>
<u>Deputy Clerk</u>	<u>Court Reporter / Recorder</u>	<u>Tape No.</u>
<u>Attorneys Present for Plaintiffs:</u>	<u>Attorneys Present for Defendants:</u>	
<u>None</u>	<u>None</u>	

Proceedings: (In Chambers)

ORDER RE: PETITION FOR TEMPORARY INJUNCTION

I. INTRODUCTION

James Small ("Petitioner"), Regional Director of Region 21 of the National Labor Relations Board ("NLRB" or "the Board"), petitions the Court to issue a preliminary injunction against Respondents Southern California Permanente Medical Group and Kaiser Foundation Hospitals (collectively, "Respondents") pursuant to section 10(j) of the National Labor Relations Act ("NLRA" or "the Act") pending the Board's disposition of the unfair labor practice charges against Respondents in Board Case No. 21-CA-39296. (Docket No. 1, Petition ("Pet.") at 2.) Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), allows the Board, upon issuance of a complaint charging a person with engaging in an unfair labor practice, to request that a district court issue "appropriate temporary relief or restraining order." 29 U.S.C. § 160(j).

The petition seeks relief on the ground that Respondents have engaged in, and are engaging in, unfair labor practices in violation of Section 8(a)(1) and (8)(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5). (Pet. at 2.) In particular, the petition explains that three sets of employees for Respondents elected the National Union of Healthcare Workers ("the Union") as the collective bargaining representative of three separate bargaining units: (1) healthcare professionals, (2) mental health workers, and (3) nurses. (*Id.*) On February 3, 2010, the Union was certified as the collective bargaining representative for those units. (*Id.*) Previously, those three units of employees had been represented by the Service Employees International Union–United Healthcare Workers West ("SEIU-UHW"). (*Id.*) The petition

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charges Respondents with violating Sections 8(a)(1) and 8(a)(5) by unilaterally altering the terms and conditions of employment set forth in agreements previously negotiated with the SEIU-UHW for employees of the three bargaining units. (*Id.* at 3.) In particular, the petition contends that Respondents violated the Act by unilaterally discontinuing (1) a tuition-reimbursement policy, (2) a paid monthly training for shop stewards, (3) a planned April 2010 across-the-board wage increase, and (4) the special assignments of the coordinators of the unit-based teams.¹ (*Id.*)

The petition seeks, among other things, an injunction ordering Respondents (1) to cease and desist from refusing to bargain collectively and in good faith by unilaterally changing the conditions and terms of employment and from otherwise interfering with employees' rights, (2) to bargain collectively and in good faith, and (3) to grant prospectively the unlawfully withheld April 2010 raise, restore the tuition-reimbursement program, and restore the steward training program. (*Id.* at 12-13.)

II. BACKGROUND

A. PROCEDURAL HISTORY

The Union filed unfair labor practice charges against Respondents on March 30, 2010, and filed amended charges on June 14, 2010. (Pet., Ex. 2 [Charge and Amended Charge].) Following an investigation, Petitioner issued a Complaint and Notice of Hearing. (Pet., Ex. 3 [Compl.].) The Complaint alleges, among other things, that Respondents unilaterally changed terms and conditions of employment in violation of the Act by withholding the April 2010 raises, cancelling tuition-reimbursement benefits, and cancelling union-steward training programs for union-represented employees.² (Compl. ¶¶ 9-15.) An Administrative Law Judge was scheduled to hear the case on October 18. (Docket No. 3, Mem. at 3.) That hearing has now concluded with a ruling in favor of Petitioner. [Docket No. 22.]

¹ The Petition, however, does not seek redress for the discontinuation of the special assignments.

² The Petitioner's complaint did not address the alleged discontinuation of the special assignments of the coordinators.

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B. FACTS

Before the election of the National Union of Healthcare Workers, employees in the three bargaining units relevant here were represented by SEIU-UHW. (Ex. 5 at 78.) The SEIU-UHW negotiated separate collective bargaining agreements (“CBAs”) for each unit. The CBAs incorporated Local, Master, and National Agreements. (Ex 5 at 78.) The National Agreement arose from collective bargaining between Respondents and a coalition of labor unions (“Coalition”), including SEIU-UHW, that represent Kaiser employees across the country. (Ex. 5 at 78; Ex. 7 at 222.)

