

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

ALARIS HEALTH AT CASTLE HILL

and

Cases: 22-CA-125034
22-CA-125866
22-CA-140619

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE
MICHAEL A. ROSAS**

Michael P. Silverstein
Eric Sposito
Saulo Santiago
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
(862) 229-7059

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Counsel for the General Counsel, Michael P. Silverstein, respectfully submits this brief in support of the accompanying Cross-Exceptions to the Decision of Administrative Law Judge Michael A. Rosas, who heard the above-captioned matter on nine, non-consecutive days from June 2015 through October 2015, and whose Decision issued on February 3, 2016.

Facts in Support of Cross Exceptions 1 Through 4

i. Devika Smith

Devika Smith has worked as a CNA at Castle Hill since 2005. Before the strike, she enjoyed full-time status, consistently working the 2nd assignment on the 3rd floor on the 7 am-3 pm day shift.¹ (Tr. 213, 216). She worked the same assignment on the same shift for the previous 7.5 years. (Tr. 217). Castle Hill administrator Maurice Duran confirmed Smith's pre-strike permanent assignment in his testimony and described her as a "great CNA." (Tr. 722, 726).

a. Devika Smith's Copious and Open Union Activities Before and During the Strike

Smith has been a vocal, ardent supporter of the Union for many years. She has been a Union delegate for over 7 years and participated in contract negotiations with Castle Hill in 2008 as well as in 2014. Smith served on the Union's 2014 bargaining committee along with fellow delegates Marquis Francois (7 am to 3 pm shift), Tasha Sangare (7 am to 3 pm shift), Danielle Humphrey (3 pm to 11 pm), and Ron Lesesne (11 pm to 7 am). (Tr. 217-219). Smith testified that, in her role as a Union delegate, she spoke to about six co-workers about

¹ There are four floors of nursing care at Castle Hill. The 3rd floor houses long-term care residents whereas short-term rehabilitation patients (sub-acute) are housed on the 5th and 6th floors. (Tr. 213-214).

the purpose of the strike. She told them that Castle Hill had violated federal labor laws by discriminating as to who could represent the Union at the bargaining table and by refusing to furnish the Union with requested information. (Tr. 234).

Smith testified without contradiction that on September 5, 2014, she, along with several other co-workers, handed Duran the Union's 10-day strike notice. She handed the document to Duran in the lobby of the building shortly after her shift ended at 3 pm. Duran did not say anything in response to receiving this notice. (GC-16, Tr. 229). Smith also participated in the Union-led prayer vigil held outside of Castle Hill on September 10. (GC-34, GC-35, Tr. 415). CNA Leanne Crawford offered uncontroverted testimony that Maurice Duran observed this prayer vigil from the 2nd floor New Horizons room. (Tr. 489-492).

During the September 16-19 strike, Smith continued her copious Union activities. She picketed outside of Castle Hill for about 9 hours each day and also picketed for one day at both Alaris Health at Boulevard East (in Guttenberg, NJ) and Alaris Health at Harborview (in Jersey City, NJ). She was photographed holding a "Stop Unfair Labor Practices" picket sign outside of Boulevard East during the September strike. (GC-19(a), Tr. 235-236).

Additionally, Smith appeared in two news interviews during and shortly after the conclusion of the strike. On September 18, the last day of the strike, the Labor Press interviewed Smith for a report disseminated on YouTube and through the Labor Press' website. (GC 47, Link 8- "1199SEIU Nurses on Strike in New Jersey"). In Smith's interview, which begins at the 4 minute and 25 second mark, Smith questioned how Castle Hill and its owner were making millions of dollars yet were refusing to accede to the Union's wage proposals. The following week, after Castle Hill locked out Smith and her co-workers, Smith appeared on a FIOS 1 news report speaking out against Castle Hill's illegal conduct.

(GC 47, Link 2- "Union City Health Care Workers Say They Were Illegally Locked Out of their Jobs").

b. Castle Hill's Administrator and Supervisor Illegally Interrogate Smith Prior to the Strike

Prior to the strike, Castle Hill supervisors repeatedly interrogated and threatened Smith. About a month before the strike, administrator Maurice Duran cornered Smith while she was escorting a resident to the 3rd floor day room. Duran told her that she had a lot of influence in the facility and it would be a shame for Smith to lead her co-workers on a strike that resulted in them losing their jobs. Smith replied that she worked with grown men and women and she could not make them do anything they did not want to do. Duran smirked and walked away. (Tr. 226-227, 229).

About three weeks before the strike, Smith heard over the facility's intercom that all head nurses were being paged to the 2nd floor. About 45 minutes later, 3rd floor head nurse Lavonza Jabouin returned to the floor and spoke to Smith. Smith testified without contradiction that Jabouin told her that Duran was "mad" and wanted to know when everybody was going on strike. Smith told her that she couldn't discuss union business with management and Jabouin replied that she should "be careful" because Duran was mad. (Tr. 227-228).

