

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

MERCY HEATH PARTNERS

Employer

and

MICHIGAN NURSES ASSOCIATION

Case 07-RC-232247

Petitioner

and

SEIU HEALTHCARE MICHIGAN

Intervenor

_____ /

PETITIONER'S BRIEF IN SUPPORT OF OBJECTIONS

Petitioner Michigan Nurses Association (herein Petitioner or MNA), by and through its attorneys Nickelhoff & Widick PLLC, submits this brief in support of its Objections to the Election in the above case, to Administrative Law Judge Sharon L. Steckler who heard this case on September 11, 14, and 15, 2020.

I. FACTS

Background

The Petition herein was filed by MNA on December 7, 2018 to represent registered nurses at the Hackley and Mercy campuses of MHP. (P Ex 1)¹ At the time the petition was filed the

¹ References to Petitioner's exhibits are abbreviated as P Ex; references to Employer and Intervenor Exhibits are abbreviated as E Ex and I Ex, respectively. References to transcript are abbreviated as Tr.

Employer, Mercy Health Partner (herein Employer or MHP), employed registered nurses at two campus locations less than 3 miles apart. Nurses at the Hackley campus were represented by MNA. Nurses at the Mercy Campus were represented by Intervenor, SEIU Healthcare Michigan (herein SEIU or Intervenor). (P Ex 2)

A representation hearing was held to determine whether an election would be held. Intervenor, SEIU, took the position that no election should be held because the unit was not an appropriate unit. (P Ex 2)

As discussed in the Decision and Direction of Election beginning in about 2008 the Employer planned to consolidate the two campus operations into a single facility at the Mercy Campus. (P Ex 2, p 2-3) The Regional Director issued her Decision and Direction of Election on February 5, 2019, finding the unit sought by Petitioner to be appropriate and ordering an election in such unit. (P Ex 2)

SEIU initially opposed the election arguing that the combined unit was not an appropriate unit. Thereafter SEIU filed numerous unfair labor practice charges that had the effect of delaying an election for a year and a half until June 2020. (P Ex 10, 11) The nationwide COVID-19 pandemic made a manual election problematic. SEIU opposed a mail ballot which the Regional Director ordered over its objection. (P Ex 12, p 2)

A mail ballot election was held with mail ballots being mailed to employees on June 4, 2020. The count was conducted on July 7, 2020. The tally showed 373 votes for SEIU; 333 votes for MNA; 3 votes for Neither; and 30 challenged ballots. (P Ex 14, 15)

MNA filed objections to the election on July 14, 2020.

SEIU CAMPAIGN OF THREATS AND PROMISES- Objections 1, 2, 3

From the time the representation petition was filed, even before the election was ordered, SEIU engaged in a comprehensive campaign message to registered nurses at the Hackley and Mercy campuses, consisting of promises and threats contingent upon the result of a certification of representative in a contested election.

January 2019 Campaign Leadership Meeting

In January 2019² at a meeting of SEIU leadership SEIU passed out a list of “Frequently Asked Questions for Mercy Registered Nurses.” (P Ex 29; Tr 703-05) This meeting was attended by a chief steward, and supporting stewards who were registered nurses on the Mercy campus.³ (Tr 705, 917, 920-23) This two page document summarizes the theme for the SEIU campaign and contains the essence of the promises and threats it made throughout the campaign. The document was identified by SEIU President Andrea Acevedo and Steward David Tinsley, a Mercy nurse. (Tr 716, 720, 916).

The “Frequently Asked Questions” summarized what became SEIU’s campaign to Mercy and Hackley nurses. Two of the questions related to the effect of an election choice of one union versus the other.

If all nurses become part of SEIU, what would happen next?