Under the relevant agreements, across-the-board wage increases were negotiated at the national level. (Ex. 5 at 78.) The National Agreement included a “re-opener” provision that authorized re-opener negotiations in 2008 over wage increases, even though the whole agreement had not yet expired. (*Id.* at 79.) In September 2008, the Coalition unions and Respondents agreed that employees would receive across-the-board wage increases of specific amounts in October 2008, October 2009, and on April 1, 2010. (*Id.*) Specifically, the agreement provides that all employees in the three units at issue here would receive a two percent wage increase effective on the first day of the pay period closest to April 1, 2010. (GC Ex. 7.)

The National Agreement also provided for paid time for union stewards to receive training, and the local agreements expressly incorporated this provision. (Ex. 7 at 132 [Psych Workers’ CBA]; Ex. 8 at 441 [Health Care Professionals’ CBA]; Ex. 9 at 653 [Nurses’ CBA].) The National Agreement also provided for tuition reimbursement for certain continuing education programs, and the local agreements referenced this benefit. (Ex. 7 at 178–79; Ex. 8 at 367; Ex. 9 at 547; Respondent’s Ex. 3.)

After the National Union of Health Care Workers was certified as the new bargaining representative for the three units on February 3, 2010, the Union and Respondents began negotiations. At the first meeting, on February 12, 2010, the Union asked Respondents to apply the terms of the SEIU-UHW contracts through October. (Ex. 5 at 79; Tr. 40:14.) At the second meeting, on February 26, Respondents declined to extend the contracts and also indicated that they would not be giving the two percent wage increase on April 1 and that they would be discontinuing the tuition reimbursement and union steward training benefits. (Tr. 43:14, 44:8–15.) Respondents explained that they would not grant these benefits because they derived from the National Agreement, which no longer applied because the new union was not a member of the national Coalition. (Tr. 44:17–18.) At the parties’ third meeting on March 18, 2010, Respondents gave the Union a document indicating that these benefits would not continue during negotiations over a new CBA. (Tr. 46:15, 49:14–18; GC

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Ex.10.) At another meeting for the nurses' bargaining unit in late May, Respondents again represented that they would not grant the wage increase because it was part of the National Agreement. (Ex. 5 at 43.) According to the confidential witness affidavit by a union representative, a Kaiser representative advised "that the Employer was not going to talk about the wage increase any further." (Id. at 43-44.)

Bargaining over a new CBA is currently ongoing.

III. DISCUSSION

A. LEGAL STANDARD

Section 10(j) allows a district court to grant temporary relief that it "deems just and proper" pending the Board's resolution of unfair labor practice proceedings. 29 U.S.C. § 160(j); see also McDermott v. Ampersand Publ'g, LLC, 593 F.3d 950, 957 (9th Cir. 2010). This section empowers the district court "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." McDermott, 593 F.3d at 957 (quoting Miller ex rel. NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 459-60 (9th Cir. 1994) (en banc)).

Under Ninth Circuit precedent, in determining whether temporary relief is "just and proper," district courts should "consider the traditional equitable criteria used in deciding whether to grant a preliminary injunction." Id. Thus, a party seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. (quoting Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008)). The elements of this test are "balanced, so that a stronger showing of one element may offset a weaker showing of another." Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1049-50 (9th Cir. 2010).

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B. APPLICATION

1. LIKELIHOOD OF SUCCESS ON THE MERITS

a. Standard

To establish a likelihood of success on the merits, Petitioner need not prove by a preponderance of the evidence that Respondents committed the alleged unfair labor practices. Scott ex rel. NLRB v. Stephen Dunn & Assocs., 241 F.3d 652, 662 (9th Cir. 2001), overruled in part by Winter, 129 S. Ct. 365, as recognized in McDermott, 593 F.3d at 957. Rather, a Petitioner can meet his burden by producing “‘some evidence’ in support of his contention ‘together with an arguable legal theory.’” Id. (quoting Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 460 (9th Cir. 1994)).

Contrary to Respondents’ contention, this standard survives the Supreme Court’s decision in Winter, 129 S. Ct. 365, which changed the Ninth Circuit’s earlier preliminary injunction standard. In Winter, the Supreme Court overruled Ninth Circuit precedent holding that when a plaintiff seeking a preliminary injunction demonstrates a strong likelihood of success, he need only show a “possibility” of irreparable harm. Winter, 129 S. Ct. at 375. Rejecting that standard, the Court explained that a plaintiff seeking preliminary relief must show that irreparable injury is likely without an injunction. Id. Winter did not change Ninth Circuit law on what showing is necessary to establish a likelihood of success on the merits. Accord Garcia v. Sacramento Coca-Cola Bottling Co., Inc., – F. Supp. 2d –, 2010 WL 3294384, at *5 n.3 (E.D. Cal. 2010) (“[T]he court does not conclude that the Supreme Court’s decision in Winter, nor the Ninth Circuit’s cases interpreting its applicability to labor disputes, substantially changes the standard applied in determining the likelihood of success on the merits for purposes of a § 10(j) injunction.”).

