

**Mercy Hospital Mercy Southwest Hospital and California Nurses' Associations**

**Mercy Hospital Mercy Southwest Hospital and SEIU Nurse Alliance Local 535 and California Nurses' Association.** Cases 31–CA–25139 and 31–RC–7993

November 20, 2002

**DECISION, ORDER, AND DIRECTION**

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This case involves the issue of whether the Respondent's implementation of wage increases, or the timing of their announcement or implementation, granted to its registered nurses who were the subject of organizing drives by two competing labor organizations, violates the Act or constitutes election misconduct sufficient to set aside the May 30–31, 2001 election.<sup>1</sup> We agree with the judge's conclusion that because there is sufficient evidence that the Respondent had been planning, in advance of the union activity, to implement a system-wide wage survey and corresponding adjustments to the nurses' salaries as a result of its recruitment and retention problems, the wage increase itself does not violate Section 8(a)(3) of the Act. However, we further agree with the judge, for the reasons set forth below, that the timing of the Respondent's announcements of the nurses' wage increases during the critical period violates Section 8(a)(1) of the Act and constitutes election misconduct.<sup>2</sup>

In determining whether a grant of benefits during an election campaign violates the Act, the Board has held

<sup>1</sup> On November 19, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a combined supporting brief and brief in opposition to the Respondent's exceptions, and the Charging Party/Intervenor filed cross-exceptions and a combined supporting brief and answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified above, and to adopt the recommended Order.

The Respondent and the Charging Party/Intervenor have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America*, 337 NLRB 175 (2001).

<sup>2</sup> The complaint alleges that the Respondent discriminated against employees in order to discourage their union activities, in violation of Sec. 8(a)(1) and (3) of the Act. It did not independently allege that the Respondent interfered with, restrained, or coerced them in the exercise of Sec. 7 rights, in violation of Sec. 8(a)(1). However, no party filed exceptions to the judge's finding of an independent 8(a)(1) violation.

that such conduct "is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. . . . [A]n employer can meet this burden by showing that the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the Union." *American Sunroof Corp.*, 248 NLRB 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). Similarly, an employer cannot time the announcement of the benefit in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness. See, e.g., *Capitol EMI Music*, 311 NLRB 997, 1012 fn. 4 (1993), enfd. 23 F.3d 399 (4th Cir. 1994). The standard for determining whether the timing of benefit announcement during the critical period is unlawful is essentially the same as the standard for determining whether the grant of benefit itself violates the Act. Accordingly, "[t]he Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit." *STAR, Inc.*, 337 NLRB 962, 962 (2002).

In this case, the timing of the Respondent's April 18 and May 24, 2001 announcements occurred during the critical period, and thus, raises an inference of coercive conduct.<sup>3</sup> In order to overcome this evidentiary inference, the Respondent has the burden of "establishing an explanation other than the pending election" for the timing of its benefit announcements. To this end, the Respondent produced only one witness, Sheri Comaianni, its human relations advisor. Comaianni testified that she participated in developing and implementing a wage survey for the nurses and a corresponding salary adjustment based on that survey. However, when asked by the General Counsel whether she "participate[d] in the decision as to when the increases—as to the timing of the announcement of the increases," Comaianni replied, "No, I did not." Asked a second time, "Did you participate in the decision of the timing of the granting of the increases?" Comaianni again replied, "No, I did not." As a result, the Respondent's sole witness, who was called to rebut the established inference that the timing of the April 18 and May 24, 2001 announcements were coer-

<sup>3</sup> The amended complaint alleges that the Respondent's April 18 and May 24, 2001 announcements violated the Act. The judge found that the Respondent's March 21 and May 24, 2001 announcements violate the Act. We do not base our finding of unlawful conduct on the Respondent's March 21, 2001 announcement because this announcement was not alleged as a violation in the complaint, it occurred before the petition was filed on April 10, 2001, and, ultimately, it is not necessary to rely on it for the disposition of this case.

cive, was completely unqualified to testify about the reasons the announcements were timed as they were. Respondent elicited no further testimonial or documentary evidence to carry its burden to show that the timing of the announcements was for reasons “other than the pending election.”<sup>4</sup> Therefore, we conclude that the Respondent’s April 18 and May 24, 2001 announcements violated Section 8(a)(1) of the Act.<sup>5</sup> In so finding, we further conclude that the Respondent engaged in objectionable conduct warranting setting aside the election in the event that the revised tally of ballots shows that there is not a majority vote in favor of Petitioner SEIU Nurse Alliance Local 535.<sup>6</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mercy Hospital Mercy Southwest Hospital, Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 31–RC–7993 is severed and remanded to the Regional Director for Region 31 for further appropriate action consistent with this Decision.