If the majority of all nurses vote to join SEIU, the Hackley nurses would immediately become part of our bargaining unit and covered under our SEIU contract. That is one of the many reasons why, if an election is held, it is in the best interest of Hackley

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From the context of a reference on page 2 of this document it appears that it was before January 17, 2019 as there is a reference to that date as an upcoming representation hearing date. (Tr 1085)

³

The Mercy stewards are identified on Petitioner’s Exhibit 30; they are listed as nurses employed at MHP on the voting list. (P Ex 13, 50)

RNs to vote for SEIU because they would then start experiencing the benefits of our superior SEIU contract.

If all the nurses become part of MNA what would happen to our SEIU contract?

If the majority of nurses vote to be part of MNA, it would be an absolute disaster for Mercy RNs. Our contract terms would be frozen. We would then, as MNA members, have to start negotiating a completely new contract with Mercy. We would not only lose our SEIU contract which we have built up over many years but we would also lose the strength, support and resources of SEIU.

(P Ex 29, p 2 [emphasis in original])

SEIU's Communications to Hackley Nurses - Objection 1

On January 24, 2019 SEIU mailed a brochure to approximately 446 Hackley nurses communicating the theme set at its leadership meeting. (Tr 866) In two locations on the mailer, SEIU headlined "HACKLEY RNs HAVE SO MUCH TO GAIN WITH AN SEIU CONTRACT" In an accompanying letter from Wendy Trach, Chief Steward and Mercy nurse, SEIU touted its "superior contract." SEIU also repeated the assertions of the Frequently Asked Questions in its leadership handout and explained:

[I]f an election does take place, it is in the best interest of MNA members to vote for SEIU. If the majority of the Rns vote for SEIU, Hackley nurses would immediately be covered by our superior SEIU contract, and start enjoying the better wages, benefits, rights and protections of SEIU membership. But if the majority of RNs vote for MNA, all Hackley and Mercy RNs will have to negotiate a completely new contract, with no guarantees of improvements.

P Ex 17, p 1; P Ex 31))

The second page of the flyer repeated a third time, the headline "HACKLEY RNs HAVE SO MUCH TO GAIN WITH AN SEIU CONTRACT." Below the headline it repeated in a highlighted yellow box:

If the majority of RNs vote for SEIU, Hackley nurses would immediately be covered

by the superior SEIU contract, and start enjoying the better wages, benefits, rights and protection of SEIU membership. **See how much you have to gain.**

(P Ex 17, p 2 [emphasis in original]) Below was a contract comparison between the collective bargaining agreements of MNA and SEIU. (P Ex 17) This document was mailed to approximately 446 Hackley nurses. (Tr 866)

In December 2019 SEIU sent a mailer that repeated the promise first sent to Hackley nurses in January 2019 that joining SEIU provides better pay, working conditions and a better contract, “immediately” via our superior contract. (P 45, Tr 956-57)

Moreover SEIU’s theme of a promise to Hackley nurses of the superior contract was implicitly carried through by contract comparisons which were titled “How much are MNA members who work at Hackley losing every year?” Such comparisons were sent to all Mercy and Hackley nurses on March 6, 2019 and May 29, 2020, just prior to the mailing of ballots. (P Ex 32, 33)

In December 2019 SEIU created a special website for the campaign: nursesforseiu.org. (P Ex 51) On this website they posted the flyer created a year before and mailed to all Hackley nurses in January 2019 that contained language almost identical to the message of the Frequently Asked Questions. The flyer promised Hackley nurses the coverage of SEIU’s superior contract immediately after a majority of nurses voted for SEIU. (P Ex 19) The flyer remained on the website for the duration of the campaign and voting where it was still posted as of the hearing. (P Ex 19; Tr 932-34, 1016-18) This website had hundreds of visits. (P Ex 51)

The promise to Hackley nurses of immediate coverage under the SEIU contract in the event that a majority of nurses voted for SEIU was one piece of an comprehensive message that either promised or threatened every voter in the bargaining unit.

SEIU's Communications to Mercy Nurses - Objections 2 and 3

While promising Hackley nurses that an election win for SEIU would result in an immediate financial benefit upon certification, it simultaneously communicated a negative message to its own bargaining unit employees that a loss for SEIU would be a disaster for SEIU and lead to bargaining that would start from zero.