In assessing whether the NLRB has established a likelihood of success on the merits, “it is necessary to factor in the district court’s lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals.” Miller, 19 F.3d 449, 460 (9th Cir. 1994). Thus, this Court “should evaluate the probabilities of the complaining party prevailing in light of the fact that ultimately, the Board’s determination on the merits will be given considerable deference.” Id. In light of the Board’s primary responsibility for declaring federal labor policy, “even on an issue of law, the district court should be hospitable to the views of the General Counsel, however novel.” Id. (internal alteration and quotations omitted).

b. Application

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Section 8(a)(5) of the NLRA makes it unlawful for an employer “to refuse to bargain collectively with the representatives of his employees” 29 U.S.C. § 158(a)(5). Thus, an employer generally may not unilaterally change a term or condition of employment unless there is “deadlock, . . . foot-dragging by the union, [or] . . . exigency requiring an immediate change in the terms or conditions of employment to stave off disaster.” Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 997 (7th Cir. 2000); accord NLRB v. Carilli, 648 F.2d 1026, 1214 (9th Cir. 1981) (explaining that an employer must “maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse”). This duty not to make unilateral changes also applies when a new union replaces a previous union. See Ariz. Portland Cement Co., 302 NLRB 36, 36 & n.2 (1991). The Board has recognized some exceptions to this duty, however. E.g., Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 199–200 (1991). The Court will address in turn whether any of the benefits at issue here fall within any such exception.

i. Scheduled April 2010 Wage Increase

Respondents offer two alternative arguments that their failure to grant the scheduled April wage increase fell within an exception to the general rule that an employer cannot unilaterally change a term or condition of employment while negotiating with a new union. First, they contend that the elimination of the increase was permissible under Neighborhood House Association and Service Employees International Union, 347 NLRB 553 (2006), which provides that, “if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice.” Id. at 554. (Opp. at 9–13.) Second, they contend that it actually would have been unlawful for them to grant the scheduled pay increase under Consolidated Fiberglass Products Co., Inc., 242 NLRB 10 (1979). (Opp. at 13 n.8.) The Court concludes that these arguments are not likely to prevail, and that Petitioner accordingly is likely to obtain reinstatement of the eliminated wage increase.

(1) Neighborhood House

As an initial matter, the Court doubts whether Neighborhood House, which involved a

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recurring wage *review*, even applies where the parties have already negotiated and agreed to a specified wage increase effective on a date certain. In Neighborhood House, the employer's past practice was to review its wage structure and grant its employees annual cost-of-living (COLA) increases that varied between 2.2 and 3.6 percent. Neighborhood House, 347 NLRB at 553. Following a change in the employee's bargaining representative, the time for the annual COLA review arrived during negotiations with the newly certified union. Id. The parties bargained over the amount of the increase, and ultimately the employer offered to grant a 2.2 percent increase at the customary time, but only if the union agreed to make that the final agreement regarding that year's increase. Id. at 554. The union insisted on keeping open future negotiations on that year's COLA amount, and the employer accordingly refused to grant any COLA. Id. The Board concluded that this refusal did not amount to an unfair labor practice. Id. at 555. The Board based its decision on TXU Electric Co., 343 NLRB 1404 (2004), Stone Container Corp., 313 NLRB 336 (1993), and Alltel Kentucky, Inc., 326 NLRB 1350 (1998), which establish that "if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice." Neighborhood House, 347 NLRB at 554.

Like the present case, TXU Electric, Stone Container, and Alltel Kentucky, all involved scheduled annual reviews that involved anticipated wage increases that were open to discussion and negotiation. TXU Elec., 343 NLRB at 1405; Stone Container, 313 NLRB at 336; Alltel Ky., 326 NLRB at 1350. The Board's rationale in TXU Electric and Stone Container provides useful guidance here. In TXU Electric, the Board emphasized that it was not "sanctioning the use of unilateral wage changes as an economic weapon during bargaining" or departing from the policy that disfavors piecemeal bargaining and unilateral implementation of changes. TXU Electric, 343 NLRB 1407. The Board explained that "piecemeal treatment is unavoidable" in the situation there because the date for annual review of wages would occur while bargaining was ongoing. Id. Thus, "[a]bsent a contract on that date, the Respondent had to do something with respect to that matter. It could not wait for an overall impasse." Id. (emphasis in original). The Board held that the employer acted properly by offering to bargain with the union about what that "something" would be. See id. Accordingly, when the union declined to bargain over the issue, the employer properly implemented a unilateral change. Id. Similarly, in Stone Container, the Board explained that bargaining over the amount of annual increases had to happen before the appointed time for the annual increase. Stone Container, 313 NLRB at 336. Thus, piecemeal bargaining over that particular annual event was allowed. Id.

