Kaiser Foundation Hospitals; Kaiser Foundation Health Plan, Inc.; and the Permanente Medical Group, Inc. *and* Office and Professional Employees International Union, Local 29, AFL–CIO *and* Aikya Param. Cases 32–CA–19771–1 and 32–CB–5477–1

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On August 12, 2003, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent Employer and the Respondent Union each filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief. The Respondent Union filed an answering brief to the limited exceptions. The General Counsel filed a reply brief.

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

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

We adopt the judge's finding that the Respondent Employer violated Section 8(a)(1), (2), and (3) by extending recognition to the Respondent Union as the collective-bargaining representative of the research assistants, informing the research assistants that the collective-bargaining agreement's union-security clause applied to them, and applying the agreement to them. We further agree that the Respondent Union violated Section 8(b)(1)(A) and (2) by accepting recognition from the Respondent Employer as the collective-bargaining representative of the research assistants, informing the research assistants that the collective-bargaining agreement's union-security clause applied to them, and applying the agreement to them. As the judge found, the addition of the research assistants into the bargaining unit was not lawful, regardless of their alleged community of interest with unit employees, because the research assistants historically had been excluded from the bargaining unit. See *United Parcel Service*, 303 NLRB 326, 327 (1991), 17 F.3d 1518 (D.C. Cir. 1994), cert. denied 513 U.S. 1076 (1995).[1]

We also agree with the judge in rejecting the Respondents' argument that the addition of the research assistants to the bargaining unit was not an accretion, but rather was a recapture of bargaining unit work, sanctioned by *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB 1407 (2000). In *Lockheed Martin*, the union protested to the employer that graphic artists, who were not included in the office and clerical bargaining unit, were doing work covered by the collective-bargaining unit. Id. at 1407. The parties audited the nonbargaining unit employees and determined that 26 out of the 76 graphic artists primarily did office and clerical work. Id. That work was returned to the bargaining unit, and the graphic artists who performed the unit work were given the option of transferring into the unit in order to do the transferred work. Id. Prior to allowing the incumbents to take the reclassified jobs, the union determined that no bargaining unit employees were on layoff status with recall rights who could return to do the recaptured work. Id. The Board found that the conduct of the employer and union was not unlawful. In doing so, the Board specifically acknowledged that the General Counsel was not alleging that the parties were attempting to expand the unit description by including a historically excluded classification. Id. at 1408. Here, however, the General Counsel has made that allegation. Thus, an issue critical to our resolution of this case was not presented in *Lockheed Martin*.[2]

Moreover, the cases are factually distinguishable in several critical respects. In *Lockheed Martin*, the parties did not treat the graphic artists as a classification. Instead, the parties looked at the work of each particular graphic artist. Only the work covered by the collective-bargaining agreement was transferred to the bargaining unit. The fact that bargaining unit members in layoff status, if there had been any, would have been given the disputed graphic artists' work, demonstrates that in

[1] The Respondent Union argues that the recognition clause here did not explicitly exclude the research assistants and that this case is thus distinguishable from *United Parcel Service* and is governed by *Austin Cablevision*, 279 NLRB 535 (1986). We disagree. In *Austin Cablevision*, the Board clarified a unit to include a group of employees that had come into existence prior to the execution of the most recent collective-bargaining agreement. Id. at 536–537. The classification of employees in dispute in *Austin Cablevision*, however, had not been historically excluded from the bargaining unit. Id. at 536. Here, conversely, the Respondents do not dispute that the research assistants have been historically excluded from the bargaining unit.

Neither do we find merit to the Respondents' reliance on *John P. Scripps Newspapers*, 329 NLRB 854 (1999). In *John P. Scripps*, the Board found that where the bargaining unit is described functionally, new employees who perform job functions covered by the unit description should be included in the unit, unless the unit functions they perform are merely incidental. Id. at 859. The unit here is not described functionally and, therefore, the Board's treatment of functionally described units is inapposite. See *Archer Daniels Midland Co.*, 333 NLRB 673, 673 fn. 2 (2001).

[2] Chairman Battista notes that he did not participate in *Lockheed Martin*. He does not pass on the validity of that case.

Lockheed Martin the work was transferred, not a classification of employees.

In contrast, here, the Respondents treated the research assistants as a classification. The record is clear that the audit committee did not interview individual research assistants to ascertain how much bargaining unit work they did or to segregate their bargaining unit work from their other work. Moreover, the Respondents' witnesses testified that they were aware that there were research assistants who did no bargaining unit work. Without undertaking an individualized assessment, like the one undertaken in *Lockheed Martin*, the Respondents transferred the research assistant classification as a whole into the bargaining unit. Thus, we find that the Respondents captured a classification, not just bargaining unit work, as they allege.