On January 16, 2019 it sent a mailer to hundreds of SEIU bargaining unit nurses:

We want to be clear that *being forced to leave SEIU would be a absolute disaster for Mercy RNs*. We would lose our contract, which we strongly believe is superior to MNA's contract at Hackley. We would have to negotiate a completely new contract, starting from zero.

(P Ex 30, page 2 [emphasis in original]; Tr 865-68) Like other SEIU literature this flyer contained a contract comparison between the collective bargaining agreements of SEIU and MNA. With respect to the last box in the comparison it stated that it had superior pay, benefits, scheduling and rights, as opposed to MNA whose terms it characterized as frozen:

MNA's Hackley contract expired in November and it has been unable to win a new agreement, leaving Hackley with frozen terms.

(P Ex 30 page 2, "The SEIU Difference" [emphasis added]).

Another piece of literature repeated the same threat, a piece of literature the existence of which that SEIU feigned ignorance except that it was at one time present in its office. Branden Gemzer, MNA representative, testified that he saw this posted in the first quarter of 2019 at the Hackley campus. Gemzer testified that it was up at least at least two weeks. (Tr 935)

The MNA is endangering our wages, benefits and job security because if Mercy nurses vote to leave SEIU, we will lose out contract completely at a very risky time of change, and have to start the negotiating process from zero.

(P Ex 44)

Dave Tinsley, SEIU steward and activist posted on a Facebook page after balloting started:

If we lose we will immediately fall under the MNA agreement. So you want to keep your contract. Get out the vote. Talk to your colleagues and make sure they have sent their ballots in. There is too much to lose. \$\$\$ Saturday premium, higher wages, seniority. Please send your ballots in today. Don't wait.

(P Ex 6)

This threat was posted on a private Facebook page that was accessible to most (300-350) registered nurses on the Mercy Campus. (Tr 724-25) The post received 11 comments and 7 emoticons. One of the comments was from Sam Mogielski, a Mercy RN. (Tr 730, 732) Tinsley testified as to other comments that were made by nurses in the Mercy campus bargaining unit RN. Mike Henry responded about seniority and Mercy RN Crystal Ross commented something like "scaring your members into voting probably isn't the way to go." (Tr 732) From the context of the post it appears that this post was posted after the date that ballots had been mailed, June 4, 2020; Tinsley confirmed that he thought it was posted in the beginning of June 2020. Tinsley testified that it remained up for a few weeks and was taken down at some point because of a "controversy." (Tr 727-28)

The next post on the private Facebook page, below Tinsley's, was that of Andrea Acevedo, President of SEIU Healthcare Michigan. She did not contradict or comment on Tinsley's post but merely amplified its message by reminding employees that today was the last day to get a ballot, "as we continue to work the campaign." (P Ex 46)

Finally, the threat that if MNA was certified Mercy nurses would lose their contract and

bargaining would start from zero was a permanent fixture on its website seiuhealthcaremi.org from about spring or early summer 2019 until the day of the hearing, as was the reference to MNA's terms as "frozen". (P Ex 18; Tr 808-15, 1022-23)

Moreover the website and the contract comparison therein was frequently cited in its campaign literature. For example on June 5, 2020, Andrea Acevedo sent an email sent to all Mercy nurses during the balloting period, which specifically cited its website which contained the threats about losing their contract and bargaining starting from zero if they are forced to leave SEIU, and MNA terms being frozen. (P Ex 18; Tr 812-15; 928-31;1018-20) This concept of immediate application of the MNA contract as a threat was reinforced by an SEIU nurse story on its nursesforseiu.org website by Fred Wyse, RN at Mercy, that stated, " I just can't afford to take the pay cut if MNA were to get in." (P Ex 19[o])

Employer's Failure to Disavow SEIU's Conduct - Objection 6

It is essentially uncontradicted that MNA raised issues with respect to SEIU's campaign promises and threats with Employer's counsel Keith Brodie in about February or March 2019.

