

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

ALARIS HEALTH AT HARBORVIEW

and

Cases: 22-CA-125023
22-CA-125882
22-CA-140591

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**

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

TABLE OF CONTENTS

I.	SUMMARY OF THE ARGUMENT	1
II.	STATEMENT OF FACTS	1
	A. Background and Bargaining History	1
	B. The Union and Harborview Bargain for A Successor Agreement	2
	C. ALJ Rosas Findings and Conclusions	2
	D. Union Calls a Delegate Meeting for August 27, 2014.	.3
	E. Strike Begins on September 16 and Ends on September 19.	.5
	F. 8(a)(1) and 8(a)(3) Allegations.	.6
	i. Ingrid Williams and Kyria Miller.	.6
	ii. Harborview's DON and ADON Threaten Employees With Job Loss If They Go on Strike.	.7
	iii. Miller Participates in the Strike.	.7
	iv. Harborview Uses Four Temporary Agencies to Staff the Facility During the Strike.	.8
	v. The Union Unconditionally Offers to Return to Work on September 19, 2014.	.10
	vi. The Strike Ends and Harborview Refuses to Reinstate Miller and Williams.	.11
	vii. Union Communicates With Harborview Counsel Regarding Return to Work Offers.	.13
	viii. Harborview Informs the Union That Williams and Miller Could Return to Work on October 15 and then Woodard Turns Them Away When They Report for Work.	.13
	ix. Williams and the Union Receive No Communications From Harborview Until December.	.15
	x. Williams Receives a Certified Letter from Harborview in March 2015.	.17
	xi. Only 1 Agency Employee Works at Harborview After the Strike Ends.	.18

xii.	Harborview Hires New CNAs in Early October 2014 While Refusing to Let Miller and Williams Return to Work.	.20
IV.	ARGUMENT	21
POINT I.	HARBORVIEW'S REFUSAL TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS AFTER THE UNION UNCONDITIONALLY OFFERED TO RETURN TO WORK VIOLATES SECTION 8(a)(3) OF THE ACT	21
POINT II.	HARBORVIEW VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO REINSTATE INGRID WILLIAMS AND KYRIA MILLER AT THE CONCLUSION OF THE UNION'S 3-DAY STRIKE.	21
EXCEPTIONS 29, 31-34, 36-41.	The Substantial Record Evidence Supports Judge Rosas' Conclusion that Harborview Violated Section 8(a)(3) of the Act by Failing to Immediately Reinstate Williams and Miller Because Harborview has Failed to Establish a Substantial and Legitimate Justification for Refusing to Immediately Reinstate Them and Because Minimum Stay Requirements Were Not Necessary for Harborview to Secure Temporary Help In Preparation for the Strike	.22
EXCEPTION 30.	The Substantial Record Evidence Supports Judge Rosas Correctly Crediting William Massey's Testimony Confirming Jasinski Told Him that Harborview Entered Into Lengthy Contracts Because It Believed the Strike Would Be Longer Than 3 Days.	.25
EXCEPTIONS 36 and 37.	Judge Rosas Correctly Concluded That Harborview's Refusal to Reinstate Williams and Miller Violated Section 8(a)(3) of the Act.	.26
A.	No Agency Employee Worked the 3pm-11pm Shift After the Strike Ended.	.27
B.	Harborview Also Violated the Act by Refusing to Immediately Reinstate Returning Striker Kyria Miller.	.30
EXCEPTION 35.	<i>Pacific Mutual Door and Roosevelt Memorial Medical</i>	.33

Center are Clearly Distinguishable from the Facts of this Case.

1. There is No Need for a 5-Day <i>Drug Package</i> Grace Period Here.	.37
V. CONCLUSION.	38

TABLE OF AUTHORITIES

Federal Cases

<i>American Gypsum Co.</i> , 285 NLRB 100 (1987).	.21
<i>Beverly Health and Rehabilitation Services, Inc.</i> , 335 NLRB 635, 671 (2001).	21
<i>Drug Package Co., Inc.</i> , 228 NLRB 108, 113-114 (1977).	37
<i>Harvey Mfg.</i> , 309 NLRB 465, 469-470 (1992).	21, 22
<i>Laidlaw Corp.</i> , 171 NLRB 1366, 1368 (1968).	22
<i>Martin Luther King, Sr., Nursing Center</i> , 231 NLRB 15 fn. 1 (1977).	24, 30
<i>NLRB v. Fleetwood Trailer Co.</i> , 389 U.S. 375, 379 (1967).	.21-22
<i>NLRB v. Mackay Radio & Tel. Co.</i> , 304 U.S. 333, 345-346 (1938)	21
<i>Pacific Mutual Door Co.</i> , 278 NLRB 854, 856 n.12 (1986).	.22, 33-35
<i>Roosevelt Memorial Medical Center</i> , 348 NLRB 1016.	.33, 35-36
<i>Standard Dry Wall Products</i> 91 NLRB 544 enfd. 188 F.2d 362 (1951).	.26
<i>Sutter Health Center d/b/a Sutter Roseville Medical Center</i> , 348 NLRB 637 (2006).	.37-38
<i>Teledyne Still-Man</i> , 298 NLRB 982, 985 (1990).	21

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 Harborview (Harborview) violated Section 8(a)(3) of the Act by failing and refusing to timely reinstate strikers Ingrid Williams and Kyria Miller at the conclusion of the September 2014 3-day strike. Judge Rosas correctly ordered that Respondent immediately reinstate these two strikers prior to the expiration of Respondent's contracts for replacement employees. Additionally, Judge Rosas correctly refused to credit Harborview officials' testimony regarding the necessity of the four to six week windows for the temporary employee contracts given that two of the staffing companies used during the strike, Staff Blue and Medistar, did not require any fixed time commitment to provide the required services. Despite Harborview's assertion that it could not recall Williams and Miller immediately due to contractual commitments, the record evidence shows that no temporary replacement employee worked the 3:00pm to 11:00pm shift (Williams' shift) after the conclusion of the strike, and Harborview hired new CNAs during the same period of time in which it unlawfully refused to recall both Williams and Miller.

II. STATEMENT OF FACTS

A. Background and Bargaining History

Harborview is engaged in the operation of a long-term care nursing facility in Jersey City, New Jersey. Harborview's supervisory hierarchy at the time of the September 2014 strike consisted of Administrator Kevin Woodard, Director of Nursing Gerry Mijares and Assistant Director of Nursing Mariae Lopus. (GC-101(p)).

For over a decade, 1199 SEIU United Healthcare Workers East (“the Union”) and Harborview have been parties to successive collective bargaining agreements covering a bargaining unit of licensed practical nurses, CNAs, dietary and housekeeping employees and recreation employees. (GC-101(p), GC-108). There are approximately 110 employees in the unit. (GC-110).

B. The Union and Harborview Bargain for A Successor Agreement

The most recent collective bargaining agreement between the Union and Harborview expired on March 31, 2014. (GC-108). Negotiations for a new collective bargaining agreement began in March 2014. David F. Jasinski, Harborview’s labor counsel, acted as the chief negotiator for Harborview during the 2014 negotiations. (Tr. 2147). Negotiations occurred simultaneously at three other Alaris nursing home facilities.¹ Jasinski was chief negotiator for all of those Alaris facilities as well. Mendy Gold, a principal for Alaris, also represented Harborview 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 Union Representative Ron McCalla assisted him during bargaining.

