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

ANSWERING BRIEF ON BEHALF OF THE GENERAL COUNSEL IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS

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I. SUMMARY OF THE ARGUMENT

The record evidence adduced at the hearing before Judge Michael A. Rosas clearly supports the Administrative Law Judge's findings that Alaris Health at Castle Hill (Castle Hill) violated Section 8(a)(3) of the Act by failing and refusing to timely reinstate 15 CNA strikers at the conclusion of the September 2014 3-day strike. Judge Rosas correctly found that Castle Hill should have immediately reinstated these strikers prior to the expiration of Castle Hill's contracts for replacement employees. Additionally, Judge Rosas correctly refused to credit Castle Hill officials' testimony regarding the necessity of the four to six week windows for the temporary employee contracts given that a fourth staffing company, Staff Blue, was used by related companies, Harborview and Rochelle Park, during the strike, and Staff Blue did not require a multi-week minimum guarantee in order to meet staffing needs. Furthermore, the record evidence shows that Castle Hill employed non-unit employees and employees from other Alaris facilities to staff Castle Hill immediately after the strike concluded. Also, the record evidence demonstrates that certain striking CNAs were not in fact replaced by staffing company CNAs, but were replaced by existing Castle Hill employees, some of whom were hired the week before the strike began.

II. STATEMENT OF FACTS

A. Background and Bargaining History

Castle Hill is engaged in the operation of a long-term care nursing facility in Union City, New Jersey. At the time of the September 2014 strike, Castle Hill's supervisory hierarchy consisted of Administrator Maurice Duran, Director of Nursing

Alexandra Bracea, Assistant Director of Nursing Laura Vartolone, and Nursing Supervisor Lavonza Jabouin.[1] (GC-1(p)).

For over a decade, 1199 SEIU United Healthcare Workers East ("the Union") and Castle Hill have been parties to successive collective bargaining agreements covering a bargaining unit of licensed practical nurses, certified nursing aides (CNAs), dietary, housekeeping, and recreation employees. (GC-1(p)). There are approximately 120 employees in the unit. (GC-10).

B. The Union and Castle Hill Bargain for a Successor Agreement

The most recent collective bargaining agreement between the Union and Castle Hill expired on March 31, 2014 and negotiations for a new collective bargaining agreement began in March 2014. (GC-3). David F. Jasinski, Castle Hill's labor counsel, acted as the chief negotiator for Castle Hill during these negotiations. (Tr. 1411). Negotiations occurred simultaneously at three other Alaris Health nursing homes, and Jasinski was chief negotiator for all four Alaris facilities.[2] (Tr. 1414-1415). Mendy Gold, a principal for Alaris, also represented Castle Hill at the bargaining table and attended most of the bargaining sessions. (Tr. 1427-1428). Union counsel William Massey served as the Union's chief negotiator and Ron McCalla assisted him during the negotiations.

C. ALJ Rosas Findings and Conclusions

In his Decision dated February 3, 2016, ALJ Rosas made certain findings of fact and legal conclusions based on the record evidence. First, Judge Rosas found that by walking out of the March 27, 2014 collective bargaining session, Castle Hill refused to

[1] The complaint refers to this admitted 2(11) supervisor as Lavonza Jaubio. The corrected last name is derived from a review of Castle Hill's daily schedules. (GC-52).
[2] The other three Alaris facilities were Alaris Health at Harborview, Alaris Health at Boulevard East, and Alaris Health at Rochelle Park.

bargain in good faith in violation of Section 8(a)(5) of the Act. (ALJD page 25, lines 18-24). Next, Judge Rosas found that Castle Hill unlawfully delayed in furnishing the Union with requested information relevant to the parties' collective bargaining negotiations. (ALJD page 26, lines 18 through 27). Additionally, Judge Rosas found that Castle Hill refused to provide the Union with requested health insurance information and employee daily work schedules in violation of Section 8(a)(5) of the Act. (ALJD page 27, lines 45-47). Furthermore, Judge Rosas found that Castle Hill violated Section 8(a)(1) of the Act by engaging in numerous threats and interrogations of employees prior to the September 2014 strike. (ALJD page 28, line 4 through page 31, line 11). Also, Judge Rosas found that Castle Hill engaged in unlawful surveillance of employees by photographing them during the strike. (ALJD page 31, lines 15 through 42). Finally, Judge Rosas found that the September 2014 3-day strike engaged in by the Union was an unfair labor practice strike. (ALJD page 32, line 4 through page 33, line 36). Castle Hill has not filed exceptions to any of these factual findings or legal conclusions.[3]

D. The Union Calls a Delegate Meeting for August 27, 2014

On August 27, the Union called a meeting (at the Union's office) with the delegates from the four Alaris facilities to discuss the possibility of going on strike.[4] Massey and McCalla led this meeting.

Approximately 10 delegates attended this meeting in person and another 4-5 Castle Hill delegates participated in the meeting by conference call. Union vice-president Milly Silva also participated in the meeting via conference call. McCalla recapped

[3] To the extent that it is relevant to support these findings, Counsel for the General Counsel relies on Judge Rosas' findings of facts on pages 2-23 of his Decision.
[4] The Union and Alaris Health at Rochelle Park held a bargaining session at the same location earlier that day.

bargaining, comparing Alaris' proposals to the Union's proposals, and explaining what had transpired in bargaining at all four facilities. Other union officials and delegates also participated in this discussion. (Tr. 103-107).

After McCalla's contract status presentation, Massey discussed the status of the Union's unfair labor practices charges and indicated that an NLRB complaint would likely issue against Castle Hill in September 2014. Massey also told delegates that the Alaris charges against the Union were going to be dismissed, and that there was nothing else delaying the complaint from issuing. Massey also informed the delegates that based on reports he had received, it appeared that additional unfair labor practices had been committed by the four Alaris facilities. (Tr. 107, 116-121, 888-889, 896-898).

Massey further explained to delegates the difference between a purely economic strike versus a strike which was partially motivated by unfair labor practices. Massey had drawn up a strike resolution for discussion at the meeting. (Tr. 121-122, 136-137, 898). The strike resolution read in *pertinent* part:

> WHEREAS, the Employer had violated our rights by committing Unfair Labor Practices, specifically by failing and refusing to provide information requested by the Union that is needed for bargaining (especially health insurance and staffing information), unduly delaying in providing other information, and interfering with the composition of the Union's bargaining committee; and
>
> WHEREAS, Region 22 of the National Labor Relations Board has informed the Union that a Complaint against the Employer alleging multiple Unfair Labor Practices in connection with this unlawful conduct is forthcoming; and
>
> WHEREAS, the Employer has continued to commit additional Unfair Labor Practices, including by unlawfully polling and coercively interrogating Union members, and threatening Union members with adverse employment consequences for engaging in protected Union activity; and.

> BE IT FURTHER RESOLVED THAT: the Union and its members hereby determine to serve the Employer with a subsequent legally required 10-day notice of intent to engage in a strike, for three days at each facility, in response to the Employer's ongoing Unfair Labor Practices and unreasonable bargaining position. (GC-15)

The strike resolution was read out loud and debated with the delegates. The delegates then voted unanimously to authorize a 3-day strike. (Tr. 219-220, 223-226, 261, 346-348, 898). The Alaris delegates from Rochelle Park, Harborview and Boulevard East each signed the resolution. (GC-15, Tr. 898,). Although the Castle Hill delegates were not present to sign the actual strike resolution, Devika Smith testified that the resolution was read aloud before the vote and Christina Ozual showed her the resolution at a meeting at Castle Hill's breakroom. (Tr. 257-258).

Following the strike resolution vote, the Union officials and delegates talked about the next steps. The group decided that the employees would deliver 10-day strike notices to each Alaris facility administrator and that delegates would talk with workers about the dual nature of the strike: dissatisfaction with the progress in bargaining and the unfair labor practices committed by Alaris in bargaining as well as recent threats and interrogations of employees. (Tr. 136-137, 899). On September 5, at approximately 3:00 p.m., Devika Smith and Marquis Francois handed Castle Hill administrator Maurice Duran the Union's 8(g) notice in the lobby of the facility. The 8(g) notice indicated that "the strike and informational picket are to protest the Employer's ongoing Unfair Labor Practices and the Employer's unreasonable bargaining demands. " (GC 16, Tr. 229).

E. <u>Strike Begins on September 16 and Ends on September 19</u>

The Castle Hill strike was scheduled to begin at 5:30 am on September 16. The day before the strike began, Jasinski asked the Union to permit striking night shift

employees to complete their full shifts, which were scheduled to end at 7:00 am. By email dated September 15, Massey granted Jasinski's request. Massey reiterated that the strike would begin at the time indicated in the 8(g) notice served on Castle Hill and the night shift workers would join the strike after the conclusion of their shift. (GC-28).