Counsel for MNA in the representation case, Amy Bachelder, testified that she specifically called Brodie in about March 2019 about SEIU's promise that if a majority of employees voted for SEIU, Hackley nurses (represented by MNA) would immediately fall under SEIU's superior contract. Brodie responded that he understood that the law required an employer to maintain the status quo as to terms and conditions of employment after certification. Bachelder agreed with Brodie's understanding of the law and stated that his understanding demonstrated why SEIU's conduct was so damaging. She told Brodie that the Employer had an obligation to inform its employees what the real result of a certification would be. When Brodie suggested that MNA could

do so, Bachelder responded that the two groups of employees represented by rival unions would be unable to discern the reality from the different positions of the unions. It was uncontradicted that Bachelder told Brodie that such conduct was coercive and affected employee free choice.⁴ Brodie indicated that he understood MNA's position. He told Bachelder that he "didn't want to get involved" and that he didn't want there to be a perception that the Employer was favoring one union over another. (Tr 1097-1100)

Sascha Eisner, Associate Executive Director of Field Operations, supervisor of all representation matters for MNA in Michigan, testified that he also had a conversation with Keith Brodie in about February of March 2019. (Tr 807-08, 818) Eisner called Brodie because he was alarmed at what was being circulated by mail by SEIU. He told Brodie that he was concerned because he was hearing from members and seeing chats among SEIU and MNA members that people were confused as to what happens to their contract depending on the outcome of the election. He told Brodie that SEIU is telling people that if a majority of employees vote for MNA, SEIU members will lose their contract and bargaining would start from zero. He told Brodie that SEIU was telling MNA members that if they for SEIU, they will immediately start receiving superior benefits under the SEIU contract. Eisner said that he understood that that was not correct. (Tr 817-20)

Brodie responded that he agreed with Eisner that the principle of status quo ante would prevail and that the terms of the existing contracts would remain in effect until a new contract was

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Brodie testified in a vague and general manner as to his conversations with Bachelder without specifically contradicting Bachelder's testimony. His only denials were to a question whether Bachelder had stated that the Employer had a "legal obligation" when she had only testified to an "obligation" and to statements not testified to by Bachelder with respect to starting from zero, and "frozen" benefits. (Tr 1098-99)

negotiated. Eisner responded that MNA was attempting to communicate the status quo ante principle that to employees but they were not convinced because they see it all as union propaganda and don't know who to believe. Eisner said he was contacting Brodie as the final authority on the questions because the employer will enact the terms and conditions of employment or carry forward new terms and conditions. He said that employees were confused and unable to cast a fair vote if they don't know the truth about what will happen to their contract. (Tr 819-20)

Eisner asked Brodie for the Employer to clarify the record because people don't know who to believe. (Tr 820) Brodie agreed that he viewed the law the same way as Eisner, but responded that he was not inclined to advise the Employer to weigh in on this matter. Brodie responded that if they put out a statement that agreed with MNA's view, SEIU could complain that the Employer was siding with MNA and use it to file more charges and potentially block the election which was already blocked at the time. Brodie said that he wanted to "stay out of it" and not have an allegation that they were siding with one union or the other. (Tr 821)

Eisner stated that he was not asking the Employer to take sides, but to clarify the law and the truth because employees were confused and not fully trusting what they hear from either union. Eisner again asked Brodie to clarify what the consequence would be on the existing contracts. (Tr 821)

Brodie told Eisner that he would talk to his client but he was leaning against saying anything. (821-22) The Employer never weighed in on the issue. The only documentary communication from the Employer did not address the issue of what terms and conditions would be in effect, but only stated that an entirely new contract would have to be negotiated. (E Ex 5)