Duran's interrogations of Smith accelerated as the strike approached. About two weeks before the strike, Duran approached Smith while she was playing a game with a resident in the 3rd floor day room.² Duran asked her whether she was going on strike but Smith did not respond. She did, however, notice that standing 10 feet away from her were Alaris quality assurance nurse Ann Taylor and an Alaris corporate vice-president who fits the

² Smith testified that this conversation took place shortly after she handed Duran the 10-day strike notice. (Tr. 231-232).

description of Regina Figueroa (African-American female with shoulder-length hair). When Smith did not respond, Duran left the room and walked over to where Taylor and Figueroa were standing.³ (Tr. 230-232). Furthermore, about a week before the strike, Smith was standing outside of the facility after her shift was over. Duran approached Smith while she was speaking with a colleague. Duran asked her if she was going out on strike and Smith said yes. Duran then walked away laughing. (Tr. 233).

ii. **Claudia Saldana**

Claudia Saldana started working as a CNA at Castle Hill in March 2001. Before the strike, she enjoyed full-time status, consistently working the 2nd assignment on the 6th floor on the 7 am-3 pm shift. She worked the same 6th floor day shift assignment ever since the 6th floor opened in about 2003. (Tr. 278-279).⁴ Duran confirmed Saldana's pre-strike permanent assignment in his testimony, and noted that Saldana was an "amazing" CNA. (Tr. 727-728).

a. **Saldana's Pre-Strike Union Activity**

Saldana served as a Union delegate for 7 years. (Tr. 280). Although she was not a delegate in 2014, the Union asked Saldana to advocate its position regarding the state of contract negotiations before the Union City municipal government.⁵ On August 19, Saldana spoke at a public meeting of the Union City Board of Commissioners. Saldana informed the Board of Commissioners that the Union that represents her (and her co-workers) was fighting for a better contract with Castle Hill, their previous contract had expired, and she was asking the Board's support in this fight. (GC-31, Tr. 289, 292, 336-337). Union City Mayor Brian Stack pledged his support in the Union's campaign and that evening, the Board of Commissioners passed a resolution in support of the Union and its members "in their efforts

³ Neither Taylor nor Figueroa testified about this encounter.

⁴ Saldana testified that there were normally 5 CNAs working on the 6th floor 7am-3pm shift. (Tr. 279).

⁵ Castle Hill is located in Union City.

to hold Alaris Health accountable for good jobs and quality resident care.” (GC-32). Later that evening, Saldana posed for a picture with Mayor Stack while holding the Board of Commissioners’ resolution. (GC-33, Tr. 293). The picture and resolution were posted on the Union’s Facebook page the next day. (GC-33).

b. Administrator Duran’s Pre-Strike Interrogations and Threats Directed at Saldana

In about July, Duran approached Saldana as she was returning from her lunch break. Duran asked to speak with her privately in his office. Saldana followed him to his office and Duran closed the door. He said that he wanted Saldana to help him fix Castle Hill and that he did not want Saldana and her co-workers to go on strike. Saldana said that she could not convince anybody regarding the strike and suggested that he tell the owner of Castle Hill to sit down and negotiate fairly with the Union and then nobody would go on strike. Duran again pleaded for help but Saldana told him that she wasn’t going to tell anyone not to fight for their rights. (Tr. 281-284).

About a week after the August Board of Commissioners meeting, Duran confronted Saldana in the 6th floor dining room while she was feeding a resident.⁶ Duran approached her and called her a “puñalada espalda,” meaning that she stabbed him in the back. Duran said that he couldn’t believe that she took a picture with Mayor Stack and said he thought that she was with them (the company). Saldana asked what he meant and Duran said he couldn’t believe how she was instigating to go on strike. Saldana said that she wasn’t instigating and that the Mayor was a friend of hers. Duran dismissed the notion that she and the Mayor were friends and during this exchange, he referred to Saldana as a puñalada several times. (Tr.

⁶ CNA Marquis Francois testified without contradiction that Duran showed her GC-33 (the Union’s Facebook post) on his cell phone and said that he didn’t know that Saldana was involved and committed to activities in Union City. Francois confirmed that Saldana was indeed committed to these activities. (Tr. 349-350).

295-297). Saldana testified that she exited this conversation feeling a little scared and nervous. (Tr. 296).

Duran continued to threaten Saldana in the run-up to the strike. On the Friday before the strike, Duran again confronted Saldana in the 6th floor dining room. Duran called her over to a side table while she was in the middle of feeding a resident. Duran then told her that it was a shame that she was going to lose her job because she was such a good worker. Duran also stated that 17 other single mothers were going to lose their jobs for going on strike. Saldana replied that she was a good worker and she had never been written up in 13 years on the job. Duran told Saldana that she didn't have to worry because she had a house and a husband, but he felt bad for the single mothers who were going to lose their jobs. Saldana said that she needed her job and that she was fighting for her rights. She said that she was only earning \$11.96/hour and that it was fair that employees receive a raise. Duran said that the Union wouldn't do anything for "you people." Saldana said that the employees believed that the Union was fighting for them and then walked away. (Tr. 298-301).

c. Saldana's Strike and Post-Strike Activities

Saldana fully participated in the September 2014 strike. She picketed outside of Castle Hill for about 8 hours on all 3 days of the strike. She also picketed for 1 day at both Boulevard East and Harborview. Like at Castle Hill, at Boulevard East Saldana carried a picket sign that said "Stop Unfair Labor Practices." (GC-19(t), Tr. 304-310). Additionally, on September 19, NJ.com and the Jersey Journal published an article detailing Castle Hill's refusal to reinstate over a dozen strikers, including Saldana. Saldana is quoted in this article as saying "I've dedicated the past 13 years of my life caring for the residents at Castle Hill.

We went on strike to call attention to Alaris' unfair labor practices, short staffing levels⁷, and low pay. ” (GC-47, link #5: “Nursing Home Workers in Jersey City, Union City Locked Out, Union Says”).

d. September 21, 2014 Daily Schedule Assigns Saldana and Rodriguez to Work

Claudia Saldana, Devika Smith, and fellow CNA Angela Rodriguez both testified that they went to Castle Hill on September 19 to return to work after the strike. Castle Hill representatives informed them that there was no work for them. (Tr. 312, 692). On that morning, Castle Hill attorney Jasinski handed Union counsel Massey two lists- one for strikers that could go back to work and another for striking employees for whom there was no work until further notice. Saldana, Smith and Rodriguez's names were on the latter list. (GC-27, Tr. 907).

