

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

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ALARIS HEALTH AT CASTLE HILL

and

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

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST

-----X  
ALARIS HEALTH AT HARBORVIEW

and

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

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST

-----X  
ALARIS HEALTH AT BOULEVARD  
EAST

and

Cases 22-CA-125076  
22-CA-125886  
22-CA-131372  
22-CA-140582

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST

-----X  
ALARIS HEALTH AT ROCHELLE  
PARK

and

Cases 22-CA-124968  
22-CA-125889  
22-CA-140560

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST

-----X

**CHARGING PARTY'S BRIEF IN OPPOSITION TO EXCEPTIONS AND IN SUPPORT  
OF CROSS EXCEPTIONS**

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## PRELIMINARY STATEMENT

In related Decisions and Orders in the above-captioned matters, Administrative Law Judge Michael A. Rosas found that four New Jersey nursing homes, commonly owned and operating under the name Alaris Health—Alaris Health at Castle Hill; Alaris Health at Harborview; Alaris Health at Boulevard East; and Alaris Health at Rochelle Park (collectively, “Respondents” or “Employers”)—committed numerous unfair labor practices in connection with 2014 bargaining for a new contract with its employees’ bargaining representative, Charging Party 1199 SEIU United Healthcare Workers East (“Charging Party” or “the Union”), and the employees’ subsequent 3-day unfair labor practice strike. *See* February 3, 2016 Decision and Order (Castle Hill [“CH”]); February 11, 2016 Decision and Order (Harborview [“HV”]); February 18, 2016 Decision and Order (Boulevard East [“BE”]); and February 25, 2016 Decision and Order (Rochelle Park [“RP”]).<sup>1</sup> Charging Party submits this answering brief in opposition to Respondents’ Exceptions to the ALJ’s Decisions and Orders, and in support of the General Counsel of the National Labor Relations Board’s Cross-Exceptions.

The ALJ heard these cases consecutively over eighteen days, finding that the Respondents committed pervasive, widespread violations of §§ 8(a)(1), (3) and (5) of the National Labor Relations Act (“the Act”). The ALJ found, and the Respondents do not contest, that all or some of the Respondents committed unfair labor practices by unlawfully: (1) refusing to bargain in good faith; (2) delaying the provision to the Union of relevant and necessary information which the Union requested for bargaining; (3) refusing to provide the Union with relevant and necessary information requested for bargaining; (4) interrogating employees regarding strike activity; (5) threatening employees with job loss if they went on strike; (6)

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<sup>1</sup> Reference to these Decisions and Orders will be to the abbreviated name of the facility followed by the page number of the Decision and Order, *e.g.*, “CH 28-29.”

making coercive statements relating to the strike at employee meetings; (7) surveilling picketing employees during the strike; (8) reducing the hours of nine striking workers upon their reinstatement; (9) imposing changes to working conditions, or more onerous working conditions, upon returning strikers; (10) prohibiting employees from wearing Union insignia at Boulevard East; and (11) refusing to bargain with the Union over its decision to deny access to Union organizer Christina Ozual at Rochelle Park. The Respondents also do not contest the ALJ's findings that the employees engaged in an unfair labor practice strike, rather than an economic strike, and that Respondents refused to reinstate immediately thirty-five striking workers upon their unconditional offer to return to work.

In their Exceptions to the four Decisions and Orders, Respondents raise only one limited challenge. They assert that their refusal to immediately reinstate returning ULP strikers was justified by a legitimate and substantial business reason, because they were required to contract with temporary staffing agencies for terms of four and six weeks to obtain replacement workers for the 3 day strike. *See* Respondents' Brief at 2. But as is explained below, this argument fails both on the law and the record. First, Respondents are not entitled to a 5 day grace period to reinstate returning ULP strikers in a short-duration strike in the health care context where, like here, they had adequate notice of the strike's limited duration and familiarity with the Union's history of returning promptly at the conclusion of short-duration strikes. Moreover, Respondents may not rely upon Board law applicable to the reinstatement of economic strikers to assert a purported "legitimate and substantial business justification" for the delayed reinstatement of ULP strikers. Finally, even if such an exception existed in this context, Respondents failed to present any credible evidence, never mind meet their burden under *Pacific Mutual Door Co.*, 278 NLRB 854 (1986), for establishing entitlement to such a defense. In any event, none of

Respondents' arguments address their failure to reinstate four workers—Devika Smith, Claudia Saldana, Ingrid Williams and Rodley Lewis—for periods ranging from more than eight months to more than a year.