Brodie's testimony with respect to his conversation with Eisner was vague and general and

did not contradict the specificity of Eisner's recollections. Nor was Brodie asked by his attorney whether Eisner specifically raised the issue of SEIU threats that if MNA won the election Mercy nurses would lose their contract and "bargaining would start from zero." This failure to ask Brodie to deny these statements was clearly not an oversight, but an indication that Brodie would not have denied such statements. Paradoxically, Brodie was asked to deny such statements by Bachelder when Bachelder did not so testify. (Tr 1098-99)

HEALTHCARE DISCOUNT-Objection 5

Unfair labor practice charges were filed by MNA and SEIU with respect to the Employer's termination of the health care pharmacy discount. Both MNA and SEIU signed informal settlement agreements with the Employer. (P Ex 8, 9) However, SEIU falsely represented on its website throughout the period of time up to and including voting, that MNA did nothing in connection with this issue. (P Ex 18[g])

UNCOUNTED BALLOTS -Objection 14

Ten ballots were postmarked before the count, but were not included in the count. Had the ten ballots which were postmarked before the count been included in the count it is possible that the challenged ballots would have been determinative and a different election result reached or a runoff election been required to be held.

Different reasons appear for the failure to count; eight of the ballots postmarked before the count were not received by the Region before the date of the count. Of the ballots not received by the Region before the count, one ballot, that of Dorothy Harris, was postmarked on June 20, 2020

but not received by the Region until July 14, 2020, 34 days later. It was not counted.

Of the ballots not received by the Region before the count, the ballot of Paula Randolph was postmarked on June 8, 2020 addressed to the Grand Rapids Office which was closed because of COVID-19 issues; the ballot was forwarded by the Post Office on July 16, 2020 to an address belonging to a Grand Rapids NLRB employee, and was received there on July 20, 2020. Paula Randolph's ballot took 42 days from the date of Grand Rapids postmark to be received by the Grand Rapids NLRB office. It was not counted.

Of the ballots not received by the Region before the count, the ballot of Kristi Larson was postmarked on July 1, but not received by the Region until July 14, 2020, 13 days later. Similarly Stephanie French's ballot was postmarked on July 1, 2020 but not received by the Region until July 14, 2020, 13 days later.

Two ballots received by the Region before the count were nonetheless not counted. The ballot of Cindy Mendez (P Ex 47 [m, n]) was postmarked on June 10, 2020 and received by the Region on June 15, 2020. It was not counted. From the explanation offered by the Region with respect to documents produced it appears that Mendez was sent a second ballot because it was returned without a blue envelope. (See P Ex 48, Cindy Mendez) Apparently the second ballot was not returned by her as her name is not checked off the voting list. (See P Ex 50, Cindy Mendez). According to Regional policy the first ballot which was returned without a blue envelope should have been counted. (Tr 1037-38)

Grant Smith's ballot was postmarked on June 9, 2020 and received by the NLRB on June 12, 2020; it was not counted. (P Ex 47 [w, x]) While the voting list shows that he submitted a void ballot, (P Ex 50, Grant Smith) it was not the ballot in Petitioner's Exhibit 47 of uncounted ballots

that was voided as the voided ballot is contained in Petitioner's Exhibit 49, rejected by the Judge. (Rejected Exhibit P 49 [g, h]), reflects the ballot deemed void, presumably because of the lack of a signature.) It appears that he was initially sent a duplicate ballot because of a blue envelope issue (See P Ex 48, Grant Smith; P Ex 47 [w] "dup blue env") Again according to Regional policy the first ballot returned without a blue envelope should have been counted. (Tr 1037-38) Petitioner renews its offer of Petitioner 49 for the reasons discussed, i.e. to demonstrate that Grant Smith's uncounted ballot should have been counted, even though he sent in a second ballot which was properly voided.

"The Board gives great weight to the closeness of the election in deciding whether conduct is objectionable." Hopkins Nursing Care Center, 309 NLRB 958, 959 n 8 (1992). The election herein was decided by at most ten votes, more likely 8, either one of which is a negligible number in view of the eligible voters. See Cambridge Tool & Mfg. Co., 316 NLRB 716 (1995).