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Thus, it appears that the Neighborhood House rule that Respondents rely on applies only where piecemeal treatment of the amount of a scheduled wage increase is unavoidable. Here, no piecemeal bargaining was necessary, as Respondents had already agreed to the amount and timing of the wage increase. For that reason, the Court concludes that Neighborhood House is not likely to excuse the failure to implement the scheduled wage increases here.

Further, even if Neighborhood House did apply here, Petitioner is likely to establish that Respondents did not satisfy Neighborhood House's requirements. In particular, Neighborhood House authorizes the unilateral refusal to grant a scheduled wage increase only where the employer "provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice." Neighborhood House, 347 NLRB at 554. Petitioner has put forth enough evidence that Respondents refused to bargain about the intended change to establish a likelihood of success on the merits under Stephen Dunn & Associates's "some evidence" standard, 241 F.3d at 662.

At the administrative hearing, union representative John Borsos testified that the hospital told the union that "they weren't going to talk about" the wage increase, which they claimed they did not have to abide by. (Tr. 132:5-10, 135:7-11.) In addition, the administrative record contains a March 18 letter from Respondents indicating that they believed they were not obligated to continue honoring terms embodied in the predecessor National Agreement as opposed to the predecessor local agreements. (GC Ex. 11.) Further, Respondents indicated in this letter that they did "not have the right or the ability to apply the obligations and privileges contained in the National Agreement," which included the wage increase. (Id.) In particular, they suggested this would undermine the "right of self-governance" of the Coalition that had established the National Agreement because it would in effect grant the benefits of its agreement to a union that the Coalition had not selected for membership. (Id.) Thus, Respondents had indicated that they thought it was not only proper, but necessary, for them to refuse to grant benefits provided for in the National Agreement. This plausible sounding but fallacious argument amounts to nothing more than sophistry intended to conceal an unwillingness to bargain.

The evidence that Respondents offer to contradict the Union's position does not actually establish that they offered to bargain. Respondents cite only the testimony of a union representative that Respondents refused to extend the previous contract through October and said "[t]hat they would not be giving the two percent increase to our members." (Tr. 27:4-5, 44:8-9.) This in no way reflects that Respondents offered to bargain in good faith about the wage increase. They had previously agreed to it and, in view of the evidence presented in support of this position, appear to have sought a means of circumventing that

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obligation.

Thus, the Court concludes that Respondents are unlikely to establish that their unilateral elimination of the April wage increase was permissible under Neighborhood House.

(2) Consolidated Fiberglass

The Court also concludes that Respondents are unlikely to establish that it would have been unlawful for them to honor the scheduled wage increase under Consolidated Fiberglass.

In Consolidated Fiberglass, the Board held that it was an unlawful labor practice for an employer to grant a wage increase without bargaining for it with the current union. Consolidated Fiberglass, 242 NLRB at 10. There, wage increases were specified in a memorandum of understanding that a predecessor union and the employer had entered into to stop a strike after a collective bargaining agreement expired. Id. The Board held that the employer could not implement these wage increases after a new union was elected because the MOU “only suggested” increases for the new contract. Id. In other words, the wage increases were not already set and provided for in a CBA, and the employer could not foreclose the ability of the new union to negotiate on behalf of its members by insisting that a suggested wage increase had been fully negotiated.

In the alternative, the Board held that even if there were “a contractual commitment for such wage increases, our Decision in American Seating Company would control.” Id. American Seating establishes only that a new union may collectively bargain about all subjects even though, absent the election of that union, a previous collective bargaining agreement with a predecessor union would remain in force. American Seating Co., 106 NLRB 250, 255 (1953). This honors the employees’ choice of the new union and recognizes that there would be “little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time.” Id. With this understanding of American Seating, it is clear that Consolidated Fiberglass establishes only that an employer cannot implement a unilateral wage increase even if it would have been contractually obligated to agree to such a wage increase when negotiating a new collective bargaining agreement with the predecessor union. It says nothing about whether an employer can offer a wage increase that was promised in the actual predecessor CBA.