C. ALJ Rosas Findings and Conclusions

In his Decision dated February 11, 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, Harborview refused to bargain in good faith in violation of Section 8(a)(5) of the Act. (ALJD page 21, lines 25-29). Next, Judge Rosas found that Harborview unlawfully delayed in furnishing the

¹ The other three Alaris facilities include Alaris Health at Castle Hill, Alaris Health at Boulevard East, and Alaris Health at Rochelle Park.

Union with requested information and that “the tactic was clearly calculated to prolong bargaining by ensuring that the Union would have insufficient time to analyze the information provided and, thus, be unable to commence meaningful bargaining at the first session.” (ALJD page 22, lines 30-37). Additionally, Judge Rosas found that Harborview 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 24, lines 13-15). Furthermore, Judge Rosas found that shortly before the September 2014 strike, Harborview’s Director of Nursing and Assistant Director of Nursing unlawfully threatened employees with job loss in violation of Section 8(a)(1) of the Act. (ALJD page 24, lines 20-40). Finally, Judge Rosas found that the September 2014 3-day strike engaged in by the Union was an unfair labor practice strike. (ALJD page 25, lines 26-47, page 26, lines 1-29). Harborview has not filed exceptions to any of these factual or legal conclusions.²

D. 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.³ 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 compared

² 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 1-18 of his Decision.

³ The Union and Alaris Health at Rochelle Park held a bargaining session at the same location earlier that day.

Alaris' proposals to the Union's proposals, and recapped what had transpired in bargaining at all four facilities. (Tr. 103-107).

After McCalla's contract status presentation, Massey discussed the status of the Union's unfair labor practice charges and indicated that an NLRB complaint would likely issue against Castle Hill and the other three Alaris facilities in September. Massey also told delegates that the Alaris charges against the Union were going to be dismissed, and that there was nothing else delaying the complaints 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, 116-119, 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 has 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). Delegates from all four Alaris facilities signed the resolution. (Tr. 898, GC-15). Denese Bowden, Cassandra Willis, and Rene Jordan signed this resolution on behalf of Harborview. (GC-15).

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, the Union delivered the 8(g) notice to Harborview administrator Kevin Woodard. The notice announced that the strike would start on September 16 and end on September 19. (GC-118).

E. Strike Begins on September 16 and Ends on September 19

The Harborview 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 Harborview and the night shift workers would join after the conclusion of their shift. (GC-28).

On September 16, approximately 25 Harborview employees walked out to join the picket line outside Harborview. The employees carried 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.” Employees wore 1199 T-shirts, played musical instruments and chanted Union slogans while picketing. (GC-19).

F. 8(a)(1) and 8(a)(3) Allegations

Harborview employed a different tactic than the other Alaris facilities to retaliate against its nursing department strikers. Instead of targeting Union delegates like in Castle Hill, Harborview refused to reinstate Ingrid Williams, a 23-year veteran CNA, and Kyria Miller, a part-time CNA who had the temerity to rebuff the Director of Nursing’s threats of termination during a group meeting. Harborview’s actions sent an unmistakable signal to unit employees that no Union supporter was immune from retaliation.

i. Ingrid Williams and Kyria Miller

Harborview refused to reinstate two nursing department CNAs at the conclusion of the September 2014 strike - Ingrid Williams and Kyria Miller. Williams started working at Harborview’s Jersey City, New Jersey facility in 1991. Throughout her entire career, she worked on the 4th floor on the 3pm to 11pm shift. (Tr. 1797). She participated in the September strike along with about 25 of her co-workers. During the strike, Williams picketed for about 9 hours each day carrying signs and placards provided to her by the Union. (Tr. 1798-1799). Kyria Miller started working at Harborview as a part-time CNA in October 2013. Miller worked as a floater on the 7 am to 3 pm shift. (Tr. 1837-1838).

ii. **Harborview's DON and ADON Threaten Employees With Job Loss If They Go on Strike**

Kyria Miller testified without contradiction that in the period leading up to the strike, head nurse Estephanie Bonocan directed all of the 4th floor CNAs into the lunch room (break room) for a brief meeting with Director of Nursing Gerry Mijares and Assistant Director of Nursing Mariae Lapus. DON Mijares then distributed a piece of paper to the CNAs and told them not to go on strike because they could lose their jobs. Mijares equated going on strike to neglecting Harborview's residents. Miller interrupted Mijares and said this wasn't true. Miller reminded Mijares that housekeeper Rene Jordan went on strike the last time and she was still working at Harborview. ADON Lapus then interjected that Mijares was telling the truth. Lapus begged Miller not to go on strike and not to listen to what others were saying because she would lose her job if she went on strike. (Tr. 1844-1849).⁴ As noted *infra*, Judge Rosas found Mijares and Lapus' threats to have violated Section 8(a)(1) of the Act.

iii. **Miller Participates in the Strike**

Miller had a scheduled day off on the first day of the strike, September 16. The next day, haunted by Mijares and Lapus' threats, Miller arrived at Harborview prepared to go to work. Union representative Christina Ozual spotted her and asked if she would be joining the picket line. Miller confessed that she didn't want to lose her job. Ozual assured her that she wouldn't lose her job and Miller joined the picketers that day. Miller picketed outside Harborview for about 8 hours that day and the next day. Miller also

⁴ Although Miller did not offer a specific date for this conversation, a review of the daily nursing schedules for September 2014 shows that Miller worked on the 4th floor and Bonocan, Mijares, and Lapus served in their respective positions on the following days: September 2, 4, 11, and 15. (GC-105, pages 33, 35, 42, and 46).

participated in strike activities at Castle Hill on the 2nd day of the strike. (Tr. 1841-1843, 1849).

iv. **Harborview Uses Four Temporary Agencies to Staff the Facility During the Strike**

Harborview used four different staffing agencies to provide replacement CNAs during the 3-day strike: Medistar Personnel, Inc. (“Medistar”), Tristate Rehab Staffing (“Tristate”), Towne Nursing Staff, Inc. (“Towne”), and Staff Blue. (Tr. 2268). Although Harborview presented contracts for Medistar, Tristate, and Towne, there was no contract between Staff Blue and Harborview for the provision of said services. Consequently, Staff Blue did not require that its personnel serve a minimum period of time either during or after the strike. The Medistar contract, which Alaris vice-president Linda Dooley signed on behalf of Harborview on August 20, 2014, makes no mention of the September 16-18 strike and also contains no minimum or specified period in which Harborview must retain any Medistar-referred CNAs. (R-106). The contract does, however, address (on page 2) the mechanics of how and when Medistar will refer CNAs to Harborview. Paragraph F states that “Subject to the limitations contained herein, AGENCY shall provide personnel upon the FACILITY’s request, with twenty-four (24) hours minimum notice prior to reporting time. Emergency requests may be placed by FACILITY at any time and AGENCY will use its best efforts to attempt to accommodate such requests. AGENCY will provide a minimum of six (6) hours prior notice for any shift cancellations. The FACILITY may cancel without penalty by providing at least two (2) hours advance notice, prior to shift.” Paragraph G states that “Assignments are made according to the Facility’s needs and the availability of AGENCY’S staff. The AGENCY shall notify the FACILITY of its ability to meet staffing requests within a

reasonable period following the requests and provide twenty-four (24) hours on-call service for the purpose of resolving scheduling issues in a timely manner.” Additionally, page 3 of the contract states that this is a 1-year contract, effective August 2014. (GC-106).