But Castle Hill's daily schedule for two days after the strike ended, Sunday September 21, listed Saldana and Rodriguez in their regular 6th floor assignments. (GC-52, H-3). Nobody from Castle Hill informed Saldana or Rodriguez that they could work that day and their names were circled to indicate their absence. The daily schedule indicates that Hecmarie Sanchez was added to the 6th floor rotation for that shift, but it does not specify which assignment she worked that day. No other staff member was called in or moved over to cover the Saldana/Rodriguez assignments and this left the 6th floor understaffed for the shift.⁸ (GC-52, H-3, Tr. 1145-1146).

⁷ Saldana testified that she raised concerns about short staffing to Union business representative Christina Ozual, who informed Saldana that the Union wished to raise these issues with Castle Hill at the bargaining table. (Tr. 287-288).

⁸ Staffing coordinator Fredline Altenor testified that there should always be 5 CNAs working on the 6th floor day shift at Castle Hill. (Tr. 1120-1121).

iii. **Castle Hill Replaces Devika Smith with Tonia Abrue**

Administrator Maurice Duran was asked at the hearing why Castle Hill did not immediately return Devika Smith to work after the strike concluded. Duran first testified that Smith was not returned to work on September 19 due to agency contract obligations.⁹ (Tr. 722). Duran then course corrected to state that when the strike occurred, part-time employee Tonia Abrue took Smith's hours. Duran explained that Castle Hill wanted to go with the employees that worked during the strike. He said that he and DON Bracea went floor by floor assigning full-time hours to part-time employees that wanted full-time hours. (Tr. 723).

Duran next suggested that this change was made because he didn't know how long the strike was going to last. He, however, was forced to concede that the Union presented him with the 10-day strike notice which specified the limited duration of the strike. Duran then admitted that he and Bracea did not permanently replace Smith. To further muddy the waters, Duran testified that Abreu began working Smith's permanent assignment on the 3rd floor (assignment 2) on the first day of the strike. (Tr. 723-726, 1606).

The record evidence, however, contradicts Duran's testimony. Abreu did not work on the first day of the strike (GC-52, W-2, GC-79-003). Abreu did work on the 17th and 18th, but she did not work Smith's assignment #2 nor did she even work on the 3rd floor. On the 17th, Abreu worked on the 4th floor as a floater and on the 18th, Abreu worked assignment 1 on the 4th floor, which was Cherlie Celestin Valfils' permanent assignment. (GC-52, Z-2, C-3).¹⁰

⁹ Duran specifically stated that Smith had not been accused of misconduct and that she was a great CNA. (Tr. 722).

¹⁰ Tonia Abrue did not testify at the hearing.

iv. **Castle Hill Replaces Claudia Saldana with Hecmarie Sanchez**

Duran explained that Saldana was not immediately returned to work after the strike ended because he and Bracea selected part-time employee Hecmarie Sanchez to fill Saldana's permanent spot on the 6th floor (assignment 2). According to Duran, Sanchez did not participate in the strike and she was made a full-time employee around the time of the strike. Unlike Abrue, there was no memorialization of Castle Hill's promotion of Sanchez to full-time status, and the reasons for this selection, in Sanchez's personnel file. Sanchez is now permanently working assignment 2 on the 6th floor. (Tr. 728-729).

The daily strike schedules reveal that while Sanchez worked assignment 2 on the 6th floor on the first day of the strike, she did not work in this slot the remaining two days of the strike. On September 17, Sanchez did not work at all and M. Zamora, a part-time employee hired on August 21, 2014, worked in that assignment instead. On September 18, Sanchez worked assignment 6 on the 6th floor leaving L. Prince, an agency employee, to work assignment 2 on the 6th floor. (GC-52, Z-2, C-3).

v. **13 of 15 Striking CNAs Return to Work by the End of October but Smith and Saldana Remain Locked Out**

All of the strikers replaced by agency personnel returned to work by the end of October 2014. Yet Devika Smith and Claudia Saldana remained locked out. Smith and Saldana testified without contradiction that in about December 2014, they received separate phone calls early in the morning asking them to work because the facility was short-staffed. Smith and Saldana asked the caller if she had the authorization to bring them back to work because they had been locked out. The Castle Hill representative then hung up the phone. (Tr. 248-249, 313-314). Staffing coordinator Altenor testified that the facility kept a list of CNAs that was used to find replacements when employees called out. During the week,

Altenor would make these calls. On the weekend, this task would fall to the supervisor.

Altenor then confirmed that Smith and Saldana's names remained on the call list after the strike ended. (Tr. 1125-1126, 1157).

vi. **Castle Hill Offers Smith and Saldana Work on the 11pm to 7am Shift in December 2014**

In about late December 2014, Altenor called Saldana to offer her work on the 11pm to 7am shift. Saldana told Altenor that she had a family to take care of and that she couldn't work nights. Saldana said that she worked the 7 am to 3 pm shift for 13 years and asked why Castle Hill didn't offer Hecmarie Sanchez the 11 pm to 7 am work and give Saldana back the position she held before the strike. Altenor just said she could take it or not and Saldana declined the offer. (Tr. 317-318).¹¹

Castle Hill's witnesses testified inconsistently regarding post-strike job offers made to Devika Smith. Bracea testified that in 2014, Smith was offered the same full-time 11 pm to 7 am position the Employer offered to Saldana, and like Saldana, Smith turned down the offer. (Tr. 1654-1655, 1666).¹² But Duran testified that this offer was first made to Smith in May 2015 because there had been no vacancies before that time. (Tr. 726).