Finally, we find merit to the General Counsel's exception to the judge's failure to order make-whole relief for the research assistants who were unlawfully transferred into the bargaining unit and subjected to the terms of the collective-bargaining agreement. To the extent that those research assistants suffered a loss of benefits as a result of their transfer, the Respondents must compensate them for that loss. See *American Tempering, Inc.*, 296 NLRB 699, 709 (1989), enfd. mem. 919 F.2d 731 (3d Cir. 1990). Moreover, we modify the judge's recommended Order to make clear that nothing in our Order should be construed to authorize or require the Respondent Employer to withdraw or revoke any benefits that have been granted to the research assistants as a result of the Respondents' imposition of the contract and their unlawful grant and acceptance of recognition of the Respondent Union as the research assistants' representative. See *Brooklyn Hospital Center*, 309 NLRB 1163, 1164 (1992), enfd. 9 F.3d 218 (2d Cir. 1993); *King Radio Corp.*, 257 NLRB 521, 527 (1981).[3]

ORDER

A. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Employer, Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., of California, collectively and singly, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c) of the Order.

"(c) Applying the unit contract to those employees; but nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment which may have been established pursuant to such contract."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Jointly and severally with the Respondent Union make the research assistant employees whole for any losses they may have suffered by reason of any change in their employment conditions effected by the application to them of any contract with the Respondent Union, with interest, in the manner set forth in the remedy section of this Decision."

3. Substitute the attached appendix A for that of the administrative law judge.

B. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Union, Office and Professional Employees International Union, Local 29, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c) of the Order.

"(c) Applying the unit contract to those employees; but nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment which may have been established pursuant to such contract."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Jointly and severally with the Respondent Employer make the research assistant employees whole for any losses they may have suffered by reason of any change in their employment conditions effected by the application to them of any contract with the Respondent Employer, with interest, in the manner set forth in the remedy section of this Decision."

3. Substitute the attached appendix B for that of the administrative law judge.

[3] We find it unnecessary to pass on the General Counsel s exception to the judge's failure to find that the Respondent Union violated Sec. 8(b)(1)(A) by announcing to the research assistants at the May 10 meeting that their continued employment was contingent on their membership in the Respondent Union. Such a finding would not add materially to the remedy. The remedy here effectively rescinds the application of the contract and its union-security clause to the research assistants and prohibits the Respondents from informing the research assistants that the union-security provisions apply to them. See *Area Transportation*, 299 NLRB 751, 751 fn. 2 (1990), enfd. 957 F.2d 328 (7th Cir. 1992) (finding it unnecessary to pass on judge's failure to find surface bargaining where judge already had found an unlawful refusal to execute an agreement and unilateral changes because surface bargaining finding would not affect the remedy).

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any 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.

At the heart of the National Labor Relations Act is the principle that employees may freely select or decline union representation. When the employees in a job classification, such as the research assistants in our department of research, have long been unrepresented, it is necessary and appropriate to first determine that a majority of such employees desire representation before recognizing a union to represent them and applying a collective-bargaining agreement with a union-security clause and union-security payment obligation to those employees.

After a trial at which we and the Office and Professional Employees International Union, Local 29, AFL–CIO submitted evidence and argued our case, the National Labor Relations Board found that we inappropriately recognized the Union as the exclusive representative for purposes of collective bargaining of our research assistant employees in our department of research and the Union inappropriately accepted such recognition.

The Board also found that we inappropriately applied our contract with the Union to those employees, including the union-security provisions of that contract, and improperly informed those employees they were bound by its terms.

Finally, the Board found that we inappropriately and improperly collected and remitted to the Union, union-security payments from these employees.

The National Labor Relations Board has required us to post this notice and to honor the promises we now make to our employees in it.

Accordingly,

We give our employees the following assurances.

WE WILL NOT grant recognition to the Union as the exclusive collective-bargaining representative of our research assistant employees in our division of research, at a time when the Union does not represent a majority of those employees, and will not so recognize the Union unless and until the Union is certified by the Board as their representative.

WE WILL NOT apply our contract with the Union, including its union-security provisions, to our research assistant employees in our division of research, unless and until the Union is certified by the Board as their representative. However, the Board has not authorized or required us to withdraw or eliminate any wage increase or other improved benefits or terms and conditions of employment which the research assistant employees have received pursuant to such a contract.

WE WILL NOT inform our research assistant employees that our contract with the Union, including the union-security provisions, applies to them.

WE WILL NOT collect union-security payments from research assistant employees and remit those payments to the Union.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

WE WILL withhold and withdraw all recognition of the Union as the exclusive collective-bargaining representative of our research assistant employees in our research division unless and until the Union is certified by the Board as their representative.

WE WILL jointly and severally with the Union make the research assistant employees whole, with interest, for any losses they have suffered by reason of any change in their employment conditions effected by any contract with the Union.

WE WILL jointly and severally with the Union make whole all research assistant employees for any and all union-security payments made by those employees pursuant to a collective-bargaining agreement's union-security language, with interest.

KAISER FOUNDATION HOSPITALS; KAISER FOUNDATION HEALTH PLAN, INC.; AND THE PERMANENTE MEDICAL GROUP, INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
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 any 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.

At the heart of the National Labor Relations Act is the principle that employees may freely select or decline union representation. When the employees in a job classification, such as the research assistant employees in the Department of Research of the Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., have long been unrepresented, it is necessary and appropriate to first determine that a majority of employees desire representation before recognizing a union to represent them and applying a collective-bargaining agreement with a union-security clause and union-security payment obligations to those employees.