The Tristate contract executed by Harborview on September 10, 2014⁵ specifically addresses the upcoming strike. The contract states: “.Anything to the contrary in the agreement between the parties, the facility will utilize temporary staffing provided by Tristate Rehab for 4 weeks following the pending strike scheduled to end on September 19th Tristate will not replace any of its staff who may discontinue working at the facility.” (R-107). Like with Tristate, Harborview executed an addendum to its existing contract with Towne specifically addressing the 3-day strike in September 2014. This addendum states that: “In order to secure and guarantee staffing during the 3 day strike, the facilities will guarantee the following full time positions for agency staff in each facility as follows: Alaris at Harborview- 3 employees for 6 weeks. ” (R-11).

During the strike itself, Medistar supplied Harborview with two replacement CNAs- Alpa Patel (9/16, 9/17, and 9/18 on the 11pm to 7am shift) and Jesus Mendez (9/16, 9/17, and 9/18 on the 3 pm to 11 pm shift). (GC-136). Tristate supplied Harborview with eight employees during the strike- Maxseen Atkinson, Sakinah Bais, Gizel Flecha, Carrie Fuller, Farida Rekada, Joyce Smith, Cissy Talbott, and Janelle Wheeler. (GC-135). Towne supplied Harborview with four CNAs during the strike- Joy Bass (3 pm to 11 pm and 11 pm to 7 am shifts), Jessica Cardoza (7 am to 3 pm shift), Audrey-Ann Neblett (7 am to 3 pm and 3 pm to 11 pm shifts), and Nerlande Therlonge (11 pm to 7 am shift). (GC-134). Staff Blue provided eight CNAs to work at

⁵ Tristate signed the contract the next day, September 11, 2014.

Harborview during the strike- Cynthia Amuzie (7 am to 3 pm and 3 pm to 11 pm shifts), Tweyee Cooper (7 am to 3 pm shift), Natasha Gardner (7 am to 3 pm shift), Laurie Hendricks (3 pm to 11 pm shift), Angela Jones (7 am to 3 pm shift), Afua Menseh (11 pm to 7 am shift), Robinson Nanfack (7 am to 3 pm and 3 pm to 11 pm shifts), and Virginia Nguiaawe (3 pm to 11 pm shift). (GC-133).

v. **The Union Unconditionally Offers to Return to Work on September 19, 2014**

The Union's 10-day strike notice, which was hand-delivered, faxed, and mailed to Woodard on September 5, 2014, informed Harborview that the strike would begin on September 16, 2014 and end at 6:59 am on September 19, 2014. (GC-118). On the morning of Thursday, September 18 (Day 3 of the strike), Harborview attorney David Jasinski informed Union counsel William Massey via telephone that not all of the strikers at Harborview and the other three Alaris facilities would be allowed to return to work at the end of the strike. Jasinski said that more strikers would not be allowed back at Castle Hill relative to the other three facilities. Jasinski also told Massey that Harborview and the other three Alaris facilities entered into month long or 30-day contracts with outside agencies to provide CNAs during the strike. Massey questioned why Alaris 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 facilities, 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).

Later that day, Massey emailed Jasinski the following reminder: “. 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).

vi. **The Strike Ends and Harborview Refuses to Reinstate Miller and Williams**

On the morning of September 19, Miller reported to work in her uniform. About a dozen employees were gathered outside along with Union representative Christina Ozual and shop steward Romeo Rodriguez. (Tr. 1850). The facility’s security guard directed the employees into the dining room where they were greeted by administrator Kevin Woodard, ADON Mariae Lopus, and business office manager Jamie Lee. Woodard stated that if he called an employee’s name, the employee had to leave the building. Woodard called Miller and Williams’ names and Miller left the building to tell

Ozual what happened. (Tr. 1851-1853, 1874-1875). After Miller told her what had happened, Ozual asked Rodriguez who was not brought back. Rodriguez had forgotten and Ozual asked him to return to ask Woodard again. Union steward Rodriguez then went inside to get an explanation from Woodard. Woodard confirmed that Williams and Miller had been replaced and Rodriguez asked whether they were terminated, fired, or locked out. Woodard said that it was for the good of the facility and Rodriguez asked two more times whether Miller and Williams had been fired, terminated, or locked out. Woodard told Rodriguez to use any word he wanted and Rodriguez reported his findings to Ozual. (Tr. 1877-1878).

Because Williams was not scheduled to report to work until 3pm, she was not present when Woodard called her name on the morning of September 19th. Williams, however, received a phone call from a co-worker informing her that she was “locked out.” In response, Williams came to Harborview and spoke with Woodard herself. Williams testified without contradiction that just days shy of her 23rd anniversary at Harborview, Woodard informed her that she had been replaced and that if a position became available, he would let her know. Williams then left the facility. (Tr. 1804-1806).

On September 30, the Union organized an outdoor rally in Union City to support workers at Castle Hill, Harborview, Boulevard East, and Rochelle Park that Alaris was refusing to reinstate. English and Spanish-language print and television media covered this rally. In attendance were the locked out workers, their friends and family members, community supporters, as well as local politicians. Williams opened the rally with a 10-

minute prayer on behalf of her co-workers and fellow Union members. (GC-102, Tr. 1800-1804, 2129-2132).

vii. **Union Communications With Harborview Counsel Regarding Return to Work Offers**

After the strike concluded, strikers at four Alaris facilities were not allowed to immediately return to work. Union counsel William Massey and Harborview counsel David Jasinski⁶ agreed that striker return-to-work offers would be communicated through counsel.⁷ Jasinski would relay the offers to Massey, who would convey the offers to Union representative Christina Ozual, and Ozual would notify the impacted employee. Most reinstatement offers were communicated to Massey via email. For those offers communicated to Massey via telephone call, Massey confirmed the offer in a follow-up email to Jasinski. (Tr. 1968-1969).

viii. **Harborview Informs the Union that Williams and Miller Could Return to Work on October 15 and Then Woodard Turns Them Away When They Report for Work**

On October 10, 2014, Jasinski's administrative assistant sent Massey an email titled "On Behalf of David F. Jasinski, Esq. -re: Alaris Health at Harborview." The email said that "The following individuals at Alaris Health at Harborview will be offered positions to return to work on Wednesday, October 15, 2014: K. Miller and Ingrid Williams." (GC-119(a)). Massey informed Ozual of this email and Ozual in turn told Miller and Williams to report to work on October 15. (Tr. 1898-1899).

Miller reported for work on October 15, but saw that her name was not on the schedule. Miller waited for administrator Woodard to arrive and told steward Rodriguez

⁶ Jasinski is also labor counsel for Castle Hill, Boulevard East, and Rochelle Park. The same agreement applied to all four facilities.

⁷ Harborview administrator Kevin Woodard confirmed that return to work offers for the striking employees were supposed to go through counsel. (Tr. 2279).

about her situation. A short time later, Rodriguez and Miller spoke to Woodard by Woodard's first floor office suite. Rodriguez told Woodard that Miller was instructed to report for work that day, but her name was not on the schedule. Woodard confirmed that Miller was not on the schedule, said he did not know anything about her returning that day, and instructed Miller to leave the facility.⁸ According to both Miller and Rodriguez, Woodard kept repeating "NO-NO-NO." (Tr. 1854-1857, 1880-1881).