In early June 2015, Castle Hill first made Smith an offer to return to work on the 7 am to 3 pm shift. This offer letter, dated May 26, but postmarked June 1, offered Smith part-time weekend work plus additional weekday hours. (GC-20). When Smith received this offer in the mail she called Altenor to accept. Smith returned to work shortly thereafter as a part-time floater on the 7 am to 3 pm shift. (Tr. 251-252).

¹¹ Castle Hill offered no explanation at the hearing as to why Smith and Saldana were not offered Sanchez and Abreu's part-time hours on the 7 am to 3 pm shift after the strike concluded.

¹² Bracea could not identify who eventually filled the full-time 11 pm to 7 am position. (Tr. 1666-1667). Duran testified that no full-time CNAs had been hired after the strike. (Tr. 1620).

As for Saldana, she testified at this proceeding on June 24, 2015. As of that date, she had not been returned to work. Sometime shortly thereafter, Castle Hill offered Saldana a full-time floater position on the 7 am to 3 pm shift and she accepted this position. (Tr. 1154).

vii. Prior to Recalling Smith and Saldana, Castle Hill Hired 2 New CNAs to Work 7-3 Hours

Castle Hill recalled Smith and Saldana to work on the 7 am to 3 pm shift in May 2015, and late June 2015, respectively. But earlier in 2015, Castle Hill hired new CNAs Jennifer Orozco and Maria Mendoza to work on the 7am to 3pm shift. (GC-62, GC-80). Castle Hill hired Orozco on February 3 for part-time weekend work, the same work offered to Smith in May 2015. But Orozco was terminated on March 16, 2015, ostensibly for poor attendance. (GC-80). A review of GC 52(a), Castle Hill's daily nursing schedules for 2015 finds that Orozco was scheduled to work on the 6th floor on the following dates: 2/14, 2/15, 2/28, 3/1, 3/7, 3/8, 3/14, 3/15. Orozco worked as scheduled on 2/14 and 2/15 but called out on 2/28 and 3/1. She was a no-call no-show on 3/7, 3/8, 3/14, and 3/15, and was fired the next day. (GC-52(a), GC-80).

Maria Mendoza applied for work at Castle Hill on December 31, 2014 and was hired as a part-time CNA on February 3, 2015. (GC-62). A review of GC 52(a) shows that between February 9 and May 9, 2015, Mendoza worked a substantial number of hours on the 7am to 3pm shift (floating on all of the floors), work which should have been offered to either Saldana or Smith.¹³ Mendoza worked 9 days in February (2/9, 2/10, 2/14, 2/17, 2/18, 2/19, 2/20, 2/21, and 2/28), 9 days in March (3/5, 3/6, 3/7, 3/9, 3/14, 3/26, 3/28, 3/30, 3/31),

¹³ Castle Hill's records also show that Vivian Makaani, a part-time CNA hired a few days before the strike, worked almost 240 hours in overtime from September 2014 through June 2015. (GC 61, 72).

and 19 days in April (4/1 through 4/4, 4/6, 4/7, 4/9 through 4/11, 4/14 through 4/16, 4/18, 4/20, 4/22, 4/23, 4/25, 4/27, and 4/29).¹⁴

Cross Exception #1: Counsel for the General Counsel argues that Judge Rosas should have explicitly ruled in his Decision that Castle Hill Refused To Recall Devika Smith In Violation Of Section 8(a)(3) Of The Act Because It Failed to Prove that Smith Had Been Permanently Replaced.

Although Judge Rosas refused to make a specific finding, the record evidence is clear that, separate and apart from Devika Smith being one of fifteen unfair labor practice strikers who Castle Hill refused to reinstate at the conclusion of the September 2014 strike, Castle Hill also violated Section 8(a)(3) of the Act by failing to prove that it “permanently replaced” her. By law, Smith was entitled to immediate reinstatement at the conclusion of the strike. In failing to reinstate Smith until June 2015, Castle Hill violated Section 8(a)(3) of the Act.

A. Even if Tonia Abrue “Permanently Replaced” Smith, Castle Hill was Obligated to Reinstate Smith to Her Position at the Conclusion of the Strike.

Since Devika Smith was an unfair labor practice striker, and the Union unconditionally offered to return to work at the conclusion of the strike, Castle Hill was obligated to reinstate her on September 19. Even assuming *arguendo* that Castle Hill did permanently replace Smith with Abrue, Board law is clear that unfair labor practice strikers must be reinstated regardless of whether they have been replaced or not. Therefore, Castle Hill was required to displace Abreu at the conclusion of the strike and return Smith to her previous full-time position.¹⁵ Since it did not do so, Castle Hill violated Section 8(a)(3) of the Act as alleged.

¹⁴ Mendoza was actually scheduled to work a 20th day in April, April 17th, but she called out on that day.

¹⁵ Since Abreu did not actually work Smith’s assignment (3rd floor, assignment 2) during the 3-day strike, there should have been no difficulty displacing Abreu as required.

For other CNA strikers, Castle Hill asserts that its agency contracts constituted a substantial and legitimate justification to permit the delay in reinstatement of these returning strikers. But for Devika Smith, Castle Hill eventually settled on a defense unrelated to the agency contracts. (Tr. 728). Therefore, Castle Hill established no substantial or legitimate justification for delaying Smith's reinstatement 6 weeks, let alone the 9 months it took to return her to work.