On September 16, approximately forty Castle Hill employees walked out to join the picket line outside Castle Hill. (GC-27). The employees walked up and down 23rd Street carrying picket signs that said "1199 Stop Unfair Labor Practices," "Be Fair to Those Who Care," "NO to Unfair Labor Practices," We Care for NJ" and "Standing Up For Our: Residents, Families and Communities." (GC-19). Employees wore 1199 T-shirts, played musical instruments, and chanted Union slogans while picketing.

At the conclusion of the Union's 3-day strike in September 2014, Castle Hill refused to reinstate 15 CNAs. 13 of these CNAs were reinstated over the next six weeks, but Castle Hill waited approximately 9 months to reinstate CNAs Devika Smith and Claudia Saldana.

F. Staffing Coordinator Fredline Altenor Threatens CNA Brenda Mota-Lopes

Brenda Mota-Lopes started working at Castle Hill as a part-time floater CNA in May 2014. To receive her hours, staffing coordinator Fredline Altenor would call and tell her the day and shift to which she was assigned. (Tr. 787-788). A few days before the September 16 strike, Altenor spoke to Mota-Lopes in the 1st floor office. Altenor asked her whether she was going on strike and Mota-Lopes told her that she was. Altenor then told her that her hours could be cut for going on strike. Mota-Lopes said in response that threatening her would not scare her. (Tr. 793-794).

G. Castle Hill's Strike Preparations

a. Castle Hill Quickly Hires New Part-Time CNAs

In the week before the strike, Castle Hill hired a plethora of new part-time CNAs- Katiya McSwain, Lydia Carattini, Julia Zamora, Esmerelda Kelly, Vivian Makaani, Vanessa White, Sara Villalba, and Caren Manoti. (GC-58, GC-59, GC-60, GC-61, GC-76, GC-77, GC-78, GC-81).[5] Several of these CNAs were hired almost immediately after they submitted applications. In this regard, McSwain applied for employment on September 10 and was hired the next day, Makaani applied on September 8 and was hired on September 12, and Castle Hill hired White on September 11, three days after she submitted her application. (GC-59, GC-61, GC-76). Staffing coordinator Fredline Altenor conceded that this hiring binge may have been related to the pending strike and this expedited hiring schedule was a departure from the regular hiring protocol. Altenor testified that normally new hires began their orientations a minimum of 2 to 3 weeks after submitting completed applications. (Tr. 1135, 1140).[6] In further condemnation of Castle Hill's pre-strike expedited hiring protocol, Duran testified that Castle Hill needed more than 3 days from the date of the application to confirm a hiring decision because the applicant's PPD test needed to be read. (Tr. 1611).

b. Castle Hill Recruits CNAs From Other Alaris Facilities to Work During the Strike

During the 3-day strike, Castle Hill replaced many of the strikers with CNAs from other Alaris facilities. Duran testified that at least six CNAs who worked at Castle Hill during the strike worked at his former facility, Alaris at Essex: Denise Hutchins, Sylvia

[5] These are all bargaining unit positions because the Employer checked the Union box on the internal change forms documenting the terms of hire.
[6] According to Castle Hill's daily nursing schedules, their orientations began on Thursday, September 11. (GC 52, R-2).

Phillips, Isbel Siente, Maria Soto, Eric Ballister, and M. Lubin. (GC-52, W-2, Tr. 712-717). Other replacement CNAs worked at different Alaris facilities, as noted on the daily strike schedules:

BG (Belgrove)	Savage, Clarke, Allen, Williams	GC-52, X-2, Y-2, Tr. 1137
FOUN (Fountains[7])	Giraldo	GC-52, X-2
RV (Unidentified)	Brooks	GC-52, W-2, X-2, Y-2
ST. MARY	Collier	GC-52, Y-2

c. Non-Unit QA CNAs Perform Unit Work During the Strike

Quality Assurance (QA) CNAs Angelo Daug and Doris Arcos also performed bargaining unit work during the strike. Duran testified that QA CNAs are not part of the Union and do not perform bargaining unit work. (Tr. 718-719). But during the strike, Daug worked as a regular CNA on the 6th floor (assignment 5 on the 7am-3pm shift for the first two days of the strike, and assignment 1 on the last day of the strike) (GC-52, W-2, Z-2, C-3), and it appears that Arcos worked the 3pm to 11pm shift as a regular CNA during the strike. (GC-52, X-2).

d. Castle Hill Contracted with Three Different Agencies to Provide Staffing During the Strike

Three staffing companies supplied temporary labor to Castle Hill during the strike: Medistar, Tri-State, and Towne. (R-9, R-10, R-11, Tr. 722). Adria Coleman is the only Medistar employee who worked at Castle Hill during the strike. (GC-73, Tr. 1585). Tri-State provided the following employees who worked at Castle Hill during the strike: Denise Harvey, L. Swinton, Christel Adderley, Ismael Aciniegas, Rebecca Arvelo, Latrina Frans, Cynthia Hendry, Rosa Negron, Lola Prince, Betania Rodriguez, A.

[7] Regina Figueroa testified that one of the Alaris facilities for which she has oversight responsibility is Alaris at the Fountains. (Tr. 1323).

Ceballos, and F. Pierre-Louis. (GC-52, W-2, X-2).[8] Towne provided the remaining agency employees who worked at Castle Hill during the strike: T. Mathurin, B. Mobley, R. Mondestin-Max, J. Udenta, C. Gonzalez, and J. Webster. (GC 52, W-2, X-2).

Castle Hill offered into evidence three contracts with the staffing companies. Two of these contracts, Towne and Tri-State, were complete documents. The Towne contract, dated September 11, 2014, specifically amended the parties' August 2014 contract to state that Castle Hill guaranteed five full-time positions to Towne employees for a period of six weeks in exchange for Towne providing staffing to Castle Hill during the strike.[9] (R 11). Linda Dooley, Alaris' Senior vice-president of operations, signed the contract on behalf of Castle Hill. Although her assistant Aida Hernandez testified that Dooley was still in this position at the time of the trial, Dooley did not testify. (Tr. 2636). Consequently, there is no record evidence of any negotiations between Castle Hill and the staffing companies over rates of pay, length of the contract, and number of agency CNAs to be provided.

The Tri-State contract, dated September 11, 2014, states that "the facility will utilize temporary staffing provided by TriState Rehab for 4 weeks following the pending strike scheduled to end on September 19. TriState will not replace any of its staff who may discontinue working at the facility." (R-10). Dooley also signed this contract on behalf of Castle Hill.

Unlike the Towne and Tri-State contracts, the Medistar contract proffered by Castle Hill is glaringly incomplete. The first eight pages of Respondent Exhibit 9 are a

[8] Agency employees are noted with a pre-printed (A) next to their names on the Castle Hill daily strike schedules. The word "Tri" is handwritten next to the Tri-State employees' names. (Tr. 1136).
[9] Figueroa testified that besides the strike contract, there were no existing contractual relationships between the staffing companies and the four Alaris facilities at issue here. The fact that there was an existing August 2014 contract with Towne proves Figueroa's testimony to be false. (Tr. 1366).

contract between Castle Hill and Medistar dated July 2009. The last page of the exhibit is a September 12, 2014 addendum which specifically modifies an August 20, 2014 agreement. No such August 20, 2014 agreement was offered into the record. Notwithstanding this procedural infirmity, the September 12, 2014 addendum, signed again by Dooley, states that in exchange for providing temporary labor during the upcoming strike, Castle Hill agrees to maintain Medistar employees on the schedule for a minimum of 30 days. The 30-day period was to commence the first time that Castle Hill scheduled the Medistar employee to work. (R-9).

e. <u>During the Strike, Castle Hill Informs the Union that It Believes the Strike Will Last More than 3 Days</u>

On the morning of Thursday, September 18 (Day 3 of the strike), Castle Hill attorney David Jasinski informed Union counsel William Massey via telephone that not all of the strikers at Castle Hill would be allowed to return to work the next day. Jasinski told Massey that Castle Hill entered into month long or 30-day contracts with outside agencies to provide CNAs during the strike. Massey questioned why Castle Hill did this when it knew that the Union was conducting a limited duration, 3-day strike. Jasinski replied, in part, that the strike notices said three days, but what if the employees stayed out longer- how do we know that they are actually going to return after three days? We need to be prepared in case they decide to change their minds and not return after three days. Massey reminded Jasinski of the strike five years earlier at the same facility, said that the Union only engages in strikes of limited duration and that the Union had a perfect track record of respecting a 3-day strike when it said that it was going to engage in a 3-day strike. (Tr. 902-904).

f. The Union Unconditionally Offers to Return to Work at the Conclusion of the Strike