A few hours later, Massey emailed Jasinski to express frustration with Harborview turning Miller away that morning. Massey wrote: "In accordance with your email below, Kyria Miller reported for work at Harborview this morning at her regularly scheduled time. The Administrator told Ms. Miller that she was not on the schedule and that he had not been notified of her recall back to work. I trust you will communicate with your client and fix this situation, so that she can return to work forthwith. (We also expect the facility to pay Ms. Miller for today, as well as any other days missed going forward (hopefully there won't be any) while this situation is being fixed. Since we received your correspondence below on 10-10, Ms. Miller has relied on the offer and arranged her life accordingly, and we expect the Employer to keep its word. " (GC-119(b)).

Later that day, Williams attempted to return to work. Williams testified without contradiction that Woodard met her by the entrance door. Woodard said that nobody told him she was supposed to come back to work. He then directed Williams to leave. (Tr. 1808). Less than an hour later, Massey emailed Jasinski the following: "Following up on my email below and in accordance with your email below that, Ingrid Williams

⁸ Woodard confirmed that there was a call-out on the 7 am to 3 pm shift on October 15- CNA Duane Magtoto (3rd floor, assignment 5). Instead of using Miller, CNA H. Fortune was called in to cover Magtoto's shift. (GC-105, page 79, Tr. 2290).

reported for work this afternoon at Harborview for her regularly scheduled shift (3-11). As with Ms. Miller this morning (at Harborview), the Employer turned Ms. Williams away and did not allow her to work. What is going on here? It's bad enough to lock out these employees once, but now twice? As per below, please have the Employer(s) remedy this situation ASAP, and provide me with an update." (GC-119(c)). Jasinski did not respond to these emails. (Tr. 1974).

Two days later, Harborview allowed Miller to return to work. She returned to work on October 17, working the 4th floor on the 7 am to 3 pm shift. (GC 105, page 81).⁹ Since Williams had not been returned to work at the same time as Miller, Massey called Jasinski. Massey reiterated what he wrote in his October 15 emails that it was bad enough that Harborview prevented these employees from returning to work in September, but now it was preventing them from returning to work a second time. Jasinski said that the reinstatement offers were a "miscommunication" and callously offered that "at least we have Miller back." (Tr. 1975-1976).

ix. **Williams and the Union Receive No Communications from Harborview Until December**

After being turned away from Harborview in mid-October 2014, Williams did not hear back from Harborview until December 2014. In December, Williams' son was at Harborview and business office manager Jamie Cole (Lee) asked Williams' son to call his mother so that she could speak with her. Lee told Williams over the telephone that Harborview had sent her a letter and asked Williams if she had received it. Williams said

⁹ Miller submitted a letter of resignation the following week, citing the lockout as her reason for leaving Harborview. (R-103). Counsel for the General Counsel is not seeking Miller's reinstatement to her previous position. Instead, we are only seeking backpay owed to her from September 19, 2014 through October 17, 2014.

that she did not get any letters. Importantly, Lee did not tell Williams what the letter said.¹⁰

At the hearing, Harborview introduced a letter addressed to Williams and dated November 18, 2014. (R-109). Harborview did not show Williams this letter during her testimony and instead introduced the letter through Woodard. The letter itself does not indicate it was sent via certified mail and Woodard could not recall the letter being sent via certified mail. (R-109, 2279-2280). Although the letter reads “You were contacted via telephone and advised of a part time position available at Alaris Health at Harborview. .,” Woodard did not participate in the telephone call referenced in the letter and he could not identify who actually called Williams.¹¹ (Tr. 2282, 2291). As to why Harborview was offering Williams a part-time position when she was a full-time CNA, Woodard explained that the part-time position was offered to Williams when she didn’t respond to a supposed October 2014 offer of full-time work. Woodard did not elaborate as to who communicated this full-time offer to Williams in October or by what means this offer was communicated. (Tr. 2282-2283). The only October 2014 return-to-work offer regarding Williams was the October 10 email sent to Massey. Additionally, Massey did not hear from Jasinski regarding Williams in either November or December 2014. (Tr. 1976).

In his Decision, Judge Rosas correctly rejected Woodard’s testimony regarding any pre-March 2015 written correspondence. Judge Rosas wrote that “Harborview’s hearsay testimony about letters purportedly sent to Williams prior to a March 16, 2015 certified letter offering her the opportunity to reapply for a CNA position was completely

¹⁰ Lee did not testify at the hearing.

¹¹ None of the witnesses presented by Harborview testified to having called Williams.

unreliable. It is undisputed that Jasinski worked out an arrangement whereby any reinstatement offers were to be communicated by him to Massey. In Williams' case, that did not happen." (ALJD page 19, fn 64). Harborview did not file exceptions over this finding by Judge Rosas.

x. **Williams Receives a Certified Letter from Harborview in March 2015**

On March 16, 2015, Woodard sent Williams a letter via certified mail following up on Williams' December conversation with Jamie Lee. The letter read that " .you may re-apply for a certified nursing assistant position should you be interested in being employed by Alaris Health at Harbor View. " (GC-103). Upon receipt of this letter, Williams contacted Ozual, told her about the contents of the letter, and then faxed the letter to her. (Tr. 1808-1809, 1901). Ozual then forwarded a copy of the letter to Massey. (Tr. 1902, 1976-1977).

On March 20, Massey called Jasinski and reminded him of their agreement that reinstatement offers should be centralized through counsel to avoid miscommunication. Massey told Jasinski that if there was a position for Williams, he should get her back to work immediately. Jasinski said he would check with his client and get back to him. (Tr. 1977-1979). That same evening, Massey confirmed their discussion via email. Massey wrote that: "Following up on our conversation this evening, please allow me to reiterate that Harborview employee Ingrid Williams, who has not been allowed to return to work since the strike, has not received any verbal or written offers to return. Similarly, no employer rep has reached out to me or any other union rep re Ms. Williams. That said, as she has been since September 19, 2014, Williams is willing, able, and eager to return to work immediately. So please confer with your client over the weekend and let me know

when she can report back to her prior position. ” (GC-119(e), Tr. 1979). Ten days later, Massey followed up with Jasinski regarding Williams’ status, but he received no reply. (GC-119(e)). Harborview did not return Williams to work until May 19, 2015.¹² (GC-106, page 139, Tr. 1821).

xi. Only 1 Agency Employee Works at Harborview After the Strike Ends

Woodard and Jasinski testified that the only reason why Williams and Miller were not immediately reinstated at the end of the strike was because agency personnel had temporarily filled their positions. (Tr. 2194, 2266-2268). Woodard could not identify the name of the agency or the name of the agency employee that temporarily filled Williams’ position after the strike ended. (Tr. 2268). Woodard also conceded on cross-examination that there were no agency employees working the 3 pm to 11 pm shift on September 19, the day Williams attempted to return to work after the strike ended. (Tr. 2272). In fact, no agency employee worked the 3 pm to 11 pm shift after the strike ended. A review of Harborview’s post-strike daily schedules and the agency invoices reveals that only 1 out of the 22 agency employees remained at Harborview after the strike concluded. This lone agency straggler was Tristate’s Carrie Fuller, who only worked on the 7am to 3pm shift.¹³ (GC-105, pages 53-80, GC-133, GC-134, GC-135, GC-136).

