

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALARIS HEALTH AT CASTLE HILL,

Employer,

- and-

1199, SEIU UNITED HEALTHCARE WORKERS EAST
UNION.

CASE: 22-CA-125034
22-CA-125866
22-CA-140619

ALARIS HEALTH AT HARBORVIEW,

Employer,

- and-

1199, SEIU UNITED HEALTHCARE WORKERS EAST
UNION.

CASE: 22-CA-125023
22-CA-125882
22-CA-140491

ALARIS HEALTH AT BOULEVARD EAST,

Employer,

- and-

1199, SEIU UNITED HEALTHCARE WORKERS EAST
UNION.

CASE: 22-CA-125076
22-CA-125886
22-CA-131372
22-CA-140582

ALARIS HEALTH AT ROCHELLE PARK,

Employer,

- and-

1199, SEIU UNITED HEALTHCARE WORKERS EAST
UNION.

CASE: 22-CA-124968
22-CA-126889
22-CA-140560

**RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISIONS**

Submitted by:

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I. INTRODUCTION AND STATEMENT OF THE CASE¹

This case comes before the National Labor Relations Board (hereinafter the “Board”), pursuant to Respondents Alaris at Rochelle Park, Alaris at Harbor View, Alaris at Boulevard East, and Alaris at Castle Hill² Exceptions to the Decisions and Orders of the Administrative Law Judge Michael A. Rosas (hereinafter “ALJ”). On April 30, 2015, the Regional Director for Region 22 of the National Labor Relations Board (hereinafter “Board”) issued four individual amended complaints against each Respondent. (GC Exhs. 1, 101, 201, 301). The complaints were not consolidated but all four cases were scheduled to be tried before the ALJ. (Tr. 1-9). The cases were heard consecutively. (Tr. 1773). To expedite the cases, witnesses with testimony relevant to multiple Respondents were allowed to testify once with regard to all Respondents. (Tr. 1774.) The ALJ ordered the parties to submit one brief for all four cases but indicated he would issue four separate opinions addressing the four separate complaints. (Tr. 1773). The ALJ issued his decisions and orders on February 25, 2016 for Alaris at Rochelle Park (JD-17-16), February 18, 2016 for Alaris at Boulevard East (JD-15-16), February 11, 2016 for Alaris at Harborview (JD-12-16), and February 3, 2016 for Alaris at Castle Hill (JD-09-16). Extensions to file exceptions were granted for each of the four Respondents. A final extension to file exceptions was granted setting the exceptions deadline for all four Respondents as May 23, 2016.

The Respondents specifically except to the findings that they violated Section 8(a)(3) and (1) of the National Labor Relations Act when they did not immediately reinstate employees who

¹ Throughout this document, the ALJ’s decision will be cited as “(JD-__-__ ALJD __)”;

the transcript of the proceedings before the ALJ will be cited as “(Tr. __)”;

Respondents exhibits will be cited as “(R Exh. 1, etc.)”; and references to the Acting General Counsel’s exhibits will be cited as “(GC Exh. 1, etc.).”

² The four individual Employers are collectively referred to herein as “Respondents” unless a specific Employer or group of Employers is being discussed.

had participated in the strike, as well as the related remedies ordered by the ALJ. In finding a violation and ordering a remedy, the ALJ disregarded critical portions of the record evidence which provided sufficient evidence of the necessity for Respondents to enter into contracts with staffing agencies requiring replacement employees to work for four to six weeks. Board law has considered such contracts as justification for not immediately replacing striking employees. In the context of the instant cases, involving health care facilities charged with providing around-the-clock care to an elderly, ill, frail, and vulnerable patient population, it was imperative the ALJ consider these contracts as they were necessary to facilitate the maintenance of uninterrupted care for Respondents' patients. For all the reasons set forth below, the ALJ's findings of fact, conclusions of law, and recommended remedies are not supported by a preponderance of all the relevant evidence in the record and/or are contrary to law or policy.

II. QUESTIONS PRESENTED

1) Did the ALJ err in finding Respondents were required to immediately reinstate striking employees despite Respondents contracts with staffing agencies requiring the use of temporary employees for four to six weeks? [Exceptions 1, 2, 3, 6, 7, 8, 9, 10, 15, 16, 17, 20, 21, 22, 23, 24, 29, 30, 31, 34, 35, 36, 37, 42, 43, 44, 47, 48, 49, 50, 51].

