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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

VALERIE HARDY-MAHONEY, Regional
Director of the Thirty-Second Region of the
National Labor Relations Board, for and on
behalf of the National Labor Relations
Board,

Case No. 3:17-cv-00216-MMD-VPC

ORDER

Petitioner,

v.

PRIME HEALTHCARE SERVICES D/B/A
SAINT MARY'S REGIONAL MEDICAL
CENTER, RENO,

Respondent.

I. SUMMARY

Section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, authorizes district courts to grant temporary injunctions that are "just and proper" pending the National Labor Relations Board's ("NLRB" or "the Board") resolution of unfair labor practice disputes. *See* 29 U.S.C. § 160(j). Before the Court is the Regional Director of the 32nd Region of the NLRB's petition for interim injunctive relief pursuant to section 10(j) against Respondent Prime Healthcare Services d/b/a Saint Mary's Regional Medical Center, Reno ("Petition"). The Court has reviewed Petitioner's brief (ECF No. 3), Respondent's response (ECF No. 17), and Petitioner's reply (ECF No. 19).

The Court heard oral argument on May 8, 2017. (ECF No. 20.) At the conclusion of the hearing, the Court ordered the parties to file supplemental briefs concerning its authority to narrow the relief sought by Petitioner pending the initial ruling of the Board's

1 Administrative Law Judge (“ALJ”). The Court has reviewed the supplemental briefs (ECF
2 Nos. 22, 23).

3 For the reasons discussed below, the Petition is denied.

4 **II. BACKGROUND**

5 The following facts are taken from Petitioner’s brief and accompanying exhibits.
6 (ECF Nos. 3, 3-1.)

7 This Petition involves two charges of unfair labor practices brought pursuant to
8 sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) & (a)(3). The California
9 Nurses Association/National Nurses Organizing Committee/National Nurses United
10 (collectively, “the Union”) filed the first charge in Case 32-CA-157381 (“381 Case”) on
11 August 5, 2015 after Hospice Nurse Johna May (“May”) was suspended. (ECF No. 1 at
12 3.) The Union subsequently amended the charge twice, on August 21, 2015, and
13 September 3, 2015, alleging that May was terminated in retaliation for engaging in or
14 supporting protected activities on behalf of the Union. The Union filed its second charge
15 in Case 32-CA-162431 (“431 Case”) on October 21, 2015, after Respondent purportedly
16 solicited and promised to remedy the hospice nurses’ grievances, granting wage
17 increases and other changes to the hospice nurses’ terms and conditions of
18 employment. This charge was subsequently amended on January 1, 2016, and
19 September 27, 2016. On December 29, 2016, the two cases were consolidated, and a
20 Consolidated Complaint ensued. (*Id.* at 4.) A portion of the Consolidated Complaint was
21 withdrawn via a February 22, 2017, order. On January 11, 2017, Respondent filed its
22 Answer to the Consolidated Complaint. The initial administrative hearing is scheduled for
23 June 20, 2017. (*Id.* at 5.)

24 The 381 Case arises from May’s termination after an August 3, 2015, hearing in
25 Case 32-RC-156669 (“669 Case”), which involves the Union’s petition to include 24

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1 hospice nurses in the existing bargaining unit¹ of the Union at St. Mary's Regional
2 Medical Center in Reno ("Medical Center"). (ECF No. 3-1 at 4, 57.) At this hearing, the
3 Union's counsel, Micah Berul ("Berul"), marked three exhibits for identification. One of
4 the exhibits, an email, contained the personal health information ("PHI") of a patient,
5 including the patient's name, medical condition, and date of birth. (*Id.* at 5; ECF No. 1 at
6 5.) At this point, counsel for Respondent, Mary Schottmiller ("Schottmiller"), and Berul
7 spoke privately and off the record.² Schottmiller told Berul that Respondent would have
8 to terminate May for disclosing PHI unless the Union withdrew the Representation
9 Petition. (ECF No. 3-1 at 6.) Berul disputed whether May had been the one to give him
10 the email and also told Schottmiller that Respondent had violated HIPAA by sending this
11 email with PHI to fifteen recipients, an unnecessarily excessive number. (*Id.* at 6-7.)
12 Once back on the record, Berul withdrew the email at issue and requested that all
13 references to it in the transcript be stricken. (*Id.* at 7.) Nonetheless, Schotmiller informed
14 Berul that Respondent was going to terminate May and was going to report Berul and
15 John Welsh, the Union representative, for a HIPAA violation. (*Id.* at 9.) On August 5, two
16 days after the hearing, Respondent suspended May while Respondent conducted an
17 investigation. (*Id.* at 10; ECF No. 1 at 5.) Respondent terminated May on August 11.
18 Before the August 3 hearing, May had participated in activities in support of and on
19 behalf of the Union. (ECF No. 3-1 at 30-31.)