The Board’s decision in Koenig Iron Works, 276 NLRB 811 (1985), supports this conclusion. In Koenig, an employer executed a CBA with one union at a time when another

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union represented a majority of the employees. Id. at 811. The Board ordered the employer to abrogate that CBA, but the employer nonetheless granted a wage increase provided for in that CBA, reasoning that it had become part of the status quo. Id. The Board rejected that argument, concluding that that would effectively “resurrect the abrogated . . . contract,” which “would undermine the Respondent’s employees’ right to be represented exclusively by [the union they elected].” Id. There, again, the Board did not hold unlawful a grant of a wage increase provided for under a predecessor CBA, but rather a wage increase provided for under a CBA that was improperly created. This case therefore likewise does not apply here.

For these reasons, Respondents will not likely establish that Consolidated Fiberglass precluded them from granting the wage increase here. Because Respondents likely cannot establish that their unilateral change falls under either this rule or the Neighborhood House exception, the Court concludes that Petitioner is likely to prevail on the merits of his claim that Respondents’ refusal to grant the scheduled April wage increase constituted an unfair labor practice.

ii. Tuition Reimbursement

Respondents emphasize that, under its previous policy, it paid the continuing education expenses only of employees represented by unions that were part of the Labor Management Partnership with the Coalition of Kaiser Permanente unions. (Opp. at 17.) Thus, they argue, they did maintain the status quo by continuing to deny tuition reimbursement to non-Coalition employees.

A Kaiser policy document about the tuition reimbursement program does state under “Eligibility Criteria” that “[e]mployees represented by a union in the [Coalition] may use tuition reimbursement in conjunction with any applicable education leave for eligible courses.” (Respondent’s Ex. 3 at 1–2.) This, however, does not prove Respondents’ point. Even though this document does appear to limit tuition reimbursement to members of Coalition-unions, many benefits provided under a CBA are available only to members of the union that negotiated the CBA. That does not mean that an employer maintains the status quo during negotiations over a new CBA when it stops offering those benefits to employees who are no longer members of the predecessor union. To the contrary, if that were the case, the obligation to maintain the status quo would be virtually meaningless.

The Court therefore concludes that Petitioner is likely to prevail on the merits in establishing that Respondents committed an unfair labor practice by unilaterally discontinuing the tuition reimbursement program.

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iii. Union Steward Training Time

Respondents contend that the predecessor agreement only obligated them to allow union stewards to take time for training on “the unique aspects of the National Agreement and the related Partnership,” and thus that this benefit is no longer applicable. (Opp. at 14–15.) Although the failure to include the National Agreement in the record prevents the Court from thoroughly evaluating this contention, the Court concludes that Respondents are not likely to prevail with this argument. Respondents quote what they consider to be the relevant portion of that agreement, which lists the kinds of training Respondents will support, and the kinds of training programs that may be developed. (Opp. at 14 n.9.) To be sure, many of these areas are Coalition-specific: Labor Management Partnership Council, Partnership environment, improvement in Partnership principles, and contract training on the National Agreement. (*Id.*) Nonetheless, the provisions do not exclusively list Coalition-specific topics of training, but rather also list more general areas like “leadership skills” and “effective problem solving.” (*Id.*) Respondents’ argument that the National Agreement provides for union steward training only on Coalition-specific topics therefore is likely to fail, and Petitioner is accordingly likely to succeed on the merits of the union steward training time claim.³

2. LIKELIHOOD OF IRREPARABLE HARM

Petitioner contends that a failure to reverse the unilateral changes will undermine the integrity of the bargaining process. (Mem. at 12–15.) In particular, he has put forth evidence that the unilateral changes have undermined employee support for the Union and weakened its collective bargaining position. (*Id.* at 13.) A “confidential witness” union representative attested in an affidavit that he talks to between 50 and 100 union employees each day, and about half of these employees ask or complain about the missing wage increase. (Ex. 5 at 111.) Many employees have said this makes them feel like they don’t have a union. (*Id.*) In addition, attendance at union steward meetings has dwindled from about 40–50 stewards per meeting to about 15 or 20. (*Id.* at 112.) Similarly, the number of employees voluntarily paying dues has decreased from about 50 percent to about 10 to 15 percent. (*Id.*) Flyers have circulated urging a return to the predecessor union, citing the loss of the wage increase and tuition reimbursement. (Ex. 5 at 65.) An email has circulated urging the ouster of the

³ The parties dispute whether this issue applies to all units, or only to the employees in the nurse’s bargaining unit, who are paid on an hourly basis. (Opp. at 13–14; Reply at 13.) The Court, however, need not resolve this dispute. If Respondents are correct that the salaried employees currently are able to get paid for union steward training time, then an injunction by this Court requiring Respondents to offer this training time will not actually impose any new obligations on them.