That evening, Massey memorialized the Union's position to Jasinski via email. In his email, Massey wrote " .I also want to reiterate the point I made to you this morning (and which should have been clear to the Employers from the Union's 8g notices), namely that the Union informed the Employers from the outset that the strikes (and picketing) are limited in duration to three days. Nothing has changed in that regard and therefore all of the returning strikers (at all four facilities) are unconditionally offering to return to work at the conclusion of the strikes. In light of the fact that these strikes were all motivated by Employer ULPs, we hope and expect that your clients will reconsider their plans and abide by the law, and thus not discharge, replace, or selectively lock out any of the returning strikers. (I make these points because you informed me this morning that the employers entered into 30 day contracts for agency/replacement workers because you somehow believed that the Union might extend the strike past three days, and that thus there will be no work for some returning strikers." (GC-28).

g. The End of the Strike and Employees' Attempts to Return to Work on September 19

At about 7:00am on September 19, strikers from the day shift gathered outside of Castle Hill to return to work. (GC-19(n), Tr. 244). Although usually unlocked, the front doors were locked on this morning and the returning strikers needed to be buzzed into the facility. Union officials and Union City mayor Brian Stack accompanied the employees inside. Once inside, the employees encountered Duran, Bracea, Jasinski, and Alaris quality assurance nurse Ann Taylor. Either Bracea or Duran said that if you hear your name called, you can go back to work. Bracea then said that if your name is not called,

you need to leave the facility. When CNAs Devika Smith and Claudia Saldana questioned why their names weren't called, Jasinski told them that there was no work for them at that time. (Tr. 244-248, 310-312, 362-363).[10]

h. Castle Hill Refuses to Immediately Reinstate 15 CNAs at the End of the Strike

On Friday, September 19, Castle Hill refused to reinstate 15 returning CNA strikers. The following table lists their names, shifts, floors, and assignments:

Name	Shift	Floor	Assignment	Citation
Devika Smith	7 am-3 pm	3rd	2	Tr. 216
Claudia Saldana	7 am-3 pm	6th	2	Tr. 279
Lakeysa Smith	7 am-3 pm	Floater	Floater	Tr. 383
Cherlie Celestin Valfils	7 am-3 pm	4th	1	GC-13, GC-52,Tr. 403
Natasha Santiago	7 am-3 pm	4th	Floater	Tr. 413-414
Diana Lewis	7 am-3 pm	3rd	#3	GC 13, 52, Tr. 451
Leanne Crawford	7 am-3 pm	Floater	Floater	Tr. 485
Angela Rodriguez	7 am-3 pm	6th	5	GC 13, GC-52, Tr. 683
Angelina Murillo	7 am-3 pm	5th	Floater	Tr. 737
Stephanie Garcia	7 am-3 pm	Floater	Floater	Tr. 782
Musuretu Abdulazeez	3 pm-11 pm	4th	1	GC-13, GC-52, Tr. 425
Jeanie Alexandre	3 pm-11 pm	6th	2	GC-13, GC-52, Tr. 439
Danielle Humphrey[11]	3 pm-11 pm	5th	4	GC-13, GC-52, Tr. 822
Janis Martin	11 pm-7 am	6th	2	GC-13, GC-52, Tr. 653
Komi Anakpa	11 pm-7 am	5th	1	GC-13, GC-52, Tr. 669

i. Table Showing How Castle Hill Covered Shifts During the Strike

Based on a review of the daily strike schedules, the Employer's monthly master schedules, and other record evidence, the following table reveals how Castle Hill covered

[10] The Employer similarly notified returning strikers from the 3-11 and 11-7 shifts. Musuretu Abdulazeez and Jeanie Alexandre testified that at about 2:45pm, Duran informed returning employees that if their names were called, they could go to work, and if their names weren't called, they had to leave because there was no work for them. (Tr. 430-431, 442-444). At about 11pm that night, Janis Martin and Komi Anakpa were informed by an unidentified female that they weren't on the schedule and there were no more hours for them. (Tr. 658-659, 675).

[11] Humphrey is a Union delegate who participated in contract negotiations in 2014. She is seen in GC Exhibit 19(x) holding a picket sign that says "Stop Unfair Labor Practices." (Tr. 822-824).

the shifts for 12 of the strikers who worked on permanent floors. This table contains the name of the striker, shift, employee covering their specific shift, status of that employee (e.g. regular Castle Hill employee, September 2014 new hire, employee from another Alaris facility, or agency employee), and citation to the record for their status (e.g. pre-strike schedules, witness testimony):

Devika Smith- 7 am to 3 pm, 3rd Floor, Assignment 2:

9/16	GC-52, W-2	J. Jabouin	Full-time CH employee (GC-52A-2, GC-13)
9/17	GC-52, Z-2	J. Jabouin	Same
9/18	GC-52, C-3	J. Jabouin	Same

Claudia Saldana- 7 am to 3 pm, 6th Floor, Assignment 2:

9/16	GC-52, W-2	H. Sanchez	Part-time CH employee (Tr. 729)
9/17	GC-52, Z-2	M. Vasquez	Part-time CH employee (hired 8/21/14- GC-69)
9/18	GC-52, C-3	L. Prince	Agency (Tri-State)

Cherlie Celestin Valfils- 7 am to 3 pm, 4th Floor, Assignment 1

9/16	GC-52, W-2	R. Arvelo	Agency (Tri-State)
9/17	GC-52, Z-2	R. Arvelo	Same
9/18	GC-52, C-3	T. Abrue	Part-time CH employee (GC-79)

Diana Lewis- 7 am to 3 pm, 3rd Floor, Assignment 3

9/16	GC-52, W-2	D. Harvey	Agency (Tri-State)
9/17	GC-52, Z-2	D. Harvey	Same
9/18	GC-52, C-3	D. Harvey	Same

Angela Rodriguez- 7 am to 3 pm, 6th Floor, Assignment 5

9/16	GC-52, W-2	A. Daug	QA CNA- non-unit CH employee (Tr. 718)
9/17	GC-52, Z-2	A. Daug	Same
9/18	GC-52, C-3	R. Andrews	Full-time CH employee (Tr. 683)

Angelina Murillo- 7 am to 3 pm, 5th Floor, Floater

9/16	GC-52, W-2	V. Brooks	From another Alaris facility (GC-52, W-2)
9/17	GC-52, Z-2	V. Brooks	Same
9/18	GC-52, C-3	Hendry	Agency (Tri-State)

Musuretu Abdulazeez- 3 pm to 11 pm, 4th Floor, Assignment 1

9/16	GC-52, X-2	F. Bowel	Part-time CH employee (GC-52, A-1, GC-13)
9/17	GC-52, A-3	V. White	New Hire part-time CH employee (GC-59)
9/18	GC-52, D-3	V. White	Same

Jeanie Alexandre- 3 pm to 11 pm, 6th Floor, Assigment 2

9/16	GC-52, X-2	J. Zamora	New Hire part-time CH employee (GC-60)
9/17	GC-52, A-3	J. Zamora	Same
9/18	GC-52, D-3	S. Genoveva	Full-time CH employee (GC-52, K-1, GC-13)

Danielle Humphrey- 3 pm to 11 pm, 5th Floor, Assignment 4

9/16	GC-52, X-2	T. Mathurin	Agency (Towne)
9/17	GC-52, A-3	A. Coleman	Agency (Medistar) (GC-73)
9/18	GC-52, D-3	C. Adderley	Agency (Tri-State)

Janis Martin- 11 pm to 7 am, 6th Floor, Assignment 2

9/16	GC-52, Y-2	K. McSwain	New Hire part-time CH employee (GC-76)
9/17	GC-52, B-3	A. Coleman	Agency (Medistar) (GC-73)
9/18	GC-52, E-3	L. Carattini	New Hire part-time CH employee (GC-77)

Komi Anakpa- 11 pm to 7 am, 5th Floor, Assignment 1

9/16	GC-52, Y-2	V. Makaani	New Hire part-time CH employee (GC-61)
9/17	GC-52, B-3	M. Bermudez	Part-time CH employee (GC-52, A-1, GC-13)
9/18	GC-52, E-3	L. Frans	Agency (Tri-State)

j. <u>Castle Hill Uses Three Non-Unit Employees to Perform Unit Work on September 19</u>