¹² Adding insult to injury, Harborview moved Williams off of the 4th floor, where she had worked for the past 23 years. (Tr. 1811, 1817).

¹³ Fuller ended her agency tenure at Harborview on October 16. (GC-105, page 80). About 3 weeks later, Harborview hired Fuller as a full-time CNA on the 7 am to 3 pm shift. (GC-129(b)). Even though the Tristate contract specified that Harborview must pay Tristate a substantial fee (25% of the employee’s salary) if it hired one of the temporary workers within 180 days of the referral period, Woodard was not aware of such a fee being paid. (R-107, Tr. 2288).

The following chart shows the 3 pm-11 pm shift CNAs who worked at Harborview from September 20 through September 23, 2014. All of these CNAs were full-time or part-time CNAs before the strike:

September 20, 2014

3 rd Floor	Citation
S. Abdulai	GC-114 p 41
Y. De Jesus ¹⁴	QA CNA on 8/6/14 [GC-105 page 6]
F. Chaudry	GC-114 p 43
A. Alhassan	GC-114 p 43
T. Jatta	GC-114 p 47

4 th Floor	Citation
T. Nyamasege	GC-114 p 41
M. Delas Alas	GC-114 p 41
A. Kwaasi	GC-114 p 43
N. Torres	worked as CNA on 8/4/14 [GC-105 p 4]
K. Marks	GC-114 p 43

5 th Floor	Citation
T. Mathieu	GC-114 p 43
E. McFadden	GC-114 p 47
E. Moseti	worked as CNA on 8/1/14 [GC-105 p 1]
R. Parkinson	GC-114 p 41
E. Moton	GC-114 p 41

September 22, 2014

3 rd Floor	Citation
E. Casseus	GC-114 p 41
N. Obaigwa	GC-114 p 41
M.C. Sosa	GC-114 p 41
D. Spagnolo	GC-114 p 41
I. Ogata	GC-114 p 43

4 th Floor	Citation
A Alhassan	GC-114 p 43
N. Torres	GC-105 p 4
T. Nyamasege	GC-114 p 41
A. Marcadieu	GC-114 p 43
A. Rashad	GC-127 (hire date 9/9/14)

5 th Floor	Citation
M. Emerson	GC-114 p 41
L. Gaddi	GC-114 p 41
E. Moton	GC-114 p 41
E. Moseti	GC-105 p 1
J. Nyangau	GC-105 p 1

September 21

3 rd Floor	Citation
S. Abdulai	GC-114 p 41
E. Moseti	GC-105 p 1
T. Jatta	GC-114 p 47
F. Chaudry	GC-114 p 43
A. Alhassan	GC-114 p 43

4 th Floor	Citation
M. Delas Alas	GC-114 p 41
T. Nyamasege	GC-114 p 41
A. Kwaasi	GC-114 p 43
N. Torres	GC-105 p 4
A. Rashad	GC-127 (hire date 9/9/14)

5 th Floor	Citation
R. Parkinson	GC-114 p 41
T. Mathieu	GC-114 p 43
E. McFadden	GC-114 p 47
E. Moton	GC-114 p 41
K. Marks	GC-114 p 43

September 23

3 rd Floor	Citation
E. Casseus	GC-114 p 41
N. Obaigwa	GC-114 p 41
D. Spagnolo	GC-114 p 41
M.C. Sosa	GC-114 p 41
F. Chaudry	GC-114 p 43

4 th Floor	Citation
H. Fortune	GC-105 p 5 (11-7 shift)
M. Delas Alas	GC-114 p 41
T. Nyamasege	GC-114 p 41
A. Rashad	GC-127 (hire date 9/9/14)
K. Marks	GC-114 p 43

5 th Floor	Citation
M. Emerson	GC-114 p 41
L. Gaddi	GC-114 p 41
E. Moton	GC-114 p 41
R. Parkinson	GC-114 p 41
J. Nyangau	GC-105 p 1

¹⁴ De Jesus' name is crossed out on the schedule and D. Brown's name is inserted. Brown is listed on Harborview's August 7, 2014 nursing schedule. (GC-105, page 7).

xii. **Harborview Hires New CNAs in Early October 2014 While Refusing to Let Miller and Williams Return to Work**

In early October 2014, Harborview hired two new CNAs, Duane Magtoto and Mirna Sierra, to work the 7 am to 3 pm and 3 pm to 11 pm shifts. Both Magtoto and Sierra were hired on October 1 to work about 3 days a week. (GC-126, GC-128). A review of Harborview's daily schedules reveals that Magtoto and Sierra participated in orientation on October 1, 2, and 3. From October 6 through October 15 (the day when Williams and Miller reported back for work, but were turned away), Magtoto and Sierra worked as follows:

Duane Magtoto

October 7	7 am-3 pm	3 rd Floor Assignment 6 (late to work)	GC-105, page 71
October 9	7 am-3 pm	3 rd Floor Assignment 6 (late to work)	GC-105, page 73
October 10	7 am-3 pm	3 rd Floor Assignment 6 (late to work)	GC-105, page 74
October 11	7 am-3 pm	3 rd Floor Assignment 6	GC-105, page 75
October 14	7 am-3 pm	3 rd Floor Assignment 6 (late to work)	GC-105, page 78
October 15	7 am-3 pm	3 rd Floor Assignment 5 (call out)	GC-105, page 79

Mirna Sierra

October 6	3 pm-11 pm	4 th Floor Assignment 2	GC-105, page 70
October 9	3 pm-11 pm	3 rd Floor Assignment 1	GC-105, page 73
October 11	3 pm-11 pm	4 th Floor Assignment 2	GC-105, page 75
October 12	3 pm-11 pm	4 th Floor Assignment 2	GC-105, page 76
October 13	3 pm-11 pm	4 th Floor Assignment 5	GC-105, page 77

IV. ARGUMENT

POINT I. HARBORVIEW'S REFUSAL TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS AFTER THE UNION UNCONDITIONALLY OFFERED TO RETURN TO WORK VIOLATES SECTION 8(a)(3) OF THE ACT

Given Judge Rosas' uncontested finding that the Union engaged in an unfair labor practice strike, it then follows that Harborview had an obligation under the Act to immediately reinstate the strikers to their former positions upon their unconditional offer to return to work. It is undisputed that Harborview did not immediately reinstate unfair labor practice strikers and thus, Judge Rosas correctly found that its failure to do so constitutes an unfair labor practice. *Beverly Health and Rehabilitation Services, Inc.*, 335 635, 671 (2001); *Teledyne Still-Man*, 298 NLRB 982, 985 (1990); *American Gypsum Co.*, 285 NLRB 100 (1987).