2) Did the ALJ err in ordering the Respondents to immediately reinstate striking employees prior to the expiration of their contracts for replacement employees. [Exceptions 11, 12, 13, 14, 25, 26, 27, 28, 38, 39, 40, 41, 52, 53, 54, 55].

3) Did the ALJ err in failing to credit testimony regarding the necessity of temporary replacement contracts requiring employment of temporary employees for four to six weeks. [Exceptions 4, 5, 18, 19, 32, 33 45, 46,].

III. FACTUAL SUMMARY OF EXCEPTIONS

A. Respondents Required Temporary Employees To Ensure Patient Care

Each of the facilities at issue is a long term nursing facility. As such, it is critical they maintain required staffing levels. (Tr. 1354). In fact, in order to ensure proper patient care, the Respondents are required to report daily staffing levels to the State of New Jersey. (Tr. 1565). Respondents presented testimony that in preparation for the strike, they needed to “[e]nsure all our operations and systems be functional in case of a strike.” (Tr. 1646, 2252, 2254). As Respondents were unaware of which employees were planning to strike and which employees were planning to work, it “made sure that [it] had sufficient staff in case there was a hundred percent walk out.” (Tr. 1354, 2252, 2254). The sole purpose and motivation for finding replacement employees was to “[t]ake the assignments of people that were not going to come to work, so the patients would be taken care of.” (Tr. 3221).

B. Respondents Were Required to Enter Into Contracts For Temporary Replacement Employees Which Required Four To Six Week Commitments

As noted, the Respondents had no choice but to maintain the same care and staffing levels throughout the strike in order to maintain patient care. (Tr. 1354). As such, when strikes were first threatened in July 2014, Respondents began seeking staffing agencies to ensure coverage and found the agencies required a specified guarantee of work for temporary workers. (Tr. 903, 1489). Respondents had difficulty obtaining commitments from staffing agencies to provide staff during the strike unless Respondents committed to these guaranteed periods of time for the replacements. (Tr. 1489-1490, 2171-2172). When the Union presented its ten-day strike notices, Respondents had no choice but to reach out to these temporary staffing agencies. (Tr. 1354-1355, 1365). The staffing agencies required four to six week commitments from each Respondent in order to supply a minimum number of replacement workers. (Tr. 1356). Regina

Figueroa testified that “for us to go into an agreement with [the staffing agencies] and use as many aides as they were able to provide to us, we had to commit to keeping those aides in place and hired for that timeframe.” (Tr. 1357). Thus, in order to effectuate a contract with these staffing agencies, the Respondents had to commit to keeping the agency’s aides in place and hired for the required duration, regardless of the length of the strike. (Tr. 1357). Replacement employees hired through the staffing agencies continued to work after the strike until the Respondents contractual commitments to the staffing agencies expired.³ (Tr. 1361). To not agree to the terms would have meant no replacements. No replacements would have severely compromised patient care, an obviously unacceptable outcome.⁴

Respondent Castle Hill entered into three contracts with agencies for replacement employees: Medistar which required a thirty day guarantee of work for replacement employees; Towne which required a six week guarantee for replacement employees; and Tristate which required a four week guarantee for replacement employees. (R Exhs. 9-11). Respondent Harborview entered into three contracts with agencies for replacement employees: Medistar, which required a thirty day guarantee of work for replacement employees; Towne, which

³ Contrary to the ALJ’s statements, the striking employees were not locked out (JD-17-16 ALJD 21-23; JD-15-16 ALJD 20-21; JD-09-16 ALJD 22), but were denied reinstatement for a period of time until the contracts with the temporary staffing agencies expired.

