

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALARIS HEALTH AT BOULEVARD EAST

and

Cases: 22-CA-125076
22-CA-131372
22-CA-140582

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 Boulevard East (Boulevard East) violated Section 8(a)(3) of the Act by failing and refusing to timely reinstate certain CNA and dietary department strikers at the conclusion of the September 2014 3-day strike. Judge Rosas correctly found that Boulevard East should have immediately reinstated these CNA strikers prior to the expiration of Boulevard East's contracts for replacement employees. The record evidence also clearly established that Boulevard East did not use any agency employees to replace its striking dietary employees, and Judge Rosas correctly concluded that Boulevard East's post-strike reduction of hours for these dietary employees was similarly unlawful. Additionally, Judge Rosas correctly refused to credit Boulevard East officials' testimony regarding the necessity of the four to six week windows for the temporary employee contracts given that it used a third staffing agency during the strike, Staff Blue, which did not require a multi-week minimum guarantee in order to meet staffing needs. Furthermore, the record evidence shows that Boulevard East hired new dietary department employees at the same time that it was refusing to reinstate its striking employees to their previous full-time positions.

II. STATEMENT OF FACTS

A. Background and Bargaining History

Boulevard East is engaged in the operation of a long-term care nursing facility in Guttenberg, New Jersey. Boulevard East's supervisory hierarchy at the time of the

September 2014 strike consisted of Administrator Robert Smolin, Director of Nursing Amanda Furio, and Dietary Director Maria Rodriguez. (GC-1(r)).

For over a decade, 1199 SEIU United Healthcare Workers East (“the Union”) and Boulevard East 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-201(r)). There are approximately 80 employees in the unit. (GC-204).

B. The Union and Boulevard East Bargain for A Successor Agreement

The existing collective bargaining agreement between the Union and Boulevard East expired on March 31, 2014 and negotiations for a new collective bargaining agreement began in March 2014. (GC-202). David F. Jasinski, Boulevard East’s labor counsel, acted as the chief negotiator for Boulevard East during the 2014 negotiations. (Tr. 2732). Negotiations occurred simultaneously at three other Alaris nursing home facilities and Jasinski was chief negotiator for all of those Alaris facilities as well.¹ Mendy Gold, a principal for Alaris, also represented Boulevard East at the bargaining table and attended most of the bargaining sessions. (Tr. 1427-1428). William Massey served as the Union’s Chief negotiator and Union representative Ron McCalla assisted him during the negotiations.

C. ALJ Rosas Findings and Conclusions

In his Decision dated February 18, 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, Boulevard East refused

¹ The other three Alaris facilities include Alaris Health At Castle Hill, Alaris Health At Harborview and Alaris Health At Rochelle Park.

to bargain in good faith in violation of Section 8(a)(5) of the Act. (ALJD page 24, lines 42-47). Next, Judge Rosas found that Boulevard East unlawfully delayed in furnishing the Union with requested information relevant to the parties' collective bargaining negotiations. (ALJD page 25, lines 1 through 10). Additionally, Judge Rosas found that Boulevard East 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 30-32). Furthermore, Judge Rosas found that Boulevard East 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 27, line 38 through page 29, line 8). Also, Judge Rosas found that Boulevard East violated Section 8(a)(1) of the Act by ordering dietary employees to remove pro-Union buttons from their uniforms. (ALJD page 29, line 10 through page 30, line 26). Judge Rosas also found that Boulevard East engaged in unlawful surveillance when its administrator photographed employees during the September 2014 strike. (ALJD page 30, lines 30 through 47). Finally, Judge Rosas found that the September 2014 3-day strike engaged in by the Union was an unfair labor practice strike. (ALJD page 31, line 1 through page 32, line 29). Boulevard East has not filed exceptions to any of these factual findings or legal conclusions.²

C. 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.³ Massey and McCalla led this meeting.

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 2-22 of his Decision.

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

Approximately 10 delegates attended this meeting in person and another 4-5 Castle Hill delegates participated in the meeting by conference call. Rosa Arias and Lovette Howard served as Boulevard East's delegates at this meeting. McCalla compared 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 practices charges and indicated that an NLRB complaint would likely issue against Castle Hill and the other three Alaris facilities 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 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, 116-121, 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). The Alaris delegates from Rochelle Park, Harborview and Boulevard East each signed the resolution. (GC-15, Tr. 898).

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 Smolin. The notice announced that the strike would start on September 17 and end on September 20. (GC-212).

D. Strike Begins on September 17 and Ends on September 20

The Boulevard East strike was scheduled to begin at 5:30 am on September 17. Two days 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 7:00am. 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 Boulevard East and the night shift workers would join after the conclusion of their shift. (GC-28).

On September 17, approximately 20-30 Boulevard East employees walked out to join the picket line outside Boulevard East. 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, GC-223, Tr. 2355-2356, 2431-2432, 2452-2456).

E. Boulevard East Refuses to Reinstate Employees After the Strike

i. The Union Engaged in a Three Day Strike, Unconditionally Offers to Return to Work on September 20, 2014, and Boulevard East Informs the Union that it Believes the Strike Will Last More Than 3 Days.

The Union's 10-day strike notice, which was hand-delivered, faxed, and mailed to Boulevard East on September 6, 2014, informed Boulevard East that the strike would begin on September 17, 2014 and end at 6:59 am on September 20, 2014. (GC-212). On the morning of Thursday, September 18 (Day 2 of the strike), Boulevard East attorney David Jasinski informed Union counsel William Massey via telephone that not all of the strikers at Boulevard East and the other three Alaris facilities would be allowed to return to work at the end of the strike. Jasinski also told Massey that Boulevard East 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).

ii. **Wallace Moreira is Locked Out for Three Days and Reduced to Part-Time**

Wallace Moreira worked in the kitchen at Boulevard East for 22 years. For the ten years before the strike, he worked as a full-time pot washer, filling the 10:30 a.m. to 6:30 p.m. slot and putting in 75 hours per two week pay period. (Tr. 2541).

a. Wallace Moreira's Union Activities Before and During the Strike

Moreira has been a Union shop steward for "many, many years." Moreira is also a member of the Union's contract bargaining committee, participating in the 2014 negotiations along with Lorena Aguilar and Vicki Nieves. (Tr. 2541-42). During the strike, Moreira was vocal and demonstrative on the picket line, walking up and down the street in front of Boulevard East while banging on a bucket. (GC-224-005, Tr. 2558).

b. Moreira's Return to Work After the Strike

The strike ended on Saturday, September 20 and Moreira's first scheduled day to work after the strike was Monday, September 22. When Moreira arrived at Boulevard East that Monday morning, he spoke to Maria Rodriguez about his schedule. Moreira testified without contradiction that she led him to Smolin's office where Rodriguez announced that Moreira's "full time hours were no longer available." (Tr. 2560-2561). Rodriguez explained that because he went on strike, somebody else has taken over his position. Rodriguez then informed him that the only job she had available was as a part-time dishwasher, working from 7:00 a.m. to 3:00 p.m. Moreira requested his full-time position back, but Rodriguez said that his old job was no longer available.⁴ Moreira accepted the part-time position, and began dishwashing duties three days later, on Thursday, September 25. (Tr. 2562-2563).

c. Jovanique Meneses Takes Moreira's Hours During the Strike and Jahirra Rodriguez and Ryan Hepperle Take His Pot Washing Hours After the Strike is Over.

The dietary department schedules reveal that there is only one 10:30 am to 6:30 pm assignment per day. Although the schedules do not say what job is performed during

⁴ When asked why Moreira did not get his 10:30 am to 6:30 pm pot washing job back after the strike ended, assistant dietary director Elliott Fernandez answered "I don't know." (Tr. 2849).

this shift, Moreira testified that the only job performed by dietary aides during this 10:30 am to 6:30 pm shift is pot washing, and that he had performed this job (with the same schedule) for the previous 10 years. (GC-215, Tr. 2564). During the September 2014 strike, Boulevard East assigned Moreira's pot washing duties to dietary aide Jovanique Menesses. (GC-233-012). Beginning the Monday after the strike (September 22), Boulevard East assigned Moreira's job to Jahirra Rodriguez. (GC-215B).⁵ Over the next month, Rodriguez performed the 10:30 am-6:30 pm pot washing job Monday through Thursday and every other weekend, while Ryan Hepperle performed this job on Fridays and every other weekend. Neither Rodriguez nor Hepperle went on strike.

Also, on two occasions, November 10 and 11, Jennie Martinez filled the 10:30 am to 6:30 pm pot washing slot.⁶ Since Moreira and Rodriguez were both working on November 11 and 12, it is unclear as to why Martinez worked these pot washing hours. (GC-215D).

d. Boulevard East Provides the General Counsel Incomplete Dietary Department Schedules

Pursuant to a trial subpoena duces tecum requesting dietary department schedules from August 1, 2014 through the date of the hearing, Boulevard East produced the schedules contained in GC Exhibit 215. The exhibit begins with a dietary schedule covering July 6 through July 19, 2014. (GC-215A). No schedules were produced for the remainder of July 2014, all of August, and the first half of September. The next schedule produced covered the days before the strike, the strike itself, and the week after the strike

⁵ Rodriguez's work record was far from stellar, both before and after she took over Moreira's pot washing hours. In late June 2014, Boulevard East terminated Rodriguez because she abandoned her post. (GC-232-003). It is unclear from the record when or why Rodriguez returned to work. On December 22, 2014, Rodriguez received a written warning for serving expired milk to residents. (GC-232-006).

⁶ Martinez was hired as a receptionist in early September 2014 and transferred to the dietary department on the first day of the strike. (GC-230-2).

ended (September 14 through September 27). (GC-215B). The next two week period was provided as well, but the dietary schedules then skipped to early November 2014.⁷

Boulevard East then produced two different schedules for the same period of time- November 9 through November 23.⁸ (GC-215D & E). Based on trial testimony and an examination of the names of employees listed on the schedules, it appears that GC-215E was the original draft of the schedule. In GC-215E, Maria Rodriguez is still listed as the supervisor, Paul Jaigua is listed as an active employee, and most importantly, Wallace Moreira, Lorena Aguilar, and Jahirra Rodriguez were scheduled for their pre-strike days and shift times.⁹ Therefore, GC-215D is the actual schedule that dietary department employees worked. This schedule reflects Moreira's reduction in days scheduled as well as his change to an exclusive 7:00 am to 3:00 pm job assignment. This schedule also shows that Jahirra Rodriguez was primarily, but not exclusively, assigned to the 10:30 am to 6:30 pm schedule.

e. Moreira's Hours are Reduced Significantly After the Strike

Moreira testified that after the strike, his job duties and shift times were changed and he went from full-time to part-time hours. Assistant dietary director Elliott Fernandez confirmed that after the strike, Moreira was brought back to work as a part-time dishwasher and pot washer. At that time, Moreira was only receiving about 30 hours per week. Now, Moreira is working about 9 days per pay period. (Tr. 2824, 2836, 2839, 2841).

⁷ Because Boulevard East refused to furnish any dietary schedules from mid-October through early November 2014, it is impossible to determine exactly how many shifts Ryan Hepperle worked as a pot washer from 10:30 am to 6:30 pm.

⁸ GC 215E lists the start of the schedule period as Sunday, November 10. A quick review of the 2014 calendar shows that Sunday fell on November 9th that year.

⁹ GC-215C indicates that Paul Jaigua resigned his position in early October 2014.

Because Boulevard East has failed to produce all of the relevant dietary department schedules, Boulevard East's payroll registers were examined to corroborate Moreira's assertions. The following chart shows the significant reduction of hours Moreira experienced post-strike in two distinct time periods: 9/14/14 through 1/17/15 and 3/29/15 through 8/01/15. (GC-223).¹⁰

Pay Period	Total Hours	Pay Period	Total
Hours			
09/14/14 – 09/27/14 ¹¹	29.98	03/29/15 – 04/11/15	65.05
09/28/14 – 10/11/14	44.78	04/12/15 – 04/25/15	67.73
10/12/14 – 10/25/14	37.5	04/26/15 – 05/09/15	60.41
10/26/14 – 11/08/14	52.48	05/10/15 – 05/23/15	60.23
11/09/14 – 11/22/14	52.5	05/24/15 – 06/06/15	48
11/23/14 – 12/06/14	52.5	06/07/15 – 06/20/15	31
12/07/14 – 12/20/14	39.87	06/21/15 – 07/04/15	15
12/21/14 – 01/03/15	44.98	07/05/15 – 07/18/15	59.62
01/04/15 – 01/17/15	45.2	07/19/15 – 08/01/15	67.78

f. Boulevard East Hires Reilly Perez to Perform Pot Washing Duties.

By December, Boulevard East had reduced Moreira's schedule to anywhere between 40 and 52.5 hours per pay period. (GC-223-10, 11, and 12). But this didn't stop new dietary director Elliott Fernandez from hiring Reilly Perez on December 23, 2014. Perez was offered 60 hours per pay period and was almost immediately assigned to pot washing duties on the 10:30 am to 6:30 pm shift. (GC-215G, GC-229).

g. Rodriguez Offers Moreira a Dietary Aide Position She Knows He Cannot Do.

After the strike, dietary director Maria Rodriguez twice offered Moreira a full-time dietary aide position. Moreira testified that the first time Rodriguez called him into her

¹⁰ Moreira was on vacation in February 2015 and parts of March 2015.

¹¹ Boulevard East hired Ana Rodriguez, a new dietary employee, on September 22. She worked there for 2 weeks and then resigned her position on October 9, 2014. (GC-227, GC-228-1).

office she said that a dietary aide position was available. In response, Moreira told Rodriguez that he was not refusing the position, but he was unable to perform the dietary aide job duties because he could not read well enough. Moreira told Rodriguez that he was not confident in his ability to read the tickets that identify what each patient could and could not eat, including potential food allergies or dietary restrictions (e.g. soft food, lactose intolerance, diabetic restrictions). As a pot washer, Moreira only took coffee or tea orders from written tickets. As a dietary aide, he would have to take residents' breakfast, lunch, and dinner orders. (Tr. 2865-2866). Moreira said that he was worried that he would make a mistake which could endanger the residents. (Tr. 2565-2666, 2837, 2861). Moreira offered uncontested testimony that Rodriguez was well aware of his difficulty reading and writing because she had, in the past, assisted Moreira in filling out incident reports and had completed other paperwork on his behalf. (Tr. 1566-1567).¹²

A short time later, Rodriguez again offered Moreira the same full-time dietary aide position. Moreira told her that he still could not accept the position. He again explained that his inability to read well enough left him unable to perform the essential functions of the job.¹³ Rodriguez then revealed an ugly (and unlawful) truth about Moreira's post-strike job status: "just remember that we fire[d] you [and] we rehired you back as part-time. " (Tr. 2567).

¹² During his direct examination of assistant dietary director Fernandez, Boulevard East counsel started asking Fernandez whether Moreira had ever raised concerns with him regarding his ability to read and write. Before the witness had a chance to respond, counsel withdrew the question and asked a much different one—whether Moreira had ever been disciplined for not being able to read or write English. (Tr. 2834).

¹³ On October 7, 2014, Jovanique Meneses accepted the position Moreira turned down. (GC-233 – 006). Just a few months later, Meneses received a written warning for failing to document on a food ticket a resident's dietary restriction. (GC-233 – 010). This is the primary reason why Moreira felt he could not safely perform the dietary aide position.

iii. Lorena Aguilar

Lorena Aguilar has been employed by Boulevard East as a full-time dietary aide since about October 25, 2012. During her tenure, Aguilar worked a steady schedule, from 11:30 a.m. to 7:30 p.m., with every other weekend off and Tuesdays off when she worked weekends. As a dietary aide, Aguilar is required to prepare patient food trays, do the “ticket menu for the patients,” and call “the line for the food.” (Tr. 2319).

a. Aguilar’s Pre-Strike and Strike Union Activities

Aguilar is a member of the Union’s contract negotiation committee, attending three negotiation sessions between Boulevard East and the Union in 2014. (Tr. 2320). In addition to her contract negotiation duties, Lorena Aguilar accompanied Christina Ozual to deliver the Union’s 10 day strike notice to Director of Nursing Amanda Furio. Upon receiving the notice, Furio said “you get what you deserve.” (GC-212, Tr. 2346).

During the strike, Aguilar walked the picket line outside Boulevard East all three days, carrying signs and making a lot of noise. She also attended the Union’s rally at Castle Hill on September 17th and picketed outside Rochelle Park. (Tr. 2354-2356).

b. Aguilar’s Return to Work After the Strike

Saturday, September 20, 2014 was Lorena Aguilar’s regularly scheduled day off. She, however, went to Boulevard East to find out if she would be allowed to work on her next regularly scheduled work day, Monday, September 22. Upon arrival, Aguilar was met by Director of Nursing Furio, Business Manager Lina Restrepo, Regina Figueroa, and Maria Rodriguez. Furio asked for Aguilar’s name, Aguilar identified herself, and Rodriguez confirmed that Aguilar worked for her. Aguilar testified without contradiction that Furio told her she was locked out. Aguilar asked why and Rodriguez replied that she had been replaced. Aguilar asked why she had been replaced and Rodriguez said she had

to do what she had to do.¹⁴ (Tr. 2358-2360). After being told that she was locked out, Aguilar saw co-worker Oswaida Torres, who informed Aguilar that she was replacing her. (Tr. 2361-2363).

On Monday, September 22, Aguilar returned to Boulevard East to meet with Union representatives and co-workers, intending to sign up for unemployment benefits. (Tr. 2363). Before heading to the Unemployment office, Aguilar waited for Wallace Moreira to see if he would be permitted to return to work. When Moreira emerged from the facility, Maria Rodriguez called Aguilar inside. Aguilar accompanied Rodriguez to Smolin's office where Aguilar was told that a dietary aide floater position was available because Moreira had turned it down. Aguilar asked Smolin if the position was full time and inquired as to the hours. Smolin said the position was the one formerly held by Jahirra Rodriguez, who was reassigned to Moreira's pot washing duties, and that it was full-time. Aguilar accepted the offer. (Tr. 2364-2366).

c. Boulevard East Subjects Lorena Aguilar to More Onerous Working Conditions.

Aguilar's new dietary aide floater position changed her steady pre-strike schedule to one that varied as to hours and days off.¹⁵ Before the strike Aguilar always worked from 11:30 am to 7:30 pm, with Tuesdays off one week and weekends off the other. In that regard, Aguilar said that she "never [had] to see [her] schedule, [she always knew]

¹⁴ When asked why Boulevard East replaced Aguilar at the end of the strike, assistant dietary director Elliott Fernandez testified "I don't know why." (Tr. 2852).

¹⁵ William Massey's September 23 email to David Jasinski summarized what transpired with Aguilar the day before: "I understand that about an hour after we spoke. . ., Palisades directly contacted replaced dietary worker Lorena Aguilar and offered her full-time work starting immediately/yesterday from 6-2 a.m. (To be precise, Palisades informed Ms. Aguilar that the available work is two days/week from 6-2 a.m. and three days/week from 11:30 a.m.-7:30 p.m.) Although this is not the same schedule she worked prior to the strike, Ms. Aguilar agreed to report to work immediately and promptly did so. .Please note that although Ms. Aguilar will work the offered hours, it is her strong preference and the Union's firm position that she must be reinstated to the position/schedule she worked prior to striking, namely from 11:30 a.m.-7:30 p.m. five days/week. ." (GC-222-2).

what day I'm off, what day I'm supposed to be working." After the strike, Aguilar was required to work different shifts, some days from 6:00 am until 2:00 pm and other days from 11:30 a.m. to 7:30 p.m.¹⁶ (Tr. 2366-2369). What's more, after the strike, Maria Rodriguez oftentimes changed Aguilar's schedule, sometimes requiring on short notice that Aguilar come into work at 6:00 a.m. even though she worked until 9:00 p.m. the night before. (Tr. 2370).

In addition to changing Aguilar's schedule, Boulevard East reassigned her away from duties she had come to enjoy. Before the strike, Aguilar worked independently, preparing food trays, inspecting patient menu tickets, distributing food trays for delivery to patients, and helping out whenever needed. (Tr. 2319, 2385-2386). After the strike, as a floater, she was required to work under the direct and immediate supervision of the cook, merely assisting in the cook's duties. (Tr. 2369). Such working conditions remained in place until about April 2015, when Aguilar became a cook. (Tr. 2385-2388).

d. Boulevard East Replaced Lorena Aguilar with Oswaida Torres and Jovanique Meneses

At the end of the strike, Aguilar's full-time steady dietary aide position was given to Oswaida Torres. On September 22, Rodriguez drafted an in-service memo memorializing Torres' promotion. The memo states that Torres would serve a 30-day probationary period in her new position and if Rodriguez determined that she was not picking up the new position quickly enough, she would be removed from the position and returned to part-time status. (GC-231-010).

¹⁶ It is Aguilar's uncontested testimony that the Boulevard East pre-strike schedules which show her working from 6:00 a.m. to 2:00 p.m. are incorrect because before the strike, she always worked the 11:30 a.m. to 7:30 p.m. shift. (Tr. 2412-2415).

Torres' pre-strike work record was far from stellar. On July 29, 2014, Torres received three write ups, all on the same day. The first discipline was a written warning for carelessness while washing dishes. The second write-up was a 3-day suspension for leaving the workplace without authorization, insubordination, and using profanity towards her supervisor. The final July 29 write up resulted in her termination. The Union, however, intervened on her behalf, resulting in her reinstatement to the job with a last chance agreement. (GC-231 – 002-006).

Torres' post-strike performance was similarly problematic. The very day after she assumed Aguilar's duties, Torres was suspended for violating the Employer's cell phone use policy. She followed this up by calling out on September 24th, 25th, 27th, and 28th. On October 6, Torres finally gave up, resigning the position formerly held by Aguilar. (GC-231-017).

When Torres resigned her position, Rodriguez was legally obligated to give this position back to Aguilar. She did not. Instead, Rodriguez gave it to her step-daughter, Jovanique Meneses. In a humiliating twist, Rodriguez called Torres, Meneses, and Aguilar to her office. Rodriguez told Aguilar that she was there as a witness and said that Torres no longer wanted to work the steady 11:30 to 7:30 dietary aide position. Rodriguez then announced that she was giving the position to Meneses. Torres asked Rodriguez why she did not give the position to Aguilar and Aguilar raised the same concerns. Rodriguez, however, refused to answer them.¹⁷ (GC-233-006, Tr. 2368-2369, 2856-2857).

¹⁷ Meneses resigned her employment on March 3, 2015. (GC-233-015). Boulevard East did not offer Aguilar her old position back when Meneses resigned.

iv. **Boulevard East Refuses to Immediately Reinstate 6 CNAs at the Conclusion of the Strike**

At the conclusion of the Union's 3-day strike, Boulevard East refused to immediately reinstate 6 CNA strikers. The following table identifies the name, shift, job assignment, and approximate return date for each of these strikers:

Name	Shift	Assignment	Return Date
Elizabeth Christie-Duran	3 pm-11 pm	Floater	October 15
Sandra Mejia	3 pm-11 pm	Front Nurse #2	September 21
Maria Goris	3 pm-11 pm	68 Nurse #1	September 28
Norma Diaz	7 am-3 pm	Floater	October 15
Erika Pena	7 am-3 pm	68 Nurse #3	October 15
Lovette Howard	7 am-3 pm	Floater	September 23

a. **Elizabeth Christie-Duran**

On November 11, 2012, Elizabeth Christie-Duran began working at Boulevard East as a certified nursing assistant. She worked as a floater on the 3 pm to 11 pm shift, covering other CNAs' regular assignments as needed.

i. **Christie-Duran's Protected, Concerted Activity**

In about early September 2014, Smolin and Furio held meetings with employees regarding the strike. Christie-Duran attended one of these meetings. Christie-Duran testified without contradiction that Smolin asked each of the employees present whether they were going to participate in the strike, and when it came to Christie-Duran's turn, she said yes. Smolin then told the employees that if they went on strike, they could lose their jobs. In response, Christie-Duran asked why they would lose their jobs if it was the employees' right under federal law to go on strike and then come back to work. (Tr. 2446-2448). Sandra Mejia corroborated this account in her testimony, stating that Christie-Duran told Smolin that what he was saying was illegal. (Tr. 2517). As for the strike itself,

Christie-Duran participated in all three days, picketing for two days at Boulevard East and for one day in front of Alaris Health at Castle Hill. (Tr. 2446, 2452).

ii. Christie-Duran's Attempt to Return to Work When the Strike Was Over

On Saturday, September 20, Christie-Duran went to Boulevard East seeking information regarding her return to work. She arrived there early in the morning, around 7:00 a.m., even though her normal starting time was 3:00 p.m. Upon her arrival, Christie-Duran learned that about 26 strikers had already been locked out from Boulevard East and the three other Alaris facilities. (Tr. 2456). After speaking with Union representatives Milly Silva and Christina Ozual, Christie-Duran went into Boulevard East alone and spoke with Furio, Restrepo and an unidentified female.¹⁸ Christie-Duran asked if she was on the schedule and the women said no, you are not on the schedule, you are not going to work, and we will call you. Christie-Duran asked the women "why am I not set to work when I was on the schedule to work?" The women told her to wait for their call and Christie-Duran exited the facility. (Tr. 2458-2459).

iii. Christie-Duran's Return to Work

After being locked out for almost a month, Christie-Duran received a phone call from Restrepo and Furio on October 14. They told her she could come back to work the next day. Christie-Duran asked them if her job duties, hours, and work schedule would be the same when she returned and the managers said that they would talk about it the next day. (Tr. 2462).

Christie-Duran arrived at Boulevard East on October 15 at about 2:30 p.m., 30 minutes before her start time. She went directly to Furio's office and Furio summoned Restrepo to translate. Christie-Duran testified without contradiction that Furio told her

¹⁸ Christie-Duran testified that she assumed that this woman worked in Alaris' corporate office.

she was going to work her normal 3:00 pm to 11:00 pm schedule and would resume her regular CNA floater duties. (GC-222-7, Tr. 2462-2463).

Prior to the strike, Christie Duran's workload consisted of an even number of total care and independent patients.¹⁹ Christie-Duran supplied un rebutted testimony that on her first day back after the strike, the Employer assigned her only total care patients. Christie-Duran complained to Furio about the lack of balance in her assignments but Furio refused to change them. (Tr. 2465-2466).

b. Norma Diaz

Norma Diaz began working as a Certified Nursing Assistant at Boulevard East in March 2012. Diaz labored on the 7:00 a.m. to 3:00 p.m. shift as a full-time floater, usually in the Bridge Way section of the facility. (Tr. 2524-25). Diaz participated in the strike all three days and, as a result, was locked out for three weeks. (Tr. 2529).

The day after the strike ended, Norma Diaz attempted to return to work. Diaz entered the facility with five other workers on the morning of September 20 and then encountered Furio, Restrepo, dietary director Rodriguez, and two Alaris corporate representatives. Diaz identified herself and said that she was ready to return to work on Monday as scheduled.²⁰ Diaz testified without contradiction that one of the Alaris corporate representatives told her that she was locked out. Diaz asked why she was locked out and the Alaris representative told her that Boulevard East had hired an agency worker to replace her for four weeks. (Tr. 2530-2531).

Four days later, Diaz received a phone call from Smolin. Diaz testified without contradiction that Smolin told her to apply for a position at another facility, Newport

¹⁹ Total care patients require assistance with all of life's basic functions- bathing, standing, sitting, and moving. This work is more arduous than caring for independent residents, who can perform many of these functions on their own. (Tr. 2465).

²⁰ The weekend after the strike was Diaz's regularly scheduled weekend off.

Nursing Center, or, alternatively, at a nursing home in Secaucus. Diaz asked Smolin why and he replied that if she declined his offer, she would have to wait until Boulevard East recalled her. Diaz asked Smolin how long she would have to wait and he said that her job had been taken by another person for four weeks. (Tr. 2531-2532). Diaz then asked Smolin why Boulevard East had hired an agency worker to take her job for four weeks when he knew that the strike was going to be three days. Smolin did not directly answer her question. He just said that the agency replacement worker had been hired for four weeks. (Tr. 2533).²¹

c. Sandra Mejia

Sandra Mejia works for Boulevard East as Certified Nursing Assistant on the 3:00 p.m. to 11:00 p.m. shift. Before the strike, she worked the permanent #2 assignment in the “Front Nurse” area of the facility. (Tr. 2515). Mejia was unable to participate in the strike because she had a pre-approved medical procedure on September 18. Mejia testified without contradiction that at a pre-strike meeting with Smolin and Furio, in response to Smolin’s inquiry, Mejia told Smolin that she did not know if she was participating in the strike because she had a surgical procedure scheduled for the first day of the strike. She reminded him that she had requested two days off to recover from the procedure and the third day of the strike was her regularly scheduled day off. (Tr. 2516-2520).

Mejia was, however, able to go to the picket line on the second day of the strike, and appeared in front of Boulevard East sometime between noon and 2:00 p.m. to support

²¹ On October 10, Jasinski emailed Massey that Norma Diaz, Erika Pena, and Elizabeth (Christie-Duran) could return to work on Wednesday, October 15. (GC-222-7).

her co-workers. That afternoon, Mejia witnessed Smolin taking pictures of strikers. (Tr. 2516-2520).

Mejia went to Boulevard East at about 12 pm on September 20. She asked the receptionist if she could speak with either Furio or Smolin. The receptionist instead called a male nurse named Chris. Chris told Mejia that she was not on the list of workers that were permitted to return to work because there was no work for her. (Tr. 2520-2521).

After learning that she was not going to be permitted to return to work, Mejia left the facility and walked across the street to the restaurant where workers were meeting with Union officials. Mejia informed Union attorney Massey that she was told there was no work for her because the Employer had hired a substitute. (Tr. 2521). Massey asked Mejia if she had participated in the strike and Mejia said that she had been approved for leave for an outpatient medical procedure for the first two days of the strike and was scheduled to be off on the third. (Tr. 2521-2522). Armed with this information, Massey reached out to Jasinski, briefly explained to him what had occurred in regard to Mejia, and told Jasinski that he thought that Boulevard East had “no right to replace her, lock her out, or in any way not allow her to return to work since she wasn’t technically on strike” (Tr. 2669). Massey testified that Jasinski called him back shortly thereafter and informed him that Mejia would be put back on the regular schedule the next day. (Tr. 2700). Massey, in keeping with his practice throughout this period, followed up with an e-mail to Jasinski confirming Mejia’s return to work. (GC-222, Tr. 2701).

According to the record testimony and Boulevard East’s nursing department schedules, Mejia returned to work on September 21. (GC-214-055). But on September 21, she was not assigned to her regular slot #2 in the “Front Nurse” section. Instead, Mejia filled Maria Goris’ assignment (68th Street, slot #1) when a Towne CNA was a no-

call no show. On September 21 and 22, Tristate CNA Elizabeth Graham worked Mejia's assignment. (GC-214-052 and 053). On September 23, Towne CNA Stacey Rone was assigned to work Mejia's assignment but again she was a no-call no-show. It is unclear from looking at the nursing schedules who, if anyone, replaced Rone on the 23rd (GC-214-054). The next day, Mejia returned to her permanent assignment.

Mejia also testified that prior to the strike, she worked 16 hours of overtime every other weekend.²² After the strike, Mejia went several consecutive months without receiving any overtime. (Tr. 2522-2523). A review of the CNA schedules in the record shows that Mejia did not work any extra weekends in the months of October, November, December 2014, or January, February, and March 2015. Only in April 2015 did Boulevard East resume assigning her extra weekend work that duplicated the overtime assignments she received before the strike. (GC-214).

d. Lovette Howard

Lovette Howard works at Boulevard East as a full-time floater on the 7:00 a.m. to 3:00 p.m. shift. (GC-208-17, GC-214). Howard is a Union delegate and, as such, participated in the 2014 collective bargaining negotiations between Boulevard East and the Union. (GC-221-5, GC-221-11). She also participated in the Union's August 27th strike resolution meeting, voting to authorize a strike at the Boulevard East facility. (GC-15). Howard participated in the strike, as evidenced by the interview she gave for Fios 1 news during the strike.²³ (GC-47, link #1. Fios1 Alaris Strike). Boulevard East expressly permitted her to return to work on September 23rd (GC-214-048-054, GC-222-2). To

²² Mejia was scheduled to work every other weekend. On her weekends off, she volunteered to work overtime. (Tr. 2522-2523).

²³ In this news segment, Howard was interviewed while picketing outside of Alaris Health at Castle Hill during the September 2014 strike. The Union also photographed her picketing outside of Boulevard East during the strike. (GC-224-002- holding a drum and stick on the far right side of the photograph).

this end, Massey sent Jasinski two emails on September 22 confirming Boulevard East's return to work offer for Howard and her return to work the next day. (GC-222-2).²⁴

e. **Maria Goris**

Maria Goris is employed by Boulevard East as a full-time CNA working on the 3:00 p.m. to 11:00 p.m. shift. Goris permanently works assignment 1 in the "68 Nurse" area, taking care of 10 patients. (GC-214, Tr. 2493). Goris went out on strike with the Union, walking the picket line with her co-workers on all three days. (Tr. 2500, 2503).

Goris testified that Boulevard East locked her out for four days. (Tr. 2504). Goris was not scheduled to work on the Saturday the strike ended and therefore, she first attempted to return to work on Monday, September 22. When Goris went to the facility at about 3:00 p.m. that day, she spoke to Furio. Goris testified without contradiction that Furio told her she no longer had hours for her, and when she had some hours, she would call her.

Four days later, Goris received a phone call from Smolin telling her that she could return to work the next day. (Tr. 2507). Goris' first day back was actually Sunday, September 28 and her first day back in her regular assignment #1 on the 3pm to 11pm shift was the next day, Monday, September 29. (GC-214-060). During the strike, Boulevard East replaced Goris with Angela Perez on 9/20, Sandra Mejia on 9/21, Tristate agency CNA Pricilla Thomas on 9/22, Amierose Sheffler²⁵ on 9/23, and Rosa Fernandez on both 9/26 and 9/27.²⁶ (GC-214-051-058).

²⁴ Jasinski testified that all of his written communications with Massey during this time dealt with the recall of striking employees from Boulevard East as well as the other three Alaris Health facilities. (Tr. 2802).

²⁵ Sheffler was hired on September 8, 2014, but she did not start working at Boulevard East until the first day of the strike, September 17 (3pm to 11pm shift). (GC 214-039 through 048, GC 241).

²⁶ Schedules identified in the record as GC 214 -057 and 058 are unintelligible in regard to the CNA that worked in the "68 Nurse" area, assignment #1.

f. Erika Pena

Erika Pena began working as a Certified Nursing Assistant for Boulevard East in December 2011. Pena worked full-time in the "68 Nurse" area, occupying assignment #3 on the 7:00 a.m. to 3:00 p.m. shift. (GC-214, Tr. 2427). Pena participated in the Union's strike on the first two days, September 17 and 18, walking the picket line with about 20 to 30 of her co-workers. (Tr. 2427-2428, 2431-2433, 2442-2443).

At the end of the strike, a co-worker called Pena and told her that she was "fired." In response, Pena called Union representative Christina Ozual to find out her job status. Pena testified that Ozual told her to go back to work on Tuesday, September 30, her next regularly scheduled day to work. (Tr. 2434). When Pena arrived at Boulevard East on September 30, she punched in and went to the nurse's station to retrieve her work schedule. Pena, however, did not see her name on the schedule. The nurse in charge told her that Smolin wanted to speak to her and she and Union representative Vicki Nieves waited for Smolin in his office. Pena testified without contradiction that when Smolin arrived, he told her that Boulevard East had found someone else to do her job. (Tr. 2435-2436). About two weeks later, Restrepo called Pena and told her that she could return to work on October 15. (Tr. 2437).

Between September 30 and October 14, Boulevard East used 8 different employees to fill Pena's "68 Nurse" assignment. Towne agency CNA Adeline Barthelemy filled Pena's position on 9/30, 10/4, 10/6, 10/9 and 10/13; Boulevard East part-time CNA Sara Campos replaced Pena on 10/1 and 10/14; Beatiz David stepped in for Pena on 10/2 and 10/12; Cecilia Gonzales on 10/3; Yadira Menia on 10/5; Marilyn Bocio on 10/7; Lovette Howard on 10/10; and Towne agency CNA Martine Joseph on 10/11. (GC-214 – 061-75).

v. **Boulevard East Uses Three Temporary Agencies to Staff the Facility During the Strike**

Boulevard East used three different staffing agencies to provide replacement CNAs during the 3-day September strike: Tristate Rehab Staffing (“Tristate”), Towne Nursing Staff, Inc. (“Towne”), and Staff Blue. (GC-233, 234, 226).

a. **Staff Blue**

There is no record evidence of a contract between Staff Blue and Boulevard East to provide CNAs to cover the September 2014 strike. Staff Blue, however, supplied 1 CNA to work at Boulevard East during the strike. This CNA, Virginia Nguiaawa, worked the 7am to 3pm shift and the 3 pm to 11 pm shift on September 19. (GC-226A).²⁷ Staff Blue also supplied 2 different CNAs to work at Boulevard East on the day the strike ended. These CNAs, Tweyee Cooper and Angela Jones, each worked the 7am to 3pm shift on September 20. (GC-226E & F). Jones worked this date even though she was supposed to be banned from all Alaris facilities. In this regard, Jones worked at Harborview on the first two days of the Harborview strike (September 16 and 17). (GC-226B). After Jones’ shift on the 17th, Alaris corporate officials contacted Staff Blue representatives to inform them that Jones was found behind closed doors with a friend watching television instead of working. This e-mail communication also noted that Jones’ background check revealed that she served prison time and had pending charges against her for child endangerment. Therefore, she was not allowed in any Alaris facility. (GC-225). Despite being blacklisted, Jones was still allowed to work at Boulevard East after the strike ended.

²⁷ Nguiaawa also worked at Harborview during the strike. (GC-226B)

b. Tristate

The Tristate contract executed by Boulevard East on September 10, 2014 specifically addressed 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 20th Tristate will not replace any of its staff who may discontinue working at the facility.” (R-205).

During the strike, Tristate provided the following 18 CNAs to work at Boulevard East: Sheryl Smack, Jennifer Rodriguez, Veronica Morocho, Yolanda Orellana, Karline Love, Jenita Drummond-Nelson, Zuri Severino, Carmen Soliman, Natasha Carruthers, Elizabeth Graham, Gloria Mejia, Angel Pastor, Yeritia King, Kaleena Jones, Priscilla Thomas, Aisha Rourk, Omwanda Ondande, and Deslyn Boyles. (GC-236, GC-237). Of these 18 CNAs, only 2 worked at Boulevard East after the strike ended- Elizabeth Graham and Priscilla Thomas.²⁸ Graham worked on the 3pm to 11pm shift from September 21 through October 14 with call-outs on October 4, 13, and 14. Initially, Graham filled Sandra Mejia’s Front Nurse, assignment 2 slot on September 21 and 22. Thereafter, Graham filled Christie-Duran’s floater role. (GC-214). Thomas worked post-strike on the 3pm-11pm shift from September 22 through September 25. (GC-214-053 through 056). During these days, she was a floater.²⁹

c. Towne

Like Tristate, Boulevard East executed an addendum to its existing contract with Towne specifically addressing the 3-day strike in September 2014. This addendum states

²⁸ Natasha Carruthers was scheduled to work on the 7 am to 3 pm shift on September 20 and 21, but she called out on each of these days. (GC-214-051 and 052). Angela Jones replaced Carruthers on September 20.

²⁹ It appears that Thomas’ name is crossed out on the September 23 schedule. (GC-214-054).

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 Boulevard East- 4 employees for 4 weeks. " (R-11).

During the strike, Towne provided 3 CNAs to work at Boulevard East: Adeline Barthelemy, Martine Joseph, and Stacey Rone. After the strike, Barthelemy and Joseph worked as floaters on the 7am to 3pm shift from September 22 until October 11. (GC-214, GC-234, GC-235). Rone was scheduled to work the 3pm to 11pm shift on September 20, 21, and 23, but she either called out or was a no-call no show on each of these days.

IV. ARGUMENT

EXCEPTIONS #17, 20, 23, 26, and 27 Regarding Moreira

POINT I: JUDGE ROSAS CORRECTLY FOUND THAT BOULEVARD EAST VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO REINSTATE WALACE MOREIRA TO HIS POT WASHING JOB AND BY REDUCING HIS HOURS AT THE CONCLUSION OF THE SEPTEMBER 2014 STRIKE

Judge Rosas found, and Boulevard East did not take exception to the finding, that the Boulevard East strikers were unfair labor practice strikers. Therefore, when the Union unconditionally offered to return to work at the conclusion of the strike, Boulevard East was obligated to immediately reinstate the strikers. By failing to do so, Boulevard East violated Section 8(a)(1) and (3) of the Act.

Even assuming *arguendo*, the strikers here were economic strikers, Boulevard East still violated the Act by refusing to immediately reinstatement them at the conclusion of the September 2014 strike. To this end, 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 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. *Fleetwood Trailer Co.*, 389 U.S. at 378; *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968). 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*, 389 U.S. at 380; See also *Laidlaw Corp.*, 171 NLRB at 1368.

The record evidence shows that Moreira went on strike, but Boulevard East did not permanently replace him during or after the strike. The Union unconditionally offered for Moreira and all employees to return to work on September 20. Therefore, Boulevard East was legally obligated to return Moreira to his pot washing position at the conclusion of the strike. Judge Rosas properly concluded that by refusing to do this, and by reducing Moreira's hours in the process, Boulevard East has violated Section 8(a)(3) of the Act.³⁰

1. No Agency Employees Worked in Dietary During the Strike

Boulevard East retained temporary agencies to staff its nursing department during the strike. These temporary agencies, however, did not provide replacement employees for the dietary department. Instead, Boulevard East gave extra hours to existing dietary

³⁰ It is unclear from Boulevard East's Exceptions as to whether it is taking Exceptions only to its refusal to immediately recall dietary employees Moreira and Aguilar after the strike, or whether it is also taking Exceptions to the finding that it also unlawfully reduced Moreira's hours after the strike and imposed more onerous working conditions on Aguilar. To the extent the reduction of hours and imposition of more onerous conditions Exceptions are being raised, we have responded in this Answering Brief.

workers to cover the hours of the three employees (Nieves, Moreira, and Aguilar) who went on strike. (GC-215B). Therefore, Boulevard East's contracts with Towne and Tristate are immaterial and cannot justify Boulevard East's refusal to offer Moreira his old job back at the conclusion of the strike.

2. Jovanique Meneses Worked Moreira's Hours During the Strike

During the September 2014 strike, Boulevard East gave Moreira's hours to Jovanique Meneses. Administrator Lesley Vodofsky confirmed this fact to Alaris vice-president Regina Figueroa in a 2015 e-mail: "We have a dietary employee Jovanique Meneses who was re-hired 7/3/14. Just to give you a little history she was the person given Wallace's hours. .during the strike. " (GC-233-012).

3. Maria Rodriguez Gives Moreira's Hours to Jahirra Rodriguez at the End of the Strike and Tells Moreira His Hours were No Longer Available Because He Went on Strike

At the end of the strike, dietary director Maria Rodriguez reassigned Moreira's pot washing hours from Meneses to Jahirra Rodriguez. Of course, neither Meneses nor Rodriguez went on strike. Rodriguez told Moreira that his full-time pot washing hours were no longer available because he went on strike and that all she could offer him was part-time hours.

These statements from Rodriguez mirror her pre-strike threats to Moreira and are clearly unlawful. Boulevard East knew of Moreira's Union and protected, strike activities (bargaining participant and long-time delegate), Rodriguez and administrator Robert Smolin repeatedly expressed animus towards these activities, and Rodriguez's own explanation for her reassignment and demotion of Moreira identify his strike activities as the impetus for her actions.

4. Boulevard East Has Failed to Establish That It Permanently Replaced Moreira

The record evidence clearly shows that Boulevard East failed to establish that it permanently replaced Moreira. In this regard, the only witness Boulevard East presented to testify on this subject, assistant dietary director Elliott Fernandez, testified that he did not know why Moreira was not given his pot washing job back at the conclusion of the strike. (Tr. 2849). Neither Smolin nor Maria Rodriguez testified at the hearing. Boulevard East counsel also did not make a representation as to their unavailability. Therefore, it is appropriate to draw an adverse inference against Boulevard East that Smolin and Rodriguez would have corroborated Moreira's account had they been called to testify. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977).

The record also contains zero documentary evidence showing that Jahirra Rodriguez permanently replaced Moreira. Nothing in Rodriguez's personnel file memorialized her transition to the pot washing position. Rodriguez did not sign anything indicating that she was aware of this change, nor was there an acknowledgement that this change was permanent. There was no internal change form in her personnel file addressing this subject. When Rodriguez's schedule changed earlier in the year, Maria Rodriguez generated a June 2014 memo documenting this change. (GC-232-002). Without paperwork showing that Rodriguez assumed Moreira's hours, and without either Maria Rodriguez or Jahirra Rodriguez's testimony in the record, Boulevard East has fallen woefully short in establishing a "mutual understanding between itself and the replacements that they are permanent." *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), *enfd. mem.* 812 F.2d 1443 (D.C. Cir. 1987).

The dietary schedules further reveal that although Jahirra Rodriguez primarily performed pot washing duties after the strike, she shared these duties with several other employees. Ryan Hepperle performed pot washing duties on Fridays and every other weekend. Jennie Martinez did pot washing on November 11 and 12, even though both Moreira and Rodriguez were working in the facility that day. And when Hepperle stopped working for Boulevard East in December, Reilly Perez was hired to fill many, if not all of the pot washing hours that Hepperle had worked. This post-strike, pot washing by committee approach shows that Jahirra Rodriguez did not permanently replace Moreira. Thus, Judge Rosas correctly concluded that Boulevard East violated the Act when it refused to reinstate Moreira to his full-time pot washing duties at the conclusion of the strike.

5. Judge Rosas Properly Found That Boulevard East Unlawfully Reduced Moreira's Hours at the Conclusion of the Strike

Prior to the strike, Moreira worked full-time hours (75 hours per pay period). At the conclusion of the strike, Maria Rodriguez told him that she only had part-time hours available because he went on strike. The following month, Rodriguez confessed that she fired him during the strike and rehired him back as a part-timer. (Tr. 2567). Such action led to Moreira losing significant hours of work. Beginning in September 2014 through January 2015, the most hours Moreira worked in a pay period was 52.5 hours. To this date, Moreira still has not been assigned 75 hours in a pay period. (GC-223).

Judge Rosas properly found that this reduction in hours is unlawful. The evidence cited *infra* established that Boulevard East did not permanently replace Moreira during the strike and was obligated to return him to his pre-strike assignment at the conclusion of the

strike. This meant returning Moreira to his full-time, 75 hours/pay period pot washing assignment. When Boulevard East refused to do this, it violated the Act.

Boulevard East's new administrator Lesley Vodofsky testified that Moreira complained about his lack of hours in December 2014 and January 2015, that as a result of these complaints, she and Elliott Fernandez gave Moreira more hours, but they could not give him any more hours because he only wanted to do pot washing. (Tr. 2869-2871). The record evidence belies much of Vodofsky's testimony. In this regard, Boulevard East's payroll register shows that Moreira received about 52.5 hours for each pay period in November 2014. The payroll register also shows that Moreira's hours actually went down to about 45 hours per pay period in early to mid-January 2015, the same time that Boulevard East asserts it was increasing his hours. (GC-223). The record further shows that Boulevard East did not give Moreira more pot washing hours because it hired a new employee, Reilly Perez, to perform this work. Fernandez and Vodofsky signed off on Perez's appointment on December 23, 2014. The next pay period, Fernandez assigned Perez to pot washing duties (10:30 am to 6:30 pm) on January 9 and January 13, days in which Moreira was not given any hours. (GC-215G).³¹ Even assuming *arguendo* that Moreira only wanted to do pot washing, Boulevard East cannot illegally reduce his hours and then hire a new employee to do that same work as a later justification for refusing to increase his hours.

In addition, Boulevard East would have us believe that Moreira himself initiated the change to part-time status. Vodofsky testified that Moreira told her that he had a discussion with the previous food service director and he consented to his switch to part-

³¹ A more detailed examination of the dietary department schedules is impossible because Boulevard East has refused to furnish many of the schedules for this time period. For example, there are no December 2014 schedules in the record. Therefore, our analysis of Perez's job assignments can only begin on January 4, 2015.

time status. (Tr. 2874). Although not specifically addressed in Judge Rosas' credibility findings, this testimony is absurd and cannot be credited. Moreira worked full-time hours as a pot washer for 10 years. Right before the strike, his immediate supervisor threatened him with termination if he went on strike, and Smolin threatened him with unspecified changes if he went on strike. Had Moreira not participated in the strike, he would not have lost his long-time position and his hours would not have been severely cut. (Tr. 2870). Boulevard East's retaliation was cruel, swift, and unlawful, and Judge Rosas properly found that this retaliation violated the Act.

6. Moreira Declined Boulevard East's Offers of a Full-time Dietary Aide Position Because He Was Unable to Perform the Job

At the conclusion of the strike, Boulevard East was legally obligated to reinstate Moreira to his longstanding pot washing assignment. It failed to do so. Instead, Rodriguez offered Moreira a dietary aide position- one that Rodriguez knew Moreira could not do because he could not read or write well enough. In his pot washing capacity, the only reading that Moreira had to do was to see whether residents wanted coffee or tea. As a dietary aide, employees were expected to take breakfast, lunch, and dinner orders and account for residents' dietary and medical restrictions. Moreira expressed his concerns about potentially harming a resident (if he misread a meal ticket) when he told Rodriguez that he was unable to perform the core duties of the dietary aide position. Although Boulevard East is trying to portray Moreira as intractable because he allegedly only wants to be assigned pot washing duties, this mischaracterizes Moreira's attitude. In confessing his difficulty reading and writing, Moreira was acting selflessly and credibly indicated that he would rather see his hours reduced than potentially harm one of the residents. Moreira's accounting of his conversations with Rodriguez on these subjects is unrebutted

and inherently credible. Therefore, Boulevard East cannot establish that it extended Moreira bona fide offers of full-time post-strike employment.³²

EXCEPTIONS #17, 20, 23, 26, and 27 Regarding Aguilar

POINT II. SUBSTANTIAL RECORD EVIDENCE SUPPORTS JUDGE ROSAS' FINDINGS THAT BOULEVARD EAST VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO REINSTATE LORENA AGUILAR AT THE CONCLUSION OF THE STRIKE AND CHANGING HER WORK DUTIES AND HOURS AFTER THE STRIKE

Starting in June 2014, and continuing through September, dietary supervisor Maria Rodriguez threatened Lorena Aguilar that she would be fired or replaced if she went on strike. Boulevard East administrator Robert Smolin also threatened employees, including Aguilar, that there would be unspecified changes in the facility if they went on strike. Aguilar went on strike and Boulevard East followed through on its unlawful threats. Thus, Judge Rosas properly concluded that at the end of the strike, Boulevard East violated the Act by replacing Aguilar and by giving her job to other employees.

1. Boulevard East's Replacement of Aguilar Was Unlawfully Motivated

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

³² Judge Rosas deferred these issues to the compliance stage but there is substantial record evidence supporting the General Counsel's position that Boulevard East knew that Moreira could not perform the jobs he was offered post-strike.

replacements was motivated by a purpose prohibited by the Act. *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 6 (May 31, 2016). A *Wright Line* analysis is applied. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *West Maui Resorts Partners d/b/a Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co., Inc.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (“When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual the fact finder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal--an unlawful motive ”).

There is ample proof in the record demonstrating Boulevard East’s animus towards the Union and Judge Rosas found the following events to violate Section 8(a)(1) of the Act. Shortly after the Union’s informational picketing in spring 2014, Maria Rodriguez told a group of dietary employees, including Aguilar, that they would be fired if they went on strike. Rodriguez renewed this threat against Aguilar in September. Rodriguez inquired whether Aguilar was going to participate in the strike and when Aguilar said yes, Rodriguez told her that she would be fired and that she would do what she had to do. Around this same time, Smolin told a group of employees, including Aguilar, that there were going to be a lot of changes at Boulevard East if the employees went on strike.

Aguilar was a ripe target for retaliation due to her open and vocal support for the Union. Aguilar served on the Union’s bargaining committee and personally served the

Director of Nursing with the Union's 10-day strike notice. Upon receipt of this notice, DON Amanda Furio told Aguilar that she would get what she deserved. About two weeks later, Furio herself informed Aguilar that she was locked out and replaced. The nexus between Aguilar's protected strike activities and Boulevard East's retaliation against her could not be any clearer.

The evidence of pretext here is also abundant. There was no need to permanently replace Aguilar because the Union called a limited duration strike. And Boulevard East's decision to promote Oswaida Torres to Aguilar's full-time position makes no sense given Torres' checkered disciplinary record. Just six weeks earlier, Torres had received a written warning, 3-day suspension, and termination notice all in the same day. Even though Torres' termination was rescinded on August 7, her suspension stood and she was placed on a last chance agreement. Therefore, Boulevard East's selection of Torres, a poorly performing employee, to replace Aguilar, who enjoyed a sterling work record, smacks of bad faith and pretext.

2. Boulevard East Unlawfully Failed to Return Aguilar to Her Previous Position When Torres Resigned in Early October

Boulevard East has failed to establish that it permanently replaced Aguilar. Economic strikers remain employees under Section 2(3) of the Act and are entitled to reinstatement to fill positions left by the departure of permanent replacements, and to be put on a preferential hiring list if no open positions exist. *Tri-State Wholesale Building Supplies, Inc.*, 362 NLRB No. 85 (2015); *Laidlaw Corp.*, 171 NLRB 1366 (1968). Oswaida Torres assumed Aguilar's 11:30 am to 7:30 pm dietary aide position on September 22. Almost immediately, Boulevard East suspended her for violating the

facility's cell phone policy. Torres then called out on September 24, 25, 27, and 28. The following week, Torres resigned her full-time dietary aide position.

When Torres resigned her position, Boulevard East was legally obligated to return Aguilar to her pre-strike assignment. Boulevard East refused to do so. Instead, Maria Rodriguez handed Torres' position to her step-daughter, Jovanique Meneses. Aguilar and Torres questioned Rodriguez as to why she was doing this, but Rodriguez refused to answer. Neither Torres nor Meneses testified at the hearing. And since Rodriguez did not testify either, Judge Rosas properly credited Aguilar's detailed, unrebutted accounting of this conversation. Consequently, there is substantial record evidence to support Judge Rosas' conclusion that Boulevard East violated Section 8(a)(3) of the Act when it refused to reinstate Aguilar to her pre-strike position. See *LB & B Associates, Inc.*, 346 NLRB 1025, 1031-1032 (2006)(employer violated Section 8(a)(3) of the Act by failing to recall a striker to her pre-strike chef position when this chef position became vacant after the strike and the employer instead chose to promote an active food service worker over the striker).

3. Judge Rosas Also Correctly Determined That Boulevard East Violated Section 8(a)(3) of the Act By Imposing More Onerous Working Conditions on Aguilar

Shortly before the strike, administrator Robert Smolin threatened Aguilar that there would be unspecified changes if employees went on strike. Notwithstanding this threat, Aguilar went on strike and unconditionally offered to return to work at the conclusion of the strike, but DON Furio and dietary director Rodriguez informed her that she was replaced. Two days later, Rodriguez offered Aguilar a different dietary position, one that changed her consistent 11:30 am to 7:30 pm schedule to a more variable one.

Judge Rosas properly found that by changing her schedule, Boulevard East imposed more onerous conditions on Aguilar.

After the strike, and continuing through April 2015, Aguilar endured two significant changes to her work hours. First, she was assigned to work two days a week from 6:00 am to 2:00 pm. Second, the dietary director oftentimes changed Aguilar's schedule on short notice, requiring her to come in at 6:00 am even though her previous shift ended at 9:00 pm. Aguilar testified credibly and without contradiction regarding these post-strike changes. Elliott Fernandez and Lesley Vodofsky did not address this subject in their testimony and Rodriguez did not testify at all. Smolin's threat of changes became a reality for Aguilar. The only reason why she experienced these changes was because she joined the strike. By crafting a post-strike schedule riddled with vicissitudes and representing a significant departure from her consistent, pre-strike schedule, Judge Rosas correctly found that Boulevard East imposed more onerous working conditions on Aguilar in violation of the Act.

EXCEPTIONS # 15-28

POINT III. JUDGE ROSAS CORRECTLY CONCLUDED THAT BOULEVARD EAST VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE 6 CNA STRIKERS AT THE CONCLUSION OF THE STRIKE

All Boulevard East strikers unconditionally offered to return to work at the conclusion of the Union's 3-day strike. Despite this offer, Boulevard East kept 6 CNA strikers off work for up to 4 weeks after the strike ended. Because Boulevard East did not have a substantial and legitimate justification for doing so, this conduct violated Section 8(a)(3) of the Act.

1. The 6 CNA Strikers Were Unfair Labor Practice Strikers

As discussed *infra*, Judge Rosas determined that the Boulevard East strikers were unfair labor practice strikers and Boulevard East has not filed exceptions to this finding. Therefore, when the Union unconditionally offered to return to work at the conclusion of the strike, Boulevard East was obligated to immediately reinstate these strikers. Judge Rosas correctly found that by failing to do so, Boulevard East violated Section 8(a)(1) and (3) of the Act.

2. There is No Need for a 5-Day Drug Package 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 and an orderly transition.

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 d/b/a Sutter Roseville Medical 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 at this, as well as other Alaris Health facilities. Boulevard East received the 10-day notice on September 6 and was put on notice that the strike would conclude on September 20. Therefore, Boulevard East had the benefit of time to plan for a smooth transition from its replacement employees to reinstating its striking employees on September 20. Indeed, Boulevard East reinstated most of the returning strikers on September 20 without a hitch. Boulevard East did not need an extra 5 days to reset its operations and it certainly did not need the 4-6 weeks it used here.

3. Assuming *Arguendo* That This was an Economic Strike, Boulevard East's Contracts with the Temporary Staffing Agencies Do Not Constitute a Substantial and Legitimate Justification For Delaying the Reinstatement of the Returning Strikers

In *Pacific Mutual Door Co.*, the Board found that an employer lawfully delayed reinstating strikers for 30 days pursuant to a contract with a company providing strike replacements where a 30-day cancellation provision was a necessary condition of the employer getting temporary employees from the referring company. 278 NLRB 854, 856 fn.12 (1986). But 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. Boulevard East knew when it entered into the 4-week contracts with Tristate

and Towne that the lengths of these contracts exceeded the duration of the strike by nine-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 Boulevard East has not established that the 4-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, Boulevard East presented no record evidence chronicling its negotiations with the three temporary agencies it used during the strike (Tristate, Towne, and Staff Blue). Thus, the record is bereft of probative evidence showing that it was necessary for Boulevard East to agree to these post-strike guarantee windows to obtain the required temporary services. No official from Towne, Tristate, or Staff Blue testified at the hearing and more importantly, Alaris vice-president Linda Dooley, who negotiated and signed the above-referenced contracts on behalf of Boulevard East, also did not testify.³³ Without this testimony, and without any documentary evidence providing insight into the negotiations, Boulevard East has not established why the Tristate and Towne contracts were for 4 weeks, but the Towne contract with other Alaris Health facilities (e.g. Castle Hill) was for 6 weeks. Also, there is no record explanation as to why Staff Blue, which provided temporary labor to both 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 Boulevard East's strike replacement labor, obviating the need to delay striker reinstatements. For all we know, Staff Blue did offer to staff the entire Boulevard East facility during the strike and Boulevard East rejected this offer simply so it could punish as many strikers as possible. The burden of proving that

³³ Regina Figueroa testified that she reports to Linda Dooley and Boulevard East presented no evidence demonstrating that Dooley was unavailable during the lengthy hearing. (Tr. 1368). Therefore, an adverse inference should be drawn against Boulevard East for refusing to call Dooley. *Martin Luther King, Sr., Nursing Ctr.*, 231 NLRB 15.

the post-strike replacement contracts were necessary falls squarely on Boulevard East, and the record evidence reveals that Boulevard East has fallen woefully short in meeting its burden. Therefore, Judge Rosas correctly found that Boulevard East violated Section 8(a)(3) of the Act when it refused to immediately reinstate 6 of its returning CNA strikers at the conclusion of the September strike.

Boulevard East 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 the Towne and Tristate contracts, but that were not provided. In this regard, the Towne contract guaranteed the placement of 4 employees at Boulevard East for 4 weeks after the strike. Despite this guarantee, only 3 Towne agency employees were assigned to work at Boulevard East during the strike, and 1 of these 3 did not work at Boulevard East after the strike ended (Stacy Rone).³⁴ No evidence was adduced showing that Boulevard East paid Towne for the supposedly guaranteed 4th employee who did not actually work at Boulevard East either during or after the strike.

Of the 18 CNAs Tristate referred to Boulevard East during the strike, only 2 remained to work at Boulevard East after the strike ended (Graham and Thomas). Boulevard East provided no explanation as to why 16 of their temporary CNAs stopped working at Boulevard East when the strike ended or why the parties did not honor their contractual provision supposedly guaranteeing 4 weeks of work. If Boulevard East 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.

³⁴ Rone was scheduled to work the 3pm to 11pm shift on September 20, 21, and 23, but she either called out or was a no-call, no show on each of these days.

4. Boulevard East Possessed No Reasonable Basis to Believe That the Strike Would Extend Beyond 3 Days

On the second day of the Boulevard East strike, Boulevard East attorney David Jasinski informed Union counsel William Massey that Boulevard East and the other 3 Alaris Health 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 Boulevard East 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 Boulevard East'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, Judge Rosas properly credited Massey's testimony on this subject and Boulevard East had no good faith basis for believing that the Union might extend the 3-day strike. 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, Boulevard East has proffered pretextual

reasons to justify its refusal to immediately reinstate 6 of its returning CNA strikers.

Based on the above, it can reasonably be concluded that Boulevard East only entered into these lengthy contracts to punish union strikers, and in doing so, Judge Rosas correctly found that Boulevard East violated Section 8(a)(3) of the Act.

5. Additional Evidence of Pretext is Found in Boulevard East's Treatment of Erika Pena

Boulevard East asserts that returning strikers were kept off of work due to agency commitments. But a review of the record evidence shows that Boulevard East's defense is a sham. Day shift CNA Erika Pena illustrates this point. Pena regularly worked assignment 3 of the "68 Nurse" wing on the 7 am to 3 pm shift. She participated in the strike and attempted to return to work on her next regularly scheduled day of work, September 30.³⁵ On the 30th, Smolin told her that Boulevard East had found someone else to do her job. As it turns out, that "someone else" was actually 8 different employees. Towne CNA Adeline Barthelemy filled Pena's assignment on 5, non-consecutive days, part-time CNAs Sara Campos and Beatiz David each substituted for Pena on 2 non-consecutive days, and five other employees (including Towne CNA Martine Joseph and returning striker Lovette Howard) each worked 1 day in Pena's assignment. This evidence shows that Boulevard East's defense that it replaced Pena with agency employees is clearly pretextual and must fail.

Maria Goris is another example of Boulevard East flaunting its legal obligations by shifting agency, full and part-time staff around after the strike to cover the shift of someone it refused to reinstate. Before the strike, Maria Goris regularly worked assignment 1 in the "68 Nurse" area on the 3 pm to 11 pm shift. Goris participated in the

³⁵ Pena was on vacation until September 30, 2014. (Tr. 2433).

strike and when she attempted to return to work, DON Furio told her that she no longer had hours for her. During the 6 days that Boulevard East refused to reinstate Goris, the record evidence shows that Boulevard East used 5 different CNAs to cover Goris' assignment- full-time CNAs Perez and (Sandra) Mejia, Thomas (from Tristate), Sheffler (a part-time employee who started working during the strike), and Fernandez. Playing musical chairs to fill Goris' regular assignment undercuts the credibility of Boulevard East's witnesses and the validity of its defense. Thus, Boulevard East cannot show that its defense was justifiable.

Also, several of the Agency CNAs scheduled to work at Boulevard East after the strike had serious attendance problems. Natasha Carruthers, a Tristate CNA who worked at Boulevard East during the strike, was scheduled to work after the strike as a replacement for day shift CNA (floater) Lovette Howard. But Carruthers called out on both September 20 and 21. To replace CNA Carruthers on the 20th, Boulevard East used Staff Blue CNA Angela Jones. Jones did not work at Boulevard East during the strike. Instead, she worked at Harborview and her work was so poorly received that on September 17 (the first day of the Boulevard East strike), Alaris Health corporate representatives informed Staff Blue that Jones was banned from all Alaris Health facilities. Yet somehow, Jones was recruited to fill in for Carruthers on the 20th. Thus, it is outrageous for Boulevard East to say that its refusal to immediately reinstate Howard at the end of the strike is legally defensible.

Another strike replacement with severe attendance issues was Stacey Rone. Rone was 1 of 3 Towne CNAs who worked at Boulevard East during the strike. After the strike, she was scheduled as a floater on the 3 pm to 11 pm shift, ostensibly to replace CNA Elizabeth Christie-Duran. But Rone either called out or was a no-call, no show on

her first 3 post-strike shifts- September 20, 21, and 23. At that point, Boulevard East audibled, and instead of calling Christie-Duran back to work, it slid Tristate CNA Elizabeth Graham, who had filled Sandra Mejia's "Front Nurse" assignment (#2) on September 21 and 22, into Christie-Duran's floater role for the duration of the Tristate contract. Although Graham only worked for 4 weeks at Boulevard East, she still managed to call out 3 times- on October 4, 13, and 14. Accordingly, it is clear that Boulevard East's asserted defense is pretextual and must be rejected.

6. Judge Rosas Properly Found that Boulevard East Violated the Act When It Refused to Immediately Reinstated Sandra Mejia at the Conclusion of the Strike and Denied Her Overtime Opportunities After She Returned to Work³⁶

Prior to the strike, Sandra Mejia regularly worked the 3pm to 11pm shift as a CNA on assignment 2 of the "Front Nurse" section. Mejia was excused from work during the strike due to a pre-scheduled medical procedure. Even though she was on medical leave, Mejia spent a small part of two days of the strike on the picket line. Notwithstanding her support for her co-workers, Mejia was not a striker. But Boulevard East treated her as such when she returned to work on September 20 and was told that there was no work for her. Boulevard East was not privileged to unilaterally convert her from approved leave to striker status, and in so doing, Judge Rosas properly found that Boulevard East violated the Act.

Although Mejia was reinstated almost immediately after the strike ended, she experienced retaliation which endured for several more months. Before the strike, Mejia had regularly worked about 16 hours of overtime each pay period (covering an extra

³⁶ It is unclear from Boulevard East's Exceptions as to whether it is taking Exceptions only to its refusal to immediately recall CNA Sandra Mejia after the strike, or whether it is also taking Exceptions to the finding that it also unlawfully denied Mejia overtime after the strike. To the extent the latter is being raised in Boulevard East's Exceptions, we have responded in this Answering Brief.

weekend shift). But after the strike, these overtime assignments dried up. The nursing schedules show that Mejia did not work any extra weekends in October, November, December 2014, January 2015, or February 2015. Mejia's testimony regarding her denial of overtime is unrebutted. No Boulevard East witness touched on this issue in their testimony. Therefore, there is substantial record evidence supporting Judge Rosas' finding that Boulevard East violated Section 8(a)(3) of the Act by denying Sandra Mejia overtime opportunities after the strike ended.

POINT IV: ROOSEVELT MEMORIAL MEDICAL CENTER IS DISTINGUISHABLE FROM THE FACTS HERE AND NO PUBLIC POLICY EXCEPTION IS NECESSARY HERE.

Additionally, Boulevard East, 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, Boulevard East relies on *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006). Boulevard East'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, Boulevard held 6 CNAs off of work for up to 4 weeks, and other striking dietary employees have

seen their hours reduced for almost 2 years now. The damage inflicted here is far more substantial than what the discriminatees in *Roosevelt* experienced in that the impacted *Roosevelt* employees only missed a few shifts in the course of a week. Next, there is ample evidence cited *infra* establishing that Boulevard East has failed to prove a substantial and legitimate justification for keeping these 6 CNAs off of work. To this end, the fact that Staff Blue was willing to provide temporary staff to during the strike without requiring a minimum time commitment undercuts Boulevard East's contention that it had no choice but to agree to minimum commitments from TriState and Towne.

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 Boulevard East'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 Boulevard East. Based on the above, the facts here show that *Roosevelt* cannot be relied on to excuse or condone Boulevard East's unlawful refusal to timely recall 6 striking CNAs here, and certainly cannot be used as a safe harbor for all nursing homes to delay reinstating their striking employees. Therefore, Boulevard East's Exceptions must be rejected.

V. CONCLUSION

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

Dated at Newark, New Jersey this 24th day of June, 2016.



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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 24, 2016 and on Boulevard East counsel and Charging Party on June 24, 2016 as follows:

BY ELECTRONIC FILING

National Labor Relations Board
Office of the Executive Secretary
Attn: Executive Secretary Gary Shinnars
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Dated at Newark, New Jersey this 24th day of June, 2016.



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