<sup>4</sup> We also find it significant that the Respondent’s May 24, 2001 announcement was directed solely to the two facilities at which there was union activity, and no announcement was made at the facilities not the subject of the unions’ campaigns, even though the announced increases were equally applicable to the nurses at those facilities as well. Such targeted announcements underscore the inference that the May 24 announcement was related to the union activity.

<sup>5</sup> In finding this violation, Members Bartlett and Cowen do not rely on *K-Mart Corp.*, 336 NLRB 455 (2001).

<sup>6</sup> If the revised tally of ballots shows that the election results are inconclusive and no ballot selection is favored by a majority of the voters, a rerun election shall be conducted. See *Cook Family Foods*, 317 NLRB 1137 fn. 3 (1995) (the Board will order rerun rather than runoff election where two unions have competed, the results were inconclusive, and the Board has found the Employer engaged in objectionable conduct).

If the revised tally of ballots favors the Petitioner, the Board will certify the representative. As stated in *Showell Poultry Co.*, 105 NLRB 580 (1953), in an election involving two competing unions in which one union has won the election decisively, the election will not be set aside because of employer conduct equally affecting both unions. See also *Randall Rents of Indiana*, 327 NLRB 867, 868 (1999) (the Board declined to set aside two-union election where employer issued unusually large bonuses to unit employees during the critical period); *Flat River Glass Co.*, 234 NLRB 1307 (1978) (the Board declined to set aside two-union election where employer maintained invalid no-solicitation rule). In the absence of evidence that the Employer’s misconduct disparately impacted the competing unions, the Board will presume that the objectionable conduct had equal effect on both unions, and the prevailing union will be certified.

APPENDIX  
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 announce wage adjustments in a manner to influence the outcome of any union election.

WE WILL NOT implement wage adjustments in a manner to influence the outcome of any union election.

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.

#### MERCY HOSPITAL MERCY SOUTHWEST HOSPITAL

*Ann Weinman, Esq.*, for the General Counsel.

*Mary P. Palmer, Esq.*, of Newport Beach, California, for the Respondent.

*Jane Lawhon, Esq.*, of Oakland, California, for the Intervenor/Charging party.

*James Rutkowsky, Esq.*, of Los Angeles, California, for the Petitioner.

#### DECISION

##### STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to a petition for election filed on April 10, 2001,<sup>1</sup> Region 31 conducted a union representation election among Respondent’s employees on May 30 and 31 in which California Nurses’ Association (Intervenor/Charging Party) and SEIU Nurse Alliance Local 535 (Petitioner) appeared as competing labor organizations. Challenged ballots were sufficient in number to affect the results of the election.<sup>2</sup> On June 7, Intervenor/Charging Party filed timely objections to conduct affecting the results of the election (objections). Intervenor/Charging Party filed initial and first amended unfair labor practice charges on June 29 and

<sup>1</sup> All dates are in 2001 unless otherwise indicated.

<sup>2</sup> At the hearing, the parties resolved the challenged ballots by stipulation as follows: challenges were sustained as to the ballots of Stephanie Eyherabid, Brenda Heideman, Cynthia Morlane, Cindy Relyea, Joann Seaton, and Cindy Frey. Challenges were overruled as to the ballots of Dianne Fuller, Erlinda Nitro, and Joanne Burris. Therefore, no issue exists as to challenged ballots.