II. LEGAL ANALYSIS

The standard for the overturning of an election is set forth in General Shoe, 77 NLRB 124 (1948), in which the Board held that conduct which creates an atmosphere which renders employee free choice improbable will warrant setting aside an election, even where such conduct does not rise to the level of an unfair labor practice. The issue is whether the conduct interfered with the "laboratory conditions" required to "determine the uninhibited desires of the employees." Id at 127.

The test is an objective one, whether the conduct at issue has "the tendency to interfere with employees' freedom of choice" or "could have reasonably affected the election results." Cambridge Tool & Mfg Co., 316 NLRB 716 (1995); Safeway Inc., 338 NLRB 525, 527 (2002). The Board

considers: 1) the number of incidents; 2) the severity of the incidents; 3) the number of employees subjected to the misconduct; 4) the proximity of the misconduct to the election; 5) the degree to which the misconduct persists in the mind of the bargaining unit; 6) the extent of dissemination; 7) the effect if any of misconduct by the opposing party to cancel out the effects of the original misconduct; 8) the closeness of the final vote and 9) the degree to which the misconduct can be attributed to the party. Taylor Wharton Division, 336 NLRB 157, 158 (2001) Not all factors need to be present to set aside an election but the relative strength and weakness of the factors present are examined in their totality. See Id.

SEIU PROMISES AND THREATS

Promises to Hackley Nurses

Both the Employer and Intervenor seek to characterize the campaign promises and threats to virtually all MHP nurses as mere misrepresentations of law which employees are capable of evaluating as election propaganda under Midland National Life Insurance, 263 NLRB 127 (1982). Such an argument ignores the fact that apart from the issue of misrepresentation promises of benefit and threats of loss may still justify setting aside an election and that they are evaluated under a different standard than that of Midland National Life Insurance. The mere fact that a statement is a misrepresentation “does not immunize statements that rise to the level of being coercive.” John W. Galbreath, 288 NLRB 876, 877 (1988).

It is clear that promises of benefit made by a union can be found to be objectionable. A promise or threat made by a union can be objectionable if the Union is viewed as being capable of implementing the promise or threat. See LaLique N.A., Inc., 339 NLRB 1119 (2003). While the Board in LaLique found the Union’s promise of free medical coverage not objectionable because it

was explained in other communications as being dependent on negotiations with the Employer, it cited with approval cases in which union promises of benefit constituted objectionable conduct. Id at n 7. SEIU's promise herein, that Hackley nurses will immediately receive the benefits of its superior contract, was never explained by SEIU in any context except that Hackley nurses had so much to gain, and that they would receive immediate superior contract coverage and benefits.

The concept of using the promise/threat of the effect of a certification resulting in immediate contract coverage was clearly a pillar of SEIU's election campaign as reflected in its leadership Frequently Asked Questions, which was handed out in January 2019 to the chief steward and stewards who are Mercy nurses. The promise that Hackley nurses would immediately be covered under SEIU's "superior contract" in the event that a majority of nurses voted for SEIU was explicitly promised in the January 24, 2019 mailing to hundreds of Hackley nurses and was thereafter continuously displayed on its website created in December 2019, nursesforseiu.org for the world to view. The website had hundreds of visitors and the promise was still on display as of the hearing date. (P Ex 51, p 2)

The promise was also implicitly communicated by SEIU in its frequent communications comparing contracts and asking "How much are MNA members who work at Hackley losing every year?" Finally the immediacy of the benefit to Hackley nurses was amplified by the December 2019 holiday mailing. (P Ex 45)

SEIU's promise of immediate contract coverage was a naked promise of financial benefit which was conditioned upon the success of SEIU in the election and therefore objectionable. See Crestwood Manor, 234 NLRB 1097 (1978). It was pervasively communicated to nurses, and SEIU never in any way modified its promise. While MNA attempted to communicate a different message,

it was unsuccessful in convincing employees. And MNA was unsuccessful in prevailing upon the Employer to communicate what would in reality occur. While the Employer professed that its failure to weigh in on this issue was a result of its desire for neutrality, it is clear that neutrality is more than remaining silent in the face of false promises and coercion. The Employer in effect ratified and amplified the coercive effect of SEIU's promise and threats discussed below to Mercy nurses by refusing to correct SEIU's brazen promise of benefit. See Hamburg Shirt Corp., 156 NLRB 511, 523-24 (1965).