20 The 431 Case arises from Respondent's redress of hospice nurse complaints
21 concerning wages and benefits, which occurred after May's termination. On August 19,
22 2015, several hospice nurses approached Piper Gals ("Gals"), the Director of Hospice at
23 the Medical Center. (ECF No. 3 at 13.) Several days later, Gals met with a hospice nurse
24 and instructed the nurse to email the other hospice nurses' requests to her. This list of
25 requests included: "(1) a yearly cost of living raise; (2) continuing education

26 ¹The existing bargaining unit is comprised of approximately 560 registered acute
27 care nurses at the Medical Center located at 234 West 6th Street, Reno, Nevada. (ECF
28 No. 3-1 at 8.)

²The parties dispute part of the content of this discussion.

1 reimbursement for 24 hours of educational credits per year; (3) being placed on the
2 same pay scale as the other registered nurses working for Respondent; (4) shift-
3 differential pay for working evenings, nights, weekends, and in the pediatrics unit; (5)
4 being paid at the regular rate for taking calls during the 5:00 PM to 8:00 PM shift; (6)
5 being paid for 40 hours in a work week if some of those hours were from meetings or
6 education time; (7) splitting weekend 12-hour shifts; (8) hiring an admitting nurse to help
7 with weekend admissions; (9) phone coverage for Saturdays; (10) nursing oversight for
8 referrals and admissions; (11) placing someone in the nursing office to assess acuity,
9 caseloads, and nurse coordination; (12) ending the practice of hospice nurses finding
10 their own coverage when they are sick and cannot work their shift; and (13) ending the
11 practice of night shift covering home health patients during the night.” (*Id.* at 13.)

12 On September 14, 2015, Gals met with about 13 hospice nurses and informed
13 them that she would be taking four of the nurses’ requests to management. (*Id.* at 14.)
14 These requests included a 2-3 percent cost of living increase, a continuing education
15 reimbursement, putting hospice nurses on the same pay scale as Respondent’s other
16 Union represented nurses, and providing a shift differential. On October 6, 2015, Gals
17 held a meeting with all hospice nurses to inform them that Respondent had granted a
18 wage increase, 24 hours of continuing education units, shift differential, and had agreed
19 to perform a wage review to evaluate whether the hospice nurses were on the correct
20 wage scale.³

21 The next month, November 2015, several hospice nurses collectively sent a letter
22 (“November 2015 Letter”) to the Union’s representative, Jeff Welsh (“Welsh”), stating
23 that they were no longer interested in the Union given that Respondent had met their
24 needs. (ECF No. 3-1 at 134-35.) Welsh then stopped all organizing activities for the
25 hospice nurses. (*Id.* at 135.)

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27 ³Petitioner’s brief states that Gals subsequently emailed the hospice nurses on
28 October 20 to inform them that these wage benefit increases would be implemented.
(ECF No. 3 at 15.)

1 In the meantime, on August 14, 2015, the ALJ dismissed the petition in the 669
2 Case. (ECF No. 3-1 at 56-64.) The Board reversed and remanded the decision for
3 further consideration. (*Id.* at 66.) On August 9, 2016, the ALJ issued its remand decision,
4 overturning its prior findings and issuing a direction of election. (*Id.* at 65-74.)

5 On August 20, 2016, Welsh emailed the hospice nurses to let them know that the
6 Regional Director had directed that an election take place. (*Id.* at 135.) He also called
7 some of the hospice nurses to tell them the same news. Only one hospice nurse
8 answered his call on August 31, 2016, to inform him that she was no longer interested in
9 joining the Union and that, as far as she knew, the opinions of the other hospice nurses
10 had not changed since they sent the November 2015 Letter. (*Id.* at 135-36.)