July 24, respectively. The complaint issued August 9, and the supplemental decision on objections and challenges and order consolidating cases issued September 7, consolidating Case 31–RC–7993 with Case 31–CA–25139. The consolidated cases were tried in Los Angeles, California, on October 2. The complaint, as amended at the hearing alleges: (1) that Mercy Hospital and Mercy Southwest Hospital (Respondent or Mercy) on April 18, announced and on May 13 implemented a registered nurse compensation plan (the plan) for registered nurses (RNs) that increased their wages in various respects; (2) that Respondent on May 24, announced and on May 27, implemented a weekend differential for RNs and an increase in the casual rate of pay; (3) that Respondent’s conduct was intended to discourage employees from engaging in protected activity and, thus, violated Section 8(a)(1) and (3) of the Act. Intervenor/Charging Party bases its objections on the same conduct.

#### Issues

1. Did Respondent, by announcing and implementing the plan for RNs, discourage employees from engaging in protected activity and thereby violate Section 8(a)(1) and (3) of the Act?
2. Did Respondent, by announcing and implementing a weekend wage differential and a casual per diem increase for RNs discourage employees from engaging in protected activity and thereby violate Section 8(a)(1) and (3) of the Act?
3. Did Respondent, by the conduct set forth above, interfere with the election?

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a California corporation, is engaged in the operation of hospitals and provides inpatient and outpatient medical care at facilities in Bakersfield, California. In the 12-month period preceding the complaint, Respondent derived gross revenues in excess of \$250,000 and purchased and received at its Bakersfield, California hospitals products, goods, and materials valued in excess of \$5000 directly from enterprises located outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Petitioner and Intervenor/Charging Party are labor organizations within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *Relevant Credible Evidence*

Where not otherwise noted, the facts herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.<sup>3</sup> There is little dispute regarding the events.

Respondent operates four hospitals. Bakersfield Memorial, Memorial Center, and Mercy Westside are separate facilities. Mercy Truxton/Mercy Southwest are two campuses of the same facility (Mercy), employing approximately 254 RNs. The four hospitals are operated under a parent company, Catholic Health

<sup>3</sup> I grant the General Counsel’s motion to correct the transcript as the context and my notes support the proposed changes. I make no finding that the transcript is free of other errors. The motion to correct is hereby made a part of the record.

Care West. Intervenor/Charging Party has a Section 9(a) relationship and collective-bargaining agreement with Bakersfield Memorial. No union represents RNs at Mercy Westside or Memorial Center. By at least February, union organizational campaigns had commenced at Mercy.

For more than a year prior to the election, Respondent considered changing its compensation plan for RNs in order to address RN recruitment and retention problems. In January or February, Supervisor Jill Haley told RNs employed at the Truxton campus that Respondent was considering increases in RN salaries as part of its recruitment and retention program. Prior to March, Respondent held town hall meetings of unit employees during which management representatives told RNs that Respondent was planning salary adjustments. On March 20, Chuck Van Sluyter (Van Sluyter), Respondent’s interim president, held an employee meeting where he discussed a market adjustment to RN wages. The following day, Van Sluyter issued a memorandum to all Mercy RNs stating that he had mistakenly told employees at the meeting that Respondent could not give wage increases after a union had demonstrated a 30 percent showing of interest. In correction, he stated:

Because the hospital has been planning a market adjustment for some time, and has announced this to the staff prior to receiving any mention of formal notice from a union, the hospital may proceed to make the adjustment.

The hospital is still committed to making a market adjustment so that we can continue to attract and retain qualified nursing staff. It is my hope that we will be able to make this adjustment no later than the end of April. This adjustment is not intended in any way to influence an employee’s decision to be represented by a third party. However, I also want to make it clear that Catholic Healthcare West prefers to maintain a direct working relationship with all of its employees.<sup>4</sup>

At the end of March, beginning of April, Respondent drafted a registered nurse compensation plan (the plan) to cover RNs in all its hospitals except Bakersfield Memorial, the facility represented by Intervenor/Charging Party. By that time, Respondent was well aware of union activity among the Mercy unit employees. On April 10, Petitioner filed a petition for election in a unit of Respondent’s employees at Mercy.<sup>5</sup>

On April 18, Respondent announced the plan to its Mercy RNs, the increases to be effective May 13. The plan included a

<sup>4</sup> It is clear from the content of this email that Respondent was aware the Union had obtained a showing of interest among unit employees and that the filing of a representation petition was imminent.