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Union and reinstatement of the predecessor union. (Ex. 5 at 66.) These facts show that the Union is suffering irreversible harm to its bargaining power.

Even if the Union started out with so much support that it will still be able to bargain, its bargaining position diminishes along with the erosion of its support. See Asseo v. Bultman Enters., Inc., 913 F. Supp. 89, 97 (D.P.R. 1995) (explaining that “weakening of the Union’s bargaining position” is a “consequence” of “an erosion of union support”). Further, without injunctive relief, Respondents will enjoy an undue bargaining advantage by being able to use restoration of the withheld benefits as a bargaining chip. See Herman Sausage Co., 122 NLRB 168, 172 (1958) (explaining that restoration of the status quo “is warranted to prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining an undue advantage at the bargaining table”); see also Overstreet v. Thomas Davis Med. Ctr., 9 F. Supp. 2d 1162, 1167–68 (D. Ariz. 1997) (finding that, “[i]f the unfair labor practices are allowed to continue any meaningful opportunity for collective bargaining will be destroyed” where evidence showed that union support was waning).

Circuit law teaches that, when deciding whether to grant temporary relief, the Court should “keep[] in mind that the underlying purpose of Section 10(j) is to protect the integrity of the collective bargaining process and to preserve the Board’s remedial power while it processes the charge.” McDermott, 593 F.3d at 957. Petitioner has demonstrated that the integrity of the collective bargaining process—and, by extension, the Board’s remedial power—is at stake here. He has put forth evidence that Respondents’ probable unfair labor practice is causing the Union to lose support. And, as case law explains, the loss of support can constitute an irreparable harm because it weakens the union’s bargaining position and undermines the integrity of the collective bargaining process. The Court therefore concludes that Petitioner has demonstrated that the union is likely to suffer irreparable harm if this Court does not issue a preliminary injunction.

3. BALANCE OF EQUITIES

On Petitioner’s side of the balance are the hardships its members are suffering as well as the damage to the collective bargaining process and to the Board’s ability to grant relief, as described above. These harms are significant. Contrary to Respondents’ suggestion (Opp. at 12), the fact that the comprehensive bargaining proposal that the Union made in July did not address the wage increase or the continuing education benefits does not suggest that the withheld benefits are not actually important to the Union. The fact that the Union may consider other benefits more important—or other wage proposals more beneficial—does not mean that the withheld benefits are unimportant and have no affect on the bargaining process. And it certainly does not refute Petitioner’s evidence that employees frequently complain

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about the missing benefits.

Little weighs on Respondents' side of the balance. Respondents contend that injunctive relief will unfairly force them to pay employees \$2 million⁴ in wage increases and other benefits, money that they will not be able to recover if they prevail before the Board. (Opp. at 3, 21.) First, this argument carries little weight because the likelihood that they will prevail is slim, for the reasons explained above. Second, courts regularly grant injunctive relief even where it will impose financial costs on the enjoined party. E.g., Aguayo v. S. Coast Refuse Corp., No. 99-3053, 1999 WL 547861, at * (C.D. Cal. June 28, 1999) (ordering interim reinstatement of discharged employees); Davis v. Servis Equip. Co., 341 F. Supp. 1298, 1302 (N.D. Tex. 1972) (requiring employer to implement wage increase); Fleischut v. Burrows Paper Corp., No. 98-791WS, 1999 WL 1036515 (S.D. Miss. Sept. 30, 1999) (preventing employer from "unilaterally withholding its customary across-the-board raises").

Respondents' contention that an injunction would punish them for relying on Neighborhood House and would send employers the message that they should not rely on NLRB decisions (Opp. at 22) also misses the mark. As explained above, it is unclear that Neighborhood House even applies, and, even if it does, Respondents likely did not offer to bargain over the wage increase as that case requires.

Finally, Respondents' contention that granting an injunction would "damage the very fabric of the partnership underlying the National Agreement" by sending the message that employees could enjoy the benefits of the National Agreement without bearing any of its obligations (Opp. at 23) does not persuade the Court. This argument fails to recognize that, to protect the integrity of the collective bargaining process, the NLRA requires employers to maintain the status quo when a new union supplants an old one. Under Respondents' logic, following this fundamental rule would always send the message that employees can enjoy the benefits of an old union's CBA without being obligated to the old union anymore.

Because, as explained above, the Union is likely to suffer irreparable harm through loss of support from its members, and a weakened bargaining position if the Court does not grant injunctive relief, it will suffer serious hardship. By contrast, Respondents' arguments that it will suffer hardship are unpersuasive. The Court therefore determines that the balance of hardships tips decidedly in favor of granting injunctive relief.