Charging Party adopts the General Counsel's legal arguments set forth in four answering briefs that the General Counsel has submitted in the above-referenced cases, as well as their arguments in support of their Cross-Exceptions. In particular, Charging Party relies upon the General Counsel's thorough analysis of work schedules and other record evidence establishing that Respondents did not rely upon temporary replacements hired subject to the staffing agency contracts in question to replace the striking workers who were denied immediate reinstatement.

### ARGUMENT

Under longstanding Board law, unfair labor practice strikers are entitled to immediate reinstatement to their former positions upon an unconditional offer to return to work, even if the employer has hired replacements. *See, e.g., International Van Lines*, 409 U.S. 48, 51 (1972) (“It is . . . settled that employees striking in protest of an employer's unfair labor practices are entitled . . . to unconditional reinstatement”); *Spurlino Materials, LLC*, 357 N.L.R.B No. 126, 14-15 (2011) (citing *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956)), *enforced*, 805 F.3d 1131 (D.C. Cir. 2015). The failure to immediately reinstate unfair labor practice strikers who have made such an unconditional offer is itself an unfair labor practice. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 671 (2001), *not enforced in relevant part on other grounds*, 317 F.3d 316 (D.C. Cir. 2009).

In each of the four Decisions, the ALJ found, and Respondents do not dispute, that the employees engaged in an unfair labor practice strike, rather than an economic strike. (CH 33;

HV 26; BE 33; RP 32). The ALJ further concluded that on September 18, 2014, all strikers made an unconditional offer to return to work upon the conclusion of the three day strike through the Union's counsel, William Massey. (CH 22, 33; HV18, 26; BE, 20, 32; RP 20, 32). *Id.* Respondents, further, do not contest that they delayed in reinstating 31 returning strikers for up to six weeks, and four returning strikers for significantly longer. Given these uncontested findings, the ALJ properly found that the Respondents' violated §§ 8(a)(1) and 8(a)(3) by refusing to immediately reinstate these returning unfair labor practice strikers.

The Respondents challenge this conclusion, arguing that under *Drug Package Co.*, 228 NLRB 108, 113-14, they are entitled to a five day grace period to accommodate reinstatement of ULP strikers who have made an unconditional offer to return to work. They also contend that "unfair labor practice strikers stand in the same shoes as economic strikers who have been replaced," and based on this faulty premise, assert, pursuant to *Pacific Mutual Door Co.*, that the Board's "legitimate and substantial business justification" exception to immediate reinstatement of economic strikers therefore also applies to ULP strikers. *See* Resp. Br. at 5-6. Both arguments fail as a matter of law, and on the record.

**A. Respondents Are Not Entitled To The Five Day *Drug Package* Grace Period**

First, the Board has held that there is no basis for applying the five day grace period established in *Drug Package Co., Inc.*, 228 NLRB 108, 113-14 (1977), to reinstatement of returning strikers from a short, limited duration strike in the health care context. *See Sutter Health Center*, 348 NLRB 637, 638 (2006). This five day delay in an employer's backpay obligation is an effort "to establish a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the need to effectuate that return in an orderly manner" following a strike. *Id.* at 638. However, as the Board clarified in *Drug*

*Package* itself, “[t]he 5-day period in not to enable the employer to delay reinstatement or to obtain 5 days during which it is not required to pay backpay, but is in recognition of the practical difficulties he may face in reinstating the employees, *when he is not in a position to know exactly when they may seek to return.*” *Drug Package Co*, 228 NLRB at 114 (emphasis added).

In *Sutter Health Center*, the Board refused to apply *Drug Package* precisely because the employer had notice of when the strike was to end, and sufficient time to accommodate returning strikers. The case involving a one day economic strike at a health care institution where, like here, the Union gave the employer notice of the strike and its duration pursuant to Section 8(g) of the Act, fourteen days prior to its noticed conclusion, when the employees indicated that they would return to work. The Board found that this notice gave the employer “ample time” to effectuate a smooth transition upon the strikers’ return. The Board also found it relevant that the Union had previously engaged in a one day strike in which it gave notice of the strike’s duration and returned to work at the conclusion of the strike as announced. *Sutter Health Center*, 348 NLRB at 638. Given these facts, the Board concluded that the purpose of the five day rule was not implicated, because “the prestrike period was available to the Respondent to make necessary arrangements for a smooth transition upon the strikers’ return.” *Id.*; *see also Special Touch Home Care Servs., Inc.*, 351 NLRB 754, 757-58 (2007) (same).