⁴ The ALJ erred when he credited the testimony of Massey regarding as the reason for the contracts. (JD-17-16 ALJD 20; JD-15-16 ALJD 20; JD-12-16 ALJD 18; JD-09-16 ALJD 21-22). The Respondents presented ample evidence of the reasons for entering into agency contacts and the ALJ erred when he did not credit this testimony from Figueroa, Jaskinski, and Ann Taylor. The testimony of all three was consistent that four to six week guarantees for replacement employees were required by the staffing agency contracts. (Tr. 1354-1358, 1361, 1364-1366, 1474, 1476-1477, 1488-1490, 1728-1729, 1732, 1738). This fact was further corroborated by the agreements themselves. (R Exhs. 9-11, 107, 108, 205). Moreover, the fact that the staffing agency agreements required four to six week commitments was adequately explored and there was no reason to call an additional witness, Linda Dooley, nor should an adverse inference be drawn for not calling her. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022.

required a six week guarantee for replacement employees; and Tristate, which required a four week guarantee for replacement employees. (R Exhs 11, 107, 108). Boulevard East entered into two contracts: Towne, which required a four week guarantee for replacement employees; and Tristate, which required a four week guarantee for replacement employees. (R Exhs. 11, 205). Finally, Rochelle Park contracted with two agencies: Towne, which required a four week guarantee for replacement employees; and Tristate, which required a four week guarantee for replacement employees. (R Exhs 11, 205).

IV. LAW AND ARGUMENT

A. Returning Striking Employees After The Guarantee For Replacement Workers Expired Was Not A Violation Of The Act

The ALJ erred in not finding the Respondents could return striking employees after the guarantees for replacement workers had expired.⁵ As an initial matter, the ALJ found the employees to be unfair labor practice strikers. There is long-established Board principle holding that when ULP strikers make an unconditional offer to return to work, an employer has a five-day grace period to accommodate this request. *Drug Package Co., Inc.*, 228 NLRB 108, 113-114. There is also long standing precedent that unfair labor practice strikers stand in the same shoes as economic strikers who have been temporarily replaced. As stated in *Harvey Mfg.*, 309 NLRB 465, 470 (1992), reinstatement rights of temporarily replaced economic strikers are identical to those of unfair labor practice strikers in that they both have the right to immediate reinstatement. However, there is an exception to the immediate reinstatement rule. “A delay in reinstating strikers may be excused by a legitimate business justification.” *Special Touch Home Care Services, Inc.*, 351 NLRB 754, 757 (2007).

One scenario where the Board recognizes a “legitimate business justification” is when the

⁵ The ALJ equally erred in ordering the make whole remedy to include the four to six week time period after the strike.

employer is forced to enter into a guaranteed contract with workers from an employment agency to replace the strikers. *Pacific Mutual Door Co.*, 278 NLRB 854 (1986). In *Pacific Mutual Door*, the employer temporarily replaced strikers with employees provided by a leasing agency. The leasing contract required not less than thirty days written notice of termination. Eventually, the union called an end to the strike and made an unconditional offer to return to work on behalf of the strikers. In response, the employer notified the union that, due to the thirty-day cancellation provision in its contract with the leasing company, it could not reinstate the strikers until thirty days from receipt of the union's unconditional offer. The union filed an unfair labor practice charge alleging, among other things, that the employer unlawfully failed to reinstate the strikers immediately. In response, the employer asserted that because the leasing agency insisted upon the thirty-day cancellation provision as a condition of entering into the contract, this provision constituted a legitimate and substantial business justification for delaying reinstatement of the strikers. The Board agreed.

The *Pacific Mutual Door* case remains good law. In *Sutter Roseville Medical Center*, 348 NLRB 637 (2006), the employer's replacement work force was composed of (1) temporary employees hired pursuant to guaranteed contracts with an employment agency, and (2) in-house managers, supervisors and non-unit employees. The employer refused to reinstate strikers for the period of the guaranteed contracts. The General Counsel challenged the employer's decision with respect to the use of in-house employees after the strikers' designated return date. However, there was no such challenge with respect to the use of the replacements from the employment agency. *Id.* at 637, fn. 6. The Board specifically noted that the employer was only able to procure the services of these replacement employees by committing to employ them for a specified period. *Id.* at 637, fn. 5. A General Counsel Advice Memorandum on the case noted

that, under *Pacific Mutual Door*, the employer's contract with the staffing agency for multi-day replacement employees was a legitimate and substantial business justification for delaying reinstatement of the strikers replaced by those individuals. See Advice Memorandum in *Sutter Roseville Medical Center*, Case 20-CA-30946-1 (October 31, 2003). Considering that the Board did not allege *Sutter Roseville* committed an unfair labor practice by contracting for replacement workers in that case, it is apparent the procedures followed by *Sutter Roseville* are lawful under current Board law. See also *AMI/HTI Tarzana-Encino Joint Venture*, 332 NLRB 994 (2000) (holding that an employer faced with a one-day strike lawfully hired temporary replacements for a contractual four-day minimum and was not required to return the striking employees during the three days after the strike).