11 The Petition requests two forms of injunctive relief. First, the Petition asks the
12 Court to enjoin and restrain Respondent from: (1) discharging, suspending, or otherwise
13 discriminating against employees because they join or assist the Union or engage in
14 concerted protected activity or discouraging employees from engaging in those activities;
15 (2) threatening to discharge, suspend, or otherwise discriminate against employees
16 unless the Union withdraws its Representation Petition; (3) impliedly promising
17 employees that Respondent will remedy hospice nurses' complaints and grievances, in
18 response to employees' Union organizing activities; (4) meeting with hospice nurses to
19 resolve their complaints and grievances and/or to promise to resolve their complaints
20 and grievances, in response to employees' Union organizing activities; (5) granting
21 benefits in response to employees' Union organizing activities; and (6) in any like or
22 related manner interfering with, restraining or coercing employees in the exercise of the
23 rights guaranteed to them under section 7 of the NLRA. (ECF No. 1 at 10-11.)

24 The Petition also requests this Court to require Respondent to: (1) within 5 days
25 of the Court's order and in writing, offer May immediate reinstatement to her former
26 position, or, if her position is no longer available, to a substantially equivalent position
27 without prejudice to her seniority or any other rights and privileges previously enjoyed
28 and displacing any employee who has been hired or reassigned to replace her; (2) within

1 7 days of issuance of this Court's order, post copies of the Court's order at Respondent's
2 Reno facility and maintain these postings during the Board's administrative proceeding
3 with unrestricted access to employees while granting Board agents reasonable access to
4 the facility in order to monitor compliance with the posting requirement; and, (3) within 20
5 days of the issuance of this Court's order, file with the District Court and serve upon the
6 Regional Director of Region 32 of the Board, a sworn affidavit from Respondent
7 describing with specificity the manner in which they have complied with the Court's
8 orders and the locations of the posted documents. (ECF No. 1 at 11.)

9 **III. LEGAL STANDARD**

10 "Section 10(j) permits a district court to grant [injunctive] relief it deems just and
11 proper." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011) (citing 29 U.S.C. §
12 160(j)) (internal quotation marks omitted), *cert. denied*, 566 U.S. 904 (2012). The
13 purpose of section 10(j) is to ensure that an unfair labor practice will not succeed in
14 dissipating union support because the Board takes too long to investigate and adjudicate
15 the charge. *Miller for & on Behalf of N.L.R.B. v. California Pac. Med. Ctr.*, 19 F.3d 449,
16 460 (9th Cir. 1994).

17 However, "[a] preliminary injunction is an extraordinary remedy never awarded as
18 of right." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). In the Ninth
19 Circuit, to determine whether interim injunctive relief under section 10(j) is appropriate,
20 the district court must rely on traditional equitable principles. *Small v. Avanti Health Sys.,*
21 *LLC*, 661 F.3d 1180 (9th Cir. 2011); *Frankl*, 650 F.3d at 1355 (9th Cir. 2011). These
22 equitable considerations require the Regional Director to satisfy four factors: (1)
23 likelihood of success on the merits on final disposition of the Board's resolution; (2) a
24 likelihood of irreparable harm in the absence of preliminary injunctive relief from the
25 district court; (3) the balance of equities tips in the Board's favor; and (4) the injunction is
26 in the public interest. *Frankl*, 650 F.3d at 1355. Alternatively, an injunction may issue
27 under a "sliding scale" approach if there are serious questions going to the merits and
28 the balance of equities tips sharply in the plaintiff's favor. *Alliance for the Wild Rockies v.*

1 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). “[S]erious questions are those ‘which
2 cannot be resolved one way or the other at the hearing on the injunction.’” *Bernhardt v.*
3 *Los Angeles Cty.*, 339 F.3d 920, 926-27 (9th Cir. 2003) (quoting *Republic of the*
4 *Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)). They “need not promise a
5 certainty of success, nor even present a probability of success, but must involve a ‘fair
6 chance of success on the merits.’” *Marcos*, 862 F.2d 1362 (quoting *Nat’l Wildlife Fed’n v.*
7 *Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)). The plaintiff, however, must still show a
8 likelihood of irreparable harm under either theory. *Alliance for the Wild Rockies*, 632 F.3d
9 at 1135. “Due to the urgency of obtaining a preliminary injunction at a point when there
10 has been limited factual development, the rules of evidence do not apply strictly to
11 preliminary injunction proceedings.” *Herb Reed Enters., LLC v. Florida Entm’t Mgmt.,*
12 *Inc.*, 736 F.3d 1239, 1250 n. 5 (9th Cir. 2013).