B. Assuming *Arguendo* That Devika Smith was an Economic Striker, Castle Hill Still has Failed to Establish That It Permanently Replaced Her at the Outset of the Strike.

The record evidence, and Judge Rosas' uncontested conclusion, makes clear that Devika Smith was an unfair labor practice striker. Assuming *arguendo* that she was an economic striker, Castle Hill's multiple, shifting explanations for how and why it replaced her defeat any attempt to establish that it permanently replaced Smith at the outset of the strike.

Economic strikers have a right to immediate reinstatement "because even economic strikers are entitled to reclaim their jobs—not just be placed on a rehire list—if the jobs are vacant or are occupied only by temporary replacements when they make their unconditional offer to return." *Teledyne Still-Man*, 298 NLRB 982, 985 (1990). The Board will presume that replacements for economic strikers are temporary employees, and the Board places the burden on the employer to "show a mutual understanding between itself and the replacements that they are permanent." *Hansen Bros. Enterprises*, 279 NLRB 741 (1986). It is an unfair labor practice for an employer to refuse to reinstate strikers unless it can show that its action was due to legitimate and substantial business justifications. The permanent replacement of economic strikers is a substantial and legitimate business justification for

refusing to reinstate former strikers, but it is an affirmative defense, and the employer has the burden of proof. See e.g., *Associated Grocers*, 253 NLRB 31, 31-32 (1980), *affd. mem. sub nom. Transport & Local Delivery Drivers, Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981).

Castle Hill has not carried its burden of proof to establish that Tonia Abreu permanently replaced Devika Smith. To this end, Duran testified about why Smith was not reinstated at the conclusion of the strike. Duran first testified that Smith was not returned to work on September 19, 2014 because Castle Hill was under contractual obligations with a staffing agency and there was no other work for her on that day. Duran next explained that when the first agency contract expired (4 weeks after the strike ended), somebody took Smith's hours. Duran's testimony then made a 180 degree turn. Instead of being supplanted due to the agency contract, Duran proffered that he and DON Bracea selected Abreu to replace Smith at the outset of the strike. Under Duran's revised theory, Duran and Bracea wanted "to go with the people that did show up during the strike." They started going floor by floor to see who was available and assigning people full-time hours. Duran next asserted that Abreu started working her new full-time permanent assignment on the first day of the strike. (Tr. 722-726, 1606).

Duran's multiple shifting explanations must be discredited. Duran was given an opportunity to explain why Smith was not returned to work at the end of the strike. What followed was a rambling, flawed response that offered three different explanations: 1) agency contract; 2) replaced by a part-timer after the agency contract expired; and 3) replaced on the first day of the strike by Abreu. These shifting defenses cannot form the foundation for a viable affirmative defense.

Duran's remaining explanation that Abreu permanently replaced Smith finds no support in the record evidence. Castle Hill's nursing schedules and Abreu's own personnel file undercut Duran's testimony and show he is an untrustworthy witness desperate to weave together any defense to deflect attention away from his employer's unlawful actions here. First, Duran asserted that he and Bracea went floor-by-floor to select people who showed up during the strike and that Abreu started her new permanent assignment on the first day of the strike. Both statements are false. Abreu did not work on the first day of the strike. A time-off request form retrieved from her personnel file indicated that she had an immigration appointment on September 16. (GC-79-003). Castle Hill granted this time off request and the daily strike schedule for September 16 confirms that Abreu did not work that day. Abreu also did not work Smith's assignment on the 3rd floor on either of the remaining two days of the strike. The daily strike schedules show that full-time Castle Hill CNA J. Jabouin worked assignment 2 on the 3rd floor during each day of the strike. Abreu did work at Castle Hill on the 17th and 18th of September, but on each day she worked on the 4th floor. Therefore, Duran's assertion that Abreu replaced Smith as of the first day of the strike is simply untrue.¹⁶

Duran also suggested that one of the reasons why Castle Hill replaced Smith with Abreu was because he did not know how long the strike would last. Such an explanation is absurd and indicates how untrustworthy the totality of Duran's testimony is. Duran was forced to retract this explanation almost immediately when he was shown the 10-day strike

¹⁶ That Abreu allegedly signed a document on September 16, 2014 indicating that she accepted a full-time position is hardly a basis for establishing that she permanently replaced Smith. First, Abreu was not even at work on the 16th so it is unclear how, when, and why this letter was signed. Since Abreu did not testify, this document remains at best ambiguous as to her change in status. There is no indication from the document that Abreu knew that she was permanently replacing Smith and there is no indication that she saw the internal change form documenting her supposed change in status. (GC-79). These documents alone, without Abreu's testimony, and without credible testimony from other Castle Hill witnesses, are insufficient to carry Castle Hill's affirmative burden here.

notice that Smith personally delivered to him. This notice explicitly stated that the strike would begin on September 16 and end on the morning of September 19.

Finally, Duran's assertion that Smith could not be reinstated on September 19 because there was no work for her that day is patently false. No fewer than three non-unit employees performed bargaining unit CNA work on the 7 am to 3 pm shift on September 19. QA CNAs Angelo Daug and Doris Arcos performed bargaining unit work on this shift on the 6th floor and as a floater, respectively, and V. Brooks, who normally worked at another Alaris facility, worked on the 5th floor day shift on September 19. Any assertion that there was no work for the returning strikers that day is unsupported by the record evidence.

Based on the above, Counsel for the General Counsel respectfully requests that the Board make a finding that Castle Hill separately violated Section 8(a)(3) of the Act by failing to prove that it permanently replaced Devika Smith.