Despite Duran and Jasinki's assertions on the morning of the 19th that there was no work for the returning strikers whose names were not called, at least three non-unit employees performed bargaining unit work on the 7 am to 3 pm shift that day. Duran testified that Castle Hill shifted the Alaris at Essex transplants Siente, Dogsou, Lubin, and Hutchins to QA CNA roles on the morning the strike ended. In so doing, Castle Hill shifted the regular QA CNAs, Angelo Daug and Doris Arcos, to perform regular CNA (bargaining unit) work that day. The daily schedule sheet for that day confirms that Daug

worked as a CNA on the 6th floor and Arcos served as a floater that day. (GC-52, F-3, Tr. 720-721). Furthermore, a review of the daily schedule sheet also confirms that V. Brooks, who normally worked at another Alaris facility (RV), worked assignment 1 on the 5th floor on the 7am to 3pm shift when agency employee C. Hendry called out that day. (GC-52, F-3).[12] Brooks also filled in on the 3 pm to 11 pm shift, working assignment 4 on the 5th floor when agency employee Harvey called out. As noted earlier, assignment 4 on the 5th floor was Danielle Humphrey's regular assignment.

k. <u>Certain Agency Employees Worked at Castle Hill Only for a Few Days</u>

Of the 12 Tri-State agency employees assigned to work at Castle Hill during the strike, 4 did not work at Castle Hill after the strike ended. Ceballos (3rd floor) and Pierre-Louis (4th floor) both only worked at Castle Hill as floaters on the first day of the strike on the 7am to 3pm shift. (GC-52, W-2). Swinton worked all three days of the strike on the 7am to 3pm shift, moving from the 3rd floor to the 6th floor and back to the 3rd floor. But she did not work at Castle Hill after the strike concluded. (GC-52, W-2, Z-2, C-3). Finally, Harvey worked double shifts on each day of the strike, covering assignment 3 on the 3rd floor for both the 7 am to 3 pm and 3 pm to 11 pm shifts, but like Swinton, she did not work at Castle Hill after the strike.

Of the 6 Towne agency employees assigned to work at Castle Hill during the strike, 2 did not work at Castle Hill after the strike ended. Udenta worked the 3pm to 11pm shift on the 5th floor during each of the three days of the strike, but she did not work at Castle Hill once the strike concluded. Additionally, Gonzalez worked

[12] Numerous witnesses, including staffing coordinator Fredline Altenor, testified that a circle around somebody's name on the daily schedule sheets means that the employee called out. (Tr. 1117-1118). The handwritten name filled in to the schedule means that this employee was called to cover the call out. (Tr. 1115).

assignment 5 on the 3rd floor during the 7 am to 3 pm shift for all three days of the strike, but she did not stay at Castle Hill past the end of the strike. (GC-52, W-2, Z-2, C-3).

I. Castle Hill Assigns Agency Employees to Take Certain Strikers' Hours

Ann Taylor, Alaris corporate quality assurance nurse (and Maurice Duran's fiancée), assisted Bracea and Duran with Castle Hill strike preparations. (Tr. 1727, 1730). Once the agency employees showed up to work and were assigned to specific shifts, they stayed there for the duration of their time at Castle Hill. Taylor testified that she then plotted agency employees onto the Castle Hill master nursing schedule with the Castle Hill employee's name and the agency employee that replaced them. (Tr. 1738-1739). Depending on whether the agency contract mandated that the agency employee stay for 4 or 6 weeks, that is what determined when the remaining strikers would be called back to work. (Tr. 1733).

Although Respondent did not produce the revised master schedule at the hearing, a review of GC-52 and GC-13 (master nursing schedules dating back to June 2014) reveals which agency employees were assigned to replace the strikers who were not immediately allowed to return to work[13].

Cherlie Celestin Valfils	replaced by	**R. Arvelo** (Tri-State)
Diana Lewis	replaced by	**R. Mondestin-Max** (Towne)
Angela Rodriguez	replaced by	**L. Prince** (Tri-State)
Angelina Murillo	replaced by	**C. Hendry** (Tri-State)
Musuretu Abdulazeez	replaced by	**T. Mathurin** (Towne)
Jeanie Alexandre	replaced by	**I. Aciniegas** (Tri-State)
Danielle Humphrey	replaced by	**A. Coleman** (Medistar)
Janis Martin	replaced by	**L. Frans** (Tri-State)
Komi Anakpa	replaced by	**C. Adderley** Tri-State)

[13] The remaining agency employees, R. Negron (Tri-State), D. Webster (Towne), and B. Mobley (Towne) replaced floaters Lakeysa Smith, Leanne Crawford, and Stephanie Garcia, but it is too difficult to tell who specifically replaced whom given the variable nature of the floater assignments.

Several of the agency employees either did not assume their assigned schedule immediately after the conclusion of the strike or had significant attendance problems. Yet the records reveal that Castle Hill tolerated these performance deficiencies from the agency employees rather than recalling the replaced strikers.

m. Danielle Humphrey Replaced by Adria Coleman

As noted above, Danielle Humphrey worked the 5th floor, assignment 4 on the 3:00 pm to 11:00 pm shift. Her replacement, Adria Coleman, who worked at Castle Hill during the strike, did not reappear at Castle Hill until September 28. From September 19 through September 27, 8 different employees (Brooks, Vernet, Diallo, Zamora, Manoti, Mogere, Kelly, and Adderley) filled the assignment 4 slot on the 5th floor. Coleman then worked this slot on September 28 and October 1. But Coleman called out on October 2, 3, 5, 6, 7, 11, and 12. Castle Hill tolerated Coleman's first 6 call outs and did not return Humphrey to her regular position until October 15, 2014. (GC-52, GC-52(F-4), GC-56, GC-73, Tr. 1745-1747).

Neither Duran nor Bracea could explain why Coleman did not work at Castle Hill between September 19 and September 27. Taylor also did not remember plotting out an agency employee's schedule with 10 days off. Duran did, however, confirm that Medistar did not send anybody to replace Coleman. (Tr. 1592-1593, 1677, 1751). Duran also testified that none of the locked out CNAs were called back on September 19 to replace Coleman when she did not work. (Tr. 1594).[14]

[14] Duran also testified that Castle Hill called back striking CNAs between September 20 and 27 but he could not identify who was called back. Duran could not identify anybody because in fact, none of the 15 locked out CNAs was called back during this time period- a fact confirmed by a review of the daily staffing sheets for this time period. (GC-52, G-3 through N-3, Tr. 1596-1597).

n. Janis Martin Replaced by L. Frans

Janis Martin regularly worked on the 6th floor, assignment 2 during the 11pm-7am shift. Frans did not work Martin's assignment during the strike and did not actually work on this assignment and shift until September 26. On September 19, R. John, a part-time CNA who worked at Castle Hill before the strike, worked assignment 2 on the 6th floor. (GC-52, A-1, GC-13). Frans did not work that weekend because that was Martin's weekend off. (GC-13). The following Monday and Tuesday (September 22 and 23), Frans was scheduled to work but she called off of work. (GC-52, I-3, J-3). On September 24, Lydia Carattini switched assignments with Frans such that Carattini worked on the 6th floor. (GC-52, K-3). Frans did work in Martin's stead on September 26 but she called out again on September 28 and October 2, meaning she called out 4 times in 11 days. (GC-52, O-3, S-3). Martin was not allowed to return to work until October 16. (GC-49, GC-52, G-4, Tr. 660-661).

o. Other Examples

Angela Rodriguez was replaced on the 6th floor, assignment 5 by L. Prince. Prince worked this shift on Friday, September 19, but did not work over the weekend. As noted on page 7 of the General Counsel's accompanying cross-exceptions brief, Rodriguez's name was actually on the schedule for Sunday, September 21. Prince did not work this shift in Rodriguez's stead. And Prince did not work the Saturday, September 20 shift either. F. Melendres, a full-time Castle Hill employee, worked this Saturday shift. Starting September 22, Prince worked Rodriguez's assignment until she departed on October 14. Rodriguez returned to work on October 16, 2014. (GC-51, Tr. 697).

Although I. Aciniegas worked Jeanie Alexandre's schedule from September 20 until October 14, Aciniegas did not begin this assignment on the day the strike ended. Instead, V. Normil, who worked at Castle Hill before the strike, worked in this slot.[15] Also, although T. Mathurin replaced Musuretu Abdulazeez from September 22 until October 30, Mathurin did not work on the day the strike ended. Instead, V. White, who was hired as a part-time CNA on September 11, worked in this slot.[16]

Furthermore, R. Arvelo, who replaced Cherlie Celestin Valfils on the 4th floor, assignment 1 of the 7 am to 3 pm shift, called out four times between September 29 and October 9 (9/29, 9/30, 10/4, and 10/9).[17] Yet Castle Hill permitted Arvelo to continue to work there without penalty as she worked regular shifts on October 10, 11, 13, and 14. Despite Arvelo's unreliability, Castle Hill did not recall Valfils until October 15. (GC-52, P-3, Q-3, U-3, Z-3, A-4, B-4, D-4 through F-4).