13 **IV. DISCUSSION**

14 Because the Court finds that Petitioner has not satisfied the likelihood of
15 irreparable harm prong, the Court declines to address the other elements.

16 To show likelihood of irreparable harm, a plaintiff must demonstrate that
17 irreparable injury is “*likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22
18 (emphasis in original). However, it is not enough that the claimed harm be irreparable;
19 the harm must also be imminent. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844
20 F.2d 668, 674 (9th Cir. 1998).

21 Applying this standard to petitions brought pursuant to section 10(j), the Regional
22 Director must show that the claimed harm is likely to occur absent the district court’s
23 issuance of a preliminary injunction. *Avanti Health Sys., LLC*, 661 F.3d at 1191. The
24 Ninth Circuit has held that “the Director need not prove that irreparable harm is certain or
25 even nearly certain.” *Id.* Rather, irreparable harm results where an alleged unfair labor
26 practice is allowed to “reach fruition,” thereby rendering the Board’s subsequent remedial
27 authority meaningless. *Id.*; see also *Frankl*, 650 F.3d at 1362 (“Irreparable injury is
28 established if a likely unfair labor practice is shown along with a present or impending

1 deleterious effect of the likely unfair labor practice that would likely not be cured by later
2 relief.”). Thus, interim injunctive relief under section 10(j) “preserve[s] or restore[s] the
3 status quo while the parties are awaiting a resolution of the unfair labor practice dispute
4 by the Board.” *Aguayo for and on Behalf of N.L.R.B. v. Tomco Carburetor Co.*, 853 F.2d
5 744, 747 (9th Cir. 1988) (citing *Johansen v. Queen Mary Rest. Corp.*, 552 F.2d 6, 7 (9th
6 Cir. 1975) (per curiam)), *overruled on other grounds*, *Miller v. California Pacific Medical*
7 *Center*, 19 F.3d 449 (9th Cir. 1994).

8 Petitioner has not established that the Court can preserve or restore the status
9 quo to prevent the alleged unfair labor practices from reaching fruition. The claimed
10 harm in Petitioner’s brief appears to be both stimulating support for the Union and
11 preventing any further decrease in the hospice nurses’ support for the Union. (ECF No. 3
12 at 24.) However, Petitioner fails to affirmatively show that hospice nurses currently
13 employed at the Medical Center support the Union or that there has been any support
14 for the Union since November 2015. (See ECF No. 3-1 at 134-35.) The apparent lack of
15 support is further buttressed by Welsh’s affidavit in which he states that, after informing
16 the hospice nurses via email on August 20, 2016, that the order in the 669 Case had
17 been overturned and there had been a direction for election, only one hospice nurse
18 spoke with him. (*Id.* at 135.) This nurse informed Welsh that, as far as she knew, the
19 hospice nurses’ views remained consistent with the November 2015 Letter. (*Id.*) This
20 evidence supports Respondent’s argument that the status quo cannot be revived at this
21 point in time. Given the lack of any evidence of support for the Union since November
22 2015, the Union cannot establish that the absence of preliminary injunctive relief will
23 likely result in irreparable harm. Such absence of evidence supports Respondent’s
24 argument that any final relief will be just as effective as interim relief.

25 In their brief, Respondent focuses heavily on the delay between the termination of
26 May (August 11, 2015) and the filing of the Petition (April 7, 2017). Petitioner cites to a

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1 series of cases, including two from the Ninth Circuit,⁴ to argue that the delay in time
2 between May's termination and the filing of the section 10(j) petition does not affect the
3 ability of the Union to restore or revive the status quo. (See ECF No. 3 at 25-26.)

4 While delay by itself is not a determinative factor in deciding whether interim
5 injunctive relief is just and proper, delay is significant if the claimed harm has already
6 occurred and the parties cannot be returned to the status quo or if the Board's final order
7 will likely be as effective as an order for interim relief.⁵ *Aguayo*, 853 F.2d at 750 (citing
8 *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987) and *Solien v. Merchants Home*
9 *Delivery Serv., Inc.*, 557 F.2d 622, 627 (8th Cir. 1977)). Moreover, in *Aguayo*, the court
10 asked the additional question of whether interim relief—there, reinstatement of
11 employees—would revive the union's organizational campaign. See *id.* The court
12 reasoned that if the interim relief would not revive the status quo, then the relief sought—
13 there, an order of reinstatement of eleven employees—would be an “empty formality.” *Id.*
14 at 749 (quoting *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); see also *Avanti*
15 *Health Sys., LLC*, 661 F.3d at 1192 (“[A] delay in bargaining weakens support for the
16 union, and a Board order cannot remedy this diminished level of support.”).