After a trial at which we and the Employer submitted evidence and argued our case, the National Labor Relations Board found that Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and The Permanente Medical Group, Inc., inappropriately recognized us as the exclusive representative for purposes of collective bargaining of the research assistant employees in their Department of Research and that we inappropriately accepted such recognition.

The Board also found that we inappropriately applied our contract with Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and The Permanente Medical Group, Inc., to those employees, including the union-security provisions of that contract, and improperly informed those employees they were bound by its terms.

Finally, the Board found that we inappropriately and improperly collected union-security payments both directly from employees and indirectly from the Employer who had in turn collected the moneys from these employees.

The National Labor Relations Board has required us to post this notice and to honor the promises we now make to our members and the research assistant employees in the department of research of Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc.

Accordingly,

We give our members and the research assistant employees in the department of research of Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., the following assurances.

WE WILL NOT accept recognition from the Employer as the exclusive collective-bargaining representative of the Employer's research assistant employees in its division of research at a time when we do not represent a majority of those employees and will not accept such recognition in the future unless and until we are certified by the Board as their representative.

WE WILL NOT apply our contract with the Employer, including its union-security provisions, to the research assistant employees in the Employer's division of research unless and until we are certified by the Board as their representative. However, the Board has not authorized or required the Employer to withdraw or eliminate any wage increase or other improved benefits or terms and conditions of employment which the research assistant employees have received pursuant to such a contract.

WE WILL NOT inform the Employer's research assistant employees that our contract with the Employer, including its union-security provisions, applies to them.

WE WILL NOT collect union-security payments either directly from research assistant employees or indirectly from the Employer who provides such payments after collecting them from employees.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

WE WILL withdraw, disclaim, and refuse any role as the exclusive collective-bargaining representative of research assistant employees in the Employer's division of research unless and until we are certified by the Board as their representative.

WE WILL jointly and severally with the Employer make the research assistant employees whole, with interest, for any losses they have suffered by reason of any change in their employment conditions effected by any contract with the Employer.

WE WILL jointly and severally with the Employer make whole all research assistant employees for any and all union-security payments made by those employees to us directly or indirectly by payment to the Employer pursuant to a collective-bargaining agreement's union-security language, with interest.

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 29, AFL–CIO

Jo Ellen Marcotte, Esq., for the General Counsel.
Bonnie Glatzer, Esq. (Thelen Reid & Priest LLP), of San Francisco, California, and *Daniel R. Fritz, Esq. (Kaiser Foundation Health Plan, Inc.),* of Oakland, California, for the Respondent Employer.

William H. Carder, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar, LLP), of Oakland, California, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial in Oakland, California, on April 29, 30, and 31, 2003, pursuant to a consolidated complaint and notice of hearing issued by the Regional Director for Region 32 of the National Labor Relations Board on September 13, 2002. The consolidated complaint is based on two charges filed by Aikya Param, an individual (the Charging Party) on June 28, 2002. The first charge, docketed as Case 32–CA–1977–1 is against Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc. (the Respondent Employer or the Employer). The second charge, docketed as Case 32–CB–5477–1, is against Office and Professional Employees International Union, Local 29, AFL–CIO (the Respondent Union or the Union, and, collectively with the Respondent Employer, the Respondents).

Respecting the Respondent Employer, the complaint, as amended, alleges, and the Employer's answer denies, inter alia, that the Respondent Employer recognized the Respondent Union as the exclusive bargaining representative of the Employer's research assistants employed in its division of research (the research assistants) and applied to those employees an existing collective-bargaining agreement with the Union covering an office and clerical unit including a union-security clause. The complaint alleges and the answer denies that these actions occurred at a time when the Union did not represent a majority of research assistants. The complaint further alleges and the answer denies that the Employer informed certain research assistants that they were subject to the union-security clause obligations of the contract, deducted union-security payments from research assistant pay, and remitted these moneys to the Union. Finally, the complaint alleges, and the answer denies, that this conduct by the Respondent Employer violates Section 8(a)(3) and (1) of the Act.

Respecting the Respondent Union, the complaint, as amended, alleges, and the Union's answer denies, inter alia, that the Respondent Union accepted the recognition of the Respondent Employer as the exclusive bargaining representative of the Employer's research assistants employed in its division of research and applied to those employees an existing collective-bargaining agreement with the Employer covering an office and clerical unit including a union-security clause. The complaint alleges and the answer denies that these actions occurred at a time when the Union did not represent a majority of research assistants. The complaint further alleges and the answer denies that the Union informed certain research assistants that they were subject to the union-security clause obligations of the contract and that the Union received moneys directly from the research assistants to fulfill those obligations and also received such payments indirectly from the Employer who had collected them from research assistant employees. The complaint alleges, and the answer denies, that this conduct by the Respondent Union violates Section 8(b)(1)(A) and (2) of the Act.