<sup>5</sup> The May 4 Decision and Direction of Election found the following unit to be appropriate:

INCLUDED: All full time and regular part time Registered Nurses (“RNs”) employed in positions requiring an RN license who are employed at the Employer’s facilities at 2215 Truxton Avenue and 400 Old River Road in Bakersfield, California.

EXCLUDED: Home health nurses, all other employees, guards and supervisors as defined in the Act.

2-percent market adjustment for all RNs, a 5-percent longevity increase, an equity increase, and a 2-percent BSN differential.<sup>6</sup>

On May 18, Respondent and Intervenor/Charging Party entered into a Memorandum of Agreement to modify the collective-bargaining agreement covering Bakersfield Memorial to increase RN wages. The agreement provided that if Intervenor/Charging Party were certified as the representative of Mercy unit employees, the Mercy unit would be accreted to and become a part of the parties' existing agreement.

On May 24, Respondent announced a 10-percent weekend differential for RNs and an increase of the casual pay rate from \$22.50 to \$28 per hour to be effective May 27. No such notice was given to Mercy Westside and Mercy Hospital where no union elections were pending.

#### B. Positions of the Parties

The General Counsel and Intervenor/Charging Party contend that Respondent granted salary increases to unit employees to influence them to vote against union representation in violation of Section 8(a)(1) and (3) of the Act. Intervenor/Charging Party further argues that Respondent's conduct requires the holding of a second representation election. Petitioner and Respondent maintain that no violations of the Act or objectionable conduct occurred. Petitioner further argues that even if unlawful conduct occurred, the conduct impacted both unions equally and Intervenor/Charging Party, having lost the election by a large margin, should not be able to obtain a rerun election.

#### C. Discussion of Alleged Unfair Labor Practices

The Board particularly scrutinizes wage increases given during a preelection period as they have "a potential long-lasting effect, not only because of their significance to employees, but also . . . because the increases regularly appear in paychecks [as] a continuing reminder." *Holly Farms, Corp.*, 311 NLRB 273, 281-282 (1993), enf'd. 48 F.3d 1360 (4th Cir. 1995). While a wage increase during an organizational campaign is suspect, it is not presumptively unlawful. Rather, in determining whether a grant of benefits during a union organizing campaign is unlawful, the Board looks at all the evidence presented and draws inferences of unlawful motivation and interference with protected rights. *Holly Farms*, above at 274. The Board allows an employer to rebut the inference by "coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits [citations omitted]." *Lampi, L.L.C.*, 322 NLRB 502 (1996), followed in *Noah's Bay Area Bagels*, 331 NLRB 188 (2000).

The Board uses the same standard in unfair labor practice cases for determining unlawfulness of wage increases as it does for deciding whether the grant of benefits during the critical preelection period is objectionable conduct:

The critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is

pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits [citations omitted]. *United Airlines Services Corp.*, 290 NLRB 954 (1988).

General Counsel has shown that discretionary wage adjustments occurred during the union organizing campaign warranting a presumption of unlawful effects. Respondent bears the rebuttal burden to show that its purpose was not to influence employees' representation vote. *Southgate Village, Inc.*, 319 NLRB 916 (1995); *Hawkins Lumber Co.*, 316 NLRB 837 (1995); *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995). Here, uncontroverted (though unspecific and somewhat vague) evidence established that Respondent suffered recruitment and retention problems among its RNs because their wage scales were not at market comparability. That is a legitimate business reason for adjusting wages that is unrelated to union activity. *Royal Manor Convalescent Hospital*, 322 NLRB 354 (1996). Evidence was also adduced that Respondent had been considering wage adjustments for RNs prior to its employees' union organizational activities, that employees were generally aware of Respondent's plans and queried supervisors about them. There is no evidence that the wage adjustments subsequently made were motivated by antiunion animus. In fact, Respondent has a collective-bargaining agreement with Intervenor/Charging Party covering one of its facilities and agreed that if Intervenor/Charging Party were certified as the representative of Mercy unit employees, the existing agreement would apply to the Mercy unit. The wage adjustments occurred in an atmosphere free of threats or other coercive conduct by Respondent. I find, therefore, that the wage adjustments would ultimately have been made even if no union were on the scene, and that Respondent's adjustment of RN wages was not itself a violation of Section 8(a)(1) and (3) of the Act. See *Home Health, Inc.*, 334 NLRB 279 (2001).