POINT II. HARBORVIEW VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO REINSTATE INGRID WILLIAMS AND KYRIA MILLER AT THE CONCLUSION OF THE UNION'S 3-DAY STRIKE

An employer may hire permanent replacements for economic strikers. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-346 (1938); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). However, 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 at 985; *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. *Fleetwood Trailer Co.*, 389 U.S. at 378; *Laidlaw Corp.* 171 NLRB 1366, 1368 (1968); *Pacific Mutual Door Co.*, 278 NLRB 854, 856 fn.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). If an employer fails to establish such a “legitimate and substantial business justification” it violates Section 8(a)(3) and (1) of the Act, regardless of intent. *Fleetwood Trailer Co.*, 389 U.S. at 380; See also *Laidlaw Corp.*, 171 NLRB at 1368.

Exceptions 29, 31-34, 36-41: The Substantial Record Evidence Supports Judge Rosas’ Conclusion that Harborview Violated Section 8(a)(3) of the Act by Failing to Immediately Reinstatement Williams and Miller Because Harborview Has Failed to Establish a Substantial and Legitimate Justification for Refusing to Immediately Reinstatement Them and Because Minimum Stay Requirements Were Not Necessary for Harborview to Secure Temporary Help In Preparation for the Strike.

The overwhelming record evidence supports Judge Rosas’ findings and conclusions that Harborview violated Section 8(a)(3) of the Act by failing to immediately reinstate Ingrid Williams and Kyria Miller at the conclusion of the September 2014 strike. In this regard, Harborview has failed to establish a substantial and legitimate justification for refusing to immediately reinstate Williams and Miller and the record evidence establishes that the 4 and 6-week guarantees allegedly requiring the delay in Williams and Miller’s reinstatement were not necessary for Harborview to obtain strike coverage. Staff Blue provided 8 CNAs to Harborview during the strike. This was equal to the number of employees that Tristate provided during the strike and twice as many as

Towne provided. Yet unlike the other staffing companies, Staff Blue did not require a minimum length of stay beyond the 3-day strike period.¹⁵ And the August 20, 2014 Medistar contract, signed less than 4 weeks before the strike began, makes no mention of a minimum or specified post-strike window in which Medistar CNAs must work at Harborview. This contract simply requires 24-hours notice of the facility's staffing needs. If these two staffing agencies were willing and able to provide temporary employees to Harborview without the requirement of a minimum post-strike guarantee, Harborview has clearly failed to establish a substantial and legitimate justification for refusing to immediately reinstate Ingrid Williams and Kyria Miller at the conclusion of the strike.

Harborview also presented no record evidence chronicling its negotiations with the four temporary agencies. Judge Rosas properly noted that Linda Dooley, the Harborview agent who signed the staffing contracts, did not testify at the hearing and therefore, Harborview has not established how it reached agreement on the dollar amounts charged, the number of employees provided, and the length of stay for each temporary employee. Judge Rosas also properly rejected Jasinski's feeble testimony regarding the staffing contract negotiations when he did not participate in the negotiations, he had no basis to know how the parties arrived at the contract terms that were agreed upon, or why there was no written Staff Blue contract.

Furthermore, Harborview has not established that it was, at any time, under a binding commitment to pay for any post-strike services supposedly guaranteed under the Towne and Tristate contracts, but that were not provided. In this regard, the Towne

¹⁵ Staff Blue charged the same hourly rate as Towne (\$22/hour) and charged less per hour than Medistar (\$23/hour vs. \$22/hour) and still did not require a minimum post-strike period of employment for its referrals.

contract guaranteed the placement of 3 Towne employees at Harborview for 6 weeks after the strike. Yet of the 4 Towne employees who worked at Harborview during the strike (Bass, Cardoza, Neblett, and Therlonge), none worked there after the strike. No evidence was adduced showing that Harborview paid Towne for this supposedly “guaranteed” 6 weeks of work and no explanation was provided as to why the Towne employees stopped working at Harborview on the last day of the strike. Similarly, of the 8 CNAs Tristate referred to Harborview during the 3-day strike, only 1 CNA (Carrie Fuller) remained at Harborview after the strike ended. Harborview provided no explanation as to why the other 7 Tristate employees did not continue working there after the strike or why the 4-week supposed guarantee contained in the Tristate contract only applied to Fuller. It is hypocritical for Harborview to argue that it was obligated to keep Fuller for 4 weeks after the strike, thereby preventing Kyria Miller’s return, when Fuller’s 7 Tristate colleagues did not stay and Harborview cannot show that it was contractually obligated to pay for their 4 weeks of non-service. If Harborview cannot establish that it was obligated to use (and pay for) all of the temporary employees after the strike ended, it cannot establish it was obligated to use and pay for any of these employees post-strike.

Additionally, Harborview has not adduced any probative evidence showing that it was necessary to agree to these post-strike guarantee windows to obtain the required temporary services. In this regard, no official from Towne or Tristate testified and more importantly, Alaris vice-president Linda Dooley, who negotiated the above-referenced contracts on behalf of Harborview, also did not testify.¹⁶ Harborview also has not

¹⁶ An adverse inference should be drawn against Harborview for not calling Dooley to testify about the contract negotiations. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977).

established why it negotiated a 4-week post-strike guarantee for Tristate, but a longer window for Towne. Furthermore, there is no record evidence showing that Staff Blue could not have provided all of Harborview's strike replacement needs, obviating the need to delay striker reinstatements. Based on the above, Harborview has failed to prove that the post-strike guarantees were a necessary condition for getting the temporary employee coverage required during the 3-day strike. Thus, Harborview has failed to establish a substantial and legitimate justification for refusing to immediately reinstate Ingrid Williams and Kyria Miller at the conclusion of the September 2014 strike, and Harborview's Exceptions must be denied.

Exception 30: The Substantial Record Evidence Supports Judge Rosas correctly crediting William Massey's Testimony Confirming Jasinski Told Him that Harborview Entered Into Lengthy Contracts Because It Believed the Strike Would Be Longer Than 3 Days.

Substantial record evidence supports Judge Rosas' crediting of William Massey's version of the conversation he had with David Jasinski regarding Harborview's reason for entering into lengthy strike replacement contracts. On the last day of the strike, Harborview attorney David Jasinski informed Union counsel Massey that Harborview 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. When Massey questioned why Harborview 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. This statement is clear evidence of bad faith, tainting Harborview's reasoning for entering into such lengthy contracts with the staffing agencies, and Judge

Rosas correctly credited Massey's version of the conversation. As a seasoned 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, but Jasinski did not reply. Importantly, Jasinski did not deny that he made these statements to Massey when he testified regarding the strike. Therefore, Massey's testimony on this subject stands unrebutted. The longstanding Board policy is not to overrule credibility resolutions of an 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 *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, Judge Rosas properly credited Massey because Harborview had no good faith basis for believing that the Union might extend the 3-day strike and Harborview's Exception 30 must be denied.

Exceptions 36 and 37: Judge Rosas Correctly Concluded that Harborview's Refusal to Reinstatement Williams and Miller Violated Section 8(a)(3) of the Act.

Without a good faith basis for this belief, and with no probative record evidence showing that it was necessary to sign lengthy contracts with the staffing agencies to adequately staff its facility during the strike, Harborview has proffered pretextual reasons to justify its refusal to immediately reinstate its returning strikers. Based on the above, it can reasonably be concluded that Harborview only entered into

these lengthy contracts to punish union strikers and in doing so, Judge Rosas correctly concluded that Harborview's actions violated Section 8(a)(3) of the Act.