⁴ Respondents do not explain how they calculated this figure, and Petitioner disputes it. Petitioner suggests that the amount will actually be significantly less, as he seeks only prospective payment of the wage increase, not backpay. (Reply at 21.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-7395 GAF (FMOx) Date December 15, 2010

Title James F. Small v. Southern California Permanente Medical Group et al

4. PUBLIC INTEREST

In cases under section 10(j), “the right of employees to organize and bargain collectively” can present “[a] strong claim” for the public interest. McDermott, 593 F.3d at 966 n.10. Similarly, the public has an interest in “ensur[ing] that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge.” Miller, 19 F.3d at 460.

Respondents’ arguments do not convince the Court that these interests do not control here. First, their arguments that it violates the public interest to ask the Court to go against the Board’s Neighborhood House decision and that the Union has not actually suffered a loss of support (Opp. at 24) fail for the reasons explained above. Second, the fact that they have requested expedited handling of this case by the agency does not counsel against granting injunctive relief. There is no indication that expedited handling by an ALJ, who issues a recommended order, will lead to expedited handling by the Board, the entity that actually makes the decision. Moreover, Respondents do not explain why the public has an interest in avoiding injunctive relief where the Board might soon reach its decision. Finally, even if Respondents do have a long history of good faith bargaining as they claim (Opp. at 24–25), that does not alter the Court’s analysis. By unilaterally terminating certain benefits, Respondents likely violated the Act and improperly weighted the bargaining process in their favor. The public does not have an interest in negotiations at an uneven bargaining table.

For these reasons, the Court concludes that issuing an injunction here is in the public interest.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Small’s petition for a temporary injunction under section 10(j) of the NLRA. The parameters of the injunction are set forth in the accompanying Order Granting Preliminary Injunction under Section 10(j) of the National Labor Relations Act.

IT IS SO ORDERED.

1 ROBERT MACKAY (192423)
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2 NEIL WARHEIT (133218)
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3 National Labor Relations Board
Region 21
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6 Attorneys for Petitioner
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8

9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11

12 JAMES F. SMALL, Regional
Director of Region 21 of the National
13 Labor Relations Board, for and on
behalf of the NATIONAL LABOR
14 RELATIONS BOARD,

15 Petitioner,

16 and

17 SOUTHERN CALIFORNIA
PERMANENTE MEDICAL GROUP;
18 AND KAISER FOUNDATION
HOSPITALS,

19
20 Respondents.
21
22

Civil No. CV10-7395 GAF FM0x

ORDER GRANTING PRELIMINARY
INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR
RELATIONS ACT, AS AMENDED [29
U.S.C. SEC. 160(j)];

Judge: Hon. Gary A. Feess
Courtroom: Roybal 740

23
24 This case came to be heard on the petition of James F. Small, Regional
25 Director of Region 21 of the National Labor Relations Board, for a preliminary
26 injunction pursuant to Section 10(j) of the National Labor Relations Act, as
27 amended (29 U.S.C. § 160(j)) (herein the Act), pending final disposition on the
28 matters involved pending before the Board. The Court, upon consideration of the

1 pleadings, evidence, briefs, arguments of counsel, and the entire record in this case,
2 has made and filed its findings of fact and conclusions of law, finding and
3 concluding that Petitioner is likely to successfully establish in administrative
4 proceedings that Respondents have engaged in and are engaging in, acts and
5 conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158(a)(1)
6 and (5)), affecting commerce within the meaning of Section 2(6) and (7) of the Act
7 (29 U.S.C. Sec. 152(2), and (7), and that such acts and conduct will likely be
8 repeated or continued unless enjoined.

9
10 Now, therefore, upon the entire record, it is ORDERED, ADJUDGED AND
11 DECREED, that, pending final disposition of the matters involved pending before
12 the Board:

13
14 *Respondents Southern California Permanente Medical Group; and Kaiser*
15 *Foundation Hospitals*

16 1. Southern California Permanente Medical Group; and Kaiser
17 Foundation Hospitals (herein collectively called Respondents), their officers,
18 representatives, agents, servants, employees, attorneys and all persons acting in
19 concert with them are enjoined from:

20
21 (a) Failing and refusing to bargain collectively and in good faith with
22 the National Union of Healthcare Workers (herein called the Union) as the
23 exclusive bargaining representative of the employees in the Healthcare
24 Professionals and Psych-Social units, as certified in Cases 21-RC-21117, and
25 21-RC-21118, by unilaterally implementing changes in terms and conditions of
26 employment during negotiations for a collective-bargaining agreement in the
27 absence of an overall impasse on the entire agreement.
28

1 (b) In any like or related manner interfering with, restraining, or
2 coercing employees in the exercise of the rights guaranteed them by Section 7 of
3 the Act (29 U.S.C. Sec. 157).