The conclusion that Respondent did not violate the act by adjusting RN wages is not, however, dispositive of all the issues. While an employer may not have violated Section 8(a)(3) of the Act by granting nondiscriminatorily planned wage increases, its announcement and effectuation timing may violate 8(a)(1). "[I]t is well established that an employer cannot time the announcement of increased benefits to dissuade employees from supporting the union. [Citation omitted.]" *K-Mart Corp.*, supra at 457. Such an announcement "becomes perilous . . . when the employer has, and exercises, discretion in choosing the time for the announcement; timing may not be manipulated to heighten the impact of a new benefit, a subject to which employees are keenly sensitive." *Waste Management of Palm Beach*, 329 NLRB 198, 199 fn. 4 (1999). Respondent bears the burden of showing that the announcement would have been made at the same time even if there had been no union activity, *K-Mart Corp.*, supra at 457, and it follows that the same rule applies to the effectuation timing. Respondent has not met that burden.

<sup>6</sup> All RNs received the market adjustment, half received the equity increase, and fewer than 30 received the longevity increase.

The only evidence regarding Respondent's preorganizational intention to raise wages consisted of testimony that Respondent was experiencing employee recruitment and retention problems, that some kind of comparability study was conducted, and that Respondent had discussed changing its compensation plan for RNs with both management and employees. After union activity commenced early in the year, Respondent was still in the consideration stage of wage adjustment planning. It was only after Respondent was well aware of Petitioner's standing to file a representation petition that its plans for wage adjustments crystallized. Even then, Respondent had not, apparently, resolved the details of the adjustment. Without having finalized wage adjustment details or amounts, Respondent announced its intended wage adjustment plans. Both the premature announcement and the method of announcement justify an inference that the timing of the announcement was related to union activity. Thus, the initial announcement came in a March 21 e-mail in which Respondent also stated clearly its preference for maintaining a direct (nonunion) working relationship with its employees. Moreover, a more detailed announcement made a month later and very shortly before the election was made only to employees at Mercy, the only facility facing a union election. The timing of the wage adjustment effectuation, coming shortly before the election, also justifies an inference that the timing of the effectuation was related to union activity. While an employer has the right to enumerate its benefits during a union campaign, it may not manipulate announcement (or effectuation) timing to heighten the impact of a new benefit. *Speco Corp.*, 298 NLRB 439, 443 (1990); see *American Sunroof Corp.*, 248 NLRB 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981), where announcement of a pension plan was not unlawful as the employer announced the benefit when, in the normal course of business, the plan was finalized and would have done so even if there had been no union activity.

Here, at the time of the initial announcement, Respondent apparently had not determined the amount or form of any wage adjustment. Its rush to advise employees of the anticipated change before any definite decisions were made suggests an unlawful motivation. The fact that the announcement was made more than 2 months prior to the election does not vitiate its unlawfulness or impact. The promise of a future wage adjustment coupled with Respondent's stated preference for remaining nonunion would reasonably cause employees to believe the announcement and any forthcoming adjustment were designed to influence their vote in the union election. As the Board recognized in *Holly Farms, Corp.*, above, the announcement of a future wage adjustment would have a long-lasting effect as anticipation of the wage adjustments would be an ongoing reminder. Finally, the fact that the wage adjustments themselves were not motivated by a desire to influence employees to vote against the Union does not affect these conclusions. The Board has held that a finding that a raise was lawfully granted is not inconsistent with a further finding that the announcement of the wage increase violated the Act. *K-Mart Corp.*, supra at fn. 6. It follows that the timing of the effectuation of the wage adjustments also violates the Act. Although the evidence shows that Respondent would have

made the wage adjustments at some point, Respondent has made no showing as to why it timed effectuation of the adjustments to occur shortly before the election. Therefore, Respondent has not met its rebuttal burden. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by its March 21 and May 24 announcements of wage adjustments for RNs and by its May 13 and May 27 effectuation of those wage adjustments.