Cross Exception #2: Counsel for the General Counsel argues that Judge Rosas should have explicitly ruled in his Decision that Castle Hill's Selection of Smith for Permanent Replacement was Unlawfully Motivated under *Hot Shoppes* and *American Baptist Homes of the West d/b/a Piedmont Gardens*.

There is substantial evidence in the record showing that Castle Hill's selection of Devika Smith for replacement was unlawfully motivated. The Board recognizes that an employer has a legal right to replace economic strikers at will and has held that, ordinarily, the employer's motivation for hiring replacements is immaterial, unless there is evidence of "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964); *Nicholas County Health Care Center, Inc.*, 331 NLRB 970, 990-991 (2000). *Hot Shoppes* requires only that the General Counsel show that the hiring of permanent replacements was motivated by a purpose prohibited by the Act. *American Baptist Homes of the West d/b/a*

Piedmont Gardens, 364 NLRB No. 13, slip op. at 6 (May 31, 2016). A *Wright Line* analysis is applied. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co., Inc.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal--an unlawful motive ") (internal quotations omitted).

There is ample proof in the record demonstrating Castle Hill's animus towards the Union. Some of this animus was focused directly on Smith. Duran told her it would be a shame for Smith to lead her co-workers on a strike that resulted in them losing their jobs. Jabouin then told Smith to "be careful" because Duran was mad about the strike. Other co-workers were called backstabbers and were threatened with job loss for supporting the strike.

Smith was a ripe target for retaliation due to her open and vocal union support. She was a long-time delegate and shop steward. She handed Duran the 10-day strike notice and participated in the prayer vigil held outside Castle Hill about a week before the strike began. During the strike, Smith spoke out against Castle Hill's wage proposals in a Labor Press interview disseminated via the Internet.

As noted above, the evidence of pretext here is abundant.¹⁷ It, however, also must be noted that the Union called for a limited duration, 3-day strike. Therefore, the need to permanently replace anybody here is mystifying. Even more puzzling is how Castle Hill can select Tonia Abreu to assume Smith's full-time role at the beginning of the strike, yet she worked on a different floor throughout the strike. These facts show that Castle Hill had no real need to permanently reassign Abreu during the 3-day strike, supporting a finding that Castle Hill was more concerned with cutting off the strikers' rights to their jobs than with staffing the facility. See *Nicholas County Health Care Center, Inc.*, 331 NLRB at 991.

Castle Hill's decision to keep Devika Smith off work for nearly 9 months is further evidence of its unlawful motivation. There clearly was work for her during this period of time. She received phone calls in December 2014 from supervisors seeking coverage to remedy short-staffing.¹⁸ CNA Vivian Makaani, who was hired just days before the strike, worked almost 240 hours in overtime during the period in which Castle Hill refused to reinstate Smith. And in early February 2015, Castle Hill hired new part-time CNAs Jennifer Orozco and Maria Mendoza to work the 7 am to 3 pm shift. Orozco was scheduled for 8 shifts in February and March, she worked 2 and then no-showed the rest, leading to her termination. Mendoza worked 9 shifts in February, 9 in March, and 19 in April, all on the 7 am to 3 pm shift. This work should have been offered to Smith before Castle Hill hired

¹⁷ When Duran testified the second time at the hearing, he tried to retreat from his earlier assertion that he and Bracea made staffing decisions during the strike (e.g. selecting Abreu to replace Smith). (Tr. 1581). When confronted with his earlier testimony, Duran changed his tune once more, confirming that he had a hand in the decision to replace Smith and Saldana. (Tr. 1582-1584). This is additional evidence of pretext, shifting defenses, and unlawful motivation.

¹⁸ Staffing coordinator Altenor testified that even after the strike, Smith and Saldana's names remained on her list of CNAs to call to cover a shift. Of course the new supervisor who called Smith early in the morning had no idea that Castle Hill was purposely refusing to call Smith back to work.

either Orozco or Mendoza.¹⁹ Instead, Castle Hill chose to punish Smith based on her copious Union activities. Based on the above, it is clear that Castle Hill had an unlawful motivation in selecting Smith to be permanently replaced and Counsel for the General Counsel respectfully requests that the Board find that Castle Hill separately violated Section 8(a)(3) of the Act for these reasons.

Cross Exception #3: Counsel for the General Counsel argues that Judge Rosas should have explicitly ruled in his Decision that Castle Hill Refused To Recall Claudia Saldana In Violation Of Section 8(a)(3) Of The Act Because It Failed to Prove that Saldana Had Been Permanently Replaced.

Claudia Saldana was an unfair labor practice striker who Castle Hill also refused to reinstate at the conclusion of the September 2014 strike. Saldana was entitled to immediate reinstatement at the conclusion of the strike and by failing to immediately reinstate her, Castle Hill violated Section 8(a)(3) of the Act.

A. Even if Hecmarie Sanchez “Permanently Replaced” Saldana, Castle Hill was Obligated to Reinstate Saldana to Her Position at the Conclusion of the Strike.

Since Claudia Saldana was an unfair labor practice striker, and the Union unconditionally offered to return to work at the conclusion of the strike, Castle Hill was obligated to reinstate her on September 19. Even assuming *arguendo* that Castle Hill did permanently replace Saldana with Sanchez, Board law is clear that unfair labor practice strikers must be reinstated regardless of whether they have been replaced or not. Therefore, Castle Hill was required to displace Sanchez at the conclusion of the strike and return

¹⁹ That Smith rejected a purported offer of work on the 11pm to 7am shift did not impact or eliminate her right to reinstatement. Employees are not required to accept reinstatement to a position which is not the same or substantially equivalent to their former jobs. *Rose Printing, Co.*, 304 NLRB 1076 (1991). Offers of reinstatement for jobs on a different shift are not the same or substantially equivalent. *Florida Wire & Cable, Inc.*, 333 NLRB 378 (2001); *Harvey Engineering Corp.*, 270 NLRB 1290 (1984). Even the work that Smith accepted in June 2015, part-time weekend and floating hours during the week, is not the same or substantially similar to her pre-strike full-time job.