4 2. Respondents, their officers, representatives, agents, servants,
5 employees, attorneys and all persons acting in concert with them are affirmatively
6 ordered pending final Board adjudication to:

7 (a) Bargain collectively and in good faith with the Union as the
8 exclusive representative of the employees in the units described above concerning
9 terms and conditions of employment and, if an understanding is reached, embody it
10 in a signed agreement.
11

12 (b) Grant prospectively the unlawfully withheld April 2010 annual
13 across-the-board raise.
14

15 (c) Restore the tuition-reimbursement program.

16 (d) Restore the steward training program.
17

18 (e) Post copies of the District Court's Order at the Respondents'
19 facilities where notices to employees are customarily posted, those postings to be
20 maintained during the pendency of the Board's administrative proceedings free
21 from all obstructions and defacements; all unit employees shall have free and
22 unrestricted access to said notices.
23

24 (f) Grant to agents of the Board reasonable access to Respondents'
25 facilities in order to monitor compliance with this posting requirement; and

26 (g) Within twenty (20) days of the issuance of the District Court's
27 Order, file with the District Court and submit a copy to the Regional Director of
28

1 Region 21 of the Board, a sworn affidavit from a responsible official of
2 Respondents setting forth, with specificity, the manner in which Respondents have
3 complied with the terms of this decree, including how they have posted the
4 documents required by the Court's decree.

5 3. This case shall remain on the docket of this Court. On compliance by
6 Respondents with their obligations undertaken hereto, and upon final dispositions
7 of the matters pending before the Board, the Petitioner shall cause this proceeding
8 to be dismissed.

9
10 *Respondent Kaiser Foundation Hospitals*

11 1. Kaiser Foundation Hospitals, herein called Respondent Foundation,
12 its officers, representatives, agents, servants, employees, attorneys and all persons
13 acting in concert with it are enjoined from:

14
15 (a) Failing and refusing to bargain collectively and in good faith with
16 the National Union of Healthcare Workers (herein called the Union) as the
17 exclusive bargaining representative of the employees in the AFN unit as certified
18 in Case 21-RC-21157, by unilaterally implementing changes in terms and
19 conditions of employment during negotiations for a collective-bargaining
20 agreement in the absence of an overall impasse on the entire agreement.

21
22 (b) In any like or related manner interfering with, restraining, or
23 coercing employees in the exercise of the rights guaranteed them by Section 7 of
24 the Act (29 U.S.C. Sec. 157).

25
26 2. Respondent Foundation, its officers, representatives, agents, servants,
27 employees, attorneys and all persons acting in concert with it are affirmatively
28 ordered pending final Board adjudication to:

1 (a) Bargain collectively and in good faith with the Union as the
2 exclusive representative of the employees in the unit described above concerning
3 terms and conditions of employment and, if an understanding is reached, embody it
4 in a signed agreement.

5 (b) Grant prospectively the unlawfully withheld April 2010 annual
6 across-the-board raise.

7
8 (c) Restore the tuition-reimbursement program.

9 (d) Restore the steward training program.

10
11 (e) Post copies of the District Court's Order at Respondent
12 Foundation's facilities where notices to employees are customarily posted, those
13 postings to be maintained during the pendency of the Board's administrative
14 proceedings free from all obstructions and defacements; all unit employees shall
15 have free and unrestricted access to said notices.

16 (f) Grant to agents of the Board reasonable access to Respondent
17 Foundation's facilities in order to monitor compliance with this posting
18 requirement; and

19
20 (g) Within twenty (20) days of the issuance of the District Court's
21 Order, file with the District Court and submit a copy to the Regional Director of
22 Region 21 of the Board, a sworn affidavit from a responsible official of
23 Respondent Foundation setting forth, with specificity, the manner in which
24 Respondent Foundation has complied with the terms of this decree, including how
25 it has posted the documents required by the Court's decree.

26
27 3. This case shall remain on the docket of this Court. On compliance by
28 Respondent Foundation with its obligations undertaken hereto, and upon final

1 dispositions of the matters pending before the Board, the Petitioner shall cause this
2 proceeding to be dismissed.

3 IT IS SO ORDERED.

4 Done at Los Angeles, California, this 16th day of December, 2010.

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The Hon. Gary A. Deess
9 United States District Judge

10 Presented by:

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Robert MacKay
14 Attorney for Petitioner
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