As the above discussion makes clear, under current Board law, an employer is allowed to delay immediate reinstatement of temporarily replaced economic strikers, which as discussed *supra* have the same rights to immediate reinstatement as unfair labor practice strikers, until the conclusion of the employer's contract with a staffing agency. The ALJ should have found the same here. There is ample record evidence that no less than three staffing agencies conditioned their provision of replacement workers on a four to six week required length of employment. (Tr. 1357, 1489-1490, 2171-2172; Exhs. 9-11, 107, 108, 205). The Respondents attempted to find temporary agencies with better terms in July with no success. (Tr. 903). After receiving the strike notices, Respondents were forced to accept these conditions of the agencies in order to maintain adequate staffing levels. (Tr. 1354). Under these conditions, Respondents presented a legitimate business justification for entering into guaranteed contracts with staffing agencies to ensure staffing levels and uninterrupted patient care during the strike and honoring those contracts when the strike ended.

B. Health Care Facilities, In Particular, Should Be Allowed To Show Special Circumstances For Delaying Reinstatement To Unfair Labor Practice Strikers In Order To Maintain Continuity Of Patient Care

As a matter of law and policy, health care facilities must be allowed to delay reinstatement for a period of time to strikers—economic as well as unfair labor practice strikers—if done so pursuant to contractual commitments required by staffing agencies for temporary workers needed to ensure proper staffing levels and uninterrupted patient care during a strike. This is especially true in the instant matter involving four nursing homes with elderly, frail, and vulnerable patient populations. To hold otherwise would turn logic on its head and require health care employers to choose between entering into a contract with a staffing agency for the guaranteed period of time required by the staffing agency or not having sufficient coverage to care for patients during a strike. Health care facilities do not have the luxury of simply closing or reducing staff during a strike if they are unable to negotiate contracts with staffing firms that mirror the number of strike days. Rather, health care facilities must do all that is necessary to ensure full staffing and continued patient care.

Moreover, the Board has considered *Pacific Mutual Door* in a health care setting. In *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), the union notified the employer of a one day strike. The employer sent a letter asking employees if they intended to participate in the strike. Based on the responses, the employer contacted per diem employees, volunteers, and made arrangements with an employment agency to supply temporary strike replacements and prepared a schedule of the workers for that day. *Id.* at 1016. Four days prior to the strike, the union notified the employer that the strike was postponed while the parties met in the presence of a Federal mediator. *Id.* The employer revised the work schedule but six unit employees had reduced hours for the day. The Board, citing *Pacific Mutual Door*, found the employer had a substantial business justification for the loss of hours. Specifically, when the employer

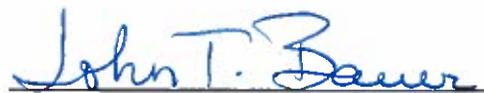
attempted to reschedule the employees, the employer did not want to exclude “the agency-supplied temp employees, for whom the [employer] was already obligated to pay, or the per diem employees who had substantially rearranged their lives in order to be available to help the [employer].” *Id.* at 1020. Using *Pacific Mutual Door* as justification, the Board found “[t]he prospect of forfeiting funds for agency-supplied workers justifies the respondent’s desire to keep those employees on the poststrike schedule, at least for a limited period of time.” *Id.*

Here, the staffing agencies conditioned their provision of replacement workers to Respondents beyond the strikers’ designated return date. In the context of health care facilities, where continuity of patient care is paramount, the rationale of *Pacific Mutual Door* must control to the post-strike reinstatement of strikers, regardless of whether the strikers are economic or unfair labor practice strikers. Patient care must be maintained regardless of the reasons for the strike. To hold otherwise would expose the most vulnerable among us to gaps in care, which cannot possibly be the law.

V. CONCLUSION

Based on the foregoing, the ALJ’s finding of fact and conclusions of law regarding the reinstatement of employees after the strike are not supported by a preponderance of all of the relevant evidence in the record and/or are contrary to law and/or policy.

Respectfully submitted,



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