On the entire record, including helpful briefs from the Respondent Employer, the Respondent Union, and the General Counsel, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

There is no dispute and I find the Respondent Employer, including each of the three captioned entities, Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., is and has been at all times material individually and collectively an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. LABOR ORGANIZATION

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer is a major Health Maintenance Organization (HMO) that operates in California and other States. It operates hospitals, clinics, and the various associated support and adjunct facilities modern health maintenance requires. It has numerous facilities and a substantial employment complement in Northern California including the eastern portions of the San Francisco Bay area (the East Bay). The Union has for many years represented office and professional employees in the East Bay and elsewhere including a unit of the Employer's East Bay office and clerical employees (the unit). The unit as of the time of the hearing comprised approximately 2700 employees engaged a broad range of office, clerical, and other duties. The unit is covered by a collective-bargaining agreement, which contains a union-security clause.

The Employer's division of research has been in existence since 1961. The division conducts medical research and publishes studies and papers associated with that research. It is primarily funded by external grants and contracts with health care entities such as the Federal National Institutes of Health. The division has grown over time with its mid-1980 compliment of perhaps 65 employees, expanding to 350–400 employees as of the time of the hearing. The division is located in facilities in Oakland. Most employees work in a building at 2000 Broadway, Oakland, with others working in a building at 3505 Broadway. Some division employees on occasion travel

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] The Respondent Employer, and each of its three constituent parts: Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., stipulated that the various legal theories of joint employer, single employer, etc., are not at issue in this case and, each of the three entities named does not contest a finding that they are the Employers of the employees involved.

to other of the Employer's area or regional facilities in conjunction with their research duties.

The division's research is comprised of separate individual studies which may continue for a period of years. The division, as of the time of the trial, was conducting over 2000 active studies. The senior administrators in charge of individual projects or studies are "principal investigators" and research associates. These individuals act as project managers or coordinators in overseeing the day-to-day work on the project and its supporting employees. Associated employees include health information coders, administrative assistants, research assistants, receptionists, main and data entry clerks, librarians, librarian assistants and information technology employees, laboratory assistants, and research nurses. Some of these positions have long been included in the unit and represented by the Union, others have never been included. The research assistant position was originally without the unit and, as described below, was thereafter included in it.

The position of research assistant came into existence at least as long ago as the early 1980's. The numbers of employees in this position has grown from that time. The parties stipulated that as of July 1, 2002, there were approximately 80 research assistants. Prior to the events in contention discussed in detail below, the research assistants had not been in the unit nor in any other established bargaining unit nor represented by a labor organization.

The unit members represented by the Union work in a large number of positions in a large number of facilities in various organizational units of the Employer. Over time, the duties of individual jobs evolve, job titles change, and jobs are created and discontinued. The Union adduced evidence that for years it has had difficulty tracking and monitoring the Employer's employee job structure as it has evolved. Union agents credibly testified that they have long received complaints from unit members respecting job changes, transformations of positions from represented to unrepresented status, and the transfer of employees from established represented positions to new unrepresented positions. In effect from the Union's perspective, the total unit employee complement—as a result of "leakage," i.e., the wrongful movement of work from unit jobs into unrepresented jobs and other forms of improper work and job classification transmutation—was not growing in step with the total numbers of the Employer's nonrepresented staff.

At least as long ago as 1988, in apparent response to the Union's complaints, the Respondents had initiated a "jurisdictional review" of various Employer job positions. That process resulted in the reclassification of certain positions and the inclusion of those positions within the bargaining unit. Although in the process of that 1988 review the Union had asked for a list of all the Employer's nonrepresented office and clerical positions, the list ultimately provided the Union did not include the position of research assistant and in consequence the research assistant position was not reviewed by the parties in that process.

B. Events

In 1998 the Union again received reports from members that nonunit employees were doing unit work. Among the positions involved was that of research assistant, a nonrepresented position. Grievances were filed by the Union concerning these jurisdictional issues. The Respondents engaged in a series of meetings from September 1998 onward dealing with these issues. During that process, the Employer provided information to the Union regarding its nonrepresented positions and included in its disclosures information regarding the position of research assistant. With respect to many nonrepresented or nonunit positions, the Union asserted that the positions were in their entirety office clerical positions and by rights ought to have been and ought to be within in the unit. The various job positions were discussed and the parties agreed that the review process would continue. The Respondents were to identify and review the positions under challenge and would determine if certain then nonunit, unrepresented, positions were appropriately to be changed to represented unit positions and further agreed that, if agreement was not reached on particular unit matters, the parties would resolve those disputes by arbitration.

The review of some positions was completed and agreements reached by the Respondents as to a portion of these. Other positions identified as part of the original review process in 1998 were as yet unexamined and remained for review. The research assistant position was one such position. The process continued apace on an informal basis into 1999–2000, but was put on hold during the 2000 contract negotiations. The meetings for those negotiations produced an agreement to establish a joint labor management committee to audit the disputed nonunit positions—one of which remained the research assistant position.

In late 2001 and into early 2002, the joint labor management committee, comprised of agents and representatives of the Respondents, met on numerous occasions. The participants considered and reviewed the Employer's job profiles and other documentation and discussed and considered various job positions. The department of research position of research assistant was discussed. The Respondents reached an agreement on the proper treatment of the research assistant position which is described in a letter from the Employer's senior labor relations representative, Clifford Gates, to the Union's president and business manager, Tamara Rubyn, dated April 29, 2002. The letter states in part:

> This letter will memorialize our agreements regarding the accretion of job classifications as a result of our meetings of April 25, 26, and 27, 2002. The discussion below indicates what I understand we have done and the agreements we have reached.
>
> In reference to the Division of Research we have agreed that the classifications of Research Assistant and Senior Research Assistant shall be accreted to the OPEIU Local 29 bargaining unit. Moreover, we have agreed those working conditions for Research Assistant and Senior Research Assistant shall remain status quo until the parties negotiate a side letter that recognizes the unique operational needs of the Division of Research.

The research assistants were informed of the Respondents' agreement by e-mail from the Employer's director of research on or about May 6, 2002, and in a meeting held on May 10, attended by Rubyn for the Union.

The parties further refined the research assistant agreement and its final implementation occurred on or about July 1, 2002. The Respondents agreed that incumbent research assistants with 5 or more years of service could elect to be "grandfathered" out of the represented unit. The remaining research assistants were given an opportunity to bid for vacant positions outside the unit. Contract wage rates were applied to the research assistants who remained save that no individual's wage was decreased. Fringe benefits for the now-represented research assistants were shifted from the Employer's package provided unrepresented employees to the contractually provided package. As of July 1, 2002, the "non-grandfathered" research assistants had been included in the unit and the terms of the contract applied to them from that point on.

The "non-grandfathered" research assistants were at no time polled respecting their wishes concerning unit placement or union representation. There is no dispute that both Respondents informed the research assistants in the unit that the terms of the union-security clause in the contract applied to them. Further the Union has received union-security obligation payments from research employees and the Employer has deducted those from some research assistant employees' compensation and remitted those fees to the Union.

C. Analysis and Conclusions

1. The issues narrowed

Many of the elements of the government's prima facie case are not in dispute. Thus, there is no dispute that the Respondents agreed to include the research assistants in the bargaining unit and thereafter implemented that agreement. There is no dispute the Respondents applied in relevant part the current collective-bargaining contract to the research assistants. There is no dispute that the contract contains a union-security clause and that the research assistants were subject to its terms by the Respondents. Further, there is no dispute that the Respondents informed the research assistants now covered by the contract that they were subject to the obligations of the contract union-security clause and that the Employer collected employee monies pursuant to the terms of the union-security clause and remitted those monies to the Union which, either directly from research assistant employees or indirectly from the Employer who collected and remitted the funds, knowingly accepted them.[3] Finally, there is no contention that the research assistants were polled respecting their opinion of whether or not they wished to be included in the unit.

[3] The Respondent Union also argues that it did not improperly fail to inform employees of their rights to pay a reduced fee to the Union under the contract. I do not take the substance of the statements respecting just what employees were obligated to do under the union-security clause to be the issue respecting what was told employees. I view the issue as simply one of whether or not the Respondents told the research assistants they had obligations under the union-security clause. Thus, it is unnecessary to go further and I only find that the employees were told by the Respondents' agents that they were in the represented unit which was covered by a collective-bargaining agreement containing a union-security clause which obligated them to pay moneys to the Union.

The issue in dispute is whether or not the Respondents could properly under the facts presented include the research assistants in the represented bargaining unit. If that action was improper, then the admitted actions described in the preceding paragraph were wrongful and the General Counsel's complaint allegations respecting them are sustained. Such actions, as alleged, if undertaken with respect to employees who are entitled as a matter of law to express their collective opinion respecting inclusion in the larger unit, would for the Employer clearly violate Section 8(a)(3) and (1) of the Act and would for the Union violate Section 8(b)(1)(A) and (2) of the Act. Conversely, if the inclusion of the research assistants in the larger unit was not improper, the actions under challenge by the General Counsel in its complaint are simply not improper and the complaint will fail in its entirety.

The heart of the dispute then, indeed essentially the entirety of the dispute, is the propriety of the unit inclusion of the research assistants. That issue, once resolved, given the undisputed facts set forth above, concomitantly produces the legal consequences described above and, in my view, carries the entire case to a definitive resolution of all allegations of the complaint.

2. The positions of the parties

At the threshold, the Respondents argue that the entire matter should be deferred to the Respondents' settlement of the jurisdictional disputes respecting research assistants under their negotiated dispute resolution process. On the merits of the issue, the Respondents make a twofold argument. First, they argue that the research assistants were a proper accretion to the bargaining unit. Thus, they assert the research assistants share a strong community of interest with the unit employees, have substantial interchange with them, and meet the other tests set forth in *King Radio Corp.*, 257 NLRB 521, 525 (1981), for finding an accretion. Second, and independently, they argue that their agreement to reclassify the research assistants as unit positions was simply an effort to restore the unit by recapturing unit work "slippage," a process explicitly lawful under the Board's decision in *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB 1407 (2000).

The General Counsel argues that deferral is inappropriate with respect to unit issues. Counsel for the General Counsel argues that a unit accretion in the traditional sense is not possible where the unrepresented employees had historically existed for the time involved. Finally, the government argues that the Respondents' work recapture arguments are not sustainable on the facts of the case. The issues are discussed separately below.