### III. OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

Following the election, the tally of ballots recorded that 216 persons cast ballots: 103 in favor of Petitioner, 49 in favor of Intervenor/Charging Party, and 55 against either labor organization. Nine ballots were challenged. By the parties' stipulations, six of the challenges are sustained and three overruled. Pursuant to the parties' stipulations on challenged ballots, the number of valid votes cast is 210. The Petitioner, with 103 counted votes in its favor, has not received a majority of the valid votes, but may do so when the three formerly challenged ballots are opened and counted. Having received only 49 votes, the status of Intervenor/Charging Party will be unaffected by the additional vote count.

Intervenor/Charging Party filed timely objections to the election that essentially parallel the complaint allegations. As set forth above regarding the unfair labor practice allegations, I have found that Respondent, by its timing of wage adjustment announcement and implementation, violated Section 8(a)(1) of the Act. A finding of an unfair labor practice does not, per se, require nullification of an election. *Recycle America*, 310 NLRB 629 (1993). However, the grant of a wage increase during the pendency of an election constitutes both an unfair labor practice and objectionable conduct. *Lampi, L.L.C.*, above. An announcement of wage increases and manipulated effectuation of wage increases can reasonably be expected to have the same effect on employees as a wage increase, and I find, Respondent's unlawful actions herein constitute both unfair labor practices and objectionable conduct.

It is true that the initial announcement of wage adjustments herein was made prepetition. The Board has consistently held that the critical period during which preelection conduct will be examined commences with the filing of the petition. *Ideal Electric Co.*, 134 NLRB 1275 (1961), and progeny. However, the Board will also consider prepetition conduct that is directly related to postpetition conduct. *National League of Professional Baseball Clubs*, 330 NLRB 670 (2000). Here the initial unlawful announcement of wage adjustments was an integral part of Respondent's wage adjustment implementation and was followed up by later announcements and by effectuation shortly before the election. From the first announcement, the effect of announcement and implementation timing was ongoing as unit employees anticipated future wage adjustments. See *Holly Farms, Corp.*, above. Made to a large portion, if not all, of the unit RNs, it is reasonable to assume that the prepetition announcement left a coercive aroma redolent during the entire election process. Both the announcements and the implementation of wage adjustments could reasonably be expected to affect the results of the election. Therefore, I find that the timing of

announcements and implementations of wage adjustments constitutes grounds for setting aside the election.

Petitioner argues that, on equitable considerations, the election should not be set aside. Petitioner points out that as Intervenor/Charging Party placed last among the three ballot choices, it would not appear on the ballot in any runoff election and would only receive another shot at representation if the election were rerun.<sup>7</sup> Petitioner asks that if, upon opening the three remaining determinative challenges, the tally of ballots shows that Petitioner did not receive a majority of the valid votes counted, a runoff—rather than a rerun—election be held in which Intervenor/Charging Party would not participate.

It is true that in spite of Respondent's conduct, employee support for Petitioner substantially outstripped that for Intervenor/Charging Party or against any labor organization. There is no evidence or permissible inference that Respondent's conduct caused or was likely to cause employees to favor Petitioner over Intervenor/Charging Party. Indeed, by agreeing to accrete the petitioned-for unit into Respondent's existing agreement with Intervenor/Charging Party, any inferential preference would appear to accrue to Intervenor/Charging Party's benefit. Petitioner engaged in no objectionable conduct. To permit a rerun election when Petitioner may have won the election even in the face of Respondent's objectionable conduct is unnecessary and unfair to Petitioner. The Board has held that if a union has won an election despite an employer's unlawful conduct, "the election results are entitled to stand as against a mechanical insistence on the normal 'laboratory conditions.' Any other result would permit the [e]mployer to benefit from its unlawful conduct and provide it with another opportunity to defeat the [u]nion. [Citations omitted]." *Axelsson, Inc.*, 263 NLRB 77, 78 (1982). See also *Randall Rents of Indiana*, 327 NLRB 867 (1999); *Empresas Inabon, Inc.*, 309 NLRB 291 (1992); *Nestle Co.*, 248 NLRB 732 (1980). Therefore, should Petitioner receive a majority of votes after the determinative challenges are counted, I recommend that the Regional Director issue the appropriate certification of representative.