Saldana to her previous full-time position.²⁰ Since it did not do so, Castle Hill violated Section 8(a)(3) of the Act as alleged.

For other CNA strikers, Castle Hill asserts that its agency contracts constituted a substantial and legitimate justification to permit the delay in reinstating these returning strikers. But for Claudia Saldana, Castle Hill proffered a defense unrelated to the agency contracts. (Tr. 728). Therefore, Castle Hill established no substantial or legitimate justification for delaying Saldana's reinstatement 4-6 weeks, let alone the 9 months it took to return her to work.

B. Assuming *Arguendo* That Claudia Saldana was an Economic Striker, Castle Hill Has Failed to Establish That It Permanently Replaced Her at the Outset of the Strike.

The record evidence makes clear that Claudia Saldana was an unfair labor practice striker. Assuming *arguendo* that she was an economic striker, Castle Hill has failed to establish that it permanently replaced Saldana at the outset of the strike.

As noted above, the Board will presume that replacements for economic strikers are temporary employees, and the Board places the burden on the employer to "show a mutual understanding between itself and the replacements that they are permanent." *Hansen Bros. Enterprises*, 279 NLRB at 741. In this case, Castle Hill has failed to carry its burden and its refusal to timely reinstate Saldana is unlawful.

Duran's flawed, uncreditworthy testimony was highlighted earlier in this brief. For similar reasons, Duran's testimony regarding Saldana must also be rejected. Duran testified that he and Bracea went floor-by-floor to replace full-time CNAs who participated in the strike with part-time CNAs that did not strike. (Tr. 723, 725). But Smith worked on the 3rd

²⁰ Since Sanchez did not actually work Saldana's assignment (6th floor, assignment 2) during the last two days of the strike, there should have been no difficulty reinstating Saldana as required.

floor and Saldana worked on the 6th floor. If Duran truly was going floor by floor, he could have selected any number of strikers from the 4th or 5th floors (Valfils, Murillo) for permanent replacement. Instead, Duran skipped up to the 6th floor and purposely selected Saldana, the one he labeled a “backstabber” for supporting the strike. Such inconsistencies in Duran’s testimony are evidence of pretext and unlawful motivation.

Duran further testified that Saldana did not return to work immediately after the strike ended because Hecmarie Sanchez, a part-time employee who did not participate in the strike, permanently filled her spot. Duran said that he and Bracea made this decision and that Sanchez was made a full-time employee around the time of the strike. (Tr. 728-729).²¹ The record evidence reveals significant flaws in Duran’s testimony, which is symptomatic of most of Duran’s testimony. Unlike Abreu, Sanchez did at least work Saldana’s assignment on the first day of the strike. But like Abreu, Sanchez did not work Saldana’s assignment on each of the last two days of the strike. The daily strike schedules show that on September 17, Maria Vasquez, a part-time CNA hired on August 21, 2014, worked Saldana’s assignment, and on September 18, Lola Prince, an agency employee, worked assignment 2 on the 6th floor.²²

Like with Smith, Duran also suggested that one of the reasons why Castle Hill permanently replaced Saldana was because he did not know how long the strike would last. Duran was forced to retract this explanation almost immediately when he was shown the 10-day strike notice that explicitly stated that the strike would begin on September 16 and end on the morning of September 19. Such testimony is indicative of bad faith on the part of Duran and Castle Hill.

²¹ Duran did concede that Saldana was an “amazing” CNA.

²² On the last day of the strike, Sanchez worked assignment 6 on the 6th floor.

Saldana credibly testified that on the day the strike ended, Jasinski told her that there was no work for her. (Tr. 312). Jasinski's statement echoes Duran's testimony relating to Devika Smith. The record evidence belies their contentions. First, as noted above, 3 non-unit employees (Daug, Arcos, and Brooks) performed bargaining unit work on the day the strike ended. Next, on the Sunday after the strike ended, Castle Hill actually scheduled Saldana to work in her regular assignment. Of course nobody informed Saldana of this, but the daily nursing schedule for Sunday, September 21 reveals this truth. She was listed on the pre-printed schedule to work her regular assignment on the 6th floor. Someone then circled her name to reflect her absence. That Castle Hill refused to call Saldana in to work, but instead knowingly understaffed the facility is the epitome of bad faith.

Finally, unlike Abreu, there is no record evidence of Sanchez signing or acknowledging a change to full-time status. There is also no internal change form reflecting that Sanchez replaced Saldana. And since Sanchez did not testify at the hearing, the record is bereft of evidence showing a mutual understanding between Castle Hill and Sanchez that she was a permanent replacement for Saldana. Based on the above, it is clear that Castle Hill has failed to carry its burden of proof establishing that Sanchez permanently replaced Saldana. Therefore, Counsel for the General Counsel respectfully requests that the Board separately find that Castle Hill's refusal to immediately reinstate Saldana at the conclusion of the strike violated Section 8(a)(3) of the Act.

Cross Exception #4: Counsel for the General Counsel argues that Judge Rosas should have explicitly ruled in his Decision that Castle Hill's Selection of Saldana for Permanent Replacement was Unlawfully Motivated under *Hot Shoppes* and *American Baptist Homes of the West d/b/a Piedmont Gardens*.