Finally, C. Hendry replaced Angelina Murillo as a 5th floor floater on the day shift. But Hendry called out 3 times in 12 days (9/19, 9/30, and 10/1) and was a no call no show on October 2. (GC-52, F-3, Q-3 through S-3). Murillo then became the first striker to be recalled to work on October 4. (GC-52, U-3, GC-53, Tr. 745).

p. <u>Castle Hill's Reduction of Brenda Mota-Lopes' Hours and Overtime Opportunities</u>

Brenda Mota-Lopes returned to work almost immediately after the strike ended but her hours were significantly cut over the next six weeks. As noted above, Mota-Lopes was a part-time CNA hired in May 2014. From July 20 through September 13,

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[15] Alexandre's schedule as set forth in the master schedules in GC-13 indicates that Friday was not her day off. Therefore, there is no reason why Aciniegas should not have worked on September 19.
[16] Abdulazeez's schedule in GC-13 indicates that she did not have any Fridays off. Therefore, there is no reason why Mathurin should not have worked on September 19.
[17] Arvelo also did not work the last day of the strike, September 18. (Tr. 1744).

Alternor consistently assigned Mota-Lopes work either 5 or 6 days each week. (GC-55, Tr. 806). During this 8 week period, Mota-Lopes worked over 40 hours 6 times, resulting in about 16-24 hours of overtime per pay period. (GC-55, Tr. 807).

Shortly before the strike, Altenor threatened Mota-Lopes that her hours could be cut if she participated in the strike. Mota-Lopes participated in the September strike by picketing at both Castle Hill and Harborview. (Tr. 788-789).

Altenor assigned Mota-Lopes work on the 3pm-11pm shifts on Saturday, September 20 and Sunday, September 21. But the following week, Altenor did not assign Mota-Lopes to work at all. When Mota-Lopes inquired that week as to when she was next on the schedule, Altenor told her that Saturday and Sunday. (Tr. 803-805).

Over the next month, Mota-Lopes' regular hours diminished considerably and she received no overtime. During the weeks of September 21, September 28, and October 4, Mota-Lopes was only assigned to work 24 hours per week. The week of October 11, Mota-Lopes was assigned 32 hours of work but the following week she only received 16 hours of work. In the last week of October 2014, Mota-Lopes worked 31 hours and in early November, her hours returned to pre-strike levels. (GC-55, Tr. 807). Altenor never explained why Mota-Lopes' hours were reduced. (Tr. 808).[18]

q. <u>CNA Leanne Crawford's Hours are Reduced After the Strike</u>

Leanne Crawford worked as a CNA floater on the day shift starting in about June 2012. (Tr. 484). Before the strike, Crawford worked on average 8-10 days per pay period. To find out her schedule, Crawford would either call the facility or someone

[18] Since Mota-Lopes quit her position at Castle Hill sometime after the strike ended, Counsel for the General Counsel is not seeking her reinstatement. Counsel for the General Counsel is only seeking reimbursement for Mota Lopes' reduction of hours and overtime opportunities from September 19, 2014 through early November 2014.

from Castle Hill would call her with her hours. (Tr. 498-499). Crawford participated in all three days of the September 2014 strike. At the conclusion of the strike, Castle Hill representatives informed Crawford that there were no hours available for her and her name was on the list furnished to the Union indicating that there were no hours for her until further notice. (GC-27, Tr. 492-493, 496).

Crawford returned to work on October 27. (GC 41, Tr. 497). But immediately after Crawford returned to work, she saw her work schedule reduced to 6 or 7 days per pay period. Judge Rosas credited Crawford's testimony that she questioned Altenor in November 2014 about her reduction of hours, but shortly after lodging this complaint, her hours dropped again to an average of 6 days per pay period. (Tr. 499). Crawford again spoke to Altenor in November to find out if there were more days available for her. Altenor told her that she had to do what she had to do because of "corporate." After lodging this second complaint, Crawford saw her hours reduced again to her current level, about 5 to 6 days of work per pay period. (Tr. 600).[19]

IV. ARGUMENT

POINT I: <u>CASTLE HILL VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE 15 CNA STRIKERS AT THE CONCLUSION OF THE STRIKE</u>

Given Judge Rosas' uncontested finding that the Union engaged in an unfair labor practice strike, it then follows that Castle Hill had an obligation under the Act to immediately reinstate the strikers to their former positions upon their unconditional offer to return to work. Castle Hill kept 15 CNA strikers off work for up to 6 weeks after the

[19] Crawford also testified that since she returned to work after the strike, she has no longer been assigned overtime. Crawford asserted that before the strike, she averaged 2-6 hours of overtime per pay period. (Tr. 500-502).

strike concluded. Because Castle Hill did not have a substantial and legitimate justification for doing so, Judge Rosas correctly found that this conduct violated Section 8(a)(3) of the Act.

1. **There is No Need for a 5-Day *Drug Package* Grace Period Here.**

Although not enumerated in a specific Exception, in its Brief in Support of Exceptions, Castle Hill asserts that it had a 5-day grace period with which to return striking employees to work. Quite simply, there is no need for a 5-day grace period here. In *Drug Package Co., Inc.*, 228 NLRB 108, 113-114 (1977), the Board reaffirmed the longstanding rule that the backpay period for unfair labor practice strikers commences 5 days after the date of the unconditional offer to return to work. The Board found that the 5-day grace period represents a reasonable accommodation between the employees' interest in a prompt return to work and the employer's interest in dealing with administrative issues involved in reinstating the strikers.

The Board, however, in a later case, confirmed that there was no need to apply this rule to a limited duration strike in the health care industry. In *Sutter Health Center*, 348 NLRB 637, 638 (2006), the Board said that:

> "In the usual unfair labor practice strike situation, it may be necessary to discharge replacement workers before strikers return to work. And the Board believes that 5 days is a reasonable amount of time to do the necessary administrative and personnel tasks to accomplish this. By contrast, in the instant case, the Respondent needed only to return the replacements to their prestrike regular positions. Indeed, the Respondent had ample time to effectuate this result. The Respondent received notice on November 1 that the strikers would strike for 1 day and return to work on November 15, 2 weeks before the strikers offered to return. Thus, this case is a particularly good example of a situation where 5 extra days is not needed. In addition, as the judge found, the Union had previously engaged in 1-day strikes, in which the unconditional offer to return to work accompanied the strike notice, and the strikers returned to work as announced. Thus, the prestrike period was available to the Respondent to make necessary arrangements for a smooth transition upon the strikers' return. Moreover, the

> history of such strikes between the parties lessened the possibility, advanced by the Respondent, that it would be faced with uncertainties as to the strikers' return to work. We find, then, that there is no showing of a need for a further period of time for such purposes."

Like in *Sutter,* the Union here called a short, limited duration strike, as it had done in the past. Castle Hill received the 10-day notice on September 5 and was put on notice that the strike would conclude on September 19. Therefore, Castle Hill had the benefit of time to plan for a smooth transition from its replacement employees to reinstating its striking employees on September 19. Castle Hill did not need an extra 5 days to reset its operations and it certainly did not need the 4 to 6 weeks it used here. Therefore, this Exception must be denied.

Exceptions 42-46, 48-55: The Substantial Record Evidence Supports Judge Rosas' Conclusion That Castle Hill Violated Section 8(a)(3) of the Act by Failing to Immediately Reinstate the 15 CNA Strikers Because Castle Hill's Contracts with the Temporary Staffing Agencies Do Not Constitute a Substantial and Legitimate Justification For Delaying the Reinstatement of the Returning Strikers.

The overwhelming record evidence supports Judge Rosas' findings and conclusions that Castle Hill violated Section 8(a)(3) of the Act by failing to immediately reinstate 15 of its CNAs at the conclusion of the September 2014 strike. In this regard, the record evidence establishes that Castle Hill did not have a substantial and legitimate justification for delaying the reinstatement of these returning strikers.

Where an employer fails to show that economic strikers have been permanently replaced prior to their unconditional offer to return to work, an economic striker is entitled to immediate reinstatement, absent a demonstrated business justification. *Teledyne Still-man*, 298 NLRB 982, 985 (1990); *Harvey Mfg.*, 309 NLRB 465, 469-470 (1992) (employer's contract with temporary replacement agency did not provide justification for delaying reinstatement of striking employees because there was no basis

to find provisions allegedly requiring delay were necessary in order to induce agency to provide replacements and because provisions did not clearly require delay). The burden of proof in this regard is on the employer. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.*, 171 NLRB at 1368; *Pacific Mutual Door Co.*, 278 NLRB 854, 856 n.12 (1986) (employer lawfully delayed reinstating strikers for 30 days pursuant to contract with company providing strike replacements where 30-day cancellation provision was a necessary condition of employer getting temporary employees from the referring company).

The Board has never addressed the question of whether the rationale of *Pacific Mutual Door* appropriately applies to a short-term strike in the healthcare industry. Clearly there are distinguishing features between the instant case and *Pacific Mutual Door*. In *Pacific Mutual Door,* the strike was open-ended and in a non-healthcare facility. In our case, the Union submitted the requisite 10-day notice announcing a limited duration 3-day strike. Castle Hill knew when it entered into the 4-week and 6-week contracts with the staffing companies that the lengths of these contracts exceeded the duration of the strike by eight-fold, resulting in a lengthy, unnecessary interruption in direct patient care.

But the most important factor distinguishing *Pacific Mutual Door* from the instant case is that Castle Hill has not established that the 4 and 6-week post-strike guarantees contained in the Tristate and Towne contracts were necessary to staff its facility during the 3-day strike. In this regard, Castle Hill presented no record evidence chronicling its negotiations with the three temporary agencies it used during the strike (Tristate, Towne, and Medistar), or the other temporary agency that supplied Harborview and Boulevard

East with personnel during the strike (Staff Blue). Thus, the record is bereft of probative evidence showing that it was necessary for Castle Hill to agree to these post-strike guarantee windows to obtain the required temporary services. No official from Towne, Tristate, or Medistar testified at the hearing and more importantly, Alaris vice-president Linda Dooley, who negotiated and signed the above-referenced contracts on behalf of Castle Hill, also did not testify.[20] Without this testimony, and without any documentary evidence providing insight into the negotiations, Castle Hill has not established why the Tristate contract was for 4 weeks, but the Towne contract was for 6 weeks. Also, there is no record explanation as to why Staff Blue, which provided temporary labor to Harborview and Boulevard East during the strike without a written contract and without the need for a post-strike guarantee, could not have provided all of Castle Hill's strike replacement labor, obviating the need to delay striker reinstatements. For all we know, Staff Blue did offer to staff the entire Castle Hill facility during the strike and Castle Hill rejected this offer simply so it could punish as many strikers as possible. The point is that the burden of proving that the post-strike replacement contracts were necessary falls squarely on Castle Hill, and the record evidence reveals that Castle Hill has fallen woefully short in meeting its burden. Therefore, Castle Hill violated Section 8(a)(3) of the Act when it refused to immediately reinstate all of its returning strikers at the conclusion of the September 2014 strike.

Castle Hill also has not established that it was, at any time, under a binding commitment to pay for any post-strike services which were supposedly guaranteed under

[20] Regina Figueroa testified that she reports to Linda Dooley and Castle Hill presented no evidence demonstrating that Dooley was unavailable during the lengthy hearing. (Tr. 1368). Therefore, an adverse inference should be drawn against Castle Hill for refusing to call Dooley. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 n.1 (1977).

the Towne and Tristate contracts, but that were not provided. In this regard, the Towne contract guaranteed the placement of 5 employees at Castle Hill for 6 weeks after the strike. Of the 6 Towne agency employees assigned to work at Castle Hill during the strike, 2 did not work at Castle Hill after the strike ended (Udenta and Gonzalez). No evidence was adduced showing that Castle Hill paid Towne for the supposedly guaranteed 5th employee who did not actually work at Castle Hill post-strike. Also, no explanation was provided as to why Udenta or Gonzalez did not fulfill the terms of the contract.

Similarly, of the 12 CNAs Tristate referred to Castle Hill during the 3-day strike, 4 did not work at Castle Hill after the strike ended (Ceballos, Swinton, Pierre-Louis, and Harvey). Castle Hill provided no explanation as to why these 4 temporary CNAs stopped working at Castle Hill when the strike ended or why the parties did not honor their contractual provision supposedly guaranteeing 4 weeks of work. If Castle Hill can't establish that it was obligated to use and pay for all of the temporary employees after the strike ended, it can't establish it was obligated to use and pay for any of these employees post-strike.

Additionally, Castle Hill, in its Brief in Support of Exceptions, argues that a public policy exception should be carved out for health care institutions to essentially have the unfettered ability to delay reinstatement of its strikers. In support of its argument, Castle Hill relies on *Roosevelt Memorial Medical Center,* 348 NLRB 1016 (2006). Castle Hill's reliance on *Roosevelt* is misplaced and its argument for such a blanket exception must be rejected.

In *Roosevelt,* the Board held that an employer did not violate the Act when, in anticipation of a strike that was eventually called off, it crafted a strike schedule using temporary and per diem employees to cover shifts. The Board found that not calling all of the potential strikers to work during the week of the previously scheduled strike was not unlawful because the loss of hours to the discriminatees was minimal, the employer had established a substantial and legitimate justification for its conduct, and there was no evidence of anti-union animus on the part of the employer.

The facts in this case are clearly distinguishable from *Roosevelt*. First, Castle Hill held 13 CNAs off of work from about 2 weeks (Angelina Murillo) to 6 weeks, and 2 more CNAs, Devika Smith and Claudia Saldana, were held out for approximately 9 months, a far more substantial amount than the discriminatees in *Roosevelt* who only missed a few shifts in the course of a week. Next, there is ample evidence cited *infra* establishing that Castle Hill has failed to prove a substantial and legitimate justification for keeping these 15 CNAs off of work. To this end, the fact that Staff Blue and Medistar were willing to provide temporary staff to Alaris Health at Harborview during the strike without requiring a minimum time commitment undercuts Castle Hill's contention that it had no choice but to agree to minimum commitments from TriState and Towne. Furthermore, the record evidence shows that Castle Hill did not actually use agency CNAs to replace some of the striking CNAs they refused to recall (e.g. Danielle Humphrey) and that it also used non-unit employees to fill strikers' positions even after the strike concluded.

The final distinguishing characteristic between *Roosevelt* and this case is the anti-union animus readily apparent here. In this regard, Judge Rosas correctly found a myriad

of 8(a)(1) threats and interrogations engaged in by Castle Hill's highest ranking officials in the run up to the September 2014 strike. As noted earlier, no exceptions were filed to these findings of unlawful threats and interrogations. Therefore, these 8(a)(1) violations demonstrate clear anti-union animus on the part of Castle Hill. Based on the above, the facts here show that *Roosevelt* cannot be relied on to excuse or condone Castle Hill's unlawful refusal to timely recall 15 striking CNAs here, and certainly cannot be used as a safe harbor for all nursing homes to delay reinstating their striking employees. Therefore, Castle Hill's Exceptions must be rejected.

Counsel for the General Counsel Renews Its Motion to Strike Medistar Contract Exhibit R-9.

On page 1487 of the trial transcript, Judge Rosas admitted into the record, over General Counsel's objection, Respondent Exhibit 9, a 9-page Medistar contract. We now renew our objection to this exhibit and move to strike it from the record. The exhibit as offered contained an 8-page contract, dated June 18, 2009, between Medistar and Castle Hill. The last page of the exhibit is a 1-page addendum, dated September 12, 2014. The first paragraph of this addendum specifically states that the addendum was modifying the parties' previous agreement dated August 20, 2014. No such August 20, 2014 contract was offered as part of this exhibit, despite the General Counsel's request for the document through the usual trial subpoena channels. On May 29, 2015, Counsel for the General Counsel issued to Castle Hill a subpoena duces tecum requesting, among other things, "Contracts signed by Respondent with staffing or temporary employment agencies to cover CNA shifts at Respondent's facility during the September 2014 strike." (GC 30, Paragraph 5).

It is unclear what relevance the first 8 pages of the exhibit can have to our proceeding given that the last page of the exhibit specifically indicates that the 2009 contract was superseded by the August 20, 2014 contract. If Castle Hill offered the first 8-pages to show that these were the terms of the agreement modified by the September 2014 addendum, this would be untrue. The September 12, 2014 addendum makes that clear. It does not reference the June 2009 contract at all. Instead it references a document that Castle Hill failed and/or refused to produce.[21] This makes R-9 at best incomplete and at worst, misleading because we do not know the specific contractual terms that the parties were working under in September 2014. We also have no idea why Castle Hill and Medistar needed to modify a contract that was only a few weeks old.[22] Based on the above, R-9 is an incomplete offering whose probative value is greatly outweighed by the prejudicial impact of allowing it to continue to cloud up the record, and pursuant to Federal Rules of Evidence 106 and 403, it should be excised from the instant record.[23]

Additional Evidence of Pretext is Found in Castle Hill's Treatment of Union Delegate Danielle Humphrey.

Castle Hill asserts that returning strikers were kept off of work due to agency commitments. But a review of the record evidence shows that for certain strikers, Castle Hill's defense is a pretextual sham with more holes than a slice of Swiss cheese. Union

[21] It strains credulity that Jasinski, a seasoned labor professional, could review the September 12, 2014 addendum (as he testified on page 1476), see that it referenced a contract from three weeks earlier, also see that the contract was not attached, and not question where that August 2014 agreement was and what it contained.

[22] The existence of the August 20, 2014 Castle Hill/Medistar contract renders untrue Regina Figueroa's testimony that there were no existing contractual relationships between the Alaris facilities and staffing companies. (Tr. 1366).

[23] Should the Board disagree with our renewed motion, the undersigned respectfully requests that no weight be accorded this exhibit given how incomplete the exhibit becomes when the June 2009 portion of the document is overridden by the missing August 20, 2014 contract.

delegate Danielle Humphrey illustrates this point. She regularly worked assignment 4 on the 5th floor of the 3 pm to 11 pm shift. During the strike, three different agency employees filled her slot on three different days (T. Mathurin, A. Coleman, and C. Adderley). At the conclusion of the strike, Humphrey attempted to go back to work, but Duran and Bracea informed her that there were no hours for her. (Tr. 829-830). But nobody from the staffing companies had actually replaced her. In the 8 days immediately after the strike, 8 different employees filled Humphrey's slot on the 5th floor (Brooks[24], Vernet, Diallo, Zamora, Manoti, Mogere, Kelly, and Adderley). Based on this evidence, Castle Hill's defense is clearly pretextual and must fail.

To make matters worse, Medistar employee Adria Coleman returned to Castle Hill on September 28, after an unexplained absence of 10 days.[25] She filled Humphrey's slot on September 28 and October 1, but called out on October 2, 3, 5, 6, 7, 11, and 12. That Castle Hill countenanced Coleman's first five or six call-outs and refused to reinstate delegate Humphrey until October 15 illustrates its bad faith and the infirmity of its proffered defense.

Janis Martin is another example of Castle Hill callously flaunting its legal obligations by shifting agency and part-time staff around both during and after the strike to cover the shift of someone it refused to reinstate. Before the strike, Martin regularly worked assignment 2 on the 6th floor during the 11 pm to 7 am shift. During the 3-day strike, 3 different employees covered Martin's shift- Katiya McSwain, Adria Coleman (from Medistar), and Lydia Carattini. At the conclusion of the strike, Castle Hill

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[24] Brooks was one of the non-unit employees who came from another Alaris facility. She worked both the 7 am-3 pm and 3 pm-11 pm shifts on September 19.

[25] None of Castle Hill's witnesses could explain why Coleman did not work between September 19 and September 27.

informed Martin that she had been replaced. (Tr. 659). The record evidence shows that Castle Hill selected Tristate agency CNA L. Frans to replace Martin, but she did not start working this assignment until a week after the strike ended. On the night the strike ended, part-time CNA R. John filled Martin's slot on the 11 pm to 7 am shift. Frans worked that night, but on the 5th floor. So not only did Castle Hill not replace Martin with the same agency employee during the strike, it didn't replace her with an agency employee immediately after the strike ended. By playing musical chairs just to fill Martin's regular assignment, Castle Hill has undercut the credibility of its witnesses and the validity of its defense. Thus, Castle Hill has violated the Act.

The week after the strike was more of the same from Castle Hill and Frans. Frans called out on Monday and Tuesday, and had her assignment switched on Wednesday such that she worked on the 4th floor and Lydia Carattini filled Martin's 6th floor assignment. Frans first actually worked in Martin's slot on September 26, but she called out again on September 28 and October 2. Somehow, Castle Hill tolerated Frans' 4 call outs in 11 days and did not allow Martin to return to work until October 16.

Frans wasn't the only agency CNA with a disposition for calling out. R. Arvelo, who replaced Cherlie Celestin Valfils on assignment 1, 4th floor day shift, also called out 4 times in 11 days (calling out on September 29 and 30, October 4, and October 9). In her case, Castle Hill permitted Arvelo to continue working for another week and did not recall Valfils until October 15.[26] Additionally, C. Henry, who replaced Angelina Murillo as a 5th floor floater on the 7 am to 3 pm shift, called out 3 times in 12 days (September 19, September 30, and October 1), and was a no-call no-show on October 2. As a result

[26] Arvelo covered Valfils' 4th floor assignment during the first two days of the strike but inexplicably did not work on the 3rd day of the strike. Tonia Abreu, who had allegedly replaced Devika Smith as of September 16, covered Valfils' assignment on the last day of the strike.

of the no-call no-show, Murillo became the first reinstated striker, returning to work on October 4. That Castle Hill countenanced such poor attendance from its agency employees underscores its bad faith motive in refusing to timely reinstate its returning strikers.

Additionally, the record is replete with more cases of Castle Hill not assigning its agency employees to a designated slot in a timely manner. During each day of the strike, D. Harvey from Tristate worked Diana Lewis' assignment 3 slot on the 3rd floor, 7 am to 3 pm shift. But Harvey did not work at Castle Hill after the strike concluded. Instead of returning Lewis to work at the conclusion of the strike as required by law, Castle Hill simply reassigned Towne employee R. Mondestin-Max to cover Lewis' slot for the next six weeks. Additionally, QA CNA Angelo Daug covered Angela Rodriguez's spot (assignment 5 on the 6th floor, 7 am to 3 pm shift) on the first two days of the strike and Rhonda Andrews, a full-time Castle Hill CNA, covered this slot on the last day of the strike. Since no agency employee had replaced Rodriguez during the strike, nobody should have replaced her after the strike was over. But it didn't happen that way.[27] Lola Prince from Tristate started working in Rodriguez's slot on September 19 and then something peculiar happened over the weekend. Prince did not work for Rodriguez on the 20th, and like with Saldana, the September 21 schedule showed Rodriguez assigned to work in her regular assignment on the 6th floor. But nobody told Rodriguez this and

[27] Rodriguez's selection for replacement after the strike, however, was foreshadowed by Duran who told Saldana that Rodriguez had a big mouth for instigating employees to go on strike.

Castle Hill chose to leave its facility understaffed rather than call in one of the returning strikers.[28]

For Musuretu Abdulazeez, Castle Hill filled her slot during the strike with a part-time CNA on the first day (F. Bowel) and a new hire CNA (Vanessa White) for the second and third days. Abdulazeez came to Castle Hill on the day the strike ended, but Duran told her to leave because there was no work for her. (Tr. 430-431). But there was work for Abdulazeez that day because Castle Hill again used Vanessa White to fill her afternoon slot on September 19. T. Mathurin from Towne did not begin working Abdulazeez's slot until September 22, and she remained there until October 30. If Castle Hill did not use an agency employee to replace Abdulazeez during the three days of the strike and did not use an agency employee to replace her the day the strike ended, Castle Hill certainly has failed to establish that it lawfully refused to reinstate her. Such conduct violates Section 8(a)(3) of the Act.[29] Therefore, based on the above evidence, Judge Rosas correctly concluded that Castle Hill unlawfully refused to reinstate 15 CNA strikers at the conclusion of the strike.

POINT II:

Exception #43: The Substantial Record Evidence Supports Judge Rosas Correctly Crediting William Massey's Testimony Confirming Castle Hill counsel David Jasinski Told Him that Castle Hill Entered into Lengthy Contracts Because It Believed That the Strike Would Extend Beyond 3 Days.

Substantial record evidence supports Judge Rosas' crediting of William Massey's version of the conversation he had with David Jasinski regarding Castle Hill's reason for

[28] Altenor testified that there were always 5 CNAs scheduled to work on the 6th floor. Saldana and Rodriguez's names were circled on the September 21 schedule, but only 1 name (Hecmarie Sanchez) was penciled in to work on the 6th floor. Consequently, the facility was understaffed for this shift.

[29] One additional example undercutting Castle Hill's defense is Komi Anakpa. He regularly worked assignment 1 on the 5th floor on the 11 pm to 7 am shift. During the strike, three different employees covered his shift- Vivian Makaani, M. Bermudez, and L. Frans (who would go on to replace Martin the following week). C. Adderley from Tristate replaced Anakpa as of the night the strike ended.

entering into lengthy strike replacement contracts. On the last day of the strike, Castle Hill attorney David Jasinski informed Union counsel Massey that Castle Hill and the other 3 Alaris facilities had entered into 30 day contracts with outside agencies and consequently, not all of the strikers would be immediately returned to work. Jasinski specifically noted that the number of strikers who would not be allowed to return at Castle Hill would be greater than at the three other impacted Alaris Health facilities. When Massey questioned why Castle Hill entered into such lengthy contracts when it knew the strike was going to be of limited duration, Jasinski posited that the strikers could potentially remain on strike beyond the three days and the facilities needed to prepare for this possibility.[30] This statement is clear evidence of bad faith, tainting Castle Hill's reasoning for entering into such lengthy contracts with the staffing agencies. As a veteran practitioner, Jasinski knew that the Union's 8(g) strike notice specified the date the strike would commence and the date and time the strike would end. Extending the strike beyond those parameters would have left the strikers unprotected by the Act. It also would have run counter to the Union's perfect track record of respecting a 3-day strike when it noticed its intent to engage in a 3-day strike. Massey challenged Jasinski with those facts in their September 18 conversation, and in Massey's subsequent email to Jasinski summarizing their conversation. Jasinski, however, did not reply to Massey's email. Importantly, in his trial testimony, Jasinski did not deny that he made these statements to Massey. Therefore, Massey's testimony on this subject stands unrebutted and Castle Hill had no good faith basis for believing that the Union might extend the 3-day strike. The longstanding Board policy is not to overrule credibility resolutions of an

[30] Administrator Maurice Duran also testified that one of the reasons why CNAs Devika Smith and Claudia Saldana were not returned to work immediately was due to the belief that the strike could have extended beyond 3 days.

Administrative Law Judge unless the clear preponderance of all the relevant evidence demonstrates the findings to be incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950) *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, Judge Rosas properly credited Massey because Castle Hill had no good faith basis for believing that the Union might extend the 3-day strike and Castle Hill's Exception 43 must be denied.

POINT III: <u>JUDGE ROSAS CORRECTLY CONCLUDED THAT CASTLE HILL UNLAWFULLY REDUCED BRENDA MOTA-LOPES' HOURS AFTER THE STRIKE ENDED IN VIOLATION OF SECTION 8(a)(3) OF THE ACT.</u>[31]

Brenda Mota-Lopes regularly worked 5 or 6 days a week before the September 2014 strike. Staffing coordinator Fredline Altenor warned her before the strike that her hours could be cut if she participated in the strike. Mota-Lopes defied Altenor's threat and went on strike anyway. Over the next six weeks, Castle Hill significantly reduced Mota-Lopes' hours. Judge Rosas correctly found that this punishment violated Section 8(a)(3) of the Act.

Mota-Lopes started working as a part-time CNA at Castle Hill in May 2014. She had no set schedule, working as a floater across all three shifts. To get her hours, Altenor would either call her or tell her in person. (Tr. 787-788). Based on Mota-Lopes' detailed recordkeeping, we know that from July 20 through September 13, she consistently worked 5-6 days each week, earning about 16-24 hours of overtime each pay period.[32]

[31] At the hearing, Counsel for the General Counsel amended Complaint paragraph 45(a) to narrow the time period for this reduction of hours allegation from September 19, 2014 until early November 2014. (Tr. 14-15).

[32] Mota-Lopes testified that she began keeping records because Castle Hill wasn't properly paying her for the hours that she worked. (Tr. 799).

A few days before the strike, Mota-Lopes spoke to Altenor in the receptionist's office. Altenor asked her whether she was going on strike and Mota-Lopes said yes. Altenor than warned her that her hours could be cut. Undeterred, Mota-Lopes participated in the strike. Mota-Lopes next worked on Saturday the 20th and Sunday the 21st The following week, Mota-Lopes called Altenor each day to see if she was on the schedule and each day Altenor told her no. By the middle of the week, Mota-Lopes inquired when she was next assigned to work and Altenor told her that weekend. This was the first time that Mota-Lopes had not been assigned to work during the week, but Altenor never explained the reason for the change.

Over the next month, Mota-Lopes' regular hours diminished considerably and she received no overtime. During the weeks of September 21, 28, and October 4, she was only assigned to work 24 hours each week. For the rest of October, Mota-Lopes' hours waffled between 16 and 32 hours, with no overtime. Altenor never explained to Mota-Lopes why her hours were reduced save for the pre-strike threat.

A *Wright Line* analysis is proper here. Mota-Lopes engaged in protected strike activities, Castle Hill had knowledge of her activities, it had expressed great hostility towards this protected activity, and the staffing coordinator who assigned her hours on a daily basis told her, prior to the strike, that if she went on strike, her hours could be cut. Having established a prima facie case of a violation, the burden shifts to the Employer to establish that it would have reduced Mota-Lopes' hours regardless of her union activity. Castle Hill has failed to carry this burden. Although Altenor testified at the hearing, she did not testify about Mota-Lopes and her reduction of hours. In fact, no Castle Hill witness testified on this subject. Without reason to dispute Mota-Lopes' testimony that

her hours (and overtime) were reduced after the strike or her meticulous record keeping documenting these facts, Judge Rosas properly credited Mota-Lopes' testimony. This evidence must trump Castle Hill's feeble attempt to establish a *Wright Line* defense and based on the above, Judge Rosas correctly found that Castle Hill unlawfully reduced Mota-Lopes' hours (and overtime hours) in retaliation for her protected strike activities.

POINT IV:

Exception 47: <u>JUDGE ROSAS CORRECTLY FOUND THAT CASTLE HILL REFUSED TO REINSTATE LEANNE CRAWFORD UNTIL OCTOBER 27 AND SUBSEQUENTLY REDUCED HER HOURS IN VIOLATION OF SECTION 8(a)(3) OF THE ACT.</u>

Like Mota-Lopes, Castle Hill lashed out at part-time CNA Leanne Crawford by reducing her hours after the strike. But two important wrinkles make Castle Hill's retaliation against Crawford more severe. First, unlike Mota-Lopes, Castle Hill refused to immediately reinstate Crawford at the conclusion of the strike. And second, the discrimination against Crawford continues to this day. Judge Rosas correctly concluded that this discriminatory conduct violated the Act.

Crawford worked as a CNA floater on the 7am to 3pm shift. Before the strike, Crawford worked on average 8-10 days per pay period. As noted on page 19 of the ALJD (lines 23-34, and fn 58), Crawford attended one of Duran's pre-strike meetings in the 2nd floor conference room where Duran unlawfully threatened that employees could be replaced and possibly not return back to work if they went on strike. (Tr. 488). Judge Rosas properly credited Crawford's testimony. Yet, Duran's prognostication rang true for Crawford because Castle Hill refused to allow her to return to work at the conclusion of the strike. In fact, Crawford was not allowed back until October 27, 2014.

Upon her return, Crawford's work schedule was reduced to 6 or 7 days per pay period. When Crawford questioned Altenor in November 2014 as to why her hours were reduced, her hours were further reduced to an average of 6 days per pay period. After lodging a second complaint to Altenor, Crawford's hours were further reduced to 5-6 days per pay period. This reduction of hours continues to the present day. As noted on page 23, fn 82 of the ALJD, these findings were based on Crawford's credible and undisputed testimony.

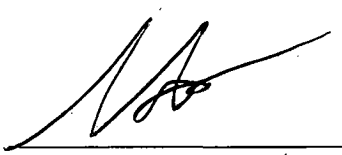
Judge Rosas correctly concluded that Crawford's post-strike reduction of hours was unlawful. Her activity, Castle Hill's knowledge of this activity, and its animus directed at this activity is clear from the record. What is also clear from the record is that while Crawford's hours have been reduced, other part-time CNAs on the 7am to 3pm shift have left and new part-time CNAs have been hired. Part-time CNA Katiya McSwain resigned in early December 2014. Certainly, Crawford was available to assume McSwain's part-time hours. Furthermore, in early February 2015, Castle Hill hired new part-time CNAs Jennifer Orozco and Maria Mendoza. These hires make clear that there was available work for part-timers and a pressing need for Castle Hill to fill these positions. That Castle Hill refused to assign these hours to Crawford makes the case for unlawful retaliation that much stronger. It must be noted that the reduction of Crawford's hours began after the agency contracts expired. This means that any Castle Hill reliance on these contracts as a justification for reducing Crawford's hours here is worthless. Since Castle Hill has proffered no explanation for Crawford's reduction in

hours in its Exceptions, Judge Rosas correctly concluded that Castle Hill's actions violated Section 8(a)(3) of the Act.[33]

V. CONCLUSION

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Castle Hill violated Section 8(a)(1) and (3) of the Act, as found by Judge Rosas. Counsel for the General Counsel respectfully requests that the Board issue a broad order with a notice and make whole remedies, and for Castle Hill to comply with any other remedies requested above and deemed appropriate.

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



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[33] Altenor's testimony did not touch on Crawford's reduction of hours.

CERTIFICATION

This is to certify that copies of the foregoing Answering Brief on Behalf of the General Counsel to Respondent's Exceptions to the Decision of Administrative Law Judge Michael A. Rosas has 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:

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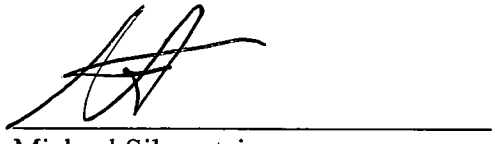

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