The promises of immediate coverage under a superior contract here are not speculative campaign promises of what the Union will achieve in negotiations; on the contrary SEIU was representing as a promise what it had achieved in its legally enforceable collective bargaining agreement. This is not a case where a union makes future promise of benefits and the Board might validly reason that employees understand that benefits must be bargained collectively. E.g. The Smith Co., 192 NLRB 1098, 1101 (1971). In this case the reasonable inference for employees is that such benefits do not have to be bargained collectively because they exist in a valid enforceable collective bargaining agreement. It is simply unrealistic to assume that employees would conclude that the contract in existence would not immediately cover them, as promised by SEIU, or that the promised benefits were not guaranteed benefits already achieved by SEIU.

The Employer's and SEIU's attempt to characterize this clear promise as a mere campaign propaganda misrepresentation ignores the reality of the workplace in which employees are not labor lawyers but rather laypersons who have no reason to question the application of SEIU's contract in the event of an SEIU election victory. It also ignores the Employer's complicity in refusing to "weigh in" on the issue.

Threats to Mercy Nurses

The same is true with respect to the threats of loss to Mercy nurses. The Employer and Intervenor would like to characterize these communications as mere campaign propaganda misrepresentations, the truth or falsity of which employees are presumably able to evaluate.

While SEIU's threats to its members that they would lose their contract may not constitute objectionable conduct by itself⁵, when combined with the threats that bargaining starts from zero, and MNA wages are frozen, it raises a familiar threat of loss that the Board has not been hesitant to conclude affects employee free choice. E.g. Pearson Education Inc., 336 NLRB 979, 980 (2001); Frank's Nursery & Crafts, Inc., 297 NLRB 781, 783 (1990).

The Board has characterized a threat that bargaining will start from "zero" a "dangerous phrase" which carries within it the threat that an employer will become punitively intransigent in the event that the union wins the election. Coach and Equipment Sales Corp, 228 NLRB 440 (1977). Admittedly cases finding such threats to be objectionable are usually threats by an employer because unions do not routinely use such threats against their members or supporters, but the impact of the these SEIU threats on employee free choice must be evaluated under the same legal principles, especially, as here where MNA advised the Employer of the threats, and asked it to correct them, which it declined to do.

Threats to bargain from zero are classically found to be coercive and objectionable, even if not alleged to be an unfair labor practice. Thus in Amboy Care Center a threat that bargaining would start from scratch if employees chose petitioner rather than an incumbent union was found to be objectionable although not alleged as an unfair labor practice. 322 NLRB 207 (1996) . The question

⁵ Air LaCarte, Inc., 284 NLRB 471 (1987).

of what terms and conditions of employment would be in effect following an election victory for either MNA or SEIU where MNA's collective bargaining agreement had expired and SEIU had a binding collective bargaining agreement in effect does not have an obvious intuitive answer for employees. In fact the intuitive answer of employees may be wrong. Labor lawyers Amy Bachelder and Keith Brodie agreed that the answer was to maintain the status quo; experienced union representative Sascha Eisner, in charge of representation matters for MNA, concluded the same. In fact it appears from the foregoing that SEIU was either painfully ignorant of the consequences or consciously deceptive in its communications of the implications of this question as it never deviated from its message of promises and threats.

SEIU Steward Dave Tinsley's June 2020 threat alone should be sufficient to set aside the election. He falsely threatened Mercy nurses during the balloting in June 2020, that if they lost they would immediately fall under MNA's contract, stressing the loss of benefits that would result from immediate application of the MNA contract. This threat was made on a private Facebook page accessible to hundreds of Mercy nurses. It received 11 comments and 7 emoticons, including thumbs up and hearts. The very next comment on the Facebook page was from SEIU President Andrea Acevedo who posted about continuing to work the campaign and reminding Mercy nurses that it was the last day to request a ballot if a nurse needed one. It is a naked threat widely disseminated.