Here, like in *Sutter Health Center*, the Employer was well aware of when the strikers planned to return. It is uncontested that the Union provided Section 8(g) notices to Respondents at each facility fourteen days prior to the noticed conclusion of the strike (CH 18; HV 16; BR 16; RP 16), and made an unconditional offer to return to work upon the strike’s conclusion at each facility (CH 22; HV 18; BE 20; RP 20). The notices specified that the duration of the strike would be three days, a fact of which Massey reminded the Respondents’ counsel, David Jasinski,

on September 18, prior to the conclusion of the strike (*Id.*). As was also true in *Sutter Health Care*, the Union had engaged previously in a three day strike five years earlier, at the same exact facilities, and had returned to work as announced at the conclusion of the strike (Tr. 902-904). Jasinski additionally would have been familiar with the Union's track record of returning to work immediately after short-duration strikes from his representation of other facilities where the Union engaged in short-duration strikes, returning promptly as noticed. *See, e.g., Wayneview Care Center*, 356 NLRB No. 30 (2010); *Kingsbridge Heights Rehabilitation Center*, 352 NLRB 6, 28 (2008).<sup>2</sup> Under the circumstances, Respondents had ample time to effectuate a smooth transition upon the return of the strikers and are not entitled to a five day *Drug Package Co.* grace period.

**B. The Respondents Are Not Entitled To Raise A “Legitimate And Substantial Business Justification” To Excuse Delaying Reinstatement of ULP strikers, And In Any Event, Have Failed to Establish Such Justification**

In addition to seeking the *Drug Package* grace period, Respondents claim that the ALJ erred by failing to apply *Pacific Mutual Door Co.*, permitting Respondents to assert a legitimate and substantial business justification for their failure to reinstate immediately the returning ULP strikers based on their contracts with temporary staffing agencies for replacement workers. *See* Resp. Br. at 5-6. But *Pacific Mutual Door* involved the reinstatement of economic strikers, not ULP strikers. Contrary to the Respondents' assertion in its brief, ULP strikers and economic strikers do not “stand in the same shoes.” *See* Resp. Br. at 5. With the exception of the *Drug Package* rule, where it applies, ULP strikers must be reinstated immediately upon making an

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<sup>2</sup> Given these facts, the ALJ appropriately credited Massey's testimony, rather than Jasinski's, relating to the understanding that Respondents had as to the duration of the strike. Moreover, the Board's policy is not to overrule an ALJ's credibility findings unless the clear preponderance of all relevant evidence demonstrates that they are incorrect. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

unconditional offer to return to work. Economic strikers, in contrast, are not entitled to immediate reinstatement if they have been permanently replaced. *See Special Touch Home Care Servs.*, 351 NLRB 754, 757 (2006), *not enforced on other grounds*, 566 F.3d 292 (2d Cir. 2008); *Fairfield Tower Condominium*, 343 NLRB 923, 926 (2004). Moreover, an employer may avoid immediate reinstatement of economic strikers if it can prove that a legitimate business justification necessitated the delay. *See Special Touch*, 351 NLRB at 757; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). While the Board observed in *Harvey Mfg.* that economic strikers' *reinstatement rights* are identical to those of ULP strikers when they have been replaced by temporary, rather than permanent replacements, *see* 309 NLRB 465, 469 (19992), this obvious acknowledgement does not mean that employers may delay reinstatement of ULP strikers based on the same establishment of a legitimate and substantial business justification that they may assert to justify delayed reinstatement of economic strikers. Respondents cite no Board law to the contrary which would permit them to raise such a defense here.

In any event, even if *Pacific Mutual Door Co.* applies to the reinstatement of ULP strikers, the establishment of a legitimate and substantial business justification for refusing to reinstate former strikers is an affirmative defense, and the burden is on the employer to establish facts sufficient to support it. *See Harvey Mfg.*, 309 NLRB at 467, 469. Thus, the Board found such a legitimate and substantial business justification existed based on a thirty day cancellation provision in a contract for the provision of temporary workers where the leasing company had declared the necessity of the provision and it was deemed a "a condition of obtaining the temporary replacements." *Pacific Mutual Door Co.*, 278 NLRB at 355-56; *see also Harvey Mfg.*, 309 NLRB at 469. In contrast, the Board refused to recognize a legitimate and substantial business justification for delayed reinstatement based on a temporary contract that contained

provisions agreeing to employ each worker for thirty days, and providing ten day's written notice before terminating a temporary employees. The Board held that there was "scant evidence in the record . . . shedding light on the contracting parties' intentions with respect to these provisions, and absolutely no basis to find that these provisions were necessary in order to induce [the temporary staffing agency] to provide replacements." *Id.* Recently, the General Counsel confirmed that such contractual provisions are not a legitimate and substantial business justification if they were not "necessary in order to obtain the temporary replacements," or if the returning strikers' "displacement was not necessitated by the arrangement." *See Civista Medical Ctr.*, No. 05-CA-088258, Advice Memorandum at 5 (February 8, 2013).