There is substantial evidence in the record showing that Castle Hill's selection of Claudia Saldana for replacement was unlawfully motivated. *Hot Shoppes, Inc.*, 146 NLRB at 805; *Nicholas County Health Care Center, Inc.*, 331 NLRB at 990-991; *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016). There is ample proof in the record demonstrating Castle Hill's animus towards the Union. Some of this animus was focused directly on Saldana. Duran called her a backstabber for speaking out on behalf of the Union to the Union City Board of Commissioners and for instigating employees to go on strike. Duran later told Saldana that she and her co-workers were going to lose their jobs if they went out on strike. Judge Rosas found that each of these statements violated Section 8(a)(1) of the Act and Castle Hill did not file exceptions over these findings.

Saldana was a prime target for retaliation due to her open and vocal union support. She was a long-time delegate and Duran sought her assistance to help him "fix this place" around the time of the Union's Journal Square press conference. Duran asked Saldana to convince her co-workers not to go on strike and later lashed out at her when he spotted the photograph of Saldana with Union City mayor Brian Stack (holding the Board of Commissioners' resolution).

Like with Devika Smith, the evidence of pretext here is abundant. There was no need to permanently replace anybody because the Union called a limited duration, 3-day strike. And Castle Hill's representation that it selected Hecmarie Sanchez during the strike to assume Saldana's full-time role makes no sense given that Sanchez did not work Saldana's

assignment during the last two days of the strike. These facts show that Castle Hill had no real need to permanently reassign Sanchez during the 3-day strike, supporting a finding that Castle Hill was more concerned with cutting off the strikers' rights to their jobs than with staffing the facility. See *Nicholas County Health Care Center, Inc.*, 331 NLRB at 991.

Castle Hill's decision to keep Claudia Saldana off work for nearly 9 months is further evidence of its unlawful motivation. There clearly was work for her during this period of time. Like Smith, she received a phone call in December 2014 from a supervisor seeking coverage to relieve a short-staffing problem.²³ When she announced that she was locked out, the supervisor hung up the phone. Later that month, Altenor offered her work on the 11-7 shift, but Saldana told her that she could not work nights. Saldana said that she had worked the 7-3 shift for 13 years and wanted to know why Castle Hill didn't offer Sanchez the 11-7 shift so that she could go back to the position she had before the strike. (Tr. 317-318).

Roughly around the time that Altenor communicated this offer to Saldana, Katiya McSwain, a part-time CNA on the 7 am-3 pm shift, resigned her position. (GC-76-006). McSwain, who was hired just days before the strike, worked about 8 shifts in October on the 7am-3pm shift (mainly weekends). (GC-52, GC-76). When she resigned her position on December 1, somebody had to fill her hours. Neither Saldana nor Smith was afforded this opportunity.

Furthermore, CNA Vivian Makaani, who was hired just days before the strike, worked almost 240 hours in overtime during the period in which Castle Hill refused to reinstate Saldana. And in early February 2015, Castle Hill hired new part-time CNAs Jennifer Orozco and Maria Mendoza to work the 7 am to 3 pm shift. Orozco was scheduled.

²³ Staffing coordinator Altenor testified that even after the strike, Saldana and Smith's names remained on her list of CNAs to call to cover a shift. Of course the new supervisor who called Saldana early in the morning had no idea that Castle Hill was purposely refusing to call Saldana back to work.

for 8 shifts in February and March, she worked 2 and then no-showed the rest, leading to her termination. Mendoza worked 9 shifts in February, 9 in March, and 19 in April, all on the 7 am to 3 pm. Clearly this work should have been offered to Saldana before Castle Hill hired either Orozco or Mendoza.²⁴ But instead, Castle Hill chose to punish Saldana based on her copious Union activities, making Duran appear prescient when he repeatedly threatened her with termination. Based on the above, it is clear that Castle Hill had an unlawful motivation in selecting Saldana to be permanently replaced. Therefore, Counsel for the General Counsel respectfully requests that the Board find that Castle Hill's refusal to timely reinstate Saldana was unlawfully motivated in violation of Section 8(a)(3) of the Act.

Respectfully submitted this 23rd day of June 2016.



Michael P. Silverstein
Saulo Santiago
Eric Sposito
Counsels for the General Counsel
20 Washington Place, 5th Floor
Newark, NJ 07102

²⁴ That Saldana rejected a purported offer of work on the 11 pm to 7 am shift did not impact or eliminate her right to reinstatement. Employees are not required to accept reinstatement to a position which is not the same or substantially equivalent to their former jobs. *Rose Printing*, 304 NLRB 1076 (1991). Offers of reinstatement for jobs on a different shift are not the same or substantially equivalent. *Florida Wire & Cable, Inc.*, 333 NLRB 378; *Harvey Engineering Corp.*, 270 NLRB 1290.

CERTIFICATION

This is to certify that copies of the foregoing COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS have been duly served on the Board's Executive Secretary on June 23, 2016 and on Castle Hill's counsel and Charging Party on June 23, 2016 as follows:

BY ELECTRONIC FILING

National Labor Relations Board
Office of the Executive Secretary
Attn: Executive Secretary Gary Shinnars
1015 Half Street S.E.
Washington, D.C. 20570

BY ELECTRONIC MAIL

John T. Bauer, Esq.
Denise Barton Ward, Esq.
Littler Mendelson, P.C.
290 Broadhollow Road, Suite 305
Melville, NY 11747

Patrick Walsh, Esq.
William Massey, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, New York 10003

Dated at Newark, New Jersey this 23rd day of June, 2016.



Michael Silverstein
Counsel for the General Counsel
National Labor Relations Board - Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
Telephone: 862-229-7059