3. The deferral issue

It is somewhat abstract to consider deferral to an arbitral process that was not invoked because the parties agreed on the actions here under challenge. Further and dispositive of the issue, however, is the General Counsel's citation of *Marion Power Shovel Co.,* 230 NLRB 576, 577–578 (1977), for the long-held Board position that matters of statutory policy such as unit matters are for the Board and not an arbitrator to decide. In agreement with the General Counsel, I find that deferral is not appropriate on the facts of the instant case.

4. The issue of accretion

The parties ably and in detail litigated the community of interest between the unit employees and the research assistants. The threshold issue in this area however is the General Counsel's assertion under *United Parcel Service*, 303 NLRB 326 (1991), that accretion is simply not appropriate, irrespective of community of interest evidence, when the group whose accretion is being advanced has been historically excluded from the unit.

In *United Parcel Service,* the employer and union had extended an existing nationwide unit to include a group of employees who had historically been excluded from that unit. The Administrative law judge found the group of employees to be a lawful accretion to the unit and dismissed the complaint distinguishing the General Counsel's cited case: *Laconia Shoe Co*., 215 NLRB 573, 576 (1974). In *United Parcel Service,* the Board reversed the judge. It discussed the doctrines involved at 327:

> In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion. See, e.g., *Towne Ford Sales*, 270 NLRB 311 (1984), One aspect of this restrictive policy has been to permit accretion only in certain situations where *new groups of employees* [emphasis in original] have come into existence after a union's recognition or certification or during the term of a collective-bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit that the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability. *Gould, Inc.*, 263 NLRB 442, 445 (1982).
>
> No such accommodation of the collective-bargaining process is required or warranted, however, where the parties to a bargaining relationship have historically failed to include an existing group of employees from a bargaining unit. If a group of employees is in existence when a union is recognized or certified, then the statutory right of those employees to select a bargaining representative can be honored and they can be included in the unit at that time without any disruption of labor relations stability. If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must timely address the unit status of those employees prior to executing a successor agreement. Should they fail to do so, the parties have only themselves to blame for any instability resulting from the existence of a group of employees having interests in common with unit employees but excluded from representation in the unit.
>
> The limitations on accretion discussed above and applied in *Laconia Shoe* and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.* [Emphasis in original.]

There is no dispute that the research assistant employees' position has been extant and staffed continuously for over 20 years, has always been outside the unit and all other represented units, and that many contract cycles have passed during this period of the research assistants position's existence. The Board, in *Gitano Group, Inc.*, 308 NLRB 1172 (1992), refused to accrete a group of employees whose positions were in existence outside the represented unit even though their presence was unknown to the union involved. The Board made clear that even when ignorance or mistake occurs, historical exclusion from a unit is a bar to out-of-time accretion of that group into the unit by the parties.

I find *United Parcel* and its progeny definitive and pursuant to its holding and analysis find it is impermissible to accrete the research assistant employees into the unit because they have historically been excluded from it. Accretion is not a legitimate reason to justify the unit transfer involved.

5. The Respondents' recaptured work argument

The Respondents argue that their agreement to incorporate the research employees in the unit is not and was not in fact an action designed to add to the work done by the employees of the unit or an action that in fact did so. Rather, it was a corrective action restoring unit work, which had been slipping away over time by the assignment of unit work to out-of-the unit employees. The Respondents argue that, either as an exception to the accretion restriction of *United Parcel* or as a completely different restoration of unit work rather than accretion of new employees, their agreement as an act of restoration was explicitly sanctioned by the Board in *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB 1407 (2000).

In *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB 1407 (2000), the General Counsel challenged the employer and union's agreement to accrete previously unrepresented employees into an existing unit. The judge found that the group accreted into the unit had historically been excluded and on that basis held the accretion improper and found a violation. The Board reversed the judge finding the application of an accretion analysis to the facts of the case error.

The Board held that, whereas in accretion cases the parties add to the scope of the existing unit, in *Lockheed* the parties did not seek to expand the unit.

> Rather they sought to adhere to the scope of the bargaining to which they had agreed by returning unit work to the unit to be performed by employees in the job classification that, by their agreement, should have been performing the work all along [331 NLRB 1407 fn. 6 at 1408.]

Thus, the Board concluded *Lockheed* involved an agreement to return work that had "seeped out" of the unit over the course of time. In essence the actions of the parties were restorative and not expansionary. They sought to restore the status quo ante rather than capture, augment, or accrete new work into the unit.

The Respondents argue that the process under challenge came into being as a result of the Union's conclusion that the work of the represented unit members was being poached by

other employees in nonrepresented job categories—both those positions newly created and those long in existence. The Union's specific complaints to the Employer in these regards and the Union's grievances caused the parties to initiate the process which involved the audit or review of both unit and nonunit positions. The Respondent Employer notes on brief at 12–13:

> As part of a negotiated dispute resolution process, Kaiser and Local 29 agreed to jointly audit the disputed classification, including the previously excluded RAs, to determine whether the work performed was "office and clerical" work that belonged in the unit. Based on this audit, Respondents determined, in good faith, that RAs performed work substantially similar to various unit positions, and were thereby depriving the bargaining unit of work that rightly belonged to it. Respondents agreed to settle the jurisdictional dispute about RAs by returning that work to the bargaining unit, and transferring the incumbent employees into reclassified unit positions.