There can be no question that the answer to the question as to the effect of a certification was of paramount concern to nurses at MHP at both the Mercy and Hackley campuses. See More Truck Lines, 336 NLRB 772 (2001). There can be no question that MNA and SEIU gave conflicting answers, and that the Employer refused to "weigh in" on the matter. There can be no question given the ubiquitous threats and promises by SEIU on the issue of impact of the certification, in an election

in which 10 votes (or 8 votes if one includes the two improperly uncounted ballots) out of 739 decided the result, that it is reasonable to conclude that this conduct had an impact on employee free choice.⁶ The Tinsley threat alone was made to a private group of Mercy nurses during the time that balloting was occurring. MHP nurses deserve better than the confused and coercive messages communicated by SEIU as aided by the silence of the Employer.

MNA requests that the objections be sustained and the election be overturned and that a new election be ordered so that nurses at both the Hackley and Mercy campuses be permitted to exercise their free choice to determine if they choose to be represented for purposes of collective bargaining and if so, by whom.

UNCOUNTED BALLOTS

Petitioner's Exhibit 47 includes ten ballots which were not counted by the Region; two were subject to extraordinary postal delays, complicated by the closure of the Grand Rapids office due to COVID-19. Two ballots were uncounted which should have been counted (Cindy Mendez and Grant Smith). The factor of postal delays and the nationwide pandemic plus two wrongly excluded ballots constitute justification for the overturning of the election in combination with the totality of circumstances discussed above. At the very least, it is evidence of an even closer election than reflected in the tally of ballots, the results of which objectively could have been influenced by the SEIU conduct discussed above. While normally delayed failure to receive the ballots may not be

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The analysis of the closeness of the vote in an election properly excludes consideration of the number of challenged ballots. See Mercy General Hospital, 334 NLRB 100, 108 (2001). P

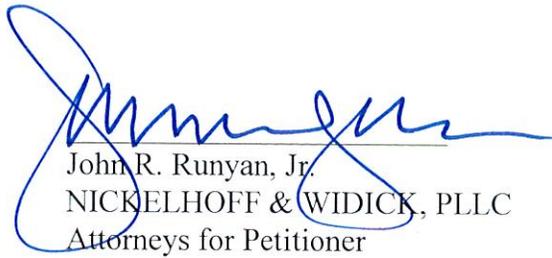
objectionable, the circumstances present here, well publicized problems with the U.S. Postal Service, and the closure of the NLRB Grand Rapids office due to the nationwide COVID-19 pandemic, dictate a closer examination.

HEALTH CARE DISCOUNT

Both MNA and SEIU filed unfair labor practice charges against the Employer for its unilateral cessation of the medical discount in late 2018, early 2019. Both unions entered into informal settlement agreements with the Employer. SEIU misrepresented the NLRB processes with respect to such case when it announced its achievement on its website, and stated that MNA had done nothing. Such message continued on the website throughout the campaign and was still being displayed as of the date of the hearing. SEIU's attempt to misrepresent the role of the NLRB in this matter contributes to the totality of the circumstances which compel a new election.

CONCLUSION

MNA urges the Judge to find that the pervasive threats and promises made by SEIU as communicated to hundreds of nurses during the critical period, justify overturning the election, as they constitute false coercive conduct, which was ratified by the Employer. The election was decided by a handful of ballots as a result of conduct which objectively and reasonably interfered with employee free choice.



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September 28, 2020

CERTIFICATE OF SERVICE

Amy Bachelder, being first duly sworn, deposes and says that on the 28th day of September, 2020 she served a copy of Petitioner's Brief in Support of Objections on:

Keith J. Brodie:

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September 28, 2020

Amy Bachelder