Moreover, "the Board has never addressed . . . the question of whether *Pacific Mutual Door Co.* appropriately applies to a short-term strike in the health-care industry, where the Employer has advance notice of the strike under Section 8(g) and is also aware of its duration." *Id.* As noted *supra* at 5-6, the Board has declined to apply the *Drug Package* grace period in the context of a short-duration strike, with notice of duration, in the healthcare context. *See Sutter Health Center*, 348 NLRB at 637-38. The Board similarly refused to find a legitimate business justification for refusing to immediately reinstate economic strikers in *Special Touch Homecare Servs.*, another short-duration healthcare strike, where the Union provided the Employer with notice of the strike's duration. *See Special Touch Homecare Servs.*, 351 NLRB 757-58 (Employer may not claim a legitimate business justification for delaying reinstatement of economic strikers for five days where the strike was three days in duration and the Employer received notice of such). The Board relied upon *Sutter Health Center* in reaching this conclusion, and further noted that it would not find a legitimate business justification for the delay where the Respondent replaced the strikers with employees already on its rolls. *Id.*; *see*

*also Kingsbridge Heights Rehabilitation Center*, 352 NLRB 6, 28 (2008) (finding that employer improperly communicated to prospective three day economic strikers that they would not be reinstated for three weeks based on contracts with temporary agencies absent evidence that such contracts had been negotiated and were necessary).

This case presents the same circumstances in which the Board has declined to apply *Pacific Mutual Door Co.*, and for those reasons, it is also inapplicable here. The employees here engaged in a short-duration strike in the healthcare sector, and gave the Employer advance notice of the strike's duration. Moreover, the Respondents have presented *no* evidence that the four and six week contractual terms were a necessary condition for obtaining the temporary staff. The Respondents did not submit any evidence that they even negotiated the terms of these contracts. In fact, they did not even call as a witness the individual who signed the contracts on their behalf, Alaris Vice-President Linda Dooley. Ms. Dooley presumably had first-hand knowledge of any negotiations that might have occurred in connection with the contracts, and if such negotiations indeed occurred, and these terms were a condition of obtaining temporary staff, she would have testified as much. Instead, the Respondents relied upon the vague, second-hand testimony of Jasinsky, Regina Figueroa, a Vice-President of Operations and Ann Taylor, a quality assurance nurse serving as a consultant to Alaris. None of these individuals participated in any negotiations relating to the contracts or had any first-hand knowledge of negotiations, if they existed at all. Based on Respondents failure to call Dooley as a witness, an adverse inference may be drawn against Respondents in this regard. *See, e.g., Meyers Transport of New York*, 338 NLRB 958, 973 (2003) (drawing adverse inference and characterizing as "particularly damaging" employer's failure to call management official who decided to implement layoffs and

selected employees). Moreover, under the circumstances, the ALJ appropriately discredited the vague and unsupported testimony of Jasinski, Figueroa and Taylor.

But the record further establishes that the Respondents did not even rely upon the temporary staff for which they contracted to replace the striking workers. Charging Party adopts and relies upon the General Counsel's detailed and thorough analysis of the Respondents' work schedules in support of this point. These schedules show, *inter alia*, that: (1) certain agency employees worked for only a few days, or inconsistently; (2) Respondents used part-time staff already employed to replace striking workers after the strike; and (3) Respondents used Alaris employees from other units and other Alaris facilities, instead of agency workers, to replace strikers after the strike; and (4) Respondents often operated shorthanded after the strike, even while refusing to reinstate strikers. All of these facts undermine Respondents' claim that it could not reinstate returning strikers because it was obliged to honor four to six week contractual terms for temporary employees. Respondents also do not explain or attempt to justify their failure to reinstate Devika Smith and Claudia Saldana at Castle Hill, Ingrid Williams at Harborview and Rodley Lewis at Rochelle Park, each of whom was denied reinstatement for significantly longer than the periods of these purported contracts. Respondents delayed the reinstatement of Williams for eight months, Smith and Saldana for nine months and Lewis for more than a year.

In addition to being inadequate to establish a legitimate and substantial business justification for delaying reinstatement, Respondents' decision to enter four and six week contracts for temporary employees was "inherently destructive" of the employees' right to engage in lawful strikes. *See NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) (the Board may find an unfair labor practices where an employer's discriminatory conduct is "inherently destructive" of important employee rights even if the employer introduced evidence

that the conduct was motivated by business considerations). “Inherently destructive conduct is that which has far reaching effects which could hinder future bargaining; i.e., conduct that creat[es] visible and continuing obstacles to the future exercise of employee rights.” *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1021 (2006) (internal quotations and citations omitted). Conduct that creates “cleavage” between bargaining unit members is deemed inherently destructive. *Id.* at 1023. As a general matter, the Board has found that the failure to reinstate strikers who have not been permanently replaced is inherently destructive of employee rights. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enforced, 414 F.2d 99 (9th Cir. 1969), cert. denied, 397 U.S. 920 (1970); *Fleetwood Trailers*, 389 U.S. 375, 380 (1967).

In *International Paper Co.*, 319 NLRB 1253, 1269-70 (1995), not enforced on othergrounds, 115 F.3d 1045 (D.C. Cir. 1997), the Board set out guidelines for determining whether an employer has engaged in inherently destructive conduct: (1) the “severity of the harm suffered by employees for exercising their rights [and] the severity of the impact on the statutory right being exercised”; (2) the “temporal impact of the employer’s conduct”; (3) whether the conduct exhibits “hostility to the process of collective bargaining”; and (4) whether the conduct discourages collective bargaining by making its employees see it as a futile exercise. By delaying the reinstatement of employees who engaged in a lawful three-day strike for more than a year (Rodley Lewis), nine months (Devika Smith and Claudia Saldana), eight months (Ingrid Williams), and as long as six weeks for 31 additional workers, Respondents’ conduct is inherently destructive under each element. For workers earning an average of approximately \$11.00-12.00 per hour, the loss of employment income for four to six weeks, or even a few days, causes severe harm to employees and their families, and creates an obstacle to engaging in the lawful conduct in question. The temporal impact of the conduct speaks for itself. Moreover, the

Respondents specifically delayed reinstatement of several of the Union's leading voices well beyond the duration of its alleged contracts. Its conduct clearly discouraged employees' future participation in concerted activities, including strikes. Finally, Respondents punished Union members who sought to protest unremedied unfair labor practices which had interfered with collective bargaining. The Union remains without a contract at all four facilities. Respondents' conduct thus discourages collective bargaining by making the process appear to be a futile exercise.<sup>3</sup>

Respondents' reliance on *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), for the establishment of a general public policy exception to immediate reinstatement of ULP strikers at healthcare facilities is misplaced. In *Roosevelt Memorial Medical Center*, the Employer reduced the hours of six employees for one week after a strike was called off, in order to accommodate temporary and per diem employees who had already been scheduled. The Board found that this reduction in hours was "comparatively slight," ranging from 4.5 to 8 hours per worker, and thus, not "inherently destructive" under *Great Dane Trailers*. It also based its decision, in part, on the absence of antiunion motive on the part of the Employer for its actions. In contrast, here, 35 employees were denied reinstatement altogether, 31 for up to six weeks, and four for significantly longer. Nine returning strikers had their hours reduced. And this delay in reinstatement and reduction in hours occurred in the context of numerous, severe unfair labor practices, some of which necessitated the strike in the first place. The Respondents have failed to demonstrate any justification for this pervasive conduct.

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<sup>3</sup> Charging Party adopts the General Counsel's arguments in its brief in support of its Cross-Exceptions.

## CONCLUSION

For the foregoing reasons, and with the limited exceptions outlined by the General Counsel in his Cross-Exceptions, Charging Party respectfully requests that the Board adopt and affirm the ALJ's Decisions and Orders in all four cases in their entirety.

Dated: New York, NY  
June 27, 2016

Respectfully submitted,



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## CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the CHARGING PARTY'S BRIEF IN OPPOSITION TO EXCEPTIONS AND IN SUPPORT OF CROSS EXCEPTIONS on the Board's Executive Secretary on June 27, 2016, and on counsel for the General Counsel and Respondents Alaris at Castle Hill; Alaris at Harborview; Alaris at Boulevard East; and Alaris at Rochelle Park as follows:

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