The Respondent Union emphasizes that the jurisdictional review and audit process undertaken by the Respondents explicitly arose in part because of "the union's perception that there has been a migration of union positions to non-union status."[4] The Respondent Union also urges that no distinction be drawn between *Lockheed's* creation of a new bargaining unit classification and the Respondent Employers' simple transfer of the research assistant position into the represented unit without essential change.

The General Counsel opposes the Respondents' *Lockheed* argument on the facts of the instant case arguing that in *Lockheed* the parties explicitly dealt with issues of unit work performed by nonunit employees, audits were undertaken measuring the amount of work so performed. As a result of the audit of some 76 jobs, 26 were reclassified as unit positions and the positions were given new job titles. The General Counsel notes further that in *Lockheed* the General Counsel did not contest the fact that the 26 individuals transferred had been doing unit work and, importantly, did not contend that the employer and the union in transferring the employees were attempting to expand the unit. Counsel for the General Counsel notes the Board analyzed the situation to be equivalent of an employer's determination to recall 26 employees from layoff to do the newly restored unit work previously done by nonunit individuals.

The General Counsel notes that the work of the research assistants in the instant case, to the degree that they did work arguably categorized as "unit work," had always done so. No leakage or slippage was at issue. The research assistants' duties and tasks relevant to the Union have not changed over time. Further, argues the government, the Respondents did not in fact audit or otherwise seek to quantify the unit work supposedly done by research assistants. Rather, the Respondents looked to community of interest evidence to determine the unit placement of these employees and, on that impermissible basis; determined it was appropriate to transfer the position of research assistant employees unaltered into the unit.

[4] Language taken from an internal communication of the Respondent Employers' labor relations manager dated March 3, 2002 (R. Exh. 9).

The dispute between the parties on the applicability of *Lockheed* to the instant case is largely factual. The Respondents seek to characterize their process as one of unit work recapture or restoration as was held permissible in *Lockheed*. The General Counsel in essence argues that, with respect to the research assistants position's transfer into the represented unit, the Respondents were not simply restoring "job leakage," but were rather making a unit determination that, under the accretion analysis supra, could only have been done years ago and is now impermissible. The Respondents' actions in the General Counsel's view simply did not involve a question of restoring bits and pieces of unit work to the unit. Rather, it simply involved capturing the entire job classification that had long been extant and had never been considered part of the unit. The parties may have viewed the transfer as correcting an ancient error in unit placement, but did not—and could not have—determined that with regard to the research assistants they were addressing or correcting a recent change in the work of the employees in the position.

I resolve this important factual dispute in favor of the General Counsel and against the Respondents. The record is quite clear that the existence of the research assistant classification is longstanding. It is also clear that the duties of the employees in the classification, in fact and in the eyes of the Respondent Employer during the process that resulted in the classification's transfer into the unit, had not changed in any way significantly relevant to issues of unit job leakage. Thus, the Respondent Employer's Labor Relations Representative, Cliff Gates, testified that he recommended the reclassification because the research employees were doing unit work and that an arbitration might go against the Employer, if it opposed the transfer. Critically in my view, he also testified that he did not believe the research assistant position had "changed materially" over the past 5 or 10 years. Rather, he testified that it was his view that the position at all times involved unit work and therefore at all times should have been appropriately part of the represented unit. Thus by his testimony the wrong he was righting by transferring the research assistants into the unit was clearly historical and not of recent vintage. The remainder of the evidence supports and confirms this basis for the action taken.

It is true that "migration," "leakage," or other terms for loss of unit work was in the Respondent Union's mind's eye when it pressed its claims regarding many different jobs on the Employer. Clearly the parties were endeavoring to restore such work to the unit as part of the process. That restorative process is, in my view, laudable for it encourages stability in labor relations. Unit adjustments or employee transfers to restore work to the unit recently lost to such leakage would clearly be permissible under *Lockheed.* It seems clear however, and I find, that other job positions under review were not evaluated on a job "leakage" basis, but rather were treated as simply historically misexcluded positions that should have at all times been included in the unit. Thus, I find the review process also—as in the instant case involving the research assistants—involved righting more longstanding or "original" wrongs of improper noninclusion of certain job classification in the unit. I specifically find that this is what was at issue respecting the research assistants and what was the motivation for the transfer. I reject

the contention that recently lost work was a factor respecting these employees. Such a transfer of employees from nonrepresented to represented status is not sanctioned by *Lockheed* and is impermissible under an accretion analysis as described above. There is therefore no basis under *Lockheed* for finding the unit transfer of the research assistants appropriate.

6. Summary and conclusions

Based on all of the above, the briefs of the parties, and the record as a whole, I have found that the instant case is not appropriately deferred to the parties' arbitral process. Further, I have found that the transfer of the research assistants into the represented unit, without an expression of a desire by a majority of those employees to be represented, may not be justified either as an accretion or as a restoration of unit work leakage. It is therefore unjustified, improper, and an unfair labor practice. Given the finding that the research assistant employees were wrongfully transferred into the unit, it follows that the contract was improperly applied to them including the contract's union-security clause. All this being so, the allegations of the complaint described above respecting each Respondent are sustained.

Thus, I find that the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act as alleged in the complaint by granting recognition to the Union as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its division of research at a time when the Union did not represent a majority of those employees, by informing research assistant employees that the contract's unit security provisions applied to them, by applying the unit contract to those employees, and by collecting union-security payments from research assistant employees and remitting those payments to the Union.

I further find that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by accepting the Employer's grant of recognition as the exclusive collective-bargaining representative of the Employer's research assistant employees in its division of research at a time when the Union did not represent a majority of those employees, by informing those employees that the contract union-security provisions applied to them, and by accepting, either directly from employees or indirectly by collection from employees by the Employer and remittance to the Union, union-security payments from research assistant employees.

REMEDY

The General Counsel in his complaint seeks an order prohibiting the Respondent Employer from recognizing the Respondent Union as the collective-bargaining representative of its research assistants and prohibiting the Respondent Union from accepting such recognition unless and until the Respondent Union is selected by the Respondent Employer's research assistants in a Board-conducted election. The complaint further seeks an order requiring the Respondents refrain from applying the terms of the unit contract to research assistants unless and until a Board certification has been issued. Finally, the complaint seeks an order directing the Respondents, jointly and severally, to reimburse all payments received from research assistant employees, directly to the Union or through the collection and subsequent remittance by the Employer, made pursuant to the union-security clause of the contract, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The remedies the General Counsel seeks are traditional for the violations found and will be included in this order. Further, having found that the Respondents violated the Act as set forth above, I shall order them to cease-and-desist there from and to post remedial Board notices. Further, the language on the Board notices will conform to the Board's recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees and members of their rights and the violations of the Act found.

CONCLUSIONS OF LAW

On the basis of the above findings of fact, and the record as a whole, and Section 10(c) of the Act, I make the following

1. The Respondent Employer is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Employer violated Section 8(a)(3), (2), and (1) of the Act by engaging in the following acts and conduct:

a. By granting recognition to the Union as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its Division of research at a time when the Union did not represent a majority of those employees,
b. By informing research assistant employees that the contract's union-security provisions applied to them,
c. By applying the unit contract to those employees, and,
d. By collecting union-security payments from research assistant employees and remitting those payments to the Union.

4. The Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by engaging in the following acts and conducts:

a. Accepting the Employer's grant of recognition as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its Division of research at a time when the Union did not represent a majority of those employees;
b. By informing those employees that the contract union-security provisions applied to them;
c. By applying the unit contract to those employees; and
d. By accepting, either directly from employees or by collection from employees by the Employer and remittance to the Union, union-security payments from research assistant employees.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

A. The Respondent Employer, Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and the Permanente Medical Group, Inc., of California, collectively and singly, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting recognition to the Union as the exclusive collective-bargaining representative of the Employer's research assistant employees in its division of research at a time when the Union did not represent a majority of those employees.

(b) Informing research assistant employees that the contract's union-security provisions applied to them.

(c) Applying the unit contract to those employees.

(d) Collecting union-security payments from research assistant employees and remitting those payments to the Union.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) Rescind and withdraw the recognition given the Union as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its division of research unless and until the Respondent Union is selected by the Respondent Employer's research assistants in a Board-conducted election.

(b) Rescind and withdraw the unit contract's application to research assistant employees in its division of research unless and until the Respondent Union is selected by the Respondent Employer's research assistants in a Board-conducted election.

(c) Jointly and severally with the Respondent Union reimburse all research assistant employees for any payments made under the terms of the contract union-security clause, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(e) Within 14 days after service by the Region, post copies of the attached notice at its San Francisco Bay area facilities as set forth in "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where research assistant employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent Employer 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 the closed facility or facilities at any time after July 1, 2002.

(f) 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 Employer has taken to comply.

B. The Respondent Union, Office and Professional Employees International Union, Local 29, AFL–CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accepting the Employer's grant of recognition as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its division of research at a time when the Union did not represent a majority of those employees.

(b) Informing those research assistant employees that the contract union-security provisions applied to them.

(c) Applying the unit contract to those employees.

(d) Accepting, either directly from employees or by collection from employees by the Employer and remitting to the Union, union-security payments from research assistant employees.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) Reject and refuse the recognition given the Union as the exclusive collective-bargaining representative of the Respondent Employer's research assistant employees in its division of research and continue to decline to represent the employees unless and until the Respondent Union is selected by the Respondent Employer's research assistants in a Board-conducted election.

(b) Rescind and withdraw the unit contract's application to research assistant employees in the division of research unless and until the Respondent Union is selected by the Respondent Employer's research assistants in a Board-conducted election.

(c) Jointly and severally with the Respondent Employer reimburse all research assistant employees for any payments made under the terms of the contract union-security clause, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and within 14 days of a request, or such additional time as the regional director may allow for good cause

[5] 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 shall be waived for all purposes.

[6] 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."

shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(e) Within 14 days after service by the Region, post copies of the attached notice at its San Francisco Bay area facilities set forth in the "Appendix B."[7] Copies of the notice, on forms provided by the regional director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondents' authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former department of research research assistant employees employed by the Respondent at the closed facility or facilities at any time after July 1, 2002.

(f) 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 Union has taken to comply.

[7] 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."