A. No Agency Employee Worked the 3pm-11pm Shift After the Strike Ended

Administrator Woodard and attorney Jasinski both testified that the only reason Ingrid Williams was not immediately reinstated at the conclusion of the September 2014 strike was because agency personnel had temporarily filled her position. Their testimony was untruthful, unsupported by the record, and is a pretextual justification for Harborview's unlawful acts.

Ingrid Williams worked the 3 pm to 11 pm shift for 23 consecutive years prior to the September 2014 strike. She fully participated in the 3-day strike, carrying signs and placards for 9 hours each day. At the end of the strike, Harborview decided to use Williams to send a clear, unmistakable message to other Union supporters- if Harborview could remove Williams, an exemplary 23-year employee, for supporting the strike, anybody who supported the strike was fair game for retribution.

The problem for Harborview is that its actions are wholly unsupported by the facts and law here. Woodard told Union shop steward Rodriguez, and then Williams herself, that she was replaced. But Woodard could not identify the name of the agency or a specific agency employee that filled her position after the strike ended. That is because Harborview never actually replaced her. Further cementing that its cover story was a sham, Woodard conceded on cross examination that no agency employee worked the 3 pm to 11 pm shift on the day the strike concluded. A review of Harborview's daily strike schedules for the next four days (September 20-23) also confirms that no agency employee worked the 3 pm to 11 pm shift at Harborview. Instead, all slots on all floors

were filled by full-time and part-time CNAs who worked at Harborview before the strike began. Therefore, the record evidence proves Harborview's sole explanation for failing to reinstate Ingrid Williams on September 19 to be a lie. Consequently, Harborview has violated Section 8(a)(3) of the Act by failing to immediately reinstate Williams after the September 2014 strike concluded.

While off work, Williams led a public rally in support of the locked out workers, which attracted local print and television media, and a bevy of local politicians. Williams' participation in this September 30 rally signaled her continued allegiance to the Union and Harborview responded by humiliating her. Less than two weeks later, Jasinski informed Massey that Williams could return to work on October 15.¹⁷ On October 15, Williams reported for work, but she was greeted by Woodard. Like what happened with Miller earlier in the day, Woodard refused to allow Williams to work and directed her to leave. Williams informed Ozual what happened and less than an hour later, a frustrated Massey emailed Jasinski saying that " .Ingrid Williams reported for work this afternoon at Harborview for her regularly scheduled shift (3-11). As with Ms. Miller this morning. .the Employer turned Ms. Williams away and did not allow her to work. What is going on here? It's bad enough to lock out these employees once, but now twice. " Jasinski cravenly did not respond to Massey's email.

Although Woodard testified that he didn't recall seeing Williams return to Harborview on October 15, the overwhelming documentary and testimonial evidence renders Woodard's version untrustworthy. (Tr. 2283). Harborview's counsel informed Massey via email that Williams could return to work on October 15. Williams did so and

¹⁷ Jasinski informed Massey of the return to work in accordance with the parties' agreement that return to work offers be centralized through counsel.

was turned away by Woodard. This version is corroborated by Massey's email later on the 15th that confirms Williams went to the facility and was turned away. Jasinski did not dispute this accounting, he just ignored it. Based on the above, Williams' testimony, supported by the corroborating emails, should be credited over Woodard's obfuscating denial.

Woodard refused to let Williams work on both September 19 and October 15, assertedly due to lack of work. In between these dates, however, Harborview hired a new CNA to perform work on the 3pm to 11pm shift. Mirna Sierra, who began her orientation on October 1, worked 5 full shifts in early to mid-October: October 6, 9, 11, 12, and 13.¹⁸ The fact that Harborview hired someone new, and put her to work on the 3pm to 11pm shift, while it refused to recall Williams, yields another reason to find that Harborview's proffered defense is pretextual and in violation of the Act.

The above evidence establishes that Harborview had no lawful reason to prevent Ingrid Williams from working on September 19 and October 15. But Harborview did not stop there. Instead of communicating through the parties' counsel, Woodard deviated from protocol and attempted to personally mail Williams a letter in November. Williams never received the letter, which references a telephone call that no witness testified to and an offer of a part-time position, which is not a legitimate return to work offer given Williams' pre-strike full-time status. Furthermore, Jasinski never mentioned this letter to Massey or any other union representative. Judge Rosas correctly discredited Woodard's testimony regarding these subjects.

When Harborview business office manager Jamie Lee inquired with Williams about the letter in December, Williams said she never received the letter and Lee did not

¹⁸ Woodard signed Sierra's new hire authorization form on October 2, 2014. (GC-126, page 1).

explain to her what was in the letter. Lee did not testify at the hearing and no representation was made as to her unavailability. Therefore, an adverse inference should be drawn against Harborview for its failure to call Lee, with the understanding that Lee would have corroborated Williams' testimony had she been called as a witness. *Martin Luther King, Sr., Nursing Center*, 231 NLRB at fn. 1.

For inexplicable reasons, Harborview continued to keep Williams off of work into 2015. In March 2015, Woodard sent her a certified letter instructing her to reapply if she wished to work at Harborview. Williams forwarded this letter to the Union and Massey immediately inquired with Jasinski regarding Williams' status. Massey twice followed up with Jasinski in writing reiterating Williams' desire to immediately return to work. Yet Harborview did not act on the Union's request for two months, postponing Williams' reinstatement until May 19, 2015, exactly 8 months after Harborview first refused to reinstate Williams. The above facts summarize Harborview's callous disregard for the Act and its obligation to timely reinstate Williams. Under any theory, be it that Williams was an economic or unfair labor practice striker, Harborview has woefully failed to establish a legitimate and substantial justification for refusing to immediately reinstate Williams, in violation of Section 8(a)(3) of the Act, and Harborview's Exceptions must be denied.

B. Harborview Also Violated the Act by Refusing to Immediately Reinststate Returning Striker Kyria Miller

Part-time CNA Kyria Miller had the temerity to stand up to Harborview's DON and ADON when they unlawfully threatened employees with termination for participating in the upcoming strike. In retaliation for taking this stand, Harborview refused to reinstate Miller at the conclusion of the strike.

In the weeks before the strike, DON Mijares and ADON Lapus called 4th floor CNAs into a meeting to address the strike. DON Mijares warned employees not to go on strike because they could lose their jobs. Miller interrupted and said that this wasn't true. Undeterred, Lapus asserted that Mijares was telling the truth and promised that she (Miller) would lose her job if she went on strike. These unlawful statements haunted Miller and almost prevented her from exercising her Section 7 right to strike. Miller did in fact participate in the last two days of the strike, picketing at both Harborview and Castle Hill.

Pursuant to the Union's unconditional offer to return to work, Miller reported for work on the morning of September 19. Woodard, however, told her that she had to leave the building. Steward Rodriguez confirmed from Woodard that Miller had been replaced. Lapus and Mijares had made good on their unlawful threats.

Woodard and Jasinski testified that the only reason why Miller was not returned to work on September 19 was the agency contracts Harborview had signed. In Miller's case, Harborview did have 1 agency employee working on the 7 am-3 pm shift (Miller's shift) after the strike. This employee, Carrie Fuller, came from Tristate, and she stayed until October 16. As discussed *infra*, Harborview has not established a substantial and legitimate justification for refusing to immediately reinstate Miller (and Williams) because its Staff Blue arrangement proved that it was not necessary to guarantee post-strike work for the staffing agencies to provide sufficient strike coverage. Additionally, 7 of Fuller's Tristate colleagues stopped working at Harborview at the conclusion of the strike with no record evidence reflecting that Harborview paid Tristate for their 4-week post-strike "commitment." If Harborview was not obligated to pay the 7 employees who

did not work beyond the strike, Harborview was certainly under no obligation to retain Fuller after the strike ended.

In addition to the above arguments, the record evidence makes clear that Harborview hired a new part-time CNA at the same time it was refusing to reinstate Miller. This evidence undercuts the legitimacy of Harborview's entire defense. This new part-time CNA, Duane Magtoto, was hired on October 1 by Kevin Woodard. He began his orientation that day and moved on to the regular schedule as of October 7. Magtoto worked on the 7am to 3pm shift on October 7, 9, 10, 11, and 14, arriving late to work on all but one of these days.¹⁹ For Harborview to assert that it could not reinstate Miller due to some sort of contractual commitment, yet at the same time hire a new CNA off the street to do the same work on the same shift as Miller, shows the infirmity of its defense and the lack of character of its witnesses.

But Harborview's insulting and unlawful behavior did not stop there. Like with Williams, Jasinski relayed to Massey via email that Miller could return to work on October 15. Miller reported for work but did not see her name on the schedule. She and Rodriguez waited for Woodard to arrive and then approached him. Rodriguez told Woodard that Miller was instructed to report for work that day but Woodard denied knowledge of this arrangement and confirmed that Miller was not on the schedule. Woodard then instructed Miller to leave the facility. Massey's email to Jasinski later that day confirms Miller and Rodriguez's account of what happened, and Judge Rosas correctly credited Rodriguez's version of events.

¹⁹ Woodard testified that the star next to an employee's name on the nursing schedule means the employee was late to work. (Tr. 2289-2290).

In his testimony, Woodard could not recall speaking to Miller or Rodriguez that day. (Tr. 2283-2284). His testimony is unworthy of credit. Miller and Rodriguez independently corroborated each other's testimony regarding their conversation with Woodard that day. Each testified that Woodard kept repeating "No, No, No" in response to their inquiries. Furthermore, Massey's email to Jasinski sent a few hours after Miller and Rodriguez's encounter with Woodard, adds a third corroborative layer to their testimony. Based on the above, it is clear that Rodriguez and Miller's detailed, specific testimony about their encounter with Woodard on October 15 was properly credited by Judge Rosas over Woodard's slithery denial.

Not only did Harborview refuse to allow Miller to work on October 15, but Duane Magtoto, who was scheduled to work that day, called out and had to be replaced by someone called in from home (H. Fortune). By inviting Miller back to work two days later, on October 17, Harborview certainly did not cure its unlawful acts from September 19 and October 15, or the unlawful threats communicated to Miller by Lapus and Mijares. Based on the above, the substantial record evidence makes clear that Harborview had no lawful reason to refuse to reinstate Kyria Miller at the conclusion of the September strike. Therefore, Judge Rosas correctly concluded that Harborview violated Section 8(a)(3) of the Act and Respondent's Exceptions 36 and 37 must be denied.

Exception 35: *Pacific Mutual Door and Roosevelt Memorial Medical Center are Clearly Distinguishable from the Facts of this Case.*

Harborview asserts that *Pacific Mutual Door Co.*, 278 NLRB 854 (1986) privileged its refusal to immediately recall strikers in the instant case. Harborview is

wrong and its Exception must be denied. In this regard, 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. Harborview 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 Harborview has not established that the 4 and 6-week post-strike guarantees contained in its temporary staffing contracts were necessary to staff its facility during the 3-day strike. In this regard, Harborview presented no record evidence chronicling its negotiations with the four temporary agencies it used during the strike (Staff Blue, Tristate, Towne, and Medistar). Thus, the record is bereft of probative evidence showing that it was necessary for Harborview to agree to these post-strike guarantee windows to obtain the required temporary services. No official from Staff Blue, 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 Harborview, also did not testify. 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 Harborview's strike replacement labor, obviating the need to delay

striker reinstatements. For all we know, Staff Blue did offer to staff the entire Harborview facility during the strike and Harborview 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 Harborview, and the record evidence reveals that Harborview has fallen woefully short in meeting its burden. Because Harborview has been unable to establish that the minimum post-strike guarantees were necessary to secure a replacement workforce, *Pacific Mutual Door* cannot be relied upon to justify Harborview's actions here. Based on the above, Harborview's Exception 35 must be denied.²⁰

Additionally, Harborview, 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, Harborview relies on *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006). Harborview'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

²⁰ Counsel for the General Counsel concedes that as it relates to Kyria Miller, Harborview's Exceptions 38 and 39 have some merit. Counsel for the General Counsel is not seeking Miller's reinstatement because she quit her position shortly after being returned to work in October 2014. Regarding Miller, the General Counsel is seeking a Board Order requiring that Harborview make her whole for her loss of earnings and benefits from September 19 through October 17. Regarding Williams, the General Counsel is seeking a Board Order requiring that Harborview make her whole for her loss of earnings and benefits from September 19, 2014 through May 19, 2015 (the date she was returned to her previous full-time position). Therefore, Harborview's Exception 40 must be denied.

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, Harborview held Ingrid Williams off of work for approximately 8 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 Harborview has failed to prove a substantial and legitimate justification for keeping Williams and Miller off of work. To this end, Staff Blue and Medistar's willingness to provide temporary staff to Harborview during the strike without requiring a minimum time commitment undercuts Harborview's contention that it had no choice but to agree to minimum commitments from TriState and Towne. Furthermore, the record evidence shows that Harborview did not employ any temporary staff on the 3pm to 11pm shift after the strike was over, making any attempt for Harborview to justify its refusal to reinstate Williams unconscionable. Additionally, Harborview hired two new CNAs off of the street to work the 1st and 2nd shifts at the same time that it was still refusing to reinstate Williams and Miller.

The final distinguishing characteristic between *Roosevelt* and this case is the anti-union animus readily apparent here. In this regard, Kyria Miller's DON and ADON threatened her with job loss if she participated in the strike. Judge Rosas correctly found this threat to violate the Act and no exceptions were filed to this unlawful threat. Therefore, this unlawful threat demonstrates clear anti-union animus on the part of Harborview. Based on the above, the facts here show that *Roosevelt* cannot be relied on to excuse or condone Harborview's unlawful refusal to recall Williams and Miller here,

and certainly cannot be used as a safe harbor for all nursing homes to delay reinstating their striking employees. Therefore, Harborview's Exception #35 must be rejected.

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, Harborview asserts that it had a five day grace period with which to return striking employees to work. Quite simply, there is no need for a five 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. Harborview received the 10-day notice on September 5 and was put on notice that the strike would conclude on September 19. Therefore, Harborview had the benefit of time to plan for a smooth transition from its replacement employees to reinstating its striking employees on September 19. Harborview did not need an extra 5 days to reset its operations and it certainly did not need the 4-6 weeks it used here. Therefore, this Exception must be denied.

V. CONCLUSION

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Harborview 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 Harborview to comply with any other remedies requested above and deemed appropriate.

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



Michael 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
Telephone: 862-229-7059

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 Harborview'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