Petitioner also seeks to prevent a rerun election in the event it loses the election, citing a number of cases, including *Axelsson, Inc.*, above, *Swingline Co.*, 256 NLRB 704 (1981); *Nestle Co.*, above, and *Packerland Packing Co.*, 185 NLRB 653 (1970). The cases do not, however, support Petitioner's position that only a runoff—and not a rerun—election should be held if Petitioner does not obtain a majority of valid votes when the determinative challenges are counted. In each of the cited cases, the union won the election over which objections were filed. Petitioner has not cited any authority where, following objectionable employer conduct, only a runoff election was conducted. Indeed, the Board, in *Cook Family Foods, Ltd.*, 317 NLRB 1137 (1995), demonstrated a clear disinclination for such a proceeding even where one union dramatically outstripped the other. In setting aside the results of the first elec-

tion and directing that a second election be held, the Board said:

In light of the unfair labor practices set forth above . . . which the Board has . . . found constituted objectionable conduct, we find no merit to the contention that a runoff election should be held based on the revised tally of ballots of the first election, which indicate that the results of the first election were inconclusive. To the contrary, the Board's prior findings establish that the first election did not fairly indicate the desires of employees concerning representation. Accordingly, we shall direct a rerun election.

Id at fn. 3.

I find, therefore, that the ballots of Diane Fuller, Erlinda Nitro, and Joanne Burris, shall be opened and counted and that a revised tally of ballots be issued. If the revised tally shows that Petitioner received a majority of the valid ballots cast in the election, the Regional Director shall issue a certification of representative. In the event the Petitioner fails to receive a majority of the valid ballots cast, the election shall be set aside and a new election conducted. See *High Energy Corp.*, 259 NLRB 747 (1981).

Accordingly, I recommend that Case 31-RC-7993 be remanded to the Regional Director for appropriate action.

#### CONCLUSIONS OF LAW

1. By announcing its intention to implement wage adjustments for RNs, Respondent violated Section 8(a)(1) of the Act.
2. By its timing of wage adjustment implementation for RNs, Respondent violated Section 8(a)(1) of the Act.
3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. The Employer has not otherwise violated the Act.
5. By the conduct set forth in paragraphs 1 and 2 above, Respondent has interfered with the representation election conducted in Case 31-RC-7993.

#### REMEDY—UNFAIR LABOR PRACTICE CASE

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.

#### REMEDY—REPRESENTATION CASE

Case 31-RC-7993 is severed and remanded to the Regional Director for Region 31 for the purpose of opening and counting the ballots cast in the election by Diane Fuller, Erlinda Nitro, and Joanne Burris. If the revised tally of ballots shows that Petitioner received a majority of the valid ballots cast in the election, the Regional Director shall issue a Certification of Representative certifying Petitioner as the representative of the appropriate unit.

In the event the revised tally of ballots shows that Petitioner failed to receive a majority of the valid ballots cast, I recommend that the election be set aside and that the Regional Director for Region 31 conduct a second election.

<sup>7</sup> NLRB Rules and Regulations Sec. 102.70 provides that where no choice in a three-choice union election received a majority of the valid ballots cast and no objections are filed, the ballot in any runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

**ORDER**

The Respondent, Mercy Hospital and Mercy Southwest Hospital, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing its intention to implement wage adjustments for employees in order to dissuade employees from selecting a union as their collective-bargaining representative.

(b) Timing the implementation of wage adjustments for employees so as to dissuade employees from selecting a union as their collective-bargaining representative.

(c) 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) Within 14 days after service by the Region, post at its Mercy Hospital and Mercy Southwest Hospital campuses in Bakersfield, California, copies of the attached notice marked

“Appendix.”<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 the facilities 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 Mercy Hospital and Mercy Southwest Hospital at any time since March 21, 2001.

(b) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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<sup>8</sup> If no exceptions are filed 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.

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<sup>9</sup> 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.”