17 Similarly here, Petitioner has not shown that the interim relief requested would
18 preserve or restore the status quo. The hospice nurses expressed that they were no

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20 ⁴The Court finds the facts here are distinguishable from the facts presented in the
21 two Ninth Circuit cases. First, in *Aguayo*, the employees who were eventually reinstated
22 were terminated in July and August of 1987. 853 F.2d at 746. The section 10(j) petition
23 was then filed on December 14, 1987. *Id.* Despite the fact that reinstatement did not
24 actually occur until the Ninth Circuit's decision on August 5, 1988, the court's
25 determination was based on the facts as presented by the petitioner in December of
26 1987. See *id.* at 750-51. At that time, only four months had transpired between the firing
27 of employees and the filing of the petition. *Id.* at 750. *Frankl* involved a longer delay than
28 the one in this case—roughly two years. However, during that time period union support
persisted and the ALJ had issued an order finding in favor of the Union.

⁵“Normally there is a significant delay before the Board issues its ruling in an
unfair labor practice proceeding.” *Aguayo*, 853 F.2d at 747; see also *Angle v. Sacks*, 382
F.2d 655, 659-60 (10th Cir. 1967) (“The concern of Congress was rather that the
purposes of the National Labor Relations Act could be defeated in particular cases by
the passage of time.”). Thus, section 10(j) was enacted so that any delay would not
thwart the NLR's objective of protecting the collective bargaining process. *Aguayo*, 853
F.2d at 747.

1 longer interested in supporting the Union in November 2015. (ECF No. 3-1 at 134-35.)
2 The ALJ's subsequent order directing an election in August 2016 received no support
3 from the hospice nurses. (*Id.* at 135.) According to Welsh, he also called some of the
4 hospice nurses to tell them the same news, but only one nurse answered his call and
5 she informed him that she was no longer interested in joining the Union and that, as far
6 as she knew, the opinions of the other hospice nurses had not changed since they sent
7 the November 2015 Letter. (*Id.* at 135-36.) The Union offered no evidence to suggest
8 any indicia of support for the Union or any change in such support despite the positive
9 news resulting from the ALJ's order directing an election in August 2016. Thus, the lapse
10 in time, coupled with the lack of any evidence from Petitioner that support for the Union
11 may be restored, would render the Court's granting of interim relief "an empty formality."
12 While consideration of the extended timeline by which the Board addresses labor
13 disputes is an inherent factor in the court's analysis, the delay here has affected the
14 Court's ability to restore the status quo pending a final decision by the Board.

15 Moreover, Petitioner presents no evidence that the claimed harm is imminent to
16 support a finding of irreparable harm. *See Caribbean Marine Servs. Co.*, 844 F.2d at 674
17 ("A plaintiff must do more than merely allege imminent harm . . . a plaintiff must
18 demonstrate immediate threatened injury as a prerequisite to preliminary injunctive
19 relief.") For instance, the Ninth Circuit has found that an "observed drop-off in union
20 activity, as evidenced by a decline in the number of union authorization cards signed and
21 in attendance at union organizing meetings . . . can be evidence that irreparable harm is
22 likely absent a preliminary injunction." *Overstreet v. Shamrock Foods Co.*, No. 16-15172,
23 2017 WL 655795, at *2 (9th Cir. Feb. 17, 2017). Petitioner does not provide the Court
24 with any affirmative evidence of indicia of support for the Union between the November
25 2015 Letter and the April 7, 2017, filing of the Petition, let alone any evidence amounting
26 to an "observed-drop off" in the hospice nurses' support for the Union.

27 Thus, the Court fails to find the existence of an immediate threatened injury at this
28 point in time and is thereby precluded from granting preliminary injunctive relief.

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V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Petition.

It is hereby ordered that Petitioner’s petition for interim injunctive relief pursuant to section 10(j) of the NLRA is denied.

The Clerk is instructed to close this case.

DATED THIS 18th day of May 2017.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE